

**FROM EMPATHY GAP TO REPARATIONS:
AN ANALYSIS OF CAREGIVING,
CRIMINALIZATION, AND FAMILY
EMPOWERMENT**

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America’s legacy of violent settler colonialism and racial capitalism reveals a misunderstood and neglected civil rights concern: the forced separation of families of color and unwarranted state intrusion upon caregiving through criminalization and surveillance. The War on Drugs, the Opioid Crisis, and the COVID-19 pandemic are a few examples demonstrating the precariousness of our nation’s collective empathy well toward caregivers and our tattered social safety net. In fact, these instances illuminate what this Essay coins an “empathy gap” in perception when the general public, policy makers, and the mainstream media view similarly situated families with different identities. Ironically, the COVID-19 pandemic presents both a tragic crisis and an unparalleled opportunity to reimagine the status quo for communities of color and society at large. Families and children deserve comprehensive transformation resourced through the abolition of carceral protection systems, reinvestment in social supports, and true reparations for slavery.

This Essay reconciles fragmented perspectives on family integrity and civil rights, analyzing empirical research about disparate treatment while engaging the framework of vulnerability theory. Ultimately, a paradigm shift is needed. Public health and socioeconomic well-being necessitate protection for marginalized families and innovation beyond the limits of law. Recognition of the inherent vulnerability in the human condition is pivotal to achieving family empowerment, economic justice, and racial justice.

INTRODUCTION..... 2622
I. FRAMEWORK & TERMINOLOGY 2624

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II. EMPATHY GAP: FAMILIES, THE OPIOID CRISIS, AND THE WAR ON DRUGS	2626
A. <i>The Opioid Crisis and the War on Drugs: How Did We Get Here?</i>	2626
B. <i>Deeper Dive: Caregiving, Substance Use, and the Empathy Gap</i>	2629
C. <i>Family Regulation and Legacies of Oppression</i>	2632
D. <i>Scarce Due Process and Problematic Evidentiary Standards</i>	2636
III. EMPATHY GAP: THE BORDER CRISIS AND THE COVID-19 PANDEMIC	2639
A. <i>Family Separation at the Southern Border</i>	2639
B. <i>The COVID-19 Pandemic</i>	2640
IV. A VITAL REFRAMING: THE LENS OF VULNERABILITY & THE HUMAN CONDITION	2640
V. A WAY FORWARD: ABOLITION, EMPOWERMENT & REPARATIONS	2642
CONCLUSION	2644

INTRODUCTION

The opioid crisis sweeping the United States in predominantly white regions—as well as the horrific separation of undocumented Central American families at the U.S.-Mexico border—has brought unprecedented public attention to issues of substance abuse and family separation. While the “opioid blight” is decried by policy makers, law enforcement, and the media,¹ the daily separation of low-income families of color in dependency courts for unwarranted reasons is either ignored or cast as an essential, benevolent, and protective function of the state.²

1. See, e.g., *Ending America’s Opioid Crisis*, THE WHITE HOUSE, <https://trumpwhitehouse.archives.gov/opioids/> [<https://perma.cc/N79T-M6Y9>] (last visited Apr. 2, 2022); *Opioid Abuse Is Devastating Families—and America’s Middle Class*, CATALYST (2018), <https://www.bushcenter.org/catalyst/opportunity-road/winnfeld-opioids-addiction.html> [<https://perma.cc/K96Z-NMNL>]; *Children in the Cross Hairs: The Opioid Epidemic and Foster Care*, CHILD.’S RTS. (June 19, 2018), <https://www.childrensrights.org/children-in-the-cross-hairs-the-opioid-epidemic-and-foster-care/> [<https://perma.cc/62FK-QMKQ>]; Sandy Santana, Opinion, *Killing Drug Dealers Won’t Protect Children from the Opioid Crisis. They Need Safe Homes.*, USA TODAY (Apr. 7, 2018, 9:10 AM), <https://www.usatoday.com/story/opinion/2018/04/07/opioid-crisis-child-victims-need-stability-home-foster-care-column/479957002/> [<https://perma.cc/E552-KVG4>]; Peter Jamison, *Falling Out: A Generation of African American Heroin Users Is Dying in the Opioid Epidemic Nobody Talks About. The Nation’s Capital Is Ground Zero*, WASH. POST (Dec. 18, 2018), <https://www.washingtonpost.com/graphics/2018/local/opioid-epidemic-and-its-effect-on-african-americans/> [<https://perma.cc/RV39-NMUE>].

2. See Shaila Dewan, *Family Separation: It’s a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html> [<https://perma.cc/CN9U-2KVD>]. When outrage over the separation of migrant children from their parents surged in May 2018, Kirstjen Nielsen, the

A deep empathy gap is apparent when one compares the U.S. government's commitment to ameliorating the suffering among white families impacted by opioids with its disregard for low-income families of color ravaged by the family regulation system. The empathy gap is not simply about divergent public compassion for individuals who misuse drugs; it also involves presumptions about government interference with purportedly deviant families, despite evidence that the family regulation system (1) uses drug allegations as a pretext for initiating surveillance and family separation and (2) fails to ameliorate struggles caused by drug misuse, poverty, health disparities, failing schools, housing instability, and mental health challenges.

The Opioid Crisis describes the period beginning in the late 1990s and lasting until at least 2019, wherein widespread misuse, overdoses, and deaths resulted from both prescription and nonprescription opioids.³ An opioid is a substance that works in the nervous system or in specific receptors in the brain to reduce pain.⁴ As pharmaceutical companies in the late 1990s "reassured the medical community that patients would not become addicted to opioid pain relievers," health-care providers "began to prescribe them at greater rates."⁵ By 2017, the U.S. Department of Health and Human Services declared a public health emergency requiring urgent attention,⁶ citing U.S. Centers for Disease Control and Prevention (CDC) data that over "140 Americans die from drug overdoses" on a daily basis.⁷ As of March 2021, the CDC reported that, since 1999, nearly 841,000 people had died from a drug overdose, with over 70 percent of those deaths involving opioids.⁸

The U.S. family regulation system, as well as the government's responses to caregivers struggling with substance use, further illustrates the existence of the empathy gap, and more importantly, why reforms are needed. Part I of this Essay provides an overview of the disability justice framework and other important concepts that are integral to a discussion of the empathy gap.

secretary of the U.S. Department of Homeland Security, shrugged off accusations that it was a "form of state terror," stating, "We do it every day in every part of the country." *See id.*; Conor Friedersdorf, *In a Year, Child-Protective Services Checked Up on 3.2 Million Children*, ATLANTIC (July 22, 2014), <https://www.theatlantic.com/national/archive/2014/07/in-a-year-child-protective-services-conducted-32-million-investigations/374809/> [<https://perma.cc/7WK8-CYUQ>].

3. *See Understanding the Opioid Overdose Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 17, 2021), <https://www.cdc.gov/opioids/basics/epidemic.html> [<https://perma.cc/9UXH-LTHB>].

4. *See The Drug Overdose Epidemic: Behind the Numbers*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 25, 2021), <https://www.cdc.gov/opioids/data/index.html> [<https://perma.cc/E9BF-BPZA>].

5. *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 27, 2021), <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/Z9DC-69EL>].

6. *See HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 26, 2017), <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html> [<https://perma.cc/FT69-QQ3N>].

7. *See id.*; *What Is the U.S. Opioid Epidemic?*, *supra* note 5.

8. *See The Drug Overdose Epidemic: Behind the Numbers*, *supra* note 4.

Part II recounts the origins of the War on Drugs and its impact on low-income families of color, as well as the Opioid Crisis and its demographic dimensions. After illustrating the empathy gap and discussing media stereotypes and misrepresentations, Part II concludes by situating state violence and family regulation within a broader context of American history. Part III addresses more nuanced dimensions of the empathy gap—including developments during the U.S.-Mexico border crisis and the ongoing COVID-19 pandemic. Part IV ultimately reframes this matter in light of Professor Martha Albertson Fineman’s theory of vulnerability and the human condition, as the pandemic necessitates a reimagining of status quo responses for struggling families. Finally, Part V recommends a way forward through several paths that are briefly described, yet worthy of increasing attention: (1) abolition of the existing family regulation system, including transformed legal norms to eradicate the unacceptable double standard, and (2) empowering fiscal responses—some of which are already underway.

I. FRAMEWORK & TERMINOLOGY

This Essay discusses vulnerability theory in some detail,⁹ and this part accordingly introduces two important concepts that are integral to a comprehensive discussion of vulnerability theory and parenting—the disability justice framework and the U.S. government and medical community’s current response to caregiver substance use.

The disability justice framework outlines principles for disability rights advocacy that honor intersectional identities. Created and led by queer and gender nonconforming disabled people of color, the disability justice framework arose in response to a disability rights movement that “invisibilized the lives of disabled people.”¹⁰ Mia Mingus, one of the original organizers, summarized the framework as “a multi-issue political understanding of disability & ableism . . . that centers justice & wholeness for all disabled people & communities.”¹¹ Importantly, the disability justice framework confronts the intersection between ableism, white supremacy, and

9. See *infra* Part IV.

10. See SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 15 (2d ed. 2019); Natalie Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 692–96 (2021); Abla Abdelhadi, *Addressing the Criminalization of Disability from a Disability Justice Framework: Centering the Experiences of Disabled Queer Trans Indigenous and People of Colour*, FEMINIST WIRE (Nov. 21, 2013), <https://www.thefeministwire.com/2013/11/addressing-the-criminalization-of-disability-from-a-disability-justice-framework-centering-the-experiences-of-disabled-queer-trans-indigenous-and-people-of-colour/> [<https://perma.cc/5Q3W-T6HA>]; Nomy Lamm, *This Is Disability Justice*, THE BODY IS NOT AN APOLOGY (Sept. 2, 2015), <https://thebodyisnotanapology.com/magazine/this-is-disability-justice/> [<https://perma.cc/2A43-NKQX>].

11. See Harriet Tubman Collective (@HTCSolidarity), TWITTER (Jan. 22, 2017, 11:14 PM), <https://twitter.com/HTCSolidarity/status/823383475537461248> [<https://perma.cc/V7G4-ZAQQ>].

state violence against people of color,¹² and thus also contextualizes social perceptions of parents who misuse substances.¹³

A disability justice approach also illuminates the need to parse out preconceptions about parental substance use from the realities of caregiving and systemic injustice. While parents' substance use has little connection to their personal identity or caregiving capacity, an analysis of responses to caregiver substance use reveals the ubiquitous work of systemic, structural, and interpersonal oppression. Notably, government officials consider substance abuse and other disabilities as elements of one's identity, as evidenced by Congress characterizing individuals with disabilities as "discrete and insular" in its initial findings¹⁴ that shaped the Americans with Disabilities Act of 1990¹⁵ (ADA). Further, the American Psychiatric Association (APA) classifies substance use disorders as diagnosable mental health conditions.¹⁶ In clinical terms, the APA's *Diagnostic and Statistical Manual of Mental Disorders* utilizes eleven criteria—or symptoms—to determine the appropriate level of intervention and treatment for substance use disorders.¹⁷ While a substance use disorder can have varying impacts on a person's life activities, there is scarce evidence showing a link between parental substance misuse and child maltreatment.¹⁸ Ultimately, there is a fine line between understanding disability as shaping a person's treatment and overstating the impact of a person's substance use on their ability to parent successfully.

12. *See id.*

13. *See generally* Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIPIAC HEALTH L.J., no. 2, 2015, at 191; Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307 (2015) [hereinafter Smith, *Conundrum of Family Reunification*]; Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSYCH. REV. 205 (2015); Charisa Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 CHARLOTTE L. REV. 377 (2014).

14. 42 U.S.C. § 12101(a)(7) (2006) (amended 2008).

15. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

16. *See* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 112, 114–23 (2001); *see also* Deborah S. Hasin et al., *DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale*, 170 AM. J. PSYCHIATRY 834, 834–46 (2013); *DSM-5 Criteria for Addiction Simplified*, ADDICTION POL'Y F. (Aug. 20, 2020), <https://www.addictionpolicy.org/post/dsm-5-facts-and-figures> [<https://perma.cc/E284-965K>].

17. *See* Hasin et al., *supra* note 16, at 835–37; *DSM-5 Criteria for Addiction Simplified*, *supra* note 16.

18. *See* MOVEMENT FOR FAMILY POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR.": HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 13–19 (2020); *see also infra* Part II.B.

II. EMPATHY GAP: FAMILIES, THE OPIOID CRISIS, AND THE WAR ON DRUGS

A. *The Opioid Crisis and the War on Drugs: How Did We Get Here?*

When former President Donald J. Trump declared the Opioid Crisis a public health emergency in October 2017,¹⁹ he continued the racialized rhetoric around opioid misuse that began in the late 1990s and signaled that the epidemic warranted a benign, harm-reduction approach due to its reach into white communities not historically perceived as criminally deviant or dysfunctional.²⁰ Throughout the Opioid Crisis, white public figures have shared narratives about how a close friend or family member's struggle with opioids convinced them that addiction should be approached compassionately.²¹ However, these calls for intervention stopped short of mentioning people incarcerated for drug crimes or caught up in the family regulation system due to substance use. Instead, the public discourse on opioids focuses on white communities, while people of color are overwhelmingly stereotyped, demonized, and targeted for punitive treatment.²²

Both empirical research about human cognition and behavior, as well as polling, confirm the empathy gap. Empirical research from the Perception Institute explains this phenomenon as a product of the extreme segregation in American residential and civic life.²³ The Perception Institute's cofounder, Rachel Godsil, asserts that since white Americans are more likely to associate with and connect deeply with those of their own racial group, they are more likely to feel empathy for people in their own group who face personal struggles and to thus demand policy solutions that will ease relatable

19. See Julie Hirschfeld Davis, *Trump Declares Opioid Crisis a 'Health Emergency' but Requests No Funds*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html> [<https://perma.cc/2BUF-TFJR>].

20. See MOVEMENT FOR FAMILY POWER, *supra* note 18, at 13–19; see also Nicolas Terry, *Perspectives on the Opioid Overdose Epidemic*, AM. BAR ASS'N (Sept. 7, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/perspectives-on-the-opioid-overdose-epidemic/ [<https://perma.cc/34V3-HGSJ>].

21. German Lopez, *When a Drug Epidemic's Victims Are White*, VOX (Apr. 4, 2017, 8:00 AM), <https://www.vox.com/identities/2017/4/4/15098746/opioid-heroin-epidemic-race> [<https://perma.cc/5YHD-EZPX>] (discussing anecdotes of the drug epidemic shared by state lawmakers).

22. See *supra* note 13 and accompanying text.

23. See Lopez, *supra* note 21. See also generally RACHEL D. GODSIL ET AL., PERCEPTION INST., *THE SCIENCE OF EQUALITY, VOLUME I: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE* (2014), <http://perception.org/wp-content/uploads/2014/11/Science-of-Equality.pdf> [<https://perma.cc/C8RM-PNDP>]; ALEXIS MCGILL JOHNSON & RACHEL D. GODSIL, PERCEPTION INST., *TRANSFORMING PERCEPTION: BLACK MEN AND BOYS* (2013), <http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf> [<https://perma.cc/KQS5-U3RU>]; JANAY CODY ET AL., PERCEPTION INST., *WHAT ARE WE UP AGAINST?: AN INTERSECTIONAL EXAMINATION OF STEREOTYPES ASSOCIATED WITH GENDER* (2019), https://perception.org/wp-content/uploads/2020/02/Story-at-Scale-Research-Review_Dec-2019.pdf [<https://perma.cc/KS53-HM57>].

types of suffering.²⁴ Polling indicates that while most Americans express sympathy for persons addicted to opioids, which are racially coded as “white,” such sympathy does not extend to addiction to drugs like crack cocaine, which are racially coded as “Black.”²⁵ Instead, white elites and the mainstream media continue to perceive drug users of color as “the other,” who remain stigmatized, criminalized, and less likely to receive compassion or empathy—let alone family restoration.²⁶

Racialized media coverage of the Opioid Crisis has been a key factor in maintaining the empathy gap, even as the demographics of the Opioid Crisis’s impact lack clear racial divisions. Documentaries, television dramas, print media, and educational sources alike propagate dominant, familiar themes and characters such as “Big Pharma . . . pill mills” and “Hillbilly Heroin,” as “gaunt teenagers” (who are white) move “from Percocet to the needle.”²⁷ Although the prominent story of opioids focuses on white communities in Appalachia, New England, and the Midwest, the story overshadows the serious urban opioid crisis impacting people of color.²⁸ In 2020, the U.S. Substance Abuse and Mental Health Services Administration (SAMHSA) highlighted this incomplete account of the Opioid Crisis, observing that minimal attention has focused on Black communities that are also experiencing dramatic increases in opioid misuse and overdose deaths.²⁹

The empathy gap also involves racialized and classist distinctions between types of opioid users, which lead to divergent public discourse and policy outcomes. Professors Julie Netherland and Helena B. Hansen conducted a content analysis of one hundred popular press articles from 2001 and 2011 and found a consistent contrast between the portrayals of criminalized urban Black and Latino “heroin injectors” and suburban and rural white “opioid users.”³⁰ Professors Netherland and Hansen assert that the media’s fascination with humanizing sympathetic, white opioid users at the cost of demonizing those of color helped to create a symbolic—and then legal—

24. See generally CODY ET AL., *supra* note 23; GODSIL ET AL., *supra* note 23; JACKSON & GODSIL, *supra* note 23; Lopez, *supra* note 21.

25. See Lopez, *supra* note 21; see also Travis Johnston, *Americans Think Opioid Addiction Is a Crisis. They’re Not Sure Federal Dollars Will Solve It.*, WASH. POST (Aug. 10, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/09/americans-think-opioid-addiction-is-a-crisis-theyre-not-sure-federal-dollars-will-solve-it/> [<https://perma.cc/FC7E-HN6Y>]; Joseph M. Gabriel, *Opiate Addiction and the History of Pain and Race in the US*, THE CONVERSATION (June 19, 2018, 6:23 AM), <http://theconversation.com/opiate-addiction-and-the-history-of-pain-and-race-in-the-us-97430> [<https://perma.cc/26R4-9EKC>].

26. See Mary Crossley, *Opioids and Converging Interests*, 49 SETON HALL L. REV. 1019, 1027 (2019).

27. See Jamison, *supra* note 1.

28. See *id.*; Crossley, *supra* note 26, at 1035.

29. See OFF. OF BEHAV. HEALTH EQUITY, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., *THE OPIOID CRISIS AND THE BLACK/AFRICAN AMERICAN POPULATION: AN URGENT ISSUE 3* (2020).

30. See Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn’t: Wasted Whiteness, “Dirty Doctors,” and Race in Media Coverage of Prescription Opioid Misuse*, 40 CULTURE MED. & PSYCHIATRY 664, 664 (2016).

distinction between white substance users and substance users of color, “reminiscent of the legal distinction between crack cocaine and powder cocaine of the 1980s and 1990s.”³¹ Ultimately, these scholars recommend more socially responsible media practices and clinical engagement with public policy to address the lack of explicit discussion of race and to narrow the gap in public empathy.³²

Furthermore, public perception of the Opioid Crisis cannot be detached from the discourse around the crack cocaine epidemic, which was portrayed almost exclusively as a matter of personal and racial pathology.³³ Media outlets have begun reflecting on the damaging role they played in framing the rise of crack cocaine in the late 1980s. Stories about alleged “crack babies” born addicted to drug-using parents and destined for physical and environmental suffering have since been proven to be based on questionable science.³⁴ Media images of neglectful parents and inner-city crime deepened believability that the crack epidemic involved society’s dysfunctional, deviant Black and Brown communities.³⁵ Contrastingly, depictions of the Opioid Crisis utilize pictures of inviting homes and feature firsthand accounts of impacted individuals.³⁶

Since the onset of the War on Drugs, child protection agencies have also acted as an arm of the carceral state, disproportionately demonizing low-income caregivers of color for not only hard drugs, but also for recreational or medicinal marijuana use, despite its minimal caregiving implications.³⁷ The injustice of violent, needless family separation in family and dependency courts persists in every jurisdiction without public outcry or sensational media coverage.³⁸ Children are persistently removed from their homes—even when marijuana is legal in the jurisdiction or when a caregiver of color is authorized to use medical marijuana.³⁹ Meanwhile, white parents

31. *Id.*

32. *See id.* at 680–81.

33. *See* Terry, *supra* note 20.

34. *See* MOVEMENT FOR FAMILY POWER, *supra* note 18, at 20.

35. *See id.* at 19.

36. *See* Rick Jones, *From the President: Crack, Opioids, and the Modest Reparation of Clemency*, NAT’L ASS’N OF CRIM. DEF. LAWS. (Nov. 2017), <https://www.nacdl.org/Article/November2017-FromthePresidentCrackOpioidsan> [<https://perma.cc/QYW7-X7XW>].

37. *See* Dewan, *supra* note 2.

38. *See* Abigail Kramer & Angela Butel, *Child Welfare Surge Continues: Family Court Cases, Emergency Child Removals Remain Up*, CTR. FOR N.Y.C. AFFS. (July 2018), <http://www.centernyc.org/child-welfare-surge-continues> [<https://perma.cc/XLJ2-V2ZU>].

39. *See* Charisa Smith, *Over-Privileged: Legal Cannabis, Drug Offending & the Right to Family Integrity*, S. DAKOTA L. REV. (forthcoming 2022); Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb-to-Foster-Care Pipeline,”* 20 CUNY L. REV. 77, 111 (2016); *Child Welfare and Alcohol and Drug Use Statistics*, NAT’L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, <https://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx> [<https://perma.cc/ZND9-ZXYD>] (last visited Apr. 2, 2022); *see also* Robert Latham & Robin Rosenberg, *The Potential of Florida’s Effective Assistance of Counsel Doctrine to Increase Parent Engagement and Promote the Well-Being of Children*, 17 FLA. COASTAL L. REV. 109, 129–30 (2015); Maia Szalavitz, *Viewpoint: Smoke a Joint, Lose Your Child?*, TIME (Aug. 19, 2011), <https://healthland.time.com/2011/08/19/viewpoint-smoke-a-joint-lose-your-child/>

have the privilege of endorsing marijuana's parenting enhancement qualities as legalization proliferates.⁴⁰ Ultimately, the outpouring of public empathy for white families experiencing opioid addiction has prevailed at the expense of equipping all jurisdictions with better resources to respond to mental health crises, bolster care networks, and support caregivers facing punitive intervention.⁴¹

B. Deeper Dive: Caregiving, Substance Use, and the Empathy Gap

In the opioid era, instinctive empathy for caregivers who use substances overwhelmingly depends on their race.⁴² While substance use is one of the main reasons why families wind up in dependency courts, the empathy gap is predominant in family regulation system scenarios.⁴³ A majority of cases (1) unnecessarily separate families; (2) exclusively focus on low-income people of color; (3) fixate on drugs as a pretext for surveillance and carceral control; and (4) fail to address any underlying reasons for caregiver or family struggles, including intrafamilial violence and abuse.⁴⁴ Importantly, the population at large has a genetic predisposition to substance-related disorders. As recently as 2018, SAMSHA found that among the 47.6 million adults with diagnosed mental illnesses, 19.3 percent also had a substance use disorder.⁴⁵ Clinicians explain that substance use disorders and other mental illnesses frequently co-occur because “one [disorder] makes you more

[<https://perma.cc/ZPS6-VKN4>]; Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), <https://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html> [<https://perma.cc/YBR5-5JAM>].

40. See Alex Halperin, ‘Cannabis Strengthened Our Bond’: Can Pot Make You a Better Parent?, GUARDIAN (Apr. 16, 2018, 3:01 PM), <https://www.theguardian.com/society/2018/apr/16/cannabis-marijuana-parenting-children-drugs> [<https://perma.cc/YA4N-BGQQ>] (discussing marijuana use by—presumably white—parents in the United States, including lactating mothers).

41. See generally Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

42. See Vann R. Newkirk II, *What the ‘Crack Baby’ Panic Reveals About the Opioid Epidemic*, ATLANTIC (July 16, 2017), <https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763/> [<https://perma.cc/67HH-DLHT>]; Issac J. Bailey, *Why Didn’t My Drug-Affected Family Get Any Sympathy?*, POLITICO (June 10, 2018), <https://www.politico.com/magazine/story/2018/06/10/opioid-crisis-crack-crisis-race-donald-trump-218602/> [<https://perma.cc/S36K-DV8J>]; MOVEMENT FOR FAMILY POWER, *supra* note 18, at 34.

43. See Newkirk, *supra* note 42; Bailey, *supra* note 42; MOVEMENT FOR FAMILY POWER, *supra* note 18, at 34.

44. Only a small portion of cases involve intrafamilial violence and abuse. See U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at ii (2019) (finding that 61 percent of victims were neglected, 10.3 percent were physically abused, and 7.2 percent were sexually abused); MOVEMENT FOR FAMILY POWER, *supra* note 18, at 13–14.

45. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SUBSTANCE USE DISORDER TREATMENT FOR PEOPLE WITH CO-OCCURRING DISORDERS 7 (2020), https://store.samhsa.gov/sites/default/files/SAMHSA_Digital_Download/PEP20-02-01-004_Final_508.pdf [<https://perma.cc/DE9M-NE6Y>]; see also Colette Bouchez, *Mental Illness and Substance Abuse*, WEBMD (June 1, 2006), <https://www.webmd.com/bipolar-disorder/features/bipolar-disorder-and-substance-abuse> [<https://perma.cc/HL9H-RNMR>].

vulnerable to the other” regardless of which starts first.⁴⁶ Research also suggests that any of the following could be true: (1) substance abuse may have reached epidemic proportions, (2) widespread exposure is now illuminating habits that were previously hidden, or (3) widespread exposure is now revealing behavior that was less surveilled and punished prior to the War on Drugs.⁴⁷

Although the crack epidemic of the 1980s and 1990s and the present Opioid Crisis have increased the number of children removed from their families and placed in the foster care system, a causal link cannot be made between parental substance use and child maltreatment.⁴⁸ A plethora of social cognition studies have been unable to conclusively draw a causal connection between drug use and inferior parenting.⁴⁹ Further, recent studies by the U.S. Department of Health and Human Services confirm that little empirical evidence supports the assertion that “parental substance use” of any kind “has been the primary cause” of increased foster care placements.⁵⁰ The insidious conflation of family poverty with child neglect also makes it impossible to reliably link parental substance abuse with foster care entry.⁵¹ Nonetheless, many child welfare professionals perceive causality between a caregiver’s substance use and the professionals’ own decisions to investigate, substantiate maltreatment, and initiate foster care placements.⁵² A Child

46. See Bouchez, *supra* note 45; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 45, at 7 (“Comorbidity [with substance misuse] is important because it is the rule rather than the exception with mental health disorders.” (citing Glenn E. Hunt et al., *Comorbidity of Bipolar and Substance Use Disorders in National Surveys of General Populations, 1990–2015: Systematic Review and Meta-analysis*, J. AFFECTIVE DISORDERS, Dec. 2016, at 321, 326)); see also Stephanie Hartwell, *Triple Stigma: Persons with Mental Illness and Substance Abuse Problems in the Criminal Justice System*, 15 CRIM. JUST. POL’Y REV. 84, 95 (2004); *Mental Illness*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness> [<https://perma.cc/H8PH-VJAK>] (last visited Apr. 2, 2022); TERESE VOGEL, CMTY. PREVENTION INITIATIVE, NEW APPROACHES TO PREVENTION: ALIGNING INTERVENTIONS BETWEEN SUBSTANCE ABUSE AND MENTAL HEALTH (2012), http://www.ca-cpi.org/wp-content/uploads/2016/10/POP_Aligning-Interventions-2012.pdf [<https://perma.cc/3QCR-R6WZ>].

47. See generally LAURA RADEL ET AL., OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., SUBSTANCE USE, THE OPIOID EPIDEMIC, AND THE CHILD WELFARE SYSTEM: KEY FINDINGS FROM A MIXED METHODS STUDY (2018), <https://aspe.hhs.gov/sites/default/files/private/pdf/258836/SubstanceUseChildWelfareOverview.pdf> [<https://perma.cc/47KX-3ZFW>].

48. See *id.* at 3.

49. MOVEMENT FOR FAMILY POWER, *supra* note 18, at 21 (“The scientific literature that suggests substance use produces social cognitive deficits in parenting is underwhelming.”).

50. RADEL ET AL., *supra* note 47, at 1–2.

51. Child neglect statutes define neglect as a caregiver’s failure to provide life’s basic necessities. See *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, U.S. CHILD.’S BUREAU, <https://www.childwelfare.gov/pubpdfs/define.pdf> [<https://perma.cc/G9JD-9XRB>] (last visited Apr. 2, 2022). Many states do not distinguish between child neglect and underlying poverty or a caregiver’s inability to improve financial circumstances. See ROBIN GHERTNER ET AL., U.S. DEPT. OF HEALTH & HUM. SERVS., THE RELATIONSHIP BETWEEN SUBSTANCE USE INDICATORS AND CHILD WELFARE CASELOADS (2018), <https://aspe.hhs.gov/sites/default/files/private/pdf/258831/SubstanceUseCWCaseloads.pdf> [<https://perma.cc/R77A-7LEH>].

52. See MOVEMENT FOR FAMILY POWER, *supra* note 18, at 21.

Protective Services (CPS) investigator's own biased opinion is the most consistent variable used to determine child maltreatment in cases involving caregiver substance use.⁵³ Such circular logic is an unreliable measure to maintain systems that tear families apart and can lead to the termination of parents' rights to their children.⁵⁴

Regardless of the family regulation system's impulse to increase caseloads where caregiver substance use is alleged, the foster system's damage to families, communities, and society at large remains a far graver concern. The system causes short- and long-term health consequences to children;⁵⁵ egregious health consequences for parents,⁵⁶ including suicidality and post-traumatic stress disorder;⁵⁷ and "heightened social disadvantages including loss of housing, employment, income and social support, and increased stigma."⁵⁸ A recent report to the United Nations asserts that such outcomes "compound societal disadvantages *already* faced by [caregivers] prior to removal of their children, further escalating systemic disregard and health/social inequities . . . and creating [monumental] barriers to rebuilding

53. See *id.* at 138 nn.51–52 (first citing Lawrence M. Berger et al., *Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes*, 15 CHILD MALTREATMENT 199, 199–210 (2010); then citing Bryan G. Victor et al., *Domestic Violence, Parental Substance Misuse and the Decision to Substantiate Child Maltreatment*, 79 CHILD ABUSE & NEGLECT 31 (2018)).

54. See *id.* at 22.

55. See *id.* at 35. See generally, e.g., DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57 (2006); Kristen Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 1 (2016) (showing the association between increased mental health issues and child placement in the foster care system); Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERVS. REV. 1143 (2011) (suggesting that placement in foster care increases the likelihood of emergency health episodes); Laura Santhanam, *How the Toxic Stress of Family Separation Can Harm a Child*, PBS (June 28, 2018), <https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child> [<https://perma.cc/X4U8-FV9M>].

56. See MOVEMENT FOR FAMILY POWER, *supra* note 18, at 35–36.

57. See generally, e.g., Kathleen S. Kenny et al., "I Felt for a Long Time Like Everything Beautiful in Me Had Been Taken Out": Women's Suffering, Remembering, and Survival Following the Loss of Child Custody, 26 INT'L J. DRUG POL'Y 1158 (2015); Kendra L. Nixon et al., "Every Day It Takes a Piece of You Away": Experiences of Grief and Loss Among Abused Mothers Involved with Child Protective Services, 7 J. PUB. CHILD WELFARE 172 (2013); Elizabeth Wall-Wieler et al., *Suicide Attempts and Completions Among Mothers Whose Children Were Taken into Care by Child Protection Services: A Cohort Study Using Linkable Administrative Data*, 63 CANADIAN J. PSYCHIATRY 170 (2018); Elizabeth Wall-Wieler et al., *Mortality Among Mothers Whose Children Were Taken into Care by Child Protection Services: A Discordant Sibling Analysis*, 187 AM. J. EPIDEMIOLOGY 1182 (2018); Elizabeth Wall-Wieler et al., *Postpartum Depression and Anxiety Among Mothers Whose Child Was Placed in Care of Child Protection Services at Birth: A Retrospective Cohort Study Using Linkable Administrative Data*, 22 MATERNAL & CHILD HEALTH J. 1393 (2018).

58. See generally, e.g., Elizabeth Wall-Wieler et al., *Maternal Health and Social Outcomes After Having a Child Taken into Care: Population-Based Longitudinal Cohort Study Using Linkable Administrative Data*, 71 J. EPIDEMIOLOGY & CMTY. HEALTH 1145 (2017); Jennifer L. Hook et al., *Trajectories of Economic Disconnection Among Families in the Child Welfare System*, 63 SOC. PROBS. 161 (2016); see also MOVEMENT FOR FAMILY POWER, *supra* note 18, at 35–36.

their lives and families.”⁵⁹ As the abolitionist organization Movement for Family Power points out, American society fails to scrutinize the foster care system’s intervention into the lives of low-income families of color because of three faulty assumptions:⁶⁰ First, that drug use by Black and Brown parents causes harms or poses risks of harms that justify the existence of this massive, powerful government apparatus.⁶¹ Second, that the foster care system is capable of identifying harm or risks of harm.⁶² And third, that the foster care system is equipped to respond appropriately to ensure the well-being of low-income families.⁶³ Ironically, American family courts name their legal proceedings against purportedly failing caregivers “in the interest of” these individuals’ own children, or in the name of “the state versus” a parent, adding to the public perception that the family regulation system prioritizes child protection despite its racially and socioeconomically discriminatory actions.⁶⁴

C. Family Regulation and Legacies of Oppression

The empathy gap originated long before the Opioid Crisis and the War on Drugs. Overcoming the racial and ethnic disparities in the modern foster care system⁶⁵—which is rooted in vestiges of explicit racial domination, capitalist

59. NAT’L ADVOCS. FOR PREGNANT WOMEN & MOVEMENT FOR FAMILY POWER, VIOLENCE AGAINST WOMEN IN THE MEDICAL SETTING: AN EXAMINATION OF THE U.S. FOSTER SYSTEM 5 (2019), https://ccrjustice.org/sites/default/files/attach/2019/06/MFP_NAPW_UN_VAW_Submission-20190531-Final.pdf [<https://perma.cc/XS69-2X7Z>].

60. See MOVEMENT FOR FAMILY POWER, *supra* note 18, at 19–23, 30–42.

61. See *id.* at 19–23.

62. See *id.* at 30–34.

63. See *id.* at 35–42.

64. The terms “in the interest of” and “the state versus” are common names for child dependency pleadings throughout the country. See, e.g., *What Is Dependency?*, ADMIN. OFF. OF PA. DEPENDENCY CTS., https://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/resources/webhelp/Dependency/Overview/What_is_Dependency.htm [<https://perma.cc/RD52-TY28>] (last visited Apr. 2, 2022); ANGELA SHERBO ET AL., YOUTH RTS. JUST., CONSTITUTIONAL RIGHT TO APPOINTMENT OF COUNSEL FOR CHILDREN IN JUVENILE DEPENDENCY CASES (2020), <https://youthrightsjustice.org/wp-content/uploads/2020/08/Right-to-Counsel-Memo-2020.pdf> [<https://perma.cc/82G8-TMQM>]; see also MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 38–39 (2005); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1441–50 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004).

65. See, e.g., U.S. DEP’T OF HEALTH & HUM. SERVS., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY (2003), <https://www.childwelfare.gov/pubpdfs/children.pdf> [<https://perma.cc/Y6Z4-BVJR>]; CHILD WELFARE INFO. GATEWAY, U.S. CHILD’S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 3 (2020) [hereinafter CHILD WELFARE PRACTICE], https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/NX5S-2TSS>]; *Disproportionality and Race Equity in Child Welfare*, NAT’L CONF. OF STATE LEGIS. (Jan. 26, 2021), <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx> [<https://perma.cc/8PRF-A9GC>].

imperialism, and western expansion across the continental United States⁶⁶—requires a transformative vision.⁶⁷

The modern foster care system’s practice of forced family separation under the guise of state benevolence continues the U.S. government’s earlier practices, which were built on deep-seated beliefs that people of color were less human and in need of control.⁶⁸ After slavery was abolished, the U.S. government attempted to resolve what was offensively coined “the Indian Problem”; indigenous families were subject to a massive relocation campaign⁶⁹ that only partially ended with the passage of the Indian Child Welfare Act of 1978.⁷⁰ As part of this campaign, the U.S. Bureau of Indian Affairs removed Native American children from their families and placed them in boarding schools to “assimilate” into the “American way of life.”⁷¹ Boarding schools were a deliberate instrument for absorbing indigenous cultures standing in the way of white people’s “manifest destiny”—the philosophy legitimizing westward expansion rooted in Christian beliefs about white supremacy.⁷² As mass graves were uncovered at boarding schools in Canada,⁷³ the remains of ten Native American children were discovered on the grounds of Carlisle Indian Industrial School in

66. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–59 (2012); DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

67. See *infra* Part V.

68. See Anthony Fieldman, *Manifest Destiny*, MEDIUM (May 5, 2021), <https://anthonyfieldman.medium.com/manifest-destiny-53ba82df7e73> [<https://perma.cc/32WH-SBVN>]; see also Jean Stefancic, *Terrace v. Thompson and the Legacy of Manifest Destiny*, 12 NEV. L.J. 532, 536 (2012).

69. See Max Nesterak, *Uprooted: The 1950s Plan to Erase Indian Country*, AM. PUB. MEDIA, <https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country> [<https://perma.cc/93DY-HWCY>] (last visited Apr. 2, 2022).

70. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C.).

71. See *History & Culture: Boarding Schools*, N. PLAINS RSRV. AID, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools [<https://perma.cc/A7A3-8AHM>] (last visited Apr. 2, 2022). See also generally Alice C. Fletcher and Zitkala-Ša, *Settler Mothers and Native Orphans*, in *THE TROUBLE WITH WHITE WOMEN: A COUNTERHISTORY OF FEMINISM* 79 (Kyla Schuller ed., 2021); NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* (2019); MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940* (2009). Cf. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1990*, at 260 (Francis Paul Prucha ed., 1973).

72. See *America’s Manifest Destiny*, SMITHSONIAN AM. ART MUSEUM, <https://americanexperience.si.edu/historical-eras/expansion/pair-westward-apotheosis/> [<https://perma.cc/9CEP-D3HJ>] (last visited Apr. 2, 2022).

73. See Mary Louise Kelly et al., *U.S. Boarding Schools Were the Blueprint for Indigenous Family Separation in Canada*, NPR (June 3, 2021, 4:21 PM), <https://www.npr.org/2021/06/03/1003020286/u-s-boarding-schools-were-the-blueprint-for-indigenous-family-separation-in-cana> [<https://perma.cc/RD45-JZL8>].

Pennsylvania in June 2021, highlighting the tragic consequences of this era of government policy.⁷⁴

Throughout U.S. history, forced separation and state intrusion upon families of color have primarily occurred for reasons linked to cultural bias, discrimination, and socioeconomic disadvantage. The empathy gap and the compassionate portrayal of white caregivers experiencing opioid addiction adhere to an old narrative about inherent white virtue, accidental corruption, and potential redemption. Since the founding of the first juvenile court in Chicago in 1899, family courts have imposed traditional, white, middle-class cultural and gender norms on marginalized communities in the same manner as the Native American boarding schools did.⁷⁵ Juvenile courts facilitated a newfound public system of intervention into the lives of Black people, Native Americans, immigrants, and poor families in the name of preventing child maltreatment and delinquency.⁷⁶ These carceral, protectionist⁷⁷ approaches involve the exertion of state *parens patriae* authority to divide families, exact punitive sanctions against caregivers, and implement monitoring systems inside communities under the pretext of care.⁷⁸

Black women have particularly borne the brunt of punitive state responses to alleged parental substance use. During the crack cocaine epidemic, images of demonized Black mothers were the “face” of substance abuse.⁷⁹ States turned to the criminal legal system to address substance use by Black women during pregnancy,⁸⁰ and prosecutors removed scores of children from their homes under the guise of child protection.⁸¹

74. See Jenna Kunze, *The Remains of 10 Children at the Carlisle Indian Boarding School Are Returning Home*, NATIVE NEWS ONLINE (June 17, 2021), <https://nativenewsonline.net/currents/the-remains-of-10-children-at-the-carlisle-indian-boarding-school-are-returning-home> [<https://perma.cc/KN2P-HKJ7>]. The National Native American Boarding School Healing Coalition is demanding an inquiry into these unmarked graves. See *History & Culture: Boarding Schools*, *supra* note 71; Kelly et al., *supra* note 73.

75. See, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61 (1994); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 586 (2011); Charisa Smith, *No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking*, 71 U. MIAMI L. REV. 1, 50 (2016); Crenshaw, *supra* note 64, at 1449–50; Roberts, *supra* note 64, at 1298–99; ROBERTS, *supra* note 55, at 234 (“Judges had the power to place Black children in the care and service of whites if they found the[ir] parents to be unfit . . .”).

76. See, e.g., Fitzgerald, *supra* note 75, at 61; King, *supra* note 75, at 592; Smith, *supra* note 75, at 22; Crenshaw, *supra* note 64, at 1449–50; Roberts, *supra* note 64, at 1298–1300; ROBERTS, *supra* note 55, at 234; see also Michael Yudell, *Proposed 1920s Orphanage Study Just One Example in History of Scientific Racism*, THE CONVERSATION (Feb. 23, 2015, 5:57 AM), <https://theconversation.com/proposed-1920s-orphanage-study-just-one-example-in-history-of-scientific-racism-37015> [<https://perma.cc/4ZPW-JQ3M>].

77. See Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1357 (2015).

78. See *id.*

79. See MOVEMENT FOR FAMILY POWER, *supra* note 18, at 15–29 (describing the historical context behind the foster care system, racism within the War on Drugs, and links between those issues and mass incarceration).

80. See *id.*

81. See Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 775 (2020).

Although communities of color use drugs at a similar rate as affluent white communities, families of color are almost exclusively the target of family regulation system intervention.⁸² The child-rearing abilities of caregivers of color have been historically devalued in the United States, even as women of color have comprised the majority of the domestic workforce.⁸³ The Department of Health and Human Services confirms that “minority children” are “more likely to be in foster care” than in in-home services, despite their families’ exhibiting the same problems and characteristics as white children’s families.⁸⁴ Additionally, states codify misinformed, discriminatory, and punitive approaches to caregiver substance use. For example, the New York Family Court Act⁸⁵ creates a presumption of neglect if a child’s well-being is threatened by a caregiver who “repeatedly misuses” drugs.⁸⁶ However, the statute is highly subjective and does not distinguish between types or quantities of drugs.⁸⁷

The Supreme Court of Pennsylvania recently addressed egregious state oversight in the foster care system, ruling that “nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court makes a determination as to whether or not to authorize” a child protective home visit.⁸⁸ Rejecting arguments that a lower evidentiary threshold is permissible in child welfare cases, the court held that “the Fourth Amendment applies equally whether the government official is a police officer conducting a criminal investigation or a caseworker conducting a civil child welfare investigation.”⁸⁹ Unfortunately, other states still afford caseworkers

82. See generally CTR. FOR BEHAV. HEALTH STAT. & QUALITY, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., RESULTS FROM THE 2017 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES (2018) (reporting statistics on drug use among white families and families of color); RACHEL N. LIPARI & STRUTHER L. VAN HORN, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., CHILDREN LIVING WITH PARENTS WHO HAVE A SUBSTANCE USE DISORDER (2017) (reporting data on the number of American children living with parents who have a substance use disorder). See also MOVEMENT FOR FAMILY POWER, *supra* note 18, at 133–34 n.31.

83. See Ashley Nkadi, *Domestic Workers: The Women Who Raised America*, THE ROOT (Mar. 27, 2018, 9:00 AM), <https://www.theroot.com/domestic-workers-the-women-who-raised-america-1823983133> [<https://perma.cc/N9QU-4699>]; David Childs, *Part Three (Women’s Rights)—The Womanist Tradition and Domestic Workers in the Early Twentieth Century US*, DEMOCRACY & ME (Oct. 7, 2019), <https://www.democracyandme.org/the-womanist-tradition-and-domestic-workers-in-the-early-twentieth-century-us/> [<https://perma.cc/C6NH-MAMD>].

84. See ADMIN. FOR CHILD. & FAMILIES, U.S. DEP’T OF HEALTH & HUM. SERVS., NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES: FINAL REPORT, at xi (1998), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-study-protective-preventive-and-reunification-services> [<https://perma.cc/L3B7-2699>]. See also generally CHILD WELFARE PRACTICE, *supra* note 65.

85. N.Y. FAM. CT. ACT § 111 (McKinney 2022).

86. *Id.* §§ 1012, 1046.

87. *Id.*

88. In the Interest of Y.W.-B., 265 A.3d 602, 625 (Pa. 2021).

89. *Id.* at 626–27. The court affirmatively stated that there is no “social worker” exception to the Fourth Amendment. *Pennsylvania Supreme Court Limits Power of Child Welfare*

extremely broad discretion and investigatory powers while relying on ill-founded understandings of culture and substance use.⁹⁰ Today, state overreach into family lives involves an intricate combination of social service and family court practices, as well as federal and state statutory schemes with a major fiscal impact on state and local budgets.⁹¹ Although the skyrocketing effects of opioid and substance abuse on families and communities are concerning, there is an urgent need to curtail an expansive family regulation system that inaccurately identifies risk, deprives most impacted caregivers of requisite support, criminalizes people of color, and perpetuates family separation across jurisdictions.⁹²

D. Scarce Due Process and Problematic Evidentiary Standards

The family regulation system also perpetuates systems of oppression by depriving fundamental constitutional rights of sufficient procedural safeguards. The harshest possible outcome of a family court case—the termination of parental rights—has been called the “civil death penalty.”⁹³ Courts must afford all caregivers the fundamental right to family integrity, as they merit “freedom of personal choice in matters of family life [as] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”⁹⁴ A majority of states utilize family integrity as a factor in determining a “child’s best interests.”⁹⁵ The U.S. Supreme Court clarified

Agencies to Search Homes, CMTY. LEGAL SERVS. OF PHILA. (Jan. 4, 2022), <https://clsphila.org/family/supreme-court-home-search-decision/> [<https://perma.cc/57XG-HLNH>].

90. See generally Bowen McBeath et al., *Under What Conditions Does Caseworker-Caregiver Racial/Ethnic Similarity Matter for Housing Service Provision?: An Application of Representative Bureaucracy Theory*, 88 SOC. SERV. REV. 134 (2014); Vivek Sankaran, *With Child Welfare, Racism Is Hiding in the Discretion*, THE IMPRINT (June 21, 2020), <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616> [<https://perma.cc/5UH3-2APA>].

91. See CHILD WELFARE PRACTICE, *supra* note 65, at 5–10.

92. See *id.*

93. See *Overview of Terminating Parental Rights*, FAMILY L. SELF-HELP CTR., <https://www.familylawselfhelpcenter.org/self-help/adoption-termination-of-parental-rights/overview-of-termination-of-parental-rights> [<https://perma.cc/NUJ8-3UQ7>] (last visited Apr. 2, 2022); *Child Welfare Appellate Clinic*, U. MICH. SCH. OF L., <https://michigan.law.umich.edu/academics/experiential-learning/clinics/child-welfare-appellate-clinic-0> [<https://perma.cc/YK7J-NRXA>] (last visited Apr. 2, 2022); *Federal Legislation to #StopTheClock and Help Families Reunify During the COVID-19 Crisis*, SHRIVER CTR. ON POVERTY L. (Aug. 20, 2020), <https://www.povertylaw.org/article/federal-legislation-to-stoptheclock-and-help-families-reunify-during-the-covid-19-crisis/> [<https://perma.cc/5QFY-3SUR>].

94. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)); see also *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); *Alsager v. Dist. Ct. of Polk Cnty.*, 406 F. Supp. 10, 16 (S.D. Iowa 1975).

95. See CHILD WELFARE INFO. GATEWAY, U.S. CHILD.’S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf [<https://perma.cc/WH7F-5GK3>] (reporting that approximately twenty-eight states consider “the importance of family integrity” as a guiding principle when making “best interests” determinations).

this priority in *Santosky v. Kramer*,⁹⁶ holding that a state must support its allegations backing the termination of parental rights by at least clear and convincing evidence because “the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”⁹⁷ The Court in *Santosky* also noted that a biological parent’s fundamental liberty interest in raising his or her children “does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”⁹⁸ In *DeBoer v. DeBoer*,⁹⁹ Justice John Paul Stevens, writing for the Court, proclaimed that courts “are not free to take children from parents simply by deciding another home offers more advantages.”¹⁰⁰

However, the family regulation system deprives marginalized families of due process at every stage of the process—from an initial CPS response to the attainment of child “permanency,” such as adoption or aging out of foster care.¹⁰¹ Problematic concerns include (1) unwieldy mandatory reporting laws for professionals and government officials; (2) broad caseworker discretion to search property, investigate, and remove children from their homes without providing *Miranda*-type warnings; (3) parental inability to decline participation in investigations or coercive programming; (4) informal yet highly influential court proceedings where parents’ attorneys are held to different standards than CPS attorneys; and (5) inadequate access to parents’ counsel in most jurisdictions.¹⁰² Further, the family regulation system utilizes surveillance tools, including random drug testing, that violate evidentiary standards utilized in other legal proceedings.¹⁰³ Notably, hearsay is also admissible in family and juvenile court.¹⁰⁴

Formal legal norms employed by the family regulation system also involve culturally biased concepts of behavior and family relationships that further compound social marginalization and fragmentation. For example, the “best

96. 455 U.S. 745 (1982).

97. *Id.* at 760.

98. *Id.* at 753.

99. 509 U.S. 1301 (1993) (Stevens, J., in chambers).

100. *Id.* at 1302 (quoting *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992)).

101. See generally Tarek Z. Ismail, Child Protective Caseworkers as Law Enforcement Officers (Mar. 1, 2021) (unpublished manuscript), <https://www.law.nyu.edu/sites/default/files/Tarek%20Ismail%20-%20Child%20Protective%20Caseworkers.pdf> [<https://perma.cc/AEH2-2MT5>].

102. See *id.*

103. See *id.*

104. See *Understanding Hearsay in Child Welfare Cases*, WILLIAMS L. GRP., <https://familylawyersnewjersey.com/understanding-hearsay-in-child-welfare-cases/> [<https://perma.cc/Q84X-UPGT>] (last visited Apr. 2, 2022); see also Brief for The Bronx Defenders et al. as Amicus Curiae at 5–6, *In re Trenasia J.*, 32 N.E.3d 377 (N.Y. 2014) (No. 30), <https://www.bronxdefenders.org/wp-content/uploads/2014/10/BxD-Amicus-Brief.pdf> [<https://perma.cc/3SV4-TBF2>] (arguing against the judicial expansion of the statutory hearsay exception for child protective and custody cases); GUARDIAN AD LITEM FOR CHILD., PROTECTING THE CHILD’S VOICE: USE AND APPLICATION OF THE CHILD VICTIM HEARSAY EXCEPTION (2018), [http://centerforchildwelfare.fmhi.usf.edu/Training/2018cpssummit/Protecting_The_Child%27s_Voice_Use_and_Application_of_the_Child_Victim_Hearsay_Exception_original.1535034309%20\(1\).pdf](http://centerforchildwelfare.fmhi.usf.edu/Training/2018cpssummit/Protecting_The_Child%27s_Voice_Use_and_Application_of_the_Child_Victim_Hearsay_Exception_original.1535034309%20(1).pdf) [<https://perma.cc/T26C-R6FC>].

interests of the child” standard is outdated, context-based, and vague.¹⁰⁵ Yet, both the Adoption and Safe Families Act of 1997¹⁰⁶ (ASFA) and state laws emphasize the child’s best interests as a guiding factor.¹⁰⁷ Legal actors with scarce investigative resources and expertise are charged with making determinations about the child’s purported best interests.¹⁰⁸ The “best interests” standard is informed primarily by Eurocentric, upper middle class concepts of nuclear family that tend to reject or misconstrue alternative understandings of extended familial ties, multigenerational family structures, indigenous tribal membership, non-heteronormative caregiving, or the sufficiency of single parenthood.¹⁰⁹ The family regulation system can learn volumes from clinical and international human rights sources that recognize that children are inextricably embedded in families, which exist in communities and within a wider societal system.¹¹⁰

Additionally, the entire rights-based framework for cognizing children’s needs, parental interests, and a state response ignores the crucial role that underlying poverty and sociocultural conditions play in establishing the legal

105. See Martin Guggenheim, *Let’s Root Out Racism in Child Welfare, Too*, THE IMPRINT (June 15, 2020), <https://imprintnews.org/child-welfare-2/lets-root-out-racism-child-welfare-too/44327> [<https://perma.cc/BE9J-DAXF>]; GUGGENHEIM, *supra* note 64, at 38–39; Smith, *Conundrum of Family Reunification*, *supra* note 13, at 311.

106. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

107. ASFA prioritizes the “child’s health and safety.” 42 U.S.C. § 671(a)(15)(A); see also Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975); Orly Rachnilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785, 814–18 (2010); Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL’Y 29, 35–36 (2001); ROBERTS, *supra* note 55, at 125–26; GUGGENHEIM, *supra* note 64, at 38–39; Fitzgerald, *supra* note 75, at 61; King, *supra* note 75, at 629–30; Smith, *Conundrum of Family Reunification*, *supra* note 13, at 311.

108. See *supra* note 107 and accompanying text.

109. See *id.*; see also Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2063–68 (2015) (discussing the “traditional” norms surrounding parenting and families); Donald M. Thomson & Susan E. Molloy, *Assessing the Best Interests of the Child*, 18 AUSTRALIAN EDUC. & DEVELOPMENTAL PSYCH., no. 2, 2001, at 5, 5–8 (critiquing the “best interests” standard and discussing persistent cultural biases).

110. See generally Sara E. Cooper, *Introduction to THE TIES THAT BIND: QUESTIONING FAMILY DYNAMICS AND FAMILY DISCOURSE* 1, 13 (Sara E. Cooper ed., 2004); Elizabeth A. Mulroy, *Theoretical Perspectives on the Social Environment to Guide Management and Community Practice: An Organization-in-Environment Approach*, 28 ADMIN. SOC. WORK, no. 1, 2004, at 77; Irene Stevens & Pat Cox, *Complexity Theory: Developing New Understandings of Child Protection in Field Settings and in Residential Child Care*, 38 BRITISH J. SOC. WORK 1320 (2007); Carol Morgaine, *Family System Theory* (2001) (unpublished course materials for Portland State University Course CFS 410U), <https://web.pdx.edu/~cbcm/CFS410U/FamilySystemsTheory.pdf> [<https://perma.cc/SM83-WC9R>]; FRED WULCZYN ET AL., *ADAPTING A SYSTEMS APPROACH TO CHILD PROTECTION: KEY CONCEPTS AND CONSIDERATIONS* (2010), <https://www.icmec.org/wp-content/uploads/2015/10/UNICEF-Adapting-a-Systems-Approach-to-Child-Protection-2010.pdf> [<https://perma.cc/7GXT-L3SB>]; see also Smith, *Conundrum of Family Reunification*, *supra* note 13, at 318–19.

standards for child maltreatment.¹¹¹ Eliminating family separation and linking child well-being to caregiver support are key to facilitating children's own interests.¹¹²

Legal norms and processes in the family regulation system also subjugate the authentic narratives, needs, and self-determination of those directly impacted. As previously described, the system's responses, starting from initial investigation protocols, penalize parents for objecting to coercive interventions and perceive any unwillingness to cooperate as potential child endangerment.¹¹³ Ultimately, the family regulation system exacts what scholar Lisa Washington coins epistemic injustice by forcing impacted caregivers to adopt external victimhood narratives and preventing them from defining issues in their own terms.¹¹⁴ Status quo approaches also misconstrue the stark reality that impacted children face. While impacted children are forced to engage in adversarial proceedings involving their caregivers, those children are denied the recognition of their own independence and the capacity to utilize resources and services for themselves.¹¹⁵

III. EMPATHY GAP: THE BORDER CRISIS AND THE COVID-19 PANDEMIC

A. Family Separation at the Southern Border

The existence of the empathy gap is evident when one compares media coverage of family separation at the southern border and perceptions of families in the foster care system.¹¹⁶ The public and mainstream media express outrage over migrant families facing forced separation but completely ignore parallels with routine separations in local family courts. Undoubtedly, stereotypical ideas about dangerous parents, violent family interactions, neglectful or absent caregivers, and children living in abject poverty were prevalent as the border crisis gained attention.¹¹⁷ Yet, the public's erasure of the trauma and devastation experienced by families of color in the foster care system remains unacceptable.¹¹⁸

111. See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 664, 667–68, 670–71 (2006).

112. See Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregivers' Rights and Children's Rights*, 15 NEV. L.J. 236, 276–84 (2014).

113. MOVEMENT FOR FAMILY POWER, *supra* note 18, at 87.

114. See S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. (forthcoming 2022).

115. See Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 304 (2014); Smith, *supra* note 75, at 66.

116. A full discussion of the empathy gap related to separations at the southern border is beyond the scope of this Essay.

117. See Dewan, *supra* note 2.

118. See *id.*

B. The COVID-19 Pandemic

The impact of the COVID-19 pandemic on poor communities of color and women also illuminates the empathy gap; yet the pandemic also presents the clearest example of complete vulnerability across all segments of society. Furthermore, it is naïve to presume that white supremacy and racial capitalism only operate where white people experience positive outcomes.¹¹⁹ Most families are struggling to balance employment, childcare or care for dependent adults, economic downturns, and job loss. Yet, poor communities of color and women are still impacted the most.¹²⁰ In addition to facing economic and financial hardships, caregivers of color are simultaneously facing overcriminalization and demonization.¹²¹ For example, family regulation systems process more educational neglect cases when low-income caregivers of color either cannot access remote school or face health challenges that keep their children out of in-person educational settings.¹²²

IV. A VITAL REFRAMING: THE LENS OF VULNERABILITY & THE HUMAN CONDITION

The COVID-19 pandemic presents both a tragic crisis and a radical opportunity to reimagine the status quo, as we see more starkly than ever the vulnerability of the human condition. Vulnerability theory provides a crucial analytical tool for conceptualizing our current conundrum and charting a path forward. This theory rejects the Western, liberal notion that the fundamental legal and political subject is an independent individual with liberty to act in the market and in society.¹²³ Instead, renowned feminist scholar Martha Albertson Fineman locates the *vulnerable subject* as the fundamental actor, asserting that a web of institutions in society distribute privileges, enabling

119. See generally CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* (2016); ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018) (discussing how white Americans are insulated from discussions about race); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* (2021) (arguing that racism is at the root of social and economic problems faced by white and Black Americans); Guggenheim, *supra* note 105 (“Similarly, it is undeniable that poor white families are far too often permanently destroyed by the rigid implementation of ASFA.”); Bridges, *supra* note 81, at 785.

120. See Naomi R. Cahn & Linda C. McClain, *Gendered Complications of Covid-19: Towards a Feminist Recovery Plan*, 22 *GEO. J. GENDER & L.* 1, 44–45 (2020); Barbara Stark, *Inequality, Covid-19, and Human Rights: Whose Lives Matter?*, 27 *ILSA J. INT'L & COMP. L.* 251, 254 (2021).

121. See, e.g., Asher Lehrer-Small, *Parents Who Kept Kids at Home for Fear of Covid Are Reported for Neglect*, *GUARDIAN* (Jan. 27, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/jan/27/covid-kids-school-reported-for-neglect> [<https://perma.cc/4SVD-BEWN>]; Christina Veiga & Amy Zimmer, *They Believed Home Was Safer than School. Now Some NYC Parents Are Accused of Educational Neglect*, *CHALKBEAT* (Nov. 19, 2021, 6:00 AM), <https://ny.chalkbeat.org/2021/11/19/22790130/nyc-parents-accs-educational-neglect-covid-concerns-remote-schooling> [<https://perma.cc/B3K3-9B5T>].

122. See Lehrer-Small, *supra* note 121; Veiga & Zimmer, *supra* note 121.

123. See Fineman, *supra* note 41, at 262–66.

us to build resilience to weather our universal human vulnerability.¹²⁴ In other words, dependency is fundamental to our existence.¹²⁵

As the pandemic has laid bare, vulnerability theory finds all persons to be inherently vulnerable—with the possibility of tragedy arising at any moment. Further, government and social institutions tend to provide certain individuals with more resources for becoming more resilient than others, and harms may statistically cluster among certain groups, while interdependence undergirds all social and political activity.¹²⁶ Additionally, vulnerability theory cognizes assumptions about autonomy and personal responsibility as barriers to transforming the status quo.¹²⁷ Professor Fineman emphasizes “the reality that we all live and die within a fragile materiality that renders us constantly susceptible to both internal and external forces beyond our control.”¹²⁸ Accordingly, a responsive state must attend to the human condition and displace the autonomous, self-interested liberal subject “that currently . . . define[s] the core responsibilities of policy and law.”¹²⁹

Vulnerability theory advocates for broad structural changes to realize greater societal equality. It resists individualized rights-based arguments and antidiscrimination efforts based on categories of identities and instead posits that a responsive state must alter institutional arrangements that create resilience and privilege.¹³⁰

Although vulnerability theory has been criticized for rejecting intersectionality in favor of “a vigorous universal conception,”¹³¹ various scholars evoke vulnerability theory in seeking practical solutions to complex sociopolitical and economic concerns.¹³² Social justice and critical race feminism provide crucial perspectives on a vulnerability framing of the American empathy drought.¹³³ Professors Dorothy Roberts and Joan

124. *See id.* at 266–69.

125. *See id.* at 263–66.

126. *See* Smith, *supra* note 75, at 38–40 (discussing Professor Fineman’s vulnerability theory in the context of commercial sexual exploitation of youth).

127. *See id.*

128. *See Property and Resilience: A Workshop on Vulnerability Theory*, EMORY UNIV. VULNERABILITY & HUM. CONDITION INITIATIVE (Apr. 2021), <http://events.r20.constantcontact.com/register/event?oeidk=a07ehsf17lyc04ddcc1&llr=7da4m4gab> [<https://perma.cc/PG5E-J25Q>] (quoting materials by Professor Fineman).

129. Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R.L. REV. 307, 310 (2014).

130. *See id.* at 311.

131. *See* Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 636 (2013).

132. *See* Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 3 nn.8–9 (2014); *see also* Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 64–65 (2013) (applying vulnerability theory in a discussion of the legal supports available for grandparents who assume caretaking roles to argue that children and older adults’ interests are in tension).

133. Social justice feminism prioritizes practice over theory, unifying language, and broad-based movement building. *See generally* Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN’S L.J. 131 (2010); Mariya Strauss & Tarso Luis Ramos, *Social Justice Feminism and How We Defeat the Right*, POL. RSCH. ASSOCS. (Mar. 1, 2018),

Callahan distinguished social justice feminism from liberal feminism in order to “shift the focus beyond individual liberty to other important considerations, thereby combining concepts of both negative and positive rights.”¹³⁴

Although proponents of substantive justice argue for a responsive state—a concept essential to vulnerability theory—America’s persistent violence and coercion toward families of color raises skepticism that any expansion of state apparatuses can yield true family empowerment or widespread prosperity. Consequently, this Essay asserts that the state should employ principles of nonintervention whenever possible in order to do minimal harm. The most promising next step is for the state to directly provide resources to individuals and communities, and the following part discusses existing initiatives along those lines.

V. A WAY FORWARD: ABOLITION, EMPOWERMENT & REPARATIONS

A serious inquiry about the role of law in society must take stock of the empathy gap and consider radical change, including the abolition of the family regulation system. Although the plethora of intersecting systems and family surveillance mechanisms have solidified inequity, exorbitant sums are committed to this entrenched industry of carceral protection.¹³⁵ The “therapeutic jurisprudence” approach offers an important analytical lens here, inquiring both how legal “rules, procedures, and [lawyer] roles” impact people’s psychological well-being and whether the law requires reform when it becomes antitherapeutic and violative of dignity.¹³⁶

Abolition of the family regulation system is a necessary and far-reaching endeavor. The system’s apparatuses need to be overhauled, starting with the repeal of ASFA, the eradication of mandated reporting in favor of systems that connect struggling families to community resources without punitive implications, and a revamped approach to substance use in the civil court context. Most importantly, jurisdictions should afford all caregivers a presumption of basic competence by adopting an overarching principle of nonintervention except for the most severe and life-threatening cases of physical or sexual abuse—a standard analogous to the “innocent until proven guilty” standard in criminal law. The “best interests of the child” standard should be eliminated, while any decision-makers on child safety should be

<https://politicalresearch.org/2018/03/01/social-justice-feminism-and-how-we-defeat-right> [https://perma.cc/7UFB-JJN8].

134. Kathleen Kelly Janus, *Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory*, 20 DUKE J. GENDER L. & POL’Y 255, 280 (2013).

135. See Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 433 (2021).

136. See Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH. L. REV. 301, 331–32 (2013).

intensively educated on cultural humility, not merely on cultural competence.¹³⁷

Another transformative change would include providing direct resources to American families in the way that other socialized democracies provide their residents. The Biden administration has adopted programs that seemed impossible in recent decades, particularly the American Rescue Plan, which includes a semblance of universal basic income.¹³⁸ Establishing paid family and medical leave and other social programs is a crucial next step.¹³⁹

Reparations for African American slavery are also integral to fulfilling the promise of equality. As the dialogue about reparations gains newfound momentum, vulnerability theory can provide a useful framework for confronting the continuing harms experienced by the descendants of African slaves and for calculating reparations in conjunction with universal basic income to be provided to all Americans.¹⁴⁰ H.R. 40¹⁴¹ and reparations-focused institutions are garnering unprecedented support from organizations like the American Civil Liberties Union and the MacArthur Foundation.¹⁴² Importantly, some jurisdictions, including California and

137. See generally UPEND, HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING (2021), <http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf> [<https://perma.cc/A8L7-GZ6W>]; Fernando Mederos & Isa Woldeguiorguis, *Beyond Cultural Competence: What Child Protection Managers Need to Know and Do*, CHILD WELFARE, Mar./Apr. 2003, at 125; Capacity Building Center for States, *Seeking Equity Calls Us to Cultural Humility*, CHILD.'S BUREAU EXPRESS (2021), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=225§ionid=17&articleid=5787> [<https://perma.cc/Y4AX-BL8P>].

138. See *The American Rescue Plan Passed—Now What?*, THE WHITE HOUSE (Mar. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/03/10/the-american-rescue-plan-passed-now-what/> [<https://perma.cc/W299-ZQRX>]. The American Rescue Plan is “significantly bolder than the response to the Great Recession in 2009” because it includes increased health-care subsidies, funding for rent and mortgage assistance, childcare, farm aid, and other vital supports. *The American Rescue Plan, Explained*, INDIVISIBLE, <https://indivisible.org/resource/american-rescue-plan-explained> [<https://perma.cc/8TML-T6CV>] (last visited Apr. 2, 2022).

139. See generally Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017); Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL’Y REV. 45 (2019); Lynn D. Lu, *From Stigma to Dignity?: Transforming Workfare with Universal Basic Income and a Federal Job Guarantee*, 72 S.C. L. REV. 703 (2021); Lynn D. Lu, *Restorative Relationships and “Radical Help”*: *Reimagining Welfare-to-Work Beyond the Market-Family Divide*, 50 U. BALT. L. REV. 287 (2021). See also Nicole Phillis, *Vulnerability Theory in Local Practice*, EMORY UNIV. L. BLOG (July 29, 2021), <https://scholarblogs.emory.edu/vulnerability/2021/07/29/vulnerability-theory-in-local-government/> [<https://perma.cc/4Q6Z-2FBH>].

140. See Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 625–26 (2015) (“[V]ulnerability theory would encourage governmental actions that are directed toward responsiveness”); Elizabeth L. MacDowell, *Vulnerability, Access to Justice, and the Fragmented State*, 23 MICH. J. RACE & L. 51, 88–91 (2017).

141. H.R. 40, 117th Cong. (1st Sess. 2021).

142. See, e.g., *What Are Reparations?*, MOVEMENT 4 BLACK LIVES, <https://m4bl.org/wp-content/uploads/2020/11/defining-reparations.pdf> [<https://perma.cc/FL5A-LF5L>] (last visited Apr. 2, 2022); Amelia Franck Meyer & Jessica Pryce, *Truth, Reconciliation, and Reparation in Child Welfare*, THE IMPRINT (Mar. 8, 2021, 7:45 AM), <https://imprintnews.org/child-welfare-2/truth-reconciliation-reparation-child-welfare/52475> [<https://perma.cc/RSA5->

Illinois, have already adopted programs that provide a template for merging approaches to universal basic income and reparations.¹⁴³ Evanston, Illinois, has funded reparations with the sales tax collected from the sale of legalized marijuana, directly linking sources of harm from the War on Drugs to social equity remedies and repair.¹⁴⁴ Calls to defund and divest from law enforcement and family regulation can inherently reimagine resource allocation. This author's forthcoming work insists that all cannabis legalization and market growth should be in lockstep with social equity efforts to address family law harms—not simply criminal justice transformation.¹⁴⁵ Impacted communities, including Native American tribes, are in the best position to assess their own experiences of harm and determine paths toward repair. The passage of certain progressive initiatives at this crucial juncture signifies persistent inspiration, hope, and motivation.

CONCLUSION

Various developments in U.S. history have created what this Essay coins an “empathy gap” in parenting, racial and ethnic identity, class, and purported morality. Too often, excessive overreach of the family regulation system into U.S.-born communities of color makes these parents' plight invisible, if not demonized, even when placed alongside parallel narratives of white families in the Opioid Crisis or undocumented families at the U.S.-Mexico border. Although factors ranging from human behavioral psychology to structural oppression widen the empathy gap, pandemic-era public policies ironically breathe life into the responsive state that vulnerability theory considers necessary. As long as demographic shifts and evolving attitudes inspire empowerment among marginalized groups, this matter will continue to resurface and potentially spark innovation.

DN42]; Press Release, Nat'l Coal. of Blacks for Reparations in Am., The National Coalition of Blacks for Reparations in America Was Awarded MacArthur Funds Supporting an Equitable Recovery (July 27, 2021), <https://www.ncobraonline.org/the-national-coalition-of-blacks-for-reparations-in-america-was-awarded-macarthur-funds-supporting-an-equitable-recovery/> [<https://perma.cc/L7L9-ZLA8>]; Russell Contreras, *First Look: ACLU to Push Reparations Bill, Southern Expansion*, AXIOS (Feb. 8, 2021), <https://www.axios.com/aclu-reparations-support-cb1a79b3-64e4-4807-a074-17aba69dd4c6.html> [<https://perma.cc/B8D3-UNG7>].

143. See S. 739, 151st Leg., 1st Sess. (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB739 [<https://perma.cc/4CWS-76EC>]; see also Will Jones, *Evanston, Illinois, to Begin Paying Reparations to Some Black Citizens This Summer*, ABC NEWS (June 14, 2021), <https://abc7chicago.com/evanston-illinois-reparations-direct-payments-for-black-americans-white-wealth-gap-restorative-housing-program/10734144/> [<https://perma.cc/2FTF-7CZZ>].

144. See generally Smith, *supra* note 39. See also Andy Fies, *Evanston, Illinois, Finds Innovative Solution to Funding Reparations: Marijuana Sales Taxes*, ABC NEWS (July 19, 2020, 11:03 AM), <https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707> [<https://perma.cc/W5XV-389L>].

145. See generally Smith, *supra* note 39.