

Spring 2025

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Online ISSN: 2643-7759

### Recommended Citation

James G. Dwyer, *The Kincare Craze In Child Protection: Romanticism, Subterfuge, And Racial Separatism*, 19 FIU L. Rev. 1 (2025).

DOI: <https://dx.doi.org/10.25148/lawrev.19.1.4>

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## THE KINCARE CRAZE IN CHILD PROTECTION: ROMANTICISM, SUBTERFUGE, AND RACIAL SEPARATISM

James G. Dwyer

Among recent developments in family law, the most prevalent issue on legislative agendas has been Kincare as an alternative to non-relative foster care when maltreated children cannot remain with parents. Long an available option legally but traditionally regarded with skepticism by child protection workers,<sup>1</sup> Kincare is now idealized. A steady stream of state legislative bills aims to encourage or command child protection and foster care agencies to place maltreated children in the home of relatives or friends of their parents whenever one is available, ostensibly based on an assumption that this is categorically better for children than living with unrelated foster parents.<sup>2</sup>

That assumption has romantic appeal. But the reality of Kincare's benefits and pitfalls is far more complex.<sup>3</sup> Moreover, motivations other than child welfare are driving Kincare advocacy. The best explanation for the recent fervor points to two aims. An immediate aim is to undermine federal child-welfare mandates that advocates for poor and minority-race parents and communities have long condemned—principally, foster care time limits and the prohibition on race-matching in adoption.<sup>4</sup> A longer-term objective for some is a return to racial separatism in private life.<sup>5</sup>

Kincare is not new, and it is not unique to any culture or ethnicity; in all cultures throughout history, extended family members have helped with childrearing, especially when parents were incapable of caring for children on their own.<sup>6</sup> Today, when a strong family support system exists, such situations never come to the attention of state child protection services agencies (CPS). If CPS does receive a maltreatment report, that signals that parents are not connected to kin who are able and inclined to help. Yet federal and state laws have long required that when CPS does get involved, it search

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See *infra* Part IV.

<sup>5</sup> See *infra* Part IV.

<sup>6</sup> See JILL DUERR BERRICK, THE IMPOSSIBLE IMPERATIVE: NAVIGATING THE COMPETING PRINCIPLES OF CHILD PROTECTION 71 (2018).

for relatives to consider as potential temporary placements for a child.<sup>7</sup> What is new is a torrent of legislation aiming to push state agencies to channel children reported for maltreatment more aggressively to kin homes, to avoid placing them with non-relative foster parents and, when a child nevertheless spends substantial time in non-kin foster care, to prevent those foster parents from adopting the child.<sup>8</sup> Rather than merely considering relatives as a possible placement, CPS is now expected to categorically prefer relatives, without individualized assessment of whether that is best for a child. This enables CPS workers, who generally align with parents,<sup>9</sup> to avoid petitioning for termination of parental rights (TPR) and to prevent formation of mixed-race families. Incidentally, it frequently destroys children's established, developmentally important bonds with long-term caregivers and leaves them in a situation of impermanency.

As shown in Part II, the push comes in many forms. These include mandates to divert children to informal Kincare as an alternative to foster care; directives to intensify and document efforts to recruit kin as foster parents; increased payments to and services for kin caregivers; lowered standards of foster-care licensing for kin; categorical prioritization of kin in choosing placements; and expanded definitions of who constitutes kin—including even people who are merely social acquaintances of parents, regardless of whether the child knows them. In the more extreme enactments, this priority applies not just when a child is first removed from parental custody but for as long as the state remains involved—indeed, even after parents' rights have been terminated and long-term non-relative caregivers seek to adopt the child.<sup>10</sup> The result has been a substantial increase in the number of maltreated children living with kin, both in informal arrangements

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<sup>7</sup> See *Fostering Connections to Success and Increasing Adoptions Act of 2008*, Pub. L. No. 110-351, 122 Stat. 3949 (codified as 42 U.S.C.A § 671(a)(29) (West 2023)). Federal “mandates” in child welfare are conditions placed on federal funding for foster care, which states are free to refuse but only at great financial cost.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See Elizabeth Bartholet, *Contested Child Protection Policies*, in *THE OXFORD HANDBOOK OF CHILDREN AND THE LAW* 415–36 (James G. Dwyer ed., 2020); RICHARD GELLES, *OUT OF HARM'S WAY: CREATING AN EFFECTIVE CHILD WELFARE SYSTEM* 75–77, 82–85, 89–90 (2017); DAVID STOESZ, *QUIXOTE'S GHOST: THE RIGHT, THE LIBERATI, AND THE FUTURE OF SOCIAL POLICY* 102–20 (2005).

<sup>10</sup> See, e.g., S. 708, 2024 Gen. Assemb., Reg. Sess. (Md. 2024); Va. Code Ann. §§ 16.1-281, 16.1-282.1 (stating permissible goals of permanency planning); Va. Code Ann. § 63.2-900.1 (“Searches for relatives eligible to serve as kinship foster parents shall be conducted at the time the child enters foster care, at least annually thereafter, and prior to any subsequent changes to the child’s placement setting.”).

and formal placements,<sup>11</sup> and in the number of adoptions by non-relatives thwarted.<sup>12</sup>

This development is not a reaction to any new research on the comparative merits of kin placements for children. In fact, as Part III documents, neither new nor old research supports prioritizing kin. The best research supports case-specific determination of the placement that is best for a child, all things considered. Relevant considerations certainly include biological relation and familiarity to the child. But other relevant and important factors might point to other caregivers as best. And if there should be any presumption, it is in favor of established caregivers, whether “kin” or not, for the sake of stability and emotional security.

This policy bandwagon also is not driven by complaints from relatives not chosen as substitute caregivers for maltreated children, nor by parents wanting a child to stay in the family. Prevailing rules give no heed to parents’ preference, and agency caseworkers commonly deny or disrupt non-kin placements that parents favor in order to channel children instead to kin. Rather, as Part IV explains, the primary impetus behind the Kincare craze is a desire of advocates for minority-race communities and broad racial-justice causes—including directors and caseworkers in child protection agencies—to circumvent federal child welfare mandates. Underlying is a view that the child welfare system is just another instrument White America uses to

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<sup>11</sup> See, e.g., Andy Newman, *They Wanted to Foster Their Great-Grandson. Why Did New York Say No?*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/nyregion/foster-care-lawsuit-nyc.html> [<https://perma.cc/LW83-UFMR>] (“[T]he percentage of children entering foster care because of abuse or neglect who are placed with relatives has nearly doubled since 2016, to 51 percent . . . .”); A.C. Ferraro et al., *Family Ties: A Quasi-Experimental Approach to Estimate the Impact of Kinship Care on Child Well-Being*, CHILD. & YOUTH SERVS. REV., Mar. 2022, at 2. In 2011, the percentage of children in foster care who were with relatives was twenty-seven, and the number was 107,995. In 2021, the figures were thirty-five percent and 133,873. See CHILD.’S BUREAU, OFF. OF ADMIN. FOR CHILD. & FAMS., U.S. DEP’T HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 1 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/ZFN4-Q4TK>].

<sup>12</sup> See Marie K. Cohen, *In New Jersey, Children’s Needs Disregarded as Blood Ties Take Precedence Over Attachment and Timely Permanency*, CHILD WELFARE MONITOR (June 15, 2022), <https://childwelfaremonitor.org/2022/06/15/in-new-jersey-childrens-needs-disregarded-as-blood-ties-take-precedence-over-attachment-and-timely-permanency> [<https://perma.cc/QQ4C-UQFS>] (describing several cases of thwarted adoption in New Jersey); NAOMI SCHAEFER RILEY, *NO WAY TO TREAT A CHILD: HOW THE FOSTER CARE SYSTEM, FAMILY COURTS, AND RACIAL ACTIVISTS ARE WRECKING YOUNG LIVES* 65–67 (2021) (describing cases and stating, “I get phone calls and emails almost every week from foster parents around the country telling me their stories”); Verified Amended Complaint at 1, *A.R.L. v. Norfolk Dep’t of Hum. Servs.*, No. 4:20-cv-00110 (E.D. Va. 2020), ECF No. 7 (suit on behalf of two-year-old girl suddenly removed from foster home where she had lived since birth, only to be placed in another non-relative (but same-race) foster home, after (White) foster parents expressed desire to adopt); *Kristopher O. v. Mazzone*, 706 S.E.2d 381, 381–82 (W. Va. 2011) (foster parents’ challenge to removal of twenty-three-month-old child who had been in their care since birth, whom foster parents wished to adopt, in favor of non-adoptive placement with paternal aunt).

oppress and exploit minority-race people and to destroy minority-race communities, a view that triggered an “abolish CPS” movement soon after the “abolish police” movement arose.<sup>13</sup>

At a still deeper level appears to be an urge for racial separation, as discussed in Part IV. Outside the child welfare world, too, some who identify as members of minority-race communities, particularly African-Americans, have promoted a racial separatist mindset.<sup>14</sup> This is understandable in a society where it seems racism’s knee will never be removed from the neck of the Black community. But lawmakers should be made aware that this is what the Kincare push is really about, that advocates for Kincare use romantic appeal to the nurturing “village” as a stratagem to undermine fundamental aspects of current child welfare law and policy that incidentally but predictably result in racial mixing. It is not truly about child welfare. In fact, it demonstrably harms many children.

This stratagem has been remarkably effective. Although many legislators might care little about the Black community’s perception of the child welfare system, Kincare has romantic resonance and can save states money by reducing the foster care population and/or reducing the costs of foster care placements, which makes legislators across the political spectrum predisposed to accept advocates’ claims about the child welfare benefits of Kincare.<sup>15</sup> Some legislators might support it precisely because they perceive and approve the segregation effect. Whatever the explanation, law makers accept advocates’ factual assertions without examining the relevant empirical research to verify them. It never occurs to them to ask how the maltreatment

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<sup>13</sup> See RILEY, *supra* note 12, at 84–86; Naomi Schaefer Riley et al., *What Child Protection Is For*, AM. ENTER. INST., Sept. 2021, at 1 (documenting and critiquing this view); Sara Tiano & John Kelly, *Historic Bill Would Remove Federal Requirement to Terminate Parental Rights in Some Cases*, THE IMPRINT (Nov. 4, 2021, 6:38 PM), <https://imprintnews.org/uncategorized/bill-remove-federal-requirement-terminate-parental-rights-foster-care-cases/60188> [https://perma.cc/9VF6-68DE] (stating, “[c]ritics of the current timeline . . . describe it as arbitrary and unjust to the families who mostly come from communities of color where daily life and the weight of historic and systemic injustice can bear down on home life. Advocates for parents say the federal timeline also penalizes people in recovery[.] . . . complex healing that can take time and involve relapse and setbacks” and quoting foster-care critic Richard Wexler, who said “the racial justice reckoning finally is reaching child welfare”).

<sup>14</sup> See, e.g., *Active Black Separatist Groups*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/intelligence-report/2015/active-Black-separatist-groups> [https://perma.cc/34U9-3F8F] (listing roughly 250 organizations in the Black separatist movement today); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378–79 (1992); Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93, 96–108 (1990).

<sup>15</sup> See Angie Schwartz & Cathy Krebs, *The Risk of Hidden Foster Care During COVID-19*, 22 CHILD.’S RTS. LITIG. 4, 5 (June 1, 2020) (noting cost savings); BERRICK, *supra* note 6, at 72; Ferraro et al., *supra* note 11, at 2 (claiming that “the new emphasis on supporting and encouraging kinship care” reflects “ideological shifts toward prioritizing family, a rising number of children in foster care, and a shortage of licensed foster care homes” and that kinship care “is often less expensive than other placement options”).

occurred in the first place, why someone had to notify CPS in the second place, or why a prolonged search for relatives is necessary in the third place, if “the village” actually exists for a particular child.<sup>16</sup>

This Article is a corrective to the false assumptions on which the Kincare campaign rides and a child-centered pushback against adult-focused and group-protective ideological agendas. It offers, in Part V, an evidence-based model of best practices when children cannot safely remain with their parents—in particular, the best approach to choosing among available placements, both immediately after initial removal and at later stages of a case. First, though, Part I explains the child protection process and the various ways maltreated children end up in kin households rather than in non-relative foster care.

## I. BACKGROUND

A brief description of the child welfare system and the law governing it will aid understanding of the recent legislative frenzy.

### A. *The Child Protection Process*

CPS offices are government agencies that receive and respond to reports of child abuse, neglect, and endangerment (collectively, “maltreatment”). The number of children reported in the U.S. is startling—nearly eight million each year.<sup>17</sup> The great majority live in poor urban areas.<sup>18</sup> Reports principally come from four sources: “legal and law enforcement personnel,” mostly police and courts (21%);<sup>19</sup> school personnel (21%); medical professionals—

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<sup>16</sup> Cf. RILEY, *supra* note 12, at 34 (noting lack of intervention by extended family while a child suffered abuse); *id.* at 67–68 (noting survey of foster parents, which found that if kin ever come forward it is usually many months or even years following placement); *id.* at 119 (noting that those most affected by drug abuse often lack social networks); SARAH A. FONT & ELIZABETH T. GERSHOFF, FOSTER CARE AND BEST INTERESTS OF THE CHILD: INTEGRATING RESEARCH, POLICY, AND PRACTICE 27 (2020) (“by the time children enter foster care, many have been exposed to repeated harm... [Seventy percent] of children placed in foster care following a CPS investigation had at least one prior investigation of maltreatment”).

<sup>17</sup> The number of reports is roughly four million per year, with many concerning multiple children in a household. See U.S. DEP’T OF HEALTH & HUM. SERVS. ET AL., CHILD MALTREATMENT 2023, at 7 (2023) [hereinafter MALTREATMENT 2023], <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2023.pdf#page=22> [<https://perma.cc/NM5E-FYUA>].

<sup>18</sup> Marc A. Winokur et al., *Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes*, 28 RSCH. ON SOC. WORK PRAC. 19, 23 (2018) (reporting a frequency of “80% of children from urban settings”).

<sup>19</sup> MALTREATMENT 2023, *supra* note 17, at 9.

particularly pediatricians and emergency room physicians, but also providers of mental health services to parents or youth (18%);<sup>20</sup> and private individuals who interact with the family—parents, other relatives, friends, neighbors (15%).<sup>21</sup>

Most calls report perceived neglect,<sup>22</sup> which includes failure to supervise (i.e., leaving young children alone at home or in public); failure to protect (e.g., from sexual abuse, drugs and alcohol, exposure to intimate-partner violence, or other danger in a household); and failure to provide basic necessities such as a safe and sanitary home environment, adequate nutrition, and medical care.<sup>23</sup> Neglect is highly correlated with parental substance abuse and mental illness, and it is the cause of most child fatalities stemming from maltreatment, as well as the cause of great suffering short of death.<sup>24</sup> One fourth of maltreatment reports involve physical or sexual abuse.<sup>25</sup>

Only a subset of reports triggers agency action. More than half are “screened out” for various reasons: the intake worker deems the facts

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

<sup>21</sup> *Id.* Ten percent come from social service employees, and seven percent are anonymous—likely also from parents’ social circle or neighborhood. *Id.*; cf. Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 20–21 (2013) (suggesting a substantial portion of reports come from grandparents).

<sup>22</sup> Winokur et al., *supra* note 18, at 23.

<sup>23</sup> Lindsey Palmer et al., *What Does Child Protective Services Investigate as Neglect?: A Population-Based Study*, 28 CHILD MALTREATMENT 96, 100–01 (2024) (finding failure to supervise most common); Eunju Lee et al., *Placement Stability of Children in Informal Kinship Care: Age, Poverty, and Involvement in the Child Welfare System*, 95 CHILD WELFARE 87, 89 (2017) (“Parental neglect due to mental health, incarceration, or substance abuse are the primary reasons that children could not stay with their parents . . . .”); Matthew D. Bramlett et al., *Health and Well-Being of Children in Kinship Care: Findings from the National Survey of Children in Nonparental Care*, 95 CHILD WELFARE 41, 49–50 (2017) (finding 70% of children in Kincare had left a household with substance abuse); see also Tessa Bell & Elisa Romano, *Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review*, 18 TRAUMA, VIOLENCE, & ABUSE 268, 268 (2015) (reporting that 34% of substantiated maltreatment incidents were exposure to IPV and 34% were other forms of neglect); Linda L. Bryant & James G. Dwyer, *Promising Protection: 911 Call Records as Foundation for Family Violence Intervention*, 102 KY. L.J. 49, 50 (2014).

<sup>24</sup> See Palmer et al., *supra* note 23, at 100–01 (finding 76% of neglect cases involved “parental substance abuse, mental illness, domestic violence, or co-occurring sexual or physical abuse”); Bramlett et al., *supra* note 23, at 57; RILEY, *supra* note 12, at 115 (“[T]he number of cases of removal that involve substance abuse is well over 80 percent.”); *id.* at 117–18, 124 (discussing connection between neglect and fatalities); Sarah A. Font & Kathryn Maguire-Jack, *It’s Not “Just Poverty”: Educational, Social, and Economic Functioning Among Young Adults Exposed to Childhood Neglect, Abuse, and Poverty*, 101 CHILD ABUSE & NEGLECT 104356, Jan. 10, 2020, at 1–2; CHILD WELFARE AND CHILD WELL-BEING: NEW PERSPECTIVES FROM THE NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING 55–82 (Mary Bruce Webb et al. eds., 2010) [hereinafter NEW PERSPECTIVES]; *id.* at 56, 58–59 (suggesting neglect is more detrimental to infants than some forms of physical abuse because infants have such an intense need for positive attention and care); *id.* at 72 (finding lifelong damage especially great when physical abuse is accompanied with neglect).

<sup>25</sup> See MALTREATMENT 2023, *supra* note 17, at 28, 49.

described insufficient to meet the law’s definition of maltreatment, there is insufficient information to respond (e.g., no identification or address), or the situation falls within the jurisdiction of another agency (e.g., police, school district, military, or Native American tribe).<sup>26</sup> Reports “screened in” trigger CPS contact of some kind with the families.<sup>27</sup>

Traditionally, the CPS response was almost always formal investigation, entailing collection of facts and a recorded determination of whether the caseworker found sufficient evidence of conduct or circumstances constituting maltreatment.<sup>28</sup> Today, however, most agencies respond to a substantial portion of screened-in reports in a more informal way, to appease critics of the child welfare system who allege that CPS is too heavy-handed and that most reported parents need only a little assistance. In recent decades, roughly half of U.S. states have adopted a “differential response” system in which reports that CPS deems less serious trigger only “assessment.” In an assessment, caseworkers contact parents and offer assistance (rent, utilities, appliances, services, etc.) that parents are free to refuse. Caseworkers make no “finding”—that is, a recorded conclusion as to whether they found sufficient evidence of maltreatment,<sup>29</sup> and an assessment per se cannot lead to the agency taking custody of the child.<sup>30</sup> Fourteen percent of screened-in reports nationwide receive only an assessment.<sup>31</sup>

Only sixteen percent of screened-in reports ultimately yield a finding of maltreatment.<sup>32</sup> This is in part because of differential response and in part because of the difficulty of accumulating evidence of what happens to children in private.<sup>33</sup> Still, that represents over half a million children nationwide annually.<sup>34</sup> Substantiated maltreatment exists disproportionately among Native Americans and African Americans, consistent with

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<sup>26</sup> See *id.* at 6–7.

<sup>27</sup> *Id.* at 23–25.

<sup>28</sup> See FONT & GERSHOFF, *supra* note 16, at 11.

<sup>29</sup> *Id.* at 50; Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 577–78, 587 (2015); cf. Andy Newman, *Is N.Y.’s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html> (observing that New York City’s Administration for Children’s Services “assigns a growing percentage of its caseload to a noninvestigative track that connects families to the help they need”).

<sup>30</sup> Bartholet, *supra* note 29, at 598.

<sup>31</sup> MALTREATMENT 2023, *supra* note 17, at 24.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.*; *id.* at 20 (noting that average time nationally between report and first CPS contact with family is four days).

<sup>34</sup> *Id.* at 26 (showing 546,159 victims from reporting states in 2023).



disproportionate rates of reports to CPS for those groups; rates of screening in and substantiation are similar across racial groups.<sup>35</sup>

When CPS does deem a report “founded,” this can lead to formally removing a child and assuming legal custody, but first the agency must make “reasonable efforts” to eliminate the need for removal.<sup>36</sup> So, this is another way the state tries to avoid disrupting family life. Eliminating the need for removal generally means altering parental behaviors or household conditions sufficiently so that it is safe for the child to remain.<sup>37</sup> In a failure-to-supervise case, for example, the caseworker would work with the parent to establish a plan for the child always to have supervision—for example, identifying affordable daycare. In a sexual abuse case, the caseworker might assist a non-offending parent with changing the residence of the child or the abuser, securing a protective order against the abuser, and arranging therapeutic services for the child.

Thus, CPS takes custody of a child only after a screened-in report triggers an investigation yielding a finding of maltreatment, and only if the caseworkers cannot readily fix the problem at home. Only a tiny fraction of maltreatment reports ultimately result in placing a child in foster care.<sup>38</sup> Additional indication that agencies err on the side of non-removal is that a large portion of children whom the agencies leave in parental custody are again reported for maltreatment.<sup>39</sup>

When CPS does place a child in foster care, it must thereafter make “reasonable efforts” to enable safe return to the child’s parents.<sup>40</sup> As a result of the federal Adoption and Safe Families Act (ASFA), however, the agency should not continue this effort endlessly, because children need permanency. Subject to capacious exceptions, CPS must petition for TPR after a child has been in foster care for fifteen of the previous twenty-two months.<sup>41</sup> This foster care timeline is the main target of CPS’s critics, who complain that it

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<sup>35</sup> See Richard P. Barth et al., *Research to Consider While Effectively Re-Designing Child Welfare Services*, 32 RSCH. ON SOC. WORK PRAC. 483, 486 (2021) (“[A]s they move through the system, socio-economically disadvantaged Black children are generally *less likely* to be substantiated or removed into foster care compared to White children.”).

<sup>36</sup> 42 U.S.C. § 671(a)(15) (2023).

<sup>37</sup> Cf. FONT & GERSHOFF, *supra* note 16, at 40 (noting these efforts can include “parent training, substance abuse or mental health treatment, home-visiting programs, domestic violence shelters, and financial supports”).

<sup>38</sup> See *id.* at 41.

<sup>39</sup> *Id.* at 44.

<sup>40</sup> 42 U.S.C. § 671(a)(15) (2023).

<sup>41</sup> See LAURA RADEL & EMLY MADDEN, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., *FREING CHILDREN FOR ADOPTION WITHIN THE ADOPTION AND SAFE FAMILIES ACT TIMELINE: PART 1 – THE NUMBERS 1–2* (2021).

does not give parents sufficient time to reform. One large exception to “the 15/22 rule,” though, is when CPS documents for the juvenile court reason to believe a TPR petition would not be in the child’s best interests despite parents’ failure thus far to overcome obstacles to adequate care—for example, because the parents need just a little more time. This is consistent with substantive rules for TPR, which require a judge to find that TPR is in the child’s best interests all things considered, in addition to inability or absence on the part of the parent.<sup>42</sup> Moreover, a potentially even larger exception, crucial to understanding current emphasis on Kincare, is when a child is in the home of relatives; if the agency places the child with kin, then the timeline does not apply. Kincare provides an easy way to evade the 15/22 rule, eliminating the legal obligation of CPS to seek permanency for a child who cannot safely return to parental custody.<sup>43</sup>

Finally, if CPS does petition for TPR and the court grants the petition, the child might then be available for adoption. Since the mid-1990s, the federal Inter-Ethnic Placement Act (IEPA) has commanded that agencies not “delay or deny” such a child’s adoption on account of a difference in race between the child and potential adopters, which many interpret as an absolute prohibition of considering race in making adoption and pre-adoption foster care placements.<sup>44</sup> Some advocates for minority-race communities, however, as described in Part IV, are adamantly opposed to trans-racial adoption. If CPS can channel the child to Kincare, then it becomes highly unlikely that any non-relatives would ever seek to adopt, thus obviating the race-blind permanency mandate. Kincare thus also provides an easy way to evade IEPA and prevent trans-racial adoption.

### *B. How Children Come to Live With Kin*

Relatives can enter the situation of a maltreated child at many decision points. First, before any report is made, even before maltreatment occurs, parents who perceive potential in their home for harm to their child might agree with relatives to have the child go live with them. This is how “the village” is supposed to operate; parents and children are embedded in a supportive social network, and others in the network do not need a state

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<sup>42</sup> See, e.g., VA. CODE ANN. § 16.1-283(B) (West 2021).

<sup>43</sup> *Id.* § 16.1-283(A).

<sup>44</sup> 42 U.S.C. § 1996b(1)(B); see also, e.g., Elizabeth Bartholet, Commentary, *Cultural Stereotypes Can and Do Die: It’s Time to Move On With Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY & L. 315, 315–20 (2006).

agency to cajole them into helping struggling or incapacitated parents.<sup>45</sup> And it does operate in this way in a great number of instances. Over two million children in the U.S. are living with kin without CPS ever having been involved (private Kincare).<sup>46</sup>

Second, when there is a report of child maltreatment and CPS screens it in, caseworkers can orchestrate “informal Kincare” in various ways. On first contact, they might encourage parents to send a child to live with any available and willing relative for a while to avoid formal investigation.<sup>47</sup> Or, they might start an investigation and, after finding evidence of maltreatment, signal to parents that a court petition for adjudication and removal is imminent but can be avoided by sending the child to live with a relative.<sup>48</sup> Josh Gupta-Kagan estimates that CPS “separate[s] tens or hundreds of thousands of children from their parents annually” by these out-of-court means.<sup>49</sup> In addition, some states empower courts, when CPS brings a substantiated report to them, to authorize placement of the child in the home of relatives, if parents agree, without initiating formal foster care, so that the relatives need not go through the licensing requirements for foster homes.<sup>50</sup>

These various practices of inducing parents themselves to place children with relatives are collectively termed “diversion.”<sup>51</sup> Historically, this has been a cost-saving measure for the state, keeping children out of the foster care system with its oversight, case management, services, and stipends, but

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<sup>45</sup> Cf. NAT’L ASS’N OF BLACK SOC. WORKERS [NABSW], KINSHIP CARE POSITION PAPER 3–4 (2002) (“Th[e] African-based definition of family extends to a broad range of non-relatives or fictive kin (godparents, friends, neighbors, and community parents) who provide very important emotional support and tangible assistance to the children and parents. . . . Kinship care is a continuation of the African tradition of caring, supporting and providing cultural continuity for families.”); Bramlett et al., *supra* note 23, at 54 (finding better health and outcomes for children who did not need state involvement to move to the home of a relative).

<sup>46</sup> See Deirdre M. Smith, *Keeping It in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L.J. 269, 272–73 (2019) (“As of 2011, more than 3 million children . . . were being raised in a home headed by a non-parent relative, most commonly a grandparent, in which the child’s parent did not reside. . . . Most intrafamilial caregiving arrangements . . . do not involve or require the legal system.”).

<sup>47</sup> See Amanda Robert, *Shadow Foster Care: Children and Caregivers in a ‘Hidden’ System Miss Out on Benefits and Support*, 109 A.B.A. J. 44, 45–46 (2023); Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 841 (2020).

<sup>48</sup> See CHILD.’S BUREAU, OFF. OF ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., KINSHIP CARE AND THE CHILD WELFARE SYSTEM 4–5 (2022).

<sup>49</sup> See Gupta-Kagan, *supra* note 47, at 843, 856–58.

<sup>50</sup> See, e.g., COLO. REV. STAT. § 19-3-403(3.6)(a)(III) (2024); GA. CODE ANN. § 15-11-133.1(b) (2024); see also CHILD.’S BUREAU, OFF. OF ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., PLACEMENT OF CHILDREN WITH RELATIVES 3–4 (2023) (stating that just twenty states require licensing).

<sup>51</sup> See *What is Kinship Care?*, ANNIE E. CASEY FOUND. (May 20, 2023), <https://www.aecf.org/blog/what-is-kinship-care>[<https://perma.cc/U97L-ZT5U>].

one used sparingly in decades past.<sup>52</sup> Informal Kincare also evades the 15/22 rule, as that rule applies only to foster care per se. The vast majority of children living with kin and not with parents are in one of these informal placement situations rather than formal foster care.<sup>53</sup>

If CPS does effect a formal removal, it must place the child in the most home-like environment available, and federal law requires state agencies to look for relatives as potential placements.<sup>54</sup> They have increasingly done so, and today roughly one-third of foster care placements in the U.S. are in kin foster homes (KFH).<sup>55</sup> As with diversion, one motivation for seeking relatives to foster is to reduce foster care expenditures.<sup>56</sup> A kin foster home is likely to be “unlicensed,” at least for a time while kin go through the qualification process, and therefore not eligible for the usual payments to foster parents.<sup>57</sup> Another motivation, increasingly, is to avoid the 15/22 rule.

A foster care agency—which could be CPS or a private agency with whom local government contracts—typically has a roster of pre-qualified foster parents, people who approached the agency without any particular child in mind but simply wanting to help care for some child, perhaps as a path to adoption.<sup>58</sup> But the agency can add people to the roster at any time, and agencies are increasingly eager to do this with relatives who step forward and appear capable of passing the qualification process.

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<sup>52</sup> Cf. Robert, *supra* note 47; *How Can We Prioritize Kin in the Home Study and Licensure Process, and Make Placement with Relatives the Norm?*, CASEY FAM. PROGRAMS (Aug. 12, 2020), <https://www.casey.org/adapting-home-studies-for-kin/> [https://perma.cc/VDR5-X3DT] (noting that kin who are not licensed foster parents must rely on Temporary Assistance for Needy Families, which provides “less than half of the monthly support that licensed foster caregivers receive”); Smith, *supra* note 46, at 296 (“Under any of these ‘voluntary’ . . . arrangements, the agency can then close the file on the child and the family.”); Gupta-Kagan, *supra* note 47, at 855 (noting results of survey showing CPS agencies discontinue supervision of informal kin placements they have orchestrated); GELLES, *supra* note 9, at 2.

<sup>53</sup> See Lee et al., *supra* note 23, at 88 (“[O]nly about 5% of all children living with kin are in public kinship care.”); Bramlett et al., *supra* note 23, at 42 (noting 48% of children living outside parents’ homes were in private or voluntary kinship care).

<sup>54</sup> 42 U.S.C. § 671(a)(29).

<sup>55</sup> See RILEY, *supra* note 12, at 64 (noting that between 2006 and 2016, the percentage of foster children placed in kinship homes nationwide increased from 24% to 32%); FONT & GERSHOFF, *supra* note 16, at 2.

<sup>56</sup> See BERRICK, *supra* note 6, at 72; Gupta-Kagan, *supra* note 47, at 880.

<sup>57</sup> See Sarah A. Font, *Is Higher Placement Stability in Kinship Foster Care By Virtue or Design?*, 42 CHILD ABUSE & NEGLECT 99, 108 (2015) (“[T]he vast majority of formal kinship care placements are estimated to be unlicensed . . .”); CHILD.’S BUREAU, *supra* note 48, at 5, 10.

<sup>58</sup> See Anthony Bald et al., *Economics of Foster Care*, 36 J. ECON. PERSPS. 223, 235–37 (2022); James G. Dwyer, *Smith’s Last Stand? Free Exercise and Foster Care Exceptionalism*, 24 U. PA. J. CONST. L. 856, 890–95 (2022) (describing operation of private foster care agency).

Despite the mandate and motivation to look for kin, two things commonly lead to a removed child being placed in non-relative foster care (NRFC) at initial removal and remaining there for a significant time: (1) no willing kin are identified at removal or (2) the process of qualifying any willing kin is prolonged or unsuccessful—for example, because of housing instability or criminal record. Once a child is placed in NRFC, overburdened caseworkers are likely to put on the back burner efforts to search for, qualify, and prepare kin to take in the child.<sup>59</sup> The initial permanency plan following foster care placement is almost always reunification with parents, and that happens about half the time.<sup>60</sup> So, caseworkers are likely to judge that the best use of their limited time after a first placement in NRFC is to work with parents on reunification. This typically entails arranging multiple services, meeting often with parents, and having conversations with service providers.

Thus, a substantial portion of children removed from parental custody remain in NRFC for many months, often for as long as two or three years, before the permanency goal becomes something other than return to parents. The 15-month mark might pass without a TPR petition because CPS documents that it would not be in the child's best interests, because the supervising court finds the agency has not made reasonable reunification efforts, or because the agency and court simply ignore the 15/22 rule.<sup>61</sup> And whereas in an earlier era, CPS might move a child around among placements to prevent foster parents from "getting too close," since the 1990s there has been a push to minimize placement changes in recognition of the psychological damage they cause children.<sup>62</sup> Children are therefore more likely to remain with the same non-kin caregivers for a substantial period if CPS did not identify a kin placement at the time of removal. If they are infants when CPS initially takes custody, which is disproportionately true of children in foster care,<sup>63</sup> they are likely to form an attachment to the non-relative foster

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<sup>59</sup> Cf. Pat Loeb, *Officials: Overwhelmed Child Welfare Case Managers in Phila. Resort to Falsifying Documents*, CBS NEWS PHILA. (Apr. 29, 2016, 12:16 PM), <https://www.cbsnews.com/philadelphia/news/officials-overworked-philadelphia-child-welfare-case-managers-resort-to-falsifying-documents/> [<https://perma.cc/W3MY-24EX>].

<sup>60</sup> See FONT & GERSHOFF, *supra* note 16, at 12, 45.

<sup>61</sup> The author once asked an attorney in Norfolk, Virginia why the 15/22 rule had not been complied with in a certain case, and the attorney responded: "Oh, we don't do that here."

<sup>62</sup> See Merav Jedwab et al., *Kinship Care First? Factors Associated with Placement Moves in Out-of-Home Care*, 115 CHILD. & YOUTH SERVS. REV. 105104, May 23, 2020, at 2 ("Promoting placement stability has been one of the ultimate goals in child welfare because frequent placement moves have deleterious effects on children's well-being.").

<sup>63</sup> See Catherine A. LaBrenz et al., *The Road to Reunification: Family- and State System-Factors Associated with Successful Reunification for Children Ages Zero-to-Five*, 99 CHILD ABUSE & NEGLECT 104252, Nov. 22, 2019, at 2 ("[T]he proportion of children under age 1 entering care has become the

parents—that is, to view those caregivers as their parents in a social and psychological sense—their security, the center of their world.<sup>64</sup> From a child development perspective, the formation of an attachment is a good thing, crucially important in fact, and disruption of it once it has formed is a bad thing, potentially destructive of psychological and emotional wellbeing.<sup>65</sup>

At any point following the initial placement of a child in NRFC, however, CPS could suddenly change the placement to kin; it has complete discretion over placements. If this happens within the first few months after initial placement, the child is unlikely to have a relationship with the non-relative caregivers of such depth that severing it would cause harm.<sup>66</sup> But what frequently happens is that no relative becomes known to the agency and qualified while reunification with parents is attempted, yet when the agency perceives, after a prolonged period of efforts, that reunification will not occur and that it will soon have to petition for TPR, it then makes a more determined effort to find and qualify relatives to take the child, rather than encouraging or supporting adoption by the non-kin foster parents.<sup>67</sup> This disrupts the child's family life and bonds, likely causing a substantial detriment to the child's wellbeing, ostensibly for the sake of a supposed gain in wellbeing from living with biological relatives.

The explanation for the latter practice is not that non-kin caregivers are uninterested in adoption; indeed, many challenge the child's removal from their home when it is not for the purpose of reunification with parents.<sup>68</sup> Most non-relative foster parents view fostering from the outset as a path to adoption, or over time they bond with a child in their care to such an extent that, by the time the TPR process starts, they wish to adopt. Thus, conflict often arises between the foster parents' aim of maintaining an established socio-psychological family unit, while perhaps keeping the child connected to the birth family, and an agency's overriding aim of having children live with biological relatives. As discussed below, the child's interests would typically be best served by the former outcome, but law and CPS policy

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highest by age group and children under five constitute 41% of all children in care.”); MALTREATMENT 2023, *supra* note 17, at 27 (showing 30.5% of maltreatment victims under age two).

<sup>64</sup> For background on the nature, conditions, and consequences of attachment, see PETER LOVENHEIM, *THE ATTACHMENT EFFECT: EXPLORING THE POWERFUL WAYS OUR EARLIEST BOND SHAPES OUR RELATIONSHIPS AND LIVES* (2018).

<sup>65</sup> See James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 415–35 (2008).

<sup>66</sup> James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 495–99 (2014).

<sup>67</sup> See FONT & GERSHOFF, *supra* note 16, at 30 (“The preference for kinship placement has led courts or agencies to move children out of otherwise suitable settings where they have been for a substantial portion of their short lives.”); Lee et al., *supra* note 23, at 94–95 (finding one-fourth of children living with kin had previously been in foster care).

<sup>68</sup> See sources cited *supra* note 12.

increasingly favor the latter—again, ostensibly because of a crucial empirical premise that living with kin is inherently better on the whole for any child.

### C. *The Law Governing Foster Care Placements*

Foster-care agency treatment of kin was once characterized by a policy of avoidance, on the assumption that the serious personal struggles underlying parents' maltreatment of the child are not limited to the parents but rather pervade the family and possibly the parents' community,<sup>69</sup> as well as an assumption that kin are less likely to adhere to directions about parental contact with the child.<sup>70</sup> Both assumptions still appear true,<sup>71</sup> and the very fact that maltreatment occurred and that someone needed to enlist CPS to protect a child suggests there is not a cohesive extended-family network for that child. Nevertheless, in the 1980s there was a shift in child-protection practice to searching for kin to consider as alternate caregivers,<sup>72</sup> based on perceptions (also true) that (1) many extended families of maltreated children *do* contain one or more persons willing and sufficiently well-functioning to care for a child; and (2) being with family, especially with relatives the child already knows, can mitigate the trauma of removal.<sup>73</sup> As noted, the shift also held the potential to lessen state expenditures on children removed from birth parents' custody, avoiding the costs NRFC entailed. The 1980s saw a steep rise in drug abuse and an inadequate supply of licensed foster homes to care for affected children.<sup>74</sup>

Since 2008, federal law has in fact required states, as a condition to receiving a certain stream of federal funding, to have a foster care regime in which CPS exerts “due diligence to identify and provide notice” to relatives,

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<sup>69</sup> See Naomi Schaefer Riley, *Reconsidering Kinship Care*, 36 NAT'L AFFS. (2018); Charlene Ingram, *Kinship Care: From Last Resort to First Choice*, 75 CHILD WELFARE 550, 552 (1996).

<sup>70</sup> See BERRICK, *supra* note 6, at 74.

<sup>71</sup> Cf. Mark Testa et al., *Comparative Safety, Stability, and Continuity of Children's Placements in Formal and Informal Substitute Care*, in NEW PERSPECTIVES, *supra* note 24, at 162–63 (“Kinship and community networks tend to be homogeneous in lifestyle and socioeconomic characteristics. . . . [A]bused and neglected children . . . come predominantly from poor families, low-status groups, and impoverished neighborhoods. . . . Child maltreatment frequently runs in families and co-occurs with drug abuse, domestic violence, and family poverty, which may make the extended family a risky agent for safeguarding the best interests of the child.”); Kierra M.P. Sattler et al., *Age-Specific Risk Factors Associated with Placement Instability Among Foster Children*, 84 CHILD ABUSE & NEGLECT 157, 167 (2018) (“[T]he risk of unauthorized contact between the child and birth parents is more likely in kinship care.”).

<sup>72</sup> Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623–24 (2001).

<sup>73</sup> See Ingram, *supra* note 69, at 553.

<sup>74</sup> BERRICK, *supra* note 6, at 72–73.

within thirty days after initial removal of a child from parental custody.<sup>75</sup> The 30-day requirement reflects recognition that children removed from parental custody need as much stability as possible during the period when CPS attempts to make it safe for them to return home, so they should settle in quickly to the best available placement and not be disturbed thereafter unless returning to parents.

Even before this mandate to search, federal law required state agencies to “consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child.”<sup>76</sup> The language “consider giving” is important. Advocates and agency personnel often claim that, when CPS has identified a willing relative, federal law compels the agency actually to give preference to the relative.<sup>77</sup> On any reasonable method of statutory interpretation, however, they are wrong. The canon of avoiding ‘surplusage’ would disallow ignoring Congress’s inclusion of “consider.”<sup>78</sup> It is a procedural rather than substantive directive. Moreover, federal law has long directed states, when they determine that return to parental custody is not safe, to aim for a permanency plan that is in a child’s best interests—presumptively adoption.<sup>79</sup> Relatives commonly seek guardianship rather than adoption, because of ambivalence about their long-term role in the child’s life and/or aversion to alienating or giving up on birth parents.<sup>80</sup> So that, along with the concerns noted above, militates against kin placement in many cases. Kin guardianship might in many cases be functionally equivalent to adoption if it entails the same permanent commitment, but relatives typically envision only a temporary situation.<sup>81</sup>

<sup>75</sup> 42 U.S.C. § 671(a)(29).

<sup>76</sup> *Id.* § 671(a)(19).

<sup>77</sup> See, e.g., Separate Licensing Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 9411, 9412 (proposed Feb. 14, 2023) (to be codified at 45 C.F.R. §§ 1355, 1356) (asserting that the governing federal statute “includes provisions requiring each agency to give priority consideration to relatives as foster care placements”); *Kristopher O. v. Mazzone*, 706 S.E.2d 381, 389–90 (W. Va. 2011).

<sup>78</sup> See *Kristopher*, 706 S.E.2d at 390 (rejecting state agency’s interpretation of federal law); *In re K.L.*, 826 S.E.2d 671, 681 (W. Va. 2019) (same).

<sup>79</sup> 42 U.S.C. § 671(a)(15)(C) (“[R]easonable efforts shall be made to . . . finalize the permanent placement of the child . . . .”); *id.* § 675(5)(A) (requiring “a case plan designed to achieve placement in a safe setting . . . consistent with the best interest and special needs of the child”); *id.* § 675(5)(C) (declaring a placement appropriate if it would “not be in the best interests of the child” to do otherwise); see also *id.* § 671(a)(15) (stating that even when deciding whether and how to attempt reunification with birth parents, “the child’s health and safety shall be the paramount concern”).

<sup>80</sup> See BERRICK, *supra* note 6, at 74; CHILD.’S BUREAU, *supra* note 48, at 13; Mark F. Testa, *Kinship Care and Permanency*, 28 J. SOC. SERV. RSCH. 25, 26 (2001) (“[R]esearch also shows that children in kinship foster care are less likely than children in non-related foster care to exit the child welfare system through the legal channels of reunification or adoption.”).

<sup>81</sup> See Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, 14 THE FUTURE OF CHILD. 114, 115, 121 (2004).



Consistent with the federal dictate simply to consider kin, until recently, the law in nearly all states has not had a categorical priority for relatives among placement options at any stage of a child protective case. Rather, it has required only that caseworkers investigate whether there are relatives willing and able to take custody and then choose the placement best for the child, all things considered, after assessing both available relatives and non-relatives and their respective individual strengths and weaknesses.<sup>82</sup> In a few states, statutes have long created presumptions of varying strength in favor of placement with relatives, but most of those have allowed for rebuttal by showing a non-relative placement would on the whole be better for the child.<sup>83</sup>

## II. THE KINCARE LEGISLATION DELUGE

Strategies to increase the channeling of maltreated children to kin take many forms—increased diversion, greater material state support for Kincare providers, intensified recruitment, relaxed rules for qualification as foster parents, stronger preferences, expanded definitions of kin, and elevation of kin guardianship as a permanency outcome. These receive rhetorical and material support from the federal government and from powerful private advocacy organizations.<sup>84</sup>

### A. Increasing Diversion

Observers of child welfare practice note a marked increase in caseworker use of diversion, in some states now dwarfing the number of

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<sup>82</sup> See, e.g., ARIZ. REV. STAT. § 8-103(C) (LexisNexis 2016) (“[T]he department or adoption agency shall place a child in an adoptive home that best meets the safety, social, emotional, physical and mental health needs of the child.”); 750 ILL. COMP. STAT. 50/15 (2024) (“The welfare of the child shall be the prime consideration in all adoption proceedings.”); cf. N.J. STAT. ANN. § 30:4C-12.1(a) (West 2021) (“[T]he department shall *consider* placement of the child with a suitable relative or person who has a kinship relationship . . . .”) (emphasis added).

<sup>83</sup> See CAL. WELF. & INST. CODE § 16000(a) (Deering 2017); FLA. STAT. § 39.810 (2006); HAW. REV. STAT. § 587A-2 (2010); ME. STAT. tit. 22, § 4003 (2022); MINN. STAT. § 260C.193(3)(a) (2022); MONT. CODE ANN. § 41-3-101 (2023); NEB. REV. STAT. § 43-533 (1987).

<sup>84</sup> See, e.g., H.R. 1384, 117th Cong. (2022) (naming September “National Kinship Care Month” and encouraging “policies to improve the lives of vulnerable children by supporting kinship families in the best interests of such children”); Erica L. Green, *Can ‘Kinship Care’ Help the Child Welfare System? The White House Wants to Try*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/politics/foster-children-biden-welfare.html> [<https://perma.cc/2MUP-9PTA>]; CASEY FAM. PROGRAMS, *supra* note 52.

cases CPS brings to court, and principally with Black children.<sup>85</sup> Some, from an adult-centered perspective, find the trend alarming because they believe the practice frequently amounts to coercing parents into giving up possession of children in circumstances where they might have fended off formal removal.<sup>86</sup> Nevertheless, for parents who would not succeed in getting the case dropped while retaining custody, diversion spares them from court proceedings and a record of founded maltreatment. Moreover, they might quickly regain possession of the children if kin do not resist that after caseworkers cease monitoring the situation.<sup>87</sup> Another complaint about diversion comes from kin who object that agencies use diversion instead of qualifying them as foster parents, to avoid providing subsidies and services to substitute caregivers.<sup>88</sup> Advocates for children would share this concern. Finally, some operating from a child-centered perspective complain that diversion typically means CPS does not provide rehabilitative services to parents or therapeutic services to children nor adequately screen or oversee the child's substitute placement to ensure safety (including insulation from abusive parents).<sup>89</sup>

But many players in child welfare policy support increased diversion, and thus much recent legislation promotes the practice.<sup>90</sup> For example, the federal 2018 Family First Prevention Services Act (“Family First Act”)

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<sup>85</sup> See, e.g., Gupta-Kagan, *supra* note 47, at 843 (“[T]hese cases likely separate tens or hundreds of thousands of children from their parents annually . . . .”); *id.* at 855–60; Testa, *supra* note 80, at 31 (noting that 90% of kin placements in a Cook County sample involved African American families). However, agencies generally do not document informal diversions, so the magnitude is unknown. See Marie K. Cohen, *Advocacy Group Files Unprecedented Lawsuit Challenging Kinship Diversion in DC*, CHILD WELFARE MONITOR D.C. (Mar. 9, 2020), <https://childwelfaremonitordc.org/2020/03/09/advocacy-group-files-unprecedented-lawsuit-challenging-kinship-diversion-in-dc/> [<https://perma.cc/3W2L-NNXH>].

<sup>86</sup> Cameron Thompson, *This Bipartisan Effort Could Keep Kids in ‘Tough Situation’ Out of Virginia’s Foster Care System*, CBS NEWS RICH. (Jan. 19, 2024, 4:11 PM), <https://www.wtvr.com/news/local-news/bipartisan-effort-aims-to-fix-foster-care-system-virginia-jan-19-2024> [<https://perma.cc/JZ4E-GMC6> ] (noting opposition to Kincare bill from Legal Aid society on grounds that it would cause parents to incur coercion); Gupta-Kagan, *supra* note 47, at 844.

<sup>87</sup> See Gupta-Kagan, *supra* note 47, at 855, 881–82 (noting non-supervision of children diverted to relatives’ custody and relatives’ inclination to permit contact beyond what CPS arranges or authorizes).

<sup>88</sup> See Cohen, *supra* note 85.

<sup>89</sup> *Id.*; Lizzie Presser, *How ‘Shadow’ Foster Care is Tearing Families Apart*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/01/magazine/shadow-foster-care.html> [<https://perma.cc/Y7AR-BAXP>]; FONT & GERSHOFF, *supra* note 16, at 49; Gupta-Kagan, *supra* note 47, at 844, 878–82.

<sup>90</sup> See Gupta-Kagan, *supra* note 47, at 846 (“[A] growing set of recent federal and state statutes and policies institutionalize and incentivize the practice without imposing meaningful regulations.”); see also, e.g., S.B. 467, 2024 Reg. Sess. (Va. 2024) (entitling parents to identify an alternative caregiver following a maltreatment report to avoid foster care and state custody); H.B. 1024, 74th Gen. Assemb., Reg. Sess. (Colo. 2023) (eliminating requirement that diversion to kin be in child’s best interests).

amended federal law requirements for state child welfare plans to mandate, effectively, that CPS attempt to place a child in informal care with kin before pursuing a formal removal to state custody.<sup>91</sup> It requires states to create for each “candidate for foster care” a written “foster care prevention strategy” enabling the child either to “remain safely at home” or live with a kin caregiver temporarily or permanently.<sup>92</sup> In other words, if CPS is unable, through reasonable efforts, to enable a child to remain safely at home with parents, its Plan B must be informal Kincare. State legislatures have been busy codifying this mandate and creating programs to fulfill it.<sup>93</sup> Increased financial support for informal kin caregivers, discussed next, also promotes the practice.<sup>94</sup>

### B. Greater Support

Historically, states paid little attention to children being cared for in informal kin arrangements, and some even denied the normal foster care subsidies to relatives who had become formal foster parents.<sup>95</sup> Underlying was an assumption that biological relatives have a natural inclination and obligation to take care of a child whose parents are not able to; it was unnecessary and unseemly to ‘pay them’ for doing what kin ordinarily just do.<sup>96</sup> Non-relatives, in contrast, are assumed to be doing something supererogatory—some even say unnatural—by fostering, and so are likely to

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<sup>91</sup> *Family First Prevention Services Act: Bill Summary*, FIRST FOCUS CAMPAIGN FOR CHILD. (Mar. 2018), <https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Short-Summary-FFPSA.pdf> [<https://perma.cc/6MKE-WWCU>].

<sup>92</sup> 42 U.S.C. § 671(e)(4)(A)(i).

<sup>93</sup> See, e.g., H.B. 27, Gen. Assemb., 2024 Sess. (Va. 2024); H.B. 1141, 68th Leg., Reg. Sess. (Wash. 2023) (eliminating mandated report on foster-parent recruiting efforts, substituting report on efforts to place children with relatives, and establishing priority for informal kin arrangements if parents agree to relinquish physical custody); see also H.B. 5801, 101st Leg., Reg. Sess. (Mich. 2022) (creating “foster care improvement commission” to “[d]evelop initiatives with a focus on . . . [b]olstering kinship care”).

<sup>94</sup> Cf. Bald et al., *supra* note 58, at 239 (citing studies showing higher stipends increase relatives’ willingness to care).

<sup>95</sup> Cf. *Miller v. Youakim*, 440 U.S. 125, 132 (1979) (holding this was inconsistent with federal statute).

<sup>96</sup> See Gupta-Kagan, *supra* note 47, at 881; Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 414 (2005) (“[S]ome have criticized public funding of ‘Kincare’ as undercutting the principle that we should be willing to ‘care for family members out of love and duty and without compensation’ . . .”) (quoting Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, in CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH 85 (Francesca M. Cancian et al. eds., 2002)); Testa, *supra* note 81, at 121–22.

be discouraged by the cost a child would add to the household if the state did not offer payment.<sup>97</sup>

Whatever the soundness of these empirical assumptions, they have given way to a perception that it is unfair to kin to deny them the same support non-kin caregivers receive and a realization that material support for kin caregivers might improve children's experience and long-term well-being.<sup>98</sup> Those perceptions—one normative, the other empirical—are both plausible. The point here is not that increased material support for kin caregivers is problematic, but rather simply that it is another aspect of the phenomenon of channeling children to kin. It is worth taking note, though, that concern about people taking in maltreated children “for the money,” which many have long raised in connection with NRFC, would be at least as great with subsidized Kincare, provided by persons likely to be otherwise very low-income.

So, legislatures are paying great attention now to the support of kin caregivers.<sup>99</sup> Assistance takes two forms: money and services. Some states have begun giving the normal foster care stipend to kin who became licensed foster parents. Many states, though, have adopted a dual foster-care system, with one program for licensed foster parents, who are eligible for federally subsidized monthly stipends, and the other for kin who are not licensed foster parents but rather merely “qualified” and therefore traditionally ineligible for the federally-funded stipends.<sup>100</sup> A further change, then, has been to give non-licensed kin foster parents some stipend, funded entirely by a state, though typically less than that received by licensed foster parents.<sup>101</sup> Recently, there have been efforts to equalize payments, or even to give kin stipends *higher* than those for non-relative licensed foster parents, aimed at inducing more to

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<sup>97</sup> Cf. RILEY, *supra* note 12, at 65–66 (quoting CEO of organization claiming to promote child welfare, who said “there is little that is more unnatural than to give up your own survival needs to care for the young of another”).

<sup>98</sup> See Amalia Huot-Marchand, “State could adopt ‘kin-first’ approach to foster care,” Capitol News (Springfield, IL) (12/30/2024) (quoting bill sponsor saying lesser funding for Kincare is unjust); Ingram, *supra* note 69, at 552–53.

<sup>99</sup> See Press Release, U.S. Dep’t of Health & Hum. Servs., HHS Delivers First National Strategy to Support Family Caregivers (Sept. 21, 2022), <https://www.hhs.gov/about/news/2022/09/21/hhs-delivers-first-national-strategy-support-family-caregivers.html> (“[T]he 2022 National Strategy to Support Family Caregivers . . . highlights nearly 350 actions the federal government will take to support family caregivers in the coming year and more than 150 actions that can be adopted at other levels of government and across the private sector to build a system to support family caregivers.”).

<sup>100</sup> See, e.g., T.M. v. DeWine, 49 F.4th 1082, 1084–86 (6th Cir. 2022) (describing Ohio program).

<sup>101</sup> *Id.* at 1086; S.B. 24-008, 74th Gen. Assemb., 2d Reg. Sess. § 7 (Colo. 2024); Press Release, N.C. Dep’t of Health & Hum. Servs., New Initiative Provides Payment to Support Relatives and Family Members Who Step in to Care for Children in Need (Nov. 17, 2023), <https://www.ncdhhs.gov/news/press-releases/2023/11/17/new-initiative-provides-payment-support-relatives-and-family-members-who-step-care-children-need> [<https://perma.cc/9Y93-ZVDH>] [hereinafter New Initiative]; S.B. 222, Gen. Assemb., 124th Sess. (S.C. 2022).

undertake fostering.<sup>102</sup> In addition, states increasingly provide financial assistance to informal kin caregivers<sup>103</sup> and relatives who become legal guardians.<sup>104</sup>

In 2022, Representative Karen Bass, a strident critic of foster care and of pro-adoption policies, introduced the Promoting Permanency Through Kinship Families Act (“Kinship Families Act”).<sup>105</sup> It did not advance far but illustrates how some members of Congress would transform federal child welfare policy if able. It was a multi-faceted effort to shift children from foster care to kin placements. One way was by requiring states to implement a kinship guardian assistance program (existing federal law merely encourages this with funding) and to shorten the time period for kin to qualify from six months to three.<sup>106</sup> It would have required states to commit more resources to prevent the transfer of a child from any form of Kincare to NRFC, which might include subsidizing home improvements.<sup>107</sup> Further, it would have put financial support for kin placements on equal footing with family-preservation services as a means of avoiding NRFC, in terms of what portion of federal prevention money can be allocated to it.<sup>108</sup>

With respect to services, federal law authorizes reimbursement to states for the costs of some services provided to any kin caregivers, not just those who are formal foster parents.<sup>109</sup> In fact, it now mandates that states provide such services to kin when they engage in diversion.<sup>110</sup> In the past twenty years, more than half of states have, with federal financial support, created “kinship navigator programs” whose staff help caregivers identify and access

<sup>102</sup> See, e.g., S.B. 24-008 (Colo. 2024); H.B. 4781(5) (Ill. 2025), pp.34–36; Green, *supra* note 84 (describing the President’s proposal to double federal spending supporting Kincare).

<sup>103</sup> See H.B. 4781(5) (Ill. 2025), pp.34–36; H.B. 27, Gen. Assemb., 2024 Sess. (Va. 2024); H.R. Res. 1384, 117th Cong. (2022) (stating forty states have support programs); Carly Moran, *Arizona Boosts Aid to Families Who Take in Kin Instead of Foster Care*, THE CTR. SQUARE (June 30, 2022), [https://www.thecentersquare.com/arizona/article\\_6dab34e4-f8a0-11ec-9f5e-577f45998ad0.html](https://www.thecentersquare.com/arizona/article_6dab34e4-f8a0-11ec-9f5e-577f45998ad0.html) [<https://perma.cc/CG9F-TEXT>] (“The increased stipend allows for kin to be paid the same as foster care providers . . .”).

<sup>104</sup> See *Factsheet: Kinship Guardianship Assistance Program*, YOUTH L. CTR. (Sept. 2022), <https://www.ylc.org/wp-content/uploads/2022/09/Fact-Sheet-Kinship-Guardianship-Assistance-Program-November-2022.pdf> [<https://perma.cc/WN5F-YFQS>].

<sup>105</sup> H.R. Res. 7416, 117th Cong. (2022). Co-sponsors were Sheila Cherfilus-McCormick (D-FL-20), Jahana Hayes (D-CT-5), and Brenda Lawrence (D-MI-14). *Id.* Bass left Congress in 2022 to become mayor of Los Angeles, and her replacement in the House, Rep. Sydney Kamlager-Dove, grabbed the Kincare baton and reintroduced the Act in 2024, also without success. H.R. 8713 (118<sup>th</sup> Cong).

<sup>106</sup> *Id.* at § 6.

<sup>107</sup> *Id.* at § 8(a).

<sup>108</sup> *Id.* at § 8(c).

<sup>109</sup> 42 U.S.C. § 671(e)(1) (covering mental health and substance abuse services and in-home parenting skills programs).

<sup>110</sup> *Id.* § 671(e)(4)(A)(i).

benefits and interact with government agencies, provide guidance on legal matters, and develop supportive community relationships.<sup>111</sup> Efforts to extend and expand such programs have generated substantial proposed legislation at federal and state levels in recent years.<sup>112</sup> For example, the bipartisan federal Grandfamily Housing Act of 2023 would fund additional services for “owners of intergenerational dwelling units,” including home improvements.<sup>113</sup>

### *C. Intensified Recruitment*

Recent legislation increases funding for the recruitment of kin caregivers and requires agencies to demonstrate more clearly, before placing a child in a non-kin foster home, that they have made extensive efforts to locate kin willing to take the child.<sup>114</sup> Some require or create a presumption that CPS continue searching for kin so long as the child is in its custody, regardless of whether transfer to kin would disrupt an existing long-term, non-relative placement.<sup>115</sup> Neither the legislation nor arguments presented in

<sup>111</sup> See *id.* § 627(a); H.B. 4781(5) (Ill. 2025), pp.36–37; S.B. 96, 2021 Leg. Sess. (Fla. 2021); FLA. STAT. § 39.5086(2)(b) (“[E]ach community-based care lead agency may establish a kinship navigator program . . . .”); S.B. 5693, 67th Leg., 2022 Reg. Sess. (Wash. 2022) (funding legal advice phone line for kinship caregivers); N.Y. STATE OFF. OF CHILD. & FAM. SERVS., 11-OCFS-ADM-03, KINSHIP GUARDIANSHIP ASSISTANCE PROGRAM (2011).

<sup>112</sup> See, e.g., H.B. 110, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (giving kin caregivers, inter alia, five days paid “leave” from caregiving each year); H.B. 1400, Gen. Assemb., Reg. Sess. (Va. 2023) (funding pilot kinship navigator programs); S.B. 5188, 68th Leg., 2023 Reg. Sess. (Wash. 2023) (funding legal advice phone line); S.B. 5124, 68th Leg., 2023 Reg. Sess. (Wash. 2023) (authorizing payment for legal representation for kin caregivers); S.B. 3207, 220th Leg. Assemb. (N.J. 2022) (mandating advocate to assist “kinship legal guardians” with legal matters); H.B. 2858, Gen. Assemb., 2022 Sess. (Pa. 2021) (requiring local agencies to provide legal services to kin caregivers).

<sup>113</sup> See H.R. 3153, 118th Cong. (2023).

<sup>114</sup> See, e.g., H.R. 7416, 117th Cong. § 8(a) (2022); H.B. 4781(5) (Ill. 2025), pp.49–54, 146, 152, 176; VA. CODE ANN. §§ 63.2-900.1; H.B. 2543, Ill. Gen. Assemb. (Ill. 2016) (requiring “notice to all adult grandparents and other adult relatives” at inception of state custody).

<sup>115</sup> See, e.g., A.B. 448, Cal. Leg., Reg. Sess. §§ 4–6 (Cal. 2023); H.B. 1866, Gen. Assemb., 2022 Sess. (Pa. 2022) (requiring “family finding” at initial removal “and at least annually thereafter until the child’s involvement with the county agency is terminated,” unless court proceedings begin for adoption by non-relatives); H.B. 1024, 74th Gen. Assemb., Reg. Sess. § 6 (Colo. 2023); Fla. Stat. § 39.4022(6)(c) (2024) (“[T]o consider a decision related to a child 3 years of age or younger, all of the following information . . . must be gathered and considered . . . [(1) i]dentified kin and relatives who express interest in caring for the child, including strategies to overcome potential delays in placing the child with such persons if they are suitable. . . .”); H.B. 4781(5) (Ill. 2025), pp.187–90, 194, 196; VA. CODE ANN. § 63.2-900.1 (2024) (“Searches for relatives eligible to serve as kinship foster parents shall be conducted at the time the child enters foster care, at least annually thereafter, and prior to any subsequent changes to the child’s placement setting.”); VA. CODE ANN. § 16.1-282.1 (2024) (“If the child has been in the custody of a local board or child welfare agency for 15 of the most recent 22 months and no petition for termination

favor acknowledge that if CPS has great difficulty locating willing relatives, then most likely any relative it does recruit is not known to the child, close to the parents, or living near the parents, which runs counter to two of the justifications for preferring kin (familiarity and proximity). Nor do they acknowledge that prospects of finding a willing relative decline dramatically the longer the search must continue.<sup>116</sup>

The proposed Kinship Families Act would require even greater agency exertions. A state would have to “substantiate with clear and convincing data and analysis that [it] is . . . provid[ing] for locating and involving relatives and fictive kin as a regular and ongoing part of case planning, for addressing barriers to family involvement, and provid[ing] for the diligent recruitment” of kin.<sup>117</sup> It would require CPS to “make and document prompt, *active, and continuous efforts* to identify and locate relatives or fictive kin as a potential kinship guardianship, foster or adoptive placement.”<sup>118</sup> “Continuous” means the efforts should persist beyond initial placement, so a child might be moved at any point from a biologically unrelated foster family if any willing relative is found—again, even after the child has bonded with long-term caregivers and even though the relative might be entirely unknown to the child. Foster care agencies would have to document with clear and convincing evidence any decision not to pursue kin on the grounds that the effort would be futile or contrary to a child’s best interests.<sup>119</sup> Thus, there would be a presumption *against* protecting a child’s attachment relationship to non-kin foster parents, if one has developed, if any kin might be available. Other federal legislation introduced in recent years would straightforwardly require states to increase the rate of Kincare placements.<sup>120</sup>

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of parental rights has been filed with the court, the local board or child welfare agency shall state in its petition for a permanency planning hearing . . . the reasonable efforts made regarding reunification or transfer of custody to a relative . . . .”); WASH. STATE DEP’T OF CHILD., YOUTH & FAMS., NO. 4527, KINSHIP CARE: SEARCHING FOR, PLACING WITH, AND SUPPORTING RELATIVES AND SUITABLE OTHER PERSONS (June 9, 2022), <https://www.dcyf.wa.gov/4500-specific-services/4527-kinship-care-searching-placing-and-supporting-relatives-and-suitable> [<https://perma.cc/8HP6-5WZN>] (directing child welfare employees to search for relatives when a child re-enters care after reunification, twelve months after placement in any non-kin home, and “ongoing” until “a permanent plan for the child has been completed,” and directing caseworkers to “prioritize kinship placements as long as there are no safety concerns”). *See also* Cohen, *supra* note 12 (describing New Jersey legislation expressly precluding consideration of a child’s attachment to non-kin foster parents).

<sup>116</sup> *Cf.* Font, *supra* note 57, at 101 (“[T]o search for relatives when a relative is not immediately identified, caseworkers may be drawing from an increasingly distal pool. . . . [Yet] kin lacking a bond with the child are more likely to decline to foster.”).

<sup>117</sup> H.R. 7416, 117th Cong. § 3(a) (2022).

<sup>118</sup> *Id.* § 3(b) (emphasis added).

<sup>119</sup> *Id.* § 3(c)(3)(iii).

<sup>120</sup> *See, e.g.*, H.R. 3058, 118th Cong. (2024).

*D. Lower Standards for Qualifying as Foster Parents*

Foster care agencies have long been more lax in approving and monitoring kin placements than with licensed non-relative foster parents.<sup>121</sup> The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 made this double standard official policy, authorizing child welfare agencies to waive for kin foster homes, on a case-by-case basis, some ordinary licensing requirements that states deem “non-safety standards,”<sup>122</sup> which might include standards whose characterization as “non-safety-related” is debatable—for example, minimum space and separate bedrooms or training to address special needs of maltreated children.<sup>123</sup> Much recent state legislation has aimed to take advantage of this authorization and lower foster-parent qualification standards for kin.<sup>124</sup> In 2023, the federal Children’s Bureau adopted regulatory amendments allowing states to adopt a blanket policy excluding kin homes from supposedly non-safety-related licensing requirements.<sup>125</sup>

Further, there have been efforts recently to weaken even concededly safety-related standards. Some states have amended statutes to permit the placement of a child in a relative’s home, with state financial support, even before CPS has begun the qualification process, possibly without criminal and child-abuse background checks.<sup>126</sup> The Kinship Families Act would have amended requirements for background checks to stipulate that kinship

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<sup>121</sup> See Sarah A. Font, *Are Children Safer With Kin? A Comparison of Maltreatment Risk in Out-of-Home Care*, 54 CHILD. & YOUTH SERVS. REV. 20, 22 (2015); Winokur et al., *supra* note 18, at 27 (“[K]inship placements, especially with unlicensed caregivers, are often more private and out of the control of child welfare agencies . . .”).

<sup>122</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949; 42 U.S.C. § 671(a)(10)(D) (2023).

<sup>123</sup> Cf. CASEY FAM. PROGRAMS, *supra* note 52, at 3 (citing “lack of adequate space” and “sleeping arrangements” as examples of barriers to kin licensing that “are not related to safety”). But see FONT & GERSHOFF, *supra* note 16, at 14–15 (denying these are unrelated to safety); Testa et al., *supra* note 71, at 183 (finding number of dependents in household correlates positively with maltreatment reports regarding children in out-of-home placements).

<sup>124</sup> See, e.g., S.B. 24-008, 74th Gen. Assemb., 2d Reg. Sess. §§ 7, 10–11 (Colo. 2024); H.B. 1024, 74th Gen. Assemb., Reg. Sess. § 4 (Colo. 2023); S.C. CODE ANN. § 63-7-2320(D)(4) (2023).

<sup>125</sup> Separate Licensing Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 9411, 9412 (Feb. 14, 2023) (codified at 45 C.F.R. pts. 1355, 1356).

<sup>126</sup> See CASEY FAM. PROGRAMS, *supra* note 52 (identifying six states); S.C. Governor’s Office, *Governor Signs Legislation to Expand Kinship Care*, LANCASTER NEWS (Sept. 27, 2022) (discussing new law, characterized by Governor as “cutting red tape”). Rhode Island retreated from this practice following child deaths with unlicensed kin. See Jennifer Bogdan, *R.I. Reduces Number of Unlicensed Foster Homes*, PROVIDENCE J. (July 22, 2016, 11:20 PM), <https://www.providencejournal.com/story/news/2016/07/23/dcyf-reduces-number-of-unlicensed-foster-homes-but-hasnt-met-promise-to-eliminate-them/27444310007/> [<https://perma.cc/AFW5-VLZU>].



placements may not be denied on the basis of “past allegations or findings of abuse or neglect” or “past criminal record” of a household member “in the absence of particularized information demonstrating that the caregiver . . . poses a current safety threat to the child or that placement of the child with the caregiver would be contrary to the welfare of the child.”<sup>127</sup> In other words, it would create a presumption against considering that a kin placement would cause the child to live with someone who has a criminal and/or child maltreatment history.

Thus, for instance, a child’s grandmother or aunt might be living with a man who has previously been criminally convicted of battering or sexually abusing children, but if there have been no children in his household recently to test whether he is still inclined to beat or molest children, the agency would likely be unable to “demonstrate” with “particularized information” that he would pose a “current safety threat” to the child or that placement in that home would be contrary to the child’s welfare. Or an uncle might just have completed a prison sentence for drug selling as a gang member, but unless the agency can demonstrate he now poses a danger to a child, it may not disfavor him as a placement because of that criminal history and indeed would have to favor him over any non-relatives, including long-time non-kin caregivers wishing to adopt. The Kinship Families Act would also prohibit considering an adult relative’s age in determining “the appropriate placement.”<sup>128</sup> So, the fact that a great-grandmother is ninety years old must be disregarded, whereas that would be quite significant in assessing a non-relative foster parent. Other proposed legislation reducing safeguards for placement in the case of kin appears on state legislative agendas every year.<sup>129</sup>

### *E. Presumptions and Categorical Preferences*

As noted, the prevailing rule has been that choice of foster or adoptive parents for children should be based simply on which is most consistent with their best interests, all things considered. Federal law has directed state agencies to “consider giving preference” to available relatives but has not created a priority or even a presumption in favor of kin.<sup>130</sup> In recent years, though, many states have passed or at least considered amendments to

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<sup>127</sup> H.R. 7416, 117th Cong. §§ 4(a)(1), (2) (2022). *See also* H.B. 4781(5) (Ill. 2025), pp.55–56 (allowing placement with kin felons based on caseworker assessment of persons’ character).

<sup>128</sup> *Id.* § 5.

<sup>129</sup> *See, e.g.*, H.B. 4781(5) (Ill. 2025), pp.40–42, 55; S.B. 1219, Gen. Assemb., 2023 Sess. (Va. 2023) (bill that would require disregarding past convictions for drug possession).

<sup>130</sup> 42 U.S.C. § 671(a)(19).

statutes governing placement decisions that tip the scale more clearly in favor of relatives. Many now have or have considered legislation creating an effective presumption, by requiring CPS to justify ever choosing non-relatives.<sup>131</sup> Some go even further and impose a categorical prioritization of kin over non-kin,<sup>132</sup> or establish a quota percentage of placements that should be with kin.<sup>133</sup> In the most extreme form, current or proposed legislation requires such prioritization at all times, even after a child has been in non-kin care for a lengthy period. For example, in 2024, Maryland amended its child welfare laws to stipulate that Kincare simply is always best for children and to command that “[i]f a kinship caregiver is located subsequent to the placement of a child in a foster care setting, the local department shall, in the best interest of the child, place the child with the kinship caregiver.”<sup>134</sup> At least one state more explicitly denigrates non-relative foster caregivers whom a child has come to view as parents; Arkansas statutes since 2017 have declared that a court may not order CPS to place a child reentering the child

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<sup>131</sup> See, e.g., S.B. 40, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); 20 ILL. COMP. STAT. 505/7(b) (2021); H.B. 4781(5) (Ill. 2025), p.21; S.B. 2246, 101st Gen. Assemb., 2021 Sess. (Ill. 2021) (proposing to give relatives standing to object to adoption by others; require that grandparents’ adoption petitions be favored over others unless proven harmful to the child; and give secondary priority to other relatives); IOWA CODE § 237.22 (2024) (requiring CPS to create permanency plan including “efforts to place the child with a relative or fictive kin”); S.C. CODE ANN. § 63-7-1680(E)(1) (2023) (“In the absence of good cause to the contrary, preference must be given to placement with a relative or other person who is known to the child and who has a constructive and caring relationship with the child . . . .”); H.B. 1499, 2024 Gen. Assemb., Reg. Sess. (Md. 2024) (requiring placement with a kinship caregiver absent “good cause”); H.B. 1866, Gen. Assemb., 2021 Sess. (Pa. 2022) (“[T]he county agency shall give first consideration to placement with relatives or kin[, and if it chooses otherwise,] the agency shall document the reason why the placement was not possible.”); H.B. 27, Gen. Aseemb., Reg. Sess. (Va. 2024) (codified at Va. Code § 63.2-900.1(C)) (adding requirements that when a child welfare agency removes a child from parental custody it “first consider placement with a kinship foster parent” and, if it does not do so, “shall file an exception report” documenting efforts to place with kin and explaining the failure to do so).

<sup>132</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-514(B) (2023) (“The order for placement preference is[  
(1) [w]ith a parent; (2) [w]ith a grandparent; and (3) [i]n kinship care with another member of the child’s extended family . . . .”); CAL. WELF. & INST. CODE § 361.3(a) (West 2023) (“[P]referential consideration shall be given to a request by a relative of the child for placement of the child . . . .”); H.B. 1024, 74th Gen. Assemb., Reg. Sess. §§ 3, 5 (Colo. 2023) (eliminating “consider” language and the requirement that kin be “appropriate”); FLA. STAT. § 39.4021(2)(a) (2023) (dictating order in which placement options “must be considered” and setting forth explicit presumption for kin placement); IOWA CODE § 232.95(2)(c) (2024) (showing legislative history indicates prioritization injected in 2022); S.B. 3196, 220th Leg., 2022 Reg. Sess. § 34(a) (N.J. 2022) (“The court shall also first consider placement of the child with a suitable relative or person who has a kinship relationship . . . .”); 2021 N.J. Sess. Law Serv. 154, § 1(b) (West) (“Kinship care is the preferred resource . . . .”); S.B. 1166, 101st Leg., 2022 Reg. Sess. (Mich. 2022) (“[An] agency must give special consideration and preference to a child’s relative or relatives . . . .”); W. VA. CODE § 49-4-601(a) (2022) (“[P]lacement preference is to be given to relatives or fictive kin of the child.”).

<sup>133</sup> See, e.g., H.B. 1024, 74th Gen. Assemb., Reg. Sess. § 1(c) (Colo. 2023).

<sup>134</sup> S.B. 708, Gen. Assemb., 2024 Reg. Sess. (Md. 2024) (approved by Governor on May 9, 2024, effective October 1, 2024) (codified a Maryland Code, Family Law § 5-534(b)(4)).

welfare system with prior foster parents on the grounds that a relationship had formed between them and the child.<sup>135</sup>

Critics of foster care have been striving to establish a clear prioritization in federal law, such that all states would effectively be compelled to prefer kin categorically as a condition for receiving federal funding. The Kinship Families Act would require CPS to document with clear and convincing evidence a conclusion that placing a child with non-relatives is in the child's best interests despite the availability of kin, or that a child should be removed from an initial kin placement and moved to a non-relative foster home.<sup>136</sup>

Regardless of statutory directives in their states, many CPS agencies and caseworkers have increasingly taken the position that they should—perhaps must—ultimately place a child, at least a Black child, with a relative unless none are ever willing and minimally qualified.<sup>137</sup> They adhere to an ideology that dictates ‘keeping the child with the family’ or ‘with his own kind,’ that does not view a child's relationship with non-kin foster parents as a family relationship, that draws no distinction among children based on age, and that overlooks the several ways in which an infant's situation differs from that of an older child.<sup>138</sup> The legislative efforts described above give them cover for doing so, and such efforts might in fact have originated in many instances with the state child welfare agency.

#### F. Expanded Definition of Kin

States' definitions of biological relatives themselves cast a wide net; many include anyone within the fifth degree of kinship, so even cousins of

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<sup>135</sup> ARK. CODE ANN. § 9-27-355(b)(1)(E)(iv) (2023); *see also* H.B. 1024, 74th Gen. Assemb., Reg. Sess. § 4 (Colo. 2023) (proposing similar provision).

<sup>136</sup> H.R. 7416, 117th Cong. (2022).

<sup>137</sup> *See* REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, at 4 (2000) (“[C]hild welfare agencies have developed a more positive attitude toward the use of kin as foster parents. Today, extended family members are usually given first priority . . . .”); Roberts, *supra* note 72, at 1624 (“[A]gencies are more likely to turn to relatives in the case of Black children than other children.”); Ingram, *supra* note 69, at 558 (“Eighty-eight percent (88%) of Philadelphia's children in kinship care are African American. . . . African Americans represented [eighty percent] of the caregivers.”); Kristopher O. v. Mazzone, 706 S.E.2d 381, 389 (W. Va. 2011) (“[T]his Court is concerned by the DHHR's contention that it is required to place a child with virtually any relative instead of with a foster parent regardless of the emotional bond formed with the foster parents, the length of stay in their home, or the many additional factors important for consideration of a child's best interests. It appears that the DHHR may be conducting its adoption policy in a manner that is inconsistent with West Virginia law.”).

<sup>138</sup> *See infra* Part IV.

parents and siblings of great-grandparents.<sup>139</sup> There is no requirement that kin have a pre-existing relationship with the child. In addition, most states recently amended their codes to include “fictive kin” among those given priority. These are persons biologically unrelated to a child but connected through social relationships.<sup>140</sup> Most count not only direct relationship with the child but also indirect connection by social relationship with parents or “the child’s family,”<sup>141</sup> which could mean anyone who has any sort of relationship with anyone biologically related to the child. In 2024, Maryland passed legislation that brings into the definition of kin any “person identified by the child’s parent.”<sup>142</sup> So, now CPS in Maryland must transfer a child, at any and every stage of a child protection case after removal from home, and sever any relationship the child might have with non-relative foster parents, to any person whom the parent might suddenly name in order to avoid TPR, which could be someone the parent hardly knows—for example, a new boyfriend, the parent’s drug supplier, or any persons advertising themselves for this purpose. The agency must prioritize such “kin” at every stage even if they have no biological connection, have never encountered the child before (so there is no gain in familiarity or stability), and have no antecedent interest in the child but offer to take the child to please or gain something from the child’s parent. It is difficult to interpret the aim of this expansion, reaching to people entirely unknown to the child (and possibly little known to the parents), as anything other than avoiding trans-racial placements.

However, one largely unrecognized implication of the expansion of “kin,” insofar as the concept now includes any persons having a relationship with the child, is that anyone who has served as a child’s long-term caregiver, including biologically unrelated foster parents, should be treated as kin,

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<sup>139</sup> See, e.g., CAL. WELF. & INST. CODE § 11400(m) (West 2023); H.B. 2858, Gen. Assemb., 2022 Sess. (Pa. 2022); WIS. STAT. § 48.02(15) (2023).

<sup>140</sup> See, e.g., S.C. CODE ANN. § 63-7-2320(D)(3)(a) (2023); S.B. 520, 2023 Leg., Reg. Sess. § 90 (Wis. 2023); CHILD.’S BUREAU, *supra* note 48, at 3 (listing twenty-eight states).

<sup>141</sup> See, e.g., S.C. CODE ANN. § 63-7-2320(A)(3) (2023) (defining fictive kin as “an individual who is not related by birth, adoption, or marriage to a child but who has an emotionally significant relationship with the child or the child’s family”); 20 ILL. COMP. STAT. 505/7(b)(i) (2023) (defining fictive kin as including someone shown to have “significant and close personal or emotional ties with the child or the child’s family”); 2022 Act 118 (Pa.) (including a godparent or “an individual with a significant positive relationship with the child or family” within the definition of kin). A few require a relationship with children themselves. See, e.g., FLA. STAT. § 39.01(28) (2023) (defining fictive kin as including someone who “has an emotionally significant relationship, which possesses the characteristics of a family relationship, to a child”); GA. CODE ANN. § 20-1-15(2) (2023) (defining fictive kin as someone “known to a child as a relative . . . and with whom such child has resided or had significant contact”); NEV. REV. STAT. § 424.090(2) (2023) (“[Fictive kin] means a person who . . . has a significant emotional and positive relationship with the child.”); NEV. REV. STAT. § 432B.0657 (2022) (same).

<sup>142</sup> S.B. 708, Gen. Assemb., 2024 Reg. Sess. § 1 (Md. 2024) (codified at Md. Code § 5-534 (effective October 1, 2024)).

though agencies are unlikely to do so unless foster parents successfully push them to do so in court. Most states' definitions of fictive kin do not exclude persons whose relationship with a child is the result of a past CPS foster-care placement.<sup>143</sup> Thus, in an instance of reentry into foster care, or when a permanency plan changes from reunification to adoption or guardianship, CPS should prefer someone who has fostered the child over any other non-kin placement, possibly on an equal footing with biological relatives. Some states do make fictive kin secondary to biological relatives,<sup>144</sup> but others treat them equally and also consider past caretaking.<sup>145</sup> That all seems good from a child-welfare perspective, consistent with KinCare advocates' rhetoric about continuity, familiarity, and stability. Yet this potential implication has received no attention in judicial decisions or scholarly commentary. Legislators in one state were aware of this implication in attempting to expand the meaning of kin, however, and without explanation or justification included language in their legislation explicitly excluding foster parents.<sup>146</sup>

#### *G. Elevation of Guardianship as a Permanency Plan*

The combined effect of the foregoing policy trends has been a steady increase in the proportion of children in formal care whose foster parents are relatives, now roughly one third.<sup>147</sup> In addition, states have increasingly supported a non-adoption permanency plan—guardianship—for children living with relatives. “Permanency” has been an ultimate aim of child welfare practice for decades. Instability and uncertainty can wreak havoc within a child's mind, so the overriding objective is to place children in good situations that will be lasting, not susceptible to disruption, and CPS must propose a permanency plan to a court when it has taken a child into its custody.<sup>148</sup> Typically the initial permanency plan is reunification with parents,<sup>149</sup> but if efforts to rehabilitate parents fail, the agency must create a different permanency plan. Traditionally, that was adoption, a new legal parent-child relationship equivalent to the legally-protected parent-child

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<sup>143</sup> This is true of the statutes cited *supra* note 141. The Illinois statute explicitly treats long-term (a year or more) foster parents as fictive kin.

<sup>144</sup> See, e.g., FLA. STAT. § 39.4021(2)(a)(4) (2023).

<sup>145</sup> See, e.g., CAL. WELF. & INST. CODE § 361.3(a) (West 2011).

<sup>146</sup> See 2023 Wis. Act. 119 (including as “like-kin” anyone “who has a significant emotional relationship with a child... and who is not and has not previously been the child's licensed foster parent”).

<sup>147</sup> See Gupta-Kagan, *supra* note 47, at 853.

<sup>148</sup> See 42 U.S.C. § 675(5)(C) (2024).

<sup>149</sup> CHILD'S BUREAU, *supra* note 48, at 12–13.

relationships state law creates with biological parents at a child's birth.<sup>150</sup> Guardianship was viewed as an inferior outcome, because it suggests a lack of commitment in caregivers and is vulnerable to extinction at any time upon petition of a parent or of anyone else who thinks they would be a better guardian for the child.<sup>151</sup>

Kincare advocates have persuaded legislatures to rethink their stances toward guardianship when kin are guardians. The Fostering Connections Act added "kinship guardianship" to favored targets for financial support, and it provided federal funding for Guardianship Assistance Programs that pay relatives who have had a child with them for at least six months.<sup>152</sup> Most states have chosen to participate.<sup>153</sup> The Kinship Families Act would make it mandatory for states to have such a program and abbreviate the qualification time. Some recent state legislation facilitates guardianships also by empowering parents, following court adjudication of maltreatment, to choose a guardian for a child in lieu of seeking reunification.<sup>154</sup>

### III. RESEARCH ON KINCARE

Advocates for prioritizing kin predicate their position on sweeping, unnuanced proclamations that research proves placement with relatives is categorically better for children.<sup>155</sup> Administrators and legislators repeat

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<sup>150</sup> See Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237 (2004).

<sup>151</sup> *Id.* at 255.

<sup>152</sup> See 42 U.S.C. § 673(d). See also H.B. 4781(5) (Ill. 2025), p.126 (treating guardianship as a permanency outcome on par with adoption).

<sup>153</sup> CHILD.'S BUREAU, *supra* note 48, at 13; H.B. 4781(5) (Ill. 2025).

<sup>154</sup> See, e.g., Assemb. B. 2309, 2021-2022 Leg., Reg. Sess. (Cal. 2022).

<sup>155</sup> See, e.g., *How Can We Improve Placement Stability for Children in Foster Care?*, CASEY FAM. PROGRAMS (May 12, 2023), <https://www.casey.org/strategies-improve-placement-stability/> [<https://perma.cc/L8L4-GLRP>] ("Research on kinship care has found that the behavior, mental health, and well-being of children placed with kin is better than that of children placed in non-relative foster care, and that children placed with relatives experience more placement stability."); DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 294 (2022); Leonard Edwards, *Relative Placement: The Best Answer for our Foster Care System*, 69 JUV. & FAM. CT. J. 55, 58 (2018) (asserting, in essay by judge, "[r]esearch has demonstrated that children placed with their kin fare better than those placed in foster care"); Elynn Jameson, Comment, "Best" Interests and "Bad" Parents: *Immigration and Child Welfare Through the Lens of SJS and Foster Care*, 168 U. PA. L. REV. 513, 520 (2020) (citing Edwards, *supra*) ("Children removed from their homes fare far better in kinship care than in foster care with strangers by every metric and it has been lauded as the best solution for the notoriously problematic foster care system."); NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, *ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES* 11 (2000) ("An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative."); Newman, *supra* note 11 (citing

these claims in explanatory sections of legislation and regulations.<sup>156</sup> The claims are flawed in a global way for being far too simplistic; the research and reality are actually complicated. And to a substantial extent, specific claims that advocates and government officials make are simply false, even the opposite of the truth.

The most often cited ways Kinship care is supposedly good for children relate to stability and long-term wellbeing. The latter is inherently valuable, whereas the former is usually (but not always) instrumentally valuable in service to wellbeing (stability in a bad environment might not be good). Much legislation also refers to maintaining family connections and cultural traditions,<sup>157</sup> which more clearly are only instrumentally and contingently valuable for children and are of uncertain meaning in regard to newborns and infants.

Among official bodies echoing these factual claims of advocates is the federal agency purporting to be the nation's authority on best practices in child welfare, the Children's Bureau. In a "factsheet" on kinship care, it asserts, without qualification:

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broad claims by New York City's ACS director); Green, *supra* note 84 (citing Heidi Redlich Epstein, *Kinship Care is Better for Children and Families*, A.B.A. (July 1, 2017), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/) [<https://perma.cc/AH8J-FVCW>] (“[R]elatives, who research shows are more likely to raise children who do better in school, have fewer mental health problems and a lower likelihood of entering the juvenile justice system.”); Epstein, *supra* (asserting, “[r]esearch shows that living with relatives is better for children and benefits them in several ways[, leading to] increased stability . . . [and] better behavioral and mental health outcomes,” and in turn citing for support only a pamphlet titled “Children Thrive in Grandfamilies,” published by Generations United, an organization that advocates for grandparents); Weaver, *supra* note 21, at 22 (“Children placed informally with grandparents fare much better than those who are placed in foster care . . .”); Gupta-Kagan, *supra* note 47, at 853.

<sup>156</sup> See, e.g., New Initiative, *supra* note 101 at 2–3 (quoting state administrator who stated, “[w]e know children in foster care do best when placed with relatives because . . . children experience fewer behavioral problems”); H.R. Res. 349, 118th Cong. (2023) (“[C]hildren in foster care who are placed with relatives, compared to children placed with nonrelatives, have more stability, including fewer changes in placements . . . and demonstrate fewer behavioral problems . . .”); H.B. 1024, 74th Gen. Assemb., Reg. Sess. § 1 (Colo. 2023); H.B. 4781(2) (Ill. 2025); H.B. 1058, Gen. Assemb., 2023 Sess. (Pa. 2023); Separate Licensing Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 9411-01 (proposed Feb. 14, 2023) (to be codified at 45 C.F.R. pts. 1355, 1356) (proposing lesser standards for kin foster parents, citing “knowledge that it is generally best for children to be with family”); VA. JOINT LEGIS. AUDIT & REV. COMM’N, IMPROVING VIRGINIA’S FOSTER CARE SYSTEM 28 (2018), <https://jlarc.virginia.gov/pdfs/reports/Rpt513-2.pdf> [hereinafter JLARC REPORT] (“National research shows that, compared to children in other placements, children placed with relatives tend to experience improved outcomes, including reduced trauma, improved placement stability, and increased ability to maintain community and cultural connections while in foster care.”).

<sup>157</sup> See generally S.B. 3814, Gen. Assemb., 2021 Reg. Sess. (N.J. 2021); S. Res. 1382, Gen. Assemb., 124th Sess. (S.C. 2021) (“[R]elationships with kinship caregivers are crucial for children, and it is our responsibility to promote and preserve kinship, sibling, and other meaningful connections for children, helping them retain their cultural heritage, family, and community ties . . .”).

When children cannot remain safely with their parents, placement with kin is preferred over placement in foster care with nonrelatives. . . . There are many benefits to placing children in kinship care, including . . . [i]ncrease[d] placement stability. Children in kinship care are less likely to experience as many moves to various foster homes and families as children in traditional foster care. . . . [Another benefit is i]mprove[d] behavioral outcomes. Children in kinship care display fewer behavioral problems than those in traditional foster care.<sup>158</sup>

These are clearly causal claims. As to any given child, the Children's Bureau is asserting that putting them in the home of a relative rather than non-kin foster care will cause them to experience certain benefits, including greater stability and better behavioral outcomes. Yet both the stability and the outcome causal claims are baseless. Subpart A explains the flaws in research on which Kincare advocates rely. Subpart B shows that well-constructed studies disprove the claims advocates make.

#### A. Flawed Research

Most studies that advocates conduct or cite have flawed designs that preclude responsible researchers from drawing conclusions about effects. In particular, they are observational rather than experimental and suffer from severe selection bias.<sup>159</sup> Many authors are insufficiently clear about this and

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<sup>158</sup> CHILD.'S BUREAU, *supra* note 48, at 2–3.

<sup>159</sup> See Marc Winokur et al., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment: A Systematic Review*, 10 CAMPBELL SYSTEMATIC REVIEWS 1, 6, 7 (2014) (noting “pronounced methodological and design weaknesses of the included studies” and that “the quality of research on kinship care is weakened by the poor methods of the included studies”); Ferraro et al., *supra* note 11, at 2 (characterizing existing research as “inconclusive” because of “research designs and analytical approaches that do not adequately address the potential for selection bias inherent in the placement decisions”); *id.* (“[S]election bias in kinship research is a well-established methodological challenge.”); Winokur et al., *supra* note 18, at 40–41 (noting “the weak standing of quantitative research on kinship care” and “the pronounced methodological and design weaknesses of the included studies and particularly . . . the lack of a baseline measurement of initial behavioral functioning”); Bell & Romano, *supra* note 23, at 270 (emphasizing “understanding whether differences in child outcomes are in fact due to placement type or to preexisting characteristics of children or caregivers”); *id.* at 282 (“[T]he majority of included studies [were left] at risk for selection bias. In other words, the inability to control for relevant variables that existed prior to out-of-home placement makes it difficult to discern whether the permanency and safety outcomes were truly the result of placement type or whether they might have also been influenced by these preexisting variables.”).



other limitations of their work, so they foster false claims.<sup>160</sup> Observational studies take two populations for comparison (e.g., children placed in formal Kincare (FKC) and children placed in NRFC) as they are, presupposing them similar in relevant respects prior to the intervention studied, and then observe differences between the two groups as to particular outcomes.<sup>161</sup> But in the case of FKC versus NRFC, the two groups are actually substantially different at entry, so observational studies simply cannot draw meaningful conclusions about the comparative effects of the two placement settings.<sup>162</sup> Children who end up in NRFC are, at the time of removal from parental custody, generally from more deeply fractured biological families (hence the absence of willing kin) and much harder for anyone to care for because of pre-existing characteristics (e.g., behavioral disorders, disability, health problems, age) and histories (e.g., sexual and other abuse by parents or other relatives, prior foster care episodes).<sup>163</sup> It is like studying the effect of a barrel's wood type

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<sup>160</sup> See, e.g., YVONNE HUMENAY ROBERTS ET AL., CASEY FAM. PROGRAMS, THE IMPACT OF PLACEMENT WITH FAMILY ON SAFETY, PERMANENCY, AND WELL-BEING (2018) (conducting in-house data analysis drawing causal conclusions with no effort to control for characteristics at entry or pre-placement history); Testa, *supra* note 81, at 34–36 (reporting greater stability for kin placements yet identifying age as the sole child characteristic recorded).

<sup>161</sup> See Laura Lee Johnson, *Design of Observational Studies*, in PRINCIPLES AND PRACTICE OF CLINICAL RESEARCH 231–47 (John I. Gallin et al. eds., 4th ed. 2018).

<sup>162</sup> *Id.* at 231 (“[I]t is generally accepted that observational studies . . . cannot conclude that one event causes another.”); Bell & Romano, *supra* note 23, at 282 (“[T]he findings do not support the use of kinship care as the primary placement type . . .”).

<sup>163</sup> See Ferraro et al., *supra* note 11, at 2, 4, 5 (finding 46% of children placed in NRFC rated high on externalizing behavior at time of removal, whereas only 26% of those placed in Kincare did so); Jennifer E. Lapin et al., *Child Protective Custody Placement for Children with Developmental Disorders*, 43 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 418–26 (2022) (finding children with developmental disabilities less likely to end up in Kincare); Font, *supra* note 57, at 101 (“[C]hildren going into kinship care tend to have more advantageous characteristics prior to entering out-of-home care (OHC), including fewer behavior problems and higher cognitive abilities. . . . [C]hildren generally only enter NRFC if a kinship placement is not available. . . . [T]he mere existence of a relative who is both able and willing to take a child into their home suggests that child may have stronger familial ties or a more involved extended family.”); Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RSCH. 105, 106 (2008) (“Children in kinship settings are different from children in nonkinship settings in many characteristics such as age, race, and disability . . . . The reasons why they enter the foster care system are also dissimilar . . . .”); Font, *supra* note 57, at 108 (“[P]rior research has demonstrated that children who enter kinship care have better cognitive scores, fewer behavior problems, lower rates of disability, and fewer biological family risk factors than children entering non-relative foster care.”); Koh & Testa, *supra*, at 109 (“Children in kinship foster homes are older [and] less likely to have disabilities. . . . Children in nonkinship placements are more likely to have been removed because of abuse or neglect.”); Jedwab et al., *supra* note 62, at 2 (“[S]tates only bring children into the foster care system if an informal kinship placement is not an option.”); *id.* at 5 (finding children with behavioral problems less likely to be taken in by kin); *id.* at 7; Carolien Konijn et al., *Foster Care Placement Instability: A Meta-Analytic Review*, 96 CHILD. & YOUTH SERVS. REV. 483 (2019); Font, *supra* note 121, at 21–22 (“Children with more severe maltreatment histories may have more difficulty attaching to a new caregiver, and may exhibit more behavioral and

on stored fruit by comparing the taste of oranges held in oak barrels with the taste of apples held in pine barrels and concluding that oak produces a more orangey flavor. Research that controls for child characteristics at time of entry confirms that outcome differences found in observational studies disappear when one compares apples to apples.<sup>164</sup> Any inferior indicia for children in NRFC reflect pre-placement characteristics and experiences; they do not reflect placement effects.

Why do the two populations differ from the outset? Because relatives generally only accept less challenging children.<sup>165</sup> This is what one would expect: kin have no legal obligation to take in children and presumably no antecedent desire to do so and thus are naturally less likely to do so when a child has been badly damaged or has manifested severe emotional disturbance or behavioral disorders.<sup>166</sup> Imagine an elderly single grandmother or an aunt with several children of her own, contemplating addition to the home of a twelve-year-old who has been setting fires, running away, killing animals, getting into fights, molesting younger children, or self-harming. Indeed, a significant percentage of children in foster care at any given time were voluntarily placed there by parents precisely because the children have mental health and behavioral problems or a disability the parents cannot

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mental health problems than children with no or fewer past experiences of maltreatment.”); Lee et al., *supra* note 23, at 91–92; Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 FUTURE OF CHILD. 130, 135 (2004) (noting children in kinship care are more likely to have been removed because of maltreatment rather than parent-child conflict or behavioral problems); Christina Sakai et al., *Health Outcomes and Family Services in Kinship Care: Analysis of a National Sample of Children in the Child Welfare System*, 165 ARCHIVES PEDIATRICS & ADOLESCENT MED. 159–65 (2011) (showing children entering NRFC have greater behavioral problems at time of entry and higher rate of physical abuse).

<sup>164</sup> See Bell & Romano, *supra* note 23, at 274 (“[A]fter propensity score matching, the differences between placement types on rates of reentry were no longer significant.”); Ferraro et al., *supra* note 11, at 5 (“After matching children in kinship care with children in foster care on propensity scores, . . . [t]he impact of kinship care on change in both internalizing and externalizing behavior was not significant.”); Sakai et al., *supra* note 163, at 164 (“Differences in outcomes may not be directly related to placement type but may be indirectly related to the reasons for . . . selection of a particular placement type.”); Koh & Testa, *supra* note 163, at 109 (“When the analysis is conducted with matched samples, most of the differences between kinship and nonkinship placements disappear.”).

<sup>165</sup> See Koh & Testa, *supra* note 163, at 106 (“Previous research on differences in permanency outcomes between children in kinship and nonkinship foster care is limited by the problem of selection bias. Kin are able to exercise greater control over who enters their care than are licensed foster parents who are typically expected to accept the children referred to them.”).

<sup>166</sup> See JLARC REPORT, *supra* note 156, at 29 (“Of 161 local department caseworkers who responded to JLARC’s survey, about half said that, in the past 12 months, they had asked relatives to be foster parents, and relatives had ultimately declined . . . . The most commonly cited reasons for declining were (1) the high needs of the child in foster care, such as challenging behavioral or medical needs, (2) an . . . unwillingness to go through the foster parent approval process, (3) an inability to meet the criteria for approval, and (4) an inability to assume the financial responsibilities of caring for the child.”).

handle *and because they have no kin willing to help*.<sup>167</sup> Thus, local agencies place in NRFC the most damaged and challenging children, who are likely to experience instability and worse long-term outcomes regardless of placement type.<sup>168</sup>

But selection bias is not the only defect in the studies that KinCare advocates press on policy makers.<sup>169</sup> There is also substantial reporting bias. Studies of emotional and behavioral problems typically rely on reports of such to the foster-care agency, but non-relative foster parents are more likely

<sup>167</sup> See Katherine Hill, *Prevalence, Experiences, and Characteristics of Children and Youth Who Enter Foster Care Through Voluntary Placement Agreements*, 74 CHILD. & YOUTH SERVS. REV. 62, 65–67 (2017).

<sup>168</sup> See Koh & Testa, *supra* note 163, at 106 (“Children in kinship settings are different from children in nonkinship settings in many characteristics such as age, race, and disability . . . . The reasons why they enter the foster care system are also dissimilar . . . .”); *id.* at 109 (“[T]he characteristics of kin placements are quite different from those of non-kin placements. Children in kinship foster homes are older [and] less likely to have disabilities. . . . Children in nonkinship placements are more likely to have been removed because of abuse or neglect . . . .”); Jedwab et al., *supra* note 62, at 2 (citing research showing children with disabilities more likely to be placed in non-kin foster care and finding “children’s behavioral problems were the highest risk factor associated with placement moves”); Konijn et al., *supra* note 163, at 484 (meta-analysis of forty-two studies finding a child’s behavioral problems played large role in placement moves); Font, *supra* note 57, at 100 (citing several studies finding “children who enter NRFC are less advantaged on a number of factors relative to children in KC—they are more likely to have a disability or health problem, and exhibit more behavior problems and cognitive deficits when entering care”); *id.* at 101 (“[T]oday’s children generally only enter NRFC if a kinship placement is not available. Having a relative who is willing and able to provide care is not likely to be an isolated factor—the mere existence of a relative who is both able and willing to take a child into their home suggests that the child may have stronger familial ties or a more involved extended family.”); *id.* at 105 (finding from statewide multi-year sample that “NRFC placements are more likely to involve children ages 11–18 and children with histories of alleged physical or sexual abuse, and less likely to be intended as long-term placements, to involve children with histories of alleged neglect, or children under 5”); *id.* at 108 (“[P]rior research has demonstrated that children who enter kinship care have better cognitive scores, fewer behavior problems, lower rates of disability, and fewer biological family risk factors than children entering non-relative foster care.”); Font, *supra* note 121, at 21–22 (“As compared with children in a kinship setting, children in NRFC are more likely to have disabilities or health problems, and disability is linked with higher risk of maltreatment. Particularly at the time of entry to OHC [out-of-home care], children who enter non-relative placements tend to have more behavioral problems than children in formal kinship care, and children with behavioral disorders experience maltreatment at higher rates. Children in formal kinship care also tend to have fewer familial risk factors and less severe histories of maltreatment than children in non-relative foster care; this is likely to also be true for children in informal kinship care. Children with more severe maltreatment histories may have more difficulty attaching to a new caregiver, and may exhibit more behavioral and mental health problems than children with no or fewer past experiences of maltreatment.”); Green, *supra* note 84, at 135 (finding children in kinship care more likely to have been removed because of maltreatment rather than parent-child conflict or behavioral problems and, where there was maltreatment, because of neglect rather than abuse).

<sup>169</sup> See Winokur et al., *supra* note 18, at 20 (“In general, the included studies also have unclear to high risks of performance, detection, reporting, and attrition bias, which compromise the tenability of the findings . . . .”); Winokur et al., *supra* note 159, at 34 (“It is clear that researchers and practitioners must do better to mitigate the biases that cloud the study of kinship care.”).

to report than are kin.<sup>170</sup> Agency caseworkers communicate less with kin caregivers, and kin are more inclined to downplay misbehavior by a grandchild, nephew, or niece.<sup>171</sup> With respect to adverse experiences in out-of-home care, another consideration sometimes said to favor kin, there is both reporting bias and surveillance bias. Children are less likely to report bad treatment or experiences if living with a grandma or other relative than if in nonrelative care,<sup>172</sup> and non-kin foster homes are generally under closer scrutiny by caseworkers.<sup>173</sup> Even when kin become licensed foster parents, agency regulations might permit caseworkers to visit them less often than non-kin foster parents.<sup>174</sup> Nevertheless, some studies find children in FKC have greater exposure to violence in the household and are subjected to harsher discipline than children in NRFC.<sup>175</sup>

Studies of stability also suffer from selection bias. Children who enter care with serious emotional and behavioral problems are more likely to experience placement disruption regardless of with whom they are placed, simply because they are more difficult to manage,<sup>176</sup> and as noted above those children are likely to go into NRFC rather than Kincare. These studies also suffer from reporting bias; whereas CPS duly records every change in foster care placement, movements from one relative's home to another often escape CPS notice. But additionally, and crucially, *no stability studies account for the impact of pro-kin policies themselves*. These policies *cause* placement disruptions in NRFC, which then register in unsophisticated studies as

<sup>170</sup> See Winokur et al., *supra* note 159, at 34–35 (“[F]oster parents have more incentive to report behavioral and mental health issues, whereas relatives are more apt to view the behavior as acceptable and thus less likely to report it as problematic.”); Sakai et al., *supra* note 163, at 160.

<sup>171</sup> See sources cited *supra* notes 52, 84; Font, *supra* note 121, at 22.

<sup>172</sup> See Font, *supra* note 121, at 4–5 (“[C]hildren experiencing maltreatment may be less willing to disclose when the abuser is a relative.”).

<sup>173</sup> *Id.* at 5 (“[C]aseworkers may make fewer visits to kinship foster homes than nonrelative foster homes thus leaving less opportunity for maltreatment to be identified or disclosed.”).

<sup>174</sup> Cf. TEX. DEP’T FAM. & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 6643.1 (2017), [https://www.dfps.texas.gov/handbooks/CPS/Files/CPS\\_pg\\_6600.asp#CPS\\_6643\\_1](https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_6600.asp#CPS_6643_1) [<https://perma.cc/TMQ9-6Y79>] (giving caseworker discretion as to frequency of visits after initial six-month period of monthly contact).

<sup>175</sup> See Font, *supra* note 121, at 22, 25–26.

<sup>176</sup> See FONT & GERSHOFF, *supra* note 16, at 89 (“[P]oorly functioning children are more likely to disrupt a placement.”); Sattler et al., *supra* note 71, at 158 (citing “older age, externalizing behavior, previous residential care, and previous placements as risk factors for instability,” along with “disability status, placement in emergency shelters, physical abuse as the maltreatment type[s]”); *id.* at 164–66, 170 (finding youth removed in adolescence, who have the greatest emotional and behavioral problems upon entry, are most likely to experience instability); RILEY, *supra* note 12, at 217 (“[A]bout half of foster parents decide to stop during their first year[,] . . . ill-prepared for the challenges: the behavioral problems [that arise].”); Lee et al., *supra* note 23, at 92; Jedwab et al., *supra* note 62, at 3; Bell & Romano, *supra* note 23, at 275 (meta-analysis finding children who enter at a younger age, which is disproportionately true of those in Kincare, have greater stability).

instability! As explained above, many children are initially placed in NRFC simply because the agency cannot immediately identify a suitable relative or quickly qualify someone identified.<sup>177</sup> In those cases, caseworkers disrupt the non-kin placement when any minimally-capable relative does complete the qualification process<sup>178</sup>—not because of any problem with the non-relative placement but because of the policy preferring and ideological commitment to Kincare.<sup>179</sup> Those children, who might on average have worse pre-removal histories than children able immediately to go to relatives, and who might be re-traumatized by the disruption if they have settled into a placement, will not be included in research comparing welfare outcomes in kin versus non-kin placement, because they have been in both.<sup>180</sup> But they are typically included in studies of stability and treated as evidence that non-kin placements are less stable.<sup>181</sup> The policy causes instability in NRFC, and then that instability is cited to support the policy. In sum, comparative studies of stability are meaningless.

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<sup>177</sup> See Jedwab et al., *supra* note 62, at 8 (“[A] child could enter care because a kinship caregiver had not been screened yet, and when the family is approved, the child will be moved into the kinship care placement.”); Font, *supra* note 57, at 102–05 (finding, from statewide multi-year sample, “NRFC placements are . . . less likely to be intended as long term placements”); Edwards, *supra* note 155, at 63 (“Criminal background checks seemed to take months. Finding fathers was a struggle and some agencies simply did not try to locate unmarried fathers. Searches for relatives often did not start until the father could be located, and many relatives were reluctant to engage in the process during the reunification process, hoping that the custodial parent would succeed in reuniting with the child.”).

<sup>178</sup> Font, *supra* note 57, at 108 (suggesting that seventy percent of “placement changes are due to system or policy-related factors,” particularly policy-driven moves to Kincare); *id.* (noting rate of disruption “differences, even in the full sample, decrease substantially or disappear entirely after the first 2 months,” consistent with the hypothesis that much supposed instability of NRFC reflects this phenomenon of temporarily parking children while awaiting kin qualification); FONT & GERSHOFF, *supra* note 16, at 29 (“Several studies have documented that children are sometimes moved from otherwise appropriate placements to facilitate policy preferences.”); Jennifer Osborne et al., *Placement Stability Among Children in Kinship and Non-Kinship Foster Placements Across Multiple Placements*, 126 CHILD. & YOUTH SERVS. REV. 1, 5–6 (2021) (stating “the present study did not collect data on the reason for placement changes,” which is often agency policy preference rather than any problem with the placement); Jedwab et al., *supra* note 62, at 6, 9 (finding substantial portion of children who begin in NRFC are moved to kin); *see also id.* at 2 (noting that older studies, before pro-Kincare policies developed, found greater instability in kin placements).

<sup>179</sup> *See infra* Part IV.

<sup>180</sup> Worse pre-removal histories are likely because the children come from less coherent biological families, display problems kin are averse to addressing, or are older and have suffered maltreatment for a longer period. *See* sources cited *supra* note 176; Osborne, *supra* note 178, at 1 (“[P]lacement disruption has also been shown to operate as a unique risk factor in the development . . . of emotional, behavioral, social, and educational concerns among youth in foster care.”).

<sup>181</sup> Sometimes the agency removes a child from a non-relative placement in order to shift the child to a *different non-relative* placement, to prevent adoption by the (typically different-race) foster parents with whom the child has lived since initial removal, and to preserve the possibility of kin placement. *See, e.g., A.R.L. v. Norfolk Dep’t of Hum. Servs.*, No. 4:20-cv-00110 (E.D. Va. 2020).

B. *A More Accurate Picture*

There are reasons to expect some benefits for most children from living with relatives. There is the normalcy of living with ‘one’s own family’ even if it is extended family and even if those people are unfamiliar to a child when placed.<sup>182</sup> Telling peers, “I’m living with my grandma for now,” is easier than saying, “I’m in foster care.”<sup>183</sup> Relatives with whom a child already has a positive relationship also provide a built-in sense of belonging and being cared about,<sup>184</sup> and the familiarity likely mitigates the shock of removal from one’s home.<sup>185</sup> The change of residence could feel like an extended version of visits one has had before with cousins, an aunt, or a grandparent. Living with kin might also provide a familiar lifestyle and cultural ethos and, if it is in the area where the parents live, continuity in other relationships and activities.<sup>186</sup> These potential virtues of Kincare can be important for children old enough to be aware of what is happening.

However, even with such children, these benefits are not guaranteed. A child’s relatives might never have shown the child positive attention or might be entirely unknown to the child. They might be manifestly resentful of the burden the child represents, their lifestyle and home culture might not foster a sense of stability and safety, and they are likely to be less able and inclined to adhere to restrictions on an abusive parent’s contact with the child (and with any form of diversion there might be no imposed restrictions).<sup>187</sup>

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<sup>182</sup> See sources cited *supra* note 168.

<sup>183</sup> See Jill Theresa Messing, *From the Child’s Perspective: A Qualitative Analysis of Kinship Care Placements*, 28 CHILD. & YOUTH SERVS. REV. 1415, 1418–19, 1424 (2006).

<sup>184</sup> See Monique B. Mitchell, “No One Acknowledged My Loss and Hurt”: *Non-Death Loss, Grief, and Trauma in Foster Care*, 35 CHILD ADOLESCENT SOC. WORK J. 1, 3–4 (2018) (relating children’s sense of lost connection and identity in foster care); BERRICK, *supra* note 6, at 72, 74.

<sup>185</sup> See FONT & GERSHOFF, *supra* note 16, at 13; Bell & Romano, *supra* note 23, at 269.

<sup>186</sup> Cf. Sarah A. Font, *Kinship and Nonrelative Foster Care: The Effect of Placement Type on Child Well-Being*, 85 CHILD DEV. 2074, 2075–76 (2014) (“Cultural dissimilarity between foster children and their caregivers has been linked to negative psychosocial outcomes, particularly among minority children.”).

<sup>187</sup> Cf. Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD’S LEGAL RTS. J. 101, 110 (2019) (“Kinship foster parents are more likely to have informal contact with the child’s parent, which may be both unwelcome and unauthorized. Due to the relationship and emotional connection with the child’s parent, kinship caregivers may have difficulty enforcing child welfare services visitation guidelines.”); Gupta-Kagan, *supra* note 47, at 881 (“When parents pose an immediate physical danger to children, hidden foster care provides at most weak protection.”); BERRICK, *supra* note 6, at 75–76 (“Caregivers often feel a combination of grief, loss, and anger—grief for their daughter or son who may be struggling to care for the child, loss of time and freedom, and anger at being asked to rise to a new level of commitment that was fully unanticipated.”).

Moreover, none of these posited benefits, which are all tied to children's perception of the removal event, pertain to babies, who lack the cognitive capacity to have such a perception or even to recognize and react to a change in environment. For infants and toddlers, familiarity might be of some but very little significance, and abstract notions of family and normalcy of no significance at all. It is mainly older children and adolescents for whom the purported benefits of kin care would be most salient, yet they are more likely to be emotionally disturbed and have behavioral disorders,<sup>188</sup> so less likely to be accepted by kin.

For any children, placement with "fictive kin" might not entail any sense of normalcy; if the child does not know the fictive kin or knows them as merely friends of their parents, it could feel just as much like placement with strangers as would a NRFC placement.<sup>189</sup> And a fictive kin placement might generate in a child especially heightened fear that the head of household (who could be a parent's paramour) will permit an abusive parent to have unauthorized and unsupervised contact.

Moreover, after a child has spent substantial time in NRFC, if the experience has been positive, much of the supposed benefit of living with kin would then derive instead *from remaining with the foster parents*—the familiarity, stability, sense of belonging, and preservation of important bonds—with other children in the foster home and with adults viewed as family. So, trauma can result from being removed from *that* home.<sup>190</sup>

Advocates who extol the psychological benefits for children of 'remaining within the family' seem to have in mind elementary-school-aged children placed with biological relatives or close family friends who have had a nurturing relationship with the child for years. But, one must wonder, why would CPS even become involved if those kin were in the child's life? Further, even in such supposed situations, it is too simplistic to assume that placement with kin will generate unqualified benefits. Such a relative might also be so closely connected to a child's abuser that the child does not feel

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<sup>188</sup> See FONT & GERSHOFF, *supra* note 16, at 12 ("[C]hildren removed at older ages have higher rates of severe emotional and behavioral disturbances.").

<sup>189</sup> See NEW PERSPECTIVES, *supra* note 24, at 178 ("At all waves children under the informal care of nonbiologically related adults reported the lowest bonding levels of all living arrangements. This result suggests that informal arrangements with friends and neighbors, as well as care by stepparents, emotionally functions differently from care by extended kin.").

<sup>190</sup> See TORI HOPE PETERSEN, *FOSTERED: FINDING FAITH & FAMILY THROUGH FOSTER CARE* (2022) (memoir of former foster child who experienced only turmoil in kin placements and, in contrast, real loving parenting and close sibling bonds in NRFC); Mitchell, *supra* note 184, at 4–5; Monique B. Mitchell, *The Family Dance: Ambiguous Loss, Meaning Making, and the Psychological Family in Foster Care*, 8 J. FAM. THEORY & REV. 360 (2016).

protected—familiarity could be frightening.<sup>191</sup> Conversely, such a relative might be, because of family history or the current intrusion into their lives, so disdainful of and angry toward the child’s parents that they inhibit restoration of the parent-child relationship.<sup>192</sup> A relative who is available might live so far from the child’s prior home and school and have so different a lifestyle that the change is disorienting.<sup>193</sup> Conversely, the relatives might live in the same troubled neighborhood as the parents, with its stressors and reminders of past traumatic events; continuity can be problematic.<sup>194</sup> An available relative might, because of shared family history, have the same predilections or the same views about children and childrearing as the parents, which also could be detrimental; in this way as well, continuity can be problematic.<sup>195</sup> The relative who is willing to take in a child is highly likely either to have been raised by the same parent(s) as were the child’s maltreating parent (e.g., the child’s aunt), or to be the parent(s) of the maltreating parent (i.e., the child’s grandparent), and that might mean they are inherently less capable of adequate childcare than the average licensed foster parents.<sup>196</sup> The pre-1980 aversion to kin placements in part reflected this concern that dysfunction pervades families and passes from one generation to the next. As Elizabeth Bartholet explains,

[W]e should be willing to face up to the fact that child maltreatment is only rarely aberrational. It ordinarily grows out of a family and community context. Keeping the child in

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<sup>191</sup> Cf. Messing, *supra* note 183, at 1418 (“Children placed with relatives are more likely to have contact with birth parents than are children in traditional foster care. This contact is less likely to be monitored by the child welfare system and is more likely to be arranged between the caregiver and the birth parent . . . . Indeed, one qualitative study found that caregivers felt that their emotional attachment to the parent of the child in their care made it difficult to enforce rules regarding visitation[, which might] provide an unfit parent with access to continue the abuse of their child.”); RILEY, *supra* note 12, at 46 (noting most maltreatment of children in foster care occurs while they visit parents).

<sup>192</sup> See, e.g., *Kinship carers’ Forum*, FAMILY RIGHTS GROUP, <https://www.frg.org.uk/FandFCForum/viewtopic.php?t=1390> [<https://perma.cc/3WGR-N42Q>].

<sup>193</sup> 42 U.S.C. § 675(5).

<sup>194</sup> See BERRICK, *supra* note 6, at 76; Wendy Gwirtzman Lane, *Prevention of Child Maltreatment*, 61 PEDIATRIC CLINICS N. AM. 873, 874 (2014) (“[Community and societal factors such as violent neighborhoods . . . increase stress on families and increase the likelihood of maltreatment.”); Font, *supra* note 186, at 2075 (describing adverse effects on children of concentrated-poverty neighborhoods); James G. Dwyer, *No Place For Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and “Adult-only” Residential Zoning*, 62 ALA. L. REV. 887, 892 (2011) [hereinafter *No Place for Children*] (urging amendment to child welfare laws to take greater account of “neighborhood effect” on child wellbeing).

<sup>195</sup> *No Place for Children*, *supra* note 194; James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189 (2010) [hereinafter *Parental Entitlement*] (discussing the adverse effects of corporal punishment on children).

<sup>196</sup> See BERRICK, *supra* note 6, at 75, 85.



that same context will often serve the child no better than keeping him or her with the maltreating parent.<sup>197</sup>

Similarly, Sarah Font observes,

[M]ental health, substance abuse, violence, and some forms of neglect have been shown to be transmitted through both biological and environmental conditions that are shared within a family or bloodline. Consequently, a kin placement may be placing a maltreated child in the same conditions that influenced the parent of that child, who was identified by the child protection and juvenile court systems to be unfit.<sup>198</sup>

This reality tends to complicate all the relationships involved—birth parent and caregiver, caregiver and child, parent and child—in ways that can inhibit parental rehabilitation and a child’s recovery from the trauma of maltreatment.<sup>199</sup>

In addition, personal and material resources matter in raising children, and kin caregivers generally rate poorly on these measures compared to non-kin foster parents. Advocates for grandparent caregivers themselves lament this fact.<sup>200</sup> Kin caregivers are on average much older (most are the child’s

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<sup>197</sup> ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 93 (1999); *see also* Font, *supra* note 57, at 101 (citing “evidence suggesting intergenerational patterns of maltreatment, substance abuse, and mental illness”); Riley, *supra* note 69 (relating stories of problematic kin situations); N. Hindley et al., *Risk Factors for Recurrence of Maltreatment: A Systematic Review*, 91 ARCHIVES DISEASE CHILDHOOD 744, 750 (2006) (citing past research finding “associations between recurrence of maltreatment and the child’s primary caretaker themselves having been maltreated as a child”); Fariba Arabgol et al., *Therapeutic Intervention and Parenting Style of Abusive Parents*, INT’L J. HIGH RISK BEHAVS. & ADDICTION 1, 1 (2014) (“Abusing parents . . . often lack the necessary parenting skills that originate from their childhood experiences.”).

<sup>198</sup> Font, *supra* note 186, at 2075.

<sup>199</sup> *See* Amélie de Serres-Lafontaine & Karine Poitras, *Parenting During a Child’s Placement: A Systemic Perspective on Parental Commitment*, 73 FAM. RELS. 1, 3 (2023) (“Parental commitment in the foster care context is vulnerable to systemic components such as the quality of relationships with third parties involved such as the child, foster parents, and case workers”); Elizabeth M. Tracy et al., *Grandmothers Raising Grandchildren: Managing, Balancing and Maintaining Family Relationships*, 34 J. WOMEN & AGING 757, 763 (2022); Meredith Kiraly & Cathy Humphreys, *A Tangled Web: Parental Contact with Children in Kinship Care*, 20 CHILD & FAM. SOC. WORK 106, 109 (2013) (finding that the most frequently mentioned issue by parents was the “complex and often ambivalent relationship between parents and the children’s [kinship] caregivers”); *id.* at 110 (observing that parents in study “expressed resentment that their parenting difficulties were related to a difficult childhood with their mother, now the caregiver of their children”).

<sup>200</sup> *See* Carole B. Cox, *Policy and Custodial Grandparents*, 11 MARQ. ELDER’S ADVISOR 281, 281-84 (2010).

grandmother), in poorer physical and mental health, less able to provide intellectual stimulation to a child, and living in more crowded households in higher-stress and lower-opportunity (in schooling and other developmental goods) neighborhoods.<sup>201</sup> They are also likely to be single and more generally lacking social support.<sup>202</sup> They typically have not had the training and mental preparation that licensed non-relative foster parents have.<sup>203</sup> These are things the state could not readily fix simply by spending more on Kincare, even if legislators are inclined to spend more. What can more readily be improved with increased material support are the quality of the food and clothing that kin caregivers can provide a child and, perhaps more importantly, caregiver stress level—by providing respite care and relief from financial worries.<sup>204</sup>

Thus, there are countervailing considerations when it comes to kin of maltreating parents—reasons intuitively to expect benefits and to expect problems. Policy makers need not and should not rely on intuition, however; there is now a substantial body of reliable research. Most compares NRFC with FKC. Little research has been done on children whom CPS diverts to informal Kincare or whose parents place them in private Kincare.<sup>205</sup>

### 1. Comparative Wellbeing Outcomes

Even observational research comparing NRFC and FKC without taking into account pre-existing differences between the two populations yields mixed results for children, not the uniformly positive conclusions Kincare advocates claim.<sup>206</sup> First, some aspects of welfare are positively associated

<sup>201</sup> See *id.* at 283–84; Sara Gable et al., *Intergenerational Conflict, Contact with Biological Parents, and Child Functioning in Kinship Caregiver Families*, 160 CHILD & YOUTH SERVS. REV. 107581 (2024); Makena L. Kaylor-Tapscott & Maureen A. Sullivan, *Caregiver Stress, Parenting, and Child Outcomes Among Grandfamilies*, 157 CHILD. & YOUTH SERVS. REV. 107406 (2024); Karen C. Clark et al., *Needs of Grandparents Raising Grandchildren: A Qualitative Study*, 2022 J. SCH. NURSING 1, 1 (2022); Font, *supra* note 186, at 2075; Sakai, *supra* note 163; Weaver, *supra* note 21, at 12, 13, 30 (noting 2.9 million children live with a grandparent as primary caretaker and 77% of custodial grandparents are women); Gary S. Cuddeback, *Kinship Family Foster Care: A Methodological And Substantive Synthesis Of Research*, 26 CHILD. & YOUTH SERVS. REV. 623–39 (2004).

<sup>202</sup> Cuddeback, *supra* note 201; Lee et al., *supra* note 23, at 90–91; Lapin, *supra* note 163, at 424; Font, *supra* note 186, at 2075.

<sup>203</sup> See Ferraro et al., *supra* note 11, at 2; RILEY, *supra* note 12, at 30–32 (describing requirements for licensing as foster parents, including training in “trauma-informed care”).

<sup>204</sup> See Cox, *supra* note 200, at 286–95.

<sup>205</sup> See Bald et al., *supra* note 58, at 234 (“[S]cant evidence exists on the effects of diversion.”); Bramlett et al., *supra* note 23, at 7 (stating children in informal Kincare “are absent from child welfare administrative databases and are invisible in most surveys”).

<sup>206</sup> Cf. Bell & Romano, *supra* note 23, at 269 (“[E]xisting research provides mixed findings. . . . [R]esearch on whether children in kinship care have better overall functioning in comparison with children in nonkinship care is inconclusive.”); Font, *supra* note 186, at 2077.

with FKC and others with NRFC. The observational research is fairly consistent in finding lesser emotional and behavioral problems following FKC (if one does not count early sexual activity or substance abuse in this category),<sup>207</sup> but also lesser educational attainment and far higher rates of teen pregnancy and substance abuse.<sup>208</sup> Second, results can differ among groups of children marked by age at entry. For example, children removed from parental custody in infancy appear to do better more comprehensively in non-kin placements, perhaps because differences in quality of care and environment matter more for those children than familiarity and continuity.<sup>209</sup> Third, results that rely on reports by third parties can vary based on who is surveyed.<sup>210</sup> And fourth, some effects appear temporary, disappearing after children spend more time in a placement—for example, the comfort of familiarity is only a short-term benefit, given that any caregiver becomes familiar over time.<sup>211</sup> One of the few studies of informal Kincare found a rate of reported maltreatment (15%) far higher than that for FKC or NRFC, in substantial part because of contact with parents (i.e., the maltreatment was by the parents), and the author counsels that “caution is warranted when using informal placements as a diversionary tactic to limit the size of the formal foster care system.”<sup>212</sup>

As explained, however, observational studies are of limited value. It is not possible to conduct fully experimental studies on the two placements; random assignment is not feasible. But some researchers have attempted quasi-experimental approaches—typically, propensity score matching—to address the great selection bias problem. They match individual children from each group based on a list of potentially influential characteristics (type of abuse, emotional disturbance at entry, disability, age at removal, etc.) and compare outcomes for children in matched pairs, with hopefully enough pairs to have a sample sufficiently large to yield statistically significant results.<sup>213</sup>

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<sup>207</sup> See Winokur et al., *supra* note 18, at 22–23.

<sup>208</sup> See RILEY, *supra* note 12, at 52 (noting Michigan study finding better academic outcomes for children in NRFC); Sakai et al., *supra* note 163, at 162 (finding seven times the risk of pregnancy and double the risk of substance abuse in Kincare); Font, *supra* note 186, at 2077.

<sup>209</sup> See NEW PERSPECTIVES, *supra* note 24, at 75–76.

<sup>210</sup> Cf. Font, *supra* note 186, at 2077 (“[T]eacher reports have found a null or negative effect of kin placement.”).

<sup>211</sup> See NEW PERSPECTIVES, *supra* note 24, at 173–75 (finding over time differences in family bonding as between kin and non-kin placements disappear, and “children’s sense of protection and closeness increased in foster family care”); Font, *supra* note 57, at 108 (“Observed differences in stability are also very time limited. All differences, even in the full sample, decrease substantially or disappear entirely after the first 2 months.”).

<sup>212</sup> Font, *supra* note 121, at 26–27.

<sup>213</sup> See Bell & Romano, *supra* note 23, at 281–82.

These quasi-experimental studies uniformly find no positive welfare outcomes for FKC children.<sup>214</sup> And they uniformly find some negative incidents to kin placements—specifically, being reported as abused or neglected while in that placement<sup>215</sup> and achieving less academic progress and cognitive development.<sup>216</sup> Sarah Font concludes that “nonrelative foster parents are equally or possibly more successful in fostering the wellbeing of children in their care.”<sup>217</sup> Further, the average quality of Kincare is likely to decline, she posits, as agencies are pushed to (a) search far beyond relatives already close to a child and (b) lower qualification standards for kin.<sup>218</sup> On the other hand, increased material support for kin might enhance care if as a result children receive more therapeutic services and caregivers are less stressed financially and receive more guidance on dealing with a child’s behavioral and emotional problems.<sup>219</sup>

## 2. Stability

The reason for caring about stability is that often “placement moves have deleterious effects on children’s well-being,” including their physical and brain development and behavioral, social, and academic functioning.<sup>220</sup> At least one quasi-experimental study, using propensity score matching, did find a somewhat higher rate of disruption in NRFC, but much less so than observational studies have found.<sup>221</sup> Another such study found no difference.<sup>222</sup> Even if many quasi-experimental studies found fewer

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<sup>214</sup> Font, *supra* note 57, at 108 (noting “better performance among NRFC placements with high risk children”); Font, *supra* note 186, at 2086 (“[T]here is no statistically significant effect of kin placement on behavior problems in the most rigorous models.”).

<sup>215</sup> See Font, *supra* note 121, at 22 (finding “significantly higher exposure to physical violence [and] harsher disciplinary techniques” and discussing a Timmer, Sedlar, and Urquiza 2004 report that “formal kin caregivers scored significantly higher on the Child Abuse Potential Index as compared with non-relative foster parents”); *id.* at 24 (describing research finding “14.5 percent of IKC [informal kin care] placements experience a maltreatment investigation, a rate at least 60 percent higher than NRFC or FKC placements . . . . FKC and NRFC placements are approximately equally likely to experience an investigation of an OHP [out-of-home placement] caregiver.”); *id.* at 27 (“[S]tudies using behavioral measures of maltreatment risk tend to find higher risk in kinship care . . .”).

<sup>216</sup> See Font, *supra* note 186, at 2082 (“[C]hildren in mostly kin placements are above the sample average on all academic measures at baseline, but decline over time in readings scores, and make little improvement in math and cognitive skills.”); *id.* at 2086.

<sup>217</sup> *Id.* at 2087.

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

<sup>219</sup> Cf. Ferraro et al., *supra* note 11, at 6 (“[A]n examination of how financial support for kinship care may improve child well-being is desperately needed . . .”).

<sup>220</sup> Jedwab et al., *supra* note 62, at 2.

<sup>221</sup> See, e.g., Koh & Testa, *supra* note 163, at 109–11, 114.

<sup>222</sup> Ferraro et al., *supra* note 11, at 5.

disruptions with kin placements, however, they would not support a conclusion that Kincare is inherently more stable unless they also took into account the reason for a changed placement. In particular, they would have to control for the fact that foster care agencies are routinely intentionally disrupting NRFC placements, not because of any problems in those placements but because of their determination to move as many children as possible into Kincare, consistent with the policy bandwagon described above and explained further below. Studies that Kincare advocates cite have not done this, so their appeal to stability as a rationale for promoting Kincare is circular, or a self-fulfilling prophecy. One study that did take account to some extent the reason for change in placement found NRFC is actually more stable on average for children at the highest risk of placement disruption.<sup>223</sup> Another found kin caregivers request the removal of a child from their home at a far higher rate than non-relatives, which supports the hypothesis that perceived instability in NRFC is actually a consequence of pro-kin agency policy.<sup>224</sup> Otherwise, data on placement moves for children in NRFC are ambiguous at best.

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I close this Part by highlighting several ironic aspects of Kincare advocacy. First, it invokes stability in support of a policy that entails disrupting placements. After a child has spent substantial time in the care of non-relatives, familiarity, continuity, and stability all count in favor of remaining with them and of returning to them following an unsuccessful attempt at reunification with parents. Second, despite citing the trauma of disrupted attachment in decrying the removal of children from parental custody,<sup>225</sup> Kincare advocates completely disregard the attachments many children form with non-relative foster parents, as children placed in infancy commonly do, and in fact seek legislation ordering CPS and courts to ignore these attachments. This is especially ironic given that the attachment a child has with birth parents who had custody of but maltreated the child is far less likely to be a secure attachment than is that which a child placed soon after birth forms with foster parents.<sup>226</sup> Third, Kincare advocates have pushed for a more expansive view of a child's family by adding fictive kin to the

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<sup>223</sup> See Font, *supra* note 57, at 106.

<sup>224</sup> See Jedwab et al., *supra* note 62, at 6–7 (showing rate of move because of “inability to cope with the child” was three and a half times higher for kin caregivers).

<sup>225</sup> See, e.g., Charlotte Baughman et al., *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 526 (2021); Caitlyn Garcia, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 FAM. L.Q. 27, 28 (2019) (“[T]he trauma of family separation is child abuse itself.”).

<sup>226</sup> Cf. FONT & GERSHOFF, *supra* note 16, at 48 (“Children who are abused or neglected often already have an insecure attachment to their primary caregiver . . .”).

category of relatives in order to further deprecate foster parents whom a child views as his or her family. The disregard for children’s perspective on who constitutes “their own” is striking.

#### IV. WHAT KINCARE DOES FOR SYSTEM CRITICS

One obvious attraction of *informal* Kincare for legislators and agency leaders is budgetary. In the aggregate, it is a huge cost-saving measure for both federal and state governments.<sup>227</sup> The workday benefit for CPS caseworkers is also clear. Each child diverted is one less as to whom they must investigate, find and supervise a foster home, prepare for and attend numerous hearings, provide services to child and parent, and document all the above. Moreover, with political pressure in recent years to reduce the number of children in foster care, diversion helps agency directors fulfill that aim and appear successful.<sup>228</sup> Even FKC is easier for caseworkers than NRFC, if state law and agency policy allow for a slimmed-down qualification process and less supervision.<sup>229</sup> Notably, none of these attractions—lower costs, less work for CPS, fewer children in foster care—is a child welfare outcome.

The forces behind the legislative Kincare tidal wave, however, are not government accounting offices or CPS officials. They are powerful non-governmental organizations that have long criticized the child welfare system for its impact on poor and minority-race parents and communities,<sup>230</sup> and who systematically aim to subordinate children’s welfare to a group-focused agenda they regard as furthering social justice.<sup>231</sup> The parent-advocacy organization Casey Family Programs has expended great effort and funds promoting Kincare policies, including the purchase of research to support its

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<sup>227</sup> See Schwartz & Krebs, *supra* note 15.

<sup>228</sup> Cf. Cohen, *supra* note 85 (noting kinship diversion helps D.C.’s Child and Family Services Agency meet statistical targets for reducing foster care numbers, consistent with “a national trend among child welfare agencies”).

<sup>229</sup> Gupta-Kagan, *supra* note 47, at 884–85.

<sup>230</sup> Trump appointees Jerry Milner & David Kelly are working with a well-funded management group to prepare for battle against ASFA. See Michael Fitzgerald & Kate Gonzales, *Advocates and Officials Press Case for Overhauling Key Adoption and Child Welfare Law*, IMPRINT (Feb. 21, 2022, 10:37 AM), <https://imprintnews.org/child-welfare-2/advocates-and-officials-asfa-overhaul/62671> [<https://perma.cc/S7Y4-MMTP>].

<sup>231</sup> Cf. Maleeka Jihad & Jessica Handelman, *The Weaponization of Whiteness in Child Welfare*, 44 *GUARDIAN* 1, 3, 5, 6 (2022) (criticizing attention to attachment in connection with Black children in the child protection system, suggesting Black children develop differently because of their race, and contending that the child welfare system should “respect” the culture of Black Americans, which “emphasize[s] and embrace[s] the needs of the group as a whole over the needs of an individual”).

advocacy.<sup>232</sup> The American Bar Association (ABA), which also takes a strong parents'-rights stance in the child maltreatment context,<sup>233</sup> has recommended that state courts categorically prefer placement with relatives and, if the state must assume custody, respect "family integrity" and minimize disruption to the child's family and community ties by prioritizing kinship care.<sup>234</sup> The National Association of Black Social Workers has also been a major voice pushing for increased resort to Kinicare.<sup>235</sup> Its views are mirrored in the anti-colonialist ideology that dominates schools of social work today, and in policies and attitudes of CPS directors and caseworkers throughout the country, who are largely members of the NABSW and graduates of those ideologically-charged social work training programs.<sup>236</sup> None of these organizations or institutions allows any nuance in their positions, which belies their self-portrayal as wanting what is best for maltreated children. In their view, the same single-minded policy should apply to all children of all ages in all circumstances.<sup>237</sup>

These organizations receive strong moral support from adult-focused academics who stridently attack child protection and foster care agencies. Their criticisms have evolved over time from complaints of perceived unfairness for individual parents to an indictment of the child welfare system

<sup>232</sup> See RILEY, *supra* note 12, at 78–79; see also ROBERTS ET AL., *supra* note 160 (in-house, self-funded study of Casey); James G. Dwyer, *The Most Dangerous Branch of Science? Reining in Rogue Research and Reckless Experimentation in Social Services*, 87 MO. L. REV. 1, 15–17, 25–26, 39–43 (2022) (describing Casey's illicit practices and pervasive presence in child welfare policy and practice).

<sup>233</sup> The National Alliance for Parent Representation has an ongoing project to increase the rate and effectiveness of lawyering for parents in child protection proceedings (but no comparable project on lawyering for children) and trains CPS lawyers to advocate for parents. See *National Alliance For Parent Representation*, A.B.A., [https://www.americanbar.org/groups/public\\_interest/child\\_law/project-areas/parentrepresentation/#](https://www.americanbar.org/groups/public_interest/child_law/project-areas/parentrepresentation/#) [https://perma.cc/GC3Y-3DRT].

<sup>234</sup> See A.B.A. Res. 118 § VI(i) (2019), [www.americanbar.org/content/dam/aba/directories/policy/annual-2019/118-annual-2019.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/118-annual-2019.pdf) [https://perma.cc/KZS3-6ZG3]; see also SOPHIA I. GATOWSKI ET. AL., NCJFCJ, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 137–38 (2016) [hereinafter ENHANCED RESOURCE GUIDELINES].

<sup>235</sup> See *infra* sources cited notes 274–75 and accompanying text.

<sup>236</sup> See Brett Drake & David R. Hodge, *Social Work at the Crossroads: The Empirical Highway or the Postmodern/Critical Off-Ramp?*, 32 RSCH. ON SOC. WORK PRAC. 363 (2022) (describing ideology pervading child welfare system); RILEY, *supra* note 12, at 66 (relating contention of "Child Welfare System Innovator" Amelia Franck Meyer that a Kinicare preference is justified because racial bias is the cause of Black children being removed from their homes); *id.* at 146 ("Frontline workers in CPS have had their minds filled with useless theories about racial disparities and how poverty and racism prevent people from making good choices and how children are always better off with the family . . . ."); JAMES G. DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES 1–24 (2018); DAVID STOESZ, PANDORA'S DILEMMA: THEORIES OF SOCIAL WELFARE FOR THE 21ST CENTURY 86–90 (2018) (describing indoctrination in social work schools, substituting post-modern critical theory for empirical research).

<sup>237</sup> See Patten, *supra* note 150.

as a whole, which these academics presume is an instrument of deliberate White domination and destruction of minority-race communities, an adjunct of what they view as a thoroughly racist and oppressive criminal justice system. Dorothy Roberts, previously the champion of the discredited Race Disproportionality Movement, now the beacon of the Abolition Movement, writes:

Like the police and prison systems, family policing is designed to maintain racial injustice by punishing families in place of meeting human needs; it targets Black, Brown, and Indigenous families in particular and relies on racist beliefs about family dysfunction to justify its terror; and it's entangled with police, criminal courts, and prisons, forming a coherent carceral machine[, which] . . . can be traced back to slavery . . . .<sup>238</sup>

Within this narrative, any CPS response to maltreatment reports is “family policing” by the “carceral state” and an “invasion” of the family and the community with the intent to destroy.<sup>239</sup> Removing children is “punishment” of parents for being poor,<sup>240</sup> “violence against” and

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<sup>238</sup> Dorothy E. Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 461 (2021). The race disproportionality movement rested on the unsupported claim that racial bias, rather than higher rates of maltreatment in Black families, explains the disproportionate presence of children in foster care. See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 873 (2009).

<sup>239</sup> See, e.g., Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1074 (2023) (characterizing child protective response as home invasion, quasi-criminal, surveillance, and “pathologizing marginalized families”); Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 942 (2023); Roberts, *supra* note 238, at 459, 468; Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 651 (2021) (referring to “the family destruction system”).

<sup>240</sup> Roberts, *supra* note 238, at 461, 463, 466; Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 569 (2021) (referring to “the system’s disruptive and punitive intentions”); Burton & Montauban, *supra* note 239, at 643 (contending that the mere possibility CPS could take one’s children amounts to “punishment”); *id.* at 644 (“CPS polices families in accordance with carceral principles of surveillance, social control, and punishment.”); *id.* at 646 (“‘Neglect’ is a nebulous, inconsistently-defined concept associated with parenting while poor and parenting while Black.”); *id.* at 668 (saying the first federal law on child abuse prevention “criminalized poverty”); *id.* at 664 (characterizing civil child maltreatment proceedings as “quasi-criminal”). For research debunking the claim that families reported for neglect just need financial assistance, see Barth et al., *supra* note 35; Font & Maguire-Jack, *supra* note 24.



“criminalization of the Black family,”<sup>241</sup> even re-enslavement,<sup>242</sup> rather than preventing harm to children.<sup>243</sup> Reference to children’s developmental needs is “weaponizing” child wellbeing against poor parents and the Black community.<sup>244</sup> Terminating parental status is a “death penalty.”<sup>245</sup> To top this terror, the placement of minority-race children in White homes for fostering or adoption constitutes neo-colonial exploitation.<sup>246</sup>

These allegations flow without citation to any evidentiary support, and without recognition of several discordant truths about child protection practice: That child protection agencies in high-minority-race areas are overwhelmingly led and staffed by persons of minority race who view parents rather than children as their clients.<sup>247</sup> That federal and state governments have repeatedly adopted and funded policies aimed at minimizing removals, with which overburdened CPS caseworkers are quite

<sup>241</sup> Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 474 (2021); Burton & Montauban, *supra* note 236, at 641.

<sup>242</sup> See Burton & Montauban, *supra* note 239, at 674 (“[T]he foster care industrial complex . . . operates as a modern-day slave system for Black families.”); Ashley Albert et al., *Ending the Family Death Penalty and Building A World We Deserve*, 11 COLUM. J. RACE & L. 861, 878 (2021) (“ASFA is a symptom of centuries of family separation policies that have relied on the degradation of Black, Brown, and poor bodies . . . . It is kin to . . . chattel slavery . . . .”).

<sup>243</sup> See, e.g., Burton & Montauban, *supra* note 239, at 649, 678 (asserting Black children “need protection from the system, not from their parents” and CPS is simply “an incarnation of the ideology of Black parental dangerousness”); Brianna Harvey et al., *Reimagining Schools’ Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 584 (2021) (urging “This System Is Family Regulation Not Child Protection”).

<sup>244</sup> Jihad & Handelman, *supra* note 231, at 5.

<sup>245</sup> See, e.g., Albert et al., *supra* note 242, at 861.

<sup>246</sup> Cf. Burton & Montauban, *supra* note 239, at 644 (“[T]he parasitic public/private foster industrial complex—a highly lucrative, ‘self-protecting ecosystem’ fueled by ‘taking other people’s children’”—is] “a large operation and network of systems, organizations, and individuals that depends on a steady recruitment of bodies for its existence . . . .”); *id.* at 650 (asserting the “foster industry . . . commodifies impoverished Black families for government revenue and private profit”); Beardall & Edwards, *supra* note 240, at 561 (“[T]he concept of a child without a parent or a child without kin rationalizes settler-logics of discovery.”); NAT’L ASS’N OF BLACK SOC. WORKERS [NABSW], POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS 2 (Sept. 1972), [https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW\\_Trans-Racial\\_Adoption\\_1972\\_Position\\_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf) (“We fully recognize the phenomenon of trans-racial adoption as an expedient for White folk . . . . The supply of White children for adoption has all but vanished and adoption agencies, having always catered to middle class Whites developed an answer to their desire for parenthood . . . . We . . . are insulted by this further assignment of chattel status to Black people.”).

<sup>247</sup> See NAOMI SCHAEFER RILEY, NOT SAFE FOR KIDS: FIXING OUR BROKEN CHILD WELFARE SYSTEM 72 (2018) (“[A] disproportionately high number of child-welfare workers in the United States are Black. In New York City, for example, 65 percent of Administration for Children’s Services (ACS) employees are Black, and 15 percent are Hispanic.”); RILEY, *supra* note 12.

happy to comply.<sup>248</sup> That studies show rates of child removal by race are consistent with rates of actual maltreatment in those groups.<sup>249</sup> That race disproportionality in inter-partner violence prosecution is even greater than that in child protection, yet no one calls for abolishing the former.<sup>250</sup> And that surveys of former foster youth consistently show abused and neglected youth themselves usually perceive the need for and benefit of removal from their homes and placement in foster care.<sup>251</sup> None of that registers for CPS abolitionists. “The system” is, from their hyper-cynical ideological perspective, thoroughly racist and malicious, deliberately aiming to destroy Black families and communities, and until it is abolished, every form of resistance is justified.<sup>252</sup>

Kincare serves these advocates for parents and minority-race communities and critics of the foster care system in several ways. In particular, Kincare has become a stratagem to evade two child-centered federal law requirements that have come under particularly heavy fire from advocates for parents, minority-race communities, and the poor—namely, mandates to (1) limit the time parents have to achieve reunification, so

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<sup>248</sup> See RILEY *supra* note 247, at 72 (quoting caseworker as saying “If I remove a child, it is so much paperwork for me. It’s an exhausting process. I would prefer you keep your child. We don’t want your babies.”); sources cited *supra* notes 35–39; *cf.* Baughman et al., *supra* note 225, at 528 (criticizing CPS agencies for their “attempts to convince a parent to agree to additional services, without court order, to avoid family separation or court intervention”).

<sup>249</sup> See Brett Drake et al., *Racial/Ethnic Differences in Child Protective Services Reporting, Substantiation and Placement, with Comparison to Non-CPS Risks and Outcomes: 2005-2019*, 28 CHILD MALTREATMENT 683, 688–94 (2023); Barth et al., *supra* note 35, at 492; *id.* at 485 (“This question has been discussed for over four decades now, and the consensus is that low-income children have contact with CPS at higher rates than other children because they are at higher risk. . . . Low-income children experience outcomes such as death or other negative child outcome and well-being measures at differentials consistent with or higher than their CPS reporting differences.”); BERRICK, *supra* note 6, at 2; (stating that the rate of actual maltreatment of Black children is more than twice that of White children); RILEY, *supra* note 12, at 82–84 (reporting that the rate of child fatalities from maltreatment is twice as high for Black children and that physical abuse rates are highest for children whose mother lives with a man who is neither her spouse nor the child’s parent, which is disproportionately true for Black children).

<sup>250</sup> See RILEY, *supra* note 247, at 74 (citing New York Times article reporting Black women three times as likely as White women to experience death from intimate partner violence, and whereas Black women make up eight percent of the adult population, twenty-two percent of homicides that result from DV/IPV happen to Black Women and twenty-nine percent of all victimized women are Black); Sherry Lipsky et al., *Racial and Ethnic Disparities in Police-Reported Intimate Partner Violence and Risk of Hospitalization Among Women*, 19 WOMEN’S HEALTH ISSUES 109 (2009).

<sup>251</sup> See Barth et al., *supra* note 35, at 492–93; *cf.* Anna E. Austin et al., *Risk and Protective Factors for Child Maltreatment: A Review*, 7 CURRENT EPIDEMIOLOGY REPS. 334, 337–78 (2020) (“Multiple studies consistently demonstrate associations of parental mental health and substance use disorders and IPV with child maltreatment.”).

<sup>252</sup> See, e.g., Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 806 (2021) (“There is no reforming a system that stems from anti-Black racism, classism, ableism, and patriarchy. There is no reforming a system that serves as a tool to uphold White supremacy.”).

children can be freed for adoption when safe reunification is highly unlikely within the timeframe of a child's developmental needs (the 15/22 rule); and (2) stop the practice of race matching in foster care and adoption placements (IEPA).<sup>253</sup> The combined effect of these two mandates, if CPS adhered to them, would be a great increase in the adoption of Black children by White people, which, in the view of the NABSW and others, would amount to genocide.<sup>254</sup>

### A. Avoiding TPR

The number one target of abolitionists is the ASFA requirement that CPS file a TPR petition in court after a child has been in foster care for fifteen of the past twenty-two months.<sup>255</sup> They complain that this gives parents, who are disproportionately Black, most of whom have suffered adverse and unjust conditions their entire lives, too little time to overcome the damage they have incurred. They insist that Congress eliminate timelines altogether.<sup>256</sup> They never address the concern that this would re-create the pre-ASFA situation of children lingering for years in impermanency, the harms of which were well-documented for Congress.<sup>257</sup> And they cite no evidence that more time and continued services increase the rate of safe reunification with parents.<sup>258</sup>

The Kinship Families Act would eliminate the timeline and replaced it with (a) a strong presumption *against ever* filing for TPR<sup>259</sup> and (b) a preclusion of TPR petitions at any time if the parent is “actively engaged in services,” which could mean simply attending a parenting class or again

<sup>253</sup> See, e.g., Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 722–23 (2021); Albert et al., *supra* note 242, at 867 (“Our mission is to dismantle ASFA . . .”).

<sup>254</sup> See NABSW, *supra* note 246.

<sup>255</sup> See, e.g., Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/L5H5-BC9L>].

<sup>256</sup> See, e.g., Guggenheim, *supra* note 253, at 725; ROBERTS, *supra* note 155, at 122, 216–17.

<sup>257</sup> RADEL & MADDEN, *supra* note 41, at 2.

<sup>258</sup> *Cf. id.* at 8 (finding less than a fourth of children who remain in foster care past seventeen months reunify with parents). Most of those who do reunify will later be again reported for maltreatment. *Id.*

<sup>259</sup> In place of the mandate, it would merely *authorize* a TPR petition, and only after twenty-four months of foster care and if CPS demonstrates by clear and convincing evidence that (a) there are compelling reasons why TPR would be in a child's best interests; (b) the agency has provided parents all support and time they might need to correct the conditions triggering removal; and (c) if the child is in a kin placement, the agency has taken into account the relatives' views about TPR. H.R. 7416, 117th Cong. § 3(d) (2022).

attempting drug rehabilitation, or if the petition would be “based principally on the incarceration of a parent.”<sup>260</sup> The 2023 Women in Criminal Justice Reform Act returned this last proposal to Congress.<sup>261</sup>

Until such legislation succeeds, Kincare undercuts the timelines. Diversion keeps children out of foster care, so ASFA does not apply.<sup>262</sup> And ASFA contains an exception to the fifteen-out-of-twenty-two rule for children in foster care who are “being cared for by a relative.”<sup>263</sup> Thus, if caseworkers can get children into a relative’s home at any point before a court forces them to file a TPR petition, the timeline disappears. Advocates for minority-race and poor parents and communities are well aware of this potentially massive exception to the ASFA timelines, and their push for increased resort to Kincare must be seen in that light. If they cannot succeed in getting 15/22 repealed, they can instead render it irrelevant by convincing legislators to channel all maltreated children into Kincare.

Notably, the Kincare subterfuge is necessary only when TPR is in fact what the child needs. If TPR is not best for a given child, the law would not permit it anyway, let alone compel it. Another exception to the 15/22 rule is the demonstration by CPS that petitioning would not be in the child’s best interests. Further, all that the 15/22 rule requires is the filing of a petition for TPR, so that a court will *consider* whether it is the right thing to do, and the court cannot grant the petition without finding TPR is in the child’s best interests.<sup>264</sup> Critics of the 15/22 rule thus speak falsely when they charge that ASFA forces termination of salvageable relationships. Hostility to the 15/22 rule, which has been unrelentingly fierce, inherently entails subordinating the needs of children to sympathy for adults and to ideology.

### B. Preventing Trans-Racial Adoption

In the early history of foster care and adoption in the U.S., race matching was the norm.<sup>265</sup> In the 1980s and 1990s, when children entering the child protection system were disproportionately Black but applicants for foster care and adoption were disproportionately White, this practice caused Black

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

<sup>261</sup> H.R. 2954, 118th Cong. § 203 (2023).

<sup>262</sup> Diversion also avoids an additional mandatory TPR-filing requirement in ASFA for cases in which parents were previously convicted of violent felonies against another child, as this, too, applies only when a child is in CPS custody. *See* 42 U.S.C. § 675(5)(E).

<sup>263</sup> *Id.* § 675(5)(E)(i).

<sup>264</sup> *See* RADEL & MADDEN, *supra* note 41, at 3.

<sup>265</sup> *See* Ralph Richard Banks, *The Multiethnic Placement Act and the Troubling Persistence of Race Matching*, 38 CAP. U. L. REV. 271, 271–72 (2009).

children to remain much longer in foster care than White children and to achieve family permanence far less often.<sup>266</sup> In the 1990s, Congress finally acted to eliminate the practice. After considering all arguments on all sides about the interests of children in connection with inter-racial adoption versus race-matching, it passed legislation mandating that CPS agencies not “deny or delay” a foster-care placement or adoption on account of race difference between child and potential caregivers.<sup>267</sup>

The NABSW vehemently opposed this legislation and ever since has continuously called for repeal.<sup>268</sup> It adamantly insists that every Black child removed from parental custody must be placed with Black foster or adoptive parents, however long it takes to find them. The group’s Position Statement on Trans-Racial Adoption declares:

The National Association of Black Social Workers has taken vehement stand against the placement of Black children in White homes for any reason. We affirm the inviolable position of Black children in Black families where they belong physically, psychologically and culturally . . . We stand firmly . . . on conviction that a White home is not a suitable placement for Black children . . .<sup>269</sup>

Beyond avowed concern for Black children’s “healthy development as Black people,” which the organization has never been able to back with empirical research,<sup>270</sup> the NABSW’s opposition to trans-racial adoption contains an element of racial separatism. Asserting that “[o]ur society is distinctly Black or White and characterized by White racism at every level,” it invokes a collective political, oppositional aim: “we need our own to build

<sup>266</sup> *Id.* at 272; Bartholet, *supra* note 238, at 889–90.

<sup>267</sup> Bartholet, *supra* note 238, at 889–90.

<sup>268</sup> *See id.*; *The National Association of Black Social Workers Calls for Repeal of the Multi-Ethnic Placement Act (MEPA) and Inter-Ethnic Placement Act (IEPA)*, 43 NAT’L ASS’N COUNS. FOR CHILD. 1,1 (2021).  
[https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/2021\\_position\\_papers/2021\\_4304\\_repeal\\_mep\\_a\\_iepa.pdf](https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/2021_position_papers/2021_4304_repeal_mep_a_iepa.pdf).

<sup>269</sup> NABSW, *supra* note 246, at 1–4; *see also Preserving Families of African Ancestry*, NAT’L ASS’N OF BLACK SOC. WORKERS (Jan. 10, 2003),  
[https://cdn.ymaws.com/www.nabsw.org/resource/collection/0D2D2404-77EB-49B5-962E-7E6FADBF3D0D/Preserving\\_Families\\_of\\_African\\_Ancestry.pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/0D2D2404-77EB-49B5-962E-7E6FADBF3D0D/Preserving_Families_of_African_Ancestry.pdf) (reaffirming this position).

<sup>270</sup> *Cf.* Bartholet, *supra* note 44, at 319–20 (concluding from research that there is “no evidence that any harm comes to children by virtue of their placement across color lines. By contrast, there is much evidence that harm comes to children in foster or institutional care when they are delayed in adoptive placement or denied adoption altogether, and there is much evidence that race-matching policies result in such delay and denial.”).

a strong nation.”<sup>271</sup> Randall Kennedy interprets the organization’s position as reflecting concern that Black children “will be taken away by Whites and acculturated in ways that will erode their ability to participate in struggles on behalf of their fellow Blacks.”<sup>272</sup> Its separatist message is consistent with the view, expressed today in polemic against the child welfare system as well as against the criminal justice system, that White people simply should have nothing to do with the fate of Black people, that CPS and law enforcement are both simply tools in an all-encompassing system of White oppression, and that what the Black community needs above all is to isolate itself, keep White people away, and fend for itself.<sup>273</sup>

The outlook and the history behind it closely resemble the Native American situation, only Black Americans do not have their own territories where they can withdraw and assert sovereignty. The separatist attitude is manifest in calls for separate systems of governance and separate legal rules—in the child protection field, for an “African-American Child Welfare Act” patterned after the Indian Child Welfare Act, which gives extra protections to Indian parents and cements children to tribal communities.<sup>274</sup> Minnesota passed just such a law in 2024.<sup>275</sup> The attitude is manifest also in the persistence and growth of institutions of all sorts intended just for Black people—schools and universities, professional and commercial networking organizations, and businesses.<sup>276</sup> It is manifest also in the substantial recent

<sup>271</sup> NABSW, *supra* note 246, at 2.

<sup>272</sup> RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 395 (2003).

<sup>273</sup> *See, e.g.*, Albert et al., *supra* note 242, at 869–71 (“We demand a world where . . . family ancestry is held sacred. . . . The world we demand is a world built for us. . . . In this world, we govern our own communities . . .”); *id.* at 872 (heading “The Violent Antagonist: White Supremacy . . .”).

<sup>274</sup> *See, e.g.*, Latagia Copeland Tyronce, *The African American Child Welfare Act and Why We Need It Now!!!*, MEDIUM (Mar. 6, 2017) <https://medium.com/latagia-copeland-tyronces-tagi-s-world/the-african-american-child-welfare-act-and-why-we-need-it-now-9cd7940ea27e> [<https://perma.cc/V7V6-U7WD>]; Jessica Dixon Weaver, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 112–13 (2008). For background on the favoring of community over individual child welfare inherent in ICWA, see James G. Dwyer, *The Real Wrongs of ICWA*, 69 VILL. L. REV. 1 (2024).

<sup>275</sup> Minnesota African American Family Preservation and Child Welfare Disproportionality Act, 2024 Minn. Laws 117 (2024). For explanation of how the law, should it survive equal protection challenge, would put Black children at risk for the sake of community insularity, see Naomi Riley, Opinion, *Reducing Racial Disparities in Foster Care Might Endanger Black Children*, L.A. TIMES (June 26, 2024, 3:00 AM), <https://www.latimes.com/opinion/story/2024-06-26/Black-children-foster-care-race-child-welfare> [<https://perma.cc/VR4R-2RN4>].

<sup>276</sup> *See, e.g.*, Shauneen Miranda, *After the Rise of BLM, Black Students and Their Families are Heading Back to HBCUS*, NAT’L PUB. RADIO (Aug. 15, 2022), <https://www.wabe.org/after-the-rise-of-blm-black-students-and-their-families-are-heading-back-to-hbcus/> [<https://perma.cc/35F5-HBF4>]; *Top Black and Minority Business Organizations*, BLACK BUS., <https://www.Blackbusiness.com/p/Black->

growth in homeschooling among Black Americans, and even in calls to migrate to Africa.<sup>277</sup> For those who do not wish to leave the U.S., the call is to distance themselves from Whites as much as possible, particularly in private life,<sup>278</sup> and to create their own society somehow within the same national borders as White America.<sup>279</sup>

Kincare for maltreated Black children is another means toward this end.<sup>280</sup> The NABSW appears to see it that way. It issued a Position Paper specifically on kinship care, urging an unlimited definition of kin to include every human in any biological relation to a child and any non-relatives socially connected to or living near a child's parents—though presumably, only if of the same race as the child—and insisting on a shift of focus away from children and toward parents and family preservation per se.<sup>281</sup> Moreover, despite extolling, in the context of removal from parental custody, the vital importance of infant attachment, urging “the greatest care and deliberation” before removing a child from her home,<sup>282</sup> the Association expresses no concern in its Position Paper about removing Black children

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minority-business-organizations.html (last visited Aug. 3, 2024) (offering a top ten); *African American Organizations to Know*, SERAMOUNT (Feb. 11, 2021), <https://seramount.com/articles/african-american-organizations-to-know/> [<https://perma.cc/F78C-NM4A>] (listing thirty professional organizations).

<sup>277</sup> See Beatrice Materu, *The African Americans who Chose to Return to Africa*, E. AFR. (Mar. 5, 2022), <https://www.theeastafrican.co.ke/tea/magazine/the-african-americans-who-chose-to-return-to-africa-3737922> (describing historical antecedents to Ghana's declaration of 2019 as “The Year of the Return”).

<sup>278</sup> Cf. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011) (describing Black community pressure on Black women not to marry White men); KENNEDY, *supra* note 272, at 402–46.

<sup>279</sup> See BLACK NATIONALISM, ENCYC. BRITANNICA, <https://www.britannica.com/event/Black-nationalism> [<https://perma.cc/2YSY-YHQM>].

<sup>280</sup> See BERRICK, *supra* note 6, at 73 (“Race politics also contributed to the shift toward kinship care. . . . For child welfare workers concerned about children living in racially or ethnically consonant households, kinship care offered a natural solution [to IEPA].”).

<sup>281</sup> See NABSW, *supra* note 45, at 4–5 (“[T]o preserve and enhance the vitality of African American families, this country must develop national and state legislation, policies, practices and support services that are equitable, family-centered and culturally sensitive. . . . These services must not be ‘child-focused,’ but ‘family-centered.’ . . . In addition, we strongly urge that the shortened ASFA timeframe for termination of parental rights be lengthened to provide sufficient time for treatment and rehabilitation of birth parents who may be experiencing drug addiction, alcoholism or incarceration.”); *id.* at 5 (invoking “the family systems” and “cultural structures accepted in the African American community” and urging legislation that would “remove both the language and the concept of ‘out-of-home’ care”); *id.* at 6 (recommending: “[e]xpand the definition of kin/relative in public policies to include the full range of blood relatives (including all cousins, regardless of degree)”).

<sup>282</sup> NABSW, *PRESERVING AFRICAN AMERICAN FAMILIES: RESEARCH AND ACTION BEYOND THE RHETORIC* 9 (1991) (“The decision to place a child outside his/her home is a monumental one which should be made only with the greatest care and deliberation. It damages whatever continuity the child has experienced and introduces new emotional risks.”).

from long-term homes with White caregivers in order to place them in Kincare.

The NABSW expects its members to abide by its position statements in their work; the statements are not meant to be merely rhetorical.<sup>283</sup> Its expectation appears generally to be met.<sup>284</sup> The child-welfare branch of social work is now dominated by people who view children as “belonging to” particular ethnic communities and who therefore oppose trans-racial adoption.<sup>285</sup> And, in practice, the legal prohibition on race matching does not deter CPS employees.<sup>286</sup> They wield so much discretion in choice of placements, in some states entirely unreviewable,<sup>287</sup> that they can with impunity easily and consistently favor Black applicants for foster care or adoption of Black children, even if that means delaying or denying an opportunity for adoption. If they need to justify their choices, there is always some non-racial factor they can point to as favoring the Black applicants, and they can ignore or downplay factors counting against the same-race placement. Courts generally do not second guess the agencies, and some judges themselves affirmatively endorse race-matching efforts.<sup>288</sup>

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<sup>283</sup> See *Position Statements*, NABSW, <https://www.nabsw.org/page/PositionStatements> (last visited Aug. 3, 2024) (“Position Statements provide mandates for best practice for human service professionals engaging with African American individuals, families, and communities.”).

<sup>284</sup> See Stephani Farr, *Workers Fired for Recommending Interracial Adoption*, PHILA. INQUIRER (July 2, 2013, 3:01 AM), [https://www.inquirer.com/philly/hp/news\\_update/20130702\\_Suit\\_Workers\\_fired\\_for\\_recommending\\_interracial\\_adoption.html](https://www.inquirer.com/philly/hp/news_update/20130702_Suit_Workers_fired_for_recommending_interracial_adoption.html) [<https://perma.cc/R4HS-SD4G>]; KENNEDY, *supra* note 272, at 395, 397–98 (observing that the Association exerts a great deal of influence over policy organizations and political actors as well over as its members).

<sup>285</sup> KENNEDY, *supra* note 272, at 423 (characterizing CPS workers committed to race matching as “true believers . . . likely to fight for what they genuinely feel is right, even if it entails engaging in deception”); *id.* at 430 (observing outright perjury in court by CPS officials intent on serving their race-matching mission); R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 HARV. C.R.-C.L. L. REV. 455, 472–73 (2003) (“[S]ocial workers are passionately committed to race matching . . . . Their commitment to race matching would, of course, prompt social workers to continue the practice in a clandestine manner.”); see also *How is New Hampshire Building a 21st Century Child Strengthening and Family Well-Being System?*, CASEY FAM. PROGRAMS (Feb. 2020), [https://www.casey.org/media/20.07-QFF-TS-CTappan\\_fnl.pdf](https://www.casey.org/media/20.07-QFF-TS-CTappan_fnl.pdf) [<https://perma.cc/Y2MQ-JTDR>].

<sup>286</sup> See RILEY, *supra* note 12, at 89 (“For decades, MEPA has been regularly ignored by child welfare agencies and family courts.”); Bartholet, *supra* note 44, at 315; Joan Heifetz & Naomi Cahn, *Forming Families by Law: Adoption in America Today*, A.B.A. (July 1, 2009), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol\\_36\\_2009/summer2009/forming\\_families\\_by\\_law\\_adoption\\_in\\_america\\_today/#:~:text=The%20necessary%20prerequisites%20for%20a,%3B%20\(3\)%20a%20determination%20that](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol_36_2009/summer2009/forming_families_by_law_adoption_in_america_today/#:~:text=The%20necessary%20prerequisites%20for%20a,%3B%20(3)%20a%20determination%20that) [<https://perma.cc/HR3B-UBTJ>] (“[T]here is evidence of a pervasive resistance to MEPA among caseworkers who continue circumventing MEPA’s core prohibitions on race-based placement decisions.”).

<sup>287</sup> See, e.g., *A.R.L. v. Norfolk Dep’t Hum. Servs.*, No. 4:20-cv-00110 (E.D. Va. 2020).

<sup>288</sup> See RILEY, *supra* note 12, at 89, 96–100; Banks, *supra* note 265, at 274–75.



The difficulty for caseworkers is that there are few African-Americans wanting to adopt.<sup>289</sup> Applicants for adoption in the United States are overwhelmingly White. Peruse websites where “waiting families” present themselves to birth parents who might be considering relinquishing a baby for adoption, and this will be graphically striking. Kin are sometimes willing to adopt a child but are generally reluctant to take this step, which feels to them like disloyalty to the birth parents as well as a great unanticipated burden and commitment. They instead prefer either continuation of efforts to reunify a child with parents or else a guardianship they can readily end at any time.<sup>290</sup> The only way for caseworkers to prevent trans-racial adoptions, therefore, is to prevent Black children from being adopted. They can accomplish this by placing children with foster parents they believe will not want to adopt. But the surer path, and one that avoids creating a perception that children are remaining too long in foster care, is to channel Black children to Kincare. Caseworkers are well aware of this.<sup>291</sup> And so the research shows most children CPS steers to Kincare are Black, even though the number of White children reported for maltreatment is more than double that of Black children reported.<sup>292</sup>

Expansion of kin definitions to include biologically-unrelated persons having a pre-existing social relationship with the family is likely generally to serve this segregationist aim as well, if they are predominantly of the same race. That presumably is what advocates for this expansion are assuming.

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In sum, the Kincare craze, though appealing to the romantic ideal of the caretaking village, is actually part of a strategy to (a) protect minority-race parents unable to care adequately for their children from losing their status as legal parents, and (b) prevent race mixing in intimate life. Both aims are part of a broader racial justice agenda, yet both ironically cause additional

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<sup>289</sup> See FONT & GERSHOFF, *supra* note 16, at 69.

<sup>290</sup> See Bell & Romano, *supra* note 23, at 279 (“Caregivers did not want to terminate their relative’s parental rights and believed that the parent would be able to resume his or her role.”); Testa, *supra* note 80, at 41; BERRICK, *supra* note 6, at 74; cf. Koh & Testa, *supra* note 163 (suggesting legal system treat kin guardianship as equivalent to adoption).

<sup>291</sup> See BERRICK, *supra* note 6, at 73 (observing that since MEPA enactment, CPS employees opposed to trans-racial placements have viewed kin preference as a way to avoid them).

<sup>292</sup> See, e.g., Jedwab et al., *supra* note 62, at 6–7; Winokur et al., *supra* note 18; U.S. DEP’T OF HEALTH & HUM. SERVS. ET AL., CHILD MALTREATMENT 2017: SUMMARY OF KEY FINDINGS 2 (2019) [hereinafter MALTREATMENT 2017], [https://stockton.edu/child-welfare-education-institute/bcwep/documents/child-welfare-course/childrens\\_bureau\\_2017\\_maltreatment\\_summary.pdf](https://stockton.edu/child-welfare-education-institute/bcwep/documents/child-welfare-course/childrens_bureau_2017_maltreatment_summary.pdf) [<https://perma.cc/43NR-LBBQ>].

suffering and damage to Black children and contribute to perpetuation of the inter-generational cycle of dysfunction and misery that afflicts a significant portion of the Black population. Well-designed research belies any claim that Kincare is inherently and categorically better for children, and it makes plain that disregard for the threats to wellbeing that kin can pose, and for children's attachment relationships with non-kin caregivers, endangers their fundamental well-being.

## V. A PROPER PLACE FOR KINCARE

For legislators and CPS officials seeking an approach that actually serves children, this final Part offers guidance regarding choice of placement that is consistent with the research. Above all, it prescribes individualized decisions, taking into account the particular characteristics of the child and of potential caregivers as well as the family and case histories. Categorical rules are attractive for their simplicity but nonsensical for the highly varied and complex situations of children unable to remain safely in parental custody. The value of kin placement for a given child must be assessed in light of the child's age, developmental stage, needs stemming from the particular history of maltreatment, and existing relationships. It must also take into account potential caregivers' capacity to fulfill children's needs—including protection from harm by any third parties—and their commitment to doing that long-term if necessary. After identifying especially important substantive considerations, this Part recommends procedural checks on agency abuse of discretion.

### *A. Substantive Criteria*

Research on child development generally and on welfare outcomes for children who enter the foster care system counsels in favor of legislation directing CPS caseworkers to accord highest significance to the following factors in an individualized determination of the best placement.

#### 1. Age and Developmental Stage

With few exceptions, child welfare law draws no formal distinction among maltreated children by age. Yet developmental stage is a very important consideration in sound best-interests decision-making. Children's needs, potentialities, and experiences differ considerably over time, and children's family situations and relationships with parents and other adults

typically differ depending on their age at time of entry into the child welfare system.<sup>293</sup>

Vital background for child welfare policy generally is an understanding of attachment.<sup>294</sup> This is a fundamental bond young children uniquely form with a long-term caregiver, if there is one. A secure attachment typically forms in the period from age seven months to twenty-four months, as a child comes through experience to see one or more care providers as a consistent source of need-satisfaction, security, and comfort.<sup>295</sup> If parenting is deficient, the child might still come to view the custodian, as the person in control, as an attachment figure, but without all the positive associations.<sup>296</sup> In that case, the attachment will be of an insecure type, the particular type depending on the way in which custodians failed to meet needs—for example, being unresponsive to a baby’s expression of discomfort versus being responsive but harsh.<sup>297</sup> The consequences for a person’s life course of having an insecure rather than secure attachment are profound and multifarious: impacting education, peer relationships, conformity to social norms and expectations, intimate partnerships, and their own parenting.<sup>298</sup> Further, when children form a secure attachment, it is highly detrimental to disrupt it.<sup>299</sup>

In light of this, when CPS determines that a newborn cannot go home with parents or that an infant cannot safely remain in parents’ home, it should aim above all to place the child with people who are prepared to provide consistent, intense, positive nurturance and who are committed, should reunification efforts fail, to do so permanently. CPS must not view the placement as simply parking a child pending a permanency determination a year and a half or more later; the substitute caregivers must treat the child as their own.<sup>300</sup> If they do so, the child can form a secure and healthy attachment with them, and this makes it more likely that the child can form a positive

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<sup>293</sup> See Richard P. Barth et al., *Explaining Reunification and Reentry 3 Years After Placement in Out-of-Home Care*, in *NEW PERSPECTIVES*, *supra* note 24, at 208–35.

<sup>294</sup> For a general overview, see Stephanie Buehler, *Handbook of Attachment, Third Edition: Theory, Research, and Clinical Applications*, 43 *J. SEX & MARITAL THERAPY* 400 (2017).

<sup>295</sup> See Dwyer, *supra* note 66 (presenting research on attachment).

<sup>296</sup> *Id.* at 479; Dwyer, *supra* note 65, at 418–27.

<sup>297</sup> Dwyer, *supra* note 65.

<sup>298</sup> *Id.* at 423–24.

<sup>299</sup> See Kristen R. Choi et al., *The Impact of Attachment-Disrupting Adverse Childhood Experiences on Child Behavioral Health*, 221 *J. PEDIATRICS* 224 (2020).

<sup>300</sup> *Cf.* *NEW PERSPECTIVES*, *supra* note 24, at 57 (“Foster parents not evincing an emotional commitment to children have also been found to have problematic interactions with the infants in their care.”); see generally James G. Dwyer, *First Parents: Reconceptualizing Newborn Adoption*, 37 *CAP. U. L. REV.* 293 (2009) (emphasizing children’s perspective on those who care for them from early infancy).

bond with birth parents also if the child ultimately returns to parental custody.<sup>301</sup>

Conversely, the potential benefits of going to live with kin, such as familiarity and continuity, are far less for babies and infants than for older children, and in fact probably non-existent. If a child is too young to have and be conscious of a social relationship, the only distinctive feature of Kincare for a newborn or infant, compared to non-kin placements, will generally be the relatives' tie to birth parents. That tie might enable relatives more easily to facilitate positive contact with the birth parents, in part because the parents might feel more comfortable. This feature, however, can also or instead be a detriment for the child. Relatives might greatly resent the birth parents, because of the burden of taking in a child or for other reasons arising from family history.<sup>302</sup> Or relatives might be unwilling or unable to resist parental pleas for contact beyond what CPS or a court has recommended and might simply give the infant over to the birth parents without CPS authorization or awareness.<sup>303</sup> Thus, Kincare can amount to non-protection, a return to the status quo before the maltreatment report, even though parents' situation has not changed.

With children who are older when reported as abused or neglected, there is more reason to risk possible adverse outcomes from placement with relatives. Older children are generally less vulnerable; they can more readily reach out to non-parents for help or fend for themselves.<sup>304</sup> Older children are more likely already to have developed relationships with extended family members and others in the birth parents' community, so they might—depending on the quality of those relationships—have an interest in continuity of interpersonal connections and environment that counts in favor of kin placement. Further, because older children are less likely than infants to be adopted following a TPR,<sup>305</sup> placement with relatives might give older children a better chance, should their birth parents never regain custody, of completing childhood in an environment where they feel part of a “real” family. And because they have known their biological family previously, youth first placed in care at an older age are less likely to view non-relative caregivers as their “real family” than are children placed in infancy.

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<sup>301</sup> See Dwyer, *supra* note 65, at 418.

<sup>302</sup> See BERRICK, *supra* note 6, at 75–76.

<sup>303</sup> See Dwyer, *supra* note 65, at 459.

<sup>304</sup> Cf. BERRICK, *supra* note 6, at 1 (“Almost three quarters of all child maltreatment-related fatalities occur to children ages 3 years or younger.”).

<sup>305</sup> See NEW PERSPECTIVES, *supra* note 24, at 56.

Florida law is extraordinary in its sensitivity to age, developmental stage, and attachment. In connection with placement changes, it directs CPS and foster care agencies as follows:

*Additional considerations for transitions of infants and children under school age.* Relationship patterns over the first year of life are important predictors of future relationships. Research demonstrates that babies begin to form a strong attachment to a caregiver at approximately 7 months of age. From that period of time through age 2, moving a child from a caregiver who is the psychological parent is considerably more damaging. Placement decisions must focus on promoting security and continuity for infants and children under 5 years of age in out-of-home care. Transition plans for infants and young children . . . must specify what decision was made as to how each of the following applies to the child:

1. The age of the child and the child's current ability to accomplish developmental tasks, with consideration made for whether the child is:
  - a. Six months of age or younger, thereby indicating that it may be in the child's best interest to move the child sooner rather than later; or
  - b. Seven months of age or older, but younger than 3 years of age, thereby indicating it may not be a healthy time to move the child.
2. The length of time the child has lived with the current caregiver, the strength of attachment to the current caregiver, and the harm of disrupting a healthy attachment compared to the possible advantage of a change in placement.
3. The relationship, if any, the child has with the new caregiver . . . .<sup>306</sup>

True advocates for children would be promoting similar, age-sensitive legislation in other states, rather than blanket preference for kin regardless of a child's age and developmental needs.

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<sup>306</sup> FLA. STAT. § 39.4023(3)(e) (2023); *see also id.* § 39.4022(6)(c).

## 2. Children's Existing Bonds

The importance of established bonds supports placement with kin when bonds already exist, but that is exceedingly unlikely with infants and with children of any age if CPS has been unsuccessful for a prolonged period of time in locating any willing kin. Georgia recognized this reality in 2018 legislation that limits agencies' obligation to consider kin for placement, to six months after the kin receive notice of a child's removal from parents.<sup>307</sup>

Conversely, recent state legislation extending the requirement to search for relatives beyond the time of initial removal, to encompass the entire time CPS has legal custody, is plainly contrary to child wellbeing, even dangerous. Once an initial placement has been made and lasted a considerable time, the child's psychological needs are crucially important. If an attachment relationship has formed, the harm of disrupting it can outweigh even the value of being raised by biological parents.<sup>308</sup> It takes at least several months for an attachment to form, though, and the process does not really begin until a child is over six months of age, so this factor is not likely to count against a change of placement from non-kin to kin for a child under nine months of age or very recently placed. Beyond that time, however, if a child has spent many months in the same placement, caseworkers should be very wary of moving the child to a different home. The bond older children might have with caregivers can also be important to their future wellbeing.

Yet few states' statutory provisions governing permanency planning acknowledge the importance of established bonds with foster parents.<sup>309</sup> Kincare proponents have even convinced some legislators to prohibit consideration of such bonds, in plain disregard for children's welfare.<sup>310</sup> On occasion, foster parents have claimed constitutional protection for a child's bonds with them, but to date, only California courts have granted such

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<sup>307</sup> See RILEY, *supra* note 12, at 76.

<sup>308</sup> See, e.g., *In re Baby Boy C.*, 630 A.2d 670, 683–84 (D.C. 1993) (affirming adoption decree where, despite statutory preference for fit father, the trial court found by clear and convincing evidence the child would suffer significant psychological harm if removed from the foster home where the child had lived for nine years).

<sup>309</sup> See S.B. 1473, 53d Leg., 2d Reg. Sess. § 2 (Ariz. 2018); CAL. WELF. & INST. CODE § 361.5 (West 2023) (mandating that permanency recommendations filed with a TPR petition include discussion of “[t]he relationship of the child to any identified prospective adoptive parent[,] . . . the duration and character of the relationship, the degree of attachment of the child . . . , [and the] adoptive parent's strong commitment to caring permanently for the child . . . .”); § 39.4023(3)(e); RILEY, *supra* note 12, at 76.

<sup>310</sup> See sources cited *supra* note 132.

protection.<sup>311</sup> So caseworkers not in California, though not precluded from considering bonds with foster parents, are legally free to ignore them.

Relationships with siblings are also important for children brought into care. Many express greater distress over separation from siblings than over separation from parents.<sup>312</sup> Placement jointly with siblings can substantially mitigate the trauma of removal from home.<sup>313</sup> With respect to this type of relationship as well, though, true concern for child welfare should cause policy advocates to recognize that children might form new relationships while in foster care; other children in a foster home can become like siblings, and suddenly severing that bond can also be traumatic for a child.<sup>314</sup>

Another potentially important consideration is whether a child has bonds with parents or other biological family members that have value for the child even though the child will not live with them, or whether the child could develop positive bonds with kin if given the opportunity. If so, then the ability and willingness of potential caregivers to preserve or promote such bonds—if and as appropriate—might count in their favor.<sup>315</sup> Agencies should also take into account, though, the potential caregivers' ability to exercise sound judgment about when contact is appropriate. American law and society have generally favored a model of child-rearing in which there are just two parent figures, but there has been some loosening of that rigid conception in recent years, and other cultures have had success with a model more open to multiple parent figures and what we call “open adoption.”<sup>316</sup>

### 3. Capacity to Care for a Child

Quality of care also outweighs placement type (i.e., kin vs. non-kin) in relevance to long-term well-being.<sup>317</sup> Successful parenting of an infant is challenging, especially if the child has incurred physical damage from in

<sup>311</sup> See *In re Santos Y.*, 92 Cal. App. 4th 1274, 1313–15 (Cal. Ct. App. 2002); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1502 (Cal. Ct. App. 1996).

<sup>312</sup> See Mitchell, *supra* note 184, at 2–3, 6; Mitchell, *supra* note 190, at 368–69.

<sup>313</sup> See Mitchell, *supra* note 190, at 368.

<sup>314</sup> *Id.* at 369.

<sup>315</sup> Cf. FLA. STAT. § 39.4022(6)(c) (2024) (requiring that placement change decisions consider each prospective caregiver's “ability and willingness to: ... d. Work with the parent to build or maintain the attachment relationship between parent and child; e. Effectively coparent with the parent; and f. Ensure frequent family visits and sibling visits.”); FLA. STAT. § 409.1415(1)(b) (2024) (“[T]he most successful caregivers understand that their role goes beyond supporting the children in their care to supporting the children's families, as a whole.”).

<sup>316</sup> See generally Malinda L. Seymore, *Inconceivable Families*, 100 N.C. L. REV. 1745 (2022).

<sup>317</sup> See ALLEN W. HARDEN ET AL., INFORMAL AND FORMAL KINSHIP CARE, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION (1997), at 71, 73.

utero exposure to toxic substances or early-childhood abuse. These traumas can create extraordinary needs, demanding super-caregiving beyond the capacity of many who might be interested in caring for a child. Older children removed from parental custody typically have different, but also pronounced, needs—in particular, dealing with psychological and emotional fallout from maltreatment over an extended period. These needs, too, require a high degree of attentiveness, capability, and expert training. Undertaken by people with inferior preparation or low tolerance, it can be disastrous. Capacity also includes ability to address the shock and fear that children might experience when CPS removes them from their homes. This entails listening attentively, interpreting unusual forms of expression, and responding sympathetically.<sup>318</sup> Further, it entails the ability to interact with many service providers and advocate for the child.<sup>319</sup>

Many things undermine an adult's capacity to care for a high-needs child—not just obvious things such as substance abuse, mental illness, or mental disability, but also stress from other household demands, work, poverty, neighborhood conflicts and dangers, distractions from other relationships or activities, and lack of motivation.<sup>320</sup> Caseworkers should look beyond results of background checks (though these are important) to take into account stressors and distractors that might diminish the caregivers' positive attention or cause harmful treatment, including harsh discipline. The target kin of children reported to CPS are likely to be “approaching old age, live on fixed incomes or on low wages, and reside in neighborhoods plagued by economic and social adversities that put children and families at risk.”<sup>321</sup> Substance abuse and domestic violence are likely to be present in some kin households.<sup>322</sup> They are also likely to be more crowded and have non-kin living in them. The number of people in a household is relevant to quality of placement, not only in terms of whether there is sufficient space for a child to sleep and have quiet time, but also in terms of whether caregivers' attention will be too diffused. Thus, though there can be important benefits to co-

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<sup>318</sup> Cf. Mitchell, *supra* note 184, at 6–8 (discussing the importance for children in foster care to be heard, understood, accepted, and comforted).

<sup>319</sup> See FLA. STAT. § 409.1415(2)(b)(12) (2024) (“A caregiver must advocate for a child in his or her care with the child welfare system, the court, and community agencies, including schools, child care providers, health and mental health providers, and employers.”).

<sup>320</sup> See HARDEN ET AL., *supra* note 317, at 57 (“[I]mpaired parenting is both more likely to occur in impoverished households and more likely to produce negative developmental outcomes for the children.”).

<sup>321</sup> Testa et al., *supra* note 71, at 163; see also Clark et al., *supra* note 201 (observing that grandparent caregivers typically are dealing with health problems and stressors, often including an offspring with a substance abuse disorder and receive little emotional support).

<sup>322</sup> Clark et al., *supra* note 201.



placement with siblings or cousins, sharing a household and caregiver's time with several other children can also have adverse effects on vulnerable, high-needs children.<sup>323</sup> Caseworkers should also assess potential caregivers' willingness to accept guidance and services that can enhance inherent ability to care for a child.<sup>324</sup>

Another potential aspect of capacity is fraught—namely, the inclination and ability to address race-based interests a child has. Research does not support the position that it is better for children to be parented by persons of the same race per se; to the contrary, there is much research finding transracially adopted children have welfare outcomes similar to those of children raised by biological parents.<sup>325</sup> Nor is there any non-metaphysical basis for ascribing to children needs arising from skin color or biological ancestry per se. There is reason to believe, though, that children removed from parental custody will do significantly better if cared for by people sensitive to and resourceful in addressing any experiences children might have in society because of *any* of their individual characteristics, including their appearance and the identity that society might ascribe to them on that basis, whether it be skin color, presumed ancestry, or any number of other traits—for example, being physically disabled, a burn victim, unusually short or tall, or skinny or obese.<sup>326</sup> For older children, there might also be benefit from continuity of past experience, including cultural practices associated with an ethnicity, along with continuity of schooling, religion, and other elements of personal history.<sup>327</sup>

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<sup>323</sup> Cf. Harden et al., *supra* note 317, at 67.

<sup>324</sup> Cf. FLA. STAT. § 409.1415(2)(b)(5) (2024) (“A caregiver must have access to and take advantage of all training he or she needs to improve his or her skills in parenting a child who has experienced trauma due to neglect, abuse, or separation from home; to meet the child’s special needs; and to work effectively with child welfare agencies, the courts, the schools, and other community and governmental agencies.”).

<sup>325</sup> See, e.g., Bartholet, *supra* note 44, at 319–20; Robert Joseph Taylor & Michael C. Thornton, *Child Welfare and Transracial Adoption*, 22 J. BLACK PSYCH. 282, 282 (1996).

<sup>326</sup> Cf. FLA. STAT. § 409.1415(2)(b)(4) (2024) (A caregiver must be “willing and able to learn about and be respectful of the child’s culture, religion, and ethnicity; special physical or psychological needs; circumstances unique to the child; and family relationships.”).

<sup>327</sup> Cf. Rebecca Carroll, *As a Black Woman Raised by White Parents, I Have Some Advice for Potential Adopters*, WASH. POST (Apr. 5, 2021, 8:00 AM), <https://www.washingtonpost.com/opinions/2021/04/05/Black-woman-raised-by-White-parents-advice-potential-adopters/>; Rachel Garlinghouse, “*Why White People Adopt Black Babies*,” FRIENDS IN ADOPTION (Mar. 22, 2012), <https://www.friendsinadoption.org/adopting-a-child/adoption-articles-why-White-people-adopt-Black-babies/> [<https://perma.cc/J5EJ-LAPM>] (observing that Black birth mothers who choose adoptive parents often choose White couples even when Black couples are available, but that “[r]esearch on transracial adoptees demonstrates . . . that transracial parenting is a unique task, one that must be carried out with education and intention in order to raise confident, secure children.”).

State legislators should not, however, directly prescribe caseworker assessment of prospective caregivers' ability to address race-based interests. In the first place, such direction might violate the federal IEPA.<sup>328</sup> In addition, CPS caseworkers simply cannot be trusted to use authorization to consider something related to race in an objective way. That is the problem that motivated amendment to MEPA in 1996.<sup>329</sup> Presumably still today, most working in a predominantly Black community abide by the NABSW credo that no Black child should ever be in a White home and accept the underlying premise that White people are absolutely incapable of assisting a Black child in developing what the NABSW thinks should be the child's proper sense of self. Such a prescription would thus amount to de facto race matching. Better perhaps to provide guidance like that in Florida law, that caseworkers should simply look favorably on a prospective caregiver's inclination to "[r]espect for the child's individuality."<sup>330</sup> Above all, caseworkers should look for the preparedness to love and to provide care and positive attention—a capacity unrelated to race.<sup>331</sup>

#### 4. Commitment

Advocates for increased Kincare who extol the value of stability are right to think stability matters; ample research shows children suffer considerably if an attachment relationship is disrupted or if their living situation changes multiple times (more than twice).<sup>332</sup> But as explained in Part III, the research does not bear out the claim that relative placements are inherently more stable or that kin are generally more committed than non-relative foster parents. Many relatives accept a child into their home to spare parents from court proceedings and from CPS taking custody, or to prevent placement with strangers after removal, not expecting it to last long. These situations can be highly unstable for children, possibly entailing secret return to parents or getting passed around from one home to another so relatives can "share the burden," and quite often ending up ultimately in NRFC if emotional and behavioral problems are more than any available relative can handle. When the permanency plan is reunification with parents, ideal caregivers, all else being equal, are ones who cooperates fully with that plan

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<sup>328</sup> See Bartholet, *supra* note 44, at 320 (describing DHHS guidance and court decisions finding states non-compliant).

<sup>329</sup> See Bartholet, *supra* note 44, at 320.

<sup>330</sup> FLA. STAT. § 409.1415(2)(b)(3)(d) (2024).

<sup>331</sup> *Cf.* Bartholet, *supra* note 44, at 320 ("[W]hile race, of course, does matter in myriad ways in our society, it does not and should not define people's capacity to love each other.").

<sup>332</sup> See HARDEN ET AL., *supra* note 317, at 58, 72.

but are prepared to keep the child in their home as a full-fledged family member long-term if reunification with parents does not happen.<sup>333</sup> Ideally, that would mean adoption, though guardianship can be a sufficiently stable long-term outcome.<sup>334</sup>

### B. Procedural Guards Against Abuse of Discretion

In addition to adopting substantive rules to guide agency and court discretion, emphasizing the four factors identified above, states should enact procedural rules constraining CPS' power. Scholars with a parent-protective perspective have offered recommendations for reducing the level of coercion exerted on parents when CPS engages in diversion—recommending, for example, that parents have legal representation before agreeing.<sup>335</sup> From a child-centered perspective, one might also or instead recommend appointment of an advocate for children whenever CPS urges parents to send a child to live with relatives instead of having a court review what has happened to the child. The child's representative might perceive and object to dangers to the child in that plan.

Arguably the greatest harm from the Kincare craze, though, is not excessive diversion or categorical preference for kin or same-race foster parents *at the time of initial placement* following removal, though that is detrimental to many. Rather, it is the renewed fixation on kin much later, after the child has long been in a stable, nurturing non-kin placement and formed an attachment to loving caregivers who want to adopt. CPS caseworkers are frequently changing children's placements after they finally cease attempts at reunification with parents, and they are doing so for no other reason than to prevent trans-racial adoptions or adoptions by same-sex couples, justifying this destructive action as necessary to serve the child's supposed interest in being with kin. And in most states, foster care agencies' authority to move children from one placement to another is unreviewable; state laws give foster parents no opportunity or legal basis for objecting.<sup>336</sup>

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<sup>333</sup> Cf. S.B. 1473, 53d Leg., 2d Rel. Sess. (Ariz. 2018) (making one factor in placement decisions whether “the caregiver is interested in providing permanence for the child if reunification efforts ultimately fail”); FLA. STAT. § 39.4022(6)(c) (directing consideration of “likelihood that the child can remain with the prospective caregiver past the point of initial removal and placement with, or subsequent transition to, the caregiver and the willingness of the caregiver to provide care for any duration deemed necessary if placement is made.”).

<sup>334</sup> See Testa, *supra* note 81.

<sup>335</sup> See Gupta-Kagan, *supra* note 47, at 843.

<sup>336</sup> See, e.g., ARK. CODE ANN. § 9-28-109 (2023); DEL. CODE tit. 31, § 354 (2023); N.H. REV. STAT. ANN. § 170-E:52(V) (2022) (requiring the agency solely to give foster parents “reasonable notice”

States must ensure long-term foster parents an effective opportunity to challenge agency plans to remove a child from their care. Courts should be empowered and instructed to order an attachment assessment, a professional evaluation of such child's situation, and the likely effect of severing the child's psychological ties to the foster parents. And at least when the agency's plan is something other than return to parents, the court should impose a presumption against disruption of a long-term placement and require the agency to show a move would be in the child's best interests.

On this score, too, Florida law provides a model. The state's legislature found in 2021 that agency decisions to change a child's placement often result in trauma to the child, that transitions often are "poorly planned and executed or improperly timed" and thereby "adversely impact a child's healthy development." It concluded that children would be better served if the agencies "support caregivers in order to promote stability."<sup>337</sup> It therefore directed agencies to change placements only after making specific findings, creating an "individualized transition plan," convening a multidisciplinary team that includes the current foster parents to develop that plan, giving foster parents 14-days notice of a planned move, and submitting the transition plan to a court.<sup>338</sup> The Legislature specifically stated an expectation that foster parents will advocate for a child's best interests in placement decisions, and that CPS will respect the foster parents' advocacy role and not retaliate against them—a rare recognition of caseworkers' tendency to abuse foster parents.<sup>339</sup> If there is disagreement on the multidisciplinary team, it must report that to the court and describe the nature of the disagreement.<sup>340</sup> In addition, CPS may not change a child's placement, except to reunify with parents, unless the current caregiver, even after being provided with supportive services, "is clearly unable to safely or legally care for the child" or "removal is demonstrably in the best interests of the child."<sup>341</sup>

What Florida lacks, like many other states, is a clearly-established procedure for appeal of an agency decision to change placements.<sup>342</sup> It gives foster parents a role in the decision making process, ensuring they can

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before removing a child and a reason for the removal); N.C. GEN. STAT. § 7B-903.1(d) (2024); TENN. CODE ANN. § 37-2-415(a)(16) (2021); WASH. REV. CODE § 74.13.300(3) (2024) (requiring only five-days' notice).

<sup>337</sup> FLA. STAT. § 39.4023(1)(b)–(c) (2023).

<sup>338</sup> *Id.*; *see also* FLA. STAT. § 39.4022(4)(a)(1)(c), (5)(a)(2) (2023).

<sup>339</sup> *See* FLA. STAT. § 409.1415(2)(b)(12) (2023) ("The department and community-based care lead agency must support a caregiver in advocating for a child and may not retaliate against the caregiver as a result of this advocacy.").

<sup>340</sup> FLA. STAT. § 39.4022(6)(d)(2), (8) (2008).

<sup>341</sup> FLA. STAT. § 39.4023(3)(b), (c) (2023), 409.1415 (2)(b)(7) (2023).

<sup>342</sup> *See* sources cited *supra* note 9.

communicate their views. But ultimately, in case of disagreement, the agency is empowered to decide as it sees fit and there is no provision for administrative appeal or judicial overturning of that decision.<sup>343</sup> Some other states do confer on foster parents a right to an appeal within the agency. Pennsylvania, for example, grants foster parents who have cared for a child at least six months a right to advance notice of intent to remove the child and to an administrative appeal before an administrative law judge of the state social service agency.<sup>344</sup> All states should ensure at least that minimal check on agency freedom to abuse power.

Even when the agency's aim is return to parents, which typically a court must approve, states should ensure courts solicit long-term foster parents' views about what is best for the child. They might be the most familiar with a child's current condition and needs.<sup>345</sup> State laws focus reunification decisions on parents' compliance with service plans and whether a household is merely safe for the child, not on parents' ability to address the child's psycho-emotional needs following maltreatment, removal, and stay in foster care. Yet a court should know if there is reason to believe reunification would be traumatic for the child or undo healing accomplished in care. Guardians ad litem are often too passive and uninformed to be relied on to resist ill-advised reunification. Even if reunification is best, foster parent input can improve the decision regarding ongoing services and assistance for the family.

## VI. CONCLUSION

Legislators, agency officials, and advocacy organizations need to understand what is fueling the Kincare bandwagon they have boarded. It is not child welfare. The research simply does not support claims that children will fare better as a result. It is protectionism for parents and ideological opposition to race mixing in private life. Those pushing Kincare aim to undermine laws and policies that promote restorative permanency for maltreated children. The few states that have resisted the craze provide models for legislation that pushes agencies to make individualized decisions,

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<sup>343</sup> FLA. STAT. § 39.4022(6)(d)(2) (“If the participants of a multidisciplinary team staffing cannot reach a unanimous consensus decision on a plan to address the identified goal, the ... department shall then determine how to address the identified goal of the staffing by what is in the child's best interest.”). This leaves unclear what the point is of communicating to the court that there is disagreement.

<sup>344</sup> 55 PA. CODE § 3700.73; *see also* MICH. COMP. LAWS § 712A.13B; ILL. ADMIN. CODE tit. 89, § 89.337.70.

<sup>345</sup> *Cf.* 21st Century Children and Families Act, H.R. 7664, 118th Cong. § 3 (2024) (“[T]he State agency shall provide a meaningful opportunity for the kinship (including fictive kinship) caregiver to express whether modification or termination is or is not in the best interests of the child”).

consider kin placements objectively based on research-based factors without categorical priority or even presumption, and recognize the significance for children of all bonds they have formed.

Nothing in this Article is meant to impugn Kincare advocates' sympathy for CPS-involved parents, who are generally incapacitated by their own adverse childhood experiences, nor to condemn the impulse within the Black community to insulate against state agencies. What is condemnable is harming children in pursuit of these aims if done with indifference to or knowing misstatements about child welfare research. That is also self-defeating, because it perpetuates the underclass for whom Kincare proponents advocate, creating another generation of parents incapacitated by adverse childhood experiences.

