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.

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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


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. An opioid is a substance that works in the nervous system or in specific receptors in the brain to reduce pain. 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.” By 2017, the U.S. Department of Health and Human Services declared a public health emergency requiring urgent attention, citing U.S. Centers for Disease Control and Prevention (CDC) data that over “140 Americans die from drug overdoses” on a daily basis. 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.

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.

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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, 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.” 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.” Importantly, the disability justice framework confronts the intersection between ableism, white supremacy, and

9. See infra Part IV.
state violence against people of color, and thus also contextualizes social perceptions of parents who misuse substances.

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 findings that shaped the Americans with Disabilities Act of 1990 (ADA). Further, the American Psychiatric Association (APA) classifies substance use disorders as diagnosable mental health conditions. 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. 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. 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.
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, 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. 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. 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.

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. 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

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22. See supra note 13 and accompanying text.

types of suffering.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 “opiod users.”\textsuperscript{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—

\textsuperscript{24} See generally CODY ET AL., supra note 23; GODSIL ET AL., supra note 23; JACKSON & GODSIL, supra note 23; Lopez, supra note 23.


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

\textsuperscript{27} See Jamison, supra note 1.

\textsuperscript{28} See id.; Crossley, supra note 26, at 1035.


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.
37. See Dewan, supra note 2.
have the privilege of endorsing marijuana’s parenting enhancement qualities as legalization proliferates. 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.

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. 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. 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. 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. Clinicians explain that substance use disorders and other mental illnesses frequently co-occur because “one [disorder] makes you more

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


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.

vulnerable to the other” regardless of which starts first.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} A plethora of social cognition studies have been unable to conclusively draw a causal connection between drug use and inferior parenting.\textsuperscript{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.\textsuperscript{50} The insidious conflation of family poverty with child neglect also makes it impossible to reliably link parental substance abuse with foster care entry.\textsuperscript{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.\textsuperscript{52} A Child


\textsuperscript{48} See id. at 3.

\textsuperscript{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.”).

\textsuperscript{50} Radel et al., supra note 47, at 1–2.


\textsuperscript{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.\(^\text{53}\) 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.\(^\text{54}\)

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;\(^\text{55}\) egregious health consequences for parents;\(^\text{56}\) including suicidality and post-traumatic stress disorder;\(^\text{57}\) and “heightened social disadvantages including loss of housing, employment, income and social support, and increased stigma.”\(^\text{58}\) 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.


\(^{58}\) 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.” 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: 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. Second, that the foster care system is capable of identifying harm or risks of harm. And third, that the foster care system is equipped to respond appropriately to ensure the well-being of low-income families. 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.

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 system—which is rooted in vestiges of explicit racial domination, capitalist discriminatory actions.

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.
imperialism, and western expansion across the continental United States—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 campaign 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, the remains of ten Native American children were discovered on the grounds of Carlisle Indian Industrial School in


67. See infra Part V.


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


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 [r] 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].


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.

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. 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. 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. Additionally, states codify misinformation, discriminatory, and punitive approaches to caregiver substance use. For example, the New York Family Court Act creates a presumption of neglect if a child’s well-being is threatened by a caregiver who “repeatedly misuses” drugs. However, the statute is highly subjective and does not distinguish between types or quantities of drugs.

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. 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.”

Unfortunately, other states still afford caseworkers


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

86. Id. §§ 1012, 1046.

87. Id.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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."\textsuperscript{94} A majority of states utilize family integrity as a factor in determining a “child’s best interests.”\textsuperscript{95} The U.S. Supreme Court clarified

\begin{itemize}
\item \textit{Alsager v. Dist. Ct. of Polk Cnty.}, 406 F. Supp. 10, 16 (S.D. Iowa 1975).
\end{itemize}
this priority in *Santosky v. Kramer*, 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.” 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.” In *DeBoer v. DeBoer*, 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.”

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. 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. Further, the family regulation system utilizes surveillance tools, including random drug testing, that violate evidentiary standards utilized in other legal proceedings. Notably, hearsay is also admissible in family and juvenile court.

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

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96. 455 U.S. 745 (1982).
97. *Id.* at 760.
98. *Id.* at 753.
100. *Id.* at 1302 (quoting *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992)).
102. See id.
103. See id.
interests of the child” standard is outdated, context-based, and vague. Legal actors with scarce investigative resources and expertise are charged with making determinations about the child’s purported best interests. 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. 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.

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


108. See supra note 107 and accompanying text.


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

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. 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. 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.

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. 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. Yet, the public’s erasure of the trauma and devastation experienced by families of color in the foster care system remains unacceptable.

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


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.\textsuperscript{124} In other words, dependency is fundamental to our existence.\textsuperscript{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.\textsuperscript{126} Additionally, vulnerability theory cognizes assumptions about autonomy and personal responsibility as barriers to transforming the status quo.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{130}

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

\textsuperscript{124} See id. at 266–69.
\textsuperscript{125} See id. at 263–66.
\textsuperscript{126} See Smith, supra note 75, at 38–40 (discussing Professor Fineman’s vulnerability theory in the context of commercial sexual exploitation of youth).
\textsuperscript{127} See id.
\textsuperscript{129} Martha Albertson Fineman, Vulnerability, Resilience, and LGBT Youth, 23 TEMP. POL. & C.R.L. REV. 307, 310 (2014).
\textsuperscript{130} See id. at 311.
\textsuperscript{131} See Martha Albertson Fineman, Feminism, Masculinities, and Multiple Identities, 13 NEV. L.J. 619, 636 (2013).
\textsuperscript{132} See Nina A. Kohn, Vulnerability Theory and the Role of Government, 26 YALE J.L. & FEMINISM 1, 3 n.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).
\textsuperscript{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.”

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.


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. 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.

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-JN8].


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


Illinois, have already adopted programs that provide a template for merging approaches to universal basic income and reparations. 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. 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. 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.


145. See generally Smith, supra note 39.