

# How 'Shadow' Foster Care Is Tearing Families Apart

Across the country, an unregulated system is severing parents from children, who often end up abandoned by the agencies that are supposed to protect them.

By Lizzie Presser

Published Dec. 1, 2021 Updated Dec. 2, 2021

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When a staph infection killed Molly Cordell's mother just before Halloween in 2015, Molly felt, almost immediately, as if she were being shoved out of her own life. At 15, she and her sister, Heaven, who was a year younger, had no idea where they would go. Their dad had been in and out of their lives for most of their childhood. His grief, as their mother lay dying, sent him spinning. It seemed to the girls that he was on too much meth, and whenever he used, he got mean and crazy. Once, he made Heaven watch him set their mom's Chevy truck on fire. Their older brother, Isaiah, left their home in the foothills of the Great Smoky Mountains when their mom was still alive, and the teenage girls depended on each other. Molly was deaf in her left ear, and her sister always asked others to speak loudly for her. They shared the same group of friends, the same tanks and capri pants. Although Molly had her own bedroom, she slept on the couch in Heaven's.

The girls moved in with their grandmother, up the road from their wood-paneled house in Cherokee County, N.C., a poor, sprawling region at the southwesternmost edge of the state. Their dad lived in a camper in the yard. Their grandmother, too, was trapped in an angry stage of mourning, looking for someone to blame for her daughter's death. She kept telling Molly and Heaven that it was their fault — if only they'd taken better care of their mom, she might be alive. Molly was starting to believe it.

In January 2016, Heaven found Molly on the bathroom floor after downing 27 tabs of Zoloft in an attempt to take her life. The hospital where Molly was admitted alerted the child-protective unit of the county's Department of Social Services, and days later, two caseworkers showed up at their grandmother's house to investigate neglect. The girls knew they needed help. Recently, their dad, who had never been physical with them, pushed Molly facedown on a dirt path. The sisters told the caseworkers that they couldn't handle their grandmother's rage any longer. Molly said that if they left her, she would try to kill herself again. "We thought that maybe they'd place us together or put us in a foster home," Molly told me. "And the only thing they did was they took us away from each other."

Their mom had always said that if anything were to happen, the girls would live with their great-aunt Sonja, who had worked at a domestic-violence shelter, but no one from the department called her. Nor did the caseworkers file a petition in court to take the girls into foster care. Instead, they dropped Heaven off with her friend's parents, Angie and Scott Haney. Molly kept asking, "Can I stay here?" But because Molly had admitted to having suicidal thoughts, caseworkers obtained an involuntary-commitment order to place her in a local hospital, where doctors noted her history of depression and anxiety and transferred her to an inpatient psychiatric facility. Ten days later, as Molly remembers it, a short woman with a loud voice and big teeth showed up. Her name was Tamyra White. Molly knew her daughter through friends, but she barely knew the mother. White said she had spoken with the department, and Molly was coming to live with her.

At first, Molly was thrilled to have her own bed, in a tidy room painted green and pink. She unpacked sweatshirts, decorated with Spider-Man and Ninja Turtles, that Heaven had chosen for her from the boys' rack at Walmart, and her small stuffed animal she called Duckie. But within a couple of days, White announced that Molly didn't need the Vistaril, Wellbutrin or trazodone that the doctors had prescribed, Molly recalls. White flushed the pills down the toilet. (White denies this.) As a stranger in the home, Molly didn't want to start a fight. As she had told her doctors, she feared "heights, spiders, when people get mad at her." No caseworker came to check in. When Molly started receiving \$643 each month in federal survivor's benefits because of her mother's death, she felt resentment from White, who was buying her food and clothes. Molly knew that White had legal authority over her: The department had told her dad to sign a power of attorney. She thought that foster parents received money, but White said she wasn't getting assistance. It seemed awkward to stick around. Molly moved out and began sleeping in friends' beds.

Without a home or medications, Molly numbed her anxiety with alcohol and weed. She drank until she blacked out, pushed away friends. "I didn't have any guidance," Molly says. "No one was telling me, 'No.'" Heaven worried that her sister might die by suicide, so she began saving to make payments for a funeral. The Haney family didn't want Heaven hanging around Molly, whom they viewed as a bad influence, but sometimes, at night, Heaven sneaked Molly into the pristine Haney home. Molly marveled at the packaged salads and

blue Gatorades, the Aveeno face wash and Dove shampoo. Her sister's life appeared perfect. Heaven didn't see it that way. She had things — a bank account, a debit card, the promise of a co-signer on a car. But feeling as if she didn't belong, Heaven was withdrawing into herself. As her own family dissolved, she wanted counseling, which she couldn't get without a legal guardian's signature.

Molly and Heaven attended the same small high school, where everyone knew that their lives had cleaved apart. Heaven curled her fine caramel hair into ringlets and walked the halls in monogrammed sweaters bearing her new family's name. Molly, who has pale skin and silvery blue eyes, wore baggy T-shirts, her dark locks wrapped in a messy bun. Some days, she lugged all her belongings in two duffel bags between classes; she was effectively homeless. Students asked her: "Do you need a place to go? I'll ask my parents if you can live with me." Embarrassed, she brushed most of them off. She started picking fistfights with girls her age; it seemed to Heaven that Molly was adopting her father's anger along with his apathy. *I'm not going to end up like that*, Heaven insisted. She didn't know any other way but to disengage from Molly. Sometimes, when she passed Molly at school, Heaven whispered, "Ew." Molly muttered, "Spoiled rich bitch."



The lawyer Melissa Jackson at a legal office in Waynesville, N.C., with documents from Molly and Heaven Cordell's cases. Elinor Carucci for The New York Times

**It would take** years before Molly and Heaven would learn that neither of them was ever in the foster system. Instead, caseworkers had diverted them to what some scholars call "hidden foster care" or "shadow foster care," in which the legal protections of the formal system disappear. In the traditional child-welfare system, caseworkers investigate reports of mistreatment to make sure a child is safe. The department must try to keep children at home, but if staff members find that the danger is too great, they file for legal custody. In hearings in family court, where children and low-income parents are generally offered free lawyers, judges decide whether children should be absorbed into foster care. They oversee the placements and determine how long children should be separated from their parents. Foster care is paid for by federal, state and sometimes local funds; caseworkers are required to regularly check on children and register updates for a national database. Because keeping the family intact is almost always the long-term goal, child-welfare departments are then responsible for trying to stabilize the family, offering services like anger management and addiction treatment. Only a judge can terminate a parent's rights.

But over the past decade, states have increasingly institutionalized hidden foster care, through statutes and departmental policies. Rather than bringing the results of an investigation before a judge, caseworkers persuade parents to send their children to live with someone they know, often by threatening a foster placement if they refuse. Parents, unsure whether caseworkers have the evidence to remove their children in a court proceeding, choose the option that, at first glance, appears to give them more control.

What the parents rarely know is that, unlike the foster system, the shadow system is not designed to support their children. The government isn't required to ensure the safety of placements with the thorough home visits and health screenings that federal law requires with foster care. Relatives or family friends, often under pressure to take children into their homes, don't receive a boarding fee to raise them; they usually don't even have the legal authority to enroll them in school or take them to a doctor. In many states, departments simply close the cases, ending the assistance that child-welfare workers can provide. Because nobody monitors the children after they are moved, it's impossible to know what happens to them while no one is watching.

Usually, hidden foster care is entered through a "safety plan." Some are basic agreements to mitigate risks to children in the home, but others stipulate that a parent move the child to live with a new caregiver. At least 35 states use safety plans in which parents and caseworkers identify a relative or friend or church member who can take children in while their parents try to address the agency's concerns. Caseworkers may want to move children for any number of reasons: drug use, unstable psychiatric conditions, a lack of heat or running water. The informal arrangements can last weeks, months or years. In many states, there are no time restrictions. These separations can last forever.

A quarter of a million children are taken into formal foster care every year, and by the best estimates, roughly the same number are moved into this shadow system, which child-welfare departments call "kinship diversion" or "voluntary kinship placements," among other names. Most states don't track how many children they divert, but in Texas alone, government workers entered into about 34,000 safety-plan placement agreements in 2014, significantly more than the number of removals into the formal system. The state published the figures after two children died in hidden foster care in 2015. In Houston, a 4-year-old boy shot himself in the head after finding a gun under the bed where he was sleeping in a caregiver's house; because he wasn't in foster care, Texas policy didn't require caseworkers to screen the home for firearms. The same winter, in Dallas, a woman was denied day care assistance for an infant whom caseworkers had placed with her. After she asked her 14-year-old daughter to babysit, the aggravated teenager drowned the infant in a shallow bowl of water.

No federal law governs the shadow system. Although some states have introduced regulations, in many states child-protective departments are not required to offer a path to reunify. "It's a due-process violation all across the country," says Josh Gupta-Kagan, a University of South Carolina Law School professor and the author of "America's Hidden Foster Care System," a Stanford Law Review article published last year. "Family integrity is a fundamental constitutional right," he says, referring to the Supreme Court's reading of the 14th amendment's due-process clause, "and this practice turned it on its head."

Shadow foster care is spurred by twin incentives. It's a cheap solution for underfunded agencies that need to lower caseloads. And, on its face, it is a welcome alternative to the formal foster system, which itself can inflict trauma on children, subjecting many to abuse and neglect. In recent years, dozens of lawsuits have challenged the informal placements. The federal courts agree that caseworkers are breaking the law if they induce these arrangements through threats of foster care when they don't have enough evidence to remove children. But the courts are split when these authorities have some legal basis to file a petition and instead pressure parents to shift the custody of their children. Departments argue that these arrangements are voluntary; parents argue that they're still coercive.

Without access to court-appointed lawyers, parents often can't afford counsel to challenge an agency's decision. It's difficult to prove that caseworkers used threats when discussions about foster care are not documented in writing. If parents sue over a violation of their rights, caseworkers, like police officers, are entitled to qualified immunity for their actions unless they break clearly established law.

No published history examines the American turn to hidden foster care. But many in the child-welfare field say they began noticing the practice in the 1980s. Under President Reagan, funding for a range of family programs was cut, and child-protection services emerged as a key source of support. But the interventions focused on individual responsibility rather than longstanding social inequities. By then, the definition of child abuse had broadened to include psychological harm like "emotional neglect" and "mental injury." States were adopting universal mandatory-reporting laws, requiring every adult to call in if they suspected intentional harm to children. The child-welfare system had once focused on prevention, but deluged with allegations, it morphed into an investigative agency.

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**'Family integrity is a fundamental constitutional right, and this practice turned it on its head.'**

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In the second half of the decade, the AIDS epidemic and the growing use of crack cocaine prompted record levels of child removals, but the government's recruitment of foster families couldn't keep pace. John Mattingly, the director of child-protective services in Toledo, Ohio, at the time, told me that he started hearing that some agencies were taking children from their homes and leaving them with relatives or friends instead of filing petitions in court — hidden foster care before it had a name. Mattingly told me: "We would argue like hell that you can't just drop a child off from a car saying, 'Is that your aunt on the porch?' and then drive away."

By the 1990s, a practice embraced out of scarcity gained a benevolent sheen, as the philosophy of family preservation swept through the field of child welfare. Evidence was mounting that traditional foster care inflicted lasting negative consequences and that placing children with relatives led to better outcomes. Advocates were also pushing for kinship care as an antidote to transracial adoptions, after agencies had moved a disproportionate number of Black children into the homes of white foster families.

In 1996, Congress started requiring states to consider relatives before strangers when placing a child in foster care. If those relatives became licensed foster parents, states had to pay them the same amount they paid strangers. But caseworkers encouraged families to bypass the courts altogether, which allowed states not to pay, says Patricia Rideout, who, as a former consultant for the Annie E. Casey Foundation, a large nonprofit that researches and funds child-welfare work, has advised departments across the country. "Anything that was going to lighten that load and do so in the name of good values like 'family empowerment,' people were like, 'This is great.'" By 1997, a national survey found that more than 283,000 children were living with relatives outside the foster system, in arrangements made by caseworkers. Absent federal regulation, the power to induce these informal placements was ripe for abuse.

**In January** 2017, after bouncing between homes for months, Molly moved to Florence, Ala., to live with her 20-year-old brother, Isaiah. But at 16, she couldn't enroll in school without a legal guardian — a common problem for children diverted into shadow foster care. Heaven told her that their dad needed to sign his rights over to Isaiah. Molly and her brother drove back to their hometown, Murphy, the Cherokee County seat, with a population of 1,600. After calling around, they picked up their father outside a double-wide trailer on the side of a highway. He was shirtless, carrying a toolbox, arguing with imaginary people. They walked him into the hulking Department of Social Services building and escorted him to the child-protective unit, where they met Heaven. Their dad kept pulling casino coins from his pockets and announcing that they were collectibles. "I didn't think they were going to let him sign anything," Molly told me. "But the lady that was in there, she didn't care." (When I spoke to the sisters' father about his daughters' recollections, he couldn't remember several details, but he denied pushing Molly, neglecting his girls and using meth while their mother was dying; he did say he made Heaven watch him burn her mother's truck.) He signed forms titled "custody-and-visitation agreements," which stated that he was giving up custody over both of his daughters — granting Heaven to the Haneyns and Molly to Isaiah — and they all went their separate ways.

A child-protective agency needs a court order to send a foster child out of state; the receiving local agency must agree to ensure that the placement is suitable and supervised and that it meets the child's needs. But no one from Cherokee told officials in Alabama, and Molly received no home visit there. Florence High School wouldn't accept her custody-and-visitation agreement because it had never gone before a judge — the only official who can remove or assign legal custody. It was an extreme version of hidden foster care: The agreement stated that Molly's father had signed over not just physical custody of his daughter, as he would in a safety plan, but legal custody as well. Because it wasn't a proper court order, Molly could only enroll in school as homeless.

Occasionally, Molly spoke with Heaven over FaceTime, but she didn't talk about her panic attacks, the way her face heated up and her legs shook and how the sounds around her dilated. Some nights, Molly cut slits on her hips with a razor. Part of her felt she deserved the pain; a larger part wanted to control it. When she and Isaiah started fighting, she rebelled by playing hooky. By the end of her junior year, she had missed 75 days of school.

Molly felt she had split in two: the calm Molly who wanted to connect and the reckless Molly who lashed out in an instant. In the late spring of 2017, realizing she was getting nowhere, she caught a ride back to her grandmother's place. That summer, when an argument over a kitten escalated and her grandmother threatened to call law enforcement, Molly found herself slapping framed family photos to the ground, punching holes in the wall. Her grandmother refused to keep her any longer. A caseworker showed up, and he told Molly that if she didn't find a place to stay, she would be sleeping on the floor in his office.

On a cousin's recommendation, Molly asked to stay in the house of another neighbor she hardly knew, Jackie Austin, whose smile reminded Molly of the sharp-toothed shark in "Finding Nemo." When the caseworker arrived at Austin's home, she told him that she made only \$12 an hour working at a supermarket, so Molly would need to "pull her weight." Austin was confused that the caseworker didn't drug-test her or check her fridge for food; he only peeked around her living room and glanced at her daughter's bedroom. "He didn't know me from nothing," Austin told me. Instead of filing in court or telling Austin she would be paid if she were licensed as a foster parent, the caseworker found Molly's dad, who had recently suffered a brain injury after being beaten with a baseball bat. He had been charged with battery and was in jail. The caseworker asked him to sign another custody-and-visitation agreement giving Molly over to Austin, which he did.



The room that Austin offered was a small pantry off the kitchen. Molly hung a sheet over the glass door and strung Christmas lights above a mattress. She slept next to pots and pans and blenders. (Austin says she later moved them.) Austin had two children at home and couldn't afford to raise another; when she applied for food stamps for Molly, she was denied. Molly got a job as a cashier at Hardee's, working 40-hour weeks to pay \$200 a month in rent, in addition to her other living costs and saving for a car. Each day after school, Molly switched into her black uniform. She was home at midnight, up at 5 a.m. and on the school bus at 6.

In the spring of her senior year, Molly received a text from Heaven that some lawyer wanted to speak with them, and she had agreed to a meeting. Molly, who was quiet and guarded around strangers, deferred to her sister's judgment. On April 25, 2018, they drove to the blue marble courthouse in town. At first, Molly figured that she was probably in some kind of trouble. But when she sat opposite Melissa Jackson, a woman in her 30s with a neat bob, who Molly thought looked rich, she realized that the lawyer was investigating the local child-protective unit.

Molly had learned to dodge questions about her circumstances, but something about the way that Jackson's eyes expressed concern made her want to talk. Molly told her about Tamyra White, about moving to Florence and living with her brother and about the pantry she now rented. She talked about how child-protection workers had told her dad to sign authority over her to three different caregivers and then vanished. When Jackson asked who her legal guardian was, Molly replied that she didn't have one. After Molly finished her account of the past two and a half years, Jackson told her, "What a department typically does did not happen with you."

Jackson explained that the department had shirked its legal responsibility. In foster care, she would have had a court-appointed lawyer, support to reunite with her family and basic services she never received: a fee for foster parents, health care for her anxiety disorder, a hearing aid for her left ear. Jackson said that she had found other children in Cherokee who were in similar situations. Molly's mind started swirling with questions. *They did this to us for no reason? This wasn't normal?*

If Molly went into foster care now, Jackson said, she could get help. In several weeks, she would turn 18, but she could join a transitional program until the age of 21. She would receive medical attention and matching funds for rent and a car; she could open a savings account, and she would be eligible for a driver's license. Molly was overwhelmed but also relieved. If she stayed at Austin's, she wasn't sure where she would go once she graduated.

The following afternoon, Jackson picked Molly and Heaven up from school in her white Lexus hybrid and drove them to the Department of Social Services. Heaven hadn't known about the pantry or that Molly was made to pay rent until she heard her sister tell Jackson the day before. Now, as Molly started speaking to a caseworker, she leaned her body against her younger sister. "Sorry that I won't have any money to pay for rent," Molly told the woman who was handling the forms. She replied that Molly wouldn't have to pay. "Sorry that I'm causing any problems," she continued. The woman told Molly that it was the adults who had failed her.

**Melissa Jackson first** uncovered the shadow system in Cherokee County several months before she met Molly. On a rainy December afternoon in 2017, she bumped into a mechanic named Brian Hogan on the courthouse steps. He asked for her help getting his daughter back, but when Jackson dug through court filings, there was no record that he had lost custody of her. Confused, she called Scott Lindsay, the child-protection unit's lawyer, who emailed her a custody-and-visitation agreement. It included signatures from Hogan and a notary but none from a judge. Jackson shot it over to a friend who specialized in family law. Within minutes, her friend was calling: "What the hell is this?"

Hogan explained to Jackson that in the spring of 2016, someone from his daughter's elementary school made a report that his 10-year-old smelled like cat urine and that she didn't have clean clothes. At the time, Hogan had left his daughter with neighbors because his wife had been airlifted to Asheville, N.C., after a heart attack, and he was staying with her at the hospital. The department created a safety plan, requiring Hogan's daughter to live temporarily in Hogan's father's house. Four months after Hogan first signed his plan, when his wife was out of the hospital, the agency switched tactics. Hogan had lost his apartment because he couldn't afford the power bill, and he was living in his mother-in-law's house. Now caseworkers said that they wanted to formalize his daughter's living arrangement with his father through a custody-and-visitation agreement. Hogan, who can barely read, says that no one explained the substance of the form that he was handed, which he believed to be a temporary contract. But the document said that he was signing his daughter over until she turned 18. "They told me if I didn't sign it, they were giving her to the state," Hogan says.

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Jackson decided to represent Hogan pro bono. She filed a motion for a hearing in family court, attaching the custody-and-visitation agreement. On the morning of Dec. 6, 2017, Judge Monica Leslie asked all the lawyers involved to step into a jury room. In her 12 years on the bench, she had never seen anything like this. She asked Scott Lindsay what legal authority he had to draw up custody-and-

visitation agreements. "None," he replied. He'd said that since he heard from Jackson about this case, he'd told his staff not to draw up any more.

The word "more" startled Jackson. She had thought that Hogan's case was an anomaly. Judge Leslie ruled in Hogan's favor, a year and a half after the department took his daughter from him. The custody-and-visitation agreement was null and void, she wrote. Hogan could pick up his daughter, who was now 11, from school and take her back home.







Brian Hogan, who for a time lost his daughter to the shadow foster care system, outside his home in Andrews, N.C. Elinor Carucci for The New York Times

After that, Jackson set out to understand how many parents had been put in Hogan's position. She grew up in Murphy, a former manufacturing town that had given way to a tourist industry. Vacationers rafted down the kudzu-lined rivers. But most of Jackson's clients were underemployed or worked minimum-wage jobs. Many were suffering from addiction. They often didn't have cash for gas to meet her at the courthouse. Murphy residents had been trying to figure out how to get by for as long as Jackson could remember; when she was in school there, some kids showed up barefoot, and teachers handed out clothing. Many of their parents had to leave town to find work. Her own father, a truck driver, was gone for days or weeks at a time, while her mother taught clogging, a form of folk dance. From a young age, Jackson was accustomed to stories about foster care. Her grandmother was raised in the system.

After college at Appalachian State University in Boone, Jackson graduated from Oklahoma City University School of Law and decided to return to the region. After a stint in a prosecutor's office, in 2010 she started criminal-defense work as a solo practitioner, with over \$100,000 in student-loan debt. As part of Jackson's legal practice, she took on child-welfare cases here and there. At 37, she was looking for a way to hold the local department accountable for what it had put Hogan through, but she had no experience in civil rights law.

To help with the legal strategy, Jackson enlisted a more established local attorney named David Wijewickrama, who had defended sheriff's offices and child-protection agencies in complex civil cases. Wijewickrama was known as a talker; Jackson was restrained and fiercely private. She prides herself on her professionalism, wearing pantsuits with stilettos in court and insisting that her clients never call her by her childhood nickname, Missy. When she's at home, she refurbishes her 1969 Ford pickup and raises chickens in her yard.

On Wijewickrama's recommendation, Jackson called caseworkers at the Department of Social Services, and within weeks, a former department employee leaked her a list of parents who had signed their children away. Many were names she knew. As a kid, she swam with one at the community pool, and she attended prom as the date of another's ex-husband. She had watched her mother teach a few how to clog.

In early 2018, she met mothers and fathers in trailers, under gazebos in soccer fields, in gas-station parking lots. She began noticing that, like Hogan, many had first agreed to a safety plan and then were handed a custody-and-visitation agreement. Every parent said they felt coerced to sign. Many of their children had special needs, including behavioral disorders and developmental delays; one had autism, and another had gigantism, a rare hormonal condition. Their children weren't receiving support from caseworkers for medical and mental-health issues. Some of the parents had once used drugs and since gotten clean, but they didn't know how to get their children back. Some hadn't been able to see their children in months or even years; they mourned that caseworkers had stoked divisions within their families. Most couldn't afford a lawyer.

The investigation consumed Jackson. She took meetings and read case law in the hours before dawn and after dusk, when she wasn't in criminal court. She and Wijewickrama sued the county in federal court for breaching Hogan's due-process rights. Jackson and Wijewickrama needed to show that his case wasn't an isolated incident — that the county had instituted a practice that violated the constitutional rights of parents and their children. If they could prove the county's liability in Hogan's case, they might have an easier time winning each of the additional cases that they were discovering.

**As Jackson read** through parents' files, she began to see how subjective some decisions seemed. Reports to child-protective departments range from obvious harm to unfounded accusations, but a majority are in the murky middle. Most substantiated allegations are for neglect, a notoriously fuzzy concept that can be conflated with poverty. Ryan C.F. Shellady, now a family-law attorney in Colorado, wrote in *The Iowa Law Review* in 2019 that it's these gray cases in which "decisions become tricky, and the implications of

error could be anything from severe trauma or death to running complete roughshod over a family's civil liberties." In shadow foster care, parents are particularly vulnerable; individual caseworkers or supervisors can choose to take children from their homes for reasons that would never hold up in court.



Courtney Myers, a former caseworker for the Cherokee County child-protection unit, in Marble, N.C. Elinor Carucci for The New York Times

In Cherokee, Sarah Esler lost two of her four daughters after a report was made that she allowed her 12-year-old to drive while she was in the passenger seat. In October 2017, the reporter, whose identity is confidential, flagged the possibility of drug or alcohol use. The following day, a caseworker, Courtney Myers, showed up at Andrews Middle School to ask Esler's daughter Audrey, who had boasted that she was learning to drive, whether she felt safe. *Who is this lady, and what the heck is she talking about?* Audrey wondered. She explained that her grandmother was taking care of her and her sister; Esler was trying to move to their school district, so the girls could live with her. In her notes, Myers wrote that Audrey said that on the night she drove, her mother was "squalling and crying" because of a fight with her husband. "I don't think that she was high," Audrey said. "I didn't see her take anything."

Esler had struggled with methamphetamine use years earlier, but without drug-testing Esler, and after noting that there was no immediate danger to her daughter, Myers handed the file over to another caseworker. That colleague asked Esler to sign a custody-and-visitation agreement, giving Audrey and her younger sister, Mya, to their grandmother. The case was opened and shut in 17 days, and no one in the family understood that Esler was signing away her rights. "You don't really question them when they do something like that," Esler told me. "They scare you. They have the power to tear your entire family apart."

In another instance, a mother named Danielle, who asked to be identified by her middle name to protect her child's privacy, lost her son to a custody-and-visitation agreement without ever signing the form. A back injury while stacking boxes at Walmart had led to an OxyContin prescription, and soon after, an opioid addiction. When an argument with her father over her drug use triggered a report to the child-protective unit in the winter of 2017, Danielle admitted to department staff that she had experienced a heroin relapse. She understood from the meeting that she had two choices: She could either allow her father-in-law to take temporary custody of her 3-year-old, or the department would find a placement. Nervous about losing her boy to the system, she took the family option, transferring custody to her father-in-law in a private court proceeding.



Two months later, Danielle's father-in-law was arrested on drug charges. The department brought a petition in family court to take Danielle's son into custody, but the judge denied it because of an error. Instead of filing again, caseworkers tracked down her father-in-law in jail and gave him a custody-and-visitation agreement to sign. Without telling Danielle, the department placed the boy in her sister's home — the one house that Danielle had begged them to avoid. Years earlier, children from another branch of her family were moved into Danielle's sister's care, and Danielle heard rumors that they had complained of mistreatment.

Danielle survived on disability checks and paid her way through a methadone program; she fought in court to get her son back, representing herself, with no luck. It took her five months to save \$2,000 for a lawyer. Nearly a year after Danielle lost her son, and six months after she had begun documenting her sobriety through drug tests, the judge granted her overnight visits. In January 2018, her son, standing by the rocking chair in her bedroom, explained that his teenage cousin had taught him a "game." As he revealed its details, describing what he had seen and felt, Danielle says she realized that he was being sexually molested. She made a report, her son sat for a forensic interview and Danielle won him back. The state's investigation is still open. (Danielle's sister says the accusation is false.) "It's like social services just put him there and left him," Danielle told me. Now, at the age of 8, he still wakes in the middle of the night, sweating, in a panic, sucking in air.



Sarah Esler (second from left) with her daughters, Mya (left) and Audrey, and her mother, Brenda Crapse. Elinor Carucci for The New York Times

In interviews with dozens of lawyers and advocates across the country, many rattled off examples in which child-protective workers had diverted children into hidden foster care without giving much of a reason at all. Valerie L'Herrou, a lawyer at the Virginia Poverty Law Center, represented one mother who lost her 5-year-old to a safety plan after a report about a pinch mark on his arm. "They criticized her for being too lenient with her child, for not being disciplinary enough," L'Herrou told me.

In some states, caseworkers push parents to transfer custody to relatives in private court proceedings, where caseworkers are not present and don't have the burden of proving a parent is unfit. In states like Oklahoma, Illinois and California, this occurs in probate court, where court-appointed lawyers are not offered. Sharon Balmer Cartagena, a lawyer at Public Counsel, a pro bono law firm in Los Angeles, represented one mother, Yvette Herrera, who lost her daughter after she was charged with a hit and run — a violation of her



probation. A caseworker told Herrera's mother to file for guardianship in probate court, but Balmer Cartagena stepped in to represent Herrera. "There was no substantiated harm" to her child, Balmer Cartagena told me, adding that these cases are troublingly common in Los Angeles County. "Parents and kin are told to go to probate court, transfer custody, or else we'll take your children."

The termination of a parent's rights has been characterized as the family-law equivalent of the death penalty. "If these were criminal procedures, and you said we don't really have enough evidence to sustain a conviction, but we're going to handle this injustice ourselves, people would be horrified," Mark F. Testa, a professor emeritus of social work at the University of North Carolina and an influential scholar of kinship care, told me. "If you can't convince a court that someone is guilty, you shouldn't resort to vigilante justice."

**As Jackson investigated** these cases, she began to talk with former caseworkers who helped her understand the inner workings of the Cherokee County Department of Social Services. Many were young or inexperienced. They hadn't completed the state's trainings. Some had never been to school for social work. They said that they were trying to do right by families. Courtney Myers, a young woman of Cherokee descent with a soft, open face, was one of the caseworkers Jackson contacted in the winter of 2018. Exasperated by the leadership and the lack of support at the department, she had quit her job by the time Jackson called.

In 2016, a year after Myers started at the child-protective unit, the county agency came under state scrutiny for keeping its cases open for too long. The number of child-protective caseworkers dwindled to two from six, in a county of 27,200 residents. Petitioning the court to separate children from their parents was time-consuming and expensive. The more children the agency took into foster care, the more money it would need to spend.

Myers explained to Jackson that the Cherokee department's lawyer, Scott Lindsay, and the supervisor, David Hughes, told staff that instead of going through the court, they could use custody-and-visitation agreements on cases that were "stuck": The circumstances at home weren't getting worse, but regardless of how many referrals caseworkers made for services, they weren't getting better either. Myers often worked cases like these — she thought the house wasn't safe, but there also wasn't immediate danger to a child. A parent was usually struggling with substance use or untreated mental illness. When she asked Lindsay if they could file petitions, Myers says he replied that the cases were too weak to win in court.

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**'I can remember the few cases where I did not do as good a job as a social worker as I should have, and that's one of them.'**

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At first, Myers and her colleagues were confused about the custody-and-visitation agreements. Myers knew that under North Carolina policy, the department couldn't close a case without going to court if a child was still living with another caregiver in a safety plan. She also knew that only a judge could determine legal custody. When she questioned her bosses, though, she says they kept telling her not to worry. In one meeting, in a supervisor's corner office, a co-worker of hers also raised concerns. She pressed the agency's director, Cindy Palmer, about whether the custody-and-visitation agreement was legitimate. Palmer held a particularly powerful position in town: In addition to serving as the director, she was also married to the county sheriff. "She was sitting on the end of the credenza, eating yogurt, and it stuck in my head because I hate that noise, scraping on plastic," Myers told Jackson. She recalled that Palmer responded that the form was fine and to follow their lawyer's counsel. Myers asked the lawyer, Lindsay, how long the custody agreements lasted. She said he told her, "Once they sign, it can't be undone."

Myers agreed to document what she knew in an affidavit for Jackson. She estimated that caseworkers completed between 30 and 50 custody-and-visitation agreements in her two and a half years at the county agency. She believed that she had done around eight.

Several months after Myers met with Jackson, an agent from the North Carolina State Bureau of Investigations called her as part of a criminal probe into the department's actions. In response to Brian Hogan's case, which Jackson brought to family court in 2017, the North Carolina Department of Health and Human Services, which oversees child welfare in the state, had alerted county directors that using private custody agreements fell outside both policy and law. After that, the state detective agency started looking into the matter in Cherokee. Now, in addition to Jackson's civil case in federal court, criminal charges were looming over the county.

Myers was worried that her admissions could land her in trouble, but she was upset that Palmer, the department's director, had said in a hearing that she knew nothing about the custody-and-visitation agreements until December 2017. Sitting on the porch at her new place of work, the John Welch Senior Center, Myers told the state agent what she had told Jackson: that her bosses, including Palmer, had led her to believe that the custody agreements were valid.

Myers had been frustrated by the limitations of her child-protection work. She often wasn't able to link parents with appropriate help in time to meet state deadlines. The county's only methadone clinic didn't accept Medicaid, and the only behavioral-health organization was swamped, she told me. "How do you work a case with someone who has mental-health issues, when they need medication, when the only place they can get into is two months out for a new patient?" She knew if she could offer preventive services to parents, she

could keep more kids at home. But without the resources she needed in her department or in the community, she often didn't feel she had a choice but to separate children from their parents. Even when she did go to family court, the system wasn't designed to provide the necessary help: The process was set up to terminate parents' rights if they weren't able to manage their health or get sober within a year or two.

She saw the benefits of the custody arrangements. In her view, some of the parents weren't acting in the children's best interests. Some told her that they wanted to avoid family court and preferred the informal agreements. Still, Myers could recall hints of trouble. Caregivers complained they didn't have the legal standing to get the children into the doctor, or they called asking how long these transfers lasted. In one instance, only a mother signed a custody agreement, stripping the rights of the child's father, who was in jail.

Myers had worked on the custody agreement for Sarah Esler, who lost her daughters after allowing one to drive. "I can remember the few cases where I did not do as good a job as a social worker as I should have, and that's one of them," she told me. Myers also briefly investigated Molly Cordell's case; she had been at Molly's grandmother's house when the department separated the sisters. When I mentioned that another caseworker had facilitated a transfer of legal authority over Molly and closed her case right after she was released from the psychiatric facility, Myers was confused. She figured that because the department had involuntarily committed Molly, it had a duty to provide her with ongoing support; Molly's caseworker should have arranged for that. Myers told me that those children were always supposed to receive follow-up care, "because obviously, the kids were in need of services."

After she spoke with the state investigator, Myers heard nothing for so long that she figured the criminal inquiry was fizzling out. But two years later, in May 2020, while scrolling on Facebook, she saw a post by a local radio station. Usually, it uploaded mug shots of residents arrested on charges of trespassing or drug possession. Instead, when she clicked through the comments on its news update, she found a link to Carolina Public Press, which showed booking photos of her former bosses at the Department of Social Services: her supervisor, David Hughes, the lawyer Scott Lindsay and the director, Cindy Palmer, who was standing against the concrete-block wall of the detention center her husband ran. A grand jury had indicted them on dozens of charges, both misdemeanors and felonies.

**The federal jury** trial over Brian Hogan's due-process rights was scheduled for May 10, 2021. Jackson and Wijewickrama, along with Ron Moore, a retired district attorney, and D. Brandon Christian, the in-house counsel for the Union County sheriff's office, were up against the department's counsel from Womble Bond Dickinson, a large international law firm with offices in North Carolina. "Four oddballs," Jackson called her team. It had taken her more than three years to get to this moment, and they had spent \$400,000 preparing for the case. Jackson had never litigated a case in federal court.

The night before, in the Crowne Plaza hotel in Asheville, 100 miles east of Murphy, Wijewickrama tried to ease her nerves. "When you were in elementary school, did you play basketball in an elementary-school gym?" Jackson nodded. "When you were in middle school, did you play basketball in a middle-school gym?" Yes, again. "When you were in high school, did you play basketball in a high-school gym? The court's the same," he assured her. Jackson finally relaxed. Later, she would learn that he had borrowed his speech from a pep talk that Gene Hackman delivers in the 1986 film "Hoosiers."

Over the following four days, Jackson questioned witnesses and introduced evidence regarding other families who had been separated in order to show that Hogan's extrajudicial custody transfer was part of a pattern. On May 13, 2021, she delivered her closing argument. "These people are at the lowest, worst point in their lives. They have addiction problems. They don't have enough money. They might not have electricity. They might not have water," she said. "And as an authority figure, then, the department comes in and takes advantage of these people, the people that they're supposed to be helping." She asked the jury to consider awarding Hogan and his daughter the same amount for their separation that the department was paying its expert witness on the impact of the custody agreement on Hogan's daughter: \$300 an hour. The total came to just over \$3 million. That same afternoon, the jury came back with a verdict. It found that the department, Palmer and Lindsay had violated Hogan's substantive and procedural due-process rights, along with his daughter's, and that it had instituted a practice to do so. The jury awarded the Hogans \$4.6 million.

The large sum sent a message to child-welfare departments across the country that versions of shadow foster care could be found unconstitutional and end up costing them. But it will take years to see whether states introduce laws to prevent agencies from pressuring parents to give up children without a legal reason. Until that happens, child-protective services may be operating in a more permissive landscape than ever.

In 2018, the Family First Prevention Services Act was signed into law, providing federal funds for mental-health care and substance-use treatment to prevent foster care placements. The law allows departments to use this assistance when children are living in "kinship placements," but it does not specify that caseworkers need a court's approval to make such arrangements. The legal scholar Gupta-Kagan worries that the statute could inadvertently encourage child-protective departments to divert children to hidden foster care, without introducing meaningful regulation. The law does not include a legal standard for a change in custody, explicit protections against coercion, a mandate to try to return children to their homes or requirements to ensure that children are safe.

One reason that the federal government hasn't established protections for hidden foster care is because state child-welfare agencies cannot agree whether the practice is driven by private decisions among family members or by caseworkers who facilitate placements. If it's a family matter, child-welfare researchers say, then caseworkers have no business encouraging parents to move their children to live with someone they know. If they're government placements, then the agencies should be paying caregivers, monitoring safety, providing health care and planning to bring the children home, just as they would in foster care. Some argue that perhaps this hidden foster system, home to hundreds of thousands of children, merits its own category altogether, with its own model of financial assistance, its own regulations and its own system of checks and balances.

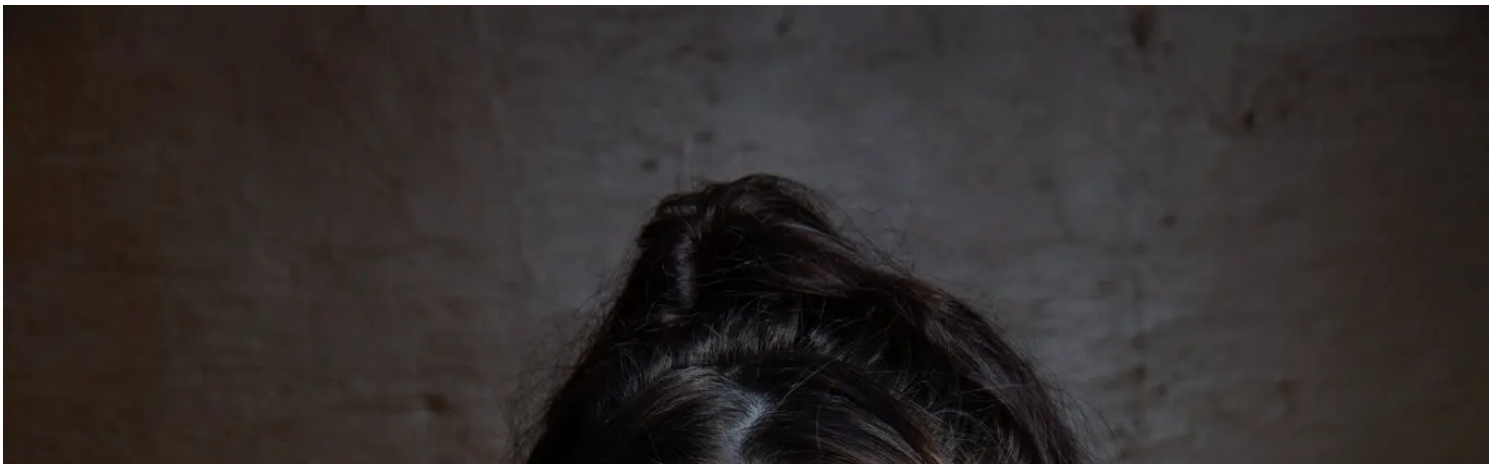
As the new law may welcome hidden foster care, reformers have been looking for fixes beyond litigation. The Hidden Foster Care Working Group, a coalition of advocates for parents, children and caregivers, compiled a list of principles this fall. They sent it to the federal Children's Bureau, which they believe has authority to write guidelines around hidden foster care and can encourage national and state legislators to enact laws. They ask that families never be separated when there isn't immediate danger. They ask that parents have the right to free counsel whenever an agency takes their children. They ask that agencies notify caregivers about their rights and available resources. And they ask that hidden foster care, if it does occur, is brief and includes a plan to return home.

Any reform will need to accommodate a wide array of experiences with informal placements. Some families prefer to avoid family court at all costs. After a child-protective investigation, some parents might decide that sending a child to live with a relative is what they want. Gupta-Kagan believes that regardless, there ought to be free counsel available to parents before they lose their children and an avenue for redress, like an administrative hearing or an independent review, so parents, armed with representation, have the option to appeal the separations.

The broad consensus is that the federal government needs to require states to monitor the outcomes in hidden foster care. Policymakers can't identify the necessary reforms without tracking cases. Texas, one of the few states that reviews fatalities in safety-plan placements, instituted firearm checks and easier access to day care assistance for caregivers after the deaths of children in 2015. I've spoken with more than 60 attorneys and advocates, child-welfare workers and researchers, and they all insist that the government has an immense responsibility to decrease the potential for coercion.

**Jackson's next federal trial** is Molly Cordell's, set to begin on Jan. 10. She expects to then bring at least 20 more cases to federal court. Proving liability shouldn't be as complicated now. After the criminal indictments were issued, the department supervisor, David Hughes, pleaded guilty to two misdemeanors, contributing to the delinquency of a minor and willfully failing to discharge duties. (One of his lawyers, Rich Cassidy, says that Hughes was advised by Palmer and Lindsay that the custody-and-visitation agreements were acceptable, and he passed that information on to the social workers.) The director, Cindy Palmer, pleaded guilty to a felony obstruction-of-justice charge for using custody agreements that avoided judicial oversight. She is unlikely to serve any time in prison but will spend the next year on probation and must perform 24 hours of community service. (Neither Palmer nor her civil or criminal attorneys provided comment.) The department's lawyer, Scott Lindsay, is expected to go to trial. His lawyer is arguing that the custody-and-visitation agreements are lawful, private contracts between parents and others. (Lindsay's lawyers declined to comment, citing pending litigation.)

It has taken years for Molly to stop blaming herself for her circumstances. After she went into state care, she got a hearing aid, bought a used Prius and rented her own one-bedroom apartment across the border in Georgia, with assistance from the department. But she was denied financial aid at Tri-County Community College because she didn't have a legal guardian for whom she could submit tax returns, and she didn't have proof that she had been in foster care for years. Heaven, who was still a junior when the girls first met with Jackson, had time to figure out that she could submit a letter from her school counselor stating that she was homeless to qualify for financial aid. After wearing a crystal corset and crown as homecoming queen and graduating from high school, she went on to earn an associate degree in applied sciences with a certificate in cosmetology this summer.







Molly Cordell. Elinor Carucci for The New York Times

When I met Molly in July, she was living with her boyfriend in the same house where she grew up. Her grandmother had died, and her maternal grandfather, who built her family home, was renting it to her for \$600 a month, as long as she committed to fixing the floors and painting the walls. The house is so deep in the mountains that there is no cell service or internet connectivity, unless she perches

her phone on five thumbtacks on a wall in her bedroom — the same bedroom her parents once claimed. “It’s weird,” she told me, under her breath. “It’s like I’m just repeating their lives.”

As she sat at the kitchen table burning incense, she talked through the events of her teenage years as if each carried the same weight: breakups with boyfriends, the realization that she was homeless, the fantasy novels she devoured, the dawning sense that the department had taken away her adolescence. She was starting to see how caseworkers had set her and her sister on starkly different paths. “It kind of puts it into perspective for me, to watch her be successful and get to do everything that I’ve wanted to do and I didn’t have the opportunity to do,” she said. She’s not mad at Heaven; the case has brought her closer to her sister, and she knows that what happened to her is not Heaven’s fault. But Heaven could afford to move to Florida, while Molly stayed behind.

This September, Jackson and her legal team settled Heaven’s case against the Department of Social Services out of court for \$450,000, minus attorneys’ fees, just as Heaven was signing her first lease in Auburndale, Fla. That afternoon, when we spoke on the phone, the first thing Heaven told me was that she was worried about Molly. Even if Molly were to win her case, it could take years before she receives damages; the county’s insurance company is arguing that it doesn’t cover illegal activity. Molly barely had enough cash for groceries and gas, and at 21, she and her boyfriend were expecting their first child.

In November, I went to see Molly with her newborn, while Heaven was visiting. Molly’s boyfriend was at his job, working construction, while the sisters sat beside each other on a worn taupe couch. They kept finishing each other’s sentences. As Molly cradled her son in her lap, she talked about how, when caseworkers kept disappearing from her life, she had imagined herself as a fugitive on the run from the department. Recently, though, she had recognized that it was a story she told herself in order to feel some sense of power. “I wish I had been able to tell that I was being treated wrong,” Molly said. “We didn’t know it was wrong,” Heaven replied. “We thought that was how we were supposed to live.”

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This article is a partnership between ProPublica and The New York Times Magazine. Alex Mierjeski contributed research.

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A version of this article appears in print on , Page 45 of the Sunday Magazine with the headline: ‘They Took Us Away From Each Other’