
Deinstitutionalizing Family Separation in Cases of Parental Drug Use

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ABSTRACT. Family separation has long served as a mechanism of social control and punishment in the United States, disproportionately targeting Black, Indigenous, and other marginalized families under the guise of child welfare. Family separation remains the family policing system's primary intervention in families, including families targeted because one parent is using substances. Recent legislation, such as the Families First Prevention Services Act, aims to reduce family separation by funding preventive services. However, the punitive approach entrenched in the family policing system remains resistant to reform. This Essay argues that the family policing system, steeped in a legacy of racialized control and punitive policies, fundamentally obstructs efforts to prioritize family preservation over child removal in cases of parental drug use.

Through an institutional theory lens, this Essay examines how the family policing system's historical emphasis on punishment and surveillance resists even well-intentioned legislative changes. Despite the inclusion of family-centered services in recent legislation addressing the opioid crisis, implementation barriers and institutional inertia within family policing agencies perpetuate default practices of policing and removal.

This Essay argues for a fundamental reimagining of family support systems that divests from punitive family policing frameworks and centers on family preservation.

INTRODUCTION

Chanetto Rivers smoked marijuana at a family barbecue before giving birth; New York City’s Administration for Children’s Services then placed her baby in foster care, even though marijuana was legal in New York at the time.¹ Susan Horton ate a salad with poppy seeds before giving birth; California’s Sonoma County Human Services Department took her newborn into protective custody.² Police and caseworkers from the Administration for Children’s Services raided L.B.’s Brooklyn home without a warrant at 5:30 A.M., terrorizing and traumatizing L.B. and her then-seven-year-old son after the state’s child welfare hotline received an anonymous and erroneous report of drug use.³ Alicia Johansen and Fred Thornten, whose child was removed due to their drug use, spent more than two years fighting the intervening foster parents for custody of their child, even after they met every requirement imposed by a Colorado judge for regaining custody.⁴

These parents experienced the all-too-common phenomenon of family surveillance and separation as a result of alleged drug use. Thirty-nine percent of all children forcibly removed from their parents’ care and custody in 2021 by so-called “child protective services” – more accurately called the family policing

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1. Andy Newman, *She Smoked Weed, Legally, Then Gave Birth. New York Took Her Baby.*, N.Y. TIMES (May 17, 2023), <https://www.nytimes.com/2023/05/17/nyregion/marijuana-mother-child-removed-lawsuit.html> [<https://perma.cc/VHX4-RQCW>].
 2. Shoshana Walters, *She Ate a Poppy Seed Salad Just Before Giving Birth. Then They Took Her Baby Away.*, MARSHALL PROJECT (Sept. 9, 2024, 6:00 AM EDT), <https://www.themarshallproject.org/2024/09/09/drug-test-pregnancy-pennsylvania-california> [<https://perma.cc/YK4A-HQAT>].
 3. Eli Hager, *Child Welfare Officials Have Searched Her Home and Her Son Dozens of Times. She’s Suing Them to Stop.*, PROPUBLICA (Nov. 16, 2023, 8:00 AM EST), <https://www.propublica.org/article/nyc-child-welfare-agency-warrantless-searches-lawsuit> [<https://perma.cc/8Y49-9Y89>].
 4. Eli Hager, *When Foster Parents Don’t Want to Give Back the Baby*, PROPUBLICA (Oct. 16, 2023, 6:00 AM EDT), <https://www.propublica.org/article/foster-care-intervention-adoption-colorado> [<https://perma.cc/3LSG-SCED>].

system⁵ – were removed in whole or in part due to parental “drug abuse.”⁶ As of September 2022, in twenty-three states, evidence of parental “drug abuse” alone could be used to initiate child removal proceedings.⁷ Some state actors, like “child protective” agents,⁸ interpret “drug abuse” to include not only chaotic use⁹

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5. Please note that “child protective services” and “drug abuse” have been placed in quotation marks throughout this Essay, because we believe the terms are stigmatizing and not reflective of the current best or intentional practices for referring to the family policing system and drug use, respectively. As Dorothy Roberts describes in her seminal book *Torn Apart*, the child-protection system is more aptly called the family policing system. DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD* 24 (2022) (“‘Policing’ is the word that captures best what the system does to America’s most disenfranchised families. It subjects them to surveillance, coercion, and punishment. It is a family-policing system.”). Further, as addressed in this Essay, substance use is not a test of parental fitness and is not per se “child abuse.”
 6. *Prevalence of Parental Alcohol or Drug Abuse as a Condition Associated with Removal in the United States, 2000-2021*, NAT’L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE (Mar. 21, 2023), <https://ncsacw.acf.hhs.gov/research/child-welfare-statistics/interactive-statistics-series/1-2-prevalence-aod-removal> [<https://perma.cc/GXQ2-68EX>].
 7. *Substance Use During Pregnancy and Child Abuse or Neglect: Summary of State Laws*, LEGIS. ANALYSIS & PUB. POL’Y ASS’N 4 (Oct. 2022), <https://legislativeanalysis.org/wp-content/uploads/2022/10/Substance-Use-During-Pregnancy-And-Child-Abuse-Or-Neglect-Summary-of-State-Laws.pdf> [<https://perma.cc/39BB-L39K>]. To accomplish this, states explicitly define parental drug use as neglect or “child abuse,” which is permissible under current federal guidance, or allow for substance use to be used as evidence of “child abuse” or “neglect.” Child Welfare Info. Gateway, *Parental Substance Use as Child Abuse*, DEP’T HEALTH & HUM. SERVS. CHILD’S BUREAU (2020), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/parentalsubstanceuse> [<https://perma.cc/V8R3-BTQW>]. As of 2022, these states were Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and the District of Columbia. LEGIS. ANALYSIS & PUB. POL’Y ASS’N, *supra*, at 4.
 8. Some states, such as Arizona and Maryland, have either enacted laws prohibiting the removal of children solely for marijuana use or have committed not to enforce these laws in certain cases, like when parents are medical marijuana users. Kyle Jaeger, *Arizona Officials Will Stop Investigating Reports of Newborn Marijuana Exposure If Parent Is Medical Cannabis Patient*, MARIJUANA MOMENT (Dec. 14, 2023), <https://www.marijuanamoment.net/arizona-officials-will-stop-investigating-reports-of-newborn-marijuana-exposure-if-parent-is-medical-cannabis-patient> [<https://perma.cc/9P2W-UMBS>]; Clara Longo de Freitas, *Under New Law, State Can’t Take Kids Away Solely for Parental Cannabis Use*, BALTIMORE BANNER (Aug. 22, 2023, 5:30 AM EDT), <https://www.thebaltimorebanner.com/community/family/maryland-cannabis-child-protective-services-parents-foster-care-25UC5W2CWFDGHARCS6TWGGPCQQ> [<https://perma.cc/9HKS-W6BP>].
 9. “Chaotic drug use” refers to drug use that interferes with an individual’s responsibilities and creates a chaotic lifestyle. The term is used by harm-reduction activists to distinguish between recreational drug use and more problematic drug use. See Giles Clasen, *Harm Reduction Centers Address a Different Model of Drug Use*, DENVER VOICE (Oct. 30, 2020), <https://www.denvervoice.org/archive/2020/10/30/harm-reduction-centers-address-a-different-model-of-drug-use> [<https://perma.cc/XZ6X-A2SM>].

of illicit drugs, but also recreational use of licit drugs (including alcohol and marijuana).¹⁰ Studies have found that substance use does not preclude people from being fit parents.¹¹ Further, there is substantial evidence that the removal itself and the placement of the child in the foster-care system cause *actual* harm.¹²

If the risk of harm *solely* due to parental substance use or misuse is tenuous, and the harm to the child caused by removal and placement in state custody is a surety, why do state governments (aided by federal law and funds) remove children due to parental drug use alone? Professor Dorothy Roberts has convincingly argued that the family policing system is not designed to protect or to improve the welfare of children.¹³ Roberts argues: “‘Policing’ is the word that captures best what the system does to America’s most disenfranchised families. It subjects them to surveillance, coercion, and punishment. It is a family-policing system.”¹⁴

In this Essay, we apply an institutional theory lens¹⁵ to extend Roberts’s and others’¹⁶ assertions to the system’s treatment of parental drug use. We argue that punishment and social control are so deeply institutionalized in the family

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10. See, e.g., Newman, *supra* note 1 (describing how Administration for Children’s Services (ACS) workers, though acting counter to New York state law and ACS policy, removed an infant because of the mother’s recreational marijuana use); Anita Wadhvani, *Mother Sues Tennessee Cops and Social Workers for Taking Her Five Children Away Following Marijuana Arrest*, MARIJUANA MOMENT (Feb. 9, 2024), <https://www.marijuanamoment.net/mother-sues-tennessee-cops-and-social-workers-for-taking-her-five-children-away-following-marijuana-arrest> [<https://perma.cc/VP6G-6C97>].
 11. SUSAN C. BOYD, *MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS* 14-16 (1999) (providing multiple studies demonstrating that substance-using mothers can also be fit parents); see also Vanessa Soderberg, *More than Receptacles: An International Human Rights Analysis of Criminalizing Pregnancy in the United States*, 31 BERKELEY J. GENDER L. & JUST. 299, 307 (2016) (“[T]here is no scientific evidence that babies born to drug using mothers are inevitably born addicted to drugs or are harmed by their mothers’ prenatal drug use.”); Linda C. Mayes, *Reframing Caring for Parents Who Struggle with Substance-Use Disorders*, 44 INFANT MENTAL HEALTH J.: INFANCY & EARLY CHILDHOOD 284, 286 (2023) (discussing the work of Nancy Suchman, who argues that “there is nothing about a substance-use disorder that precludes effective and sensitive caring for children”).
 12. Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165-71 (2019).
 13. ROBERTS, *supra* note 5, at 24.
 14. *Id.*
 15. See *infra* Part I for an introduction to an institutional-theory lens and its application.
 16. For examples of other works, see generally Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019); and Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767 (2021).

policing system that recent reform efforts will inevitably fail.¹⁷ While several articles have discussed the content, promises, and failures of the Families First Prevention Services Act (FFPSA),¹⁸ this Essay adds to the literature by providing an analysis of the legislative history and legislative discourse that gave rise to the enactment of FFPSA.

We support the claim that reform efforts will inevitably fail by first reviewing the family policing system's history. We demonstrate that the system was created to remove children from parents whom the state deemed "undeserving" or "unworthy."¹⁹ We show that, since the system's creation, it has particularly targeted Black, Indigenous, and nonwhite immigrants.²⁰ We describe how states have historically removed children from families as a form of social control and as punishment for conditions that are frequently rooted in the lasting impacts of enslavement, colonialism, structural racism, and poverty.

Second, we illustrate how decades of federal legislation (and funding) favored out-of-home placements over programs that prioritize providing services and keeping children within their homes. This approach further institutionalized surveillance, investigations into deservingness, and family separation as responsibilities of the agencies tasked with implementing these laws.²¹

Third, we address recent legislative attempts to respond to parental drug use in ways that preserve the family, such as by providing needed healthcare and assistance to parents who use drugs. The success of these attempts has been minimal. We attribute this lack of success to institutional inertia and to state family policing agencies' incapacity to provide the family-centered services needed to support family preservation in cases of parental substance use.²² We conclude by

17. These reform efforts include the Families First Prevention Services Act (FFPSA), which provides funding for prevention services that allow children to remain in the home. They also include the purportedly health-oriented amendments to the Child Abuse Prevention Services Act contained in 2016 and 2018 opioid-crisis legislation. These amendments were the Comprehensive Addiction Recovery Act of 2016 and the Substance Use Disorder Prevention That Promotes Opioid Recovery and Treatment for Patients and Communities Act of 2018.

18. See generally Caitlyn Garcia, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 FAM. L.Q. 27 (2019) (examining the FFPSA and its shift in U.S. child welfare policy from a foster-care-centered model to a family-based care approach by prioritizing prevention services, kinship placements, and reducing institutional placements); Mack, *supra* note 16 (arguing that the FFPSA perpetuates racialized surveillance and punitive control over marginalized families, particularly Black and Indigenous communities, by reinforcing systemic white supremacy in the child welfare system rather than truly shifting power away from state intervention).

19. See *infra* Section I.A.

20. See *infra* Section I.B.

21. See *infra* Section I.C.

22. See *infra* Part II.

recommending a new approach that would institutionalize the idea of family preservation and by describing what this reimagined approach might look like.²³

I. THE INSTITUTIONALIZATION OF COERCION AND PUNISHMENT IN THE FAMILY POLICING SYSTEM

The current punitive approach to addressing parental substance use did not arise in a vacuum. Since the colonial era, American states have wielded family separation as an extractive tool of racialized social control and capitalism against Black, Indigenous, and nonwhite immigrant families.²⁴ The system of family policing was designed to punish parents deemed “undeserving” of parenting because of their living conditions,²⁵ which family policing agencies treated as individual failings or flaws.²⁶ The removal of children from the home developed as part of that punishment.

Today, removal is a central tool of what we now call the “child welfare” or “child protection” system.²⁷ Supporters of family policing as an institution have justified it as benevolent and necessary to protect children from actual harm.²⁸ And yet the founding institutions—and the web of law, policies, and practices that make up family policing—continue to be rooted in the philosophies that

23. See *infra* Part III.

24. The concept of whiteness in this nation was invented and developed to discriminate against European immigrants. It was not until very late in the nineteenth century that many European immigrants became categorized as white and received social, political, economic, and legal advantages. See W.E.B. DU BOIS, *The Souls of White Folk*, in DARKWATER: VOICES FROM WITHIN THE VEIL 29, 29-30 (1920) (“The discovery of personal whiteness among the world’s peoples is a very modern thing,—a nineteenth and twentieth century matter, indeed.”).

25. These living conditions were often shaped by the legacies of enslavement, cultural genocide, structural racism, and poverty. See Alan J. Detlaff, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 4-6, 96-99 (2023); see also ROBERTS, *supra* note 5, at 24 (arguing that the United States’s “terroristic approach to protecting children blames the most marginalized parents for the impact of race, class, and gender inequalities on their children, obscuring those unequal structures and the need to dismantle them”). This is further compounded by the child welfare system’s failure to adjust to the legalization of some substances, such as marijuana. See Eli Cahan, *These Moms Smoked Weed Legally. Then Their Kids Were Taken Away*, ROLLING STONE (Sept. 22, 2024), <https://www.rollingstone.com/culture/culture-features/mothers-weed-breastfeeding-children-removed-family-separation-laws-1235108222> [<https://perma.cc/4QLP-U7JL>].

26. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 581-88 (1997) (discussing the punitive roots of child-welfare intervention and its impact on mothers).

27. See *supra* notes 1-6 and accompanying text.

28. Sarah Katz & April Lee, *Lies My Child Welfare System Has Told Me: The Critical Importance of Centering Families’ Voices in Family Policing Legal Advocacy*, 62 FAM. CT. REV. 790, 792 (2024).

children need protection from bad parents²⁹ and that undeserving parents should lose their constitutional right to parent³⁰ as a form of punishment.³¹ Early organizations and agencies created for “child protection” were developed to achieve these ends.³²

Understanding the development of the institution of family policing is crucial to grasping why recent legislative reforms, which aim to address parental substance use without defaulting to child removal, face significant institutional inertia.³³ Institutional theory suggests administrative agencies and the professionals operating within them will resist changes that contradict the systemically ingrained purposes of the institution.³⁴ Here, as the desire for social control was

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29. Shanta Trivedi, *The Hidden Pain of Family Policing*, N.Y.U. REV. LAW & SOC. CHANGE (forthcoming 2025), <https://ssrn.com/abstract=4715550> [<https://perma.cc/29RL-QFDV>].
30. The Fourteenth Amendment protects the parent-child relationship from unwanted interference by the state. See *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 789 (9th Cir. 2016) (“Parents ‘have a well-elaborated constitutional right to live’ with their children that ‘is an essential liberty interest protected by the Fourteenth Amendment’s guarantee that parents and children will not be separated by the state without due process of law except in an emergency.’” (quoting *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 1999))); *Santosky v. Kramer*, 455 U.S. 745, 747-48, 769-70 (1982) (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).
31. Victoria A. Copeland & Alan J. Detlaff, *Family Policing and the Carceral State: How Carceral Violence Persists Through the Surveillance, Punishment and Regulation of Families*, J. PROGRESSIVE HUM. SERVS. 1, 14 (2024); see also Maya Pendleton & Alan J. Detlaff, *Policing Is Reproductive Oppression: How Policing and Carceral Systems Criminalize Parenting and Maintain Reproductive Oppression*, 10 SOC. SCIS. 515, 516 (2024).
32. For a discussion of the development of Societies for the Protection of Cruelty to Children and how they laid the groundwork for the modern family policing agencies, see *infra* notes 57-65 and accompanying text.
33. These legislative reforms are discussed in depth in Part I.
34. In “purposes of the institution,” we include what the organizational-theory literature on institutions defines as regulative, normative, and cultural forces. W. RICHARD SCOTT & GERALD F. DAVIS, *ORGANIZATIONS AND ORGANIZING: RATIONAL, NATURAL, AND OPEN SYSTEMS PERSPECTIVES* 258 (2007). Organizations, such as those that investigate allegations of child abuse or neglect, are influenced by regulative, normative, and cultural forces – which collectively make up an institution. *Id.* Cultural-cognitive elements of an institution refer to the shared meaning or socially constructed paradigms for viewing or defining concepts. *Id.* at 260. Included within the cultural-cognitive elements are unconscious beliefs, assumptions, and biases that influence the behaviors of bureaucratic agencies, among other organizations. See *id.* at 261. The normative element of an institution provides guidance on social norms and widely held common values. Jennifer Palthe, *Regulative, Normative, and Cognitive Elements of Organizations: Implications for Managing Change*, 1 MGMT. & ORG. STUD., art. no. 2, at 59, 61 (2014). The legitimacy of the behaviors of an organization is defined by its adherence to these accepted norms. SCOTT & DAVIS, *supra*, at 259. The regulative elements provide the rules, laws, and systems of governance that constrain actors operating within the institution. Palthe, *supra*, at

institutionalized in the laws and policies of the family policing system, that desire became an element of the institution. As an element, it impacted the cultures, strategies, structures, and processes of regulatory bodies (such as state and federal legislatures and administrative agencies) and organizational participants (such as family policing agencies).³⁵ Because the “child welfare” system was established to police families and punish those deemed unfit by permanently terminating parental rights, its strategies, structures, and processes inevitably incorporate punitive elements.³⁶ Consequently, when reforms are introduced to prioritize family preservation, the regulatory and organizational bodies within the institution will often default to family policing – a phenomenon explored in depth in Part III.

A. *Slavery, Colonialism, and the Birth of the Institution of Family Policing*

The modern family policing system uses the threat of child removal and the permanent termination of parental rights as punitive measures for parental drug use.³⁷ This type of family separation has a deep-rooted history in this country as a punitive tool to exercise racialized social control over Black, Indigenous, and other nonwhite immigrant families.³⁸

Family policing existed long before the early predecessors of modern child protection agencies were created in the late nineteenth century.³⁹ As Roberts wrote, “Family destruction has historically functioned as a chief instrument of group oppression in the United States.”⁴⁰ Later in this Section, we will discuss the colonial history of the American family policing institution, which focused exclusively on the needs of white children living in poverty.⁴¹ However, for a more complete picture of the family policing institution, one must understand

61. These rules can be formal or informal, yet organizations comply with them to avoid punishment or to receive rewards. SCOTT & DAVIS, *supra*, at 259.

35. See SCOTT & DAVIS, *supra* note 34, at 259.

36. See *id.*

37. Corey B. Best & Sarah Katz, *True Narratives: Framing Pain, Punishment, and the Lethality of Termination of Parental Rights*, FAMS. IN SOC.: J. CONTEMP. SERVS. (forthcoming 2025), <https://ssrn.com/abstract=5131600> [<https://perma.cc/8ZHT-C49X>]; Emma Ruth, *Regulating Families: How the Family Policing System Deconstructs Black, Indigenous and Latinx Families and Upholds White Family Supremacy*, UPEND MOVEMENT, <https://upendmovement.org/regulation> [<https://perma.cc/X2UY-S3SP>] (“The family policing system ‘polices’ in three main ways: surveillance, regulation, and punishment.”).

38. ALAN J. DETLAFF, *CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 1* (2023).

39. ROBERTS, *supra* note 5, at 87-88.

40. *Id.*

41. See *id.* at 108-14.

its inattention to Black families – who are now disproportionately policed by the modern family policing system.⁴² This disregard, combined with the existence of slavery, ensured that “child welfare institutions could develop in this country without concern for the majority of Black children,” creating the conditions for “an inherently racist child welfare system.”⁴³ This system incorporated the brutal domination and destruction of Black families that the institution of slavery developed.⁴⁴

As Professor Alan J. Detlaff has documented, during slavery, the tearing apart of families through sales of enslaved people served as “a means of maintaining power and control by a system of white supremacy that is foundational to this country’s origins.”⁴⁵ Further, laws enacted during slavery monetized racial heritage by making the child of an enslaved person enslaved – thereby creating a perverse incentive for sexual violence as a means of enriching the enslaver and laying the foundation for family separation as a tool for racial capitalism, because enslavers would be financially enriched through the sales of enslaved people.⁴⁶ Similarly, the history of land theft, displacement, and physical and cultural genocide of the Indigenous people in the United States created an enduring legacy in the development and function of child welfare institutions.⁴⁷

42. See, e.g., Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL’Y REV. 217, 258 (2022); Elisa Minoff & Alexandra Citrin, *Systemically Neglected: How Racism Structures Public Systems to Produce Child Neglect*, CTR. FOR THE STUDY OF SOC. POL’Y 5 (Mar. 2022), <https://cssp.org/resource/systemically-neglected> [<https://perma.cc/NU2N-4EXC>].

43. ROBERTS, *supra* note 5, at 87 (quoting Andrew Billingsley & Jeanne M. Giovannoni, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 24 (1972)).

44. *Id.* (“On the other hand, the brutal domination and destruction of enslaved families profoundly shaped the development of child welfare institutions.”).

45. *Id.*

46. The threat of sexual violence was an ongoing and enduring feature of enslavement for enslaved women and girls, as documented in HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF 29–31 (R.J. Ellis ed., Oxford Univ. Press 2020) (1861). The notion of “racial capitalism” is credited to Cedric Robinson who argued that “the development, organization and expansion of capitalist society pursued essentially racial directions.” Whitney Pirtle, Remarks at the American Medical Association Prioritizing Equity Video Series: The Root Cause (June 3, 2020), <https://www.ama-assn.org/delivering-care/health-equity/prioritizing-equity-video-series-root-cause> [<https://perma.cc/LT2Q-XAR7>] (citing CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (1983)).

47. See Neoshia Roemer, *Un-Erasing American Indians and the Indian Child Welfare Act from Family Law*, 56 FAM. L.Q. 31, 51–52 (2022); see also *Haaland v. Brackeen*, 599 U.S. 255, 264–68 (2023) (discussing how the history and function of the Indian Child Welfare Act differentiate it from typical child welfare proceedings governed by state law); REBECCA NAGLE, BY THE FIRE WE CARRY: THE GENERATIONS-LONG FIGHT FOR JUSTICE ON NATIVE LAND 74 (2024) (arguing that

These dual legacies of enslavement and genocide stretched beyond the period of land dispossession and slavery. This is evident from the advent of Black Codes, which compelled many newly emancipated Black families in the South to apprentice their children during the Reconstruction era,⁴⁸ and the kidnapping and coercive placement of Indigenous children in Native American residential schools (guided by General Richard Henry Pratt’s infamous notion of “kill the Indian and save the man”).⁴⁹ Each of these efforts was propelled by the idea that Black and Indigenous parents did not deserve their children and could not raise children who could productively serve society’s needs—a problem that could be remedied by children’s removal from their environments.⁵⁰ This legacy of family separation as a tool of pain and punishment persists today.

As Roberts has argued, it is only against this backdrop and legacy of family separation as a “terroristic weapon against Black and Native communities” that we can consider “the emergence of modern child welfare agencies for white children in the United States.”⁵¹ James Morone’s *Hellfire Nation* describes how Puritan beliefs heavily influenced early American social welfare institutions, shaping policies that are deeply embedded in American institutions.⁵² These early Puritan beliefs led colonial society to view children living in poverty as needing salvation.⁵³ However, it was not until the beginning of the nineteenth century—

although the histories of Indigenous dispossession and enslavement are often taught separately, these histories are in fact intertwined).

48. After emancipation, former enslavers induced Black families to apprentice their children, thus reinforcing ongoing family separation, and simultaneously destabilizing the family by removing potential wage earners, while preserving the financial enrichment of plantation owners. See ROBERTS, *supra* note 5, at 96-102.
49. The Native American residential schools, orchestrated by the federal government, sought to “kill the Indian to save the man,” with the ostensible goal of producing productive citizens who could be assimilated into white society. *Id.* at 102-108; see also Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950-53 (1999) (“Indian children were to be federally educated so as to ‘give the Indian a white man’s chance’ in life.”).
50. See LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* 28-29 (2020) (detailing how former slave owners forced Black children into apprenticeships “insisting that their families could not support them” despite the fact that this practice often destroyed the economic viability of the family and was devastating for Black families); Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 460 (2022) (explaining that the justification for separating Indigenous families starting in the late 1800s relied on characterizations of Indigenous caretakers as “inferior and morally depraved”).
51. ROBERTS, *supra* note 5, at 108.
52. JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 123-28 (2003).
53. The Puritan view of children was that they were all naturally born sinful and depraved and must be tamed to be good Christians. See *id.* at 102.

when waves of immigration and increasing industrialization turned wealthy reformers' attention to the plight of poor, mostly white, immigrant children – that permanent family separation became a more widespread response to perceived parental deviance.⁵⁴ These family separation efforts were primarily driven by anti-immigrant narratives that again characterized immigrant communities, much like families in poverty during the Puritan era, as prone to deviance.⁵⁵ Rarely were efforts made to reunify families once children were removed.⁵⁶

It was against this backdrop that the predecessors to modern foster care and child protection – organizational elements of the contemporary family policing system – were formed. Fueled by anti-immigrant sentiment, the Children's Aid Society in New York developed a model of saving poor children from the “evils of urban life” by sending them to “good” Christian farmers in the country, where they could work and receive moral guidance.⁵⁷ Substance use was understood as an innate sin that could be passed from mother to child.⁵⁸ The New York Society for the Protection of Cruelty to Children sprung up in 1874, and by the 1910s, more than two hundred Societies for the Protection of Cruelty to Children (SPCCs) existed around the country.⁵⁹ The SPCCs focused on investigating abuse allegations, instituting legal action, and encouraging the prosecution of the parents for “cruelty.”⁶⁰ The vilification of parents, most of whom lived in poverty, and the use of child removal as a form of punishment reinforced the

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54. See JANE SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* 26–29 (2023). Private charitable efforts, rather than government programs, focused their attention on assimilating the children of mostly Irish, Italian and Jewish immigrants living Northern urban areas. See *id.* at 27. Many of these private charitable efforts worked hand in hand with local governments, fueling the removal and placement of low-income immigrant children. Christina Firpo & Margaret Jacobs, *Taking Children, Ruling Colonies: Child Removal and Colonial Subjugation in Australia, Canada, French Indochina, and the United States, 1870–1950s*, 29 J. WORLD HIST. 529, 537 & n.27 (2018).
55. See LELA B. COSTIN, HOWARD JACOB KARGER & DAVID STOESZ, *THE POLITICS OF CHILD ABUSE IN AMERICA* 47 (1997).
56. *Id.* Children deemed to be living in unsuitable conditions were placed in orphanages, indentured servitude, or foster families. *Id.* at 47, 50. There was no system in place to return these children to their families. See *id.* at 47.
57. Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 10, 14 (Gerald P. Mallon & Pegg McCartt Hess eds., 2005).
58. See *Born a Dope Fiend*, LITERARY DIG., July 19, 1919, at 27, 27, <https://www.unz.com/print/LiteraryDigest-1919jul19-00027> [<https://perma.cc/W6AZ-AATC>].
59. COSTIN, KARGER & STOESZ, *supra* note 55, at 46.
60. SUSAN WHITELAW DOWNS, LELA B. COSTIN & EMILY JEAN MCFADDEN, *CHILD WELFARE AND FAMILY SERVICES: POLICIES AND PRACTICE* 168 (5th ed. 1996). These Societies for the Protection of Cruelty to Children (SPCCs) were modeled after the New York Society (NYS), but not all of them were as punitive as NYS. *Id.*

idea that it was the purpose of these child protection agencies to remove children from bad homes and put them in better homes; they operated with the intent to exert social control.⁶¹ Beginning in 1854, an estimated 100,000 children were sent on “Orphan Trains” from cities to smaller farm communities in the Midwest—marking the start of formalized foster care.⁶² This approach, however, was not concerned with reuniting children with their parents or even with ensuring that children’s welfare had improved.⁶³

SPCCs created the institutional framework that gave rise to the modern family policing system: an institution that punished undeserving parents through permanent family separation. In 1935, the funding mechanism for state child protection systems became federalized through the Social Security Act,⁶⁴ which encouraged states to create family policing agencies and programs modeled after the existing SPCCs, thereby incorporating these early models of family policing into the state and local agencies that exist today.⁶⁵ In institutional-theory terms, the Act explicitly created structures and processes that were institutionalized into organizations, which adopted and incorporated the ethos of the SPCCs into the fabric of their operations. Thus, the family policing agencies were born.

B. Institutionalizing the Disproportionate Policing of Black and Indigenous Families

While Black and Indigenous children were largely not part of the equation for the SPCCs and other Progressive Era institutions focused on child-saving, this began to shift in the twentieth century.⁶⁶ Ironically, Black liberation movements and civil rights advocacy opened the doors to the institutions that would become the family policing system, creating what Roberts has described as “a Pyrrhic victory.”⁶⁷ At the root of this shift was a fight over federal financial support for low-income single mothers. In the early part of the twentieth century, Progressive Era feminists advocated for federal public welfare programs to

61. COSTIN ET AL., *supra* note 55, at 67 (applying sociologist Edward A. Ross’ term “social control” to the operations of SPCCs).

62. *See id.* at 69.

63. SPINAK, *supra* note 54, at 27-29 (charting the juvenile court’s focus on removing children whose challenges were caused by poverty, racism, or additional socioeconomic inequalities from their families, rather than addressing these issues).

64. Social Security Act, H.R. 7260, 74th Cong. (1935).

65. *See* Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, 8 FUTURE CHILD. 88, 90-92 (1998) (discussing the “federal funding streams” supporting state and local child welfare programs in the late twentieth century).

66. *See* ROBERTS, *supra* note 5, at 115.

67. *Id.*

benefit unmarried mothers. Black and Indigenous women were predominantly excluded from these benefits, either by law or practice.⁶⁸ But in the mid-twentieth century, Black women and children were at the forefront of successful desegregation and civil rights movements that helped open the welfare system to Black and Indigenous mothers.⁶⁹

In response, government officials, particularly in southern states, began to promote a racist and sexist narrative about Black mothers. For Black women, the institution of marriage was largely inaccessible due to structural racism, economic inequality, and public benefits laws that discouraged marriage. But rather than recognizing this reality, government officials often depicted Black mothers as draining public resources by accessing public benefits for their “illegitimate” children.⁷⁰ In order to curtail Black women’s access to benefits, states enacted laws to police and surveil their behavior.⁷¹ For example, so-called “suitable home” laws deputized state family policing agencies to assess whether the home environments of children receiving public benefits were “suitable” based on whether unmarried mothers had ceased all “illicit” relationships.⁷² The purpose

68. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935*, at 24-25, 31-32 (1994); GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942*, at 27-29 (1995) (discussing “child-centered maternal reform” that advocated for mothers’ pensions but also “defined ethnic motherhood in opposition to ‘American’ childhood”); BRIGGS, *supra* note 50, at 31.

69. Briggs, *supra* note 50, at 45.

70. Taryn Lindhorst & Leslie Leighninger, “*Ending Welfare as We Know It in 1960: Louisiana’s Suitable Home Law*,” 77 *SOC. SERV. REV.* 564, 566 (2003); Premila Nadasen, *From Widow to “Welfare Queen”: Welfare and Politics of Race*, 1 *BLACK WOMEN, GENDER & FAMS.* 52, 64-70 (2007) (detailing the shift from the Black women-led welfare-rights movements of the mid-1960s to the emergence of the “welfare queen” stereotype). This narrative re-emerged in the 1980s-1990s amidst the crack-cocaine epidemic to justify punitive drug laws that disproportionately impacted communities of color. *Caught in the Net: The Impact of Drug Policies on Women and Families*, ACLU, *BREAK THE CHAINS & BRENNAN CTR. FOR JUST.* 15 (Dec. 2005), https://assets.aclu.org/live/uploads/document/asset_upload_file431_23513.pdf [https://perma.cc/A7S5-BCVP] (discussing the stereotypes that were promoted about unfit mothers and illegitimate children as part of stereotypes promoted via hysteria about “crack babies”); GRACE HOWARD, *THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD* 95 (Univ. Ca. Press 2024) (discussing how “[t]he ‘crack mom’” was discursively joined with existing frames for bad Black mothers and pathological Black children); see also Josh Levin, *The Welfare Queen*, *SLATE* (Dec. 19, 2013, 12:41 AM), https://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html [https://perma.cc/E6LU-FC9G] (recounting how President Ronald Reagan popularized and promoted the fictionalized stereotype of the “welfare queen”).

71. Susan Vivian Mangold, *Poor Enough to be Eligible? Child Abuse, Neglect, and the Poverty Requirement*, *ST. JOHNS L. REV.* 575, 583-89 (2007).

72. GWENDOLYN MINK, *WELFARE’S END* 33-68 (Cornell Univ. Press 1998).

of these assessments was to evaluate each mother's morality and, thus, her eligibility for public benefits; if public benefits ceased, her child would frequently be removed to foster care.⁷³ These suitability laws share the same puritanical motivations that underpin many modern laws governing morality or perceived sins such as drug use.⁷⁴ Additional research is needed to determine the full extent to which parental drug use motivated removals during this era. However, the stigmatizing depictions of Black women as “welfare queens” in the media and policy discourse, along with the depiction of the “crack-cocaine epidemic” as a problem affecting Black communities in the 1980s and 1990s, suggest that ideals of suitability and deservingness endured beyond the mid-twentieth century.⁷⁵

Similar to Black mothers, as Native American mothers attempted to access welfare benefits, they opened themselves up to scrutiny and removal of their children to foster care.⁷⁶ As historian Laura Briggs has written, involvement with welfare meant the application of white, heteronormative, middle-class standards to Native families:

Welfare workers disparaged the poverty of reservations and shamed unmarried mothers and others who cared for children because they thought heterosexual nuclear families were the only proper homes for children. They refused to acknowledge indigenous kinship systems and the important role of elders and other adults in child rearing.⁷⁷

Civil rights organizers appealed to the federal government to deem these suitability laws unconstitutional, calling attention to how suitability laws were fueling segregation (by driving Black families out of southern states) and starving Black children (by denying their mothers welfare benefits), but they were unsuccessful.⁷⁸ Rather than address the inequities caused by these suitability laws, in 1961, Arthur Flemming, the Secretary of Health, Education, and Welfare for the Eisenhower Administration, found a workaround: states could deny mothers welfare benefits but could not leave their children without financial support simply because their caretakers were unsuitable.⁷⁹ This so-called “Flemming Rule” required states either to (1) provide “services” to make a home suitable or

73. *Id.* at 571.

74. See generally MARONE *supra* note 52 (tracing puritanical influences on American politics, including in the war against drugs).

75. Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 492-93 (2021).

76. BRIGGS, *supra* note 50, at 60-61.

77. *Id.* at 62.

78. MINK, *supra* note 72, at 49-51.

79. Lindhorst & Leighninger, *supra* note 70, at 579.

(2) remove the child to “suitable” care while providing financial support to the child.⁸⁰ It was not accompanied by additional allocations of federal funds to accomplish either of these objectives.⁸¹

Amendments to the Social Security Act in 1961 incentivized the removal of children from these homes (and from other families living in poverty) by permitting the use of federal funds to pay for removal and out-of-home placement of children (foster care).⁸² The 1961 Amendments did not include funding allocations to pay for services to make the home more suitable or to provide services to preserve the family unit.⁸³

The influx of federal funding for foster care led to the formalization of the modern “foster care” system.⁸⁴ As Roberts has documented, from 1945 to 1961, the proportion of Black children in foster care nearly doubled; yet from 1980 through 1999, the number of children total in foster care nearly doubled, and the proportion of Black children more than doubled.⁸⁵ Further, “[f]rom 1960 through 1980, roughly 25-35 percent of Native children were separated from their families and placed in foster care, adoptive homes, or institutions, most of which were outside of their original communities and family system.”⁸⁶

The history and analysis presented thus far demonstrate how the state increasingly punished parents it deemed undeserving through family separation and curtailment of their constitutional parental rights. Through a web of federal rules and legislation, federal dollars encouraged the creation of state and local family policing agencies and then encouraged family separation. In sum, separation was embedded into the framework for the modern family policing system,

80. *Id.* at 579-80.

81. MINK, *supra* note 72, at 49.

82. Act of May 8, 1961, Pub. L. No. 87-31, 75 Stat. 75, 76-78.

83. *Id.*

84. As Professor Wendy Chavkin writes, “In keeping with the same spirit that had infused the provision of colonial outdoor relief, conformity with moral standards of behavior was exacted from the recipients in exchange for relief.” Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483, 484 (1990).

85. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7 (2002).

86. Olivia Daprile, *Advocates’ Forum Bolstering the Indian Child Welfare Act*, UNIV. CHI. CROWN FAM. SCH. SOC. WORK, POL’Y & PRAC. (2022), <https://crownschool.uchicago.edu/student-life/advocates-forum/bolstering-indian-child-welfare-act> [https://perma.cc/5XPL-688W]. “With the passage of the Indian Child Welfare Act (ICWA) of 1978, these numbers decreased, but contemporary studies conducted by the National Indian Child Welfare Association confirm there is still an alarming disproportionality of Indigenous children in foster care.” *Disproportionality in Child Welfare: Fact Sheet*, NAT’L INDIAN CHILD WELFARE ASS’N (Oct. 2021), https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf [https://perma.cc/UZC3-MKDS].

ensuring this approach would endure and fueling the influx of Black and Indigenous children into foster care.

C. *The Institutionalization of Mandatory Reporting and Its Intersections with Healthcare*

In 2019, thirty-four percent of all family policing investigations for infants were initiated by medical professionals.⁸⁷ In some states, as many as eighty percent of these 2019 referrals were for parental substance use.⁸⁸ As medical historian Mical Raz has demonstrated in her critical book, *Abusive Policies: How the American Child Welfare System Lost Its Way*, one cannot underestimate the legacy of Dr. C. Henry Kempe's seminal 1962 article, *The Battered Child Syndrome*, which adopted a medicalized approach to child abuse that has been the framework for modern child protection efforts, including investigations of parental drug use.⁸⁹

Kempe's article argued that healthcare providers were uniquely situated to identify serious physical child abuse, which state child protection agencies could investigate.⁹⁰ States swiftly responded, and by 1967, all fifty states had passed mandatory reporting laws. Some expanded what should be reported and investigated as alleged child abuse and neglect, reaching far beyond what Kempe had recommended.⁹¹

By 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), which provided states with grant funding in exchange for compliance with specific requirements—including requirements that states implement mandatory reporting laws if they had not done so already.⁹² Although CAPTA did not explicitly include a mandatory reporting requirement for suspected parental

87. Frank Edwards, Sarah C.M. Roberts, Kathleen S. Kenny, Mical Raz, Matty Lichtenstein & Mishka Terplan, *Medical Professional Reports and Child Welfare System Infant Investigations: An Analysis of National Child Abuse and Neglect Data System Data 7* HEALTH EQUITY 653, 657 (2023).

88. *Id.* at 653.

89. MICAL RAZ, *ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST IT'S WAY* 55-72, n.54 (2020); C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17, 17 (1962).

90. RAZ, *supra* note 89, at 55-72.

91. Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37, 40-42 (2013).

92. Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, § 4(b)(2), 88 Stat. 4, 6 (1973) (codified as amended in 43 U.S.C. §§ 5101-5106). CAPTA also required that states maintain a system for receiving and investigating reports of alleged child maltreatment. *Id.*

substance use, federal guidance cautioned that parental drug use during pregnancy indicated a “high risk” for child maltreatment and encouraged physicians to “identify” infants who may be exposed to parental drug use during pregnancy so that the pregnant parent could be connected with needed services.⁹³ CAPTA did not, however, provide any additional federal funding to cover the costs of necessary substance use or mental health services.⁹⁴ It did, however, continue to fund out-of-home placements in foster care.⁹⁵

A pause in the chronological sequence of this analysis is warranted because CAPTA was amended in 2003 to encourage states to develop policies and procedures that

address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, including a *requirement that health care providers* involved in the delivery or care of such infants *notify the child protective services system* of the occurrence of such condition in such infants.⁹⁶

This notification requirement was accompanied by an express condition that the notification “shall not be construed to (I) establish a definition under Federal law of what constitutes child abuse; or (II) require prosecution for any illegal action.”⁹⁷ Specifically, CAPTA provides:

The Secretary is authorized to make grants to States for the purpose of assisting child welfare agencies, social services agencies, substance use disorder treatment agencies, hospitals with labor and delivery units, medical staff, public health and mental health agencies, and maternal and

93. *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects*, FED. ADVISORY BD. ON CHILD ABUSE & NEGLECT, at iii-124 (1978), <https://www.ojp.gov/pdffiles1/Digitization/48354NCJRS.pdf> [<https://perma.cc/YM7Y-JH4D>].

94. Child Abuse Prevention and Treatment Act § 5. CAPTA required the “local child protective services unit” to coordinate with the mental health centers. FED. ADVISORY BD. ON CHILD ABUSE & NEGLECT, *supra* note 93, at iii-135. These mental health centers were established by the Special Health Revenue Sharing Act of 1975. Special Health Revenue Sharing Act of 1975, Pub. L. No. 94-63, § 102, 89 Stat. 304, 305. They were later subsumed under the federal Alcohol, Drug and Mental Health Services block grant in 1981 and evolved into two separate block grants: one for “substance abuse” and prevention treatment services and one for mental health services. JOHNATHAN H. DUFF, CONG. RSCH. SERV., R46426, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (SAMHSA): OVERVIEW OF THE AGENCY AND MAJOR PROGRAMS PROGRAMS 15-16 (2020).

95. Act of May 8, 1961, Pub. L. No. 87-31, § 2, 75 Stat. 75, 76-77.

96. Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, § 114(b)(1)(B)(ii), 117 Stat. 800, 809 (emphasis added).

97. *Id.*

child health agencies to facilitate collaboration in developing, updating, implementing, and monitoring plans of safe care described in section 5106(b)(2)(B)(iii) of this title.⁹⁸

Notably, this statutory language differs from CAPTA's mandate in a different section that required states to enact laws to ensure child abuse and neglect are reported and investigated. This difference suggests that the notification requirement was not to be equated with a report of child abuse or neglect. Further, the statute's emphasis on "developing, updating, implementing, and monitoring plans of safe care"⁹⁹ signifies a focus on providing treatment and suggests that evidence of substance use is not per se child abuse or neglect.

But while the notification requirement was not intended to be a report of child abuse or neglect, it has increased the surveillance and policing of pregnancies by healthcare providers for reasons we explore in Part III.¹⁰⁰ Most importantly for the current analysis, this requirement created additional processes and procedures in family policing agencies to deal with notifications from healthcare providers, further institutionalizing the policing function of these agencies.¹⁰¹ As is a recurring theme, the 2003 amendments did not include additional allocations to pay for services for the parent that would prevent removal—or even require that services to the parent be provided.¹⁰² In practice, it is not uncommon for these notifications to result in referrals for investigations of alleged child abuse and neglect, further driving families' entanglement in the family policing system.¹⁰³ As institutional theory predicts, family policing agencies—created for the purpose of policing parental behavior—implemented these notifications with the same punitive approach they had used for eighty years.¹⁰⁴

Mandatory reporting has fueled the rapid expansion of the family policing system since the passage of CAPTA, as states have broadened their definitions of

98. 42 U.S.C. § 5106(a)(7) (2018).

99. *Id.*

100. Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733, 764 (2021).

101. Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 646 (2021); Gabriella Mercedes Mills, *Prenatal and Maternal Substance Abuse in America: Developing a Framework for the Future of Recovering Mothers*, 22 HOUS. J. HEALTH L. & POL'Y 42, 44-45 (2023).

102. 42 U.S.C. § 5106(a)(7) (2018).

103. Burton & Montauban, *supra* note 101, at 643-44; Mack, *supra* note 16, at 802-03.

104. Burton & Montauban, *supra* note 101, at 669; Mack, *supra* note 16, at 802-03.

child maltreatment and expanded the categories of mandatory reporters.¹⁰⁵ The influx of millions of reports each year—many of them unsubstantiated—overwhelms the system, leading to invasive investigations and child removals that often harm families without effectively preventing abuse and neglect.¹⁰⁶ Studies also show that the discrimination and stigmatization that parents who use substances experience in seeking treatment, along with the very real legal risks of mandatory reporting and family separation, constitute a significant deterrent to seeking help or treatment.¹⁰⁷

The influx of children into foster care, and the rising federal costs of financing it, prompted Congress in 1980 to consider the impacts that removals were having on parental rights while balancing the competing goal of providing children languishing in foster care with “permanency” (via the involuntary termination of parental rights and adoption).¹⁰⁸ Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which required agencies to make “reasonable efforts” to preserve the family before removing a child from the home. To support this requirement, the law also amended the Social Security Act (SSA) to fund services to prevent child removal, including parental counseling and substance use treatment, through what is commonly referred to as Social Security Title IV-B Programs funding.¹⁰⁹ However, the reasonable effort requirement was secondary to AACWA’s emphasis on achieving the competing

105. Talia Gruber, *Beyond Mandated Reporting: Debunking Assumptions to Support Children and Families*, 1 ABOLITIONIST PERSPS. IN SOC. WORK 1, 4-5 (2023).

106. Mike Hixenbaugh, Suzy Khimm & Agnel Philip, *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead.*, NBC NEWS (Oct. 12, 2022, 8:00 AM EDT), <https://www.nbcnews.com/news/us-news/child-abuse-mandatory-reporting-laws-rcna50715> [<https://perma.cc/CX3E-6628>]; Richard Wexler, *CAPTA Law Codifies Everything Wrong with How We ‘Fight’ Child Abuse*, YOUTH TODAY (Oct. 31, 2018), <https://youthtoday.org/2018/08/capta-law-codifies-everything-wrong-with-how-we-fight-child-abuse> [<https://perma.cc/2R3V-36NT>].

107. See generally Lisa Sangoi, “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*, MOVEMENT FOR FAM. POWER (June 2020), <https://bds.org/assets/files/MFPDrugWarFosterSystemReport.cleaned.pdf> [<https://perma.cc/D2ZA-6298>] (discussing the barriers to parents who use drugs to getting treatment due to potential intervention); Marc Canellas, *Abolish and Reimagine: The Pseudoscience and Mythology of Substance Use in the Family Regulation System*, 30 GEO. J. ON POVERTY L. & POL’Y 169, 230 (2023) (discussing family separations due to a parent testing positive for drug use).

108. LELA B. COSTIN, HOWARD JACOB KARGER & DAVID STOESZ, *THE POLITICS OF CHILD ABUSE IN AMERICA* 122-126 (1996).

109. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 500, 503.

goal of “permanency” for children.¹¹⁰ And despite the amendment to the SSA, AACWA’s prevention and reunification services were and are still underfunded—an issue that we discuss further in Part III.¹¹¹ AACWA did not contain a funded mandate to reunite families.¹¹²

AACWA was responsible for an estimated decline in the number of children in foster care from over 520,000 in 1977 to 275,000 by 1984.¹¹³ However, this decline is attributable to AACWA’s encouragement of more parental rights terminations and the facilitation of adoptions rather than the increase in reunifications.¹¹⁴ Near the turn of the century, Congress again intervened to facilitate more terminations of parental rights and adoption with the enactment of the Adoption and Safe Families Act of 1997 (ASFA).¹¹⁵

Rather than preventing child removal and providing services to keep families together, ASFA created mandatory timelines by which parents needed to reunify with their children or risk the termination of their parental rights and adoption of their children. The law did so by requiring states to file to terminate parental rights if a child had spent fifteen of the last twenty-two months in foster care.¹¹⁶ Advocates for ASFA fueled the imaginations of legislators with accounts of child abuse that allegedly occurred in homes where children were not removed due to family preservation efforts or after children were reunified with their parents following foster care.¹¹⁷ Although there was no systematic data presented to Congress to support these contentions,¹¹⁸ Congress passed ASFA anyway. And while ASFA has increased the number of family policing cases resulting in adoption,¹¹⁹

110. See Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (1999) (“The goals of AACWA flowed out of the philosophy of permanency planning.”).

111. *Id.* at 10 (“It is true that more and more children are coming into the system each year, and there is not enough funding to serve them properly.”).

112. *Id.* at 9 (explaining that “Title IV-B, which concentrates on preventive and reunification services, has always had a fiscal cap,” while funding for foster care placements has no cap).

113. DOWNS ET AL., *supra* note 60, at 266.

114. *Id.*

115. Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557, 579-80 (2022).

116. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2118, 2118.

117. Theodore J. Stein, *The Adoption and Safe Families Act: How Congress Overlooks Available Data and Ignores Systemic Obstacles in Its Pursuit of Political Goals*, 25 CHILD. & YOUTH SERVS. REV. 669, 672-74 (2003).

118. *Id.*

119. Anna Rockhill, Beth L. Green & Carrie Furrer, *Is the Adoption and Safe Families Act Influencing Child Welfare Outcomes for Families with Substance Abuse Issues?*, 12 CHILD MALTREATMENT 7, 7 (2007) (finding “after the implementation of ASFA, children in this study spent less time in foster care, were placed in permanent settings more quickly, and were more likely to be

it has also created many “legal orphans” – youth whose parents’ legal rights were terminated but for whom no adoption is ever completed.¹²⁰

The horrific impact of ASFA on families with a substance-using parent over the past twenty-six years cannot be underestimated. The timelines, coupled with the threat of termination of parental rights, greatly impacted parents who struggled with substance use for several reasons. First, it is not uncommon for parents to spiral into chaotic substance use¹²¹ as a result of family separation. When parents experience an episode of relapse into chaotic substance use, it prolongs foster care stays.¹²² Prolonged foster care stays, in turn, decrease the likelihood of reunification and, because of federally mandated timelines,¹²³ increase the likelihood of parents having their parental rights terminated and losing their child forever.¹²⁴ Rather than fund family preservation efforts or help families to

adopted than remain in long-term foster care.”) In 2022 adoption data, adoption accounted for twenty-seven percent of foster care exits, translating to 52,985 adoptions. Admin. for Child. & Fams., *The Adoption and Foster Care Analysis and Reporting System (AFCARS) Report*, U.S. DEP’T OF HEALTH & HUM. SERVS. 4 (May 9, 2023), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf> [<https://perma.cc/SQT4-T7ZY>]. From 2013 to 2022, the number has fluctuated between 50,800 and 66,200 adoptions yearly. Admin. for Child. & Fams., *Trends in Foster Care and Adoption: FY 2013-2022*, U.S. DEP’T HEALTH & HUM. SERVS. (Mar. 20, 2024), <https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption> [<https://perma.cc/6XDT-RL9X>].

120. MaryLee Allen & Beth Davis-Pratt, *The Impact of AFSA on Family Connections for Children, in Intentions and Results: A Look Back At the Adoption and Safe Families Act*, URBAN INST. 74, <https://affcn.org/wp-content/uploads/IntentionsandResults.pdf> [<https://perma.cc/XC8X-6ZV9>]; 51 *Useful Aging Out of Foster Care Statistics*, NAT’L FOSTER YOUTH INST. (May 25, 2017), <https://nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media> [<https://perma.cc/J56U-8DNW>].
121. Kelley Fong documents the dynamic of family separation causing and/or driving chaotic substance use in her comprehensive qualitative research on the impact of family policing agencies’ involvement on mothers. KELLEY FONG, *INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES* 165-66 (2023).
122. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2118, 2128.
123. *Id.* at § 103, 111 Stat. at 2118.
124. See Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 322 (2023) (explaining that parents struggling with substance use may not be able to meet “child protective services” strict timelines before termination of parental rights because “recovery is a lifelong process”). See generally Kelley Fong, *Concealment and Constraint: Fears and Poor Mothers’ Institutional Engagement*, 97 SOC. FORCES 1785 (2019) (laying out how low-income mothers remain engaged with “child protective services” even while concealing parenting hardships such as substance abuse); Lindsay Mackay, Sarah Ickowicz, Kanna Hayashi & Rob Abrahams, *Rooming-In and Loss of Child Custody: Key Factors in Maternal Overdose Risk*, 115 ADDICTION 1786 (2020) (emphasizing the loss of child custody as a major potential risk factor for post-partum overdose); Nora Volkow, *Pregnant People with Substance Use Disorders Need Treatment, Not Criminalization*, NAT’L INST. ON DRUG ABUSE (Feb. 15, 2023), <https://nida.nih.gov/about-nida/noras-blog/2023/02/pregnant-people-substance-use-disorders-need-treatment-not-criminalization> [<https://perma.cc/72BP-QKDC>]

reunify, ASFA further solidified the family policing system's institutional commitment to removing children from "bad" parents, allegedly for the children's safety and well-being.

In summary, the institutional history of the family policing system provides a clear map as to why the system is not only ill-suited to help parents who use substances but, in fact, is not designed to help them. As we have briefly reviewed above, federal funding mechanisms for the system have incentivized out-of-home placements and institutionalized a punitive approach that threatens parents who use substances with the termination of their parental rights to induce behavior change.¹²⁵

Yet, by 2018, as overdose death rates remained high¹²⁶ along with high rates of foster care placements due to parental opioid use,¹²⁷ there was a documented shift in policy narratives about addiction. Rather than framing it as primarily a moral or criminal-legal issue, policymakers began to frame it as a public health issue.¹²⁸ Unlike parental substance use more broadly, the opioid crisis was also characterized as a medical or health issue that impacts primarily the white middle class.¹²⁹ Given this narrative shift and the health-oriented federal legislation to address the opioid epidemic,¹³⁰ one might expect states to retreat from removals based on substance use alone – at least in the short term.

(advocating for addiction treatment in place of criminal punishment for pregnant people with substance use disorders, as nearly one in four deaths during pregnancy or in the following year are related to mental health conditions such as addiction).

125. Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 507-16 (2021).
126. Nana Wilson, Mbabazi Kariisa, Pujá Seth, Herschel Smith IV & Nicole L. Davis, *Drug and Opioid-Involved Overdose Deaths – United States, 2017–2018*, CDC MORBIDITY & MORTALITY WKLY. REP. (March 20, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6911a4.htm> [<https://perma.cc/H374-A9XU>] (“During 2018, a total of 67,367 drug overdose deaths occurred in the United States, a 4.1% decline from 2017.”).
127. Douglas Wiate, Mary V. Greiner & Zach Laris, *Putting Families First: How the Opioid Epidemic Is Affecting Children and Families, and the Child Welfare Policy Options to Address It*, 9 J. APPLIED RSCH. ON CHILD.: INFORMING POL’Y FOR CHILD. RISK 1, 1 (2018).
128. See Taleed El-Sabawi, *The Role of Pressure Groups and Problem Definition in Crafting Legislative Solutions to the Opioid Crisis*, 11 NE. U. L. REV. 372, 394-400 (2019).
129. When using the term “opioid crisis,” we are referring to the spike in opioid overdose deaths that sounded the alarms of politicians around 2015-2016.
130. It is well documented that the policy narrative on the opioid overdose crisis from 2014-2016 shifted from one of deviance to one describing the policy problem as a health problem. See Taleed El-Sabawi & Jennifer Oliva, *The Influence of White Exceptionalism on Drug War Discourse*, 94 TEMPLE L. REV. 649, 651-52 (2022); see also Taleed El-Sabawi, *The Role of Pressure Groups and Problem Definition in Crafting Legislative Solutions to the Opioid Crisis*, 11 NE. U. L. REV. 372, 394-400 (2019) (surveying the role of organized interest groups and federal administrative agencies in persuasively characterizing the opioid crisis for legislators using a health-oriented approach).

Although legislators claimed to have adopted a public health approach in response to the nation's opioid overdose crisis,¹³¹ the approach failed to truly prioritize public health in the family policing context. Indeed, it merely tasked the family policing system with responsibilities that either reinforced its policing tendencies or exceeded what the system was equipped to handle. As public health researchers have shown, when policing agencies try to engage in public health efforts, they cannot help but resort to their policing training and functions.¹³² In the family policing context, a genuine public health approach to substance use would require addressing the upstream causes of parental drug use,¹³³ employing a harm reduction approach to current substance use (which meets the person who is using drugs “where they are at”),¹³⁴ and prioritizing providing services that do not necessitate removal when possible.

II. THE OPIOID CRISIS AND THE NOT-SO-PUBLIC HEALTH APPROACH TO PARENTAL SUBSTANCE USE

It was not until 2016 – in response to an opioid crisis portrayed as predominantly affecting white communities in suburban America¹³⁵ – that Congress expanded the federal requirement to identify children exposed to substances in utero to include a mandate for developing Plans of Safe Care addressing the

131. Press Release, Sheldon Whitehouse, Sen., U.S. Senate, Whitehouse, Portman, Klobuchar, Ayotte Cheer Final Passage of Comprehensive Addiction and Recovery Act (July 13, 2016), <https://www.whitehouse.senate.gov/news/release/whitehouse-portman-klobuchar-ayotte-cheer-final-passage-of-comprehensive-addiction-and-recovery-act> [https://perma.cc/P6W P-ECJS] (statement by Rob Portman) (“This is a historic moment, the first time in decades that Congress has passed comprehensive addiction legislation, and the first time Congress has ever supported long-term addiction recovery. This is also the first time that we’ve treated addiction like the disease that it is, which will help put an end to the stigma that has surrounded addiction for too long.”).

132. See Maya Doe-Simkins, Taled El-Sabawi & Jennifer J. Carroll, *Whose Concerns? It’s Time to Adjust the Lens of Research on Police-Involved Overdose Response*, 112 AM. J. PUB. HEALTH 1239, 1239-40 (2022); Marco E. Tori, Emily Cummins, Leo Beletsky, Samantha F. Schoenberger, Audrey M. Lambert, Shapei Yan, Jennifer J. Carroll, Scott W. Formica, Traci C. Green, Robert Apsler, Ziming Xuan & Alexander Y. Walley, *Warrant Checking Practices by Post-Overdose Outreach Programs in Massachusetts: A Mixed-Methods Study*, 100 INT’L J. DRUG POL’Y art. no. 103483, at 7 (2022).

133. See U.S. DEP’T OF HEALTH & HUM. SERVS., *FACING ADDICTION IN AMERICA: THE SURGEON GENERAL’S REPORT ON ALCOHOL, DRUGS, AND HEALTH* 7-7 (2016).

134. *State Harm Reduction Strategies: Improving Outcomes for Reproductive-Aged Women Who Use Substances*, ASS’N MATERNAL & CHILD HEALTH PROGRAMS, <https://amchp.org/resources/state-harm-reduction-strategies-improving-outcomes-for-reproductive-aged-women-who-use-substances> [https://perma.cc/5QG9-ML2H].

135. See El-Sabawi & Oliva, *supra* note 130, at 651.

needs of both the infant and the mother. This addition came with the enactment of the Comprehensive Addiction and Recovery Act (CARA) of 2016.¹³⁶ Along with the attention paid to the rising number of opioid overdose deaths, there was a new moral panic over infants exposed in utero to opioids.¹³⁷ This panic was over Neonatal Abstinence Syndrome (NAS), which was initially attributed to prescription opioid use or side effects of medications to treat opioid-use disorder.¹³⁸ Addiction medicine specialists warned that “[d]eclaring war on this condition risks stigmatizing effective therapy, leaving mothers more vulnerable to relapse, overdose, and death.”¹³⁹ Their warnings were not heeded.

CARA also responded to the moral panic about NAS by expanding the notification requirements for infants “affected by substance abuse or withdrawal symptoms,” now requiring healthcare providers to identify infants exposed to both prescription and illicit drugs instead of just the latter.¹⁴⁰ CARA explicitly included an acknowledgment by Congress that addiction and overdose were public health issues.¹⁴¹ And yet, in the same legislative breath, Congress expanded the population of infants and families subject to the family policing system.¹⁴²

136. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 503, 130 Stat. 695, 729-31 [hereinafter CARA].

137. See Joshua M. Sharfstein, *Neonatal Abstinence Syndrome: Déjà Vu All Over Again?*, JAMA F. (Oct. 21, 2015), <https://jamanetwork.com/channels/health-forum/fullarticle/2760583> [<https://perma.cc/8GDG-QK86>] (drawing the analogy between the panic over “crack babies” and new blame put on mothers for infants exposed in utero to opioids when, in studies of the older case of neonatal cocaine exposure, “the greater culprit in poor development and health was identified as poverty”).

138. *Id.*

139. *Id.*

140. CARA § 503(a)(2); § 503(b) (amending certain clauses of CAPTA by replacing the phrase “illegal substance abuse” with “substance abuse”).

141. CARA § 708.

142. ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., ACYF-CB-PI-17-02, PROGRAM INSTRUCTION: GUIDANCE ON AMENDMENTS MADE TO THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA) BY PUBLIC LAW 114-198, THE COMPREHENSIVE ADDICTION AND RECOVERY ACT OF 2016 3 (2017), <https://www.acf.hhs.gov/sites/default/files/documents/cb/pi1702.pdf> [<https://perma.cc/Q7SD-GNNR>]. For more on the medicalization or public health framing of addiction versus its criminal-legal framing in American policy discourse, please see generally Jennifer D. Oliva & Taled El-Sabawi, *The “New” Drug War*, 110 VA. L. REV. 1103 (2024). See also Taled El-Sabawi, *Carrots, Sticks, and Problem Drug Use: Law Enforcement’s Contribution to the Policy Discourse on Drug Use and the Opioid Crisis*, 80 OHIO ST. L.J. 765, 765-67 (2019) (describing the tension between “the growing support for the idea that problem drug use should be treated like a chronic medical disease” and the insistence of various “criminal justice actors” that the justice system continue playing a central role in responding to drug use).

When answering questions about whether a notification or referral pursuant to this provision constitutes a report of abuse or neglect, the Administration for Children and Families (ACF), the federal agency charged with the enforcement and implementation of CAPTA, hedged. ACF responded:

Not necessarily. The CAPTA provision as originally enacted and amended requires the referral of certain substance-exposed infants to [child protective services] and makes clear that the requirement to refer infants affected by substance abuse does not establish a federal definition of child abuse and neglect. Rather, the focus of the provision is on identifying infants at risk due to prenatal substance exposure and on developing a plan to keep the infant safe and address the needs of the child and caretakers. (See CWPM, Section 2.1F, Questions 1 and 2.) Further, the development of a plan of safe care is required whether or not the circumstances constitute child maltreatment under state law.¹⁴³

This hedging implies that ACF knew that mandating notification risked increasing the likelihood that an investigation and removal would ensue.

In a positive step forward, CARA did require that the Plans of Safe Care also address the health and substance use disorder treatment needs of the infant's family or caretakers.¹⁴⁴ However, CARA still did not address the harm that interactions with the family policing system cause parents who use substances and their children. Although CARA purported to be public health-oriented, in reality, it maintained and reinforced the policing structure of all policy responses to drug use.¹⁴⁵ The law cloaked this policing structure by using public health rhetoric and shifting some of the policing and surveillance of parents to healthcare actors.¹⁴⁶

In October 2018, Congress enacted the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities

143. ADMIN. FOR CHILD. AND FAMS., *supra* note 142, at 4.

144. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, tit. V, § 503, 130 Stat. 735 (2016).

145. See generally Taled El-Sabawi, *The Role of Pressure Groups and Problem Definition in Crafting Legislative Solutions to the Opioid Crisis*, 11 NE. U. L. REV. 372 (2019) (explaining how CARA failed to actualize a public health framing of the opioid crisis).

146. See Oliva & El-Sabawi, *supra* note 142, at 1110-11 (“The three categories of ‘New’ Drug War laws and policies that are showcased in Part II of this article – enhanced surveillance, particularly surveillance conducted by the healthcare system, enhanced criminalization and civil punishment, and ongoing obstacles to treatment and harm reduction – demonstrate that our ‘New’ Drug War is simply an extension of its predecessor disguised by a public health promotional campaign.”).

Act (SUPPORT).¹⁴⁷ The legislation included an amendment to CAPTA authorizing grants to states to facilitate collaboration in developing and implementing Plans of Safe Care – again reinforcing that legislators were interested and willing to amend CAPTA in order to better respond to the opioid crisis, but also signaling broad bipartisan support for increased surveillance and reporting.¹⁴⁸

In 2021, Congress’s reauthorization of CAPTA updated the idea of Plans of Safe Care, renaming them Family Care Plans. Congress stated that the 2021 CAPTA “promotes a public health response for family care plans (formerly plans for safe care) to ensure the safety, permanency, and well-being of infants and their caregivers affected by substance use disorder.”¹⁴⁹ Congress claimed CAPTA did this by appropriating additional monies to improve access to treatment.¹⁵⁰ It stressed that the mandated reporting of substance exposure of the infant did not require an investigation by the agency and that CAPTA was not meant to provide a federal definition of child maltreatment that included parental substance use.¹⁵¹ However, the 2021 reauthorization did not recommend that infants remain with their parents while substance use treatment services are provided¹⁵² – despite the evidence suggesting that these services can lead to better outcomes.¹⁵³ And as scholars have noted, while the purpose of the CAPTA notification requirements for substance-exposed infants is to identify families who need services before removal becomes necessary and to do so in a nonpunitive way, this goal conflicts with current criminal legal approaches to substance use in

147. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities (SUPPORT) Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

148. See SUPPORT Act § 7065(a) (amending § 105 of CAPTA). The SUPPORT Act also made changes to other related legislation, including repealing the Abandoned Infants Assistance Act of 1988. SUPPORT ACT § 7065(b).

149. *CAPTA Reauthorization Act of 2021*, U.S. S. COMM. ON HEALTH, EDUC., LAB., & PENSIONS 1 (2021), <https://www.help.senate.gov/download/052621-capta-reauthorization-act-of-2021-fact-sheet?download=1> [<https://perma.cc/3JAM-5ZHE>].

150. *CAPTA Reauthorization Act of 2021: Section by Section*, U.S. SENATE 14-15, <https://www.help.senate.gov/imo/media/doc/052621%20CAPTA%20117th%20Section-by-Section.pdf> [<https://perma.cc/2GQX-XQAP>].

151. *Id.*

152. *Id.*

153. See Zoë G. Hodgson & Ronald R. Abrahams, *A Rooming-in Program to Mitigate the Need to Treat for Opiate Withdrawal in the Newborn*, 34 J. OBSTETRICS & GYNAECOLOGY CAN. 475, 476 (2012); Ronald R. Abrahams, Marion H. MacKay-Dunn, Victoria Nevmerjitskaia, G. Scott MacRae, Sarah P. Payne & Zoë G. Hodgson, *An Evaluation of Rooming-in Among Substance-exposed Newborns in British Columbia*, 32 J. OBSTETRICS & GYNAECOLOGY CAN. 866, 867 (2010); Lindsay Mackay, Sarah Ickowicz, Kanna Hayashi & Ron Abrahams, *Rooming-in and Loss of Child Custody: Key Factors in Maternal Overdose Risk*, 115 ADDICTION 1786, 1786 (2020).

pregnancy, which are focused on surveilling, reporting, and punishing pregnant parents.¹⁵⁴

Further, there is ample evidence that mandatory reporting creates a significant disincentive for substance using pregnant people¹⁵⁵ to seek prenatal medical care.¹⁵⁶ This disincentive is particularly strong for Black pregnant people because of the pervasive and illegal reality that they and their babies are far more likely to be tested for substances, usually without consent.¹⁵⁷

In sum, despite the widely available evidence that outcomes are better for children, parents, and the whole family when infants are not removed from their parents' care due to exposure to a substance in utero,¹⁵⁸ federal legislation has not gone so far as to require states to provide access to such evidence-based programs instead of out-of-home placement. Worse yet, federal law maintains healthcare providers as police and decreases the likelihood that pregnant people will seek healthcare.¹⁵⁹

154. Margaret H. Lloyd Sieger, Rebecca Rebbe & Stephen W. Patrick, *The 2021 Reauthorization of CAPTA – Letting Public Health Lead*, 385 NEW ENG. J. MED. 1636, 1637 (2021). For an in-depth analysis on the ways in which substance use during pregnancy is criminalized, please see generally GRACE E. HOWARD, *THE PREGNANCY POLICE*, *supra* note 70.

155. “Pregnant people” and “birthing people” are gender-neutral terms, which are considered to be more inclusive alternatives than using gender-specific language. *Inclusive and Gender-Neutral Language*, NAT’L INSTS. HEALTH (Jan. 17, 2024), <https://www.nih.gov/nih-style-guide/inclusive-gender-neutral-language> [<https://perma.cc/BT28-LCT9>].

156. Danielle N. Atkins & Christine Piette Durrance, *State Policies that Treat Prenatal Substance Use as Child Abuse or Neglect Fail to Achieve Their Intended Goals*, 39 HEALTH AFFS. 756, 756 (2020).

157. Lisa Sangoi, “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*, MOVEMENT FOR FAM. POWER 34 (June 2020), <https://www.timeforchangefoundation.org/media/pdfs/MFPDrugWarFosterSystemReport.pdf> [<https://perma.cc/SZ3M-DNR4>]. For more on the nonconsensual drug testing of parents and infants, see HOWARD, *supra* note 155, at 35–39, which discusses the only Supreme Court case “involving the prosecution of pregnant people for their actions during pregnancy,” mentions that “[t]he women included in the suit asserted that they had not consented to the[ir] warrantless drug tests,” and notes that all defendants but one in the case were Black; Marc A. Ellsworth, Timothy P. Stevens & Carl T. D’Angio, *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS e1379, e1379 (2010), which reports that race seemed to have been used as a factor when determining whether to screen infants for maternal drug use; and Carol Shetty, Lauren Oshman, Amanda Costa, Victoria Waidley, Emily Madlambayan, Madgean Joassaint, Katharine McCabe, Courtney Townsel, Justine P. Wu, Christopher J. Frank & P. Paul Chandanabhumma, *Structural Racism in Newborn Drug Testing: Perspectives of Health Care and Child Protective Services Professionals*, 22 ANNALS FAM. MED. 271, 271 (2024), which explains that “levels of racism beyond the hospital structure contributed to higher rates of drug testing for Black newborns.”

158. See Hodgson & Abrahams, *supra* note 153, at 476; Abrahams et al., *supra* note 153, at 867; Mackay et al., *supra* note 153, at 1786.

159. Abrahams et al., *supra* note 153, at 866. Mackay et al., *supra* note 153, at 1786.

A. *The Families First Prevention Services Act and the Promise of Reform*

The Families First Prevention Services Act (FFPSA), enacted in 2018, was supposed to “begin a new era for the child welfare system.”¹⁶⁰ It was first introduced in the House of Representatives in 2016, alongside several other pieces of legislation aimed at addressing the opioid overdose crisis.¹⁶¹ Its drafters wanted to redesign the current family policing system to emphasize a preventative model that kept children in their caretakers’ homes while providing the services that caretakers may need to keep children safe.¹⁶² To achieve this, the drafters of FFPSA proposed an amendment to current federal funding structures to provide more funding for “prevention services for children and families that are at risk for entering foster care.”¹⁶³ The law amended Title IV-E of the SSA to allow family policing agencies to use federal funds to support evidence-based prevention efforts for mental health, substance-abuse prevention and treatment services, and in-home parenting skills training for a maximum of twelve months.¹⁶⁴ FFPSA also permits agencies to use funds to pay for residential, family-based substance use treatment providers, which allow children to live with their parents while they undergo treatment for substance use disorder (SUD).¹⁶⁵ This feature of the law was backed by evidence demonstrating that many parents with substance use disorders can safely care for their child without the child being separated from them.¹⁶⁶ It was also supported by studies that have found that

160. Orrin G. Hatch, Ron Wyden, Kevin Brady & Sander M. Levin, *Opinion: A Better Way to Help Vulnerable Children and Families*, WASH. POST (Sept. 5, 2016, 7:02 PM EDT), https://www.washingtonpost.com/opinions/a-better-way-to-help-vulnerable-children-and-families/2016/09/05/904e60b0-7369-11e6-8149-b8d05321db62_story.html [https://perma.cc/5ZCB-79H6].

161. Family First Prevention Services Act of 2016, H.R. 5456, 114th Cong. (as introduced in the House, June 13, 2016). For example, The Child and Family Services Improvement and Innovation Act funded demonstration projects to improve outcomes for children involved with the family policing system purportedly due to parental drug use. Child and Family Services Improvement and Innovation Act, Pub. L. No. 112-34, § 201(1)(D), 125 Stat. 369, 381 (2011).

162. H.R. 5456, § 101.

163. Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283, 283 (2019).

164. H.R. 5456, § 112(a)(2).

165. *Id.*

166. See, e.g., Douglas Dodds, Kayla Koch, Talia Buitrago-Mogollon & Sara Horstmann, *Successful Implementation of the Eat Sleep Console Model of Care for Infants with NAS in a Community Hospital*, 9 HOSP. PEDIATRICS 632, 633 (2019) (describing the Eat Sleep Console (ESC) model of care for infants with Neonatal Abstinence Syndrome (NAS), which involves “improved breastfeeding support, and caregiver-centered education and social support”); Emily A. Bosk, Ruth Paris, Karen E. Hanson, Debra Ruisard & Nancy E. Suchman, *Innovations in Child Welfare Interventions for Caregivers with Substance Use Disorders and Their Children*, 101 CHILD. &

children, particularly infants born exposed to substances, fare worse if removed from their parents' care and custody.¹⁶⁷ Outcomes for both children and parents are significantly better when child protective services and courts use family-centered approaches to substance use treatment instead.¹⁶⁸ These approaches allow children to remain in the care and custody of their parents while the parents receive evidence-based substance use treatment and support.¹⁶⁹

Despite having support from many prominent family policing agencies as well as advocates in the Obama Administration's Office of National Drug Control Policy, FFPSA passed in the House but did not make it out of committee in the Senate when it was first introduced in 2016.¹⁷⁰ FFPSA had bipartisan support, and one of its drafters and primary sponsors was a Republican. Surprisingly, opposition to the bill came from Democrats over where its funding would come from. Democrats opposed using financial incentives previously awarded to

YOUTH SERVS. REV. 99 (2019) (reviewing several effective approaches to address parenting skills in conjunction with substance use disorder treatment).

167. See, e.g., Laura J. Faherty, Sara Heins, Ashley M. Kranz, Stephen W. Patrick & Bradley D. Stein, *Association Between Punitive Policies and Neonatal Abstinence Syndrome Among Medicaid-Insured Infants in Complex Policy Environments*, 117 *ADDICTION* 162, 166 (2021) ("Our findings are consistent with literature showing that punitive policies do not appear to reduce rates of NAS. There is growing evidence that suggests that punitive policies lead women to avoid or delay prenatal care and SUD treatment, thus missing critical opportunities to receive family planning services, access mental health care and prevent or cease use of non-prescribed substances."); see also Kathleen Wobie, Fonda Davis Eyler, Marylou Behnke & Cynthia Wilson Garvan, *To Have and to Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, 43 *PEDIATRIC RSCH.* 234, 234 (1998) (finding that infants separated from their mothers due to cocaine exposure fared far worse in terms of developmental milestone than infants who remained with their mothers).
168. Robin Ghertner & Mir M. Ali, *Treatment for Opioid Use Disorder May Reduce Substantiated Cases of Child Abuse and Neglect*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEPT. OF HEALTH & HUM. SERVS. 1 (Jan. 2021), <https://aspe.hhs.gov/sites/default/files/documents/eod4c22a46208c818353446378e87ba5/Buprenorphine-Treatment-Child-Maltreatment-Cases.pdf> [<https://perma.cc/8NAE-HFLF>] (noting that a particular opioid use disorder treatment appears to reduce certain kinds of child maltreatment). See generally Jennifer J. Carroll, Taleed El-Sabawi & Bayla Ostrach, *The Harms of Punishing Substance Use During Pregnancy*, 98 *INT'L J. DRUG POL'Y* 1, 1 (2021) (arguing that "punitive approaches [in response to perinatal substance use] are counterproductive, harmful, and cruel").
169. See, e.g., *How Can Family-based Residential Treatment Programs Help Reduce Substance Use and Improve Child Welfare Outcomes?*, CASEY FAM. PROGRAMS (Sept. 5, 2019), <https://www.casey.org/family-based-residential-treatment> [<https://perma.cc/686H-CKHG>].
170. 162 CONG. REC. E1003 (DAILY ED. June 28, 2016) (STATEMENT OF REP. VERN BUCHANAN). Despite this opposition, FFPSA passed in the House, yet was not voted on before the congressional session concluded – meaning it would have to be reintroduced in Senate during the following congressional session. *H.R. 5456-Family First Prevention Services Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5456> [<https://perma.cc/9JAS-PQAB>] (tracking bill progress).

the states for supporting adoption services to fund prevention services instead.¹⁷¹

FFPSA was introduced again in the Senate in 2017, where it died in committee.¹⁷² This is a common fate for legislation that does not have enough support among the chairs of committees of the controlling party, which in 2017 was the Republican Party. Most of the provisions of FFPSA were eventually enacted as part of Division E of the Bipartisan Budget Act of 2018.¹⁷³ Congress has increasingly used “riders,” policy changes within budget legislation, mainly because some of the procedural hurdles to legislative enactment are suspended for appropriation bills, making them easier to pass than standalone legislation.¹⁷⁴ The failure of FFPSA to make it out of committee suggests that the law did not have the congressional support that CARA or SUPPORT had. Despite this, FFPSA was enacted in 2018.

B. Implementation Barriers: Congressional Inquiries into the Implementation of FFPSA

FFPSA’s enactment has been flanked by implementation barriers. After the passage of FFPSA, the bill’s sponsors were quick to tout its success and claim credit for the declining number of foster care placements in 2018. In comments in front of Congress on November 20, 2019, Senator Grassley said: “Mr. President, in recent years, the opioid epidemic has resulted in steadily climbing numbers of kids entering foster care. However, in 2018, the number of children in foster care has declined for the first time since 2011. This is evidence that prevention programs are working.”¹⁷⁵ Indeed, the number of children that have entered foster care has decreased from its height of 273,000 in 2016 to 207,000 in 2021.¹⁷⁶

171. See 162 CONG. REC. H4042 (DAILY ED. June 21, 2016) (STATEMENT OF REP. LLOYD DOGGETT) (“Because the Republican-controlled Ways and Means Committee [decided] that vulnerable children can receive federal relief only from money taken from other children or other portions of initiatives within the jurisdiction of the Human Resources Subcommittee. Republicans rejected the use of any additional resources to prevent child abuse . . . This bill makes wholly unjustified and discriminatory cuts to adoption assistance.”).

172. Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. (2017).

173. EMILIE STOLTZFUS, CONG. RSCH. SERV., IN10858, FAMILY FIRST PREVENTION SERVICES ACT (FFPSA) 1 (2018).

174. *A Brief Guide to the Federal Budget and Appropriations Process*, AM. COUNCIL ON EDUC., <https://www.acenet.edu/Policy-Advocacy/Pages/Budget-Appropriations/Brief-Guide-to-Budget-Appropriations.aspx> [<https://perma.cc/2RXC-7N2W>].

175. 116 CONG. REC. S6681 (DAILY ED. Nov. 20, 2019) (STATEMENT OF SEN. CHUCK GRASSLEY).

176. Admin. for Child. & Fams., *Trends in Foster Care and Adoption: FY 2012-2021*, U.S. DEP’T OF HEALTH & HUM. SERVS. 1 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/trends-foster-care-adoption-2012-2021.pdf> [<https://perma.cc/7V57-278E>].

However, the numbers were trending down before the enactment of FFPSA, and FFPSA's funding provisions did not go into effect until October 1, 2018.¹⁷⁷ The fact that the number of children entering foster care declined before FFPSA went into effect suggests that the initial downward trend cannot be attributed directly to FFPSA.

Further, FFPSA has been hard to implement, contributing to only seventeen states and one tribe using FFPSA funds in 2022.¹⁷⁸ And FFPSA has fallen short of furthering actual systems reform for several institutional reasons.

First, FFPSA does not truly prevent removal, as it is not triggered unless there is an *imminent* risk of family policing involvement.¹⁷⁹ Advocates have asked Congress to expand the definition of who is eligible for FFPSA services to any family who is at risk of family policing involvement as opposed to only those who are at *imminent* risk of family policing involvement.¹⁸⁰ FFPSA gives states wide latitude to determine what imminent risk of harm means. The federal government has issued guidance stating it applies to anyone who would likely enter foster care without intervention.¹⁸¹

Second, as other advocates and experts have argued, the underfunding of Social Security Title IV-B Programs, which were created in the 1990s to support family support and family preservation services, is also stymying the systems change FFPSA aims to promote. Title IV-B programs have been leveraged to ensure that social workers visit children in foster care regularly rather than to support families to prevent removal.¹⁸² As the Executive Director of the Utah

177. Admin. for Child. & Fams., *Public Law 115-123, the Family First Prevention Services Act: Implementation of Title IV-E of the Social Security Act*, U.S. DEP'T OF HEALTH & HUM. SERVS. 4 (2018), <https://www.acf.hhs.gov/sites/default/files/documents/cb/pi1807.pdf> [<https://perma.cc/ZX8U-UC92>].

178. Letter from Sen. Ron Wyden, Sen. Mike Crapo, Rep. Darin LaHood & Rep. Danny Davis, U.S. Congress, to Xavier Becerra, Sec'y, U.S. Dep't of Health & Hum. Servs. 2 (Dec. 5, 2023), https://www.finance.senate.gov/imo/media/doc/wyden_crapo_lahood_davis_four_corners_iv_e_clearinghouse_comment_letter.pdf [<https://perma.cc/TL7L-NR8H>].

179. Raymond C. O'Brien, *Child Welfare Requires Adequate Remedial Services*, 92 MISS. L.J. 107, 152-53 (2022).

180. *Testimony of JooYeun Chang, Director of Child Well-Being at DDF, Before the U.S. Senate Committee on Finance*, DORIS DUKE FOUND. (2024), <https://www.dorisduke.org/news--insights/articles/testimony-of-jooyeun-chang-director-of-child-well-being-at-ddf-before-the-u.s.-senate-committee-on-finance> [<https://perma.cc/CGN8-M3WJ>].

181. See Admin. for Child. & Fams., *Public Law 115-123, the Family First Prevention Services Act: Implementation of Title IV-E Plan Requirements*, U.S. DEP'T OF HEALTH & HUM. SERVS. 2 (2018), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1802.pdf> [<https://perma.cc/WEK5-9GJD>]; Mack, *supra* note 16, at 804 (discussing state flexibility in determining the definition of risk of child welfare involvement).

182. *Hearing on Modernizing Child Welfare to Protect Vulnerable Children Before the Subcomm. on Work & Welfare of the H. Comm. on Ways & Means*, 118th Cong. 3 (2023).

Department of Health and Human Services explained, Title IV-B funding offers states tremendous flexibility to meet the needs of families and prevent removal.¹⁸³ During her congressional testimony, the Director gave the example of a family of five that was at risk for child removal.¹⁸⁴ In that particular case, the social worker had identified that the cause of the removal was poverty-related and had used Title IV-B funds to provide short-term resources to pay rent and access medical care.¹⁸⁵ Despite the benefits of these funds, the Director noted that they only make up 2.5% of Utah’s total family policing budget.¹⁸⁶ As Dr. David Sanders, Executive Vice President of Systems Improvement at the Casey Family Programs, explained to the Senate Finance Committee, “Family First focuses on children right at the doorstep of foster care, and Title IV-B provides more flexibility for [s]tates to address issues at an earlier point and strengthen families who might be at risk.”¹⁸⁷

Third, the overall institutional structure financing the family policing system creates tremendous administrative complexity that may prevent states from applying for FFPSA funding. FFPSA funding comes with reporting requirements. State child welfare agency directors have explained that the current family policing system’s federal funding structure – with different federal funding buckets accompanied by their own rigorous reporting requirements – is so complex that even small states have to hire twenty administrative personnel just to manage the federal financing and reporting requirements for all of the various streams of funding for family services.¹⁸⁸ This complexity adds to the administrative burdens of an already-taxed system, and the siloing of budgets and social services makes it difficult for agencies to address upstream causes and prevent removal. In 2024, Senator Ron Wyden blamed the federal government for this administrative complexity, stating as part of a more extensive critique of the federal implementation of FFPSA: “[L]ast year, the federal government spent just \$182 million on prevention services, while we spent over \$4 billion on traditional foster care. Clearly priorities are out of whack. The government can and must do better to get this funding out the door to states that ask for it.”¹⁸⁹ In sum, the

^{183.} *Id.* at 161 (statement of Tracy Gruber, Executive Director, Utah Department of Health and Human Services).

^{184.} *Id.*

^{185.} *Id.*

^{186.} *Id.* at 23.

^{187.} *Id.* at 5 (statement of David Sanders, Executive Vice President, Systems Improvement, Casey Family Programs); *see infra* Part I (reviewing Title IV-B program funding).

^{188.} *Id.* at 66 (statement of Emilie Stoltzfus, Specialist in Social Policy, Congressional Research Service).

^{189.} Press Release, U.S. S. Comm. on Fin., During Foster Care Awareness Month, Wyden Convenes Hearing on Successes, Roadblocks and New Opportunities to Keep Families Together

administrative complexity may be preventing states from accessing FFPSA funds, which would provide an alternative to removal—leaving states to resort to their family policing functions.

Fourth, numerous stakeholders have explained that satisfying the rigorous requirements to receive confirmation that an intervention is “evidence-based,” and thus eligible for FFPSA funds, is time-intensive and costly. They have also described how the approval process is arduous and opaque.¹⁹⁰ Based on communications between Congress and the Secretary of Health and Human Services (HHS), which Congress tasked with implementing the Act, members of Congress have argued that HHS has treated the legislative requirement that FFPSA fund only evidence-based programs as including a need for a rigorous, “academic” evaluation of each program.¹⁹¹ Congress has stated that HHS has frequently made decisions without communicating with study authors.¹⁹²

This has led to HHS approving only a “relatively small number of interventions” for states to choose from.¹⁹³ Even after interventions are cleared as fulfilling the arduous requirements of being “evidence-based,” many of these interventions may not be available in states because they are relatively new.¹⁹⁴ HHS’s narrow interpretation of “evidence-based” means states must invest in the start-up costs of developing interventions from the ground up.¹⁹⁵

Finally, a critique absent from the congressional discourse is that FFPSA leaves the current family policing system intact, including the expansion of reporting requirements for infants exposed to substances in utero. Miriam Mack, Policy Director of the Bronx Defenders’ Family Defense Practice, has written that FFPSA “in no way challenges the fundamental pillars upon which the family regulation system rests.”¹⁹⁶ FFPSA does not fully separate the family policing system from its roots in centuries of institutionalization of racism and classism, reviewed in depth in Part II of this Essay. FFPSA continues to allow states wide latitude in defining child maltreatment, or the imminent risk of child

2 (May 22, 2024), https://www.finance.senate.gov/imo/media/doc/05222024_wyden_statement.pdf [<https://perma.cc/9822-NDYU>].

190. *Hearing on Modernizing Child Welfare to Protect Vulnerable Children*, 118 Cong. 18 (2023) (statement of Tracy Gruber, Executive Director, Utah Department of Health and Human Services).

191. Letter from Sen. Ron Wyden, Sen. Mike Crapo, Rep. Darin LaHood & Rep. Danny Davis, U.S. Congress, to Xavier Becerra, Sec’y, U.S. Dep’t Health & Hum. Servs., *supra* note 178, at 2.

192. *Id.* at 2.

193. *Id.*

194. *Id.*

195. See, e.g., O’Brien, *supra* note 179, at 152-54; Caitlyn Garcia, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 FAM. L.Q. 27, 30 (2019).

196. Mack, *supra* note 16, at 770.

maltreatment, as including parental drug use alone – rather than requiring states to demonstrate the risk of actual harm to the child resulting from that substance use.¹⁹⁷ Some states, like Colorado, have explicitly stated in their substance legalization laws that possession or use of certain substances does not constitute child abuse or neglect unless it threatens the health or welfare of the child.¹⁹⁸ Other states, like Michigan, have issued regulatory guidance stating that parental substance use alone does not meet the definition of child maltreatment.¹⁹⁹ Yet despite these positive trends in some states, state legislatures continue to propose laws that would add parental substance use to definitions of child maltreatment.²⁰⁰

Moreover, agencies continue to remove children for parental drug use, often when it occurs in utero. FFPSA does nothing to address the punitive responses adopted by many states in addressing perinatal or maternal substance use. This continues despite evidence that these types of policies do not address either the underlying substance use or the potential risk of harm to the child – and could even make the problem worse.²⁰¹

While FFPSA is an important step in permitting states to engage in family preservation activities for parents who use substances, it falls short of addressing the centuries of institutionalization of family policing and surveillance, which continue to shape the practices of local agencies responding to complaints of

197. Gabriella Mercedes Mills, *Prenatal and Maternal Substance Abuse in America: Developing a Framework for the Future of Recovering Mothers*, 22 HOUS. J. HEALTH L. & POL'Y 45-46 (2023).

198. COLO. REV. STAT. §§ 18-18-434, 19-3-103 (2024); see also MD. CODE ANN., CTS. & JUD. PROC. § 3-801(t)(2) (West 2024) (providing that, in Maryland, parental use of marijuana does not qualify as neglect unless other criteria are met).

199. MICH. DEP'T OF HEALTH & HUM. SERVS., PSM 716-7, CHILD PROTECTIVE SERVICES MANUAL: CASES INVOLVING SUBSTANCES 1 (Aug. 1, 2023), <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/716-7.pdf> [<https://perma.cc/225B-AVRH>].

200. Laura Leslie, *Bill to Criminalize Pregnant Drinkers and Drug Users Moves in NC House*, WRAL NEWS (June 27, 2024), <https://www.wral.com/story/bill-to-criminalize-pregnant-drinkers-and-drug-users-moves-in-nc-house/21500912> [<https://perma.cc/E9U5-CA3J>]; Stephen Christian & Rob Geen, *Bipartisanship Across the Nation: A Review of State Child Welfare Legislation*, BIPARTISAN POL'Y CTR. (Dec. 19, 2023), <https://bipartisanpolicy.org/report/child-welfare-legislation-national-review> [<https://perma.cc/8WBV-MHB2>] (finding that legislators in multiple states introduced bills aimed at expanding the definition of neglect to include prenatal substance exposure among other conditions).

201. Mills, *supra* note 197, at 45-46. Mary Peeler et al., *Racial and Ethnic Disparities in Maternal and Infant Outcomes Among Opioid-Exposed Mother-Infant Dyads in Massachusetts (2017-2019)*, 110 AM. J. PUB. HEALTH 1828, 1833 (2020) (noting that “punitive child welfare reporting policies and criminalization of drug use in pregnancy, which historically disproportionately affect families of color, may be a powerful motivator for women to try to hide drug use rather than access treatment”).

parental substance use. To actualize the goals of the drafters of FFPSA, we must interrogate the current system.

III. THE PATH FORWARD

In this Essay, we have outlined in detail both the deeply embedded structural problems with the current family policing model, including its longstanding focus on punishing parents deemed “undeserving,” and how federal legislation has further institutionalized this punitive approach in addressing problems that may be exacerbated by parental substance use. While FFPSA funding allocations for prevention services and substance use treatment that prioritize keeping children with their parents are commendable, the implementation barriers discussed above bolster the claims of scholars, advocates, and impacted families who are calling for the abolition of family policing rather than its continued reform.²⁰² In envisioning a path forward, we join and amplify that chorus.

Family policing is not built to help families, particularly those with parents who use substances.²⁰³ As abolitionist lawyer and organizer Andrea J. Ritchie writes in *Practicing New Worlds: Abolition and Emergent Strategies*, “We can’t continue to organize in ways that replicate and legitimize the systems we are seeking to dismantle.”²⁰⁴ Thus, she explains, abolition is as much about envisioning and creating the world we wish to live in as it is about dismantling oppressive systems.²⁰⁵ Renowned activist and scholar Angela Y. Davis has explained that abolition “is not only, or not even primarily, about . . . a negative process of tearing down, but it is also about building up, about creating new institutions.”²⁰⁶ Accordingly, the remainder of this Essay is devoted to laying out a set of principled “non-reformist reforms”²⁰⁷ that should guide future policymaking to provide

202. See, e.g., ROBERTS, *supra* note 5; SPINAK, *supra* note 54; Roxanna Asgarian, *The Case for Child Welfare Abolition*, IN THESE TIMES (Oct. 3, 2023), <https://inthesetimes.com/article/child-welfare-abolition-cps-reform-family-separation> [https://perma.cc/CEY7-JYVS]; Trivedi, *supra* note 124, at 334-37.

203. See Sankaran et al., *supra* note 12, at 1164-71 (describing the harms of child removal for both parents and children).

204. ANDREA J. RITCHIE, *PRACTICING NEW WORLDS: ABOLITION AND EMERGENT STRATEGIES* 4-6 (2023).

205. *Id.*

206. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 73-74 (2005).

207. See ROBERTS, *supra* note 5, at 281-84, 289-303; see also Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507-11 (2023) (mapping the history of nonreformist reforms and the movement toward this conceptualization in struggles for, among others, abolition and decriminalization).

support and care to families with parents who use substances, rather than surveil and punish those families. Non-reformist reforms, as abolitionist scholar Ruth Wilson Gilmore has described, are “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization[.]”²⁰⁸ These suggestions are not meant to be exhaustive, in part because, in the practice of abolitionism, the families most impacted by family policing must lead the way in designing the future path.

A. Families Are Calling for Abolition: Listen to Them!

A burgeoning movement of families impacted by the family policing system is calling for a radical reimagining of safety for families – namely, through the abolition of the family policing system.²⁰⁹ These families, including parents and (former) youth who have lived experience with the family policing system, are calling attention to the many harms perpetrated by the system, particularly for Black and Indigenous families.²¹⁰ Although the family policing system is premised on the narrative that state intervention is benevolent and necessary for the care and protection of children, these families’ experiences underscore the many

208. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007).

209. Erin Miles Cloud & Lisa Sangoi, *Fulfilling the Promise of Reproductive Justice: Abolition and the Family Regulation System*, *ABOLITIONIST*, Summer 2023, at 6, 6-7, <https://criticalresistance.org/abolitionist/issue-39-reproductive-justice> [<https://perma.cc/UG42-UA5T>]; Michael Fitzgerald, *Rising Voices for ‘Family Power’ Seek to Abolish the Child Welfare System*, *IMPRINT* (July 8, 2020), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141> [<https://perma.cc/V23R-AZWU>]; Leyda M. Garcia-Greenawalt, *Moral Injury: The Undiagnosed Epidemic Spread Through the Family Policing System and a Call for Abolition*, 43 *CHILD. LEGAL RTS. J.* 36, 45-46 (2023); Rise Staff, *Centering Parent Leadership in the Movement to Abolish Family Policing*, 12 *COLUM. J. RACE & L.* 1, 22-23 (2022); see also *Audio Nuggets*, *MINING FOR GOLD*, <https://safecampaudio.org/show/audio-nuggets> [<https://perma.cc/GZJ5-Q8Q5>] (featuring content devoted to Black liberation and abolitionism, with a particular focus on family policing abolition); *JMAC FOR FAMILIES*, <https://jmacforfamilies.org> [<https://perma.cc/9F2Z-PQSL>] (describing the organization’s JMAC For Families’ work to “dismantle the family policing system”); *MOVEMENT FOR FAM. POWER*, <https://www.movementforfamilypower.org> [<https://perma.cc/9S65-MMNE>] (describing a national family policing movement hub and incubator); *UPEND MOVEMENT*, <https://upendmovement.org> [<https://perma.cc/C432-MJ5T>] (describing the organization’s mission of building “a society where children and families are strengthened and supported, not surveilled and separated).

210. While the family-led movement to abolish family policing has great depth and breadth, some examples of such organizing can be found on the following organizations’ websites: *MOVEMENT FOR FAM. POWER*, <https://www.movementforfamilypower.org> [<https://perma.cc/LW2Q-4A3S>]; *REPEAL ASFA*, <https://www.repealasa.org> [<https://perma.cc/X3AE-4JGF>]; and *REPEAL CAPTA*, <https://www.repealcapta.org> [<https://perma.cc/J946-G7L6>].

myths that are woven into the law, policy, and practice of family policing.²¹¹ Not only must states listen to families' narratives, but the very families most impacted by family policing must help design new approaches that support families with parents who use substances. Some of the approaches to community care already identified by families most impacted are named below.

B. Decouple Access to Services from Family Policing and End Mandatory Reporting of Substance Use During Pregnancy

As discussed above, the current policy framework—as articulated by FFPSA and related federal and state family policing law—requires parents who use substances to engage, or risk engagement with, the family policing system to access help and treatment. Doing so comes at significant risk of mandatory reporting and family separation, and as a result, disincentivizes seeking help and care.²¹² Further, mandated reporting requirements for suspicions of infant exposure to substances in utero disincentivize pregnant persons who use substances from seeking both treatment for SUD and prenatal care.²¹³ Parents who use substances need a way to access care that does not result in the punishment inherent in the family policing system. To meet that need, the state should provide parents with ways of accessing medical care, SUD treatment, and harm reduction services that do not automatically trigger mandatory reporting and possible family separation. For example, the Family-Based Recovery model includes “[i]n-home treatment that provides concurrent psychotherapy, substance use

211. See Katz & Lee, *supra* note 28, at 792–93.

212. Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 932–34 (2014); Gruber, *supra* note 105, at 9; Carly Loughran, *Maternal Substance Use: How the MLP Model Can Address Issues Surrounding Mandatory Reporting Laws*, 30 GEO. J. ON POVERTY L. & POL’Y 115, 120–24 (2022).

213. Davida M. Schiff et al., “You Have to Take This Medication, but then You Get Punished for Taking It:” *Lack of Agency, Choice, and Fear of Medications to Treat Opioid Use Disorder Across the Perinatal Period*, J. SUBSTANCE ABUSE TREATMENT, Aug. 2022, at 1, 5–7; Erin C. Work et al., *Prescribed and Penalized: The Detrimental Impact of Mandated Reporting for Prenatal Utilization of Medication for Opioid Use Disorder*, 27 MATERNAL & CHILD HEALTH J. 104, 109–10 (2023); Anna E. Austin, Rebecca B. Naumann & Elizabeth Simmons, *Association of State Child Abuse Policies and Mandated Reporting Policies with Prenatal and Postpartum Care Among Women Who Engaged in Substance Use During Pregnancy*, 176 JAMA PEDIATRICS 1123, 1127–28 (2022); Laura J. Faherty, Ashley M. Kranz, Joshua Russell-Fritch, Stephen W. Patrick, Jonathan Cantor & Bradley D. Stein, *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, JAMA NETWORK OPEN, Nov. 13, 2019, at 1, 7–8, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304> [<https://perma.cc/PS8R-VP4L>].

treatment and parent-child dyadic therapy.”²¹⁴ Models like these offer evidence-based and effective alternatives to family separation.

Research shows that both parents who use substances and their children thrive when they are able to stay together while the parent receives treatment for their substance use.²¹⁵ Rather than funneling federal money to the states via the family policing system and conditioning access to treatment on a finding of imminent risk of harm, funding should go to flexible, evidence-based treatment that prioritizes family stability and integrity and addresses the upstream causes of substance use and child maltreatment.

Ending mandatory reporting would make a significant difference in substance-using parents’ ability to access treatment. Since CAPTA’s inception, its requirements – especially its mandatory reporting provisions – have been a primary driver of family separation. Many have called for the end of this practice.²¹⁶ As scholars and advocates have documented, because of the structural racism embedded in family policing, Black and Indigenous families are more likely to be reported and more likely to be separated as a result of family policing intervention.²¹⁷ The racialized enforcement of the war on drugs further compounds these racial disparities. As explained in Part II, mandatory reporting can deter parents from accessing help and treatment.²¹⁸ Ending mandatory reporting would focus service providers’ efforts on providing assistance and care to

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214. Karen E. Hanson, Elizabeth R. Duryea, Mary Painter, Jeffrey J. Vanderploeg & Dale H. Saul, *Family-Based Recovery: An Innovative Collaboration Between Community Mental Health Agencies and Child Protective Services to Treat Families Impacted by Parental Substance Use*, 28 CHILD ABUSE REV. 69, 69 (2019).
215. Alison Niccols, Karen Milligan, Wendy Sword, Lehana Thabane, Joanna Henderson & Ainsley Smith, *Integrated Programs for Mothers with Substance Abuse Issues: A Systematic Review of Studies Reporting on Parenting Outcomes*, 9 HARM REDUCTION J., Mar. 19, 2012, at 14, 14. Karen E. Hanson et al., *Family-Based Recovery: An Innovative In-Home Substance Abuse Treatment Model for Families with Young Children*, 94 CHILD WELFARE 161, 161 (2015).
216. A coalition of organizations have called for an end to mandated reporting via the Repeal CAPTA campaign. REPEAL CAPTA, <https://www.repealcapta.org> [<https://perma.cc/BS4U-HHGB>].
217. Shereen White & Stephanie Marie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let’s Talk About It that Way*, AM. BAR ASS’N (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> [<https://perma.cc/6388-DHKN>]; see also ROBERTS, *supra* note 5, at 23 (“Black and Native children are impacted the most – they are more than twice as likely as white children to experience the termination of both parents’ rights.”); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 14-20 (2002) (detailing the disproportionate numbers of Black children separated from their parents).
218. Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL’Y&L. 293, 340-42 (2016).

families, rather than acting as agents of family policing surveillance.²¹⁹ As Joyce McMillan, who founded the New York City-based organization JMac for Families, has argued, we should have mandated support instead of mandatory reporting.²²⁰ Such an approach would permit parents who use substances to seek care, treatment, and other support without the very real risk of family policing involvement and family separation.

C. Prohibit the Use of Federal Funds to Pay for Removals and Neglect Findings Based Solely on Substance Use

As noted above, CAPTA creates a floor for states to define neglect, but it permits states to drastically expand their definitions of neglect—which they have done.²²¹ Just as poverty should not be the basis for a finding of neglect, so too substance use should not be a per se basis for a finding of neglect. Most parents who use substances can safely care for their children. Congress should amend federal laws to reflect that reality. As previously discussed, the availability of federal funds to pay for foster care services dramatically shaped state behaviors in terms of prioritizing removal and foster-care placement as the appropriate response. By amending CAPTA to exclude federal funding for removals and foster care in cases with findings of neglect based solely on evidence of parental substance use, Congress can incentivize states to change their definitions of child maltreatment without infringing on states' police powers.

CONCLUSION

As detailed throughout this Essay, there are numerous institutional and organizational barriers embedded in the family policing system that prevent it from being a source of meaningful help or care to families with parents who use substances. Reform efforts cannot overcome the impact of these institutional and organizational barriers. The failure of FFPSA and other piecemeal reforms

219. See, e.g., Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 507-16 (2021); Gruber, *supra* note 105, at 8-11.

220. JMACforFamilies was founded by Joyce McMillan who coined the term “mandated support.” *Mandated Support*, JMACFORFAMILIES, <https://jmacforfamilies.org/mandated-supporting> [<https://perma.cc/8MGG-6V74>]; see also JMACforFamilies, *What Is Mandatory Supporting?*, YOUTUBE (Aug. 24, 2023), <https://www.youtube.com/watch?v=r7wgSoIEC24> [<https://perma.cc/V2JQ-8X2Z>] (featuring individuals impacted by family policing explaining the harms of mandated reporting, particularly on Black communities, and the need for a different system of providing families support).

221. See *supra* note 7 and accompanying text.

demonstrates the family policing system's inability to shed its institutional commitment to the punishment and surveillance of families.

The current family policing system does not work. Rather than institutionalizing existing approaches to substance use within the family policing system, we must pursue a new, family-centered approach that centers the lived experience of parents who use substances and is rooted in evidence – not in stigmatizing narratives and a desire to moralize and control. If we do not change our approach, we will continue to witness the impacts of an ineffective, costly, and inefficient system of family policing that harms families more than it helps them.

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