Creating a Strong Legal Preference for Kinship Care

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One new to our field would be forgiven for thinking that the law must favor placing foster children with kin rather than with strangers. After all, individuals and organizations from across the ideological spectrum endorse kinship care, government publications describe kinship care as "the preferred resource" for placing children who cannot live at home with a parent[1] and, after steady increases over multiple decades, authorities now place more than one-third of all foster children with kin.[2] And decades of evidence establish that kinship care is generally more stable and serves children's health and well-being better than living with strangers,[3] a point so well accepted that it needs no further elaboration here.[4]

So, one should expect the law to strongly favor kinship care over stranger foster care. But it largely does not. Instead, the law grants child protective services (CPS) agencies wide discretion to determine whether to place foster children with kinship caregivers. As a result, any meaningful preference for kinship care over stranger foster care varies significantly by jurisdiction. Putting any preference into practice is subject to the whims of CPS agencies and the judgment of individual caseworkers and family court judges regarding specific kinship caregivers.

Absent laws requiring such a meaningful preference, not every state and not every county has seen relatively higher rates of kinship placements over recent years. Even where such increases have happened, the law does not prevent a change in agency administration or agency policy from significantly impacting the kinship care rates (and our field is certainly susceptible to dramatic changes in practice following high-profile cases, even if they are outliers). And individual children, parents, and kinship caregivers who would prefer kinship care to stranger foster care are left without the powerful legal remedies they deserve when agencies use their discretion to keep children away from kinship caregivers unnecessarily.

This state of the law can lead to significant harm. Consider the death of Ma'Khia Bryant, a Black foster child in Ohio shot to death by police during an incident outside her non-kinship foster home.[5] After

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[1] U.S. Dep't of Health and Human Servs., Administration for Children and Families, Administration on Children, Youth, and Families, Children's Bureau, Placement of Children with Relatives 1 (2018), https://www.childwelfare.gov/pubPDFs/placement.pdf.

[2] The federal government reports that 35 percent of all foster children on September 30, 2020 lived in a "foster family home (relative)." U.S. Dep't of Health & Human Servs, Admin. for Children and Families, Admin. On Children, Youth and Families, Children's Bureau, The AFCARS Report: Preliminary FY 2020 Estimates as of October 4, 2021 – No. 28 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf. That compares, for instance, with 24 percent on September 30, 2005. U.S. Dep't of Health & Human Servs, Admin. for Children and Families, Admin. On Children, Youth and Families, Children's Bureau, The AFCARS Report: Preliminary FY 2005 Estimates as of September 2006 (13) (2006), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport13.pdf.

[3] For recent summaries of this research, see Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 Child Legal Rts. J. 101, 104-08 (2019).

[4] The point does, however, need a caveat: Those defending the widespread family separations caused by the present child protection system can rhetorically point to frequent use of kinship care as a way distract from those family separations. It is essential to recognize that when the state separates a parent and child and places the child with a kinship caregiver, it is still imposing a harmful family separation. In this context, the value of kinship care is that it is generally better than the alternative – living with strangers or in institutions – and that is the comparison on which this article focuses.

[5] The facts in this paragraph are taken from the New York Times' exhaustive account of her case. Nicholas Bogel-Burroughs, Ellen Barry & Will Wright, *Ma'Khia Bryant's Journey Through Foster Care Ended with an Officer's Bullet*, N.Y. Times (May 8, 2021), https://www.nytimes.com/2021/05/08/us/columbus-makhia-bryant-foster-care.html. For a critique of the handling of kinship care in this case and argument to "exhaust all other options" before placing a child with strangers, see Vivek Sankaran, Ma'Khia Bryant's Story Reveals Flaws in Foster Care System, The Imprint (May 31, 2021 7:00 PM), https://imprintnews.org/opinion/makhia-bryants-story-reveals-flaws-in-foster-care-system/54943.

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the CPS agency removed Ma'Khia from her mother it placed her with her grandmother, where she stayed for the next 16 months. But when her grandmother's landlord discovered Ma'Khia was there, he evicted the family. Rather than help the grandmother defend against the eviction, or help her obtain alternative family housing, or even permit the grandmother to take the children into a hotel temporarily while she sought alternative housing on her own—all steps the law might have required if it contained a strong kinship placement preference—the agency took Ma'Khia away from her grandmother and placed her with strangers. A series of short-term placements followed, ultimately leading to the turbulent final placement and Ma'Khia's death at the hands of the police. The case did not need a deadly end to illustrate the point that the law and legal system failed to keep Ma'Khia living with her grandmother rather than a succession of strangers.

Other cases appear to raise serious questions about whether all agencies truly treat kinship placements as the "preferred resource."[6] Consider a few headlines from this past summer. In one Hawaii case, authorities chose to place a child with strangers over the child's grandmother, who clamored for custody for shifting reasons—a desire to keep the child from living with someone who was mourning the loss of her daughter (the child's mother), and disparaging (and subsequently retracted) statements from the grandmother's former partner.[7] Multiple Florida families accuse agencies there of avoiding potential kinship placement, including in pending litigation.[8] A California agency's alleged failure to identify and seriously consider kinship placements has also become the subject of litigation.[9] In an Oregon case, the agency decided to move a child to kinship caregivers—but not until three years after the kin initially sought custody, with no explanation for the delay.[10]

The Law Gives Agencies and Courts Wide Discretion to Decide Whether to Use Kinship Care

While there is now a consensus that kinship care is generally better for children, the law in most states does not generally impose a strong preference for kinship care. Instead, agency and judicial practice has warmed to using kinship care more in some jurisdictions, without much change in the underlying law. This leaves agencies and courts with wide discretion on whether to use kinship care in individual cases and what steps—if any—to take to overcome obstacles to initiating or maintaining kinship placements.

When family courts order children removed from their parents, little law governs where courts may order them placed. Federal law disfavors congregate care,[11] but there is no federal substantive provision that makes it difficult for states to place a foster child with strangers when kinship caregivers are available. Federal law requires state agencies to identify adult family members that a child is in foster care and inform them that they can seek custody,[12] a nudge in the direction of a kinship placement preference. That requirement is not always followed,[13] and even when it is, it does not actually create such a preference. Instead, federal law only requires states to "consider" giving preference to kin when determining where to place children that they separate from their parents. Even that "consideration" is further qualified—the kinship caregiver must "meet all relevant State child protection standards," without defining what is relevant.[14] Federal law does not require states to actually place children with these family members, nor does it require states to consider such family placements before placements with strangers, nor does it require CPS agencies to work to remove obstacles to such family placements, nor does it provide for meaningful remedies if states violate the modest requirements that do exist.

Some states' statutes and case law do explicitly preference kinship placements.[15] But even where placement hierarchies exist, agencies and courts can divert from kinship preferences by asserting vague substantive standards exist, such as "good cause"[16] or "best interests," which functionally give agencies discretion to determine whether to trigger kinship placement preferences.[17] Multiple state statutes create a kinship placement preference but only for kinship caregivers approved by the agency—effectively giving the agency power to determine whether to approve a family.[18] State laws generally do not impose any specific obligation on agencies to overcome obstacles to preserving or maintaining a kinship placement.[19] And many states simply list possible placement options with no hierarchy among them.[20] (Ohio, where the state agency removed Ma'Khia Bryant rather than help her remain with her grandmother, is among the states without a kinship placement preference.)[21]

The result of these laws is to give tremendous power and discretion to CPS agencies. Judges use statutory provisions to place children in agency custody,[22] leaving agencies with wide discretion

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[6] I thank Richard Wexler and the National Coalition for Child Protection Reform blog, which compiled news stories about the cases in this paragraph.

[7] John Hill, *She Took Her Fight for her Grandson Public. A Hawaii Judge Said She Went Too Far*, Honolulu Civil Beat, June 23, 2022, https://www.civilbeat.org/2022/06/she-took-her-fight-for-her-grandson-public-a-hawaii-judge-said-she-went-too-far.

[8] Florida now faces federal litigation over repeated alleged failure to meet existing, minimal legal requirements regarding kinship care, including by pointing to a variety of flimsy reasons for refusing to place children with particular relatives. Complaint, *ABCD v. DeSantis*, Case No. 4:22-cv-00222-AW-MAF (N.D. Fla. June 15, 2022), available at https://www.abcactionnews.com/news/local-news/i-team-investigates/lawsuit-dcf-accused-of-keeping-kids-from-relatives-adopting-them-to-system-connected-strangers. For a summary of some such claims, see Katie LaGrone, *More families accuse DCF of keeping relatives from getting custody of young family members*, ABC-WFTS (July 14, 2022), https://www.abcactionnews.com/news/state/more-families-accuse-dcf-of-keeping-relatives-from-getting-custody-of-young-family-members.

[9] *See, e.g.* Ishani Desai, *Maternal grandfather of Cal City toddlers files claims against CPS*, June 19, 2022, https://www.bakersfield.com/news/maternal-grandfather-of-cal-city-toddlers-files-claims-against-cps/article_0ca7bdfa-ef38-11ec-af45-bb71ceaa98dc.html (describing case in which grandparent alleged county CPS agency failed to explore kinship placement before placing young siblings with strangers who allegedly murdered the children).

[10] Colby Enebrad, *Biological relatives of foster child speak out after protests*, Central Oregon Daily News, Aug. 25, 2022, https://centraloregondaily.com/%E2%96%B6%EF%B8%8F-biological-relatives-foster-child-speak-out-after-protests/.

[11] Federal funding rules now limit reimbursement for congregate care facilities by imposing a set of requirements on such facilities and procedures for placement in them. 42 U.S.C. § 672(k)(2) – (4).

[12] 42 U.S.C. 671(a)(29).

[13] *See, e.g.,* In the Matter of Richard HH. V. Saratoga county dep't of Soc. Servs., 163 A.D.3d 1082, 1082-85 (N.Y. App. Div. 3d Dep't 2018) (describing and admonishing family court and agency for failure to comply with this requirement).

[14] The full text provides that "the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that that the relative caregiver meets all relevant State child protection standards." 42 U.S.C. § 671(a)(19).

[15] *E.g.* Ariz. Rev. Stat. § 8-514(B) (creating "order for placement preference"); Fla. Stat. Ann. § 39.521(3) (creating placement hierarchy of parents, other kin, and agency custody); Miss. Code Ann. § 43-21-609(b) (same); Or. Rev. Stat. § 419B.192(1) (preference for kinship placement); S.C. Code § 63-7-1680(E)(1) (requiring agency placement plan to give "preference" to a kinship placement absent "good cause to the contrary"); W. Va. §49-4-604(c) (providing "sequence" of dispositional options to consider); *In re J.W.,* 226 P.3d 873, 881 (Wyo. 2010) (finding "a compelling preference" for "placement with nuclear or extended family members"); Rev. Code of Wash. § 13.34.130(3) (requiring placement with a relative absent a risk to the "health, safety, or welfare of the child").

[16] S.C. Code § 63-7-1680(E)(1).

[17] For instance, Arizona courts have ruled that family courts need not even make a best interest finding in diverting from placement hierarchies; the court need only "include placement preference in its analysis of what is in the child's best interest." *In re Antonio P.,* 187 P.3d 1115, 1118 (Ariz. Ct. App. 2008).

[18] For an example of weak statutory language, see Ala. Code § 38-12-2, which directs the agency to "attempt to place the child with a relative for kinship care," but then in the very next sentence, clarifies that such placement is contingent on the agency's decision to grant a foster care license or not consistent with the agency's own policies. *See also* Ark. Ann. Code § 9-27-303 (providing that a kinship caregiver "shall be given preferential consideration for placement," but only if the agency determines that the kin "meets all relevant protective standards and it is in the best interest of the child to be placed with the relative or fictive kin"); N.Y. Fam. Ct. Act § 1017(2)(a)(ii)-(iii) (creating a preference for placement with kin unless their "home . . . is found unqualified").

[19] Agencies, of course, have an obligation to make reasonable efforts to achieve a child's permanency plan, and in some cases, that could include an obligation to overcome obstacles to make or maintain a kinship placement.

[20] *See, e.g.,* D.C. Code § 16-2320(a)(3)(A) (disposition statute which does not preference kinship placements); GA. Code Ann. § 15-11-212(a)(2) (same); Me. Rev. Stat. tit. 22 § 4036 (1) (same); Mo. Rev. Stat. § 211.181.1 (same); Mont. Code Ann. § 41-3-438(3) (same); Ohio Rev. Code Ann. § 2151.353(A) (same); Pa. Cons. Stat. § 6351(a) (same).

[21] *Id.*

[22] *E.g.,* D.C. Code § 16-2320(a)(3)(A); Ga. Code Ann. § 15-11-212(a)(2)(B); Mo. Rev. Stat. § 211.181.1(2).

to determine where foster children actually live. Absent clear laws preferring kinship care to living with strangers, CPS agencies can decide whether to license kin as kinship foster parents and place children with kinship caregivers, and when to place children with strangers instead.

With this discretion, agencies can refuse to place children with kin for a variety of reasons which are subject to biases based on the family member's race or financial status. Kinship caregivers are disproportionately poor, especially when compared with stranger foster families,[23] so the potential for bias is particularly serious. When seeking a foster care license, kinship caregivers and, in most jurisdictions,[24] all adults in their homes (including their partners, adult children, and other family members) must submit to criminal background and child protection registry checks. Agencies may view any issue, no matter how old or minor, as problematic. The racial and class disparities within the criminal justice system have a disparate impact on families of color and poor families from criminal background checks. Further, the racial and class disparities in the family regulation system—which substantiates hundreds of thousands of disproportionately Black, Indigenous, and poor parents and caregivers for the vaguely defined condition of "neglect"—have a disparate impact on families of color and poor families.

These licensing rules also create the potential for unwarranted state intervention in families. Consider a situation in which a kinship caregiver's adult child has a conviction on their record. Agencies may put the caregiver in an impossible situation, demanding that they kick out their adult child in order to be licensed to become a foster parent to a different relative. Other licensing criteria directly reflect a kinship caregiver's financial status rather than their ability to care for the child. Such criteria include the number of bedrooms, or factors designed to guard against hypothetical safety risks, such as the presence of smoke detectors and fire extinguishers.[25]

The law structures these issues as creating presumptions against agencies approving kinship placements. The default is that kinship caregivers seeking foster care licenses must meet the same licensing standards as strangers seeking to become foster parents.[26] Indeed, meeting "all relevant State child protection standards" is a pre-requisite just to trigger the weak obligation of a state to "consider" preferencing kinship placements.[27] When some negative fact appears in a family member's licensing file—a marijuana possession conviction, an old substantiation for neglect due to an ex-partner's violence, a necessity to put multiple children (perhaps of different sexes) in one bedroom, or the like—the agency must decide whether to grant the kinship caregiver a waiver.[28]

Under this legal structure, kinship caregivers are judged on whether they meet licensing standards developed in the abstract and, if they do not, whether they deserve an exception to those standards. The law does not require kinship caregivers to be judged based on the strength of their relationship with a child or the child's parents, nor does it require kinship caregivers be judged in comparison with the likely alternative. And nowhere does the law require agencies to help overcome obstacles to make kinship placements happen or, as Ma'Khia Bryant's case tragically illustrates, to provide assistance to preserve kinship placements.

Beyond licensing rules, once family courts remove children from parents and place them in agency custody, agencies have wide discretion in choosing placement options. And making such decisions leaves room for a range of subjective judgments about particular family members. For instance, their age (whether they be elderly or young adults), their relationship with the child's parent who is accused of neglect or abuse, or their level of compliance with agency directives. Such decisions

[23] Riehl & Shuman, *supra* note 3, at 109, 111.
[24] The Children's Bureau reports that 31 states require all adults in a potential kinship foster home to have a criminal background check. *Placement of Children with Relatives, supra* note 1, at 3.
[25] E.g. D.C.M.R. tit. 29 §§ 6005.2-3, 6007.16-22.
[26] 42 U.S.C. § 671(a)(10)(A).
[27] 42 U.S.C. § 671(a)(19).
[28] 42 U.S.C. § 671(a)(10)(D).

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leave much room for disagreement and for biases toward kinship caregivers to impact decisions. The current legal structure leaves little remedy for family members, parents, or children aggrieved by an agency's refusal to place children with kinship caregivers.

Kinship Foster Care Rates Vary Significantly By Jurisdiction

Many CPS agencies might respond by asserting that they would surely never oppose a kinship placement for a frivolous reason, only for a real safety concern. Indeed, the increase in the rate of kinship foster placements shows that many agencies have become more welcoming of kinship placements. But that does not mean agencies that are generally kinship-friendly will show proper deference to potential kinship placements in every case. And it surely does not mean that every agency is kinship friendly.

A striking feature of kinship care in the United States is wide variation by jurisdiction in the proportion of foster children that agencies place with kin. When local agencies follow a strong preference for kinship placement, those rates can increase to as high as two-thirds or more.[29] But no statewide rate reaches that high, and most do not come close. In 2020, statewide kinship foster placement rates ranged from seven percent of all foster placements in one state to 54 percent in another (See Figure 1). Such significant variation of kinship care rates has long been a feature of the American foster system.[30]

This variation does not reflect that kinship caregivers are more or less safe in one jurisdiction or another. Kinship caregivers in Delaware and Virginia (states with the two lowest rates of kinship placement among the 50 states, DC, and Puerto Rico) are not less safe than kinship caregivers in Maryland (fifth highest). Kinship caregivers in Kentucky (ranked 49th) are not less safe than those in West Virginia (ranked first). Rather, it shows that some CPS agencies use the wide discretion the law grants them to place many more children with kin than others.[31]

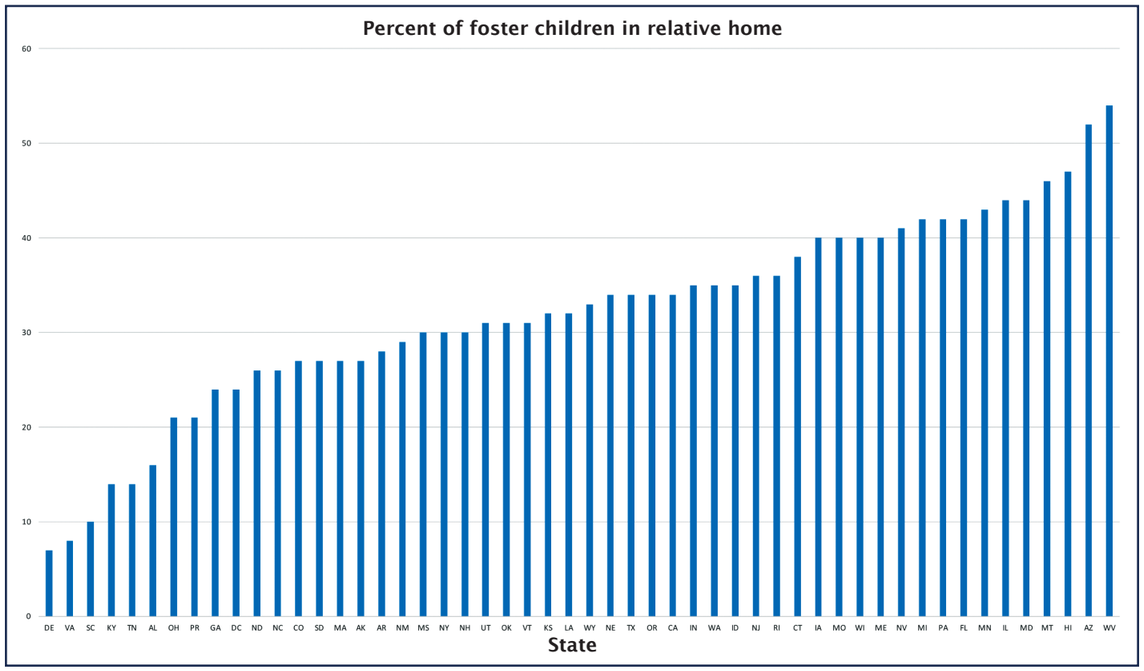

Figure 1. Source: AFCARS, Child Trends, March 2022.[32]

These dramatic variations in the frequency of kinship care illustrate the central point: despite decades of evidence demonstrating the benefits of kinship care, the law largely does not require agencies and courts to actually use kinship care. We do not have a set of laws that require agencies to value kinship placements consistently. Rather, our laws give agencies power to determine whether to pursue kinship placements, with different agencies doing so at vastly different rates. The result is wide disparities in when children can actually benefit from kinship care, including many jurisdictions where children suffer unnecessary separations from family caregivers.

Legal Reforms to Strongly and Consistently Preference Kinship Care

If the state must remove a child from the parents' custody and place the child in the state's custody, the law should impose a strong kinship placement preference consistent with the benefits of kinship care. The goals of such reforms would be to increase kinship care rates in all jurisdictions and in jurisdictions already using kinship care frequently, to provide families with the ability to challenge agency decisions about kinship care, and for the law to reflect the value of kinship care, especially as compared with placements with strangers.

First, state legislatures should require agencies and courts to follow a placement hierarchy whenever a child must be removed from a parent. Other legal parents should have custody when possible, followed by other family members or fictive kin,[33] followed by stranger foster families, followed by congregate care facilities. Whenever an agency (or any other party) seeks to move down that hierarchy, the law should require it to prove why more favored options are impossible,[34] dangerous, or otherwise strongly contrary to a child's best interest.

State legislatures should require any party seeking to overcome a kinship placement preference to

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[29] *See* Judge Leonard Edwards, *Relative Placement: The Best Answer for Our Foster Care System,* 69 Juv. & Fam. Ct. J. 55, 59 (2018) (describing Allegheny County, Pennsylvania); Edwards *supra* note 3, at 7 (asserting that "[s]everal model counties have demonstrated that they can place children with relatives in over 80% of their dependency cases"). Allegheny County currently reports that the "majority placement" – "the placement setting in which a child spends greater than 50% of his/her placement spell in a given year" – was kinship care for 65% of foster children. https://analytics.alleghenycounty.us/2021/01/07/child-welfare-placement-interactive-dashboard/ ("majority placement" tab, last visited July 25, 2022). At any point in time, about 57% of Allegheny County foster children are in kinship care. *Id.* ("PIT" – point in time – tab).

[30] A similar range is evident, for instance, in 2011 data. U.S. Dep't Of Health and Human Servs., Admin. For Children and Families, Admin. on Children, Youth and Families, Children's Bureau, Report to Congress on States' Use of Waivers of Non-Safety Licensing Standards for Relative Foster Family Homes 6-7 (2011), available at http://www.acf.hhs.gov/sites/default/files/cb/report_ congress_statesuse.pdf.

[31] Other variables beyond the scope of this article contribute to the different rates in different states. For instance, states use hidden foster care with different frequencies, and some may have low rates of *formal* kinship foster care but high rates of kinship care via hidden foster care. *See* Josh Gupta-Kagan, *America's Hidden Foster Care System,* 72 Stan. L. Rev. 841 (2020). For instance, South Carolina has reported more than 2,000 children living in kinship care via the hidden foster care system, id. at 858, but only several hundred in kinship foster care (counting licensed kinship homes and court-ordered unlicensed kinship placements). E.g. S.C. Dep't of Soc. Servs., Placement Types for Youth in Foster Care on June 30, 2020, https://dss.sc.gov/media/2534/placement-types-for-children-in-foster-care.pdf.

[32] Each state's data is available at https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states. Child Trends has helpfully created state-specific data based on state submissions to the federal government, which the U.S. Children's Bureau aggregates into the national AFCARS reports. See Child Trends, State-level Data Trends for Understanding Child Welfare in the United States: Companion Guide (2022), https://www.childtrends.org/wp-content/uploads/2022/02/ChildWelfareDataCompanionGuide_ChildTrends_March2022.pdf.

[33] "Fictive kin" refers to individuals with a close family-like relationship to a child or the child's parents, but who are not related biologically or through marriage or adoption. E.g., 29 D.C.M.R. § 6027.3(b). Fictive kin's close relationship with the child or child's parents distinguishes living with them from living with strangers in foster care. As of 2018, the U.S. Children's Bureau reported that only 28 states defined kinship care to include fictive kin. *Placement of Children with Relatives, supra* note 1, at 2. States that have not done so should expand definitions of kin to include anyone with a close family-like relationship with the child or the child's parent that pre-dates agency involvement; those relationships, not biological or legal ties, define kinship care.

meet a significant burden of proof to ensure that a kinship placement preference is meaningful. Current law largely puts the burden on the kinship caregiver—they must show that they meet state licensing standards, or at least grants CPS agencies the discretion to determine whether to waive such standards.[35] That is, the law asks, "Why should the state place this child with this kinship caregiver?" To strengthen kinship placement preferences, the law must frame the question differently: "Why should this child not have the right to live with family members?"

This burden begins with agencies' obligations to find relatives promptly after a child enters foster care and inform them that they can seek custody. If an agency claims that no potential kinship caregivers have been identified, it should establish the efforts it made to identify such individuals. When agency efforts are lacking, courts should not hesitate to order agencies to take such steps.[36]

If an agency wants to place a child with strangers rather than with a proposed kinship caregiver, the agency must prove more than some risks may exist with that kinship placement and more than simply that the agency's licensing process did not approve the placement. No arrangement is risk-free, and the risks of any particular kinship placement must be balanced with the risks of placing children with strangers. The agency instead should have to provide some compelling evidence that the kinship placement presented an unacceptable risk to the child's safety or emotional well-being and one that is significantly greater than placing a child with strangers. A standard like this ensures a real kinship preference, not merely a kinship preference, if agencies decide to support a kinship placement. A standard like this focuses on the essential questions of safety—not only in the abstract but in comparison with the real-world alternatives to kinship care.

The Washington Supreme Court's recent decision in *In re K.W.*[37] provides an example of what a meaningful kinship placement preference ought to mean and what other state courts should follow and other state legislatures should seek to codify.[38] The court recognized a preference for placing children with kinship caregivers, and made clear that agency predictions of a family member's likelihood of passing an agency home study, or past CPS agency involvement does not suffice for overcoming a kinship placement preference.[39]

That essential holding flips the current legal structure in many cases. Currently, kinship caregivers seeking foster care licenses must frequently convince agencies why they deserve a waiver from licensing standards. The meaningful kinship preference required by *In re K.W.* instead requires an agency or any party opposing a kinship placement to prove why any perceived problem with kinship caregivers renders living with strangers better for a child. The agency would have to establish what threat a criminal conviction for a misdemeanor or a relatively minor neglect substantiation poses to the specific child at issue.

The Washington Supreme Court continued by admonishing agencies and family courts to be wary of discretionary decisions based on such factors because they will have a disproportionate impact on low-income families and families of color,[40] and family courts must review agency denials of kinship placements to ensure they are not based on factors which could serve as "proxies for race."[41] Indeed, establishing a stronger kinship preference and a clearer standard for when agencies may place children with strangers can serve to limit the potential for racial or class bias to infect decisions.

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[34] Such proof should include why *any* possible kinship placement is impossible, not simply that one potential placement is.
[35] *E.g.* 42 U.S.C. § 671(a)(10) & (19).
[36] For a description of where the legal process failed to accomplish this at the outset of a case – leaving the matter to be corrected years later on appeal – see Matter of Richard HH, 163 A.D.3d at 1084-85.
[37] 504 P.3d 207 (2022).
[38] In fact, the Washington legislature did recently codify a similar rule, requiring kinship placements unless a risk to the "health, safety, or welfare of the child" existed. Rev. Code of Wash. § 13.34.130(3).
[39] *Id.* at 221.
[40] *Id.* at 220, 221.
[41] *Id. at 222.*

Second, the law should further require CPS agencies to make active efforts to facilitate and maintain placements higher on the hierarchy. This includes strong efforts to identify and explore all potential kinship caregivers and to aid them in making a placement work. When obstacles arise—such as when a child's kinship foster parent faces eviction, and thus the child faces losing a preferred placement—agencies should have to help preserve that kinship placement, as agencies failed to do in Ma'Khia Bryant's case.

Both state legislatures and Congress can enact these reforms. Some state legislatures have already enacted kinship placement preferences,[42] and other states should follow and include provisions to ensure such preferences are meaningful and difficult to overcome. Congress should remove the mushy statutory language that states must "consider" a kinship placement preference[43] and require states to impose such a preference, along with provisions to enforce it.

One recently introduced federal bill illustrates modest steps towards these goals. H.R. 7416, the Promoting Permanency Through Kinship Families Act[44] includes several provisions to enforce a meaningful kinship placement preference. Agencies declining to use kinship placements in individual cases would have to "document the basis for that determination with clear and convincing evidence."[45] Criminal and child protective registry records could not prevent licensing of kinship caregivers "in the absence of particularized information demonstrating that the caregiver poses a current safety threat to the child" or some comparable evidence.[46] States would be prohibited against discriminating against kinship caregivers on the basis of their age.[47] Agencies would be required to make reasonable efforts to maintain kinship placements unless they were either reunifying children with their parents or establish "clear and convincing evidence that remaining in the kinship placement is contrary to the welfare of the child."[48]

Third, to enforce these laws, all states must ensure a strong right to effective counsel for all parties. Note that this does not require providing counsel or standing to kin; at the placement stage, such steps would inappropriately undermine the parent-child relationship and reunification efforts. But vigorous and effective advocacy for parents and children[49] will help identify kinship caregivers and enforce these reformed laws preferencing placement with them. The federal government can further enforce such changes by making the adequacy of agency efforts a part of Child and Family Services Reviews. State agencies that fail to identify kinship resources effectively or place children with available kinship caregivers should lose federal funding; the federal government should not fund placement with strangers or in institutions when kinship caregivers are available.[50]

Conclusion

The law should better reflect the social science evidence showing the benefits of kinship care and the consensus within our field that kinship care is strongly preferable to stranger foster care. Current

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[42] *Supra* note 15.
[43] 42 U.S.C. § 671(a)(19).
[44] H.R. 7416 was introduced by Rep. Karen Bass and co-sponsored by Reps. Mary Gay Scanlon, Sheila Cherfilus-McCormick, Jahana Hayes, and Brenda L. Lawrence. The full text of H.R. 7416 is available at https://www.govinfo.gov/app/details/BILLS-117hr7416ih.
[45] H.R. 7416, § 3(c)(3) (2022).
[46] *Id.* At § 4.
[47] *Id.* At § 5.
[48] *Id.* at § 3(c)(3) (2022).
[49] The proper scope and role of lawyers for children is a topic beyond the scope of this article. For present purposes, I will note that children's lawyers should represent what children want – which will more often be living with family members than strangers – or, for young children unable to voice a desire, their right to live with kin whenever possible.
[50] Child and Family Services Reviews (CFSRs) are described in 45 C.F.R. §§ 1355.31-37 and permit the federal government to impose consequences on state agencies which fail to meet federal standards. See also Vivek S. Sankaran & Christopher Church, Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care, 19 U. PA. J.L. & SOC. CHANGE 207, 234 (2016) (describing the history, process, and function of CFSRs).

law may suggest that direction—such as in the federal provision that states "consider" a kinship placement preference or in state laws that create kinship placement preference so long as the agency has approved it—but largely does not require it. (That should not, of course, stop advocates from seeking stronger legal rulings in individual cases or state courts interpreting existing laws as strongly as possible, as the Washington Supreme Court did in *In re K.W.*)

The status quo is a legal structure that grants agencies and courts too much power and discretion to decide when to use kinship care, results in significant variations by jurisdiction in the use of kinship care, and leaves families without adequate remedies when denied the opportunity to live together. Legal reforms can establish a strong kinship placement preference and requirement that agencies act to achieve and maintain such placements. In jurisdictions with high kinship care rates already, such reforms can codify that practice and help ensure it applies to each individual family and that some future change in administration or judicial personnel does not limit the use of kinship care. In jurisdictions with lower kinship care rates, such reforms can become a powerful tool for improved outcomes and can provide parents and children (and their lawyers and advocates) stronger tools to seek kinship placements and avoid placements with strangers.

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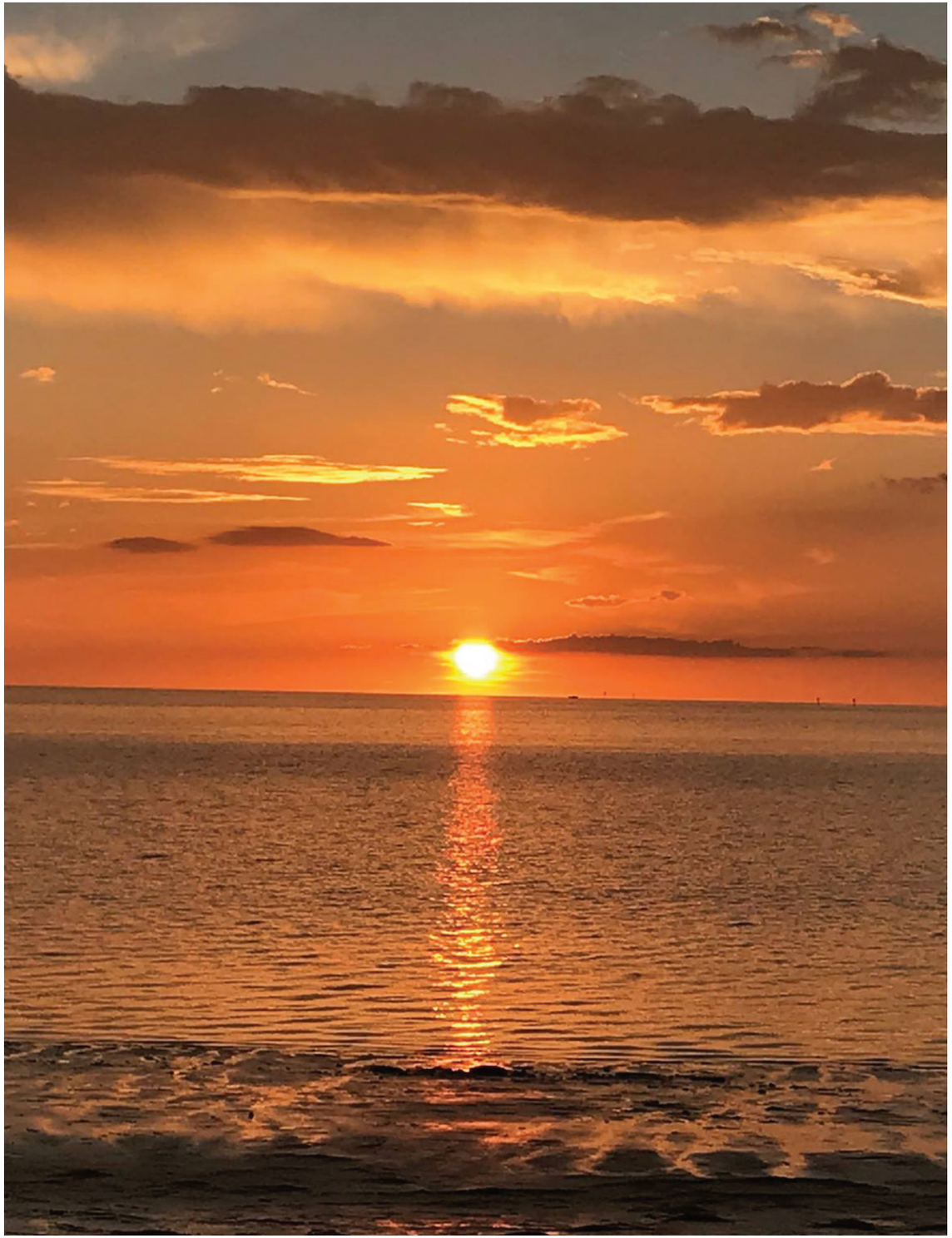

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