

A Post-*Dobbs* Future: Bailing Water Downstream to Center Democracy's Children

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The reversal of Roe v. Wade¹ by Dobbs v. Jackson Women's Health Organization² not only imperils vital reproductive freedom across the United States but also illuminates the countless ways that childhood precarity will be exacerbated downstream now that forced births are sanctioned by the state. While an individual's reasons for exercising abortion rights in a particular circumstance are personal and complex, the decimation of reproductive self-determination diminishes possible alternative life paths for children and threatens to destabilize communities amidst a lingering global pandemic. Although those who oppose reproductive autonomy cloak themselves in rhetoric centering children and families, right-wing law and policy priorities consistently imperil children and families. Just as America's tattered social safety net disregards human vulnerability throughout the life course, interconnected public systems with a punitive and often violent orientation simultaneously curtail marginalized children's basic ability to function and survive. These developments exist amidst a backdrop that this author previously coined the "empathy gap," wherein public perception and legal responses towards marginalized communities depend largely upon specious preconceived notions about race, ethnicity, class, and deviance.³

This Article addresses the question of how the legal landscape, as well as daily political life, should shift to mitigate the forthcoming damage that Dobbs (and forced caregiving) will inevitably inflict upon children and families. Those seeking to truly provide for and empower children must interrogate and

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¹ Roe v. Wade, 410 U.S. 113, 164–65 (1973).

² Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284–85 (2022).

³ See Charisa Smith, *From Empathy Gap to Reparations: An Analysis of Caregiving, Criminalization, and Family Empowerment*, 90 FORDHAM L. REV. 2621, 2621 (2022) [hereinafter Smith, *Empathy Gap*], <https://doi.org/10.2139/ssrn.3991940>.

reject the entrenched, systemic barriers that already cause harm. Examining several ubiquitous, punitive systems of intervention that will undoubtedly cause amplified damage to children in the wake of Dobbs, this Article ultimately argues that a post-Dobbs democracy requires a paradigm shift towards abolition, re-imagination, and revitalized self-governance. Efforts to rescue children from a deluge of precarity and avoid ripples of socioeconomic impact must prioritize the eradication of the school-to-prison pipeline, the famil- policing system, and the overgrown carceral state. Without that vital paradigm shift, the United States risks figuratively drowning children in hardship and repression, towards an immense loss of future civic participation and workforce stability. More than ever, realigned budget priorities (particularly divestment-reinvestment) and widespread self-governance are a vital baseline for ensuring that children—whether planned or unplanned—and their families avoid dire outcomes. After discussing numerous promising examples across the country, this Article makes recommendations for best practices and future advocacy.

It was an especially hot day in an Orlando, Florida classroom, and six-year-old Kaia felt irritable and a bit out of breath. Her teacher's first grade lesson was very tough to follow. Although she tried to stay interested and calm, Kaia felt herself become more upset. With her sleep apnea, sometimes Kaia just could not get enough rest for a growing six-year-old, and she felt so uncomfortable during long school days that she ended up acting out. Before she knew it, Kaia became physical and was in the midst of a childhood temper tantrum. She did not mean to, but Kaia ended up kicking Ms. Lewis as the teacher tried to contain her, and Kaia's physical discomfort and emotions flared. Crying uncontrollably, Kaia became terrified when Officer Turner of the Orlando Police Department towered over her. Officer Turner violently grabbed her and forced her small arms and wrists into handcuffs. School staff and officials simply looked on, despite knowing of Kaia's medical condition and creating her a Behavior Intervention Plan as a mandated special education provider. Kaia sobbed, "Please! Please! I wanna go back! Let me go!" but Officer Turner gruffly dragged her down the hall in handcuffs and pushed her into the police car. He congratulated Kaia on "breaking the record" as the youngest person he had ever arrested.

Kaia's grandmother Meralyn did not get word of Kaia's arrest until well after the traumatized six-year-old was in custody. Kaia was denied the comfort of her grandmother's visit even after being hauled to the Juvenile Assessment Center, where she was fingerprinted and had her mugshot taken. Officer Turner had a history of misconduct, was previously suspended for using excessive force on a teenager, and had actually arrested a six-year-old boy the same day Kaia was arrested. Kaia's family would later file a lawsuit against Officer Turner, his supervisor, the Orlando police chief, the mayor, and the city of Orlando for unreasonable seizure; excessive force; violation of due process and equal

protection; violation of the Americans with Disabilities Act and the Rehabilitation Act for discriminating against children with disabilities; and the tort claims false arrest, battery, assault, intentional infliction of emotional distress, and negligence. Yet, Kaia ultimately experienced lingering trauma, social stigma, educational delays, and exacerbated health issues for years, while the school district was not named as a defendant, and underlying issues of zero tolerance school discipline policies, racism, gender stereotyping, and other systemic oppression impacting students throughout the district remained unaddressed.⁴

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⁴ This narrative is based on a true story. See, e.g., Sejal Parekh, *6-Year-Old's Arrest Raises Questions About School Discipline and Behavioral Disorders*, ABC NEWS (Sept. 30, 2019, 5:04 AM), <https://abcnews.go.com/US/year-olds-arrest-raises-questions-school-discipline-behavioral/story?id=65847416> (“Many children with problem behaviors go underdiagnosed . . .”).

INTRODUCTION

Regardless of states' differing protections for reproductive autonomy, the *Dobbs v. Jackson Women's Health Organization* decision now ushers in an era of widespread forced parenting, exacerbated precarity for children and families, and potential socioeconomic devastation in the short- and long-term. To best respond to these newfound conditions of state-enforced caregiving and intensified socioeconomic distress for many, it is critical to interrogate how prevailing state systems and institutions inflict violence, perpetuate suffering, reinforce dominance, and stymie attempts to further empowerment and well-being for children and families. Though conservative attacks on reproductive autonomy are cloaked in the guise of care for babies and family life, the corresponding neoliberal, capitalist orientation to law and social policy justifies profound inequality in wealth, position, and power—abandoning support for individuals in vulnerable positions throughout the human life course, including (but not limited to) basic social goods like maternal and child healthcare, early childhood education, K-12 education, elder care, disability services, and affordable housing.⁵

On the contrary, the United States is the only industrialized nation that denies its populace any kind of legal recognition of a basic right to care.⁶ The predominant conservative position accordingly justifies rampant inequality by emphasizing individual liberty (including freedom to contract), purported autonomy, and supposed meritocracy within the free market, while constricting any state obligation to more equitably distribute access, resources, responsibilities, or power among individuals, groups, or institutions.⁷ “COVID Capitalism” austerity measures and sociopolitical suppression have only amplified inequality.⁸

While asserting the necessity of reproductive autonomy in a functioning democracy and focusing on the material realities of child

⁵ Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 251–52 (2010) [hereinafter Fineman, *The Vulnerable Subject*].

⁶ Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1157 (2005), <https://doi.org/10.2105/AJPH.2004.055111>.

⁷ See, e.g., Fineman, *The Vulnerable Subject*, *supra* note 5, at 251–53; Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 3 (2014); Smith, *Empathy Gap*, *supra* note 3, at 2640–42.

⁸ See Charisa Smith, *When COVID Capitalism Silences Children*, 71 U. KAN. L. REV. 553, 554–55, 566, 579 (2023) [hereinafter Smith, *COVID Capitalism*].

and family well-being, this Article illuminates how the current legal landscape, and three key public systems, inflict state violence and curtail children's basic capacity to function and survive. Examining the family-policing system(s) ("FPS"), the school-to-prison pipeline, and (briefly) the carceral system, this Article argues that such interconnected, publicly funded legal institutions and interventions not only damage marginalized children and families but also seriously injure society and the marketplace in the long term—now at a time when forced caregiving wreaks further havoc. Ironically, these three systems ostensibly exist to serve people's needs yet have become behavior-modification programs and systems of retribution that regulate those who rely on them and punitively enforce compliance.⁹

The direness of forced caregiving alone cannot be understated. Laws not only deny reproductive autonomy—violating basic human dignity and personhood—but also create a multi-faceted crisis. Research from both the United States and abroad reveals how profoundly denials of wanted abortion harm children, families, and society, whereas autonomy over pregnancy and childrearing provide decisive benefits.¹⁰ States and the federal system are completely unprepared for the "coming surge of babies" that will arrive due to violations of reproductive autonomy.¹¹ Further, scholars predict that many of these children will be born in states within highly concentrated poverty, abysmal maternal and child health outcomes, and a veritably nonexistent social safety net.¹² As if this anticipated onslaught is not concerning enough, the prevailing legal and sociocultural landscapes are also tainted by what this author coins the "empathy gap"—a phenomenon through which the racial and class identity of often similarly situated children and families largely preordains the legal, fiscal, and broader civic response they receive.¹³ Vigilance about resisting the empathy gap is thus crucial to advance scholarly and advocacy discourse and policymaking, to ensure that a

⁹ Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3, 4 (2019).

¹⁰ BIXBY CTR. FOR GLOB. REPROD. HEALTH, TURNAWAY STUDY 2 (2019) [hereinafter TURNAWAY STUDY], https://bixbycenter.ucsf.edu/sites/bixbycenter.ucsf.edu/files/Turnaway_Study_summary_web.pdf.

¹¹ Melissa Jeltsen, *We Are Not Prepared for the Coming Surge of Babies*, THE ATL. (Dec. 16, 2022), <https://www.theatlantic.com/family/archive/2022/12/abortion-post-roe-rise-in-births-baby-care/672479>.

¹² *Id.*

¹³ See Smith, *Empathy Gap*, *supra* note 3, at 2623.

post-*Dobbs* surge of forced caregiving does not exacerbate crisis points for marginalized groups, extend the overreach of punitive systems, and to challenge attempts to eradicate institutionalized and systemic oppression. Throughout US history up to the present day, marginalized families and communities face destruction through manifestations of the empathy gap, as well as from underlying racialized, sexualized, gendered forces of dominance that frequently masquerade as benevolent intervention.¹⁴

Both the current legal landscape and daily political life require a radical, comprehensive shift in order to mitigate the forthcoming damage that *Dobbs* (and forced caregiving) will inevitably inflict upon children and families. True care for, and empowerment of, children means interrogating and rejecting the entrenched, systemic barriers that already cause harm, while ultimately shifting the present carceral, reactive, neoliberal paradigm towards abolition, re-imagination, and revitalized self-governance. Renowned scholar, theorist, and activist Ruthie Wilson Gilmore puts this into a macrolevel perspective, noting that “so many public agencies—education, healthcare . . . have absorbed policing functions. . . . [A]t the same time, many of the agencies of organized violence, such as jails and prisons and police, are absorbing social work functions, mental health care functions, things that they actually can’t do.”¹⁵ Ultimately, Gilmore argues, “abolition is about presence, not absence. It’s about building life-affirming institutions.”¹⁶ Long-term, structural change is vital for building a society with more effective responses than such punitive systems. Yet, even short-term changes are crucial first steps towards staving off daily damage, achieving broader prosperity, and engendering self-determination among the populace.¹⁷ Crucial change involves dismantling of, and divestment from, destructive systems and institutions, and reinvestment in prevention, life-affirming approaches and institutions, and revitalized self-governance.

Key questions addressed herein include: *What concrete evidence exists to demonstrate that babies, children, and families actually matter in the*

¹⁴ See *id.* at 2632–34.

¹⁵ Intercepted, *Ruth Wilson Gilmore Makes the Case for Abolition*, THE INTERCEPT (June 10, 2020, 6:02 AM), <https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition>.

¹⁶ Karis Clark, *Abolition Is*, THE MICH. DAILY (Apr. 19, 2021), <https://www.michigandaily.com/michigan-in-color/abolition-is>.

¹⁷ See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1167, 1208, 1210 (2015); Intercepted, *supra* note 15.

United States' legal, sociopolitical, and economic spheres (evidence in the form of legal protection; resource allocation; resource investment; institutional treatment; material well-being; civic discourse; capacity-building; and political expression, engagement or influence)? Which children in the United States today would realistically agree that systems, institutions, and economic choices treat them as if their lives are precious, and why?¹⁸ Why do three, illustrative public systems (the FPS, the school-to-prison pipeline, and the carceral system) exert punitive responses to the daily struggles of low-income communities of color, while White communities experience similar struggles—i.e., caregiving stress, financial precarity, child misbehavior in and out of school, mental health challenges or crises, and substance misuse—and are met with vastly different responses (dignity vis-a-vis supportive resources, autonomous problem-solving, strengths-based programming, opportunities for self-discovery and transformation, and avoidance of punitive surveillance and intrusion)? Why is one segment of the population pathologized or overmedicalized and subject to coercive state intrusion and surveillance for issues that are common for most contemporary families?¹⁹ What would social goods and fiscal policies look like if marginalized children and caregivers were trusted and adequately resourced to solve their own problems and draw from their own expertise on issues concerning their lives? What does a revolutionary vision for widespread child and family well-being, and revitalized self-governance, look like? What are

¹⁸ See Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> (quoting Ruthie Wilson Gilmore on her epiphany during an impactful environmental justice conference involving youth). Youth participants from rural California—many of Latinx descent, from farm working families—were initially suspicious of abolitionism due to reflexive thinking about crime control, and yet they ultimately humbled Gilmore by demonstrating that abolitionism is about far more than crime and punishment. *Id.* Towards the close of the conference, youth presented about the three environmental hazards affecting their lives most pressingly as children: “pesticides, the police[,] and prisons.” *Id.* The youth sagely “lifted up the larger point of what [Gilmore] attempted to share: Where life is precious, life is precious. They asked themselves, ‘Why do we feel every day that life here is not precious?’ In trying to answer, they identified what makes them vulnerable.” *Id.* Ultimately, abolition is “about the entirety of human-environmental relations.” *Id.*; see Notes from Charisa Smith, Professor of L., CUNY Sch. of L. on Year of Uncertainty Workshop on Youth Rights and the Future of the U.S. Constitution, to Queens Youth Activists (Oct. 2021) (on file with author); see also The Brian Lehrer Show, *Your 28th Amendment?*, WNYC, at 18:54–19:35 (Dec. 8, 2021), <https://www.wnyc.org/story/your-28th-amendment> (discussing youth workshops and mentioning Charisa Smith).

¹⁹ See News Release, Am. Psych. Ass’n, APA’s Apology to Black, Indigenous and People of Color for Its Support of Structural Racism in Psychiatry (*Jan. 18, 2021*), <https://www.psychiatry.org/newsroom/apa-apology-for-its-support-of-structural-racism-in-psychiatry>.

necessary short- and long-term steps towards abolition of destructive public systems and reinvestment in life-affirming approaches? What are promising domestic approaches to carceral abolition and a reimagined civic landscape, that demonstrate both care for, and empowerment of, children and families?

After a note on baseline terminology, parameters, and social justice frameworks, Part I of this Article establishes the demographic scope and dire significance of forced parenting and caregiving in a post-*Dobbs* nation. Part I then engages research about the profound socioeconomic, societal benefits of reproductive autonomy, as well as the contrasting upheaval caused by denials of a wanted abortion. Part II discusses what this author has coined the “empathy gap,” which is a pervasive, historically entrenched backdrop in our multiracial nation and poses an obstacle to sociopolitical change. Part III delves more deeply into the FPS, its denials of and disruptions to caregiving, and the extensive individual, familial, and socioeconomic damage it causes. Part IV addresses the school-to-prison pipeline and accompanying short- and long-term harms. After a very brief discussion of the carceral system and its many outgrowths, the prison industrial complex (PIC), and what many scholars and advocates deem “the incarcerated family,” Part V concludes by enumerating the direct violence the PIC inflicts upon children and adults, and its short- and long-term impacts on communities, society, and the economy. Lastly, Part VI calls for a paradigm shift towards reimagining the true meaning of child and family well-being and civic empowerment. Utilizing human vulnerability theory as an essential tool for reassessing the status quo and a divergent future, Part VI makes various recommendations that encompass short-term harm reduction, incremental law and policy change, as well as abolitionist initiatives that advance long term transformation, while introducing several promising approaches. This Article then briefly concludes by offering a crucial dose of realism and pragmatism amidst hope and opportunity.

Terminology and Parameters: Although a thorough discussion of the failures of the FPS,²⁰ the school-to-prison pipeline, and the carceral

²⁰ Regarding the problematic terminology of “child welfare system,” see, for example, Dorothy Roberts, *Keynote—11th Annual Symposium: Strengthened Bonds: Abolishing The Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 455, 457 (2021), <https://doi.org/10.52214/cjrl.v11i3.8738>; Edwin Rios, ‘Family Policing System’: How the US Criminalizes Black Parenting, THE GUARDIAN (Apr. 14, 2023, 5:42 PM), <https://www.theguardian.com/world/2023/apr/14/family-policing-system-black-childcare>; The Imprint Staff Reps., *Guggenheim at Kempe: It Cannot Be Called Child Welfare Any Longer*, THE IMPRINT (Nov. 15, 2022, 5:56 AM),

system are beyond the scope of this Article, this work is part of a long-term interdisciplinary, intercultural effort to abolish such oppressive systems in favor of reinvestment in impacted communities, prevention, and community empowerment.²¹ Herein, the terms *child*, *youth*, *minor*, *young person*, and *juvenile* will be used interchangeably to describe individuals under age eighteen, as eighteen is the most commonly utilized, presumptive age of majority in the United States. Indeed, states and the federal government place a plethora of limitations on individuals below age eighteen, including (and not limited to) exclusion from voting; curtailed speech, privacy, and association rights; school attendance requirements; restricted access to alcohol, tobacco, and firearms; and restriction from signing contracts or accessing funds.²² This Article acknowledges ongoing scholarship and

<https://imprintnews.org/youth-services-insider/guggenheim-at-kempe-it-cannot-be-called-child-welfare/235110>.

²¹ See Smith, *COVID Capitalism*, *supra* note 8, at 557 n.13 (first citing CHILD WELFARE INFO. GATEWAY, U.S. CHILD.'S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 1, 7, 10 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf; then citing *Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. OF STATE LEGIS. (Jan. 26, 2021), <https://www.ncsl.org/human-services/disproportionality-and-race-equity-in-child-welfare>; then citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 47–48 (2010); then citing DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 6–8 (2008); then citing Max Nesterak, *Uprooted: The 1950s Plan to Erase Indian Country*, AM. PUB. MEDIA (Nov. 1, 2019), <https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country>; MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE 25 (2009); then citing Nancy D. Polikoff & Jane M. Spinak, *Foreword—11th Annual Symposium: Foreword: Strengthened Bonds: Abolishing The Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 433 (2021), <https://doi.org/10.52214/cjrl.v11i3.8737>; then citing Vivek Sankaran, *With Child Welfare, Racism Is Hiding in the Discretion*, THE IMPRINT (June 21, 2020, 11:00 PM), <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616>; and then citing ALAN DETTLAFF ET AL., UPEND, HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING 3 (2021), <http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf>.)

²² See Smith, *COVID Capitalism*, *supra* note 8, at 558 n.14 (“The boundaries determining the age at which US residents can exercise certain rights vary widely among the states, sometimes appearing arbitrary or bereft of scientific or legal rationale. Copious neuroscientific and psychosocial research demonstrates that while youth cognitive abilities—implicating deliberation and logical reasoning—typically resemble the abilities of adults by age fifteen, psychosocial and hormonal development are incomplete until our mid- to late-twenties. See, e.g., Leslie R. Walker-Harding et al., *Young Adult Health and Well-Being: A Position Statement of the Society for Adolescent Health and Medicine*, 60 J. ADOLESCENT HEALTH 758, 758 (2017),

precedent regarding children's rights and family justice while past work of this author directly addresses such issues.²³ Further, future scholarship, advocacy, and collaboration on this topic can and should more directly involve and empower youth, while also employing diverse modes of communication that reach a broader audience.

A reproductive justice framework grounds this discussion as well. Far from seeing denials of abortion and forced caregiving as matters of narrow "pro-choice," reproductive rights advocacy and proponents of reproductive justice (RJ) contend that "[t]here is no choice where there is no access."²⁴ The RJ movement itself is "a transformational and grassroots-based movement for social change" with an intersectional human rights orientation, first formally coined in 1994

<https://doi.org/10.1016/j.jadohealth.2017.03.021>; *Drawing Legal Age Boundaries: A Tale of Two Maturities*, AM. PSYCH. ASS'N (July 3, 2019) (citing Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity*, 43 LAW & HUM. BEHAV. 69, 69–85 (2019), <https://doi.org/10.1037/lhb0000315>; Charisa Smith, *No Quick Fix: The Failure of Criminal Law and the Promise of Civil Remedies for Domestic Child Sex Trafficking*, 71 U. MIAMI L. REV. 1, 55 (2016) [hereinafter Smith, *No Quick Fix*]; Charisa Smith, *#WhoAmI: Harm and Remedy for Youth of the #MeToo Era*, 23 U. PA. J.L. & SOC. CHANGE 295, 342 (2020) [hereinafter Smith, *#WhoAmI*]; Charisa Smith, *At the Crossroads of Rape Culture: Noncarceral Approaches for #MeToo Era Youth*, 36 OHIO ST. J. ON DISP. RESOL. 773, 821 (2021) [hereinafter Smith, *Crossroads*]; Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. APPLIED RSCH. ON CHILD. 1, 1–2 (2013) [hereinafter Smith, *Nothing About Us Without Us!*], <https://doi.org/10.58464/2155-5834.1111>; Charisa A. Smith, *Don't Wait Up—Issues in Juvenile Justice*, 28 N.J. FAM. LAW. 144, 145 (2008) [hereinafter Smith, *Don't Wait Up*] (citing interviews with various medical experts and academics regarding research on "differences between the decision-making capabilities and brain maturation of juveniles and adults"); Lori S. Kornblum et al., *Peer-on-Peer Child Sexual Abuse*, N.Y. L.J., Jan. 25, 2021, at 1, 5–6; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1009 (2004), <https://doi.org/10.1037/0003-066X.58.12.1009>; Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1131 (2019); Icenogle et al., *supra*, at 70–71, 79.)

²³ Icenogle et al., *supra* note 22, at 70–71, 79.

²⁴ While "Indigenous women, women of color, and trans[] people have always fought for Reproductive Justice, . . . the term was invented in 1994[,] by "a group of [B]lack women gathered in Chicago" prior to "attending the International Conference on Population and Development in Cairo, where the entire world agreed that the individual right to plan your own family must be central to global development." *Reproductive Justice*, SISTERSONG [hereinafter *Herstory*], <https://www.sistersong.net/reproductive-justice> (last visited Oct. 8, 2023); *see also Get Involved*, NAT'L LATINA INST. FOR REPROD. JUST., <https://www.latinainstitute.org/get-involved> (last visited Oct. 8, 2023); *NCJW and Reproductive Justice*, NAT'L COUNCIL OF JEWISH WOMEM (Nov. 2014), https://www.ncjw.org/wp-content/uploads/2018/07/NCJW-and-Reproductive-Justice_FINAL.pdf.

by US women of African descent engaging in international and domestic human rights advocacy.²⁵ Further, RJ situates abortion within the context of intersecting oppressions because as the late radical feminist scholar and author Audre Lorde stated that “[t]here is no such thing as a single-issue struggle because we do not live single-issue lives.”²⁶ A RJ framework inherently connects abortion rights and the overarching power structures operating in society that reinforce “gendered, sexualized, and racialized acts of dominance” on a daily basis.²⁷ RJ-framing grounds reproductive choice in “the situational impacts of economics, politics[,] and culture” that deny broader bodily autonomy to those “most marginalized,”²⁸ including women of color, low-income women, “gender expansive people,” and people with disabilities.²⁹ Likewise, while abortion is critical, in the RJ framework, access writ large—and liberation of oppressed people in general—means much more, including (but not limited to) the availability of contraception; comprehensive (medically accurate) sex education; “STI prevention and care, alternative birth options, adequate prenatal and pregnancy care, domestic violence assistance, adequate wages to support families, safe homes”; the end of family-policing and carceral systems; reparations; and sexual consent consciousness.³⁰

I. DOBBS, FORCED BIRTHS, AND PRECARIETY

Over one year after the *Dobbs* decision, communities throughout the United States are grappling with a dearth of vital reproductive health access, forced parenthood, dire socioeconomic and educational precarity, and increasing criminalization—even as public support for abortion access continues to increase.³¹ Abortion bans in general are

²⁵ *Reproductive Justice*, OUR OWN VOICE [hereinafter OUR OWN VOICE], <https://blackrj.org/our-issues/reproductive-justice> (last visited Oct. 8, 2023); see also *Herstory*, *supra* note 24 (“RJ is based on the United Nations’ internationally-accepted Universal Declaration of Human Rights, a comprehensive body of law that details the rights of individuals and the responsibilities of government to protect those rights.”).

²⁶ *Herstory*, *supra* note 24.

²⁷ *Id.*

²⁸ OUR OWN VOICE, *supra* note 25; *Herstory*, *supra* note 24.

²⁹ OUR OWN VOICE, *supra* note 25; see *Herstory*, *supra* note 24.

³⁰ *Herstory*, *supra* note 24; see *Visioning New Futures for Reproductive Justice Declaration 2023*, SISTERSONG, <https://www.sistersong.net/visioningnewfuturesforrj> (last visited Oct. 8, 2023).

³¹ Regarding increased support for abortion access, see E-mail from Movement for Black Lives to Charisa Smith, Professor of L., CUNY Sch. of L. (June 24, 2023, 09:34 EDT) [hereinafter E-mail from M4BL, June 24, 2023] (on file with author)

inextricably linked to plummeting public health outcomes.³² Many individuals seeking an abortion in states with bans are essentially trapped by both distance and poverty—with a particular impact on people of color and those who are gender nonconforming (GNC).³³ Forced to travel thousands of miles, some people turn to overwhelmed nonprofit organizations “for logistical, financial, and emotional support.”³⁴ Yet, even when the event of birthing alone is considered, the United States consistently ranks as the worst wealthy country for overall maternal mortality, with Black women experiencing a verifiable maternal mortality crisis.³⁵ Denying alternative life paths and forcing people to birth children will inevitably exacerbate current public health dilemmas; individual, intrafamilial, and community strife; and socioeconomic inequities.³⁶

By myriad accounts, the United States is grossly unprepared to care for the “coming surge of babies” that is already resulting from curtailed abortion access. States continue instituting and litigating abortion bans and medication restrictions while clinics cut services and shut down. One projection by Middlebury College economics professor, Caitlin Knowles Myers, estimates that if the anti-abortion

(“According to a 2023 Gallup poll, ‘85 percent of American voters think abortion should be legal in some or all circumstances.’”).

³² *Reproductive Justice Is Public Health*, PUB. HEALTH MADISON & DANE CNTY.: PUB. HEALTH BLOG (May 12, 2022) [hereinafter PUB. HEALTH BLOG], <https://publichealthmdc.com/blog/reproductive-justice-is-public-health> (“Banning abortions doesn’t reduce abortions, but it does lead to worse public health outcomes.”).

³³ E-mail from M4BL, June 24, 2023, *supra* note 31 (“One year after the fall of Roe: Public support for abortion access is higher than ever!”); *see also* Jeltsen, *supra* note 11 (“This is really an inequality story about who ends up trapped by distance and poverty, and who doesn’t[.]”).

³⁴ E-mail from M4BL, June 24, 2023, *supra* note 31. Regarding the anticipated geographic challenges that abortion seekers will face post-Dobbs, *see also* Jeltsen, *supra* note 11.

³⁵ Black women “are three times as likely to die from a pregnancy-related cause than [W]hite women.” PUB. HEALTH BLOG, *supra* note 32; *see also* Annalies Winny & Rachel Bervell, *How Can We Solve the Black Maternal Health Crisis?*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (May 12, 2023), <https://publichealth.jhu.edu/2023/solving-the-black-maternal-health-crisis>; Jessica Grose, *Black Maternal Mortality Is Still a Crisis*, N.Y. TIMES (June 22, 2022), <https://www.nytimes.com/2022/06/22/opinion/black-maternal-mortality.html>; *Working Together to Reduce Black Maternal Mortality*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2023), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.

³⁶ *See* PUB. HEALTH BLOG, *supra* note 32.

plans of twenty-four states come to fruition, “there will be approximately [fifty thousand] additional births nationwide.”³⁷ Many babies will be born in states that already have the highest concentrated poverty and worst maternal and child health outcomes in the country.³⁸ Yet, our tattered social safety net receives scarce reinforcement in the wake of these developments.³⁹ COVID-inspired policy initiatives to offset poverty and improve outcomes for children and families are short-lived.⁴⁰ Additionally, lawmakers on various levels are reflexively instituting austerity measures such as severe budget cuts to education, childcare, public benefits, medical care, housing support, eviction defense, and school nutrition programs to balance their general budgets despite the growing need for a fortified social safety net.⁴¹ Republican governors opposing abortion have also not produced tangible material “support” for “women and teens facing unexpected or unwanted pregnancies,” even as their moralistic pronouncements purport to center life and families.⁴² This stark reality will also undoubtedly amplify the toll upon people of color in hostile states that seek to criminalize the exercise of bodily autonomy.⁴³

Extensive evidence from the United States and abroad demonstrates that the denial of a wanted abortion causes long-term economic hardship and insecurity, whereas having autonomy over one’s life course and the timing of pregnancy benefits caregivers, children, and broader society.⁴⁴ One of the most renowned and prolifically peer-reviewed studies on point is the Turnaway Study (“Turnaway”) by the University of California, San Francisco, which was published in 2020 and involved a “thousand women from clinics in [twenty-one] states, who closely resemble the population seeking

³⁷ Jeltsen, *supra* note 11.

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *See* Smith, *COVID Capitalism*, *supra* note 8, at 574–75.

⁴¹ *Id.* at 579.

⁴² Jeltsen, *supra* note 11 (quoting Press Release, Brad Little, Governor of Idaho, Gov. Little Comments on SCOTUS Overrule of Roe v. Wade (June 24, 2022), <https://gov.idaho.gov/pressrelease/gov-little-comments-on-scotus-overrule-of-roe-v-wade>).

⁴³ *See* E-mail from Movement for Black Lives to Charisa Smith, Professor of L., CUNY Sch. Of L. (June 26, 2023, 11:45 EDT) [hereinafter E-mail from M4BL, June 26, 2023] (on file with author).

⁴⁴ TURNAWAY STUDY, *supra* note 10, at 2.

abortions” across the United States, tracked over a five-year period.⁴⁵ A 2022–2023 study from the National Bureau of Economic Research confirms and expands on Turnaway’s findings by linking women’s outcomes to credit report data and following them over a ten-year period.⁴⁶ Research revealed that subsequently, these women’s lives diverged in ways directly attributable to whether they received an abortion or were turned away. For example, prior children of women denied abortions were over “[three] times more likely to live in households below the federal poverty level and . . . less likely to achieve developmental milestones” than prior “children of women who received abortions.”⁴⁷ Poverty increased for at least four years in the households of women who were turned away, and many families of women turned away from an abortion experienced long-term precarity and hardship with basic living expenses like food, housing, and transportation.⁴⁸ Similarly, the denial of an abortion lowered women’s credit score, increased their debt, increased their number of their negative public financial records, and resulted in more reliance on public assistance.⁴⁹ These outcomes inevitably worsen in the era of COVID Capitalism and the lingering impacts of a global pandemic.⁵⁰

II. ENTER THE *EMPATHY GAP*

Despite the verifiable link between forced births, childhood precarity, and long-term socioeconomic and legal detriment, and despite the need for reimagined responses to marginalized children in the United States, myriad hurdles stand in the way of change. One

⁴⁵ ADVANCING NEW STANDARDS IN REPROD. HEALTH, THE HARMS OF DENYING A WOMAN A WANTED ABORTION FINDINGS FROM THE TURNAWAY STUDY I (2020) (citing Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA PEDIATRICS 1053, 1053–60 (2018), <https://doi.org/10.1001/jamapediatrics.2018.1785>), https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf.

⁴⁶ Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26662, 2023), <https://doi.org/10.1257/pol.20210159>.

⁴⁷ TURNAWAY STUDY, *supra* note 10, at 2.

⁴⁸ *Id.*

⁴⁹ See Miller et al., *supra* note 46, at 4.

⁵⁰ See Smith, *COVID Capitalism*, *supra* note 8, at 566; Naomi R. Cahn & Linda C. McClain, *Gendered Complications of Covid-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 16–32 (2021).

hurdle that potentially obstructs transformation is what this author's previous scholarship coins "the empathy gap"—a pattern of legal responses and public sentiment that demonstrates incongruous perceptions about members of society depending on their race and class.⁵¹ Before an extensive discussion of the various systems impeding child well-being and possibilities for transformation, it is necessary to contextualize the legal landscape and sociocultural backdrop.

A. *Empathy Gap & Caregiving Paradoxes*

This author's previous and ongoing work coins the term "empathy gap" to describe the starkly divergent ways that US lawmakers, public systems, media, and the general public respond to similarly situated children and families with different identities.⁵² The empathy gap reveals an incongruous public sentiment and incommensurate compassion for individuals who experience caregiving or overall life challenges that may impact domestic life.⁵³ Previous work of this author asserted that when low-income caregivers of color are targeted by the FPS, erroneous presumptions about their purported deviance and the necessity of state intervention are a focal point, particularly regarding substance misuse, despite comparable drug use among other racial groups in the population.⁵⁴ Here, the

⁵¹ See Smith, *Empathy Gap*, *supra* note 3, at 2623.

⁵² See *id.* at 2626.

⁵³ See *id.*

⁵⁴ See, e.g., *id.* at 2621, 2627; Charisa Smith, *Over-Privileged: Legal Cannabis, Drug Offending & the Right to Family Integrity*, 67 S.D. L. REV. 569, 569–70, 582 (2022) [hereinafter Smith, *Over-Privileged*] (first citing Khiara M. Bridges, Professor of L., Univ. of Cal., Berkeley Sch. L., Seminar on Private Law at Yale Law School: Family Law of the Poor (Mar. 24, 2020); and then citing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 234 (2002) [hereinafter ROBERTS, SHATTERED BONDS], [https://doi.org/10.1016/S0190-7409\(02\)00238-4](https://doi.org/10.1016/S0190-7409(02)00238-4), <https://doi.org/10.2139/ssrn.4227363> ("Judges had the power to place Black children in the care and service of [W]hites if they found the parents. . . unfit and deemed placement to be 'better for the habits and comfort of the child.'"); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 196 (2005), <https://doi.org/10.4159/9780674038028> (explaining that the best interest standard is often applied according to the decision-maker's beliefs); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 595–602 (2011) (noting the ideals of White settlers created what the law deems as "proper" familial roles); 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) (discussing the over policing and under protection of women of color); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004) (discussing mass imprisonment and long-standing sociopolitical

empathy gap is likewise apparent when children and communities of color are stereotyped, demonized, and singled out for punitive treatment throughout the various public systems being discussed—namely, the FPS, the school-to-prison pipeline, and the PIC.

First, the empathy gap manifests in the paradoxical nature of prevailing sociolegal responses to caregiving. Caregiving is simultaneously forced and denied in a post-*Dobbs* nation, and the brunt of damage will continue to be borne by low-income communities of color. While anti-abortion laws force parenting upon pregnant persons without regard to their willingness or caregiving capacity,⁵⁵ the FPS and PIC ironically deny parenting rights and family cohesion to communities of color for specious, discriminatory reasons⁵⁶—resulting in racial disparities and disparate treatment. The state’s disproportionate over-intrusion into the private lives of low-income families of color occurs in every jurisdiction, even when they evince the “same problems and characteristics as [W]hite children,” largely due

subordination); *The Life-Changing Consequences of a Marijuana Arrest in New York: Child Welfare*, START SMART N.Y. (Sept. 2019), http://smart-ny.com/wp-content/uploads/2017/06/The-Life-Changing-Consequences-of-a-Marijuana-Arrest-in-New-York-Child-Welfare_4.12.2019.pdf (“Despite similar rates of marijuana consumption across racial and ethnic groups, 80 percent of the nearly [twenty-three thousand] people arrested for marijuana possession in New York State in 2016 were Black or Latino.” (footnotes omitted)); Hayley Fox, *Weed and Pregnancy: How Cannabis Laws Are Hurting Mothers*, ROLLING STONE (Nov. 17, 2018), <https://www.rollingstone.com/culture/culture-features/weed-pregnancy-mother-family-marijuana-cannabis-755697> (discussing how low-income women of color are the nearly exclusive targets of marijuana prosecutions during pregnancy despite marijuana use’s prevalence across socioeconomic groups); see also Charisa Smith, *Making Good on an Historical Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIAC HEALTH L.J. 191, 227–28 (2015) [hereinafter Smith, *Making Good*]; 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, 333 (2015) [hereinafter Smith, *Conundrum*]; Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSYCH. REV. 205, 220–21 (2015) [hereinafter Smith, *Finding Solutions*]; Charisa Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent’s Mental Challenges*, 5 CHARLOTTE L. REV. 377, 383 (2014) [hereinafter Smith, *Unfit*].

⁵⁵ See discussion *supra* Part II.A.

⁵⁶ See Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2221 (2018) (regarding the ways that contemporary women’s prisons “incapacitate motherhood” by alienating women from their children, denying reproductive care, engaging in humiliating practices during pregnancy and postpartum recovery, and even sterilizing women in some cases); see also Smith, *Over-Privileged*, *supra* note 54, at 620.

to implicit and explicit bias regarding parental capacity, credibility, and abilities.⁵⁷ Countless esteemed scholars, practitioners, and advocates, including Dorothy Roberts, Khiara Bridges, and Martin Guggenheim, assert that since their inception in the late nineteenth century, family courts and the FPS have been instrumental in demarcating the “undeserving poor” and perpetuating myths of racial inferiority.⁵⁸ Further, the legal standards, intervention strategies, and investigation practices of the FPS continue to violate (or ignore) the civil rights of marginalized communities while pushing traditional, White middle-class norms upon marginalized communities.⁵⁹

⁵⁷ ROBERTS, SHATTERED BONDS, *supra* note 54, at 17; *Child Welfare and Substance Use Disorder Treatment Statistics*, NAT’L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE [hereinafter *Child Welfare & Treatment*], <https://ncsacw.acf.hhs.gov/research/child-welfare-statistics> (last visited Oct. 8, 2023) (discussing racial disparities in the family policing system, including terminations of parental rights even when no risks to child safety were found); LISA SANGOI, MOVEMENT FOR FAM. 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 24 (2020) (“It is not a coincidence that the overwhelming majority of parents involved with the foster system are living in poverty, or that Black, American Indian and Latinx parents are overrepresented.” (footnotes omitted)) .

⁵⁸ See, e.g., KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 48 (2017), <https://doi.org/10.1515/9781503602304>; GUGGENHEIM, *supra* note 54, at 196; ROBERTS, SHATTERED BONDS, *supra* note 54, at 7–10, 20–29, 173; Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68, 86 & n.68, 89–90, 90 n.84; Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 224 (2017), <https://doi.org/10.1111/fcre.12274> (regarding the role of racial, ethnic, and cultural bias in custody cases); Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 363, 374 (2016); Solangel Maldonado & Jonathan Ross, *Biased Custody Decisions or Common Sense: When are Race, Ethnicity, and Cultural Norms Relevant to a Child’s Best Interests?*, FAM. ADVOC., Winter 2022, at 42, 44; Jessica Dixon Weaver, *Racial Myopia in [Family] Law*, 132 YALE L.J.F. 1086, 1090 (2023); Smith, *Empathy Gap*, *supra* note 3, at 2621, 2642–43; Smith, *Over-Privileged*, *supra* note 54, at 582.

⁵⁹ Although family cohesion for low-income families of color has proved evasive in the face of the FPS, the Supreme Court confirmed the fundamental constitutional rights of biological parents. *Santosky v. Kramer*, 455 U.S. 745, 787–88 (1982). The Court held that a state must support its allegations in favor of terminations of parental rights (“TPR”) 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[]” and because imperfect parenting alone should not necessitate TPR. *Id.* at 788 n.13; see also *DeBoer* by *Darrow v. DeBoer*, 509 U.S. 1301, 1302 (1993) (quoting *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992)); GUGGENHEIM, *supra* note 54, at 196; ROBERTS, SHATTERED BONDS, *supra* note 54, at 229; Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 723 (2021), <https://doi.org/10.52214/cjrl.v11i3.8749>; Smith, *Conundrum*, *supra* note 54, at 333 (discussing federal jurisprudence on family integrity); Smith, *No Quick Fix*, *supra*

The opioid crisis, and moreover the War on Drugs, particularly exposes the racialized, classist empathy gap regarding caregiving.⁶⁰ Instinctive empathy for caregivers who use substances overwhelmingly depends on their race; substance use is a leading reason why families wind up in the FPS.⁶¹ Just as governmental responses and widespread media commentaries compassionately lament the suffering endured by White families in the opioid crisis, emphasizing public health interventions to maintain family cohesion in communities coded as White, the pathologizing and demonization of caregivers of color who misuse drugs persists.⁶² Amidst the opioid crisis, the daily separation of families of color in civil courts for specious reasons either goes largely unnoticed, or is presumed to be a benevolent, vital function of the state.⁶³ Further, mere suspicion of drug use continues to be a

note 22, at 50 (“[Since] the first juvenile court in 1899, . . . courts and their corresponding reformatories pushed traditional, [W]hite, middle-class norms upon African-American, immigrant, and poor families.”).

⁶⁰ See, e.g., Smith, *Empathy Gap*, *supra* note 3, at 2621, 2632.

⁶¹ See Smith, *Empathy Gap*, *supra* note 3, at 2621, 2629 (first citing Vann R. Newkirk II, *What the ‘Crack Baby’ Panic Reveals About the Opioid Epidemic*, THE ATL. (July 16, 2017), <https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763>; then citing 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>; and then citing SANGOI, *supra* note 57, at 34).

⁶² See, e.g., *Opioid Abuse Is Devastating Families—and America’s Middle Class*, GEORGE W. BUSH INST.: THE CATALYST (Fall 2018), <https://www.bushcenter.org/catalyst/opportunity-road/winnefeld-opioids-addiction.html>; *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>; Sandy Santana, *Killing Drug Dealers Won’t Protect Children from the Opioid Crisis. They Need Safe Homes.*, USA TODAY, <https://www.usatoday.com/story/opinion/2018/04/07/opioid-crisis-child-victims-need-stability-home-foster-care-column/479957002> (Apr. 7, 2018, 9:10 AM); Peter Jamison, *Falling Out*, WASH. POST (Dec. 18, 2018), <https://www.washingtonpost.com/graphics/2018/local/opioid-epidemic-and-its-effect-on-african-americans>.

⁶³ See ABIGAIL KRAMER & ANGELA BUTEL, CHILD WELFARE SURGE CONTINUES: FAMILY COURT CASES, EMERGENCY CHILD REMOVALS REMAIN UP 2 (2018), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b50c5c38a922d3211b6606d/1532020164221/Child+Welfare+Surge+Continues.pdf>; see also Smith, *Empathy Gap*, *supra* note 3, at 2622–23 (first citing 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>; and then citing Conor Friedersdorf, *In a Year, Child Protective Services Checked Up on 3.2 Million Children*, THE ATL. (July 22, 2014),

common pretext for family separation in marginalized communities.⁶⁴ Yet, the inclination to pathologize caregivers of color in the context of drug use is wholly unfounded. On the contrary, the overall US population is genetically predisposed to substance-related disorders, which frequently co-occur with other diagnosable mental illnesses.⁶⁵ A 2021 *National Survey on Drug Use and Health* by the Substance Abuse and Mental Health Services Administration (SAMHSA) found that 7.6 percent of adults aged eighteen or older (19.4 million people) had both a mental illness and substance use disorder in the past year, while the rates of co-occurrence were similar for adults in the White, Black, and Latinx communities.⁶⁶

services-conducted-32-million-investigations/374809) (“When outrage over the separation of migrant children from their parents surged in May 2018, Kirstjen Nielsen, the secretary of the US 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.’”).

⁶⁴ In many jurisdictions, either the suspicion of parental substance use, or parental substance use itself, is the main reason for a family’s involvement with child protective system surveillance and control. See Jun Sung Hong et al., *Termination of Parental Rights for Parents with Substance Use Disorder: For Whom and Then What?*, 29 SOC. WORK PUB. HEALTH 503, 503 (2014). Terminations of parental rights (TPR) occur absent any evidence of cannabis and absent any documented risks to child safety. See *id.* But, the stringent timelines of the Adoption and Safe Families Act, combined with other punitive interventions, consistently lead to TPR. See 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) (“[A] consent plea to marijuana usage [may] . . . escalate to a termination of parental rights proceeding[s] . . . even [where] the parent’s original behavior was [not] proven . . . harmful to the child.”); Dewan, *supra* (“Even a caretaker’s authorized use of medical marijuana use can be grounds for removing children.”); SANGOI, *supra* note 57, at 22 (“[A] growing body of literature finds that drug use alone is not necessarily correlated with child maltreatment.”).

⁶⁵ See, e.g., Smith, *Empathy Gap*, *supra* note 3, at 2629 n.45 (first citing 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; and then citing Colette Bouchez, *Mental Illness and Substance Abuse*, WEBMD (June 1, 2006), <https://www.webmd.com/bipolar-disorder/features/bipolar-disorder-and-substance-abuse>).

⁶⁶ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2021 NATIONAL SURVEY ON DRUG USE AND HEALTH 41–42 (2022), <https://www.samhsa.gov/data/sites/default/files/reports/rpt39443/2021NSDUHFFRRev010323.pdf> (“The percentage of [co-occurrence] . . . was higher among Multiracial adults (16.3 percent) than among White (7.9 percent), Black (7.4 percent), Hispanic (7.2 percent), or Asian adults (3.5 percent).” (citation omitted)).

“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.”⁶⁷ Additionally, a causal link cannot be made between substance use and inferior parenting, despite myriad social cognition studies and recent studies by the US Department of Health and Human Services.⁶⁸

In general, the empathy gap represents the scientifically proven degree that White Americans connect more deeply with those of their own racial group, feel more empathy for them and their challenges, and thus demand policy solutions that will ease relatable—as opposed to unrelatable or racially pathologized—types of suffering.⁶⁹ “Both empirical research about human cognition and behavior, as well as polling, confirm the empathy gap.”⁷⁰ Empirical research from the

⁶⁷ Smith, *Empathy Gap*, *supra* note 3, at 2630; *see also* LAURA RADEL ET AL., 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 3–4, 9 (2018), <https://aspe.hhs.gov/sites/default/files/private/pdf/258836/SubstanceUseChildWelfareOverview.pdf>.

⁶⁸ Smith, *Empathy Gap*, *supra* note 3, at 2630–31 (first citing RADEL ET AL., *supra* note 67, at 1–3; then citing SANGOI, *supra* note 57, at 21–22, 138 nn.51–52; then citing CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT (2022) [hereinafter CHILD.’S BUREAU, DEFINITIONS]; and then citing ROBIN GHERTNER ET AL., OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., THE RELATIONSHIP BETWEEN SUBSTANCE USE INDICATORS AND CHILD WELFARE CASELOADS (2018)); *see also* SANGOI, *supra* note 57, at 21 (“The scientific literature that suggests substance use produces social cognitive deficits in parenting is underwhelming.”).

⁶⁹ *See* Smith, *Empathy Gap*, *supra* note 3, at 2626–27; 1 RACHEL D. GODSIL ET AL., THE SCIENCE OF INEQUALITY: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE 18, 24 (2014) [hereinafter GODSIL ET AL., ADDRESSING IMPLICIT BIAS]; RACHEL D. GODSIL & ALEXIS MCGILL JOHNSON, BLACK MALE RE-IMAGINED II: TRANSFORMING PERCEPTION: BLACK MEN AND BOYS 6–7 (2013) [hereinafter GODSIL & MCGILL JOHNSON, TRANSFORMING PERCEPTION], <http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf>; JANAY CODY ET AL., WHAT ARE WE UP AGAINST?: AN INTERSECTIONAL EXAMINATION OF STEREOTYPES ASSOCIATED WITH GENDER 9–10, 14 (2019), https://perception.org/wp-content/uploads/2020/02/Story-at-Scale-Research-Review_Dec-2019.pdf; 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> (discussing anecdotes of the drug epidemic shared by state lawmakers); Mary Crossley, *Opioids and Converging Interests*, 49 SETON HALL L. REV. 1019, 1027 (2019).

⁷⁰ *See* Smith, *Empathy Gap*, *supra* note 3, at 2626–27; GODSIL ET AL., ADDRESSING IMPLICIT BIAS, *supra* note 69, at 34, 56–57; GODSIL & MCGILL JOHNSON, TRANSFORMING

Perception Institute explains this phenomenon as a product of the extreme segregation in American residential and civic life.⁷¹

The empathy gap and a paradox are also evident in the stark contrast between the spheres of public and private family law. These distinct spheres of family law are veritable antitheses. Public family law draws from a presumption of the validity of state overreach and coercive intervention upon families who are predominantly low-income people of color, whereas private family law operates upon principles of nonintervention and privacy when frequently (though not exclusively) White and economically stable families are involved.⁷² In a constant double standard, families in private disputes receive the benefit of the doubt to guard their privacy and autonomy while low-income families of color are targeted by the broad discretion of the FPS. Public family law matters involve state intrusion upon a family's life that is initiated by a state actor or another party (such as a mandated reporter of child maltreatment in a school or healthcare facility, a neighbor who calls in an allegation of child maltreatment, or a law enforcement officer who reports maltreatment or arrests a child for their behavior).⁷³ Public family law also incorporates the FPS (courts and agencies handling child dependency and intimate partner violence), the juvenile justice system, and the child support enforcement system for unmarried parents.⁷⁴ The FPS alone entails myriad courts, agencies, contracted service providers, and intertwined adjacent systems that initiate reports and cooperate in proceedings. Additionally, while children's own wishes and goals are insufficiently prioritized throughout most family law cases, the public family law

PERCEPTION, *supra* note 69, at 11–12, 14; CODY ET AL., *supra* note 69, at 11, 14; Lopez, *supra* note 69; Crossley, *supra* note 69, at 1027.

⁷¹ See Smith, *Empathy Gap*, *supra* note 3, at 2626–27; Lopez, *supra* note 69; GODSIL ET AL., ADDRESSING IMPLICIT BIAS, *supra* note 69, at 30, 50–51; GODSIL & MCGILL JOHNSON, TRANSFORMING PERCEPTION, *supra* note 69, at 12; CODY ET AL., *supra* note 69, at 9.

⁷² See, e.g., Tonya L. Brito et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1254–55, 1275 (2022); BRIDGES, *supra* note 58, at 45–47.

⁷³ See generally *Constructing a Legal Education for a Career in Family Law*, N.Y.U. L., <https://www.law.nyu.edu/academicservices/advising/academicadvising/family> [<https://perma.cc/5G2H-EGEG>] (last visited Nov. 11, 2023) (explaining the two overarching categories of family law—public and private).

⁷⁴ *Id.*

realm provides especially scarce opportunities for children to develop or express their own interests.⁷⁵

Contrastingly, the realm of private family law operates through principles of nonintervention, presumptions of litigant credibility, and reverence for privacy, as disputes are initiated by autonomous private parties (such as spouses, grandparents, or other legal guardians). The parties in private family law cases are empowered to litigate quite independently from state interference, including crafting mutual settlements and avoiding scrutiny of FPS altogether.⁷⁶ In private family law matters, forced state intrusion into the home itself is rare, and instead the parties voluntarily litigate against one another⁷⁷ to settle claims about access to children, property, or legal decision-making.⁷⁸ Likewise, in such private matrimonial and custody cases, litigants are presumed competent enough to decide how, and whether, to voluntarily disclose personal information such as medical records, mental health records, and educational records. Litigants in private proceedings typically remain immune from constant surveillance and mandatory programming, and they are afforded broad discretion to

⁷⁵ See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 642–46 (2006); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 6–8, 12–13, 19 (1986); GUGGENHEIM, *supra* note 54, at 38–39; Brito et al., *supra* note 72, at 1270; MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 92–94 (1991).

⁷⁶ See BRIDGES, *supra* note 58, at 46–47; June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1187–89, 1200, 1216–17, 1229 (2013) (describing a separate system of family law for families who are from low-income or historically marginalized communities, and thus deprived of opportunities to privately order their families, while arguing that low-income, marginalized families are most vulnerable to state-initiated action); *Constructing a Legal Education for a Career in Family Law*, *supra* note 73 (“‘Family law’ may be divided into two categories—public and private.”); cf. Smith, *Over-Privileged*, *supra* note 54, at 580–82.

⁷⁷ This assertion recognizes the fact that many matrimonial and custody actions are unilaterally initiated, but it notes that once an action is filed, the litigation only proceeds through legal systems due to both appellants’ and appellees’ cooperation with the proceedings, including pre-trial discovery and alternative dispute resolution attempts. By virtue of the nature of default judgments, cases where the “process” is wholly unilateral are not embroiled in the work of courts and collaborating agencies because they do not involve extensive litigation and are ultimately only processed clerically. See NAT’L CTR. FOR STATE CTS., FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS IN STATE COURTS, at i–ii (2018), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf.

⁷⁸ See CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS, at xii–xiii (2014); BRIDGES, *supra* note 58, at 46–47; Carbone & Cahn, *supra* note 76, at 1187–89, 1200, 1216–17, 1229.

choose their own child-rearing approaches while maintaining presumptive access to their children.⁷⁹

Cases involving cannabis are particularly illustrative.⁸⁰ While low-income caregivers of color are targeted for punitive intervention regardless of whether their own jurisdiction has legalized cannabis, White caregivers in countless jurisdictions flourish in the legal cannabis sectors, without scrutiny of their caregiving or private lives, and often due to their very identity as “cannamoms.”⁸¹

The school-to-prison pipeline also reveals ubiquitousness of the empathy gap. Sociocultural norms and legal responses “adultify” children of color and deny them the privilege of presumptive innocence, despite the fact that children of all identity groups experience behavioral challenges and merit opportunities for guidance and inclusive support.⁸² Often, students of color face classroom exclusion, punitive discipline, or arrest for the same age-appropriate actions that students in more affluent, White communities rarely face.⁸³ There are at least 1.27 million cases of very young children (between preschool and late elementary school) who are suspended or expelled in a given year, and racial and ethnic disparities

⁷⁹ See HUNTINGTON, *supra* note 78, at xi–xix; BRIDGES, *supra* note 58, at 46–47; Carbone & Cahn, *supra* note 76, at 1187–89, 1200, 1216–17, 1229.

⁸⁰ See generally Smith, *Over-Privileged*, *supra* note 54 (discussing the disparate treatment of caregivers by the state for cannabis issues, depending on the caregivers’ race, ethnicity, and class).

⁸¹ Across the United States, the cannabis industry (and its outgrowths or its entrees into mainstream society) is dominated by White Americans. In various terrains including the corporate sector, the entertainment industry, the media and social media, and the wellness and mindfulness space—not to mention in medicine, science, and government—White Americans can completely avoid legal scrutiny into their caregiving arrangements. In many instances, White Americans’ own merging of cannabis and caregiving is the *raison d’être* for their livelihood. See Smith, *Over-Privileged*, *supra* note 54, at 588 & n.112; see also Genevieve Shaw Brown, ‘Weed Moms’ Are the New ‘Wine Moms’, GOOD MORNING AM. (Oct. 10, 2019, 4:39 PM), <https://www.goodmorningamerica.com/gma/story/weed-moms-wine-moms-66184880> (describing “weed moms” as the new “wine moms”).

⁸² See, e.g., Smith, #WhoAmI?, *supra* note 22, at 336–37, 337 nn.197–98; Smith, *Crossroads*, *supra* note 22, at 789–92 (citing various research and policy reports on point); see also OFF. FOR C.R., U.S. DEP’T OF EDUC., 2015–16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 3, 13, 15 (2018) (showing that Black K-12 students, especially Black boys, are disproportionately suspended or expelled from school); Catherine dP. Duarte et al., *Punitive School Discipline as a Mechanism of Structural Marginalization with Implications for Health Inequity*, 1519 ANNALS N.Y. ACAD. SCI. 129, 149 (2023), <https://doi.org/10.1111/nyas.14922>.

⁸³ See Smith, *Nothing About Us Without Us!*, *supra* note 22, at 5–6.

in school discipline appear as early as preschool.⁸⁴ Throughout the broader K-12 student population, an estimated 2.7 million students received at least one suspension each year.⁸⁵ The FBI also reported that over thirty thousand children under age ten were arrested between 2013 and 2018.⁸⁶ Disparities involving students with disabilities are exacerbated by other discriminatory or problematic approaches including (but not limited to): racial and ethnic profiling, schools' zero tolerance policies that remain in place long after the 1990s "tough on crime" approaches instituted them, prison-like environments and surveillance apparatuses in schools, and chronic underinvestment in both school counseling resources and in schools more generally in marginalized communities.⁸⁷ As a result of these developments, state and federal lawsuits are proliferating regarding the false or wrongful arrest of minors in school, the use of excessive force by school police, and emergency medical restraint and hospitalization of schoolchildren as young as age five who exhibit an outburst or tantrum.⁸⁸ Further, extensive scholarship and advocacy

⁸⁴ *Racially Disproportionate Discipline in Early Childhood Educational Settings*, NAT'L PREVENTION SCI. COAL. [hereinafter NAT'L PREVENTION SCI. COAL.], <https://www.npscoalition.org/post/racially-disproportionate-discipline-in-early-childhood-educational-settings> (Sept. 17, 2020).

⁸⁵ U.S. COMM'N ON C.R., *BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES* 3–4 (2019).

⁸⁶ Bill Hutchinson, *More than 30,000 Children Under Age 10 Have Been Arrested in the US Since 2013: FBI*, ABC NEWS (Oct. 1, 2019, 9:31 AM), <https://abcnews.go.com/US/30000-children-age-10-arrested-us-2013-fbi/story?id=65798787>; see also Katherine Bishop, *FBI Says Nearly 30,000 Kids Arrested During Past 5 Years: What if It Happens to Your Child?*, ATT'Y AT L. MAG. (Oct. 14, 2019), <https://attorneyatlawmagazine.com/latest-articles/fbi-says-nearly-30000-kids-arrested-during-past-5-years-what-if-it-happens-to-your-child>.

⁸⁷ See CARA MCCLELLAN, *OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY & REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE* 1–2, 4, 6–7, 28, 34 (2018).

⁸⁸ See, e.g., *School Discipline Settlement Underscores Harm to City Students and Importance of Reform*, N.Y.C.L. UNION (Nov. 19, 2015), <https://www.nyclu.org/en/press-releases/school-discipline-settlement-underscores-harm-city-students-and-importance-reform>; *E.B. v. Department of Education*, ADVOCS. FOR CHILD. OF N.Y., https://www.advocatesforchildren.org/litigation/class_actions/eb_vs_doe (last visited Oct. 8, 2023); News Release, Legal Servs. NYC, *LSNYC Files Lawsuit on Behalf of Schoolchildren Unlawfully Sent to ERs for Alleged Behavior Issues* (Dec. 16, 2013), <https://www.legalservicesnyc.org/news-and-events/press-room/786-lsnyc-files-lawsuit-on-behalf-of-schoolchildren-unlawfully-sent-to-ers-for-alleged-behavior-issues>; Mariana Dale, *Families of Black and Disabled Students Sue Antelope Valley Schools over Discipline Policies*, LAIST (May 24, 2023, 11:53 AM),

efforts discuss the degree to which carceral responses to youth of color are cloaked in the rhetoric and legal justification of protection and benevolence.⁸⁹

Ultimately, prioritizing the eradication of various harsh public systems that impede children also means acknowledging the empathy gap, and the minimal public and legal compassion that low-income children of color receive. When engaging in extremely typical, often age-appropriate behavior, children of color are met with vastly disparate egregious legal and sociocultural responses. This phenomenon extends the long-standing legacy of oppression—and even genocide—that Native American, Black, Latinx, and other immigrant children have endured from purportedly benevolent public systems.⁹⁰ Despite the systematic overcriminalization of youth of color both inside and outside of their schools, divestment from, and abolition of, the school-to-prison pipeline has failed to become a widespread public concern. Rhetorical questions regarding the empathy gap thus arise, including: *Why aren't lawmakers and a critical mass of constituents demanding drastic changes regarding the school-to-prison pipeline? Why aren't predominantly White communities outraged that children of color (in contrast to White children) lack equivalent opportunities to make*

<https://laist.com/news/education/antelope-valley-union-high-school-district-discipline-lawsuit-black-students-students-with-disabilities-racial-discrimination>; Jane Meredith Adams, *Settlement in Kern Discrimination Lawsuit Calls for New School Discipline Policies*, EDSOURCE (July 24, 2017), <https://edsources.org/2017/settlement-in-kern-discrimination-lawsuit-calls-for-new-school-discipline-policies/585212>; Kerrin C. Wolf, *Assessing Students' Civil Rights Claims Against School Resource Officers*, 38 PACE L. REV. 215, 239–48 (2018), <https://doi.org/10.58948/2331-3528.1963>; Marlene Lenthag, *5-Year-Old Boy Allegedly Detained, Handcuffed and Threatened by Maryland Police*, ABC NEWS (Mar. 27, 2021, 5:29 PM), <https://abcnews.go.com/US/year-boy-allegedly-detained-handcuffed-threatened-maryland-police/story?id=76721492>; *Handcuffed 5-Year-Old Sparks Suit*, CBS NEWS (Apr. 25, 2005, 9:40 AM), <https://www.cbsnews.com/news/handcuffed-5-year-old-sparks-suit>; Benjamin T. Greenberg, *Mother Sues Florida School Board over Police Handcuffing of Her Kindergartner*, HUNGRY BLUES (Apr. 7, 2009), <http://hungryblues.net/2009/04/07/mother-sues-florida-school-board-over-police-handcuffing-of-her-kindergartner>; Carrie Melago, *Parents of 5-Year-Old Handcuffed in School Will Sue City for \$15M*, DAILY NEWS (Feb. 21, 2008, 1:32 AM), <https://www.nydailynews.com/news/parents-5-year-old-handcuffed-school-sue-city-15m-article-1.310107>.

⁸⁹ See, e.g., Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1321 (2015); JENNIFER MUSTO, CONTROL AND PROTECT: COLLABORATION, CARCERAL PROTECTION, AND DOMESTIC SEX TRAFFICKING IN THE UNITED STATES 3–4 (2016), <https://doi.org/10.1525/9780520957749> (coining the term “carceral protection” to describe legal responses to marginalized youth who exhibit behavioral problems or otherwise come in conflict with the law).

⁹⁰ See Smith, *Empathy Gap*, *supra* note 3, at 2632–36.

mistakes in school and to receive constructive interventions that evade carceral surveillance and the legal entanglement of caregivers? Whose children actually matter in United States' society and public policy? Why are youth of color persistently adultified in schools, the media, and other fora, and seen as either less innocent, inherently more mature and resilient, inherently devious and criminal, or ultimately dehumanized?

The empathy gap is an inevitable backdrop for any analyses and any forthcoming recommendations regarding marginalized children and families in a post-*Dobbs* nation. It is also critical to closely examine the predominant public systems that harm children, as well as the nature and extent of their destructiveness.

III. PARENTING DENIED AND DISRUPTED: A CLOSER LOOK AT THE FAMILY-POLICING SYSTEM

The FPS is a major component of the US legal landscape that not only exposes the empathy gap but also persistently damages children and families in the name of paternalistic, yet discriminatory protection.⁹¹ Although a comprehensive discussion of the legally complex FPS—including the ways that different federal statutes and fiscal incentives interact with state and local governments⁹²—is beyond the scope of this Article, it is paramount to clarify the system's traits that are most detrimental to children and families. Although scholarship and advocacy on the FPS has gained momentum in the past decade, the system's injustice “remains a longstanding, misunderstood, and overlooked realm of civil rights.”⁹³ Specifically,

⁹¹ *Fighting to End the Family Policing System*, ACLU OF N. CAL., <https://www.aclunc.org/issue/gender-sexuality-reproductive-justice/fighting-end-family-policing-system> (mentioning the UpEnd Movement); see also Smith, *Over-Privileged*, *supra* note 54, at 582 (citing Godsoe, *supra* note 89, at 1313–20) (“‘[C]arceral protectionist’ approaches involve the exertion of state *parens patriae* authority to divide families, exact punitive sanctions against caregivers, institutionalize children, and implement surveillance systems under the cover of care.”).

⁹² See, e.g., GUGGENHEIM, *supra* note 54, at 175, 182–85; Smith, *Making Good*, *supra* note 54, at 210–13; Smith, *Conundrum*, *supra* note 54, at 324–26; Smith, *Finding Solutions*, *supra* note 54, at 224–25; Smith, *Unfit*, *supra* note 54, at 379.

⁹³ See Smith, *Over-Privileged*, *supra* note 54, at 580; Dorothy Roberts, *Building a World Without Family Policing*, LAW & POL. ECON. BLOG (July 17, 2023), <https://lpeproject.org/blog/building-a-world-without-family-policing> (“A small but dynamic movement to abolish the family-policing system and radically transform child welfare is gaining momentum. . . [and it] rests on a long tradition of resistance . . . [involving] social justice activists, legal services providers, nonprofit organizations, and scholars.”); Symposium, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. OF RACE & L. 471 (2021); cf Tarek Z. Ismail,

Tarek Ismail and Julia Hernandez define the FPS as “the interlocking administrative, social-services, and judicial structures deployed to surveil, control, and sometimes separate families.”⁹⁴ On a daily basis in every US jurisdiction, caseworkers in the FPS utilize flimsy justifications to pursue home inspections, uproot children from their homes, embroil families in courts, conduct sweeping investigations that scrutinize a plethora of personal data, rely on adjacent institutions and systems for cooperation, mandate random drug testing, and compel programming that is often ill-suited for impacted caregivers and children.⁹⁵ “As the abolitionist organization Movement for Family Power points out,” prevailing public sentiment faultily presumes the legitimacy of FPS interventions for several reasons.⁹⁶ In addition to a reliance on flawed understandings of drug use, race, and risks of harm to children,⁹⁷ lawmakers and the general public assume that the foster care system accurately identifies harm and risks of harm.⁹⁸ There is also an inaccurate presumption that “the foster care system is [actually] equipped to respond appropriately to ensure the well-being of low-income families.”⁹⁹

On the contrary, however, the FPS neither accurately identifies risks of harm to low-income children of color nor employs effective interventions to care for them. The FPS and the laws governing its daily functions inappropriately conflate poverty with child neglect, treating social disadvantage and the failure of the social safety net as a

Family Policing and the Fourth Amendment, 111 CALIF. L. REV. 1485, 1490 (2023), <https://doi.org/10.15779/Z38DV1CP78> (“[S]cholarship examining the constitutional limits of CPS investigations has been woefully underdeveloped . . . [just as] courts and the legal academy have shied away from scrutinizing head-on the extent of the Fourth Amendment’s applicability to CPS investigations as a standalone coercive government intervention.” (footnotes omitted)).

⁹⁴ Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense Against Family Policing*, 132 YALE L.J.F. 659, 659 n.1 (2022) [hereinafter Hernandez & Ismail, *Radical Early Defense*].

⁹⁵ See, e.g., Tarek Z. Ismail, *The Consent of the Compelled: Child Protective Agents as Law Enforcement Officers* (July 7, 2021) [hereinafter Ismail, *Consent of the Compelled*] (unpublished manuscript) (on file with author); Smith, *Empathy Gap*, *supra* note 3, at 2637.

⁹⁶ See, e.g., Ismail, *Consent of the Compelled*, *supra* note 95; Smith, *Empathy Gap*, *supra* note 3, at 2632.

⁹⁷ See Smith, *Empathy Gap*, *supra* note 3, at 2632 (citing SANGOI, *supra* note 57, at 19–23).

⁹⁸ *Id.* (citing SANGOI, *supra* note 57, at 30–34).

⁹⁹ *Id.* (citing SANGOI, *supra* note 57, at 35–42).

caregiver's own personal failure.¹⁰⁰ Similarly, stakeholders in the FPS incorrectly equate substance misuse with unsafe parenting and impose unnecessary surveillance that prevents caregivers from obtaining employment or housing for decades to come.¹⁰¹ Family-policing interventions also spurn family cohesion; children's rights to self-determination and familial support; and parental rights to caregiving, legal decision-making, public benefits, and even a semblance of privacy.¹⁰² Further, although termination of parental rights ("TPR") is the most extreme action that the FPS can take, TPR occurs constantly

¹⁰⁰ See *id.* at 2630 & n.51 ("Child neglect statutes define neglect as a caregiver's failure to provide life's basic necessities. . . . Many states do not distinguish between child neglect and underlying poverty or a caregiver's inability to improve financial circumstances." (citations omitted) (first citing CHILD.'S BUREAU, DEFINITIONS, *supra* note 68; and then citing GHERTNER ET AL., *supra* note 68)); see also, e.g., CASEY FAM. PROGRAMS, *How Do Economic Supports Benefit Families and Communities?*, in TRANSFORMING CHILD WELFARE SYSTEMS 2 (2022), https://www.casey.org/media/22.07-QFF_TS-Economic-Supports_fnl.pdf ("While a large proportion of the families involved with child welfare have a neglect allegation, the child protection system response often is not effective at distinguishing between intentional harm (such as a refusal to provide food and water for one's child) and harm resulting from a lack of access to adequate food, housing, and other material resources. The latter conditions are the consequences of structural and social factors beyond a family's control, such as poverty, systemic and structural adversities that exist within their neighborhood, racism, and additional forms of discrimination." (emphasis removed) (footnotes omitted)); NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, DISTINGUISHING POVERTY EXPERIENCED BY FAMILIES FROM CHILD NEGLECT 1, 4–5 (2021), <https://www.ncjfcj.org/wp-content/uploads/2021/11/Distinguishing-Poverty.pdf> (explaining the conflation of poverty and child neglect).

¹⁰¹ State laws governing the FPS link reports of child maltreatment by a caregiver—whether substantiated, false, frivolous, or ultimately dismissed—to the caregiver's public profile through a registry of past reports. See CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE OR NEGLECT REPORTS 1 (2018), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/centreg>. Often, for well over a decade after a family ceases its involvement with the FPS, the subject caregiver is barred from employment in fields that expose them to children, the elderly, or individuals with disabilities even if that caregiver poses zero risk to society. See Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 2 (2021). Even employment as a public transit driver or as a custodial staffer in a nursing facility are typically off limits. See, e.g., CHILD WELFARE INFO. GATEWAY, *supra*, at 1–2; Henry & Lens, *supra*, at 2.

¹⁰² See, e.g., ROBERTS, SHATTERED BONDS, *supra* note 54, at 140; BRIDGES, *supra* note 58, at 45; GUGGENHEIM, *supra* note 54, at 36; HUNTINGTON, *supra* note 78, at 82–83.

in myriad jurisdictions with scarce public or political outcry about this cruel infliction of the “civil death penalty.”¹⁰³

The FPS also exerts particular violence upon marginalized children and families by punishing people for financial and socioeconomic hardship—now in a legal landscape where abortion bans also escalate precarity. As previously mentioned, poverty is overwhelmingly conflated with child maltreatment, to the point where poor families are unwarrantedly flagged for FPS scrutiny.¹⁰⁴ Although financial scarcity in and of itself does not lead to child maltreatment, material precarity may “increase the likelihood of maltreatment” when other risk factors are present, including a caregiver’s untreated mental health challenges and social isolation.¹⁰⁵ Importantly, mounting evidence demonstrates that “[c]ash assistance to families with low incomes is critical both to help them stabilize their circumstances and to create conditions in which they can thrive.”¹⁰⁶ Research compiled by Chapin Hall at the University of Chicago found that “when families are given cash assistance, their risk for [FPS] involvement is reduced.”¹⁰⁷ Further, in the relatively rare instances where incidents of child abuse or serious neglect are incontrovertible, status quo approaches nevertheless fail to address underlying reasons for family strife, including intrafamilial (and often multigenerational) violence or maltreatment, health disparities, failing schools, housing instability,

¹⁰³ See *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (“The termination of parental rights has been characterized as tantamount to a ‘civil death penalty.’”); Smith, *Over-Privileged*, *supra* note 54, at 570, 578.

¹⁰⁴ See *supra* note 100 and accompanying text (citing sources that discuss how the FPS conflates poverty with neglect).

¹⁰⁵ See *Poverty and Economic Conditions*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/centreg> (last visited Nov. 11, 2023) (“While most people in financial need do not maltreat their children, poverty can increase the likelihood of maltreatment, particularly when poverty is combined with other risk factors, such as depression, substance use, and social isolation.”).

¹⁰⁶ Aditi Shrivastava & Urvi Patel, *Research Reinforces: Providing Cash to Families in Poverty Reduces Risk of Family Involvement in Child Welfare*, CTR. ON BUDGET & POL’Y PRIORITIES (May 1, 2023), <https://www.cbpp.org/research/income-security/research-reinforces-providing-cash-to-families-in-poverty-reduces-risk-of>; see also Clare Anderson et al., *Child and Family Well-Being System: Economic & Concrete Supports as a Core Component*, UNIV. OF CHI.: CHAPIN HALL (Mar. 2023), <https://www.chapinhall.org/wp-content/uploads/Economic-Supports-deck.pdf>; Julie Y. Cai, *Economic Instability and Child Maltreatment Risk: Evidence from State Administrative Data*, 130 CHILD ABUSE & NEGLECT 1, 10 (2022), <https://doi.org/10.1016/j.chiabu.2021.105213>.

¹⁰⁷ Shrivastava & Patel, *supra* note 106.

mental health challenges, socioeconomic deprivation, constant racial trauma from events such as historical oppression and publicized police killings of African Americans, and a dearth of supportive resources like childcare and employment opportunities.¹⁰⁸

History of the FPS also exposes its current dysfunction and its legacy of injustice towards marginalized children. Since their origin in the late nineteenth century, United States family courts and child service agencies have disrupted and surveilled families of African American, Native American, immigrant, and sometimes Caucasian descent (who were not recent immigrants) if they were experiencing poverty.¹⁰⁹ Copious evidence confirms the US government's explicit belief in White supremacy and White people's "manifest destiny" in the nineteenth century, which led to the principle that anyone not entirely White, Anglo-Saxon, and protestant was less human, more deviant, and in need of state control.¹¹⁰

Although the modern foster system, administered on the federal and state levels today, originated in the early 1960s, the overall foster system and its congregate residences for children originated in the mid-nineteenth century.¹¹¹ Early FPS stakeholders justified systematic

¹⁰⁸ Only a small and extremely unpredictable portion of cases involve intrafamilial violence and abuse. See SANGOI, *supra* note 57, at 10. "In 2017, [over] 3.5 million children were subjected to investigations as alleged victims of child abuse[,] while "[t]here were 1,720 known child abuse fatalities[]" in the nation that year. *Id.* at 129. Given these circumstances, even if each and every child who was ultimately killed in a tragic fashion "had been known to authorities, that still would be less than five one-hundredths of one percent of investigated children." *Id.* at 129; see also CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT, at ii (2019) ("[61] percent [of victims were] neglected only, 10.3 percent [were] physically abused only, and 7.2 percent [were] sexually abused only.").

¹⁰⁹ See, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61–62 (1994); King, *supra* note 54, at 586–87; Crenshaw, *supra* note 54, at 1449–50; ROBERTS, SHATTERED BONDS, *supra* note 54, at 234 ("Judges had the power to place Black children in the care and service of [W]hite [individuals] if they found the[ir] parents to be unfit . . .").

¹¹⁰ See Anthony Fieldman, *Manifest Destiny*, MEDIUM (May 5, 2021), <https://anthonyfieldman.medium.com/manifest-destiny-53ba82df7e73> [https://web.archive.org/web/20210607115844/https://anthonyfieldman.medium.com/manifest-destiny-53ba82df7e73]; Jean Stefancic, *Terrace v. Thompson and the Legacy of Manifest Destiny*, 12 NEV. L.J. 532, 536 (2012); *History and Culture: Boarding Schools*, N. PLAINS RSRV. AID, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_ (last visited Nov. 11, 2023).

¹¹¹ SANGOI, *supra* note 57, at 10, 24–27 (discussing different waves of traumatic foster system intervention, including the era of "Orphan Trains" established by protestant

family separation, coercion, force, violence, cultural deprivation, compulsory religious conversion, sexual abuse, and even fatalities to purportedly prevent child maltreatment and delinquency within marginalized communities.¹¹² Poverty, social disadvantage, and cultural differences were treated as personal failings in the earliest stages of the system, as immigrant children were ripped from their families and made indentured or enslaved laborers in homes or farms across the nation.¹¹³ Disturbing remnants of that era continue to be uncovered, including mass graves at the sites of former Native American boarding schools in the United States and Canada, while obviously all actions within the United States outside of Indian reservations occur upon Native American land that was stolen by force.¹¹⁴

Additionally, the punitive approaches and apparatuses of the FPS create racial disparities that not only mirror the disparities found in the criminal legal system but also directly connect to the havoc that the War on Drugs has wreaked upon marginalized children. The Organization Movement for Family Power and many other commentators contend that the FPS is now ground zero in the War on Drugs.¹¹⁵ Between the early 1980s and 2005, the War on Drugs claimed to center public safety through widespread law enforcement militarization; strengthening of countless penalties; lowering of minimum age for child incarceration (including life without parole);

minister Charles Loring Brace in 1852, when Italian Catholic immigrant children were seen as non-[W]hite and forced to travel to placements in the American west).

¹¹² *Id.*; see also Smith, *No Quick Fix*, *supra* note 22, at 50 (“[F]rom the first juvenile court in 1899, . . . courts and their corresponding reformatories pushed traditional, [W]hite, middle-class norms upon African-American, immigrant, and poor families.”); 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>; Fitzgerald, *supra* note 109, at 61–62 (discussing why the “‘best interests of the child’ standard” is problematic and subject to the biases of the decision-maker).

¹¹³ SANGOI, *supra* note 57, at 10, 24–27.

¹¹⁴ See, e.g., Alice C. Fletcher & Zitkala-Ša, *Settler Mothers and Native Orphans*, in THE TROUBLE WITH WHITE WOMEN: A COUNTERHISTORY OF FEMINISM 79, 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 89 (2019); JACOBS, *supra* note 21, at 1–2, 430; cf. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE AMERICAN INDIANS 260, 260 (Francis Paul Prucha ed., 1973), <https://doi.org/10.4159/harvard.9780674435056.c39>.

¹¹⁵ See SANGOI, *supra* note 57; at 15–17; ALEXANDER, *supra* note 21, at 16–17, 59–60.

aggressive arrest policies for even minor crimes under a “Broken Windows” philosophy; zero tolerance policies in urban schools; proliferation of profitable mass incarceration facilities and monitoring technologies (including apparatuses to control parolees and probationers); criminological fervor despite an overwhelming basis in junk science; and a corresponding media strategy that emphasized fearmongering around dehumanization of youth of color.¹¹⁶

Increases in foster system populations accompanied burgeoning mass incarceration throughout the War on Drugs. Children and caregivers impacted by the FPS are also almost exclusively low-income people of color “from communities hit hard by deindustrialization and skyrocketing unemployment[,]” like those subjected to the criminal legal system, and both the War on Drugs and the FPS exacerbate America’s existing, entrenched racial caste system.¹¹⁷ Further, as previously discussed,¹¹⁸ low-income caregivers of color “use drugs at a similar rate to their richer and [W]hiter counterparts,” and yet FPS and criminal legal interventions uniquely target them often because of a mere suspicion of substance misuse.¹¹⁹

Particular legal aspects of the FPS are exceptionally injurious to children. Derivative neglect charges and status offender cases are

¹¹⁶ See generally ALEXANDER, *supra* note 21, at 2–5; James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1003 (2010); OFF. JUV. JUST. & DELINQ. PREV., U.S. DEP’T JUST., *Challenging the Myths*, in 1999 NATIONAL REPORT SERIES: JUVENILE JUSTICE BULLETIN 1, 2–3 (2000), <http://www.ncjrs.gov/pdffiles1/ojdp/178993.pdf>; *Fact Sheet: Punitive Policies Hit Youth of Color Hardest*, BUILDING BLOCKS FOR YOUTH, www.buildingblocksforyouth.org/issues/dmc/facts_yoc.html [https://web.archive.org/web/20100620010321/www.buildingblocksforyouth.org/issues/dmc/facts_yoc.html (last visited Nov. 11, 2023)]; CAMPAIGN FOR YOUTH JUST., *THE CONSEQUENCES AREN’T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 3* (Liz Ryan & Jason Ziedenberg eds., 2007), http://www.campaignforyouthjustice.org/images/nationalreports/consequencesarentminor/CFYJNR_ConsequencesMinor.pdf. Regarding John Di-Ulio’s since-debunked scholarship regarding superpredators, “Broken Windows” policing, and other junk science promoting overcriminalization, see, for example, Case Comment, *State v. Belcher*, 342 Conn. 1 (2022), 135 HARV. L. REV. 2219, 2219 (2022); *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later>; Carroll Bogert & LynNel Hancock, *Analysis: How the Media Created a ‘Superpredator’ Myth that Harmed a Generation of Black Youth*, NBC NEWS (Nov. 20, 2020, 6:00 AM), <https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101>.

¹¹⁷ See SANGOI, *supra* note 57, at 15.

¹¹⁸ See discussion *supra* Part II.A.

¹¹⁹ See SANGOI, *supra* note 57, at 15.

especially problematic. In a cruel twist of fate, minors who themselves are in state care through the FPS and who then birth children are extremely likely to either have their infant automatically removed or be targeted for maltreatment charges by the very state that serves as their own legal parent.¹²⁰ As the national Substance Abuse and Mental Health Services Administration asserts, the foster care system was not designed to raise children,¹²¹ although it frequently does so by virtue of foster care drift and the scarcity of adoptive parents. In such cases, the neglect allegation against the caregiver (foster child) is referred to as “derivative neglect” because it stems from a distinct, yet related, incidence of maltreatment involving the same caregiver.¹²² Additionally, distinct yet related FPS cases regarding the young caregiver and their child could “be pending at the [exact] same time, [even] in the same courthouse, and [potentially] before the same judge.”¹²³ The derivative neglect phenomenon subjects an already-marginalized young person who has undergone significant trauma to inhumane scrutiny as a caregiver, despite the monumental failures of the FPS to ensure their stability. Further, minors lack the legal capacity to engage in most actions that adult caregivers would perform, including enrolling themselves or their children in school, signing contracts, or independently obtaining housing and healthcare.¹²⁴

¹²⁰ Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB POL'Y 1, 3 (2006); *Supporting Teen Mothers in Foster Care*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. [hereinafter SAMHSA], <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/supporting-teen-mothers> [<https://web.archive.org/web/20230207062107/https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/supporting-teen-mothers>] (last visited Nov. 11, 2023) (“[T]he biggest concern [with foster youth who become pregnant] is intergenerational foster care, meaning that their infants might end up in the system themselves.”).

¹²¹ SAMHSA, *supra* note 120.

¹²² MARGARET A. BURT, DERIVATIVE NEGLECT OR ABUSE CASELAW REVIEW 1 (2008). <https://ww2.nycourts.gov/sites/default/files/document/files/2018-10/derivative-abuseneg.pdf>; Careena Farmer et al., *I Was Scared for Anyone to Know I Was Pregnant’—How to Protect Against Removal at Birth*, RISE (July 15, 2020), <https://www.risemagazine.org/2020/07/how-to-protect-against-removal-at-birth>; see generally Stotland & Godsoe, *supra* note 120, at 3 (extensively discussing legal issues for pregnant and parenting youth in foster care, which include situations that would be targeted for derivative neglect filings).

¹²³ Stotland & Godsoe, *supra* note 120, at 3.

¹²⁴ This statement acknowledges the possibility of formal emancipation of a minor, which does not occur automatically when a youth gives birth to a child or in any other

Derivative neglect charges against foster children are also particularly ironic considering the caregiver's (foster child's) precarity and capacities are directly attributable to the state's own failures as a parent.

Similarly, status offense cases involve both the family-policing and delinquency systems, which create a veritable quagmire for children as young as age six, who are frequently targeted for legal intervention despite exhibiting completely age-appropriate behavior, and who then become more vulnerable to exacerbated harm by public systems.¹²⁵ Status offenses are noncriminal acts that younger people are legally sanctioned for, which would be otherwise permissible if committed by adults.¹²⁶ Overwhelmingly, best practice research reveals that children who wind up in court for status offenses like truancy, running away, curfew violations, or underage purchase and consumption of substances prohibited from minors (i.e., alcohol and tobacco) should avoid law enforcement and court involvement altogether.¹²⁷ Children

circumstance but requires a young person to initiate a specific, often lengthy legal process that differs among the states. Stotland & Godsoe, *supra* note 120, at 2–3.

¹²⁵ Juvenile codes and other state laws vary regarding the courts to which they assign original status offender jurisdiction. See TOW YOUTH JUST. INST., UNIV. NEW HAVEN, *Why Status Offense Laws in Connecticut Have Changed*, in V ISSUE BRIEF: A PUBLICATION OF THE TOW YOUTH JUSTICE INITIATIVE 1, 1–2 (2019), https://www.cga.ct.gov/app/tfs/20141215_Juvenile%20Justice%20Policy%20and%20Oversight%20Committee/20190919/Status%20Offenses%20Issue%20Brief.pdf.

Age boundaries for status offenses also vary by state. See *id.*; see also *Jurisdictional Boundaries*, OFF. OF JUV. JUST. & DELINQ. PROT. (May 21, 2021) [hereinafter *Statistical Briefing Book*], https://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp; ANGEL ZANG, U.S. AGE BOUNDARIES OF DELINQUENCY 1, 4 (2015), https://www.njjn.org/uploads/digital-library/US_Age_Boundaries_of_Delinquency.pdf.

¹²⁶ See, e.g., *Statistical Briefing Book*, *supra* note 125; *What Are Status Offenses and Why Do They Matter?*, ANNIE E. CASEY FOUND. (Apr. 6, 2019) [hereinafter CASEY FOUND.], <https://www.aecf.org/blog/what-are-status-offenses-and-why-do-they-matter>; COAL. FOR JUV. JUST., NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 89 (n.d.), <http://juvjustice.org/sites/default/files/resource-files/National%20Standards%202015%20WEB.pdf>.

¹²⁷ Ungovernability and incorrigibility are also traditional status offenses. These charges allege that a child is beyond control of their guardians and the school system. See Michael Fitzgerald, *New York Moves to Eliminate Language in State Law Labeling Youth 'Incorrigible'*, THE IMPRINT (July 23, 2020, 8:00 PM), <https://imprintnews.org/child-welfare-2/new-york-state-law-labeling-youth-incorrigible-fitzgerald/45525>. New York eliminated this offense in 2021 following strong advocacy emphasizing the subjective, sexist nature of this charge. *Id.*; see also SARA MOORE ET AL., STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM 2 (n.d.), <https://www.unomaha.edu/college-of-public-affairs->

considered status offenders are mostly first-time offenders whom the legal system purports to see as posing minimal public safety risk.¹²⁸ Yet, “net widening” and dangerous collateral consequences are a constant threat for status offenders.¹²⁹

While states may call children considered status offenders “juveniles in need of supervision,” “dependent children,” or even “neglected children,” these children are persistently overcriminalized while their families endure FPS surveillance, mandatory programming, and other coercive interventions regardless of the children’s actual wishes, concerns, needs, and goals.¹³⁰ Once under the radar of the FPS and delinquency systems, children often receive excessive punishments that far exceed the gravity of their original actions.¹³¹ At times, status offense jurisdiction (and thus courts’ interference with children and families’ lives) may even extend far beyond the time that delinquency jurisdiction would last.¹³² Likewise, thousands of US children are handcuffed and even incarcerated for minor misbehavior each year, despite state trends towards status offender diversion from courts and institutions.¹³³ It then becomes extremely difficult to extricate from courts, agencies, and potentially escalated legal and personal implications.¹³⁴ This pattern involves a faulty approach that scholar, Cynthia Godsoe, refers to as “punishment as protection.”¹³⁵

Although children caught in the status offender bind are often singled out unfairly for typical adolescent exploration and risk-taking, at times their behavior does indicate deeper needs that are then woefully neglected and mishandled by public systems. For example, there is a strong connection between truancy and academic

and-community-service/nebraska-center-for-justice-research/documents/statusoffendersfinal.pdf.

¹²⁸ SARA MOORE ET AL., *supra* note 127, at 1; *see also* DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 929 (6th ed. 2017).

¹²⁹ *See* Godsoe, *supra* note 89, at 1377 n.384; SARA MOORE ET AL., *supra* note 127, at 1.

¹³⁰ TOW YOUTH JUST. INST., *supra* note 125, at 1 (citing Mahsa Jafarian & Vidhya Ananthakrishnan, *Just Kids: When Misbehaving Is a Crime*, VERA INST. OF JUST. (Aug. 2017), <https://www.vera.org/when-misbehaving-is-a-crime> (discussing how status offenses impact youth on probation)).

¹³¹ TOW YOUTH JUST. INST., *supra* note 125, at 1–2.

¹³² *Id.*

¹³³ TOW YOUTH JUST. INST., *supra* note 125, at 1.

¹³⁴ *See, e.g.*, Godsoe, *supra* note 89, at 1382; SARA MOORE ET AL., *supra* note 127, at 6.

¹³⁵ *See* Godsoe, *supra* note 89, at 1319; Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1357 (2013); MUSTO, *supra* note 89, at 3.

challenges, undiagnosed disabilities, or school experiences with bullying.¹³⁶ Likewise, children experiencing sexual abuse, witnessing intimate partner violence, or simply exploring the boundaries of their own identity and sexual orientation may run away from home or otherwise act out due to frustration with their domestic life—especially if they are being rejected by their families.¹³⁷ But, the FPS and delinquency systems cruelly pathologize survival from abuse and trauma, proving unequipped to adequately divert, screen, and assess children and families in crisis, let alone to connect them with empowering, affirming, noncarceral resources in their communities, stronger support systems, or opportunities for self-directed growth.¹³⁸ Frequently, states resort to foster care placements or juvenile detention for children considered status offenders, which only exacerbates children’s mental health challenges and general precarity.¹³⁹ Other common approaches to children labeled as status offenders include mandated participation in social service programs, extended curfews from a court or agency, carceral electronic monitoring (e.g., probation ankle bracelets), social media restrictions and confiscation of their electronic devices, and continued monitoring of caregivers’ emotional and financial status.

A. *Childhood Outcomes and Collateral Consequences*

The damage that the FPS causes to children, families, and society more broadly cannot be understated. Ironically, there is a cognitive dissonance among the general public regarding the foster system, childhood trauma, and abuse. While most lawmakers and the public presume that young children in the FPS are being rescued from trauma in their homes of origin, to ultimately move past early childhood anxieties upon reaching a “stable” environment like foster

¹³⁶ See TOW YOUTH JUST. INST., *supra* note 125, at 2.

¹³⁷ See *id.*

¹³⁸ See MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY 12, 14 (2015), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf>; TOW YOUTH JUST. INST., *supra* note 125, at 2; Smith, *No Quick Fix*, *supra* note 22, at 20 (first citing Smith, *Nothing About Us Without Us!*, *supra* note 22, at 4, 7; then citing RACHEL LLOYD, GIRLS LIKE US 111 (2011); then citing Godsoe, *supra* note 89, at 1313; and then citing Fernando Camacho, *Sexually Exploited Youth: A View from the Bench*, 31 TOURO L. REV. 377, 383 (2015)).

¹³⁹ See generally TOW YOUTH JUST. INST., *supra* note 125 (discussing treatment and demographics of status offenders both nationally and in Connecticut); CASEY FOUND., *supra* note 126; COAL. FOR JUV. JUST., *supra* note 126, at 39, 62–63.

care, Jack Shonkoff, director of Harvard’s Center for the Developing Child, insists that this assumption “is absolutely wrong.”¹⁴⁰ On the contrary, the foster care system fails to support or sufficiently equip children or caregivers but instead abruptly (and unnecessarily) separates families and causes immense harm.¹⁴¹

Children’s health and developmental risks increase the longer they are separated from their families.¹⁴² Yet, even the brief removal of a child from their family of origin can have lasting, devastating effects.¹⁴³ As of 2013, at least 10 percent of all child removals in the United States lasted only thirty days or fewer.¹⁴⁴ Copious brain research confirms these points, along with a wealth of social science and human rights literature discussing best practices rooted in *family systems theory*.¹⁴⁵ “Thus, the drawbacks of isolating family members’

¹⁴⁰ See Laura Santhanam, *How the Toxic Stress of Family Separation Can Harm a Child*, PBS NEWS HOUR (June 18, 2018, 5:46 PM), <https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child> (citing a 2012 study in the journal *Pediatrics* that explored how adversity and toxic stress in early childhood can manifest itself throughout a child’s life).

¹⁴¹ See Aburiyeba Amaso & Tressa Palcheck, *Child Welfare and the Criminal System: Impact, Overlap, Potential Solutions*, GEO. J. ON POVERTY L. & POL’Y ONLINE (Mar. 24, 2021), <https://www.law.georgetown.edu/poverty-journal/blog/child-welfare-and-the-criminal-system-impact-overlap-potential-solutions>; SANGOI, *supra* note 57, at 35–40.

¹⁴² See Santhanam, *supra* note 140; Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

¹⁴³ Clifford & Silver-Greenberg, *supra* note 142.

¹⁴⁴ *Id.*

¹⁴⁵ See Smith, *COVID Capitalism*, *supra* note 8, at 567 (“Extensive literature and best practices in a myriad of fields recognize *family systems theory*—a concept that children are inextricably embedded in families, which exist in communities and within a wider societal system.” (first citing Sara E. Cooper, *Introduction to THE TIES THAT BIND: QUESTIONING FAMILY DYNAMICS AND FAMILY DISCOURSE IN HISPANIC LITERATURE* 13 (Sara E. Cooper ed., 2004) [hereinafter COOPER]; then citing 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, 1322–24 (2008), <https://doi.org/10.1093/bjsw/bcm052>; then citing Carol Morgaine, *Family Systems Theory* (2001) (unpublished course materials) (on file with Portland State University), <https://web.pdx.edu/~cbcm/CFS410U/FamilySystemsTheory.pdf>; and then citing Fred Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations* 5–6, 11 (Jan. 2010) (unpublished working paper), https://www.socialserviceworkforce.org/system/files/resource/files/Adapting_A_Systems_Approach_to_Child_Protection.pdf). Accordingly, “significant emotional, financial, educational, and health dilemmas . . . [can] result[] when families are unnecessarily torn apart or intervened upon.” Smith, *COVID Capitalism*, *supra* note 8,

divisible legal rights and relying on tools of family separation ultimately far outweigh the potential benefits.”¹⁴⁶ Further, many persistent societal factors create adverse childhood experiences in marginalized communities, including intergenerational racial trauma and poverty, police violence, and its coverage in the media, community violence, structural bias, and systemic exclusion from socioeconomic and educational opportunities.¹⁴⁷ Likewise, the FPS causes short- and long-term health consequences for children including emotional breakdowns, stunted brain development from “toxic stress,” continued anxiety, depression, school behavioral problems, susceptibility to substance misuse, and even propensity for chronic medical conditions

at 567; *see also* Santhanam, *supra* note 140; Smith, *Conundrum*, *supra* note 54, at 318–19; Smith, *Unfit*, *supra* note 54, at 391–93.

¹⁴⁶ Smith, *COVID Capitalism*, *supra* note 8, at 567; *see also* Santhanam, *supra* note 140; COOPER, *supra* note 145, at 13; Elizabeth A. Mulroy, *Theoretical Perspectives on the Social Environment to Guide Management and Community Practice: An Organization-in-Environment Approach*, 28 ADMIN. SOC. WORK 77, 77 (2004), https://doi.org/10.1300/J147v28n01_06; Stevens & Cox, *supra* note 145, at 1324, 1332; Morgaine, *supra* note 145; Wulczyn et al., *supra* note 145, at 24, 26–27; Smith, *Conundrum*, *supra* note 54, at 321–23; Smith, *Unfit*, *supra* note 54, at 395–96; Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REVUE D’ETUDES CONSTITUTIONNELLES [REV. CONST. STUD.] 1, 7–8 (1993) (Fr.) (discussing problematic conceptions of rights pertaining to families).

¹⁴⁷ *See, e.g., ACEs and Toxic Stress: Frequently Asked Questions*, HARV. UNIV. CTR. ON THE DEVELOPING CHILD, <https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions> (last visited Nov. 13, 2023); Dominique Parris et al., *Resources to Support Children’s Emotional Well-Being Amid Anti-Black Racism, Racial Violence, and Trauma*, CHILD TRENDS (June 23, 2020), <https://www.childtrends.org/publications/resources-to-support-childrens-emotional-well-being-amid-anti-black-racism-racial-violence-and-trauma>; Elizabeth Gehrman, *Through the Eyes of a Child*, HARV. MED., Winter 2021, <https://hms.harvard.edu/magazine/racism-medicine/through-eyes-child>; Dan Hurley, *Can an Algorithm Tell When Kids Are in Danger?*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/magazine/can-an-algorithm-tell-when-kids-are-in-danger.html> (“Studies . . . have attributed the disproportionate number of [B]lack families investigated by child-welfare agencies across the United States not to bias, but to their higher rates of poverty.”); Keva M. Miller, *Exploring the Intersection of Child Welfare and Criminal Justice*, CHILD WELFARE 360°, Spring 2018, at 1, 4–5, https://cascw.umn.edu/wp-content/uploads/2018/04/CW360_Spring2018_WebTemp.pdf.

such as diabetes or heart disease.¹⁴⁸ Even when home life is stressful, family policing exacerbates strain and may cause irreparable harm.¹⁴⁹

Additionally, the experience of foster care carries egregious, proven risks of harm for children. Many children describe harrowing experiences of abuse, neglect, isolation, and exploitation while living in foster care and group homes.¹⁵⁰ Notre Dame researcher, Sarah Kroeger, even asserts that “youth exiting foster care have the worst outcomes of any population in the United States.”¹⁵¹ About one-in-twenty US children experience foster care during their childhood, and dual-system youth who experience both foster care and delinquency systems have the highest level of subsequent involvement with the criminal system and homeless shelters, although foster care alone has a strong link with future incarceration.¹⁵² Children in foster care also

¹⁴⁸ See *Fast Facts: Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 29, 2023), <https://www.cdc.gov/violenceprevention/aces/fastfact.html>; Santhanam, *supra* note 140 (citing a study by the Harvard Center on Developing Child); ROBERTS, SHATTERED BONDS, *supra* note 54, at 16–19, 189, 229 (discussing the extensive emotional damage caused by families targeted by the FPS); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 59–60, 71–72 (2006), <https://doi.org/10.1017/S0954579406060044>; Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS, Nov. 2016, at 1, 2, 5, 10, <https://doi.org/10.1542/peds.2016-1118> (demonstrating the connection between increased mental health issues and children’s placement in foster care); Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERVS. REV. 1143, 1149 (2011), <https://doi.org/10.1016/j.chilyouth.2011.03.01> (suggesting that placement in foster care increases the likelihood of emergency health episodes).

¹⁴⁹ Clifford & Silver-Greenberg, *supra* note 142.

¹⁵⁰ See, e.g., *Sex Abuse and the Foster Care System*, FOCUS FOR HEALTH FOUND., <https://www.focusforhealth.org/sex-abuse-and-the-foster-care-system> (last visited Nov. 13, 2023); CASEY FOUND., *supra* note 126; *Sexual Abuse: An Epidemic in Foster Care Settings?*, HG LEGAL RES., <https://www.hg.org/legal-articles/sexual-abuse-an-epidemic-in-foster-care-settings-6703> (last visited Nov. 13, 2023) (“A study by Johns Hopkins University found that children in foster care are four times more likely to be sexually abused than other children not in this setting.”).

¹⁵¹ Brendan Perry, *What the Experts Say: Improving Outcomes for Youth in Foster Care*, WILSON SHEEHAN LAB FOR ECON. OPPORTUNITIES (Sept. 21, 2022), <https://leo.nd.edu/news/what-the-experts-say-improving-outcomes-for-youth-in-foster-care>.

¹⁵² *Id.*; Santhanam, *supra* note 140; CTR. FOR INNOVATION THROUGH DATA INTEL., N.Y.C. OFF. OF THE MAYOR, *YOUNG ADULT OUTCOMES OF FOSTER CARE, JUSTICE, AND DUALY INVOLVED YOUTH IN NEW YORK CITY* 5 (2015), https://www1.nyc.gov/assets/cidi/downloads/pdfs/foster_care_justice_and_dually_involved_exec_summary.pdf; see also SANGOI, *supra* note 57, at 41 (discussing an

have a higher risk of experiencing educational disruption, academic and developmental delays, and unemployment; dropping out of high school; living in poverty; relying on public benefits for their basic needs; becoming teenage parents; engaging in survival sex; being subject to FPS intervention for their own children; and failing to enroll in and complete college, when compared with the general population.¹⁵³ Further, older youth in foster care wind up disconnected from meaningful kinship relationships and social support in their lives, ultimately aging out of a system that frequently abandons them at a bus station upon reaching age twenty-one.¹⁵⁴

Importantly, studies comparing outcomes for children in the foster system with those of comparably “maltreated children” who remain in their homes reveal that children removed from their caregivers “fared far worse,” and such studies have successfully isolated foster care (i.e., intrusion by the FPS itself) as the source of detrimental outcomes, rather than parental maltreatment.¹⁵⁵ Caseworker (investigator) biases and preconceptions also play a major role in deciding children’s fate throughout the FPS, despite the extremely divergent outcomes at stake in each case.¹⁵⁶ An in-depth study by the Massachusetts Institute of Technology Sloan School of Management examined family-policing cases deemed marginal (cases where a strict investigator might opt for foster care placement, but a different

extensive Kansas study that found over 20 percent of the six thousand people experiencing incarceration who were surveyed had spent time in foster care).

¹⁵³ See Perry, *supra* note 151; CTR. FOR INNOVATION THROUGH DATA INTEL., *supra* note 152, at 1; *The Current State of Foster Care*, FOSTERCLUB (Oct. 29, 2015), <https://www.fosterclub.com/blog/statistics-and-research/current-state-foster-care>; SANGOI, *supra* note 57, at 41–42.

¹⁵⁴ See, e.g., *First-of-its-Kind Data Track Troubling Outcomes of Youth Transitioning from Foster Care*, ANNIE E. CASEY FOUND. (Nov. 13, 2018), <https://www.aecf.org/blog/first-of-its-kind-national-data-track-troubling-outcomes-of-youth-transitioning>; Elisabeth Balistreri, *What Happens to Kids Who Age Out of Foster Care?*, HOUSE OF PROVIDENCE (Nov. 15, 2022), <https://www.thehofp.org/articles/what-happens-to-kids-who-age-out-of-foster-care>; 21 NAT’L SURV. OF CHILD & ADOLESCENT WELL-BEING, *Disconnected Youth Involved in Child Welfare: Findings from the NSCAW Study*, in RESEARCH BRIEFS 1 (2014), <https://www.acf.hhs.gov/opre/report/nscaw-no-21-disconnected-youth-involved-child-welfare>; Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 FUTURE CHILDREN 30, 35 (2004).

¹⁵⁵ SANGOI, *supra* note 57, at 42.

¹⁵⁶ *Id.* at 21–22 (first citing Lawrence M. Berger et al., *Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes*, 15 CHILD MALTREATMENT 199, 199–210 (2010); and then citing Bryan G. Victor et al., *Domestic Violence, Parental Substance Misuse and the Decision to Substantiate Child Maltreatment*, 79 CHILD ABUSE & NEGLECT 31, 31–41 (2018)).

investigator might return a child to their family), and found that “[o]ver time, children sent to foster care had higher delinquency rates, higher teen birthrates, lower earnings[,] and a higher likelihood of going to prison as an adult.”¹⁵⁷

As previously mentioned, youth in foster care are also more likely than their peers to become involved in the juvenile and criminal legal systems—especially if they have experienced multiple placements.¹⁵⁸ One study found that over 90 percent of foster youth who moved five or more times will wind up in the juvenile justice system.¹⁵⁹ Ironically, the correlation between foster care and embroilment with the criminal legal system is so strong that many advocates refer to a “foster care-to-prison pipeline”—which signifies that neglect of children *by the state itself* creates fodder for mass incarceration.¹⁶⁰ For these reasons, “[n]umerous state and federal laws exist to attempt to limit the detrimental effects of transition in foster care.”¹⁶¹

B. *The Family-Policing System: Caregiver, Societal, and Market Impact*

In addition to the multitude of hardships that the FPS causes children, it also has a devastating impact on caregivers, communities, and society more broadly, such as the US economy. Caregivers whose families are torn apart by coercive state intervention endure their own short- and long-term health consequences including suicidality, posttraumatic stress disorder,¹⁶² and “heightened social disadvantages

¹⁵⁷ Clifford & Silver-Greenberg, *supra* note 142.

¹⁵⁸ See Rachel Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works*, TEEN VOGUE (May 25, 2018), <https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works>. Regarding connections between time in foster care and involvement with juvenile and criminal legal systems, see *What Is the Foster Care-to-Prison Pipeline?*, JUV. L. CTR. (May 26, 2018) [hereinafter *Pipeline*], <https://jlc.org/news/what-foster-care-prison-pipeline>.

¹⁵⁹ Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System—A Former Prosecutor’s Perspectives on Reform*, 48 FAM. CT. REV. 322, 325 (2010) (citing Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERVS. REV. 227, 230 (2005)).

¹⁶⁰ See, e.g., SANGOI, *supra* note 57, at 41; *Pipeline*, *supra* note 158; Anspach, *supra* note 158.

¹⁶¹ See, e.g., Smith, *Unfit*, *supra* note 54, at 398–99 (citing McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431–11435).

¹⁶² See SANGOI, *supra* note 57, at 36; 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, 1160 (2015); Kendra L. Nixon et al., “*Every Day It Takes a Piece of You Away*”: Experiences of Grief and

including loss of housing, employment, income and social support, and increased stigma.”¹⁶³ A recent report to the United Nations found that these outcomes compound the societal disadvantages that such caregivers already faced prior to removal of their children.¹⁶⁴ After FPS intrusion, however, caregivers in the system face seemingly insurmountable “barriers to rebuilding their lives and families.”¹⁶⁵

The emerging discourse on the “return on investment” from the foster care system paints a similarly bleak picture of general market and societal detriment caused by the FPS and its deplorable outcomes. A 2019, national publication from Alia, Ecotone, and the Moxie Foundations found that essentially “investment in foster care has multiplied the future long term negative outcomes far beyond those occurring in the general population.”¹⁶⁶ Specifically, the US economy and society incurs exorbitant—and frankly, unnecessary—costs from the failing FPS in the way of legal system and public agency administration (both civil and criminal); judicial processing; incarceration and surveillance; future medical and mental health care

Loss Among Abused Mothers Involved with Child Protective Services, 7 J. PUB. CHILD WELFARE 172, 180–81, 183–84 (2013); Elizabeth Wall-Wieler et al., *Suicide Attempts and Completions Among Mothers Whose Children Were Taken into Care by Child Protection Services*, 63 CAN. J. PSYCHIATRY 170, 174–75 (2017); 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, 1187 (2018); Elizabeth Wall-Wieler et al., *Postpartum Depression and Anxiety Among Mothers Whose Child Was Placed in Care of Child Protection Services at Birth*, 22 MATERNAL & CHILD HEALTH J. 1393, 1396 (2018).

¹⁶³ See Elizabeth Wall-Wieler et al., *Maternal Health and Social Outcomes After Having a Child Taken into Care*, 71 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1145, 1145 (2017); Jennifer L. Hook et al., *Trajectories of Economic Disconnection Among Families in the Child Welfare System*, 63 SOC. PROBS. 161, 176 (2016).

¹⁶⁴ Shereen A. White & Stephanie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let’s Talk About It That Way*, ABA (Oct. 13, 2022), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2022/fall2022-racial-discrimination-in-child-welfare-is-a-human-rights-violation>; Movement for Fam. Power & Nat’l Advocs. for Pregnant Women, *Violence Against Women in the Medical Setting: An Examination of the U.S. Foster System 2* (2019) [hereinafter *Violence Against Women*], https://ccrjustice.org/sites/default/files/attach/2019/06/MFP_NAPW_UN_VAW_Submission-20190531-Final.pdf.

¹⁶⁵ VIOLENCE AGAINST WOMEN, *supra* note 164, at 5.

¹⁶⁶ WILLIAM NIELSEN ET AL., *THE UNSEEN COSTS OF FOSTER CARE: A SOCIAL RETURN ON INVESTMENT STUDY* 5 (2019), <https://www.thetcj.org/wp-content/uploads/2019/10/Alia-unseen-costs-of-FC.pdf>; see also Mihir Patel, *Working Paper: Economic Implications of Foster Care Children* (2012) (thesis, The College of New Jersey), <https://business.tcnj.edu/wp-content/uploads/sites/219/2013/07/Mihir-thesis-2012.pdf>

costs, including those of prospective children of foster youth; projected public benefits payments; lower lifetime earnings, which ultimately impact the national Gross Domestic Product (GDP); and maternal health and childcare costs, particularly from teen parenting by foster youth in an era of dwindling abortion rights, among multiple other lost resources and societal benefits.¹⁶⁷ To add insult to injury, FPS actually directly impose debt upon the caregivers whom it unnecessarily targets. For example, in each state, parents are billed for the cost of foster placements, which delays family reunification.¹⁶⁸ Likewise, in at least thirty-six states and the District of Columbia, social security survivor benefits of some children in foster care are seized to finance FPS operations.¹⁶⁹

On a much less transactional, pragmatic level, however, the entrenched overreach, abusiveness, and broader socioeconomic destruction of the FPS illuminates a national disregard for child well-being and family survival. Widespread youth and family empowerment in local FPS decision-making, along with insistence upon presumptions of non-intervention, should be a baseline next step for advocacy and reform. Yet, true progress in a post-*Dobbs* democracy ultimately means abolition of the FPS, with divestment and reinvestment of resources and realigned priorities driven by the communities that are most directly impacted.

IV. DISCARDED EDUCATION AND PROMISE: THE SCHOOL-TO-PRISON PIPELINE

In the wake of the *Dobbs* decision, as forced parenting escalates precarity for children and families, it is imperative to examine another entrenched form of state violence that discards children in the very universal, state-sponsored locus of their development—namely, the school-to-prison pipeline. The pipeline simultaneously dehumanizes, isolates, and abuses children while depriving them of their basic rights to education, safety, and future development.

As initially discussed,¹⁷⁰ the school-to-prison pipeline is prevalent across the nation and begins in education environments as early as

¹⁶⁷ NIELSEN ET AL., *supra* note 166, at 18.

¹⁶⁸ Astraea Augsberger & Mary Elizabeth Collins, *The U.S. Child Welfare System Is Falling Short Because of Persistent Child Poverty*, PA. CAPITAL-STAR (July 22, 2022, 6:30 AM), <https://www.penncapital-star.com/commentary/the-u-s-child-welfare-system-is-falling-short-because-of-persistent-child-poverty-opinion>.

¹⁶⁹ *Id.*

¹⁷⁰ See discussion *supra* Part II.

preschool. It involves a system of policies and practices that criminalize or punish youth for typical or minor behaviors, or subjective infractions, to ultimately propel students out of school and into the juvenile and criminal legal systems.¹⁷¹ Students of color and students with disabilities are consistently targeted for classroom exclusion, suspension, expulsion, surveillance, and arrest.¹⁷² Although a wave of zero tolerance policies in the 1990s in schools are the most recent root of this issue, they solidified a long-standing pattern of exclusion and criminalization of marginalized students in the American education system.¹⁷³ Historical contributors include persistent segregation, overpolicing, and underfunding of public education, which have all garnered rebuke from the UN Committee on the Elimination of Racial Discrimination (CERD).¹⁷⁴

Generally, funneling of youth of color, youth with disabilities, and LGBTQIA or GNC youth into the pipeline stems from the bias of educators and school administrators. The dimensions of bias include cultural stereotypes, racial profiling, reliance on punitive school discipline policies, and adultification—particularly of Black children—which entails the inappropriate perception that Black children are less innocent than their peers, less vulnerable, more aggressive, more savvy or devious, hypersexualized, more emotionally resilient, and more deserving of harsher punishment than White children.¹⁷⁵ A 2020 study

¹⁷¹ See, e.g., Stacie Nelson Colling et al., *Defending the Whole Child: Education Advocacy as an Integral Part of Holistic Juvenile Defense*, 20 SEATTLE J. FOR SOC. JUST. 199, 199 (2021); Artika R. Tyner, *The Tangled Web of Mass Incarceration: Addressing the School-to-Prison Pipeline Through a Restorative Justice Approach*, 17 U. ST. THOMAS L.J. 59, 59–60 (2020).

¹⁷² See, e.g., *Racial Disparities in Education and the Role of Government*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (June 29, 2020) [hereinafter WATCHBLOG], <https://www.gao.gov/blog/racial-disparities-education-and-role-government>; *Race, Discipline, and Safety at U.S. Public Schools*, ACLU (2018) [hereinafter ACLU, *Race, Discipline, and Safety at U.S. Public Schools*], <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/race-discipline-and-safety-us-public-schools>.

¹⁷³ See Jay Blitzman, *Shutting Down the School-to-Prison Pipeline*, 47 HUM. RTS. MAG., Oct. 12, 2021, at 20, 21; Amanda D. Iocono, Note, “*That’s the Hate They’re Giving Us, Baby, A System Designed Against Us.*” *The Restorative Justice Solution to the School-to-Prison Pipeline*, 17 U. MASS. L. REV. 183, 183 (2022).

¹⁷⁴ Blitzman, *supra* note 173, at 20; Lisa Borden, *UN Report: US Fails to Implement Terms of Treaty on Eliminating Racial Discrimination*, S. POVERTY L. CTR. (Sept. 9, 2022), <https://www.splcenter.org/news/2022/09/09/un-report-us-fails-implement-terms-treaty-eliminating-racial-discrimination>.

¹⁷⁵ See REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 1 (2017), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf> (describing how the

by the National Prevention Science Coalition even found that Black preschoolers account for 47 percent of students suspended, even though they represent only 19 percent of enrollment.¹⁷⁶ Yet, there is no evidence that Black children (or other youth of color) display greater or more severe misbehavior than their White counterparts.¹⁷⁷ Rather, racially disparate preschool suspensions—and most other racial profiling in schools—are the direct result of adult behavior.¹⁷⁸ Yet, even a child’s early origins in the pipeline could ultimately land them in long-term incarceration.¹⁷⁹

adultification of Black girls—“the perception of Black girls as less innocent and more adult-like than [W]hite girls of the same age”—generates “disparate treatment of Blacks girls” throughout education, juvenile justice, and child welfare systems); ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 76–85 (2017) (highlighting how Black and Latinx girls, particularly sexual and GNC youth, are routinely subjected to excessive force, sexual harassment, and even arrest by police officers located in schools for largely trivial behavior); Sonja C. Tonnesen, Commentary, “*Hit It and Quit It*”: Responses to Black Girls’ Victimization in School, 28 *BERKELY J. GENDER L. & JUST.* 1, 10 (2013) (“Often misperceiving Black girls’ and young women’s self-defense as aggression, school officials frequently punish victimized Black girls and young women.”); Valeria M. Pelet del Toro, Article, *Let Black Girls Learn: Perceptions of Black Femininity and Zero-Tolerance Policies in Schools*, 87 *REVISTA JURÍDICA U. P.R.* 55, 69 (2018) (“[Z]ero-tolerance discipline policies seem notably blind to and ultimately unfit to handle problems stemming from gender-based violence and harassment in schools. . . . [W]hen school officials are faced with a Black female who seems disengaged or is acting out, she is usually suspended, expelled[,] or referred to law enforcement.”); JAMILIA J. BLAKE & REBECCA EPSTEIN, *LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS* 1 (2019), <https://endadultificationbias.org/wp-content/uploads/2019/05/Listening-to-Black-Women-and-Girls-v7.pdf>; see also, Kristen Weir, *Inequality at School: What’s Behind the Racial Disparity in Our Education System?*, *AM. PSYCH. ASS’N* (Nov. 2016), <https://www.apa.org/monitor/2016/11/cover-inequality-school>; Smith, #WhoAmI, *supra* note 22, at 311–12; NAT’L PREVENTION SCI. COAL., *supra* note 84; Iocono, *supra* note 173, at 194–97; Raymond Magsaysay, *Asian Americans and Pacific Islanders and the Prison Industrial Complex*, 26 *MICH. J. RACE & L.* 443, 479 (2021) (demonstrating the criminalization of Asian American & Pacific Islander (AAPI) youth by the school-to-prison pipeline).

¹⁷⁶ NAT’L PREVENTION SCI. COAL., *supra* note 84.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Marian Wright Edelman, *The Cradle to Prison Pipeline: America’s New Apartheid*, *CHILD.’S DEF. FUND: CHILD WATCH COLUMN* (Feb. 6, 2009), <https://www.childrensdefense.org/child-watch-columns/health/2009/the-cradle-to-prison-pipeline-americas-new-apartheid>; *CHILD.’S DEF. FUND, CRADLE TO PRISON PIPELINE FACT SHEET 1* (2009) [hereinafter *CRADLE TO PRISON PIPELINE FACT SHEET*], <https://www.childrensdefense.org/wp-content/uploads/2018/08/cradle-to-prison-pipeline-overview-fact-sheet-2009.pdf>; see also Sam LaPres, *4 Things You Need to Know About the Cradle-to-Prison Pipeline*, *TEX. INST. FOR CHILD & FAM. WELLBEING*,

Despite changes in the sociocultural and public health context, the school-to-prison pipeline has proven resilient. Digital age approaches to punitive school discipline are nonetheless problematic. A variety of covert and invasive surveillance methods are utilized to monitor students, including social media monitoring, device monitoring, predictive analytics, and the use of police surveillance, often done without children's or parents' knowledge or consent.¹⁸⁰ Unsurprisingly, there is also disparate digital scrutiny upon students of color and students with disabilities.¹⁸¹ Further, research reveals that zero tolerance policies and aggressive school policing have persisted despite the COVID-19 pandemic, although virtual learning somewhat disrupted the pipeline phenomenon.¹⁸²

America's rejection of reproductive autonomy, coupled with our aforementioned unpreparedness for an estimated fifty thousand unwanted babies, signifies an outright investment in the damaging school-to-prison (or cradle-to-prison) pipeline. Marian Wright Edelman, president emerita of the Children's Defense Fund, asserts that a cradle-to-prison pipeline is truly at stake because babies in poverty enter the world with multiple strikes against them: scarce prenatal care, low birthweights, teen parents, economic precarity, and less educated parents—often with absent fathers.¹⁸³ As more risks pile on at crucial points in their development, the likelihood of a "successful transition to productive adulthood" diminishes and involvement in the criminal legal system becomes more likely.¹⁸⁴ Contrary to the perspective of many in law enforcement, certain policy arenas, and certain segments of the public, maintaining police in

<https://txicfw.socialwork.utexas.edu/4-things-you-need-to-know-about-the-cradle-to-prison-pipeline> (last visited Nov. 13, 2023); Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 81 (2015) ("This essay examines the school-to-prison pipeline through a capitalistic lens, revealing that African American and Latino students expelled, suspended, or arrested in public schools are exploited by the prison industry. . . . [which] relies on uneducated African American . . . and Latino[] males for financial gain.").

¹⁸⁰ Andy Froelich, Article, *The Increasingly Covert and Invasive Surveillance of Students and Its Visible Role in the School-to-Prison Pipeline*, 40 CHILD.'S LEGAL RTS. J. 118, 118–19 (2020).

¹⁸¹ *Id.* at 120.

¹⁸² Andrew Hairston, *Lawyers Fighting for Education Justice in 2021*, 58 HOUS. LAWYER, May–June 2021, at 27, 27; Laura R. McNeal, *A Call to Action: Zero Tolerance for the School-to-Prison Pipeline*, 57 IDAHO L. REV. 663, 664 (2021).

¹⁸³ Edelman, *supra* note 179; see also LaPres, *supra* note 179.

¹⁸⁴ Edelman, *supra* note 179.

schools diminishes child safety and simply increases the likelihood that children will be criminalized.¹⁸⁵ Exclusionary, discriminatory school discipline causes immediate trauma, shame, low self-esteem, and social ostracization, especially for early-age children.¹⁸⁶ The pipeline is a form of structural discrimination that proves devastating to children's short- and long-term mental health, socioemotional development, educational stability, educational achievement and future prospects, skill development, physical health, physical safety, and social viability.¹⁸⁷ Children mired in the pipeline are also more likely to experience subsequent family strain and FPS involvement.¹⁸⁸ The school-to-prison pipeline also makes children in the juvenile and criminal legal system more susceptible to abuse, assault, academic deprivation, and isolation within carceral facilities, and they are destined to suffer from the extensive collateral consequences of criminalization, including voting disenfranchisement.¹⁸⁹

Unfortunately, such reduced opportunities for guidance and losses of crucial classroom time reinforce the educational opportunity gap and set children on a negative trajectory that continues into

¹⁸⁵ James Paterson, *Making Schools Safe and Just*, NEA TODAY (Apr. 28, 2022), <https://www.nea.org/nea-today/all-news-articles/making-schools-safe-and-just>; *Bullies in Blue: The Problem with School Policing (Infographic and Descriptive Abstract)*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/bullies-blue-problem-school-policing-infographic> (last visited Nov. 13, 2023).

¹⁸⁶ Richard O. Welsh & Shafiqia Little, *Caste and Control in Schools: A Systematic Review of the Pathways, Rates and Correlates of Exclusion due to School Discipline*, 94 CHILD. & YOUTH SERVS. REV. 315, 315–339 (2018); Kara Arundel, *Panel: Trauma of Preschool Suspensions, Expulsions Is Long-lasting*, K-12 DIVE (Jan. 10, 2023) <https://www.k12dive.com/news/Trauma-from-preschool-expulsions-suspensions/640034> (“Preschool expulsions and suspensions can cause long-lasting trauma to children and families, as well as more immediate damage to children’s cognitive and social development, panelists said during a webinar . . . by The Hunt Institute . . .”).

¹⁸⁷ Blitzman, *supra* note 173, at 20; NAT’L PREVENTION SCI. COAL., *supra* note 84; Tyner, *supra* note 171, at 64.

¹⁸⁸ See Christopher A. Mallett, *The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents*, 49 EDUC. URB. SOC’Y 563, 570–71 (2017), <https://doi.org/10.1177/0013124516644053>.

¹⁸⁹ CRADLE TO PRISON PIPELINE FACT SHEET, *supra* note 179, at 1–2; NAT’L PREVENTION SCI. COAL., *supra* note 84; ACLU, *Race, Discipline, and Safety at U.S. Public Schools*, *supra* note 172 (discussing inequitable access to academic instruction due to disparities in school discipline, and noting the “unjustifiable disparate impact on the educational and life outcomes of children of color”).

lifelong challenges for health, well-being, and economic success.¹⁹⁰ In numerical terms, the American Civil Liberties Union reports that the “eleven million days of lost instruction from suspensions as disciplinary actions” in the 2015–2016 academic year alone “translates to more than [sixty thousand], more than [sixty] million hours of lost education, and billions of dollars wasted.”¹⁹¹ “[C]hildren who are expelled or suspended are as much as [ten] times more likely to drop out of high school, experience academic failure and grade retention, hold negative school attitudes, and face incarceration than those who are not.”¹⁹² Students with disabilities face an especially dire situation. Nationally, exclusionary discipline practices cause students with disabilities to lose instruction from “suspensions at more than twice the rate of their non-disabled peers.”¹⁹³ Several states with the highest rates of lost school days for students with disabilities are also banning abortion with paltry investment in education or a social safety net, including Tennessee and North Carolina.¹⁹⁴

Additionally, public education system shortcomings reinforce the childhood trauma, injurious outcomes, and socioeconomic strife of the school-to-prison pipeline. Schools with the greatest propensity to criminalize their students (and to employ law enforcement on campus) also tend to lack supportive resources, including counselors, social workers, and nurses.¹⁹⁵ According to federal data, tens of thousands of schools across the United States that prioritize law enforcement staffing cannot meet the basic social, emotional, or behavioral needs of their students.¹⁹⁶ As of 2016, “[m]ore than [thirty-six] million students were enrolled in [fifty-five thousand] schools that did not meet the American School Counselors Association’s recommended 250:1 student-to-counselor ratio,” and the national average student-to-counselor ratio was 444:1.¹⁹⁷ Schools that do

¹⁹⁰ NAT’L PREVENTION SCI. COAL., *supra* note 84; CRADLE TO PRISON PIPELINE FACT SHEET, *supra* note 179, at 1; ACLU, *Race, Discipline, and Safety at U.S. Public Schools*, *supra* note 172.

¹⁹¹ ACLU, *Race, Discipline, and Safety at U.S. Public Schools*, *supra* note 172.

¹⁹² NAT’L PREVENTION SCI. COAL., *supra* note 84.

¹⁹³ ACLU, *Race, Discipline, and Safety at U.S. Public Schools*, *supra* note 172.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; see also DANIEL J. LOSEN & AMIR WHITAKER, 11 MILLION DAYS LOST: RACE, DISCIPLINE, AND SAFETY AT U.S. PUBLIC SCHOOLS app. A (stating that data was collected from the 2015–16 school year).

employ counselors severely overwork them, and their caseloads are far higher than professional counseling and behavioral health associations recommend.¹⁹⁸

V. THE PRISON INDUSTRIAL COMPLEX AND THE INCARCERATED FAMILY

A thorough discussion of the carceral system's destructiveness for children and families is beyond the scope of this Article and is discussed extensively elsewhere. But the carceral system and its apparatuses—including the juvenile legal system, the criminal legal system, both public and privatized detention and incarceration facilities, community supervision infrastructure including nongovernmental organizations (NGOs) that sustain themselves through referrals and reporting with the juvenile and criminal legal systems, electronic surveillance, militaristic policing practices, the child support collection and enforcement system, and the immigration detention/deportation machine—are a long-standing vehicle for state violence upon marginalized children and communities, evincing racial animus and stemming directly from chattel slavery and Jim Crow.¹⁹⁹ By just one measure of impact, the Bureau of Justice Statistics states that “[s]ince 1991, the number of children with a mother in prison has more than doubled, up 131%,” and “[t]he number of children with a father in prison has grown by 77%.”²⁰⁰ African Americans, Latinxs, and other people of color receive starkly disparate treatment at all stages of the carceral system despite having comparable rates of lawbreaking to Whites.²⁰¹ Further, as scholar, Michele Goodwin, points out, although the Thirteenth Amendment abolished antebellum chattel slavery, it

¹⁹⁸ See, e.g., ACLU, *Race, Discipline, and Safety at U.S. Public Schools*, *supra* note 172.

¹⁹⁹ See, e.g., ALEXANDER, *supra* note 21, at 2; BLACKMON, *supra* note 21, at 5–9; Ann Cammett, *The Shadow Law of Child Support*, 102 B.U. L. REV. 2237, 2237 (2022); NAZGOL GHANDNOOSH ET AL., SENT’G PROJECT, PARENTS IN PRISON 1–2 (2021), <https://www.sentencingproject.org/policy-brief/parents-in-prison>; ASHLEY NELLIS, SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project>; Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1015–16 (2013), <https://doi.org/10.2139/ssrn.2232078>; Clark, *supra* note 16 (quoting abolitionist and organizer Mariame Kaba); McLeod, *supra* note 17, at 1207.

²⁰⁰ LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU JUST. STAT., PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008).

²⁰¹ Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 958 (2019).

continues transforming and evolving—with our nation nevertheless condoning the slavery of people experiencing incarceration—as both states and the federal government “force prisoners” in both state and private facilities “into the modern labor conditions of slavery.”²⁰² An increasing groundswell of scholarship and activism also documents the ways the carceral system incapacitates motherhood, fatherhood, and immediate and extended kinship connections, and can even sever both reproductive capacity and reproductive autonomy.²⁰³

Not only does the PIC cause immediate, short-term, and long-term harm to children and family systems, it also causes many communities to remain socioeconomically and psychically devastated.²⁰⁴ Professional mental health associations are now copiously documenting and addressing the racial trauma caused by the carceral system and its constant—often mass televised or digitally repeated—police violence against communities of color.²⁰⁵ Adults

²⁰² *Id.* at 952–60.

²⁰³ See, e.g., Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2191–92 (2018) (“This Article aims to bridge this discursive gap by highlighting the specific ways in which incapacitation has been used as a means to regulate the bodies and reproductive capacities of marginalized women. The Article advances this claim in three ways. First, by mapping the historical function of women’s prisons as a mechanism to restore and regulate ‘fallen women’ who deviated from traditional norms associated with femininity and motherhood. Second, by examining the ways in which contemporary women’s prisons similarly regulate women’s identities as mothers.”); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL’Y 127, 127 (2011); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1474 (2012); Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. 517, 520 (2022), <https://doi.org/10.52214/cjrl.v12i1.9946>; GHANDNOOSH ET AL., *supra* note 199, at 1–2.

²⁰⁴ See, e.g., U.S. COMM’N ON C.R., *COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1–7* (2019) [hereinafter *COLLATERAL CONSEQUENCES*]; *Million Dollar Blocks*, COLUM. CTR. FOR SPATIAL RSCH., <https://c4sr.columbia.edu/projects/million-dollar-blocks> (last visited Nov. 13, 2023); Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES SCI. & TECH., Fall 2015, <https://issues.org/effects-mass-incarceration-communities-color/> (last visited Nov. 22, 2023); Diane Orson, ‘*Million-Dollar Blocks*’ Map Incarceration’s Costs, NPR (Oct. 2, 2012, 6:13 PM), <https://www.npr.org/2012/10/02/162149431/million-dollar-blocks-map-incarcerations-costs>; Emily von Hoffmann, *How Incarceration Infects a Community*, THE ATL. (Mar. 6, 2015), <https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967>.

²⁰⁵ See, e.g., American Psychologist *Special Issue on Racial Trauma and Healing*, AM. PSYCH. ASS’N (Mar. 1, 2019), <https://www.apa.org/pubs/highlights/spotlight/issue->

likewise endure the collateral consequences of criminal records upon reentry, including legally sanctioned barriers to employment, housing, and education, along with felon voter disenfranchisement, which in turn stifles their children's prospects for well-being.²⁰⁶ The broader US society and economy are also tremendously damaged by the PIC.²⁰⁷

VI. SHIFTING THE PARADIGM: REIMAGINING CHILD WELLBEING AND CIVIC EMPOWERMENT POST-*DOBBS*

In light of the current and impending turmoil that forced parenting and reproductive repression will cause, a paradigm shift is necessary to reorient notions of how our nation cognizes its purported priorities of preserving human life. Authors of the *Dobbs* decision, jurists, and policymakers steering measures that facilitate forced parenting ignore the actualities of the peril they cause to unplanned babies, children, caregivers, families, broader society, and the US economy. A vital paradigm shift in our understandings of preservation of life should likewise engage the framework of vulnerability theory to conceptualize the status quo landscape and reorient a future beyond the deluge of harm.²⁰⁸ Vulnerability theory—as particularly conceptualized by renowned feminist scholar, Martha Fineman—asserts that contrary to Western, liberal notions of individualism, the fundamental legal and political subject (actor) is a *vulnerable one*.²⁰⁹ Dependency, fragility, and the limitations of residing in a single human body, are what fundamentally define human existence.²¹⁰ Fineman and a plethora of scholars and advocates engaging vulnerability theory understand that although the human condition is

129; *Racial Trauma*, MENTAL HEALTH AM., <https://www.mhanational.org/racial-trauma> (last visited Nov. 13, 2023); Jude Mary Cénat, *Complex Racial Trauma: Evidence, Theory, Assessment, and Treatment*, 18 PERSPS. ON PSYCH. SCI. 675, 675 (2022), <https://doi.org/10.1177/17456916221120428>.

²⁰⁶ See, e.g., *Collateral Consequences*, N.Y. CTS., <https://www.nycourts.gov/courthelp/criminal/collateralConsequences.shtml> (last visited Nov. 13, 2023); CRIM. JUST. SECTION, AM. BAR ASSOC., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 4–6 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf>; COLLATERAL CONSEQUENCES, *supra* note 204, at 9.

²⁰⁷ See, e.g., CMTYS. UNITED ET AL., *THE \$3.4 TRILLION MISTAKE: THE COST OF MASS INCARCERATION AND CRIMINALIZATION, AND HOW JUSTICE REINVESTMENT CAN BUILD A BETTER FUTURE FOR ALL* 3–5 (2016).

²⁰⁸ See Smith, *Empathy Gap*, *supra* note 3, at 2640–42 (discussing vulnerability theory).

²⁰⁹ Fineman, *The Vulnerable Subject*, *supra* note 5, at 262–66.

²¹⁰ *Id.*

universal and vulnerable on a global level, a complex web of institutions and networks in society still distributes privileges to certain people over others, while interdependence is inevitable throughout the law and society.²¹¹ Certain individuals and groups gain the privilege of becoming more resilient to harm and hardship, in turn gaining power to subjugate and exclude those who lack historical (and/or newfound) power and privilege.²¹² If anything, the lingering COVID-19 pandemic is a key historical phenomenon demonstrating inherent vulnerability across the human condition. Although low-income communities of color and women were disparately impacted and overcriminalized in the United States, while poorer nations struggled to even access vaccines and medical expertise, no one was fully immune.²¹³ Nevertheless, vulnerability to sudden illness, death, material hardship, and extensive loss was still apparent across all segments of society.²¹⁴

Ultimately, only multifaceted, broad, structural change can achieve a semblance of pervasive well-being and resilience for children, and what Fineman coins a “responsive state” is essential to eradicating problematic systems like the FPS, the school-to-prison pipeline, and

²¹¹ See Smith, *No Quick Fix*, *supra* note 22, at 38–40 (discussing Professor Fineman’s vulnerability theory in the context of commercial sexual exploitation of youth).

²¹² See Martha A. Fineman, *Understanding Vulnerability Theory*, EMORY UNIV. SCH. OF L. BLOG: VULNERABILITY & THE HUM. CONDITION (Aug. 26, 2019), <https://scholarblogs.emory.edu/vulnerability/2019/08/26/understanding-vulnerability-theory>.

²¹³ See Cahn & McClain, *supra* note 50, at 44–45; Barbara Stark, *Inequality, COVID-19, and Human Rights: Whose Lives Matter?*, 27 ILSA J. INT’L & COMPAR. L. 251, 254 (2021); see, e.g., Asher Lehrer-Small, *Parents Who Kept Kids at Home for Fear of Covid Are Reported for Neglect*, THE GUARDIAN (Jan. 27, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/jan/27/covid-kids-school-reported-for-neglect>; 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-acs-educational-neglect-covid-concerns-remote-schooling>.

²¹⁴ *In Their Own Words: Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic>; *How the COVID-19 Pandemic Changed Society*, THE UNIV. OF ALA. AT BIRMINGHAM (Mar. 14, 2022), <https://www.uab.edu/news/youcanuse/item/12697-how-the-covid-19-pandemic-changed-society>; M. Mofijur et al., *Impact of COVID-19 on the Social, Economic, Environmental and Energy Domains: Lessons Learnt from a Global Pandemic*, 26 SUSTAINABLE PROD. CONSUMPTION 343, 343–44 (2021), <https://doi.org/10.1016/j.spc.2020.10.016>.

the carceral system, which now only perpetuate systemic oppression.²¹⁵ The following recommendations begin to highlight a needed paradigm shift towards abolition of punitive systems, and reimagining a societal (and governmental) approach to children and families that centers on support, self-determination, and revitalized self-governance. Some approaches mentioned herein focus on harm reduction or mitigation, while others aim to create a world beyond oppressive systems. Ironically, our post-*Dobbs* democracy evinces more openness to carceral abolition, a critique of racial capitalism, and scrutiny of government overreach than many other prior eras in the United States.²¹⁶ In fact, widespread instances of youth and community

²¹⁵ See Fineman, *The Vulnerable Subject*, *supra* note 5, at 269-275 (discussing the meaning and potential of a “responsive state” and social institutions that can bolster human “resilience in relation to . . . human vulnerability”).

While several prevailing American myths currently impede the establishment of a state more responsive to the vulnerable subject, the challenge is to think beyond current ideological constraints and consider the possibility of an active state in nonauthoritarian terms. This theoretical task of reconceptualizing the role of the state requires that [society] imagine responsive structures whereby state involvement actually empowers a vulnerable subject by addressing existing inequalities of circumstances that result from undue privilege or institutional advantage.

Id. at 274.

²¹⁶ Regarding vastly increased mass consciousness and mainstream coverage of potential carceral abolition and defunding police, see Amna A. Akbar, *The Left Is Remaking the World: “Defund the Police” and “Cancel Rent” Aren’t Reforms, but Paths to Revolution*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html>; Mary Zerkel, *6 Reasons Why It’s Time to Defund the Police*, AM. FRIENDS SERV. COMM. (Oct. 15, 2020), <https://afsc.org/news/6-reasons-why-its-time-defund-police>; Geo Maher, *Yes, We Should Defund the Police*, NEWSWEEK (Sept. 14, 2021, 5:17 PM), <https://www.newsweek.com/yes-we-should-defund-police-opinion-1629125>; Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration> (describing the proliferation of “mass consciousness about prison abolition,” from grassroots movements to elite universities and multiple White House administrations); E-mail from M4BL, June 26, 2023, *supra* note 43; Nathaniel Rakich, *How Americans Feel About ‘Defunding the Police’*, FIVETHIRTYEIGHT (June 19, 2020, 5:58 AM), <https://fivethirtyeight.com/features/americans-like-the-ideas-behind-defunding-the-police-more-than-the-slogan-itself/> (“‘Defund the police.’ In the last several weeks, this slogan has entered the mainstream amid nationwide protests against police violence. [But], there’s some disagreement about what exactly the slogan means. . . . The slogan is unpopular with most demographic groups, too, with two notable exceptions: Black Americans and Democrats. . . . So what we’re seeing here may be another reflection of Black and [W]hite Americans’ different experiences with police.”); Scott Neuman, *America Reckons with Racial Injustice: Police Viewed Less Favorably, but Few Want to ‘Defund’ Them, Survey Finds*, NPR (July 9, 2020, 10:55 PM),

mobilization towards FPS and carceral abolition, reparations movements, and justice reinvestment are burgeoning across the country, while legal transformation occurs in both small and significant ways, even as major attempts at suppression and austerity persist.²¹⁷

A. *Fortifying the Social Safety Net*

While abundant scholarship, advocacy, and policymaking focus on fortifying the social safety net, a few key developments aim to eradicate the harmful systems mentioned herein, and to reimagine a sociolegal landscape that prioritizes resilience-building instead of individualism, profit-making, and privatization. The Casey Family Foundation, a premier policy advocacy and service provision organization regarding foster systems and youth justice, reiterates:

Helping families address basic needs . . . is an effective way to prevent child maltreatment and involvement with child welfare, and is in keeping with the social determinants of health and the widespread understanding that children must be supported within the context of their families, and families within their communities and cultures.²¹⁸

Similarly, Boston University social work and social welfare professors, Astraea Augsberger and Mary Elizabeth Collins, contend that true progress “require[s] a more robust safety net and the authorities taking a more constructive approach to supporting parents of children deemed to be experiencing neglect or abuse.”²¹⁹ These authors and many others recommend bolstering public benefits and social programs to enable caregivers to weather the financial and

updates-protests-for-racial-justice/2020/07/09/889618702/police-viewed-less-favorably-but-few-want-to-defund-them-survey-finds; Charisa Smith, *Youth Visions and Empowerment: Reconstruction Through Revolution*, 75 RUTGERS U. L. REV. 825, 826 (2023) [hereinafter Smith, *Youth Visions and Empowerment*].

²¹⁷ See Smith, *Youth Visions and Empowerment*, *supra* note 216, at 825–26 (first citing Alyssa Biederman et al., *Meet Gen Z Activists: Called to Action in an Unsettled World*, ASSOCIATED PRESS (Sept. 29, 2020, 10:58 AM), <https://apnews.com/article/climate-race-andethnicity-shootings-climate-change-school-violence-01673bd21da246ce942d1e98a08fc96f>; then citing Jessica Bennett, *These Teen Girls Are Fighting for a More Just Future*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/06/26/style/teen-girls-black-lives-matteractivism.html>; and then citing *Our Guiding Principles*, ZERO HOUR, <https://drive.google.com/file/d/1076W0LkomdEO3IWHakKodIJjigOMMYUE/view> (last visited Nov. 13, 2023)).

²¹⁸ CASEY FAM. PROGRAMS, *supra* note 100, at 3.

²¹⁹ Augsberger & Collins, *supra* note 168.

personal challenges they may face, including boosting federal funding for child care (as two former treasury secretaries have proposed); expanding eligibility for the Child Tax Credit; facilitating affordable housing; broadening medical and mental health services and supports; providing employment assistance; and increasing legal services.²²⁰

Likewise, scholars, Clare Huntington, Lynn Lu, and many others, examine other transformative changes that can have major impacts on children, communities, and the market by creating a baseline of stability and resilience across the populace.²²¹ They assert that it is neither unfeasible nor outlandish for the United States to consistently provide direct resources, like universal basic income (UBI) to American families in the manner of other socialized democracies or restore a monthly payment approach that decreased poverty briefly during the pandemic.²²² Likewise, paid family and medical leave and other social programs should be institutionalized on a national level.²²³ If anything, in recent years the United States has implemented certain social policies that seemed previously unimaginable since the New Deal era, such as the American Rescue Plan.²²⁴ Those occurrences

²²⁰ *Id.*; see also CASEY FAM. PROGRAMS, *supra* note 100, at 5.

²²¹ See Lynn D. Lu, *From Stigma to Dignity? Transforming Workfare with Universal Basic Income and a Federal Job Guarantee*, 72 S.C. L. REV. 703, 703–05 (2021) [hereinafter Lu, *From Stigma to Dignity?*]; Lynn D. Lu, *Restorative Relationships and “Radical Help”: Reimagining Welfare-to-Work Beyond the Market-Family Divide*, 50 U. BALT. L. REV. 287, 288–90 (2021) [hereinafter Lu, *Restorative Relationships*]; Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755, 755–56 (2017) [hereinafter Huntington, *Early Childhood Development*]; Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL’Y REV. 459, 459–60 (2019).

²²² See Lu, *From Stigma to Dignity?*, *supra* note 221, at 705, 710–11; HUNTINGTON, *supra* note 78, at xv; Harbach, *supra* note 221, at 464; Augsburg & Collins, *supra* note 168; CASEY FAM. PROGRAMS, *supra* note 100, at 2; Huntington, *Early Childhood Development*, *supra* note 218, at 756.

²²³ See Huntington, *Early Childhood Development*, *supra* note 221, at 776, 797–98, n.239; Harbach, *supra* note 221, at 512; Lu, *From Stigma to Dignity?*, *supra* note 221, at 709; Lu, *Restorative Relationships*, *supra* note 221, at 325; see also Nicole Phillis, *Vulnerability Theory in Local Practice*, EMORY UNIV. SCH. OF L. BLOG: VULNERABILITY & THE HUM. CONDITION (July 29, 2021), <https://scholarblogs.emory.edu/vulnerability/2021/07/29/vulnerability-theory-in-local-government>.

²²⁴ See *The American Rescue Plan Passed—Now What?*, THE WHITE HOUSE: BLOG (Mar. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/03/10/the-american-rescue-plan-passed-now-what>. “[The American Rescue Plan] is significantly bolder than the response to the Great Recession in 2009” because it includes increased health-care subsidies and funding for rent and mortgage assistance, childcare, and farm aid, along with other vital supports. *The American Rescue Plan, Explained*,

offer hope and tools for better innovation on the local, state, and federal levels.

B. *Family-Policing System: Mitigating Harm*

A variety of front- and back-end interventions can stave off the flood of marginalized children and families that are propelled into FPS in each US jurisdiction, even if such interventions do not independently achieve large-scale change or system abolition. As daily state violence is inflicted, reunification is an essential first step.²²⁵ Robust scholarship and advocacy has begun to recommend curtailing mandated reporting of child maltreatment in order to reduce unnecessary investigations and family separation on the front end.²²⁶ Similarly, efforts towards reforming child maltreatment (or domestic incident) registries address the back end of the FPS, to mitigate the harm caused when caregivers languish on a registry for as long as two decades after a mere report or investigation with devastating collateral consequences.²²⁷ Also known as expungement, registry reform can at least hasten caregivers' return to the workforce, facilitate better care for children, and minimize the long-term precarity that would otherwise result as long as maltreatment allegations persist in a discriminatory, abusive system.²²⁸

Instituting a presumption of nonintervention by the state in all non-egregious maltreatment scenarios, and altering threshold legal standards for family surveillance, are also vital baseline changes to prevent harm at the front end of the FPS and keep children from unnecessary exposure altogether. The Statewide Central Register (SCR) reform that occurred in New York also includes initiatives that can significantly reduce an influx of families into the system, including

INDIVISIBLE, <https://indivisible.org/resource/american-rescue-plan-explained> (last visited Nov. 13, 2023).

²²⁵ DETTLAFF ET AL., *supra* note 21, at 10.

²²⁶ See, e.g., Keyna Franklin & Shakira Paige, *New SCR Legislation Took Effect January 1st: What It Means for Parents*, RISE (Jan. 18, 2022), <https://www.risemagazine.org/2022/01/what-new-scr-legislation-means-for-parents>; Chris Gottlieb, *Major Reform of New York's Child Abuse and Maltreatment Register*, ALM (May 26, 2020, 10:30 AM), <https://www.law.com/newyorklawjournal/2020/05/26/major-reform-of-new-yorks-child-abuse-and-maltreatment-register>.

²²⁷ See, e.g., Franklin & Paige, *supra* note 226; Gottlieb, *supra* note 226.

²²⁸ See generally CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS (2018), <https://www.childwelfare.gov/pubpdfs/registry.pdf>.

statutory changes that raise “the standard of evidence that [child protective services] (CPS) must utilize in determining whether to indicate a report of alleged child abuse or maltreatment that [would be] accepted by the SCR.”²²⁹ The New York report substantiation standard was thus elevated “from ‘some credible evidence’ to ‘a fair preponderance of the evidence.’”²³⁰ Yet, higher burdens of proof and revamped evidentiary standards are needed in all aspects of the FPS—especially the “best interests of the child” standard.²³¹ In one trailblazing instance of judicial defense of families against the FPS, the Supreme Court of Pennsylvania recently ruled 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 home visit by child welfare personnel.²³² 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.”²³³ Yet caseworkers outside of Pennsylvania still have extreme levels of discretion and investigatory powers despite their proven bias and misconceptions.²³⁴ Other burgeoning, innovative legal advocacy has instituted or championed *Miranda* warnings for CPS home visits and early legal defense programs for families at the initial stage of contact with CPS, to stop unnecessary investigations from proceeding at the front end; guaranteed legal representation for parents in every state; and required informed consent to drug test pregnant people and their newborns.²³⁵

²²⁹ See N.Y. STATE OFF. CHILD. & FAM. SERVS., ADMINISTRATIVE DIRECTIVE 2 (2021) (alteration in original).

²³⁰ *Id.*

²³¹ See Smith, *Over-Privileged*, *supra* note 54, at 620.

²³² *Ex rel. Y.W.-B.*, 265 A.3d 602, 625 (Pa. 2021).

²³³ *Id.* at 627 (citing *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003)). The court expressly confirmed that there is no “social worker” exception to the Fourth Amendment. *Pennsylvania Supreme Court Limits Power of Child Welfare Agencies to Search Family Homes*, CMTY. LEGAL SERVS. PHILA. (Jan. 4, 2022), <https://clsphila.org/family/supreme-court-home-search-decision>.

²³⁴ Sankaran, *supra* note 21; see also 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, 134 (2014), <https://doi.org/10.1086/675373>.

²³⁵ See Ismail, *Consent of the Compelled*, *supra* note 95; Hernandez & Ismail, *Radical Early Defense*, *supra* note 94, at 671; Dorothy Roberts, *Abolish Family Policing, Too*,

C. *Family-Policing and Carceral System Abolition*

“[A]bolition is not a one-and-done ordeal. It is an ongoing, evolving process with the liberation and self-determination of all peoples in mind.”

— Karis Clark²³⁶

“In abolitionist organizing, we foster new relations, developing new configurations of care and justice-making that demand, rehearse and manifest the world we want. Prison abolition is about making a world composed of everything we are denied when “security” is presented as the solution to all ills. . . . [J]ustice-making [is] the work of making a place.”

— Kelly Hayes²³⁷

“The abolition of family policing should be at the top of the left’s agenda. A growing movement to dismantle the family regulation system led by parents and youth who have been ensnared in it is already charting the way. . . . [These activists] advocate [to] shift government funds away from coercive interventions . . . toward putting resources directly in parents’ hands. And . . . community-based approaches to support families and keep children safe. As with prison abolition, the aim is not to reform the child protection system; the aim is to replace it with a society that attends to children’s welfare in a radically different way.”

— Professor Dorothy Roberts²³⁸

“[T]here is no abolition land . . . that we’re getting to . . . there is only an ongoing set of processes that will allow us to have better responses to what I see as inevitabl[e] . . . we’re going to constantly harm each other because we’re human beings. . . . And so my interest as a PIC abolitionist, it’s just always been an abolition rooted in transformative justice . . . I’m constantly interested in relationship, and harm. And harm defined, not as crime, but harm”

— Mariame Kaba²³⁹

DISSENT, Summer 2021, at 67, 69 [hereinafter Roberts, *Abolish Family Policing, Too*], <https://doi.org/10.1353/dss.2021.0049>.

²³⁶ Clark, *supra* note 16.

²³⁷ Kelly Hayes, *Kelly Hayes and Ruth Wilson Gilmore Discuss Organizing, Extraction and Time.*, TRUTHOUT (Apr. 14, 2022), <https://truthout.org/audio/ruth-wilson-gilmore-on-abolition-the-climate-crisis-and-what-must-be-done>.

²³⁸ Roberts, *Abolish Family Policing, Too*, *supra* note 235, at 69.

²³⁹ *Harm, Punishment, and Abolition with Mariame Kaba*, FINDING OUR WAY (July 5, 2021), <https://www.findingourwaypodcast.com/individual-episodes/s2e12>.

A paradigm shift towards FPS and carceral abolition signifies not only a commitment to eradicating structural oppression and systemic harm but also an investment in a more robust vision of life-affirming support to build empowerment and resilience among marginalized children and communities. It is somewhat remarkable that even as attention to carceral abolition has increased, progressive politicians and the mainstream media continue to overlook the destructiveness of the FPS and the need for its abolition.²⁴⁰ Often, calls for PIC abolition reflexively involve simultaneous demands for increased social services funding and connections, though those measures would undoubtedly expand the discretion and overreach of the FPS.²⁴¹ In terms of perspective, abolitionist approaches may concretely address both front- and back-end concerns, as well as issues and dimensions far beyond existing systems themselves.²⁴² Abolitionist approaches to the FPS and carceral system aim to prevent possible maltreatment from arising in the first place—by both the state and individuals responsible for the care of children and families. Further, abolition means addressing the challenges presented when incidents, crises, and hardships arise for children and families, along with creating a world in which the social safety net and empowering interventions ensure that such pitfalls are less likely to occur.

It remains critical to ask key questions regarding dismantling the FPS, including: *what responses and interventions (if any) are utilized when White families experience similar incidents, crises, and challenges?* Overwhelmingly, White families simply maintain the right to experience accidents—which will inevitably occur in a household with children—to encounter personal and caregiving challenges (including substance misuse), and to even undergo an unfortunate period of intrafamilial conflict that might warrant support. For example, myriad studies reveal that doctors (and caseworkers and judges) scrutinize non-White caregivers more closely.²⁴³ One Philadelphia hospital study found that Black and Latinx toddlers with fractures were over five

²⁴⁰ See Roberts, *Abolish Family Policing, Too*, *supra* note 235, at 67.

²⁴¹ See *id.* at 69.

²⁴² See, e.g., Intercepted, *supra* note 15 (describing expansive and multi-faceted abolitionist visions and activity, including divergent “frontline demand[s],” such as large-scale “massive divestment-reinvestment” efforts and meticulous accountability processes to respond to police killings and violence upon communities); Clark, *supra* note 16.

²⁴³ Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS: FRONTLINE <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html> (last visited Aug. 23, 2023).

times more likely to be evaluated for maltreatment and over three times more likely to be reported to the FPS than White children with comparable injuries.²⁴⁴ In turn, racial disparities in the FPS reinforce the stereotypical notion that people of color “are incapable of governing themselves” and require formal supervision.²⁴⁵ Frequently, White families steer clear of FPS scrutiny by quietly connecting to either privatized or public supports and counseling; making strengths-based inquiries about their own aspirations and needs; and finding opportunities for personal, economic, and professional progress, while avoiding the pathologizing of their longer term caregiving capacity.²⁴⁶

One of the most radical, broad-based efforts towards FPS abolition involves both a proposal for massive legal change and empowerment among impacted families as the goal—vis-à-vis coalition-building itself. The movement to repeal the federal Adoption and Safe Families Act (“#RepealASFA”) aims to dismantle the FPS at its legislative core. As the primary federal law that administers, maintains, and fiscally incentivizes oppressive family policing, ASFA single-handedly upholds the disempowerment of marginalized children and families and creates the harsh countdown of twenty-two months towards TPS (the family death penalty)²⁴⁷ when a caregiver allegedly fails to fulfill certain requirements, often due to a dearth of state resources, programs, or providers who consider disability accessibility.²⁴⁸ #RepealASFA describes ASFA as “a legal infrastructure that entrenches a dominant culture of family separation.”²⁴⁹ As a “multi year, multi state, grassroots effort” towards

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ “Social work professor Duncan Lindsey calls this [defect of the FPS] the ‘residual approach’ to child welfare because state intervention is [seen] as a last resort to be invoked only” when families are already in crisis, purportedly “rescuing children who have been mistreated by deficient parents,” after the family exhausts all resources at its disposal. *Id.* Accordingly, a family’s ability to avoid the FPS depends on their privilege to access supportive resources. *See id.* But in a reimagined landscape, the role of government could focus on ensuring the broader health and welfare of all families. *See id.*

²⁴⁷ *Repeal ASFA*, REPEAL ASFA [hereinafter *Repeal ASFA*], <https://www.repealasma.org> (last visited Nov. 14, 2023).

²⁴⁸ *See* DETTLAFF ET AL., *supra* note 21, at 9; *Repeal ASFA*, *supra* note 247; LAURA RADEL & EMILY MADDEN, U.S. DEP’T HEALTH & HUM. SERVS., FREEING CHILDREN FOR ADOPTION WITHIN THE ADOPTION AND SAFE FAMILIES ACT TIMELINE: PART I—THE NUMBERS 1 (2021) (detailing ASFA timelines and their problematic nature).

²⁴⁹ *Who Are We?*, REPEAL ASFA [hereinafter *Who Are We?*], <https://www.repealasma.org/who-we-are> (last visited Nov. 14, 2023).

family liberation,²⁵⁰ #RepealASFA began in 2019 with a “convening called, ‘Fighting for Family’ co-hosted by the National Council for Incarcerated and Formerly Incarcerated Women and Girls.”²⁵¹ First predominantly comprised of mothers and people of color, #RepealASFA leverages lived experience expertise and focuses on “build[ing] out solidarity against family separation tactics.”²⁵²

Other important initiatives to empower youth and marginalized communities include positive youth development programs²⁵³ and leadership and capacity-building programs for both youth and adults, to ensure that policy and decision-making in the prevailing system is driven by the lived expertise of those directly impacted.²⁵⁴ Parent advocacy within the system has become a significant factor in efforts to dismantle the FPS. The American Bar Association now holds convenings about parent representation to emphasize interdisciplinary representation and lived experience expertise in family legal defense work.²⁵⁵ As *Rise Magazine* points out, across the country, birth parents’ leadership roles and expertise are improving how the FPS system treats parents and shifting longer-term outcomes.²⁵⁶ Such leadership may involve “meeting with child welfare

²⁵⁰ *Repeal ASFA*, *supra* note 247; *Who Are We?*, *supra* note 249.

²⁵¹ *Who Are We?*, *supra* note 249.

²⁵² *Id.*

²⁵³ See, e.g., Rachel Lugay, *Positive Youth Development Networks: The Community-Based Solution to Juvenile Delinquency and Other Problem Behaviors*, 23 RICH. PUB. INT. L. REV. 355, 356 (2019); *Positive Youth Development*, FAM. & YOUTH SERVS. BUREAU (Nov. 13, 2017), <https://www.acf.hhs.gov/fysb/positive-youth-development>; *Positive Youth Development*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2, 2022), <https://www.cdc.gov/healthyyouth/safe-supportive-environments/positive-youth-development.htm>.

²⁵⁴ See Augsberger & Collins, *supra* note 168 (“We’ve also observed that it helps when authorities engage parents as partners committed to the well-being of their own kids. For example, there are peer mentoring programs for parents that are building trusting and supportive relationships. One such example is Minnesota One-Stop for Communities Parent Mentor Program, a grassroots nonprofit developed by [Black] mothers.”).

²⁵⁵ *National Alliance for Parent Representation*, AM. BAR ASSOC., https://www.americanbar.org/groups/public_interest/child_law/project-areas/parentrepresentation (last visited Nov. 14, 2023).

²⁵⁶ *Raising Our Voices*, RISE, Fall 2006, at 1, <https://www.risemagazine.org/item/parent-advocacy>.

staff, training caseworkers, speaking at conferences, running support groups, and working at foster care agencies as parent advocates.”²⁵⁷

While these approaches warrant further scrutiny in the face of potential tokenism, Augsberger and Collins lift up the work child welfare agencies have done to establish parental advisory boards in twenty-six states, as these panels involve parents who provide “feedback” to systems based on their lived experiences.²⁵⁸ The Family First Prevention Services Act, signed by President Donald Trump in 2018, limits use of federal funds to “only the first two weeks of group care placements,” so that systems must make stronger efforts to keep families together.²⁵⁹ Yet, frontline advocates have significant critiques of this top-down approach that makes only incremental change.²⁶⁰

D. *Divest/Reinvest and Reparations: Harm Mitigation and Abolitionist Transformation*

Reimagining the sociolegal landscape on child and family wellbeing and starting anew likewise involves redistributing resources—namely, divesting from the exorbitant maintenance costs of oppressive systems and institutions and reinvesting in communities directly impacted by those systems, while also engaging a system of reparations for historical and continued harm. Such approaches are considered highly empowering to individuals and communities as well, as they relinquish state overreach and entrust impacted people with the resources for self-determination.²⁶¹ Just as FPS spending is done

²⁵⁷ *Id.*; see also *Family Advocate, Family Defense Practice*, NON-PROFITS JOB BD. (Sept. 2022), <https://nynonprofits.com/job/center-for-family-representation-inc-family-advocate-family-defense-practice>.

²⁵⁸ Augsberger & Collins, *supra* note 168.

²⁵⁹ *Id.*

²⁶⁰ See, e.g., *Family First Act: A False Narrative, a Lack of Review, a Bad Law*, CHILD WELFARE MONITOR (Oct. 1, 2019), <https://childwelfaremonitor.org/2019/10/01/family-first-act-a-false-narrative-a-lack-of-review-a-bad-law>.

²⁶¹ See, e.g., Matthew Nuttle, *They’re Our Kids’ Proposed Bill Would Give \$1,000 Monthly Stipend to Kids Aging Out of Foster Care*, ABC NEWS (May 11, 2021, 2:34 PM), <https://www.abc10.com/article/news/local/california/california-foster-care-thousand-dollars-stipend-sb739/103-5dc30668-2e86-497b-9d5e-23694011a43c> (“This approach says, ‘Let’s try something different. Let’s try empowering them by giving them a stipend of \$1,000 a month,’ which we believe will keep a large percentage of them out of the systems we want them to stay out of, like the justice system[.]”); *Reparations*, M4BL, <https://m4bl.org/policy-platforms/reparations> (last visited Nov. 14, 2023); M4BL, REPARATIONS NOW TOOLKIT 12 (2019) [hereinafter REPARATIONS NOW TOOLKIT].

on the federal, state, and local levels, divest/reinvest strategies should be multifaceted. Dorothy Roberts points out that “[i]n 2019 [alone], the federal government . . . devoted \$8.6 billion to maintaining children in foster care—more than ten times the amount allocated to services aimed at” maintaining family cohesion.²⁶² Although analysis of diverse, promising divestment/reinvestment and reparations initiatives is beyond the scope of this work, several aspects merit at least a brief discussion.

Importantly, the Movement for Black Lives (“M4BL”) distinguishes divestment/reinvestment from reparations approaches—asserting that reparations requires “specific forms of repair to specific individuals, groups of people, or nations for specific harms they have experienced.”²⁶³ Yet, M4BL likewise argues that both “strategies are essential to our collective liberation and well-being.”²⁶⁴ As a tool for dismantling entrenched, structural, and institutional discrimination, divestment/reinvestment approaches often span systems, due to the interconnected nature of the FPS, school-to-prison pipeline, and the PIC, and over-intrusion upon the same marginalized families and neighborhoods. Political will to enact reparations for family separation, parenting denied, and overcriminalization has increased in recent years, although support for broader reparations for slavery remains controversial.²⁶⁵ The current FPS is the legacy of “state-sponsored involuntary and coerced sterilization” of people of color, which occurred “at the height of the US eugenics movement.”²⁶⁶ Thus far, successful reparations measures to compensate survivors of forced sterilization provide a blueprint for family-policing reparations.²⁶⁷ As of summer 2023, “three US states [had] provided financial reparations for state-sponsored . . . sterilization. Ultimately, the fight for RJ, reparations, and revitalized US democracy requires deep

²⁶² Roberts, *Abolish Family Policing, Too*, *supra* note 235, at 68.

²⁶³ REPARATIONS NOW TOOLKIT, *supra* note 261, at 27–28.

²⁶⁴ *Id.* at 28.

²⁶⁵ Cf. Smith, *Over-Privileged*, *supra* note 54, at 618; Carol Kocivar, *Will Reparations Change California Schools?*, ED 100 (Apr. 22, 2023), <https://ed100.org/blog/reparations> (“A 2021 Pew Research Center survey . . . indicates that [t]hree-in-ten U.S. adults say descendants of people enslaved in the U.S. should be repaid in some way, such as given land or money. About seven-in-ten (68%) say these descendants should not be repaid.” (citation omitted)).

²⁶⁶ See E-mail from M4BL, June 26, 2023, *supra* note 43.

²⁶⁷ See *id.*

understanding of “the historical contexts in which these fights started.”²⁶⁸

Another promising—though very modest—model for FPS reparations is the resolution reached in the city of Chicago. Chicago’s reparations package for survivors of police torture included a \$5.5 million fund (significantly less than the \$20 million the torture victims originally requested); a formal apology from city council; creation of a permanent memorial recognizing the victims; an agreement to teach public school students about the torture case in 8th and tenth grade history; free city college tuition and job training to survivors and their families; and funded mental health and counseling services to victims and their immediate family members.²⁶⁹

The abolitionist organization UpEnd, along with many other advocates and scholars, articulated basic guidelines towards FPS reparations.²⁷⁰ UpEnd’s recommendations are as follows: direct financial assistance to address the physical, social, and economic costs that result from family-policing intervention and a “sustainable mechanism to identify and stop harms done to individuals and communities financially, environmentally, and socially.”²⁷¹ Implementing a reparations framework likewise includes “five elements—repair, restoration, acknowledgment, cessation, and nonrepetition.”²⁷² Nonrepetition involves intentional steps to ensure

²⁶⁸ *Id.*

²⁶⁹ See generally REPARATIONS NOW TOOLKIT, *supra* note 261, at 67, 71 (referring to case studies of reparations in various jurisdictions, including Chicago); Mary Wisniewski & Fiona Ortiz, *Chicago Police Torture Victims Receive \$5.5 Million in Reparations*, REUTERS (Jan. 5, 2016), <https://www.reuters.com/article/us-usa-police-chicago/chicago-police-torture-victims-receive-5-5-million-in-reparations-idUSKBN0UJ1R420160105>; *Teaching Reparations Won*, CHI. TORTURE JUST. CTR., <https://www.chicagotorturejustice.org/curriculum> (last visited Nov. 14, 2023).

²⁷⁰ DETTLAFF ET AL., *supra* note 21, at 12, 18.

²⁷¹ DETTLAFF ET AL., *supra* note 21, at 12, 18.

²⁷² *Id.* at 17; see also G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ¶ 18 (Mar. 21, 2006) (“In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”); *What Is Reparations?*, NAT’L COAL. BLACKS FOR REPARATIONS AM., <https://ncobra.org/aboutus> (last visited Nov. 14, 2023).

that oppressive forms of “help” are not recreated.²⁷³ Proponents of reparations essentially advance “policies that shift government funds away from coercive interventions in families, toward putting resources directly in parents’ hands.”²⁷⁴ Where Native American families are concerned, “[r]eparations [also] include[] honoring and supporting tribal sovereignty” and investing in the “housing, health, and education services . . . promised in past trusts and treaties.”²⁷⁵

Just as the FPS and PIC cause devastation to children, adults, and broader society, promising approaches to harm mitigation and reparations occasionally target particular sub-sets of survivors. Advocates across the nation are looking to California’s leadership as that state implements the first reparations-type initiatives focused on former foster youth.²⁷⁶ California now has a state-funded UBI program providing direct, regular income to several marginalized populations.²⁷⁷ One stream of income assists people who aged out of foster care and face immense challenges obtaining housing, entering the workforce, learning independent living, and coping with the trauma of family separation and FPS exposure.²⁷⁸ Laudably, California state legislators openly remarked upon the state’s responsibility for dismal FPS long-term outcomes, explaining “they’re our kids,” who require direct remuneration and further support.²⁷⁹ Various California counties had initially implemented such UBI programs for former foster youth, with a Los Angeles program providing \$1,000 each month for two years, citing a forward-looking “goal of [facilitating] ‘financial stability, the alleviation of stress, the completion of deferred schooling, and participation in one’s

²⁷³ DETTLAFF ET AL., *supra* note 21, at 17; NAT’L COAL. BLACKS FOR REPARATIONS AM., *supra* note 272.

²⁷⁴ Roberts, *Abolish Family Policing, Too*, *supra* note 235, at 69.

²⁷⁵ DETTLAFF ET AL., *supra* note 21, at 18.

²⁷⁶ See ELI DVORKIN & MO RUSSELL LEED, CTR. FOR URB. FUTURE, BASIC INCOME FOR TRANSITION-AGE FOSTER YOUTH: ADOPTING CALIFORNIA’S APPROACH (Jonathan Bowles ed., 2022), <https://nycfuture.org/research/basic-income-for-transition-age-foster-youth>.

²⁷⁷ See, e.g., Maya Miller, *Nearly 2,000 Californians Will Get Up to \$1,200 a Month Through New Basic Income Program*, SACRAMENTO BEE (Nov. 22, 2022, 6:30 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article269062077.html>.

²⁷⁸ See *id.*

²⁷⁹ See Nuttle, *supra* note 261.

community.”²⁸⁰ Alameda County, South San Francisco, and Santa Clara launched similar programs.²⁸¹ Former foster youth in California also “receive [eighteen] months of support through a \$25 million program funded by the California Department of Social Services.”²⁸² Other “guaranteed income projects [across] the state are overseen by” a nonprofit organization that provided “between \$600 and \$1,200 per month” to youth who have aged out of foster care.²⁸³

E. *Triage: Clogging the School-to-Prison Pipeline Through Legal Initiatives*

As long as the school-to-prison pipeline persists, legal measures attacking select functions of the system are unlikely to transform child well-being or educational outcomes. Nevertheless, various legal measures can mitigate short-term harm and slow the daily flood of students into the pipeline, and towards lingering disconnection from school and community. The aforementioned federal and state lawsuits are one such important approach. Other legal approaches include holistic juvenile defense, which increasingly involves educational advocacy to help target the root causes and consequences of the pipeline, as well as the underlying (often nonlegal) issues pushing youth into the legal system. As attorneys become better versed on young clients’ specific educational history, needs, and rights in school discipline, special education, and delinquency proceedings, their respective firms may also support the youth and their families with enhanced self-advocacy tools.²⁸⁴ Accordingly, some practitioners demand fiscal and legal reforms to better fund educational advocacy as an integral aspect of the public defense system.²⁸⁵

Other legal initiatives that combat the school-to-prison pipeline includes efforts to formally recognize the pipeline as a mitigating

²⁸⁰ Jeremy Loudonback, *Former Foster Youth Included in L.A. County Guaranteed Income Project*, THE IMPRINT (Apr. 5, 2023, 3:33 PM), <https://imprintnews.org/top-stories/former-foster-youth-included-in-l-a-county-guaranteed-income-project/240181>.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See Colling et al., *supra* note 171, at 199.

²⁸⁵ See *id.* at 200.

factor in juvenile sentencing decisions.²⁸⁶ Connecticut-based advocates rely on the state's historical and constitutional commitment to provide adequate and equal education to its children, "as well as the Connecticut Supreme Court's interpretation of the" education clause, which grants a fundamental right to education and the state's affirmative obligation to educate.²⁸⁷ Essentially, one Connecticut advocate proposes that the state must take into account its own failure to educate (and its role in increasing children's likelihood of criminal involvement) when sentencing juvenile offenders, and thus must provide youth with a second chance to receive the benefits of education that they were denied.²⁸⁸ Other notable (though modest) legal steps towards changing punitive school discipline includes allowing court-appointed advocates to represent children in school exclusion hearings and raising the minimum age of juvenile court jurisdiction.²⁸⁹

F. *#BooksNotBars: Dismantling the Pipeline Through Education and Empowerment*

Ultimately, however, only systemic change can dismantle the school-to-prison pipeline, and legal fixes alone are an insufficient pathway to abolition.²⁹⁰ Fortunately, a groundswell of advocacy and scholarship has led to new legislation on multiple levels, revised school codes of conduct, and less "use of suspensions, expulsions, and other exclusionary practices"—"efforts [made] by education officials and policymakers."²⁹¹ Jurisdictions such as St. Louis, Oakland, Seattle, Denver, and Minneapolis have significantly divested resources away from school policing, largely due to the bold activism of youth and families, to instead reinvest in community-based programming and

²⁸⁶ See Elizabeth D. Hrywniak, *Education and Juvenile Sentencing: Recognizing the Effects of the School-to-Prison Pipeline as Mitigation Factors in Connecticut Juvenile Sentencing Decisions*, 40 QUINNIPIAC L. REV. 709, 711 (2022).

²⁸⁷ *Id.*

²⁸⁸ See *id.* at 712 ("At most, the state's failure to give him or her a 'first chance' should require the state to provide this child a 'second chance,' especially when the state hands down sentences of life imprisonment or lengthy terms of imprisonment on Connecticut's children.")

²⁸⁹ See generally Colling et al., *supra* note 171, at 199.

²⁹⁰ Cf. T. Andrew Brown, *Why All Lawyers Should Care About Education*, N.Y. STATE BAR ASS'N (Sept. 13, 2021), <https://nysba.org/why-all-lawyers-should-care-about-education>.

²⁹¹ NAT'L PREVENTION SCI. COAL., *supra* note 84.

youth leadership.²⁹² Some school districts are taking the initiative to creatively reform their own policies and practices, remove law enforcement from schools, and promote restorative justice.²⁹³ Likewise, impacted families have become more empowered to take on anti-racist leadership roles on school boards, stage demonstrations, and build coalitions across ethnic and racial lines, as well as insist on more self-governance within local school districts—despite school boards and localities being hotly contested battlegrounds for anti-racist education, youth access to information and literature, and other social justice and civil rights concerns.²⁹⁴

Further, noncarceral approaches provide a true alternative to punitive school discipline. Noncarceral approaches that improve student behavior and create safe, supportive school climates include healing-centered schools, “School-Wide Positive Behavior Interventions and Supports” (“PBIS”),²⁹⁵ and restorative justice—a philosophy focused on peer accountability, reconciliation, and community-building rather than punishment.²⁹⁶ Such approaches are radical alternatives to address the structural inequities of the school

²⁹² Smith, *Youth Visions and Empowerment*, *supra* note 216, at 876; Jill Cowan et al., *Protesters Urged Defunding the Police. Schools in Big Cities Are Doing It.*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/02/17/us/los-angeles-school-police.html>.

²⁹³ *Cf.* Colling et al., *supra* note 171, at 234–37.

²⁹⁴ *Cf.* Roby Chatterji, *Fighting Systemic Racism in K-12 Education: Helping Allies Move from the Keyboard to the School Board*, CTR. FOR AM. PROGRESS (July 8, 2020), <https://www.americanprogress.org/article/fighting-systemic-racism-k-12-education-helping-allies-move-keyboard-school-board>; Hairston, *supra* note 182, at 28; Magsaysay, *supra* note 175, at 452.

²⁹⁵ Regarding broad approaches that shift school culture and engender student leadership and norm-setting, see, for example, *PBIS, DIGNITY IN SCHS.*, https://dignityinschools.org/?attachment_id=1133 (last visited Nov. 14, 2023); *What Is PBIS?*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS (PBIS) AT SCH., <https://www.pbis.org> (last visited Nov. 14, 2023); OFFICE OF SPECIAL EDUC., MICH. DEP’T OF EDUC. OFFICE OF SPECIAL EDUC., POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS) AT SCHOOL 1 (2023), https://www.michigan.gov/-/media/Project/Websites/mde/specialeducation/familymatters/FM1/PBIS_School_FactSheet.pdf?prev=1251312819474fe6933091fa8c0a1a1c; Robert H. Horner & George Sugai, *School-Wide PBIS: An Example of Applied Behavior Analysis Implemented at a Scale of Social Importance*, 8 BEHAV. ANALYSIS PRAC. 80, 81 (2015), <https://doi.org/10.1007/s40617-015-0045-4>.

²⁹⁶ *Cf.* Smith, *Crossroads*, *supra* note 22, at 840–41. Restorative justice is a collaborative and holistic approach to resolving conflicts and repairing harm, which can serve as an alternative to the school-to-prison pipeline and foster a positive and supportive school climate. *See id.* at 839. Trademark principles and practices of restorative justice include healing circles and peace communities. *See id.*

system and prevent the school-to-prison pipeline.²⁹⁷ Currently, nearly two decades of best practices have emerged with the goal of dismantling the pipeline and instituting noncarceral responses to student misbehavior and positive school climates. Vital endeavors include removing police from schools, limiting school exclusion and arrest to only the most egregious offenses, replacing zero tolerance policies with strength-based alternatives, investing more in mental health resources to promote school safety and student development, and reviving “the 2014 Department of Education Guidelines on school discipline.”²⁹⁸ Notably, education advocates are also calling on the Biden Administration to expand the US Department of Education to include an Office of School Discipline and Safety, which could address the school-to-prison pipeline and promote more innovative, multidisciplinary approaches to school safety across the country.²⁹⁹

Lastly, community empowerment and dismantling the pipeline also necessitates attention to the deeper problems in the US public education administration and curricula today. Many scholars and advocates are demanding that the K-12 curricula and school administration include more parent-school partnerships; robust civics education; consent education and boundary awareness; education about digital age (online/tech) citizenship; education about various dimensions of violence and gender-based harms; and medically accurate sex education—which in turn is a vital policy solution reducing unwanted pregnancies.³⁰⁰

²⁹⁷ See *id.* at 840–41; see also Iocono, *supra* note 173, at 183, 185 (regarding the challenges and opportunities of implementing restorative justice in schools, especially in the aftermath of the COVID-19 pandemic).

²⁹⁸ Blitzman, *supra* note 173, at 22; cf. Froelich, *supra* note 180, at 135 (discussing mental health resources); Tyner, *supra* note 171, at 80 (discussing restorative justice).

²⁹⁹ See McNeal, *supra* note 182, at 664.

³⁰⁰ See, e.g., PUB. HEALTH BLOG, *supra* note 32; cf. *Campaigns to Undermine Sexuality Education in the Public Schools*, ACLU (Apr. 1, 1998), <https://www.aclu.org/documents/campaigns-undermine-sexuality-education-public-schools>; Jayne Swift, *More than Ever, We Need Comprehensive Sex Education*, GENDER POL’Y REP. (May 24, 2023), <https://genderpolicyreport.umn.edu/more-than-ever-we-need-comprehensive-sex-education>; Marilyn Price-Mitchell, *Boundary Dynamics: Implications for Building Parent-School Partnerships*, 19 SCH. CMTY. J. 9, 10 (2009); Rae Jacobson, *Teaching Kids About Boundaries*, CHILD MIND INST. (Apr. 27, 2023), <https://childmind.org/article/teaching-kids-boundaries-empathy>; *Everything You Need to Teach Digital Citizenship*, COMMON SENSE EDUC., <https://www.commonsense.org/education/digital-citizenship> (last visited Nov. 14, 2023).

G. *Reclaiming Democracy: Prioritizing Community Self-Governance and Participatory Budgeting*

In order for us to free our imagination, we need new forms of social relations and new forms of democracy. I mean real democracy. We keep saying democracy is in crisis, but it's voting that's in crisis. And that's a serious thing. . . . But what does it mean to go to a people's assembly and make a decision about the city budget? What does it mean to make decisions not by choosing who's going to decide for you but by making decisions about things like energy or land use?³⁰¹

To create a future without oppressive systems of state violence against children and families, impacted communities and the broader populace need to expand their commitment to liberation and democracy writ large. Although a thorough discussion of revitalized self-governance is far beyond the scope of this Article, several examples illustrate the breadth of possibilities. As historian Robin D.G. Kelley argues, recent events in the cities of Jackson, Mississippi and Detroit, Michigan are inspiring.³⁰² In Detroit, diverse residents are finding resourceful ways towards sustainability, self-governance, and community building.³⁰³ Residents have created their own energy grids against the privately owned energy company and banded together to create energy sources using community land grants.³⁰⁴ Although the state and local administrations are challenged in many ways, residents themselves are organizing companies to provide low-income housing and extending community farming to minimize the privatization of land.³⁰⁵ High school students are likewise engaging in projects to utilize what Kelley coins "human energy" to produce usable electricity.³⁰⁶ Rejecting the installation of law enforcement cameras, Detroit residents have insisted that elders are a safer, nonviolent source of "community protection" as they sit on porches and watch over children and the neighborhood.³⁰⁷ These efforts also naturally

³⁰¹ Nathan J. Robinson, *Robin D.G. Kelley on the Importance of Utopian Visions for Social Movements*, CURRENT AFFS. (Sept. 29, 2022), <https://www.currentaffairs.org/2022/09/robin-d-g-kelley-on-the-importance-of-utopian-visions-for-social-movements>.

³⁰² *See id.*

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ *See id.*

³⁰⁶ *See id.*

³⁰⁷ Robinson, *supra* note 301.

cultivate intergenerational knowledge transfer and mentorship.³⁰⁸ Likewise, endeavors like participatory budgeting are proliferating across the country and rejecting the COVID Capitalism direction of austerity measures and general voter suppression.³⁰⁹

CONCLUSION

Despite the promising approaches that can further the abolition of oppressive systems harming children, realism and pragmatism are important. Especially in a post-Trump era, the rule of law is consistently under attack and youth activists are astute enough to craft movements that both utilize legal strategies and reject the salience of systems built on exploitation, violence, White supremacy, and feigned neutrality.³¹⁰ If nothing else, a both-and outlook is pragmatic and cathartic. A both-and outlook holds space for multiple paths forward, given the need for both long-term, structural change and short-term approaches to stem the daily tide of harm that systems cause the children and families embroiled within them.³¹¹ Advocates and stakeholders can better harness existing legal tools to ensure prevention, decarceration, and harm reduction, while still maintaining the chief goal of abolition—dismantling and divestment from oppressive systems and insistence upon re-imagined alternatives. As visionaries like Mariame Kaba, Robin D.G. Kelley, and Ruthie Wilson Gilmore point out, our collective imagination is tainted by a limited understanding of how past transformations occurred and what reimagining can really signify.³¹² Kaba asserts, “I know that our ancestors, who were slaves, could not have imagined my life.”³¹³

³⁰⁸ *See id.*

³⁰⁹ *Cf. What Is PB?*, PARTICIPATORY BUDGETING PROJECT, <https://www.participatorybudgeting.org/about-pb/> (last visited Nov. 14, 2023); *Participatory Budgeting*, N.Y.C. COUNCIL, <https://council.nyc.gov/pb> (last visited Nov. 14, 2021); *Participatory Budgeting*, ORG. ENGAGEMENT, <https://organizingengagement.org/models/participatory-budgeting> (last visited Nov. 14, 2023).

³¹⁰ *Cf. Smith, Youth Visions and Empowerment, supra* note 216, at 826, 828, 840, 862.

³¹¹ *See, e.g., McLeod, supra* note 17, at 1161, 1167, 1208, 1210 (discussing what McLeod coins the “prison abolitionist framework” wherein abolition is conceptualized “as a transformative goal of gradual decarceration and positive regulatory substitution— . . . a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement”); *Intercepted, supra* note 15.

³¹² Robinson, *supra* note 301; *Intercepted, supra* note 15; Kushner, *supra* note 18.

³¹³ Kushner, *supra* note 18.

Similarly, although entrenched oppression, apathy, and misinformation remain pervasive, the multiracial present is a profoundly positive transformation from antebellum America. It is no less critical to imagine a future for abolition that is far more life-affirming than the present day—especially wherein today’s children take the reins and create anew.