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Recommended Citation

Megan Schmidt, *The Hidden Foster Care System: A Parallel System in Legal Limbo During A Deadly Pandemic*, 12 U. MIA Race & Soc. Just. L. Rev. 141 ()

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The Hidden Foster Care System: A Parallel System in Legal Limbo During A Deadly Pandemic

Megan Schmidt*

In 2020, Josh Gupta-Kagan's article on the American Hidden Foster System challenged the welfare system to face its coercive practices that effectuate in a child being removed from the home without formal state intervention and court oversight.¹ Families find themselves struggling to stay together as child protection workers utilize threats and safety plans to force the removal of a child from the home and into the custody of a family member.² The children's, the parents', and the kinship caregivers' lives are forever impacted by the welfare state, yet they receive insufficient benefits or protections afforded to families, caregivers, and children placed in licensed foster care under the jurisdiction of the court.³ This paper will explore what Gupta-Kagan coined the "American Hidden Foster system"⁴ during the COVID era, as well as some solutions to the injustices these families face while in the system. Lastly, this paper hopes to offer an approach to balance the inevitable tension that surfaces when child welfare agencies push for "under the table" removals while impoverished families desperately try to stay together.

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I would like to thank my faculty advisor, Professor Bernard Perlmutter, and my clinic supervisor, Robert Latham for introducing me to Children and Youth Law as well as empowering students like myself to question oppressive structures that impact American families. Thank you to Melissa Blanco, Michelle Blanco, and Lauren Maier for your support. Finally, I send my appreciation and love to my mother and grandmother, Ninfa and Flor, who always inspire me to seek justice.

¹ Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 *Stan. L. Rev.* 841(2020).

² *Id.*

³ *Id.*

⁴ *Id.* at 844.

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I. INTRODUCTION

The foster care system is a large institution involved in the business of child welfare that varies greatly from state to state.⁵ This national system is “a complex bureaucratic apparatus of private and public agencies that monitors parents or caregivers for actual, perceived, and prospective abuse, abandonment, and neglect.”⁶ Every year, state agencies separate more than 250,000 children from their parents and place them in formal foster care.⁷ In the formal foster care system, the children are in the state’s legal custody under the oversight of a family court judge.⁸ To remove children from their family, the child welfare system must balance the parents’ fundamental right to family integrity with the state’s *parens patriae* power to protect children from abuse and neglect.⁹ This balancing act is subjected to a complex body of federal and state laws that require court hearings, which examine child safety and parental fitness.¹⁰ What remains clear is that the formal foster care system is a poor substitute caregiver for these abused and neglected children when they are removed from their families.¹¹

Even more so, the placement of children in foster care triggers a variety of state costs from payments to foster parents for taking care of the children to services for the children and their parents to assist in reunification.¹² According to Gupta-Kagan, “the partial accounting of such costs – including payments to foster parents and some services for children in addition to agency administrative costs, but excluding reunification services for parents – reveals an average annual cost of more than \$25,000 per child in foster care.”¹³ The federal government, in part, reimburses state agencies through Title-IV, which results in the federal government having substantial influence over state child welfare policy decisions.¹⁴

⁵ See generally, Ashley Riegle, Ashan Singh, & Allie Yang, *For Foster Kids, COVID-19 Poses A Second Obstacle To Stability And Success*, ABC NEWS (Nov. 23, 2020, 9:24 PM); see also David Dodge, *Foster Care Was Always Tough. Covid-19 Made It Tougher*, NEW YORK TIMES (Jan. 8, 2021).

⁶ Kele Stewart & Robert Latham, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 *Fordham Urb. L.J.* 95, 99 (2021) at 99.

⁷ Gupta-Kagan, *supra* note 1, at 847.

⁸ *Id.*

⁹ *Id.* at 843.

¹⁰ *Id.*

¹¹ See Stewart & Latham, *supra* note 6, at 99-101. (This part of the article points to the traumatic and lasting impacts of foster care involvement on children. It expresses that the state fails to provide stable placement and nurturing support systems that will last into adulthood for these children.)

¹² Gupta-Kagan, *supra* note 1, at 884.

¹³ *Id.*

¹⁴ *Id.*

Current legislative trends support the prevention of children placed in the formal foster care system as implemented through The Family First Act in 2018, which “explicitly envisions avoiding foster care through kinship placements” and funds “services ‘directly related to the safety, permanence, or well-being of the child or to preventing the child from entering foster care.’”¹⁵

As COVID-19 catalyzed a global health crisis and national recession, the foster care system was not immune to the devastating impact of the pandemic.¹⁶ With over 430,000 children in foster care as of 2018, experts rightly fear that a system already overwhelmed with children is facing challenges it may not be equipped to handle.¹⁷ According to the CEO of First Star, a national nonprofit that supports children in foster care, the pandemic led to caregivers closing their doors to foster placement, not because of the child’s behaviors, but because the caregivers are now concerned about COVID-19.¹⁸ As more and more children enter into the foster care system, fewer families are willing to take in foster children for fear of spreading the virus.¹⁹ Even more so, some foster families find themselves incapable of accepting children because they are financially or physically unable.²⁰

State child welfare agencies worry about the rise of abuse and neglect cases exacerbated by families being confined at home, but agencies are finding it difficult to investigate with current safety regulations.²¹ Notably, COVID-19 has disproportionately affected Black and Brown families at alarming rates.²² The pandemic’s racial and economic disparities, coupled with the fact that these vulnerable classes of children are already overrepresented within the foster care system, exemplifies the perpetual crisis that these children and families are facing. Black and Brown families in the foster care system are left in a legal limbo as court proceedings remain halted and agency services discontinued or moved remotely.²³ Yet, children continue to be removed from their families.²⁴ A global pandemic

¹⁵ *Id.* at 894 (citing to Family Services Act § 50711(a)(2), 132 Stat. at 232-33 (codified as amended at 42 U.S.C. § 671(e)(1))).

¹⁶ See Riegle, Singh, & Yang, *supra* note 5.

¹⁷ Roxanna Asgarian, *Revealing the Hidden Side of Foster Care*, CENTER FOR HEALTH JOURNALISM (July 23, 2020), *see also*, Riegle, Singh, & Yang, *supra* note 5.

¹⁸ Riegle, Singh, & Yang, *supra* note 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Char Adams, *Foster Care Crisis: More Kids Are Entering, But Fewer Families Are Willing To Take Them In*, NBC (Dec. 30, 2020 6:00 AM).

²² See Riegle, Singh, & Yang, *supra* note 5; *see also* Adams, *supra* note 21.

²³ Angie Schwartz & Cathy Krebs, *The Risk of Hidden Foster Care During COVID-19*, AMERICAN BAR ASSOCIATION (June 1, 2020).

²⁴ Adams, *supra* note 21.

does not relieve the federal or state government from the moral and legal obligations to protect abused, abandoned, or neglected children who require state intervention and services after removal from the homes of parents or guardians.²⁵

But, there is a practice that promotes circumvention of the foster care system and its legal duties while displacing children in a pandemic with little court or agency supervision.²⁶ With legislation and statutes that promote cost-cutting and foster-care prevention, a parallel system is gaining attention from child welfare experts who fear the rise of what Professor Josh Gupta-Kagan calls, “America’s Hidden Foster Care System,” during the COVID era.²⁷ The system mirrors the traditional foster care system in both size and scope.²⁸ This Note reviews Gupta-Kagan’s article and considers the grave impacts of coercive removals on impoverished families. Like in the formal foster care system, these removals occur roughly hundreds of thousands of times every year.²⁹ The impact of fracturing families remains the same.³⁰ However, this system utilizes coercion used by agencies in their imposition of safety-plans towards parents to remove children from their homes.³¹ The lack of data has legal advocates concerned that budget tightening due to the pandemic’s economic effects will increase the scope of these removals.³² Legal advocates worry that this hidden foster care system continues to grow without any sense of how the children are affected or how much support these families are excluded from receiving due to the fact that the system operates without court oversight of case plans.³³

These cases fall under many different names, such as “kinship diversion” or “informal kinship”, but they all start with the same premise: the child-welfare agency receives a report that a child was abused or neglected, and the agency dispatches a child protective worker to investigate the situation.³⁴ The child protection worker, who is often over-

²⁵ See generally Stewart & Latham, *supra* note 6.

²⁶ See generally Gupta-Kagan, *supra* note 2.

²⁷ *Id.*

²⁸ Roxanna Asgarian, *Hidden Foster Care: All of The Responsibility, None of the Resources*, THE APPEAL (Dec. 21, 2020), <https://theappeal.org/hidden-foster-care/>; see also Gupta-Kagan, *supra* note 1, at 856.

²⁹ Josh Gupta-Kagan, *How the Biden Administration Can Address Hidden Foster Care*, THE IMPRINT (Dec. 21, 2020, 11:45 AM), <https://imprintnews.org/child-welfare-2/how-biden-administration-address-hidden-foster-care/50487>.

³⁰ *Id.*

³¹ *Id.*

³² Asgarian, *supra* note 28.

³³ ANNIE E. CASEY FOUNDATION, *The Kinship Diversion Debate: Policy and Practice Implications for Children, Families, and Child Welfare Agencies* (Jan. 1, 2013), <https://www.aecf.org/resources/the-kinship-diversion-debate/>.

³⁴ Gupta-Kagan, *supra* note 1, at 843.

worked and underpaid, then makes the decision to file a petition against the parents for abuse or neglect. Thus, the child protection worker begins the legal process to remove the child.³⁵ However, it is at the point of the petition where the formal foster care system and the hidden foster care system diverge. Some children begin a process that has legal oversight, agency accountability, financial funding, and due process through the court system.³⁶ Meanwhile, others are subjected to safety plans or threats of legal action that effectuate a change in physical custody from their parents to kinship caregivers. These removals occur without any guarantee of reunification.³⁷ The parents' and the child's legal rights are circumvented because parents fear never being reunified or losing parental rights over their children if they do not comply with the agency's request.³⁸ While the child's physical custody changes, the child's legal custody status is left in limbo.³⁹

The child's legal custody is left in limbo for multiple factors that prioritize keeping the family together and the state out of the family. Gupta-Kagan emphasizes that "kinship arrangements sometimes reflect parents' true wishes and the best option for children . . .," like Laura and her husband, fictive kin, who took in a young baby from a close friend who suffered from substance abuse problems and could not provide a stable home for her child.⁴⁰ Like the formal foster care system, the hidden foster care system relies greatly on informal kinships and kinship diversions.⁴¹ Informal kinship occurs when a parent transfers physical custody of their child to the care of a family member, typically without court involvement.⁴² The legal custody of the child remains with the

³⁵ *Id.* at 874.

³⁶ *Id.*

³⁷ Angie Schwartz & Cathy Krebs, *Addressing Hidden Foster Care: The Human Impact and Ideas for Solutions*, AMERICAN BAR ASSOCIATION (Mar. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/addressing-hidden-foster-care-the-human-impact-and-ideas-for-solutions/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Asgarian, *supra* note 28 (This article tells the story of Laura and her husband who were asked to take in 1-year-old Sophie from her mother's care. The biological mother needed help providing a stable home for the baby. The mother was continuously in and out of rehabilitative services without success. Laura and her husband spent thousands of dollars in legal fees trying to stabilize Sophies placement. This story demonstrates the desperate need for the child's legal stability as well as kinship caregivers need for support).

⁴¹ *Kinship Diversion: A Parallel System of Foster Care*, CHILD WELFARE MONITOR (March 9, 2020), <https://childwelfaremonitor.org/2020/03/09/kinship-diversion-a-parallel-system-of-foster-care/>.

⁴² Asgarian, *supra* note 28.

parents.⁴³ Thus, informal kinship caregivers face challenges when making decisions for the child.⁴⁴ The idea is that the children are better off being cared for by people who are familial and culturally familiar.⁴⁵ Much research exists to support the benefits of kinship placement for children, and these children's families are forced to weigh those benefits against the difficult realities of poverty, racism, and the global pandemic.⁴⁶ The majority of kinship families live in poverty and desperately need supportive services.⁴⁷ However, informal kinships do not typically receive the same amount of funding or services as formal kinship foster care.⁴⁸

Gupta-Kagan's article took the child welfare system by storm and exposed the desperate circumstances that parents face in the hidden foster care system. This Note will expand on the due process issues that occur when coercive methods are used to force "voluntary" transfers of physical custody. It will expose the child safety and welfare concerns that plague America's hidden foster care. To continue, the Note will further explain the barriers kinship care givers face and the practices that prioritize formal kinship arrangements. The Note analyzes the known problems of the hidden foster care with the nuances of a COVID-19 America. However, this Note recognizes and accepts that the hidden foster care system can have benefits. It does not call for the abolition of the system. Specifically, the Note will touch on the benefits of informal kinship care such as its policy benefits and child welfare benefits. It recognizes that informal kinship provides opportunities for Black, Immigrant, Indigenous, and impoverished families to stay together without the crippling weight of state oversight. Rather, the Note seeks to reduce licensing barriers that ultimately will help some of the "hidden" placements become formal, expand the right to counsel for both parents and children, promote community-care programs, and utilize technology to increase accessibility and services. The Note heavily relies on Gupta-Kagan's extensive research on the system and in part reviews it, while the Note expands his thoughts to meet a COVID-19 America.

⁴³ Gupta-Kagan, *supra* note 1, at 845.

⁴⁴ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 12.

⁴⁵ Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619 (2001).

⁴⁶ Asgarian, *supra* note 28; *see also* Schwartz & Krebs, *supra* note 23.

⁴⁷ Asgarian, *supra* note 28.

⁴⁸ *Id.*

II. PROBLEMS WITH DUE PROCESS

a. *Substantive and Procedural Due Process: A Brief Familial Perspective*

The Constitution affords protection to the parental right to family integrity through the 14th Amendment.⁴⁹ Federal state actors are prohibited from obstructing citizens' rights to life, liberty, and the pursuit of happiness without due process.⁵⁰ From the general principle of liberty within the Due Process Clause of the Fourteenth Amendment, the Supreme Court secured parents' superior right to "establish a home and bring up children."⁵¹ According to Professor Josh Gupta-Kagan, "any state action that interferes with parental authority over children . . . raises substantive and procedural due process concerns."⁵² The Supreme Court precedent supports the notion that parents have a fundamental right to the control, care, and custody of their children.⁵³ Similarly, children also have the fundamental right to live in their parents' custody.⁵⁴ Because of Due Process, it is required that a hearing occurs prior to the deprivation of a parent's fundamental interest in the care and custody of their child.⁵⁵ Here, the hidden foster care presents both substantive and procedural due process problems. The hidden foster care system dodges court hearings that would otherwise be constitutionally required.⁵⁶ There is an avoidance of court oversight that threatens the due process rights of both parents and children.⁵⁷

b. *The Trick of "Voluntariness"*

As previously mentioned, the hidden foster care system and the formal foster care system diverge when the child protective worker makes the determination that a child must be removed from the home but fails to file a petition against the parents.⁵⁸ It is at this moment that the parents' and the child's due process rights are jeopardized by a state actor.⁵⁹ Then, the

⁴⁹ Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1 (2019).

⁵⁰ *Id.*

⁵¹ Sacha M. Coupet, "Ain't I A Parent?": *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595 (2010).

⁵² Gupta-Kagan, *supra* note 1, at 860.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jennings, *supra* note 49, at 31.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ Gupta-Kagan, *supra* note 1, at 844.

⁵⁹ *Id.*

child protective worker threatens the parents with legal action unless the child is removed from the home.⁶⁰ In an alternative scenario, the child protective worker offers the parent the opportunity to “voluntarily” sign a safety plan that effectuates a change in the child’s placement to a kinship caregiver.⁶¹ Here, the parents are faced with a decision: sign the safety plan and face the removal of their child, or avail themselves and their children to the hands of the state.⁶² This evasion of due process happens almost as frequently as formal removals.⁶³ Evidence shows that for every ten children entered into foster care, seven children are diverted to kinship care.⁶⁴

Diversion advocates acknowledge a great imbalance of power with system involvement and its negative impact on families.⁶⁵ Many critics of kinship diversion find the characterization of the diversion as a “choice” to be grossly misleading.⁶⁶ Others fear that so long as the parents are dealing with a state agency that has the power to remove their child, there is no real choice.⁶⁷ According to a report provided by the Annie E. Casey Foundation, “birth parent advocates also argue that once the government intervenes in the lives of families, a child’s parents lose any meaningful choice regarding the child’s placement.”⁶⁸ It suggests that there is always a level of coercion when the state is involved.⁶⁹

“The social work goals of safety planning include ‘increas[ing] family engagement.’”⁷⁰ This goal expresses that safety plans are supposed to improve families and their unification.⁷¹ Yet, Gupta-Kagan’s article suggests that safety plans are a vessel for the child welfare agencies’ coercion into child removals without due process and fail to meet the social work goals of safety planning.⁷² Generally, these safety plans are created without the provision of counsel for the parents.⁷³ In this process, the parents typically do not discuss with a lawyer the validity of child protective services’ threats or the ability to succeed in a court hearing.⁷⁴

⁶⁰ *Id.*

⁶¹ Schwartz & Krebs, *supra* note 37.

⁶² *Id.*

⁶³ Asgarian, *supra* note 28.

⁶⁴ Schwartz & Krebs, *supra* note 37.

⁶⁵ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 4.

⁶⁶ *Id.* at 9.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Gupta-Kagan, *supra* note 1.

⁷¹ *Id.* at 849.

⁷² *Id.*

⁷³ *Id.* at 852.

⁷⁴ *Id.*

While making the safety plan, parents lack the legal help to negotiate the terms of the safety plan, such as visitation terms, duration, decision authority and so forth.⁷⁵ These safety plans are supposed to be voluntary; however, with the uneven bargaining power of the state, the voluntariness of the safety plans are suspect.

The courts tried to acknowledge the issue of coercion and due process within the hidden foster care system, more specifically regarding coercive safety plans. All federal courts agree that legally unjustifiable threats inducing a change in a child's physical custody are a violation of the parent's due process rights.⁷⁶ The courts diverge when determining whether the practice is coercive when the threats are legally justifiable. Two notable cases rule against the idea that the practice is coercive: *Dupuy v. Samuels* and *Smith v. Williams-Ash*.⁷⁷

In *Dupuy v. Samuels*, a class action suit by parents claimed that Illinois' child-welfare agency's practices of removing children from homes through safety plans infringed on the parental rights as protected by the due process clause of the 14th Amendment.⁷⁸ The trial court findings included multiple details that casted doubt on whether these safety plans were actually voluntary.⁷⁹ The CPS agency, both in writing and verbally, threatened parents with the removal of their children if they failed to agree.⁸⁰ The safety plan durations were unknown and there was little procedure to contest these plans through the agency.⁸¹ None the less, the court held that hidden foster care is the result of voluntary choices by parents to temporarily relinquish physical custody of their child.⁸² In *Dupuy*, the court employed the logic that the agencies are not coercive but rather giving the parents possible options.⁸³ Seventh Circuit rejected the class action plaintiffs' challenge to the frequent method of threatening to remove children if the parents did not agree to change a child's physical custody to a kinship caregiver through a safety plan.⁸⁴

Similarly, the court in *Smith v. William-Ash* ruled that a safety plan shifting physical custody of children to family friends was voluntary.⁸⁵ In *Smith*, parents brought an action against a county social worker after

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.* at 856.; *see also* *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005); *Smith v. Williams-Ash*, 520 F.3d 596 (6th Cir. 2008).

⁷⁸ *Dupuy*, 397 F.3d at 496.

⁷⁹ Gupta-Kagan, *supra* note 1, at 862.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Gupta-Kagan, *supra* note 1.

⁸⁴ *Id.* at 861.

⁸⁵ *See id.* at 865.; *see also* *Smith v. Williams-Ash*, 520 F.3d 596, 597-98 (6th Cir. 2008).

children were removed from their home because of unsanitary conditions, arguing that their due process rights were violated because they did not receive a hearing before the removal.⁸⁶ The district court granted summary judgement in favor of the social worker, which supported that the parents were not entitled to a hearing because they consented to removing their children via the voluntary safety plan.⁸⁷ The Sixth Circuit held that the temporary removal of children from a home and an inability to recover them after such removal did not violate the due process rights of the parents.⁸⁸

However, the *Smith* dissent points to a logic, which is supported by Third Circuit case law, which views the child protective worker's actions as going well beyond a threat to enforce a valid legal right.⁸⁹ In *Croft v. Westmoreland County Children and Youth Services*, the Third Circuit held that safety plans hinging on a threat of removal are inherently coercive and must require some form of due process protections for families.⁹⁰ The Third Circuit pointed to evidence showing ways in which CPS authorities were acting beyond their legal authority.⁹¹ *Croft* also suggests that no CPS threat of removal could lead to a truly voluntary safety plan.⁹²

In the hidden foster care system, the options are merely illusions of choice. Parents may be more likely to submit to coercive practices because of the constant instability that the pandemic brings. Factors that are requirements in reunification with parents like stable employment and house are difficult to find in COVID-19 America.⁹³ Gupta-Kagan acknowledges that parent fear they may not be able to withstand a court hearing and may forever lose their children to the foster care system.⁹⁴ The pressure to say yes to “voluntary” safety-plans may seem like the only option to parents who are already struggling through poverty, racism, and a global health crisis.

III. CHILD SAFETY AND WELFARE ISSUES

There is no evidence to suggest that kin placements are less safe than other placements.⁹⁵ As forementioned, there is copious evidence to support

⁸⁶ See *Smith*, 520 F.3d. at 597-98.

⁸⁷ *Id.*

⁸⁸ *Id.* at 599-600.

⁸⁹ *Id.* at 601-02 (Gilman, J., dissenting).

⁹⁰ 103 F.3d 1123, 1125 n.1 (3rd Cir. 1997); see Gupta-Kagan, *supra* note 1, at 866.

⁹¹ Gupta-Kagan, *supra* note 1, at 867.

⁹² *Id.*

⁹³ Stewart & Latham, *supra* note 6.

⁹⁴ Gupta-Kagan, *supra* note 1, at 873.

⁹⁵ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 18.

the benefits of kinship placements over non-familial placements.⁹⁶ However, the lack of state oversight for these informal kinships, which the state induced, leaves the door open for children to be neglected and abused.⁹⁷ This proves especially troubling when the hidden foster care has no legal checks or balances to the child protective workers' determinations of the child's well-being.⁹⁸ Also, without the legal process, these removals can occur with little to no evidence that the circumstances would warrant a child's removal.⁹⁹ Without due process, it is difficult to confirm that the children in hidden foster care are there for their welfare and safety. Rather, the hidden foster care brings more benefits to the formal foster care system and its financial bottom-line.¹⁰⁰

The foster care system has a duty to ensure the safety of abused or neglected children; however, the child welfare agencies' reliance on the hidden foster care system circumvents that duty to the children.¹⁰¹ Unlike formal foster care, the child welfare agencies have no legal requirement to make reasonable efforts toward reunification of families.¹⁰² The agencies do not develop case plans prescribing how parents may reunify with their children.¹⁰³ Kinship placements are not investigated as thoroughly and are not subjected to welfare checks.¹⁰⁴ Thus, the children are left vulnerable to further trauma and possible intergenerational abuses.¹⁰⁵

This Note also argues that to be in a legal limbo is not in the best interest of the child. The informal removals split the child's custody in two, where their legal custody remains with their parents and their physical custody with the kinship caregiver.¹⁰⁶ The caregiver's access to making decision about the child's education and health insurance becomes more difficult.¹⁰⁷ Furthermore, with the child's legal status in limbo, there is nothing the hidden foster care can do to stop parents who are truly dangerous from taking back custody of their child.¹⁰⁸ The informal kinship caregivers in the hidden foster care system are left with no legal leverage

⁹⁶ *Id.*

⁹⁷ Asgarian, *supra* note 28.

⁹⁸ Gupta-Kagan, *supra* note 1, at 875.

⁹⁹ *Id.* at 876.

¹⁰⁰ CHILD WELFARE MONITOR, *supra* note 41.

¹⁰¹ Gupta-Kagan, *supra* note 29.

¹⁰² *Id.*

¹⁰³ CHILD WELFARE MONITOR, *supra* note 41.

¹⁰⁴ *Id.*

¹⁰⁵ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 17.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ Alliance for Children's Rights, *The Human Impact of Bypassing Foster Care for At-Risk Children: Building a Continuum of Support for Families Diverted*, STEP UP FOR KIN (Feb. 28, 2020), <https://stepupforkin.org/hiddenfostercare/>.

¹⁰⁸ Gupta-Kagan, *supra* note 1, at 881.

to protect the child. Unfortunately, their custody is physical only, not legal.¹⁰⁹ If the family wanted to effectuate a private kinship, they would have to incur the costs of that legal proceeding.¹¹⁰

In addition, during the pandemic, the courts closed in many states, which has slowed reunification processes, adoptions, and licensing.¹¹¹ Now more than ever, the parents who have been forced into the hidden foster care system face decreased access to the courts. While their children were effectually removed by the state, these kinship families neither have the access to COVID testing that the state may provide, nor the consideration that social workers must have for the health needs and risk statuses of the people involved.¹¹² Both the traditional foster care system and the hidden foster care system pose great public health threats to at-risk children.

The conditions of the informal kinship care are in stark contrast to those of formal kinship foster care. If the families were in formal kinship, they would receive those benefits as well as a substantial monthly stipend. In formal kinship foster care, the family would have access to services and additional foster care subsidies.¹¹³ It is not sufficient to say that formal kinship is what is in the child's best interest. Kinship foster care makes the child a ward of the state.¹¹⁴ The child's legal custody transfers to child welfare agencies.¹¹⁵ The kinship foster care families receive a large amount of oversight and relinquish a substantial amount of control over the child.¹¹⁶ In general, families' inconsistent and negative experiences with the welfare system are often enough to avoid the financial benefits of formal kinship.¹¹⁷ Informal kinship may be an appropriate choice for some families who would not survive the state's intrusion. Rather, the true question remains whether the child welfare system, in its current state, can truly guarantee children's safety and welfare.

¹⁰⁹ *Id.*

¹¹⁰ See Lauren E. Bartlett, *Promoting Permanency and Human Rights*, 23 U.C. DAVIS J. JUV. L. & POL'Y 123, 133 (2019).

¹¹¹ Kate Cray, *How Do You Find a Home for a Foster Child at a Time Like This?*, THE ATLANTIC (Oct. 11, 2020).

¹¹² *Id.*

¹¹³ Bartlett, *supra* note 110, at 132-33.

¹¹⁴ *Id.* at 142.

¹¹⁵ *Id.* at 142-43.

¹¹⁶ *See id.*

¹¹⁷ ANNIE E. CASEY FOUNDATION, *supra* note 33.

IV. LACK OF FINANCIAL AND SERVICE SUPPORT FOR KIN CAREGIVERS

Just because a kinship placement is typically better for the child does not mean that all kinship caregivers can manage the complex needs of the child without additional support. A majority of kinship caregivers live in poverty.¹¹⁸ A large percentage of these informal placements are the families of under-represented communities. Particularly, the Black community's long history of communal care for children is taken advantage of in the system of kinship diversion.¹¹⁹ The idea that family should take care of family is an important one, but it hinders communities when the ideology excludes certain caregivers from financial and service support.¹²⁰ In the hidden foster system, child welfare agencies prioritize kinship diversion over foster care because it saves the state and federal government millions of dollars.¹²¹

In kinship foster care, the kin receive foster parent licenses, financial funding, and services that are not accessible in private kinship arrangements. The financial support given to informal arrangements is limited to Temporary Assistance for Needy Families (TANF) and is much less substantial than what is provided to their formal counterparts.¹²² The caregivers are expected to take on the great costs of childcare as well as the specialized needs of an abused or neglected child.¹²³ While formal kinship placements may benefit from therapeutic services provided by the state, informal kinship caregivers, at most, are referred to support groups and kinship diversion programs.¹²⁴ Moreover, kinship placements are poorly compensated by the state in comparison to traditional foster homes.¹²⁵ For example, in Texas, kinship caregivers are entitled to less than half the money per child that a licensed nonrelative foster parent receives for a basic level of care.¹²⁶ For those that took in children without a Child Protective Services case, they often receive nothing.¹²⁷

¹¹⁸ Bartlett, *supra* note 110, at 124.

¹¹⁹ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 6-7.

¹²⁰ *See* Bartlett, *supra* note 110, at 154.

¹²¹ *Id.* at 130.

¹²² *Id.* at 153.

¹²³ *Id.* at 154-55.

¹²⁴ *Id.* at 157.

¹²⁵ *Id.*

¹²⁶ Asgarian, *supra* note 28.

¹²⁷ *Id.*

V. BENEFITS OF INFORMAL KINSHIP

a. Policy and Cultural Benefits

While this Note focuses on kinship agreements that the state informally effectuates, not all informal kinships are involuntary and coercive. In many instances, there are great benefits to informal kinship. Many placements happen organically.¹²⁸ Families are free to define their care structures for their children.¹²⁹ Kinship caregiving is significantly more common in the United States than it was decades ago.¹³⁰ Rates of kinship caregiving participation appear higher in urban areas like New York City, Detroit, Chicago, and Los Angeles.¹³¹ However, only a small minority of children residing with their relatives are in a formal arrangement through the foster care system.¹³² In America, millions of children live in kinship households, but only an estimated 131,000 children are in formal placements.¹³³

Kinship has a long history that is woven into the norms of many cultures.¹³⁴ Informal kinship is particularly prevalent in the Black Community.¹³⁵ The Anglo-American ideal of the nuclear family model was not traditional amongst Black families.¹³⁶ The ideology that the community shares responsibility for its children has historical roots in the traditions brought by enslaved people to the United States.¹³⁷ They believe in shared parenting across generations.¹³⁸ Kinship caregiving practices are part of a range of strategies that Black families use to cope with economic, social, and political pressure.¹³⁹ Their strength and support for their community allows Black families to manage life stressors like poverty and discrimination.¹⁴⁰ Social scientists have revered the success of Black kin networks' abilities to meet the challenges of raising children under immense stress and racism.¹⁴¹

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Coupet, *supra* note 51, at 603.

¹³¹ *Id.*

¹³² *Id.* at 603-04.

¹³³ *Id.* at 604.

¹³⁴ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 17.

¹³⁵ Coupet, *supra* note 51, at 606.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 606-07.

¹⁴¹ *Id.*

Policy wise, kinship caregiving preserves family, community, and cultural ties.¹⁴² In the Family First Act passed in 2018, Congress also promoted foster care prevention.¹⁴³ A good number of jurisdictions and child protection workers are opposed to kinship foster care because they believe it creates a system that “pays relatives to care for their family members.”¹⁴⁴ To continue, informal kinship prevents children from becoming wards of the state.¹⁴⁵ The government incentivizes low-cost and safe child placements out of the foster care system.¹⁴⁶ Also, during the pandemic, states are likely to face severe budget cuts that may increase the likelihood of the use of the hidden foster care system.¹⁴⁷ The child welfare system is greatly flawed in that it is punitive to the family by nature and it assumes that parents are solely responsible for the care of their children.¹⁴⁸ During COVID-19, family placements are even more needed as kinship placements are more likely to take entire sibling groups together rather than separating the children and further traumatizing them.¹⁴⁹ Similarly, the pandemic has made frequent and adequate visitation a particular issue in foster care.¹⁵⁰ Kinship families are dedicated to assist the children in their care remaining connected to their parent through safe, socially distant or virtual means.¹⁵¹

b. Mental Health Benefits

The removal process of a child from the custody of their parents to the foster care system is traumatic.¹⁵² When children are removed and transferred to a new environment, children are too often traumatized.¹⁵³ As the children are placed with strangers, they feel a sense of loss and ambiguity.¹⁵⁴ Children in non-kinship placements are more at risk for physical abuse as well as emotional and medical neglect.¹⁵⁵ Similarly, the removal process has negative mental and social health outcomes on the

¹⁴² *Id.*

¹⁴³ Gupta-Kagan, *supra* note 1, at 894.

¹⁴⁴ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 5.

¹⁴⁵ *See* Bartlett, *supra* note 110, at 142.

¹⁴⁶ *Id.* at 129.

¹⁴⁷ Schwartz & Krebs, *supra* note 23.

¹⁴⁸ Cray, *supra* note 112,

¹⁴⁹ Schwartz & Krebs, *supra* note 23.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Vivek Sankaran et. al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1166 (2019)

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Jennings, *supra* note 49, at 9.

parent.¹⁵⁶ For example, mothers whose children were removed and placed in foster care have increased rates of anxiety and substance use disorder diagnoses within two years of being separated.¹⁵⁷ Institutions are not meant to raise children. Studies show that children raised in an institution like the foster care system exhibit higher incidences of psychosocial disorders and face difficulties in building relationships with others.¹⁵⁸ The horrible impact of children in formal foster care is often irreversible.¹⁵⁹ These negative consequences of the formal foster care system can be circumvented with the use of informal kinship placements.

Children in kinship caregiving families enjoy positive mental health benefits. Data from the National Survey of Child and Adolescent Well-Being shows that these placements demonstrate better outcomes for children on physical, cognitive, and skills-based domains in comparison to nonrelative placements.¹⁶⁰ The children also report having more positive perceptions of their placement.¹⁶¹ They report liking who they live with and feeling loved by their caregivers.¹⁶² These children are also less likely to run away.¹⁶³ In their familial placements, the children perceive a greater deal of love, safety, and stability than those placed with non-kin.¹⁶⁴

VI. POSSIBLE SOLUTIONS

a. Increasing Community Care and Kinship Support

Black and impoverished families need the space to develop their families. The paternalistic foster care system stifles their familial structures. When considering solutions to the child welfare system, the best solution would come from those who are most impacted by it. Therefore, because Black families are grossly over-represented in the system, it is essential that they are the engineers of reform and progress instead of detached, White legislators. Alan Dettlaff, the head of the University of Houston's Graduate School of Social Work and a founder of a network of organizations that promote the abolishment of the child welfare system, states, "it's about trusting Black families and communities

¹⁵⁶ *Id.*

¹⁵⁷ Sankaran, *supra* note 152, at 1170.

¹⁵⁸ Jennings, *supra* note 49, at 9.

¹⁵⁹ *Id.*

¹⁶⁰ Coupet, *supra* note 51, at 607.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 608.

to take care of their children.”¹⁶⁵ He suggests that financial support can be given directly to the families in need rather than to non-relative foster parents in the welfare system.¹⁶⁶

Advocates for kinship care believe that state custody and the strictures of licensed foster care should not be the only path for these caregivers to receive specialized support.¹⁶⁷ They argue that community-based services should be available to all kinship families in an equitable, need-based fashion.¹⁶⁸ Services that prioritize involvement in the formal foster care system over need neglect so many informal kinship families across the United States.¹⁶⁹ In the COVID-19 era, the families who may be enduring dire health and safety circumstances are excluded from the already-limited resources that are only available to formal kinship placements.¹⁷⁰ The community-based model of support focuses on building a more consistent network of support groups for the families, as well as on better coordinating existing government support.¹⁷¹ The intent is to give families access to the resources on their own terms and needs without state-forced intervention.¹⁷² The support of more community-based care groups and services can create a more equitable system of supplying services to needy families.

b. Expanding the Right to Counsel

Parents already have a right to counsel in proceedings of neglect and abuse.¹⁷³ However, this right may arrive too late for those whose safety plans and kinship diversion never trigger a legal process.¹⁷⁴ Gupta-Kagan in reference to the hidden foster care states, “[b]ecause no court oversight follows, there are no checks and balances on the agency’s decision that children must be separated from their parents. No lawyers for the parents challenge whether the parent truly abused or neglected the child, whether any maltreatment threatened imminent harm, or whether alternatives to a parent-child separation existed, and no judges determine whether such a separation is truly necessary.”¹⁷⁵ Thus, to prevent the negative consequences of such interaction between a state actor and a parent that

¹⁶⁵ Asgarian, *supra* note 28.

¹⁶⁶ *Id.*

¹⁶⁷ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Schwartz & Krebs, *supra* note 23.

¹⁷¹ ANNIE E. CASEY FOUNDATION, *supra* note 33, at 8.

¹⁷² *Id.*

¹⁷³ Gupta-Kagan, *supra* note 1, at 877.

¹⁷⁴ *Id.*

¹⁷⁵ Gupta-Kagan, *supra* note 29.

results in the removal of a child should trigger a right to counsel, regardless if an official petition was filed.¹⁷⁶ The Children's Bureau made federal funding available for pre-petition representation.¹⁷⁷ Also, the Biden Administration should collaborate with the states to ensure that parents are appointed such representation.¹⁷⁸ The appointment of pre-petition counsel ensures that these separations occur only when in the best interest of the parent, when necessary, and when legally justifiable.¹⁷⁹ Lawyers are essential to parents who need help navigating and negotiating safety plans.¹⁸⁰

All children should be granted the right to counsel when the involvement of a state actor results in their removal from the home. This solution, like the parent's right to counsel, acts as a barrier against due process violations from the state. Several states explicitly require the appointment of legal counsel for the child in neglect and abuse proceedings.¹⁸¹ This Note argues that the appointment of legal counsel for these proceedings should be federally mandated to protect the rights and interests of the child. The child's wishes are important and often determinative in cases, as the child is a party in the proceedings.¹⁸² This right to counsel will empower the children.¹⁸³ Rather than leaving the children legal limbo, their counsel ensures that the child's wishes are considered or at least that the child can access the Court.¹⁸⁴ The desire for children to have counsel stems from an empowerment rights perspective that recognizes the child's power and autonomy.¹⁸⁵ According to this perspective, the removal of a child over the child's objections would be an unacceptable response to allegations of abuse or neglect, especially if the child never has their day in court.¹⁸⁶ In a system where practices are racist and classist¹⁸⁷, the child represented by independent counsel who advocates for their client's wishes serves as a safeguard from an overly paternalistic system.¹⁸⁸ Instead of perpetuating the children's

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Gupta-Kagan, *supra* note 1, at 902.

¹⁸¹ Katherine Hunt Federle, Children's Rights and the Need for Protection, 34 *Fam. L.Q.* 421, 425 (2000).

¹⁸² *Id.* at 427.

¹⁸³ *Id.* at 437.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ This Note takes the opinion that laws and practices which have racist and classist effects are racist and classist, despite the intent of the legislator or practitioner.

¹⁸⁸ *See* Federle, *supra* note 181, at 426.

vulnerabilities and dependencies, the attorney has a legal responsibility to take those children's wishes and claims seriously.¹⁸⁹

Legal representation improves the parties' engagement in the case.¹⁹⁰ It can lead to individualized safety plans that consider the interests of the parent and the child.¹⁹¹ Furthermore, having all parties legally represented is likely to trigger internal improvement for Child Protective Services agencies.¹⁹² When external lawyers become involved, internal agency lawyers become involved too, allowing for the better counselling of child protection workers.¹⁹³ Legal representation can often accelerate the process and provide positive outcomes.¹⁹⁴ Finally, the Children's Bureau expanded Title IV-E funding eligibility that would allow parents to receive representation.¹⁹⁵ This reform expands the possibility of significant raises in funding so that both parent and child representation is possible.¹⁹⁶ The costs are simply worth incurring when it is pertinent to a fundamental, constitutional right.

c. Reducing Barriers in Licensing of Foster Parents

Foster care licenses require a lot of effort to acquire.¹⁹⁷ They place a great burden on the foster parents trying to achieve them.¹⁹⁸ Some of the licensing barriers are inherently exclusionary toward impoverished families.¹⁹⁹ Others are overly paternalistic and ethnocentric to the Anglo-American ideal of family. The policy intent behind licensing standards is ensuring the appropriate and safe placements of foster children.²⁰⁰ However, the licensing system in its current state is discouraging possible kinship caregivers from utilizing formal kinship, as it relies on standards that pertain more to wealth and cultural bias than safety.²⁰¹ In this situation, the hidden foster care system becomes the only practical alternative to keep children with caring relatives.²⁰² Changes to the licensing system can

¹⁸⁹ *Id.* at 435.

¹⁹⁰ Gupta-Kagan, *supra* note 1, at 902.

¹⁹¹ *Id.*

¹⁹² *Id.* at 873.

¹⁹³ *Id.* at 903.

¹⁹⁴ *Id.*

¹⁹⁵ Schwartz & Krebs, *supra* note 23.

¹⁹⁶ *Id.*

¹⁹⁷ See ANNIE E. CASEY FOUNDATION, *supra* note 33.

¹⁹⁸ *Id.*

¹⁹⁹ See Gupta-Kagan, *supra* note 1, at 890.

²⁰⁰ *Id.* at 841.

²⁰¹ *Id.* at 873.

²⁰² ANNIE E. CASEY FOUNDATION, *supra* note 33, at 4.

incentivize families to partake in formal kinship. In general, the changes can improve the foster care system's inclusivity.²⁰³

Licensing homes for foster care placements create a plethora of barriers that could scare away kin caregivers and parents who wish to receive financial benefits and services from the state. These families may fear that the kin may not meet the licensing requirements.²⁰⁴ Then, the families are left with no choice but to remain in the hidden foster care system.²⁰⁵ Furthermore, the lack of federal oversight of this system has allowed for dramatic variations in licensing from state to state.²⁰⁶ For example, Arkansas, Colorado, Missouri, Nevada, Oklahoma, and Utah all have standards that may potentially cause discrimination against rural families.²⁰⁷ Some standards, such as the aforementioned, are problematic and simply not necessary.

Especially in COVID-19 where formal foster placements are harder to find, the Note argues that some of the standards must be reformed or abolished altogether. Initial training standards, which require foster families to receive some form of prior training, must become consistent and accessible to families who struggle to attend the trainings.²⁰⁸ Home studies rely on subjective opinions from case management that can promote cultural bias.²⁰⁹ Furthermore, strict square footage requirements act as an arbitrary licensing barrier and should be removed.²¹⁰ Size requirements are inherently classist and ethnocentric. Different cultures utilize space and living arrangements differently, but that does not automatically translate into an inability for certain people to be adequate caregivers. As some states do not require substantiated evidence or support before denying a license over an indictment, open or pending case of abuse or neglect, abuse and neglect background checks require federal uniformity.²¹¹ Pursuant to the Adam Walsh Protection and Safety Act of 2006, all states and the District of Columbia are required to do background checks on foster parent applications.²¹² At least 21 states disqualify potential foster parents for crimes beyond those outlined in the Walsh

²⁰³ See generally, Ana Beltran & Heidi Redlich Epstein, *Improving Foster Care Licensing Standards around the United States: Using Research Findings to Effect Change*, GRAND FAMILIES (last updated Feb. 2013).

²⁰⁴ ANNIE E. CASEY FOUNDATION, *supra* note 33.at 4.

²⁰⁵ *Id.*

²⁰⁶ See generally, Beltran & Epstein, *supra* note 203.

²⁰⁷ *Id.* at 7-8.

²⁰⁸ *Id.* at 10.

²⁰⁹ *Id.* at 11.

²¹⁰ *Id.* at 13.

²¹¹ Beltran & Epstein, *supra* note 203, at 14.

²¹² *Id.* at 15.

act.²¹³ Some states, such as Florida, go so far as to prohibit driving violations.²¹⁴ Coupled with the hyper-incarceration of Black and Brown bodies, this standard of licensing is inherently racist. The licensing requirements should weigh the totality of the circumstances and consider the possible rehabilitation of the kin caregiver before denying such placements.

Finally, the Adoption and Safe Families Act prohibits a two-tiered system of licensing that creates separate standards for relative caregivers.²¹⁵ This law requires kinship caregivers to meet the same approval standards as non-relative foster family homes.²¹⁶ The unclear language of the Act resulted in 27 states changing their standards.²¹⁷ 18 of those states implemented stricter licensing standards for relatives than before the adoption of the Act.²¹⁸ There should be a federal process that facilitates the licensing of relatives. For example, in Hawaii, relatives are not required to complete training prior to licensing.²¹⁹ Furthermore, procedures can be in place to expedite the process. New York's process allows relatives to receive a court hearing that places their child in their care after they submit the application fairly quickly.²²⁰ In addition to an expedited process, the states should make licensing waivers public knowledge and more accessible. Some families are unaware that the state can and will waive certain standards, such as not being able to speak English, if the child protection worker determines it is appropriate.²²¹ Kinship caregivers would do better to receive waivers that are easy to understand and complete so that they may receive licensing.

d. Relying on Technology

In the age of COVID-19, the reliance on technology is pivotal to our society's safety and success. This Note argues that the child welfare system should utilize technology in new and creative ways to regulate the hidden foster care system. For families already involved with the system, multiple functions of the system were migrated to a virtual format.²²² Through the use of technology, in-home services can be managed without the need for physical intervention by the state. Similarly, user-friendly

²¹³ *Id.*

²¹⁴ *Id.* at 16.

²¹⁵ *Id.* at 17.

²¹⁶ *Id.* at 18.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *See* Stewart & Latham, *supra* note 6.

apps can be designed to connect informal kinship caregivers, parents, and children with support groups and legal advice. Programs can be developed that manage safety plans, track the plans durations, and require feedback from the parents. This technology will also allow for agencies to begin to track these informal placements and their outcomes. Gupta-Kagan viewed data collection by the states to be vitally important in the informed oversight of the hidden foster care system.²²³ COVID-19 may be exasperating the foster care system, but it is also catalyzing innovative practices within the foster care system that are less physically intrusive on families.

VII. CONCLUSION

The hidden foster care system is a lawless place with extremely destructive potential. Without regulation and support, families will find themselves at the mercy of the state. This Note maintains that the financial incentives perpetuated by legislation and policy are insufficient motivators for the obstruction of familial due process. The rights of families are precious. The safety of children at risk of removal is too important to leave hidden. This Note does not point to any single solution. While it does divulge into some solutions, it is clear that those are not comprehensive. Kinship caregivers require financial support and community help to provide for these children. The complexities of the child welfare system are endless. Some organizations believe that informal kinship care is a solution to much of the strife that the formal foster system causes.²²⁴ These same organizations call for the abolition of child welfare system.²²⁵ This Note does not suggest that informal kinship is less than the formal foster care system; rather, it argues that the hidden foster care, in its present function, is left to the coercive devices of the state. Gupta-Kagan calls for immediate attention from the Biden Administration to the national issue of coercive child removal in a pandemic²²⁶, and this Note agrees that national attention to the system is needed. The shadows of hidden foster care are too dark to remain unregulated and underfunded, especially at the expense of Black and Brown families.

²²³ Gupta-Kagan, *supra* note 29.

²²⁴ Asgarian, *supra* note 28.

²²⁵ *Id.*

²²⁶ Gupta-Kagan, *supra* note 29.