

# COLUMBIA JOURNAL OF RACE AND LAW

---

VOL. 11

JULY 2021

NO. 3

---

## ARTICLE

### THE WHITE SUPREMACY HYDRA: HOW THE FAMILY FIRST PREVENTION SERVICES ACT REIFIES PATHOLOGY, CONTROL, AND PUNISHMENT IN THE FAMILY REGULATION SYSTEM

Miriam Mack\*

*Fundamentally, the so-called “child welfare system”—more appropriately named, the family regulation system—is a policing system rooted in white supremacist ideologies and techniques. From its earliest iteration, the family regulation system has functioned to pathologize, control, and punish the families entrapped in its web, most especially Black families. Nevertheless, among many, the myth persists that the family regulation system is one of child protection and family support. This is especially true when discussing the Family First Prevention Services Act of 2018, which—for the first time since the establishment of the modern family regulation system—opens up federal funding streams previously reserved for the removal of children to the foster system to provide prevention services for families in which children have not yet been removed to the foster system. While the Act is a course change in federal family regulation policy, this Article traces how it leaves*

---

\* Miriam Mack is Policy Counsel to the Family Defense Practice at The Bronx Defenders. This Article was prepared in my personal capacity. The opinions expressed are my own and do not reflect the view of The Bronx Defenders. This Article would not be possible without, and humbly builds upon the decades of work, analysis, reflection, and thinking of folks who have been working to resist the family regulation system. I extend my deepest gratitude to those comrades and colleagues who have supported, guided, and shaped my thinking and given incredibly invaluable feedback on this article including Erin Miles Cloud, Megan Eardley, Michele Hall, Emma S. Ketteringham, Joyce McMillan, Clara Presler, Lisa Sangoi, and so many more.

---

*undisturbed the pathology, control, and  
punishment central to the policies that preceded it.*

---

I. Introduction.....	770
II. Pathology, Control, And Punishment in Federal Family Regulation System Policy.....	771
A. Early Federal Family Regulation System Policy .....	771
B. Modern Federal Family Regulation System Policy...774	
1. 1960s & 1970s Amendments to the Social Security Act .....	774
2. The Adoption Assistance and Child Welfare Act of 1980 .....	775
3. The Adoption and Safe Families Act of 1997 .....	776
C. Regulation Through Family Separation .....	778
III. The Family First Prevention Services Act of 2018: A Shift in Federal Family Regulation System Policy .....	783
A. Impetus for the Family First Act .....	785
B. Prevention as the Solution.....	788
IV. The Family First Act Leaves Firmly in Place the Family Regulation System’s Investment in Pathologizing, Controlling, And Punishing Black Mothers .....	791
A. The Family First Act: A Continued Myopic Focus on Perceived “Parental Defects” .....	791
B. The Family First Act: A Continuation of The Family Regulation System Tradition of Expansive Control .....	797
C. The Family First Act Exists in an Ecosystem of Punishment.....	804
V. Recommendations .....	805
VI. Conclusion.....	809

## I. INTRODUCTION

Some frame the family regulation system not as a policing system, but rather as a gentler, non-punitive government intervention aimed at protecting children and supporting families. This framing is especially true when discussing the Family First Prevention Services Act of 2018. This act has been lauded by some as a reordering of the family regulation system through a more supportive, family-centered approach. Though undoubtedly the Family First Prevention Services Act is a shift in federal family regulation system policy, the Act is a recalibration of the old and familiar family regulation system, not a transformation. The Act keeps intact, and indeed reifies, the fundamental pillars of the family regulation system: pathology, control, and punishment, all of which uphold and further white supremacy. It leaves unchallenged the underlying structure of the family regulation system which works to pathologize Black parents, mostly mothers, and which allows Black communities and homes to be controlled and occupied by family regulation system workers. Despite tinkering at the system's edges, the Family First Act reinforces the notion that Black children remaining in their homes with their parents necessitates the watchful eye of family regulation system agents.

This article traces how the Family First Act leaves firmly in place the white supremacist roots of the family regulation system. Part I of this article explains how federal family regulation system policy is rooted in white supremacist ideologies and techniques, namely pathology, control, and punishment of Black mothers. Part II of this article analyzes how the Family First Act changes the family regulation system's mechanisms of action from removal to the foster system to in-home services, but in no way challenges the fundamental pillars upon which the family regulation system rests. And drawing from the prison abolition movement, Part III of this article humbly suggests some organizing questions and principles that can help guide us in dismantling the family regulation system and investing in self-determination, autonomy, care, and support.

II. PATHOLOGY, CONTROL, AND  
PUNISHMENT IN FEDERAL FAMILY  
REGULATION SYSTEM POLICY

Like the criminal legal system, the family regulation system is largely state-run. As such, no two states' family regulation systems are identical. That being said, state family regulation systems have certain unifying characteristics driven in part by federal policy, which this article refers to as "federal family regulation system policy." To understand federal family regulation system policy, we must look to where the federal government allocates federal monies to support state family regulation system services, programs, and costs.

Virtually all federal spending in support of state family regulation systems derives from the Social Security Act.<sup>1</sup> Federal dollars allocated to state family regulation system services, programs, and costs come from a variety of different funding streams—including Titles IV-B and IV-E of the Social Security Act, Temporary Assistance for Needy Families (TANF), Social Services Block Grant, Medicaid, and other funds.<sup>2</sup>

A. Early Federal Family Regulation System Policy

In its early iterations, federal family regulation system policy was bound up with federal anti-poverty programs imbedded in Social Security Act of 1935.<sup>3</sup> Building from states' "mother's pension" programs, Title IV-B of the Social Security Act of 1935 established the Aid to Dependent Children program (ACD), a means-tested entitlement program provided to certain low-income mothers who lacked financial support of the fathers of their children.<sup>4</sup> As noted by legal scholar Dorothy Roberts, an authority on the family regulation system, a guiding principle of federal family regulation system policy during the Progressive Era was that government funded financial support for single mothers living in poverty would help minimize the need for

---

<sup>1</sup> ELIZABETH JORDAN & DANA DEAN CONNELLY, AN INTRODUCTION TO CHILD WELFARE FUNDING, AND HOW STATES USE IT, CHILD TRENDS 2 (2016), <https://www.childtrends.org/wp-content/uploads/2016/01/2016-01IntroStateChildWelfareFunding.pdf>.

<sup>2</sup> *Id.* at 2–3.

<sup>3</sup> DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 173–200 (2002) [hereinafter ROBERTS, SHATTERS BONDS].

<sup>4</sup> JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 35 (2005).

children to be removed from their families and placed in orphanages and asylums.<sup>5</sup>

A second guiding principle, in tension with the first, was the notion that providing financial aid to those in need risked encouraging “dependency, moral degeneracy, and family breakdown.”<sup>6</sup> Therefore—despite providing federal family assistance for the first time in American history—federal anti-poverty programs and child welfare policy were bound up with the moral construction of poverty: “demarcating the ‘undeserving poor’ and perpetuating the myth of racial inferiority.”<sup>7</sup>

The ACD program functioned not just as an anti-poverty program focused on child welfare, but also as a means of social control of the “deserving” poor, a category that was largely restricted to poor, widowed, white women.<sup>8</sup> In distributing ACD aid, states were given wide discretion to define the criteria used to determine aid eligibility requirements.<sup>9</sup> With this discretion, jurisdictions imposed “suitable home” requirements to ensure that the women to whom funds were provided were “conform[ing]

---

<sup>5</sup> ROBERTS, SHATTERED BONDS, *supra* note 3, at 175.

<sup>6</sup> *Id.* Early federal family regulation system policy was influenced by nineteenth and early twentieth century middle-class reformers, who were deeply concerned with “the behavior of the ‘dangerous classes’ (i.e. urban poor immigrant groups). Among these reformers, the urban poor immigrant groups were thought to be criminal, vicious, indolent, and intemperate,” and thus beyond redemption. TINA LEE, *CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM* 19 (2016). Many reformers believed that children of the urban poor immigrant groups needed to be saved from their parents and formed private organizations to carry out these forced separations. Some states also passed laws allowing children to be removed from their parents to asylums and orphanages. *See id.* at 20–22. Private organization, such as Children’s Aid Society, a foster agency that remains in existence today, was among these middle-class private institutions that coercively removed children from poor parents and sent them to work for white Protestant to families in the Western United States on “Orphan Trains.” *See id.*

<sup>7</sup> *See* MOVEMENT FOR FAMILY POWER ET AL., *WHATEVER THEY DO, I’M HER COMFORT, I’M HER PROTECTOR: HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR* 24 (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277> [<https://perma.cc/8BTJ-48EM>]. For a comprehensive analysis of the moral construction of poverty, see KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 37–64 (2017).

<sup>8</sup> *See* ROBERTS, SHATTERED BONDS, *supra* note 3, at 175. *See also* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 24.

<sup>9</sup> Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, *FUTURE CHILD*, 28, 29–30, (1997) [<https://perma.cc/4EHG-QTHY>].

to ‘American’ family standards.”<sup>10</sup> Examples of “unsuitable homes” included homes where a child was born to an unwed mother, where a caretaker engaged in “promiscuous conduct,” and where a child was being neglected, among other things.<sup>11</sup> With this discretion, many jurisdictions used “suitable home” requirements to preclude Black women from accessing the aid almost entirely.<sup>12</sup> Also excluded from ACD aid were Indigenous communities, who had long since been subjected to a federal policy of forced family separation and forced assimilation to white society and culture under the Indian Civilization Act.<sup>13</sup>

The Social Security Act of 1935 authorized a small allotment of funds to states annually to support “child welfare services.”<sup>14</sup> The purpose of the allotment was to enable:

[T]he United States, through the Children’s Bureau, to cooperate with State public welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, public [child] welfare services . . . for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent.<sup>15</sup>

In total, the Social Security Act authorized \$1.5 million annually “for use by cooperating state public-welfare agencies on the basis

---

<sup>10</sup> ROBERTS, SHATTERED BONDS, *supra* note 3, at 175. *See also* Blank & Blum, *supra* note 9 at 29–30.

<sup>11</sup> *See* LAURA MEYER & IFE FLOYD, CTR. ON BUDGET & POL’Y PRIORITIES, CASH ASSISTANCE SHOULD REACH MILLIONS MORE FAMILIES TO LESSEN HARDSHIP: FAMILIES’ ACCESS LIMITED BY POLICIES ROOTED IN RACISM 8–9 (2020), <https://www.cbpp.org/sites/default/files/atoms/files/6-16-15tanf.pdf> [<https://perma.cc/257L-XTQR>]; *The “Suitable-Home” Requirement*, 35 SOC. SCIENCE REV. 203, 203–204 (1961).

<sup>12</sup> *See* MEYER & FLOYD, *supra* note 11, at 8–9.

<sup>13</sup> *See* Heron Greenesmith, *Best Interests: How Child Welfare Services as a Tool of White Supremacy*, POL. RSCH. ASSOCS. (Nov. 26, 2019), <https://www.politicalresearch.org/2019/11/26/best-interests-how-child-welfare-serves-tool-white-supremacy> [<https://perma.cc/N4PZ-FW8V>].

<sup>14</sup> REICH, *supra* note 4, at 35.

<sup>15</sup> H. REP., COMM. ON WAYS & MEANS, GREEN BOOK, CHILD WELFARE LEGISLATIVE HISTORY, (2012) [hereinafter H. REP. GREEN BOOK LEG. HIST.], <https://greenbook-waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/legislative-history> [<https://perma.cc/D944-LJZQ>].

of plans developed jointly by the State agency and the Children's Bureau."<sup>16</sup>

#### B. Modern Federal Family Regulation Policy

While the early iterations of federal family regulation policy largely excluded Black families, successes of the sustained resistance of the Civil Rights Movement resulted in greater access to public assistance for Black Families.<sup>17</sup> With these wins came a parallel shift toward the federal government increasingly directing federal dollars to support punitive state interventions, namely the removal to the foster system. As more Black families became eligible for federal aid programs, the moral construction of poverty became an even larger part of the narrative of the family regulation system.<sup>18</sup> In turn, the commitment to government funded anti-poverty measures, such as ACD aid and the maintenance of public goods, diminished.<sup>19</sup>

So too did federal family regulation policy recalibrate itself by ushering in a string of amendments to the Social Security Act and new laws that allocated more federal dollars toward growing states' family regulation system infrastructures and the costs and programs associated with maintaining children placed in the foster system.

##### 1. 1960s & 1970s Amendments to the Social Security Act

The 1960 amendments to the Social Security Act ushered in the modern-day foster system and increased family regulation system funding to \$25 million.<sup>20</sup> A year later, the 1961 amendments provided that states could seek, on a temporary basis, federal reimbursement for part of the costs associated with placing and maintaining children in the foster system.<sup>21</sup> Thereafter, in 1974 the Child Abuse Prevention Treatment Act of 1974 (CAPTA) was enacted to provide financial assistance to states to establish a system for receiving and responding to allegations of child maltreatment, to support states in the

---

<sup>16</sup> Social Security Act, 42 U.S.C. § 521(a) (1935).

<sup>17</sup> See Greenesmith, *supra* note 13. See also MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 24.

<sup>18</sup> MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 27–28.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> H. REP. GREEN BOOK LEG. HIST., *supra* note 15.

“prevention[,] assessment, investigation, prosecution, and treatment” of child maltreatment.<sup>22</sup>

2. The Adoption Assistance and Child Welfare Act of 1980

Then, in 1980, the Adoption Assistance and Child Welfare Act (AACWA) was passed into law and established a federal adoption assistance program as well as “strengthen[ed] the program of foster care assistance for needy and dependent children.”<sup>23</sup> AACWA reflects yet another important recalibration of federal family regulation policy to ensure its continued existence.

With the number of children being separated from their families and removed to the foster system increasing, beginning in the 1970s,<sup>24</sup> Congress faced pressure to recognize and address the ways that federal family regulation policy incentivized family separation and the foster system.<sup>25</sup> To help disrupt the expansion of the foster system nationwide, AACWA introduced a “reasonable efforts” requirement and mandated additional case

---

<sup>22</sup> CHILD.’ BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf> [https://perma.cc/TYV2-TA5N]. Since 1974, CAPTA has been amended numerous times in the 1990s and the 2000s, building out the federal governments expansive financial support for state family regulation systems investigation and prosecution infrastructures and foster systems. See CHILD.’ BUREAU, MAJOR FEDERAL LEGISLATION Concerned with Child Protection, Child Welfare and Adoption (2019) [hereinafter CHILD.’ BUREAU, MAJOR LEGISLATION], <https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf> [https://perma.cc/M9FF-FHTQ].

<sup>23</sup> CHILD.’ BUREAU, MAJOR LEGISLATION, *supra* note 22.

<sup>24</sup> This increase in children being removed to the foster system was due in part to Dr. C. Harry Kempe’s theorization of “the battered-child syndrome” in 1962. In response the introduction of this “syndrome,” between 1963 and 1967, all 50 states had passed laws establishing the creation of child abuse “hotlines” and other systems that allowed people to report suspected child maltreatment. See Lee, *supra* note 6 at 28. Moreover, Roberts points out that the medicalization of child maltreatment served another purpose. Failing to gain bipartisan support for family regulation legislation focused on poverty-related harms to children, instead, Congress promoted “a medical model of child abuse—a distinguishable pathological agent attacking the individual or family that could be treated in a prescribed manner and would disappear.” See ROBERTS, SHATTERED BONDS, *supra* note 3, at 14.

<sup>25</sup> See ROBERTS, SHATTERED BONDS, *supra* note 3, at 105.

planning requirements.<sup>26</sup> Yet the AACWA recalibration, like the recalibrations that preceded it, was not a repudiation of family separation or the foster system. Rather, it firmly embraced the foster system by establishing “[f]unding for foster care and adoption assistance,” as a “permanent entitlement for assistance to eligible children” under the newly established Title IV-E of the Social Security Act.<sup>27</sup> And if the direction of federal dollars reflects federal policy priorities, then AACWA made clear the centrality of the foster system as a means to address issues faced by struggling families. For example, between 1981 and 1990, federal spending on family regulation system services went from \$0.5 billion to \$1.6 billion.<sup>28</sup> The vast majority of these dollars were allocated to support the programs and costs associated with children placed in the foster system rather than on family preservation.<sup>29</sup>

### 3. The Adoption and Safe Families Act of 1997

The next significant change to federal family regulation funding policy came with the Adoption and Safe Families Act (ASFA) in 1997. Enacted on the heels of the so-called “crack epidemic” of the 1980s and 1990s, and faced with massive increase in the number of children removed from their families to state foster systems—40% of which were Black children—federal family regulation policy doubled down on its reliance on family separation as the policy solution.<sup>30</sup> Under ASFA, federal

---

<sup>26</sup> *See Id.* The AACWA made the receipt of federal funds contingent on state family regulation system agencies making “reasonable efforts” to prevent a child’s placement in the foster system, except under circumstances where doing so would not be in the child’s best interest. *See* H. REP. GREEN BOOK LEG. HIST., *supra* note 15. Neither the AACWA, nor later amendments to Title IV-E of the Social Security Act define “reasonable efforts.” According to agency guidance, this was done intentionally, as defining “reasonable efforts” would “be a direct contradiction of the intent of the law,” which calls for a case-by-case determination of whether “reasonable efforts” were made. *See* U.S. DEP’T SOC. SERVS., ADMIN. FOR CHILD. & FAMS., CHILD WELFARE POLICY MANUAL, 8.3C.4 TITLE IV-E, FOSTER CARE MAINTENANCE PAYMENTS PROGRAM, STATE PLAN/PROCEDURAL REQUIREMENTS, REASONABLE EFFORTS, [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=59](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59) [<https://perma.cc/KBB2-TX9M>] (last visited Mar. 17, 2021).

<sup>27</sup> *See* H. REP. GREEN BOOK LEG. HIST., *supra* note 15.

<sup>28</sup> ROBERTS, SHATTERED BONDS, *supra* note 3, at 142.

<sup>29</sup> *Id.* at 175.

<sup>30</sup> MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 16, 26. For an extensive discussion how both the news media and lawmakers racialized,

family regulation system spending emphasized permanency for children placed in the foster system by way of adoption over family reunification.<sup>31</sup> Specifically, ASFA required state family regulation system authorities to seek to terminate the rights of parents whose children have been in the foster system for 15 of 22 months.<sup>32</sup> In other words, ASFA introduced time limits on the reunification services and activities provided to families where children were removed from their home to the foster system to just 15 months.<sup>33</sup> ASFA also made incentive payments available to states that “increased adoptions from foster care, relative to a baseline number of adoptions.”<sup>34</sup> As an incentive to “fast track” children to adoption, states were eligible to receive \$4,000 for each child adopted out of the foster system over the established baseline for that state.<sup>35</sup> Beyond underwriting more expedient terminations of parental rights and adoptions, the federal government also placed limitations on the already vague “reasonable efforts” requirements.<sup>36</sup>

---

gendered, and pathologized the use of crack cocaine, and devastating impact that the so called “crack epidemic” and the drug war had on the family regulation system, see also ROBERTS, SHATTERED BONDS, *supra* note 3; Nancy D. Campbell, *Regulating “Maternal Instinct”: Governing Mentalities of Late Twentieth-Century U.S. Illicit Drug Policy*, 24 SIGNS: J. WOMEN IN CULTURE AND SOC’Y 895, 895–97 (1999); LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997).

<sup>31</sup> See Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68, 84 (2017).

<sup>32</sup> See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (absent certain exceptions, ASFA mandates, “in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the Child’s parents . . . and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption).

<sup>33</sup> Among the services subject to the 15-month time limit was mental health services, inpatient substance abuse treatment programs, domestic violence assistance programs, and family and/or child therapeutic services, and transportation services provided for travel to and from family regulation system services. See CHILD.’ BUREAU, MAJOR LEGISLATION, *supra* note 22.

<sup>34</sup> Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8, 11 (Ctr. for Study Soc. Pol’y & Urb. Inst. ed., 2009), [http://webarchive.urban.org/uploadedpdf/1001351\\_safe\\_families\\_act.pdf](http://webarchive.urban.org/uploadedpdf/1001351_safe_families_act.pdf) [<https://perma.cc/YA85-DA4E>]

<sup>35</sup> *Id.*

<sup>36</sup> Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 261 (2003).

### C. Regulation Through Family Separation

The results of ASFA and the federal family regulation policies preceding it are striking. One need only look to Title IV-E of the Social Security Act, the largest federal funding stream for state family regulations systems.<sup>37</sup> In state fiscal year 2012,<sup>38</sup> the federal government spent nearly \$13 billion supporting state family regulation system costs, programs, and services.<sup>39</sup> Title IV-E spending accounted for nearly \$6.5 of the nearly \$13 billion.<sup>40</sup> Of the nearly \$6.5 billion, an astounding 51% went to the Foster Care Program, and 35% went to the Adoption Assistance Program.<sup>41</sup> The remaining 14% was allocated among the Chafee Foster Care Independence Program, the Guardianship Program, and Demonstration Waivers.<sup>42</sup> Importantly, key to all of these Title IV-E funding programs was the requirement that the children for whom the funds were allocated be removed from their home to the foster system.<sup>43</sup> In contrast, Title IV-B funding—which funds family support services, family preservation programs, and time limited reunification, among other programs and services—reflected just three percent (a little over \$595 million) of federal family regulation system spending.<sup>44</sup> Not only did the federal government spending on maintaining states’ foster systems and fast tracking adoptions dwarf spending on family preservation, it also dwarfed spending on programs addressing child poverty including the Special Supplemental Nutritional Program for Women, Infants, and Children (WIC), the Children’s Health Insurance Program (CHIP), and the Supplemental Nutrition Assistance Program for Children (SNAP).<sup>45</sup>

---

<sup>37</sup> JORDAN & CONNELLY, *supra* note 1, at 2.

<sup>38</sup> Generally, “state fiscal year” signifies a 12-month period running from July 1 through June 30 of the following year, and is named for the calendar year in which the state fiscal year ends. All but four states in the United States have fiscal years ending on June 30. See *Quick Reference Fiscal Table*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/fiscal-policy/basic-information-about-which-states-have-major-ta.aspx#fyrs> [<https://perma.cc/WT4F-EBGP>] (last visited Mar. 17, 2021).

<sup>39</sup> JORDAN & CONNELLY, *supra* note 1, at 1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2.

<sup>45</sup> See MOVEMENT FOR FAMILY POWER, *supra* note 7, at 26.

The modern family regulation policy pathologization, control, and punishment of Black families is borne out by the numbers.<sup>46</sup> By the early 2000s, Black children were overrepresented in the foster system at a rate of more than twice their population in 36 states, and a rate of more than 3 times their population in 16 states.<sup>47</sup> In total, Black children were overrepresented in the foster system nationwide at a rate of 2.26 their general child population.<sup>48</sup> Moreover, data shows that between 2000 and 2011, one out of every nine Black children had been removed from their parents, as compared with one in 17 white children.<sup>49</sup> Black families and children also fare worse at every point within the family regulation system.<sup>50</sup> Black families are more likely to have maltreatment allegations made against them, more likely to be investigated by state family regulation system authorities, and more likely to have those cases

---

<sup>46</sup> The family regulation system also disproportionately targets indigenous families. While Indigenous children represent 2% of the children removed from their homes to the foster system, they represent just 1% of the overall child population in the United States. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL H.H.S. ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 73 (2007) [hereinafter GOA, AFRICAN AMERICAN CHILDREN IN FOSTER CARE]. Moreover, between 2000 and 2011, data show that one out of every seven indigenous children had been removed from their parents. See MOVEMENT FOR FAMILY POWER, *supra* note 7, at 12. As with Black families, there is a long history of the U.S. government targeting, pathologizing, controlling and punishing indigenous families and communities. See Greenesmith, *supra* note 13; Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533 (2021). This history and the particular way in which it is reproduced and reified today in the modern family regulation system warrants particular attention and further research. Given the limitations of this article's research, this paper focuses on the family regulation system as a cite of pathology, control, and punishment of Black families.

<sup>47</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 46, at 73.

<sup>48</sup> *Id.*

<sup>49</sup> See MOVEMENT FOR FAMILY POWER, *supra* note 7, at 12.

<sup>50</sup> See Dorothy Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE J. 127 (2008) [hereinafter Roberts, *Racial Geography of Child Welfare*]. See also Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How The Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e> [<https://perma.cc/6HEG-R79G>].

substantiated. Further, Black children are more likely to be removed from their homes to the foster system.<sup>51</sup>

As Black children entered the foster system, many have documented how ASFA and the federal family regulation policy increasingly incentivized regulation through family separation.<sup>52</sup> Roberts points out:

[I]t is often forgotten that state agents forcibly remove most of these children and that the mothers are intensely supervised by child welfare authorities as they comply with the agency requirements to be reunified with their children. This state intrusion is typically viewed as necessary to protect maltreated children from parental harm. But the need for this intervention is usually linked to poverty, racial injustice, and the state's approach to caregiving, which addresses family economic deprivation with child

---

<sup>51</sup> See Roberts, *Racial Geography of Child Welfare*, *supra* note 50, at 127. See also Roberts & Sangoi, *supra* note 50.

<sup>52</sup> See, e.g., MOVEMENT FOR FAMILY POWER, *supra* note 7; DON LASH, *When the Welfare People Come* 43 (2017); ROBERTS, *SHATTERED BONDS*, *supra* note 3; Rise Magazine, "You Have to Get it Together": ASFA's Impact on Parents and Families, in INTENTIONS AND RESULTS, *supra* note 34; Molly Schwartz, *Do We Need to Abolish Child Protective Services*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/> [<https://perma.cc/2RBN-QFJC>] (quoting numerous parents impacted by the family regulation system, activists, and advocates including, Joyce McMillan, Angeline Montauban, Martin Guggenheim, Emma Ketteringham, Teyora Graves, Chris Gottlieb, Erin Miles Cloud, and Lisa Sangoi); Erin Miles Cloud, *Unraveling Criminalizing Webs: Building Police Free Futures*, S&F ONLINE, <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/> [<https://perma.cc/P5S6-QL9L>] (last visited Mar. 14, 2021); Martin Guggenheim, *Let's Root Out Racism in Child Welfare, Too*, IMPRINT (June 15, 2020, 2:00 AM), <https://imprintnews.org/child-welfare-2/lets-root-out-racism-child-welfare-too> [<https://perma.cc/9NGA-VAF8>]; Elizabeth Brico, *Forced, Rapid Adoptions Are a Weapon of the Drug War*, FILTER MAG. (Dec. 21, 2020), <https://filtermag.org/forced-adoption-drug-war/> [<https://perma.cc/LAQ4-ZZ3E>]; Chris Gottlieb, *The Lessons of Mass Incarceration for Child Welfare*, AMSTERDAM NEWS (Feb. 1, 2018, 9:28 AM), <http://amsterdamnews.com/news/2018/feb/01/lessons-mass-incarceration-child-welfare> [<https://perma.cc/9DFY-74SW>]; Emma Ketteringham, *Systems Built on Good Intentions are the Most Dangerous*, FRANK INTERVIEWS (Aug. 19, 2020), <http://www.franknews.us/interviews/429/429> [<https://perma.cc/4ATC-BEYK>]; Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline,"* 20 CUNY L. REV. 77, 95 (2016); Roberts & Sangoi, *supra* note 50.

removal rather than services and financial resources.<sup>53</sup>

Central to federal family regulation policy is the pathologization of Black parents, largely Black mothers. Myopically focusing on alleged “parental defects,” prevents the federal family regulation system from addressing the structural factors that produce marginalized families’ adversities.<sup>54</sup> In other words, instead of focusing on structural issues of racism, poverty, housing- and food-insecurity, the family regulation system only focuses on the parent.<sup>55</sup>

Regulation through family separation also enables family regulation agents to exercise expansive control over families caught up in the system. As noted above, parents are subject to intense supervision by family regulation system agents who give parents compulsory “service plans” in order to have their family reunified. Often, these service plans consist of a written list of behavior modification services, including parenting classes, anger management classes, drug tests, drug treatment, counseling, psychological evaluations, and visitation with their children.<sup>56</sup> But the family regulation system monitoring goes beyond compliance with services. It also regulates with whom parents associate, where they go, and what they do.

Though family regulation system agencies often frame their interventions as “care” and “support,” regulation through family separation is marked by coercion. For parents who—in the eyes of state family regulation agencies and courts—fail to modify their behavior within ASFA timelines, the court may terminate parental rights and fast track the child for adoption.

Pathologizing Black parents, particularly Black mothers, and using family separation as a means to control and punish Black communities is not new. The roots of these ideologies and techniques reach back to the brutal enslavement of Black people

---

<sup>53</sup> Dorothy Roberts, *Prison, Foster Care, And the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1486 (2012).

<sup>54</sup> Dorothy Roberts, *The Dialectic of Privacy and Punishment in The Gendered Regulation of Parenting*, 5 STAN. J.C.R. & C.L. 191, 194 (2009).

<sup>55</sup> See LASH, *supra* note 52, at 43.

<sup>56</sup> Annett R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 582–83 (1997); ROBERTS, *SHATTERED BONDS*, *supra* note 3, at 78–81. See generally LASH, *supra* note 52.

in the United States and state-sanctioned white supremacy.<sup>57</sup> Again, Roberts' analysis is critical here. Roberts observes, "Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care."<sup>58</sup> To this point, David A. Love notes:

Women of color are more likely than [w]hite women to be monitored and supervised by the state, and more likely to experience state control over their bodies and their children. Call it a holdover from slavery, when Black women have no right to privacy, were violated at will, and could not make decisions regarding themselves, their bodies or their families.<sup>59</sup>

Historically and presently, justification for state-sanctioned family destruction and the devaluing of Black motherhood and Black children is based on images and narratives of "unfit and dangerous Black mothers" cultivated by American culture.<sup>60</sup> Fundamentally, white supremacy mandates the complete control of Black women.<sup>61</sup> As with the criminal punishment system, the moment a Black woman steps outside of the "controlling narratives developed in service of white colonialism and white supremacy," she is perceived as a threat justifying a punitive and violent response.<sup>62</sup>

With this framing, I now examine how the Family First Prevention Services Act—the most significant policy shift in federal family regulation system spending policy since ASFA—is situated along this continuum.

---

<sup>57</sup> See Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER J. 9 (1987).

<sup>58</sup> Dorothy Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER. & L. 141, 146 (1995).

<sup>59</sup> David A. Love, *On the Criminalization of Black Motherhood*, BLACK COMMENTATOR (May 8, 2008), [https://blackcommentator.com/276/276\\_col\\_criminalization\\_of\\_black\\_motherhood\\_printer\\_friendly.html](https://blackcommentator.com/276/276_col_criminalization_of_black_motherhood_printer_friendly.html) [<https://perma.cc/5SQ9-JDQH>].

<sup>60</sup> *Id.*

<sup>61</sup> See ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 183 (2017).

<sup>62</sup> *Id.*

III. THE FAMILY FIRST PREVENTION  
SERVICES ACT OF 2018: A SHIFT IN  
FEDERAL FAMILY REGULATION SYSTEM  
POLICY

After decades of financially incentivizing the separation of Black families, the Family First Prevention Act of 2018 (Family First Act or the Act) reflects a change of course in federal family regulation system.<sup>63</sup> For the first time since the establishment of the modern day foster system, the purported goal was to prevent children from entering the foster system. To do so, the Family First Act opened up IV-E funding for state family regulation system agencies to provide prevention services and programs to families with children who are deemed are “candidates for foster care.”<sup>64</sup> Unlike prior federal laws, under the Family First Act, family separation is no longer a prerequisite to states accessing Title IV-E funds.<sup>65</sup>

Focusing on the “prevention activities” elements, the Family First Act allows states to be reimbursed under Title IV-E for funds used “to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, [and] in-home parent skill-based programs . . . .”<sup>66</sup> To do this, the Family First Act amended the Title IV-E program to “authorize new support for services to prevent the need for children to enter foster care.”<sup>67</sup> More specifically, under Title IV-E, states may seek federal reimbursement for part of the cost associated with providing “foster care prevention services,”

---

<sup>63</sup> While this Article focuses exclusively on the Family First Act’s provisions related to “prevention activities,” the Act also ushers in new requirements for congregate/group care foster placements, provides more funding authority to improve processing systems for the interstate placement of children, and provides more financial support for kinship navigator programs and foster independence programs. See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §§ 50701–82, 132 Stat. 64 (2018). See also *Family First Prevention Services Act*, NAT’L CONF. STATE LEGISLATURES (Apr. 1, 2020), <https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx> [<https://perma.cc/S6WB-GB78>].

<sup>64</sup> Bipartisan Budget Act of 2018.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> H. REP., COMM. ON WAYS & MEANS, GREEN BOOK, CHAPTER 11: PREVENTION, FOSTER CARE, AND ADOPTION (2018), <https://greenbook-waysandmeans.house.gov/2018-green-book/chapter-11-prevention-foster-care-and-adoption> [<https://perma.cc/TL3Q-8EY2>].

including evidence based “[m]ental health and substance abuse prevention and treatment services provided by a qualified clinician” and “[i]n-home parent skill-based programs.”<sup>68</sup>

A state, however, may not seek unlimited reimbursement. The Act caps reimbursement for Title IV-E prevention services and programs at 12 months,<sup>69</sup> although funding can be extended on a “case-by-case basis.”<sup>70</sup> The Act also establishes certain criteria in order to be eligible for Title IV-E reimbursement. Among other requirements, prevention services must be “provided in accordance with . . . practices” that are “promising,” “supported” or “well-supported.”<sup>71</sup> Importantly, the Act’s reach, in terms of the families to whom states can provide Title IV-E prevention services is broad; it covers “children who are candidates for foster care or who are pregnant or parenting foster youth and the parents or kin caregivers of the children.”<sup>72</sup> The Act defines a child who is “a candidate for foster care” as “a child who is identified in a prevention plan . . . as being at imminent risk of entering foster care . . . but who can remain safely in the . . . home or in a kinship placement”<sup>73</sup> with the provision of prevention services or programs.<sup>74</sup> Though states’ access to Title IV-E prevention funds is not without limits,

---

<sup>68</sup> Bipartisan Budget Act of 2018.

<sup>69</sup> *Id.*

<sup>70</sup> U.S. DEP’T HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAM., CHID.’ BUREAU, STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 4 (2018) [hereinafter ADMIN. FOR CHILD. & FAM., STATE REQUIREMENTS], <https://www.acf.hhs.gov/sites/default/files/documents/cb/pi1809.pdf> [<https://perma.cc/29G9-DLNR>].

<sup>71</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018). In broad strokes, a “promising practice,” is “[c]reated from an independently reviewed study that uses a control group and shows statistically significant results”. A supported practice “[u]ses a random-controlled trial or rigorous quasi-experimental design” and “[m]ust have sustained success for at least six months after the end of treatment”. A well-supported practice “[s]hows success beyond a year after treatment. NAT’L CONF. STATE LEGISLATURES, *supra* note 63.

<sup>72</sup> Bipartisan Budget Act of 2018.

<sup>73</sup> The Family First Act defines a “prevention plan” as a written plan that must include certain components, depending on whether the child is “a candidate for foster care” or a “pregnant or parenting foster youth.” Bipartisan Budget Act of 2018.

<sup>74</sup> See FIRST FOCUS CAMPAIGN FOR CHILDREN, FAMILY FIRST PREVENTION SERVICES ACT: SECTION BY SECTION 1 (2018), <https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Section-by-Section-FFPSA.pdf> [<https://perma.cc/E3WM-8AJT>].

federal agencies interpret the Family First Act broadly in order to allow states to provide prevention services early and proactively.<sup>75</sup>

At first glance, the Family First Act appears to be a repudiation of, and break from, federal family regulation policy that came before it. But, a more discerning look at the Family First Act suggests otherwise. First, we must consider both the impetus for the Family First Act, and the prevention paradigm upon which the Family First Act rests.

#### A. Impetus for the Family First Act

Though first introduced in 2016 jointly in the U.S. House of Representatives and the U.S. Senate, advocacy of key provisions in the Family First Act began as early as 2014.<sup>76</sup> But, to fully understand the reasons behind the shift in federal policy, we must start at 2013.<sup>77</sup> Following a peak of 567,000 of children in the foster system nationwide in 1999, the number of children entering the foster system steadily declined until around 2013—at which point the numbers of children being forcibly separated from their families and entering the foster system began to increase.<sup>78</sup> Even more troubling to lawmakers and policymakers

---

<sup>75</sup> See generally, ADMIN. FOR CHILD. & FAM., STATE REQUIREMENTS, *supra* note 70. See also *The Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA): Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Ways and Means*, 115th Cong. (2018) [hereinafter H. COMM. ON WAYS & MEANS, OPIOID HEARING] (testimony of Jerry Milner, Assoc. Comm'r of the Child. Bureau & Acting Comm'r of the Admin. on Child., Youth & Families, U.S. Dep't of Health & Hum. Servs.), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg33873/html/CHRG-115hhrg33873.htm> [<https://perma.cc/3U7C-YK4E>].

<sup>76</sup> Daniel Heimpel, *Inside Game: The Key Players Behind Washington's Biggest Foster Care Reform in Decades*, IMPRINT (Mar. 7, 2018, 6:17 AM), <https://imprintnews.org/featured/inside-game-how-foster-care-changed-forever/30118> [<https://perma.cc/924N-4A67>].

<sup>77</sup> See H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75; see also *Examining the Opioid Epidemic: Challenges and Opportunities: Hearing Before the S. Comm. on Fin.*, 114th Cong. 35 (2016) [hereinafter S. COMM. ON FIN., OPIOID HEARING] (statement of Sen. Robert P. Casey, Jr.), <https://www.govinfo.gov/content/pkg/CHRG-114shrg23291/pdf/CHRG-114shrg23291.pdf> [<https://perma.cc/F9CC-U7SE>].

<sup>78</sup> S. COMM. ON FIN., OPIOID HEARING, *supra* note 77, at 8; see also *About the Law: Family First Prevention Services Act*, FAMILYFIRSTACT.ORG, <https://www.familyfirstact.org/about-law> [<https://perma.cc/X4LL-XW3U>] (last visited Mar. 17, 2021) (noting a steady increase of children entering the foster system beginning in 2012 after years of decline).

alike was that among this group the number of infants entering the foster system were at least double that of children of other ages.<sup>79</sup>

Coinciding with this increase was the national opioid crisis. The crisis resulted in 450,000 opioid overdose related deaths between 1999 and 2018.<sup>80</sup> Currently, no data exists establishing a specific causal relationship between the opioid crisis and the massive expansion of the nation's foster system.<sup>81</sup> Nevertheless, faced with increasing numbers of children entering the foster system and national data showing parental drug abuse as a key factor in child removal,<sup>82</sup> lawmakers and policymakers adopted the narrative that the opioid crisis was driving the rapid expansion of the foster system. For example, in a Senate Finance Committee hearing on the opioid epidemic, Republican bill sponsor Senator Orrin G. Hatch, warned:

The current opioid epidemic is just the latest manifestation of an ongoing problem in child welfare. Whether it be the crack cocaine epidemic of the 1980s, the methamphetamine epidemic that has plagued many rural areas, or the current opioid crisis, we have seen time and again that the

---

<sup>79</sup> *Id.* at 67 (prepared statement of Nancy K. Young, Ph.D., Director of Children and Family Futures, Inc.).

<sup>80</sup> *Opioid Overdose: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), <https://www.cdc.gov/drugoverdose/epidemic/index.html> [<https://perma.cc/QF9D-C3VB>].

<sup>81</sup> Sarah C. Williams & Kerry DeVooght, *5 Things to Know About The Opioid Epidemic And Its Effects on Children*, CHILD TRENDS (June 2, 2017), <https://www.childtrends.org/publications/5-things-to-know-about-the-opioid-epidemic-and-its-effect-on-children> [<https://perma.cc/SP3T-LFAE>].

<sup>82</sup> Between 2016 and 2019, so-called parental drug abuse, a subset of neglect, accounted for between 34% and 36% of child removals to the foster system. See CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2016 ESTIMATES AS OF OCT 20, 2017 - NO. 24 (2017), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport24.pdf> [<https://perma.cc/E5CZ-BG6S>]; CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 - NO. 25 (2018), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport25.pdf> [<https://perma.cc/5SL9-DAQP>]; CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2018 ESTIMATES AS OF AUGUST 22, 2019 - NO. 26 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf> [<https://perma.cc/3XGJ-9LL4>]; CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 - NO. 27 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [<https://perma.cc/6DR5-5235>].

child welfare system is ill-equipped to deal with families struggling with substance abuse.<sup>83</sup>

Also connecting the crisis in the foster system and the opioid crisis, Democratic bill sponsor Senator Ron. Wyden underscored the need for “better prevention, better treatment, and better and tougher enforcement.”<sup>84</sup> Senator Wyden cautioned of “pregnant mothers giving birth to opioid-dependent babies,” warning that “[a] parent’s drug addiction is becoming a growing reason for removing children from their homes and placing them in foster care.”<sup>85</sup>

Similarly, advocates and policymakers framed the opioid crisis as a “child welfare” crisis, noting that the “opioid crisis has drawn national attention to the challenges that substance misuse and addiction pose for children, families, and communities,” and claiming that “opioid epidemic is placing new demands on child welfare caseloads.”<sup>86</sup> Following the Family First Act’s enactment, lawmakers reiterated the connection between the opioid crisis and the expansion of the foster system. For example, during one U.S. House of Representatives

---

<sup>83</sup> S. COMM. ON FIN., OPIOID HEARING, *supra* note 77, at 2 (statement of Sen. Orrin G. Hatch).

<sup>84</sup> *Id.* at 4 (statement of Sen. Ron Wyden).

<sup>85</sup> *Id.* at 5. See also *Bipartisan Senate, House Leaders Announce Proposed Child Welfare Legislation*, S. COMM. ON FIN. (June 10, 2016), <https://www.finance.senate.gov/chairmans-news/bipartisan-senate-house-leaders-announce-proposed-child-welfare-legislation> [<https://perma.cc/3HBR-ZMJA>].

<sup>86</sup> CASEY FAM. PROGRAMS, WHAT IS THE IMPACT OF SUBSTANCE ABUSE ON CHILD WELFARE? 1 (2018), [https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF\\_Substance-Abuse-Resource-List\\_fnl.pdf](https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Substance-Abuse-Resource-List_fnl.pdf) [<https://perma.cc/5Y2R-YG5E>]. See also, *Opioid Use*, NAT’L CTR. FOR HEALTHY SAFE CHILD., <https://healthysafechildren.org/opioid-use> [<https://perma.cc/DL83-TULG>] (last visited Dec. 26, 2020) (noting the increase in children entering the foster system between 2014 and 2015 and concluding that “[t]he opioid epidemic has reached crisis proportions and is having a devastating impact on children and families in rural, urban, and tribal communities across the country.”); Stephanie Pham, *How the Opioid Epidemic Harms Youth and Families*, IMPRINT (June 29, 2017, 3:00 PM), <https://imprintnews.org/research-news/opioid-epidemic-harms-youth-families/27348> [<https://perma.cc/R5XP-XF9P>] (noting that “[t]hrough federal child welfare data does not specify the type of drugs being abused, many officials have linked this surge [in the foster system nationwide] with the opioid epidemic.”); Williams & DeVooght, *supra* note 81 (noting that though there is no available data directly linking the opioid epidemic to the expansion of the nationwide foster system, there are “many anecdotal reports linking the opioid epidemic to increases in the number of children in foster care”).

committee hearing focusing specifically on the opioid crisis and implementation of the Act, Representative Adrian Smith opened the hearing by explaining that “[b]oth the data and the experience of those on the front lines indicate substance abuse, specifically opioid use and overdose, are a contributing factor.”<sup>87</sup> As such, the opioid crisis was not viewed just a public health issue, but also a family regulation issue.

## B. Prevention as the Solution

Faced with the opioid crisis and the rapid uptick of children entering the foster system nationwide, lawmakers and family regulation system policymakers called for a shift from a system that incentivized forced family separation and placement in the foster system to a system that incentivized prevention.<sup>88</sup>

---

<sup>87</sup> H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75; (opening remarks of Representative Adrian Smith, Chairman of the House Ways and Means Subcomm. on Hum. Res.).

<sup>88</sup> As noted above, the opioid crisis created, at least in part, among lawmakers and policymakers a perceived need for a different, prevention-oriented family regulation system response. As meticulously documented by various scholars, during so-called crack epidemic of the late 1980s and 1990s the narrative around use of smokable cocaine was pathologized and demonized, and the typical user was narratively constructed as a Black, urban, and poor. *See, e.g.,* GOMEZ, *supra* note 30; MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010). On the other hand, many have observed that the narrative constructed around opioid crisis is notable for its whiteness. *See, e.g.,* Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 771, 789 (2020); Julie Netherland and Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," And Race in Media Coverage for Prescription Opioid Misuse*, 40 CULT MED PSYCHIATRY 664 (2016). According to a 2016 National Survey on Drug Use and Health, the prevalence of opioid use disorder was highest among white Americans (72.29%), with a lower prevalence along Black Americans and Latinx Americans (9.23% and 13.82%, respectively). *See* THE WHITE HOUSE, *THE PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS* (2017), <https://www.hsdl.org/?view&did=805384> [<https://perma.cc/VBD8-8VJC>]. Of the 450,000 opioid overdose related deaths between 1999 and 2018, white Americans represented the largest proportion each year. *See Opioid Overdose Deaths by Race/Ethnicity*, KAISER FAMILY FOUNDATION (Nov. 14, 2020), <https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/?currentTimeframe=3&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/LQ4S-YZZ5>]. As observed by legal scholar Khiara M. Bridges, while the opioid crisis did not “disproportionately” affect white people, given that white Americans comprise 77% of the United States population, the sheer number of white people that died from opioid overdose led to the construction of the opioid crisis as being “fundamentally about” white people. *See* BRIDGES,

The Family First Act does not require states to use any specific prevention model. Nevertheless, examining the prevention paradigm is important because prevention is a significant guiding principle of the Family First Act.

Prevention is not a new concept within federal family regulation policy.<sup>89</sup> In the early 2000s, federal policy increasingly shifted its focus (though not necessarily through funding) to prevention efforts.<sup>90</sup> Specifically, it embraced prevention programming supporting “protective factors,” deemed by some as “necessary to help families offset parenting stress and make children and families safer.”<sup>91</sup> The federal Children’s Bureau explains, “[a] protective factors approach to the prevention of child maltreatment focuses on positive ways to engage families by emphasizing their strengths and what parents and caregivers are doing well, as well as identifying areas where families have room to grow with support.”<sup>92</sup>

Among the protective factors centered in federal family regulation policy are “[p]arental resilience,” “[n]urturing and attachment,” “[k]nowledge of parenting and child development,” “[c]oncrete supporting times of need,” “[s]ocial connections,” and “[s]ocial-emotional competence of children.”<sup>93</sup> Fundamentally, the protective factors prevention model focuses squarely on parental behavior modification, with the goal of helping “children, youth, and families build resilience and develop skills, characteristics, knowledge, and relationships that offset risk exposure and contribute to both short- and long-term positive outcomes.”<sup>94</sup> With respect to parents, the federal Children’s Bureau Child Welfare Information Gateway explains that

---

*supra* note 88, at 789. Worth further exploration and research is the extent to which the perception of the opioid crisis as a “white crisis” created an imperative among lawmakers and policymakers to financially incentivize prevention-oriented family regulation system interventions rather than swift removal to the foster system.

<sup>89</sup> CHILD.’ BUREAU, CHILD MALTREATMENT PREVENTION: PAST, PRESENT, AND FUTURE 4 (2017) 4, [https://www.childwelfare.gov/pubPDFs/cm\\_prevention.pdf](https://www.childwelfare.gov/pubPDFs/cm_prevention.pdf) [<https://perma.cc/7WLN-G4JX>].

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> CHILD.’ BUREAU, PROTECTIVE FACTORS APPROACHES IN CHILD WELFARE 2 (2020), [https://www.childwelfare.gov/pubPDFs/protective\\_factors.pdf](https://www.childwelfare.gov/pubPDFs/protective_factors.pdf) [<https://perma.cc/XGV8-843G>].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

protective factors “can serve as safeguards, helping parents who otherwise might be at risk find resources, support, or coping strategies that allow them to parent effectively—even under stress.”<sup>95</sup>

Absent from the prevention model and protective factors approach is any offering of concrete solutions to the structural obstacles facing Black and other marginalized people—including lack of access to affordable housing; child care; health care; jobs that pay a living wage; environmental injustice; food insecurity; and mass incarceration.<sup>96</sup> This omission is even more striking because many studies find that addressing these exact structural barriers, and lack of material resources, correlate with reductions of what the family regulation system considers “child maltreatment.”<sup>97</sup> For instance, one study found that increases in minimum wage corresponded with a reduction in family regulation system involvement, particularly reports of neglect involving young children (aged 0–5) and school-aged children (aged 6–12).<sup>98</sup> Based on these findings, the researchers suggest that “[i]mmediate access to increases in disposable income may affect family and child well-being by directly affecting a caregiver’s ability to provide a child with basic needs . . . .”<sup>99</sup> Yet another study examined the relationship between states’ earned income tax credits (EITC) with rates of child maltreatment reports. The study found that availability of the EITC benefit corresponded with lower rates of reported child neglect.<sup>100</sup> The

---

<sup>95</sup> *Id.* at 1.

<sup>96</sup> See See Darrick Hamilton, *Neoliberalism and Race*, DEMOCRACY J., <https://democracyjournal.org/magazine/53/neoliberalism-and-race/> [<https://perma.cc/XWF7-8RXQ>] (last visited Mar. 18, 2021) (discussing the myriad factors that have prevented Black Americans from achieving economic inclusion in the United States).

<sup>97</sup> See MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 39 (collecting studies). See also Kelley Fong, “*The Tool We Have*”: *Why Child Protective Services Investigates So Many Families and How Even Good Intentions Backfire*, COUNCIL ON CONTEMP. FAM. (Aug. 11, 2020), <https://contemporaryfamilies.org/cps-brief-report/> [<https://perma.cc/ZG3V-H9S9>] (collecting studies).

<sup>98</sup> See Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does The Minimum Wage Affect Child Maltreatment Rates?*, 72 CHILD. & YOUTH SERVS. REV. 60, 63–66 (2016).

<sup>99</sup> *Id.* at 65.

<sup>100</sup> Nicole L. Kovski et al., *Association of State-Level Earned Income Tax Credits With Rates of Reported Child Maltreatment, 2004–2017*, 20 J. CHILD MALTREATMENT 1, 1 (2021).

researchers found that the more generous the states' ETIC, the greater the decline in rates of reported child neglect.<sup>101</sup> Despite these findings, the federal family regulation system approach to prevention focuses not on eradicating poverty and adversities stemming from it, but rather on enhancing parents', children's, and families' capacity to cope with their living conditions and the "risk factors" that they face.

#### IV. THE FAMILY FIRST ACT CODIFIES THE FAMILY REGULATION SYSTEM'S INVESTMENT IN PATHOLOGIZING, CONTROLLING, AND PUNISHING BLACK MOTHERS

Having identified a prevention model as the solution to the opioid and foster system crises, the Family First Act was hailed as a "fundamental re-ordering of foster care."<sup>102</sup> Lawmakers proclaimed that the law was enacted to "fundamentally shift child welfare from separating families to strengthening them."<sup>103</sup> Indeed, the Act's core aim is to "prevent[] child abuse and neglect primarily through strengthening the resiliency and protective capacity of families."<sup>104</sup> Lauded by many for its sweeping changes to federal family regulation system's spending policy, little attention has been given to how the Family First Act codifies the family regulation's system reliance on pathology, control, and punishment.

##### A. The Family First Act: A Continued Myopic Focus on Perceived "Parental Defects"

Like the federal family regulation policy that preceded it, and in conformity with the prevention paradigm, the Family First Act embraces pathology and a behavior modification theory of change. In the three areas of time-limited prevention for which states may seek Title IV-E reimbursement, the Act focuses on shifting parental behavior, whether it be their mental health,

---

<sup>101</sup> *Id.*

<sup>102</sup> Heimpel, *supra* note 76.

<sup>103</sup> H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75; (opening remarks of Representative Adrian Smith, Chairman of the House Ways and Means Subcomm. on Hum. Res.).

<sup>104</sup> Jerry Milner, *Trump's Top Child Welfare Official: Family First a Good First Step, but True Prevention is Key*, IMPRINT (Feb. 14, 2018), <https://imprintnews.org/featured/trumps-top-child-welfare-official-family-first-good-first-step-true-prevention-key/29901> [<https://perma.cc/8948-ZSUC>].

substance use, or parenting skills. Indeed, to be eligible for Family First Act reimbursement, many programs—including in-home parenting skills, mental health, and substance abuse treatment—must contain a counseling or behavioral therapeutic component.<sup>105</sup> To understand the centrality of behavior modification, one need only look at the programs that have been approved thus far by the Prevention Services Clearing House. Consider a few of the prevention services that have been rated by Prevention Services Clearing House as “well supported”:

- **Brief Strategic Family Therapy** uses “structured family systems approach to treat families with children . . . who display or are at risk for developing problem behaviors including substance abuse, conduct problems, and delinquency.” The “intervention components” are: (1) counselors “establish relationships with family members to better understand and ‘join’ the family system”; (2) counselors observe the ways that family members behave together/interact with each other; and (3) “counselors work in the present, using reframes, assigning tasks and coaching family members to try new ways of relating to one other to promote more effective and adaptive family interactions.”<sup>106</sup>
- **Motivational Interviewing** is a counseling program “designed to promote behavior change and improve physiological, psychological, and lifestyle outcomes.” The Motivation Interviewing model seeks to “identify ambivalence for change and increase motivation by helping clients progress through five stages of change: pre-contemplation, contemplation, preparation, action, and maintenance.”<sup>107</sup>

---

<sup>105</sup> SANDRA JO WILSON ET AL., OFFICE OF PLAN., RSCH., & EVALUATION, ADMIN. FOR CHILD. & FAMS’, TITLE VI-E PREVENTION SERVICES CLEARINGHOUSE: HANDBOOK OF STANDARDS AND PROCEDURES, VERSION 1.0 2–3 (2019), [https://preventionservices.abtsites.com/themes/ffc\\_theme/pdf/psc\\_handbook\\_v1\\_final\\_508\\_compliant.pdf](https://preventionservices.abtsites.com/themes/ffc_theme/pdf/psc_handbook_v1_final_508_compliant.pdf) [<https://perma.cc/937D-VGGR>].

<sup>106</sup> *Brief Strategic Family Therapy*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, <https://preventionservices.abtsites.com/programs/251/show> [<https://perma.cc/5LSX-RHXV>] (last updated Dec., 2020).

<sup>107</sup> *Motivational Interviewing*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, <https://preventionservices.abtsites.com/programs/256/show> [<https://perma.cc/DX5V-PZMU>] (last updated Dec., 2020).

- **Healthy Families America** is a home visiting program where the goal is to “cultivate and strengthen nurturing parent-child relationships, promote healthy childhood growth and development, and enhance family functioning by reducing risk and building protective factors.”<sup>108</sup>
- **Parents as Teachers** is a home visiting program that “teaches new and expectant parents skills intended to promote positive child development and prevent child maltreatment.” The core components of Parents as Teachers are: “personal home visits, supportive group connection events, child health and developmental screenings, and community resource networks.”<sup>109</sup>
- **Homebuilders – Intensive Family Preservation and Reunification Services** is an “in-home counseling, skill building[,] and support service[] for families,” that uses intervention strategies such as “Motivational Interviewing, a variety of cognitive and behavioral strategies, and teaching methods intended to teach new skills and facilitate behavior change.”<sup>110</sup>

Absent from all but one (Homebuilders) of the programs’ descriptions is *any* reference to the provision of material resources as an intervention strategy. Consistent with the prevention paradigm, all of the programs center, and indeed several explicitly highlight, behavior modification as a core objective.

The Family First Act’s focus on individual behavior modification suggests that a core ideology, like the federal family regulation policy that preceded it, is the notion that parents’ behaviors and choices are to blame for the circumstances that led to their family’s involvement in the family regulation system. In other words, under the Family First Act, it is still the choices of

---

<sup>108</sup> *Healthy Families America*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, <https://preventionservices.abtsites.com/programs/253/show> [<https://perma.cc/PYG5-GWPF>] (last updated Dec., 2020).

<sup>109</sup> *Parents as Teachers*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, <https://preventionservices.abtsites.com/programs/250/show> [<https://perma.cc/R9Z4-DEP8>] (last updated Dec., 2020).

<sup>110</sup> *Homebuilders – Intensive Family Preservation and Reunification Services*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, <https://preventionservices.abtsites.com/programs/254/show> [<https://perma.cc/2TA9-LHRD>] (last updated Dec., 2020).

Black mothers, and their personal “deficits,” rather than the structures that reinforce and reproduce privilege and disadvantage, that threaten Black children most.

But to place blame on individual character flaws as the reason for families being involved in the family regulation system is a political choice that has long been used to stymie critique of and challenges to the structures that uphold privilege and disadvantage. Many families impacted by the family regulation system, activists, scholars, researchers, and advocates have noted that poverty is an overwhelming and unifying characteristic of the families enmeshed in the family regulation system.<sup>111</sup> Neither the Family First Act, nor the prevention paradigm guiding it, contends with, nor reckons with the fact that these disproportionalities become all the starker for Black children. Neither the Act, nor its fundamental paradigm puts federal family regulation system dollars towards addressing the reality that Black people are overrepresented in the population of people living in poverty in the United States.<sup>112</sup> Rather than building out a radical anti-poverty program, the Family First Act builds out behavior modification program.

As a concrete example, “inadequate housing” was identified as a “circumstance associated with a child’s removal” in 10% of children entering the foster system each year between 2016 and 2019.<sup>113</sup> Research shows that a lack of access to stable

---

<sup>111</sup> Appell, *supra* note 56, at 583; CHILD.’ BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (NSCAW) 8–32 (2005) [hereinafter CHILD.’ BUREAU, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING], <https://files.eric.ed.gov/fulltext/ED501301.pdf> [<https://perma.cc/X8SU-U8XS>] (noting that of the families involved in the family regulation system, nearly 40% fall below the poverty line).

<sup>112</sup> JOSEPH DALAKER ET AL., CONG. RSCH. SERV., R44698, DEMOGRAPHIC AND SOCIAL CHARACTERISTICS OF PERSONS IN POVERTY: 2015 5–6 (2016), <https://greenbook-waysandmeans.house.gov/sites/greenbook-waysandmeans.house.gov/files/R44698%20-%20Demographic%20and%20Social%20Characteristics%20of%20Persons%20in%20Poverty%20-%202015.pdf> [<https://perma.cc/S6RR-FNGN>].

<sup>113</sup> See CHILD.’ BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2016 ESTIMATES AS OF OCT 20, 2017 - NO. 24 (2017), *supra* note 82; CHILDREN’S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 - NO. 25 (2018), *supra* note 82; CHILDREN’S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2018 ESTIMATES AS OF AUGUST 22, 2019 - NO. 26 (2019), *supra* note 82; CHILDREN’S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 - NO. 27 (2020), *supra* note 82.

and safe housing can have a range of negative effects on children’s health, development, educational achievement, and emotional wellbeing.<sup>114</sup> Research also shows that stable housing plays an important role in people’s recovery from substance use disorder, yet people with substance use disorders face myriad barriers to affordable housing.<sup>115</sup>

Housing insecurity is also linked to food insecurity.<sup>116</sup> In 2015, nearly 16 million households in the United States were food insecure.<sup>117</sup> And just as the family regulation system disproportionately affects marginalized communities, so too does food insecurity. Due to historic racialized policies that diminished resources in marginalized communities, food insecurity “disproportionately affects racial and ethnic minorities, low-income families, and households with children . . . .”<sup>118</sup> To this point, one study found that nearly one quarter of families enmeshed in the family regulation system had trouble paying for basic necessities.<sup>119</sup> Given the numerous impacts that housing and food insecurity has on people’s lives, it is not surprising that various international organizations—including the World Health Organization and the United Nations Commission for Human Rights—have recognized the critical importance of adequate housing. Specifically, the World Health Organization advised that “[i]mproved housing conditions can

---

<sup>114</sup> Veronica Gaitan, *How Housing Affects Children’s Outcomes*, URBAN INSTITUTE (Jan. 2, 2019) <https://housingmatters.urban.org/articles/how-housing-affects-childrens-outcomes> [https://perma.cc/W6TQ-CN7S].

<sup>115</sup> See CTR. ON BUDGET & POL’Y PRIORITIES, MEETING THE HOUSING NEEDS OF PEOPLE WITH SUBSTANCE USE DISORDERS 1–2 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/5-1-19hou.pdf> [https://perma.cc/AV26-W6GA]; SUSAN G. PFEFFERLE ET AL., U.S. DEP’T OF HEALTH & HUM. SERVS., CHOICE MATTERS: HOUSING MODELS THAT MAY PROMOTE RECOVERY FOR INDIVIDUALS AND FAMILIES FACING OPIOID USE DISORDER iv (2018), <https://aspe.hhs.gov/system/files/pdf/261936/Choice.pdf> [https://perma.cc/4SSN-KQEE] (noting the well-established association between Opioid Use Disorder and homelessness, and finding that lack of stable housing creates barriers to engaging in Medication Assisted Treatment, which is a well-documented evidence based treatment to treat Opioid Use Disorder).

<sup>116</sup> Kierra S. Barnett, Glennon Sweeney & Mikyung Baek, *Food or Shelter? An Introduction to Understanding the Connections between Housing and Food Insecurity*, MEDIUM (Aug. 1, 2017), <https://medium.com/the-block-project/food-or-shelter-156928546a0e> [https://perma.cc/ZHU9-AUNV].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> CHILD.’ BUREAU, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING *supra* note 111.

save lives, prevent disease, increase quality of life, reduce poverty, [and] help mitigate climate change . . .” among other things.<sup>120</sup> Recognized as a basic human right by international human rights law, the United Nations Commission for Human Rights takes an expansive view of the right to adequate housing and urges that the right be seen as “the right to live somewhere in security, peace and dignity.”<sup>121</sup>

And although research shows that it is nearly impossible for families to achieve housing stability without access to subsidized housing, the subsidized housing stock decreased at the same time that need for subsidized housing has “skyrocketed.”<sup>122</sup> Indeed, the United States’ approach to housing insecurity and inequality is a political choice that continues to fuel the racial wealth gap.<sup>123</sup> Take for instance, housing policies like the mortgage interest tax deduction bestow the greatest benefits on wealthy families, and exclude in its entirety those who do not own a home.<sup>124</sup> As household wealth increases, so too do the benefits from the mortgage interest tax deduction.<sup>125</sup> The prioritization of wealth over the reduction of poverty is even clearer when comparing the housing subsidies. In 2015, the cost of the mortgage interests and property tax deductions was \$90 billion dollars, while the cost for federal rental assistance programs was \$51 billion, nearly \$40 billion less.<sup>126</sup>

---

<sup>120</sup> WORLD HEALTH ORGANIZATION, WHO HOUSING AND HEALTH GUIDELINES: EXECUTIVE SUMMARY 4 (2018), <https://www.who.int/publications/i/item/9789241550376> [<https://perma.cc/6758-XTY7>].

<sup>121</sup> Office of U.N. High Comm’r for Hum. Rts., *The Right to Adequate Housing* 3 (2009), [https://www.ohchr.org/documents/publications/fs21\\_rev\\_1\\_housing\\_en.pdf](https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf) [<https://perma.cc/7VZB-HL8J>].

<sup>122</sup> *Child Homelessness: A Growing Crisis*, U.S. DEP’T HEALTH & HUM SERV., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/child-homelessness-growing-crisis> [<https://perma.cc/7MF2-B9M2>] (last updated July 31, 2019).

<sup>123</sup> *See generally* INST. ON ASSETS AND SOC. POL’Y & NAT’L LOW INCOME HOUS. COAL., MISDIRECTED INVESTMENTS: HOW THE MORTGAGE INTEREST DEDUCTION DRIVES INEQUALITY AND THE RACIAL WEALTH GAP 5 (2017), <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/misdirected-investments.pdf> [<https://perma.cc/KP6H-7BE2>].

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

<sup>126</sup> Ezra Levin & David Meni, *The Biggest Beneficiaries of Housing Subsidies? The Wealthy.*, TALK POVERTY (June 30, 2016), <https://talkpoverty.org/2016/06/30/biggest-beneficiaries-housing-subsidies-wealthy/> [<https://perma.cc/F5G5-WBM6>].

Federal housing policy, on the one hand, creates protective barriers around wealth and furthers wealth concentration. On the other hand, where the family regulation system reflexively pathologizes parents, housing instability among those within in the system is often attributed to personal “deficits.” In fact, one study found that while families were more likely to identify needing assistance, such as housing, family regulation system case workers more readily identified and prioritized the needs related to perceived parental deficits.<sup>127</sup> Yet another study found that family regulation system case workers in Connecticut “could offer little to address families’ chronic material needs.”<sup>128</sup> Sociologist Kelley Fong notes, “[m]aterial hardship creates conditions that make child maltreatment more likely . . . but CPS is structured around addressing parents’ abusive and neglectful behaviors, not meeting families’ persistent needs.”<sup>129</sup> Fong further points out that while for families in New Haven “housing needs were paramount,” CPS lacked the ability to provide rental assistance or address this need in any sustained way.<sup>130</sup> Born out of a prevention paradigm—again, which is rooted in pathology—it is unsurprising the Family First Act is not structured to provide housing or the material resources necessary to secure safe, stable housing. The Act instead continues the tradition of behavior modification as *the* policy solution to the problems faced by system-involved families.

#### B. The Family First Act: A Continuation of The Family Regulation System Tradition of Expansive Control

As noted above, federal family regulation policy of the 1980s and 1990s exercised expansive control over parents caught up in the system. To engender compliance with therapeutic interventions, including intense monitoring and mandatory “services,” federal family regulation policy funded coercive techniques—mainly the removal of children from their families to the foster system. The Family First Act does not disrupt

---

<sup>127</sup> See generally Mark E. Courtney et al., *Housing Problems Experienced by Recipients of Child Welfare Services*, 83 CHILD WELFARE 393 (2004).

<sup>128</sup> Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 624 (2020).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

federal family regulation system's embrace of expansive control over Black families. The Family First Act merely shifts the fundamental goal of coerced immediate removal of children to the foster system to the *threat* of removal to the foster system.

To exercise expansive control over families subjected to the family regulation system, the Family First Act relies on a familiar set of tools. As with the federal family regulation policy that preceded it, ongoing monitoring is central to the Family First Act. For instance, the Act requires ongoing, periodic risk assessments during the period in which prevention services are provided. To achieve this, the Act necessarily anticipates monitoring of families by family regulation system agency case workers.<sup>131</sup>

While few things approach the level of violence that is family separation, persistent, unconstrained government monitoring and supervision is not benign. And the threat of family separation to compel acquiescence can be equally traumatic. Family regulation system monitoring creates a level of surveillance that is unimaginable for those with racial and class privilege.<sup>132</sup> As Fong notes, “merged supportive and coercive capacities [of the family regulation system] yield an expansive, stratified, and distressing surveillance, with everyday system interactions—a doctor’s visit, a child going to school—opening families up to the state.”<sup>133</sup> Those under the family regulation system’s critical and constant gaze are required to open their homes to family regulation system workers whenever those workers appear, answer far-reaching inquiries into their mental health, medical, sexual, and romantic histories. And they must

---

<sup>131</sup> CHILDREN’S DEFENSE FUND ET AL., IMPLEMENTING THE FAMILY FIRST PREVENTION SERVICES ACT: A TECHNICAL GUIDE FOR AGENCIES, POLICYMAKERS AND OTHER STAKEHOLDERS (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf> [<https://perma.cc/T76V-9DY6>].

<sup>132</sup> See also We Be Imagining Podcast, *Minisode 4 - Mother’s Day in the Trenches: Abolishing the Child Welfare System*, AM. ASSEMB. (May 10, 2020), <https://americanassembly.org/wbi-podcast/minisode-child-welfare-ae7rh-84pj52-254c6-kxlej> [<https://perma.cc/Q33X-Y6Q7>] (activist and organizer Joyce McMillan discussing the expansive surveillance of Black families in New York City by the Administration for Children’s Services, New York City’s family regulation system agency).

<sup>133</sup> Fong, *supra* note 128, at 628.

disclose this otherwise protected and deeply private health information.<sup>134</sup>

Implicit in the family regulation system intervention is the government's signal to children that their parent is no longer their protector. The government removes parents' ability to shield their children from the governments' equally invasive and traumatizing interventions, including far reaching family regulation system agency inquiries about the family's "functioning" and composition in both the home and at children's schools, and strip-searches. If parents do not acquiesce, they can be reported as "non-compliant," defiant, and meriting further suspicion and surveillance.<sup>135</sup> Nor are parents' family, friends, community members, or social service providers off limits. Rather, case workers seek information about the parent from parents' extended network, and indeed deputize parents' communities and social service providers as *de facto* extensions of the family regulation system monitoring and surveillance apparatus.<sup>136</sup> External entities upon which families depend for

---

<sup>134</sup> See *id.* at 623 (noting that "CPS investigations are much more informationally invasive," involving multiple home visits, far reaching interviews of all household members and criminal background checks of all household members). See also Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 518 (2005).

<sup>135</sup> See Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of The Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 132, 138–139 (2019); Emma S. Ketteringham et al., *supra* note 52, at 95.

<sup>136</sup> Similar forms of commandeering are also apparent in the way that social service agencies operate with respect to Black, Latinx, Indigenous, and low-income families. Sociologist Kelley Fong explains, "Child welfare surveillance of families encompasses not only surveillance by child welfare authorities[,] . . . but also a more extensive monitoring by other entities for child welfare authorities," such as the health care system. Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1786 (2019). Fong's research reveals that parents identified risks in interactions with social service providers such as health care systems, and "acknowledged their vulnerability to [child welfare] reports because professionals could misconstrue their best efforts to parent their children." *Id.* at 1792. While in some extreme situations parents avoided social service systems all together, Fong found that most often parents engaged in "selective visibility, concealing personal details or behaviors as they interacted with systems." *Id.* at 1793.

vital services “not only broker resources[,] . . . but also broker surveillance.”<sup>137</sup>

To fully appreciate the family regulation system’s expansive reach, it is imperative to understand the system’s shift from incentivizing and relying on separation of the family unit and removal of the child at the system’s inception, to intensive monitoring and supervising of the family with the threat of family separation. These two mechanisms are a continuum rather than separate, unrelated systems of control. Given the Family First Act’s reliance on intensive monitoring as a mechanism of control, one open question is whether the Family First Act will reduce the number of families enmeshed in state family regulation systems. Because of the Family First Act’s recent enactment, there is not yet data available to know the outcome of the policy shift. New York, however, made a state-level policy change prior to the enactment of the Family First Act, and thus is an interesting frame of reference.

If the Act’s implementation is anything like New York, the Family First Act will likely not reduce the number of families with the family regulation system. In the early 2000s, New York State redirected a stream of family regulation system funding toward prevention services.<sup>138</sup> Following this funding shift, New York City’s foster population decreased from more than 40,000 to just over 8,000.<sup>139</sup> Coinciding with the decrease in NYC foster population was a massive increase in intensive monitoring and supervision by way of prevention services, which fall under the purview of NYC’s family regulation agency, the Administration for Children’s Services (ACS). As of 2019, over 45,000 families were under prevention services, administered by the NYC’s Administration for Children’s Services.<sup>140</sup> As such, in New York

---

<sup>137</sup> Fong, *supra* note 128, at 629.

<sup>138</sup> NEW YORK STATE OFFICE OF CHILD. & FAM. SERVS., FINAL REPORT TO THE LEGISLATURE CHILD WELFARE FINANCING: DECEMBER 2006 2–3 (2006), [https://ocfs.ny.gov/main/reports/CWF\\_12\\_2006.pdf](https://ocfs.ny.gov/main/reports/CWF_12_2006.pdf) [<https://perma.cc/U6DV-4XT3>]. See also MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 50.

<sup>139</sup> MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, 50–51. It is also important to point out that also during this time period New York became home to the first institutional providers of family defense for parents in New York City. This shift to high quality parent defense very likely was a large contributing factor to the reduction of children in New York City’s foster system.

<sup>140</sup> NEW YORK CITY ADMINISTRATION FOR CHILDREN’S SERVICES, CHILDREN\* SERVED BY CHILD WELFARE PREVENTION SERVICES BY HOME

State, the family regulation system's controlling reach over Black families remains expansive.<sup>141</sup> Likewise, the Family First Act is likely to expand states' control over Black families. Further emphasizing this point is the Act's spending flexibility, allowing state family regulation systems to move more "upstream;" or in other words, enable earlier interventions into families' lives.<sup>142</sup>

Beyond ongoing monitoring, the Family First Act tethers eligibility for reimbursement for prevention services to the maintenance of a "prevention plan" that identifies "the foster care prevention strategy for the child so that the child may remain safely at home . . . ;" as well as the list of services provided "to ensure the success of that prevention strategy."<sup>143</sup> Among the services that will be more available as a result of the Act are drug treatment programs and mental health services. If the Act's goals are met, and families within the family regulation system have greater access to drug treatment and mental health programs, those families may avoid state-imposed family separation. To be clear, recognizing a greater availability of services may help some families does not mean that those families necessarily pose a risk of harm to their children. Nevertheless, engaging in services (regardless of the actual risk of harm to the child) *can, and often*

---

BOROUGH/CD, CY 2019 (2019),  
[https://www1.nyc.gov/assets/acs/pdf/child\\_welfare/2020/ChildrenReceivingPreventiveServicesByCDCY2019.pdf](https://www1.nyc.gov/assets/acs/pdf/child_welfare/2020/ChildrenReceivingPreventiveServicesByCDCY2019.pdf) [https://perma.cc/6X2F-V89T].

<sup>141</sup> Warranting further research are the parallels between the expansive reach of the family regulation system by way of monitoring and supervision and the criminal legal system by way of probation and parole. According to the Prison Policy Initiative points out that we must "understand[ ] correctional control beyond incarceration [as that] gives us a more accurate and complete picture of punishment in the United States . . ." Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POLY INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html> [https://perma.cc/L4R5-437P]. She observes, "[t]outed as alternatives to incarceration, these systems often impose conditions that make it difficult for people to succeed, and therefore end up channeling people in prisons and jails." *Id.* Similar arguments can be made about family regulation system services, which in many circumstances function to enmesh families deeper within the family regulation system, rather than allow the family to escape it. Moreover, for families subject to non-court-ordered prevention services, failure to comply can lead to family court intervention, and for in-tact families subject to family court monitoring, failure to comply with service plans can lead to family separation.

<sup>142</sup> H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75.

<sup>143</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50711, 132 Stat. 64 (2018).

does, mean the difference between family unity and family separation. To the extent that the Act achieves less forced family separation, this will be an undoubtedly meaningful and important change.

We must question, however, whether greater access to substance abuse treatment and mental health services alone connotes that the family regulation system has shifted to a system of true support from a system rooted in expansive control. It does not. Instead, the Family First Act disguises “mandatory measures as compassionate rehabilitation” and “redefin[es] . . . coercion as compassionate pedagogy . . . .”<sup>144</sup> Sociologist Allison McKim has written expansively on mandated addiction treatment. This tool is heavily relied upon by the criminal system and the family regulation system, and carries with it carceral logics and techniques.<sup>145</sup> With respect to a mandated drug treatment program, McKim noted that although the program used “practices and therapeutic language” to conceal the program’s coercive power, it compelled compliance by using the threat of incarceration or continued forced separation from one’s child.<sup>146</sup> Dawn Moore, a law and legal studies scholar, has, through the lens of drug treatment courts, challenged the rigid distinctions often drawn between care and control. Moore notes that in drug treatment courts “control is eschewed as an explicitly state goal in favor of the ethic of care intended to ‘cure the offender of her addictions.’”<sup>147</sup> In this space, care and coercion go hand in hand. And though drug treatment court is framed as having “more benevolent goals, the means to achieving those goals do not sit outside a system whose impact . . . is primarily exerted through a power hierarchy that governs those who come before it.”<sup>148</sup>

Similarly, where the family regulation system is the oversight apparatus for parents’ substance abuse treatment and/or mental health services, a lack of progress in treatment and relapses often serve as indictments on one’s ability to parent their child, as basis for court intervention, to remove children,

---

<sup>144</sup> Campbell, *supra* note 30, at 902.

<sup>145</sup> See generally ALLISON MCKIM, ADDICTED TO REHAB: RACE, GENDER, AND DRUGS IN THE ERA OF MASS INCARCERATION (2017).

<sup>146</sup> *Id.* at 66.

<sup>147</sup> Dawn Moore, *The Benevolent Watch: Therapeutic Surveillance in Drug Treatment Court*, 15 *Theoretical Criminology* 255, 256 (2011).

<sup>148</sup> *Id.* at 257.

and, in some cases, to terminate parental rights. Those who are tasked with treating parents—e.g., counselors, case workers, therapists—serve as arms of the family regulation system. They report not only on one’s progress, but on every behavior that might assist the family regulation system worker in determining whether the parent is a fit parent. Thus, a counselor—in theory the parents’ support—is also an extension of their investigator, prosecutor, and adjudicator. And as Angela Y. Davis, poignantly observes, “[i]ncreased punishment is most often a result of increased surveillance.”<sup>149</sup> “Insight” and surveillance intrinsically become linked to control and coercion through the Act. The investigator, prosecutor, and adjudicator—the case worker in this instance—determine whether a parent benefits from, and complies with, the system’s programs.

Activists, scholars, and advocates note that the prevention plans are determined with little more than a list of standardized services doled without any consideration of the families’ individual needs, much less their material needs.<sup>150</sup> Often, parents feel that they have no other choice but to engage in the mandated services in order to protect their familial integrity.<sup>151</sup> Unquestioning “compliance” with family regulation system monitoring, and prevention plans, is most often the paramount concern. Thus, eliminating the parent’s self-determination and autonomy within the state’s treatment plan.

---

<sup>149</sup> ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 29 (2005); *See also* Moore *supra* note 147, at 263 (observing that in drug treatment court, “the more contact, the more surveillance, the more chances [a person] will be observed making mistakes and thus more opportunities for punishment as part of [their] treatment”).

<sup>150</sup> *See e.g.*, ROBERTS, *SHATTERED BONDS*, *supra* note 3, at 79–81 (observing that child services service plans generally bear little resemblance to a family’s needs, and were often, rather a checklist of requirements parents had to complete in order reunite with their children); Burrell, *supra* note 135, at 138–139; Emma Ketteringham, *Live in a Poor Neighborhood? Better be a Perfect Parent.*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html> [<https://perma.cc/S22V-HW93>]; Emma S. Ketteringham et al., *supra* note 52, at 95; Annett Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 775 (2001), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1458&context=mjlr> [<https://perma.cc/9FBD-FN35>] (noting the routine failure of child service agencies to provide “meaningful and sufficient services to support or reunify the families”); Appell, *supra* note 56, at 597–599;

<sup>151</sup> *See* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 30, 95–97.

As Roberts observes, “[c]ompliance overshadows the child’s needs or parent’s ability to care for the child or even the truth of the original charges of maltreatment.”<sup>152</sup> Thus, the family’s fate—how long the family will be in the family regulation system’s gaze, whether the family will be subject to court intervention, whether the family will be forcibly separated, and whether and when they will reunify—rests on whether the parent completed their class, attended treatment sessions, or submitted to evaluations and drug screens.<sup>153</sup> The same is likely to be true under the Family First Act for two reasons. First, the Act only authorizes reimbursement for children identified by state family regulation agencies as being “at imminent risk of entering foster care;” yet such children can remain safely at home with forced participation in prevention services.<sup>154</sup> And second, nothing in the Act eliminates removal to the foster system as a response for resistance to, and non-compliance with, family regulation system control.

### C. The Family First Act Exists in an Ecosystem of Punishment

Finally, as noted above, the Family First Act, like preceding policy, utilizes coercion to engender compliance. Underpinning this coercion is the state’s power to forcibly separate children from their parents. To be clear, the Act does not remove this coercive power. As such, whereas ASFA and preceding policy relied on the immediate removal of children to the foster system to compel compliance, the Family First Act forces compliance with the ever present *threat* of removal to the foster system.

ASFA, moreover, and its adoption imperative still remain firmly in place. It serves as an implicit reminder that failure to modify behavior and remedy perceived parental “deficits” through the Act’s prevention interventions can still lead to removal to the foster system, termination of parental rights, and fast-tracked adoptions. In fact, the Family First Act reauthorizes the adoption and guardianship incentives program ushered in by the Preventing Sex Trafficking and Strengthening Families Act

---

<sup>152</sup> ROBERTS, SHATTERED BONDS, *supra* note 3, at 80.

<sup>153</sup> *Id.*; see also MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 75 (noting, “[a] single positive drug test after a period of abstinence could topple the progress of a case, resulting in the removal of a child from a home . . .”).

<sup>154</sup> See FIRST FOCUS CAMPAIGN FOR CHILDREN, *supra* note 74, at 1; Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018).

of 2014, which created financial incentives for states to increase the adoption and guardianship of children, in particular older children, in the foster system.<sup>155</sup> Specifically, the Act authorizes \$43 million for the program.<sup>156</sup> The Act also designates “[s]upporting and [r]etaining foster families” as a “[f]amily [s]upport [s]ervice,” and makes available to states \$8 million in competitive grants “to support . . . the recruitment and retention of high-quality foster families to increase their capacity to place more children in [foster] family settings . . . .”<sup>157</sup>

Clear from the Family First Act’s provisions, and recent statements from some of the allegedly more liberal Children’s Bureau leaders, is the firm belief that there will always be a need for a foster system.<sup>158</sup> Thus, the Act does not remove punishment as a pillar on which the family regulation system rests. Rather, under the Act, punishment by way of removal to the foster system, termination of parental rights, and adoption—all with varying financial incentives—continues to be available to state family regulation agencies.

#### V. RECOMMENDATIONS

Having identified how the Family First Act maintains the family regulation system’s core pillars—pathology, expansive control, and punishment—the question remains, what do we do

<sup>155</sup> CHILDREN’S DEFENSE FUND ET AL., *supra* note 131.

<sup>156</sup> Mary Boo, *The Family First Prevention Services Act Becomes Law*, N. AM. COUNCIL ON ADOPTABLE CHILD., <https://www.nacac.org/resource/family-first-prevention-services-act-becomes-law/> [<https://perma.cc/3MY7-S8U6>]. (last visited Mar. 19, 2021).

<sup>157</sup> Bipartisan Budget Act of 2018 § 50751.

<sup>158</sup> David Kelly & Jerry Milner, *High-Quality Legal Representation is Critical to Creating a Better Child Welfare System*, A.B.A. (July 17, 2019), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/january---december-2019/high-quality-legal-representation-is-critical-to-creating-a-bett/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/high-quality-legal-representation-is-critical-to-creating-a-bett/) [<https://perma.cc/DYB3-YREZ>] (noting the historic and current failing of the family regulation system, yet simultaneously affirming that “there will likely always be a need for child protective services and for foster care . . . .”); Daniel Heimpel, *In Era of Family Separation, a Top Administration Official Vows to Fight the Practice in Child Welfare*, IMPRINT (Apr. 17, 2019, 4:01 AM), <https://imprintnews.org/politics/in-era-of-family-separation-a-top-administration-official-vows-to-fight-the-practice-in-child-welfare/34573> [<https://perma.cc/X4AK-CUVV>] (quoting David Kelly, special assistant to Children’s Bureau Associate Commissioner, “[w]e’re not asking you to engage in magical thinking. We know that foster care will likely always be necessary, but we’re absolutely convinced — absolutely convinced — that it can be dramatically lessened.”).

with the family regulation system? I humbly, and emphatically, echo the calls of families impacted by the system, activists, agitators, community organizations, advocates, and scholars to abolish the family regulation system.

There is no reforming a system that stems from anti-Black racism, classism, ableism, and patriarchy. There is no reforming a system that serves as a tool to uphold white supremacy. Yet, the family regulation system was neither erected in a day, nor will it be dismantled in a day. While progress toward abolition may at times be incremental, “[a]bolitionist steps are about gaining ground in the constant effort to radically transform society . . . ,” and “chipping away at oppressive institutions rather than helping them live longer.”<sup>159</sup> As Rachel Herzing explains, “[m]aking incremental changes to the systems, institutions and practices that maintain systemic oppression and differentially target marginalized communities is essential to shifting power.”<sup>160</sup>

Guiding our imagination and struggle toward abolition should be the abolitionist principles developed by prison industrial complex (PIC) abolitionist movement leaders, organizers, and strategists. Adapted to the family regulation system context, I suggest we use the following guiding questions, developed by Survived and Punished New York:

1. Does the reform (as a whole or in part) legitimize or expand the policing system we are trying to dismantle?
2. Does the reform benefit parts of the family regulation system, industries that profit from the family regulation system, or elected officials who sustain the family regulation system?
3. Do the effects the reform creates already exist in a way we have to organize against? Will we, or others, be organizing to undo its effects in five years?

---

<sup>159</sup> Critical Resistance, *Abolitionist Steps*, in THE ABOLITIONIST TOOLKIT 48, 48 (2004), <http://criticalresistance.org/wp-content/uploads/2012/06/Ab-Toolkit-Part-6.pdf> [<https://perma.cc/TGB6-KUTS>].

<sup>160</sup> Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), <https://truthout.org/articles/big-dreams-and-bold-steps-toward-a-police-free-future> [<https://perma.cc/58RN-8SQC>].

4. Does the reform preserve existing power relations? Who makes decisions about how it will be implemented and enforced?
5. Does the reform create a division between “deserving” and “undeserving” people?
6. Does the reform undermine efforts to organize and mobilize the most affected for ongoing struggle? Or does the reform help us build power?<sup>161</sup>

With this framework, we are more likely to avoid the pitfalls of non-reformist-reforms,<sup>162</sup> and steer a clearer course toward abolishing the family regulation system.

And, because abolition demands not only dismantling, abolition requires our work to also include imagining and building true systems of community-based and community-defined support. I do not have the answer—nor do I think any one person should—to the question: what do we build in place of the family regulation system; or rather, the better question: how do we respond to, prevent, and heal harm within communities without causing more harm? My thinking on this question, however, is shaped by prison abolitionist activist, organizer, educator, and curator Mariame Kaba who explains that it is imperative to “transform the relationships that we have with each other so we can really create new forms of safety and justice

---

<sup>161</sup> These guiding questions, developed by Survived and Punished NY, are in turn drawn from the thought leadership of abolitionist organizers and strategists including but not limited to, Mariame Kaba, Erica Meiners, Dean Spade, Peter Gelderloos, Movement 4 Black Lives and Law 4 Black Lives. SURVIVED AND PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 3 (2020), <https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf> [<https://perma.cc/9HTL-26G5>].

<sup>162</sup> A non-reformist-reform is a term coined by Andre Gorz and lifted up and expanded upon by Ruth Wilson Gilmore, mean “measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.” Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/6733-8VPC>]. See also Mariame Kaba & John Duda, *Towards The Horizon of Abolition: A Conversation with Mariame Kaba*, NEXT SYS. PROJECT (Nov. 9, 2017), <https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba> [<https://perma.cc/TPL8-FTEL>].

in our communities.”<sup>163</sup> Radical Black abolitionist activists, organizers, groups, and networks have long been doing, and continue to do, this work of visioning, demanding, and building a society without policing systems.<sup>164</sup> These visions lift up, and center, the need to transform the conditions that lead to harm—including demanding access to affordable housing, living wage employment, health care, education, and “universal, quality, and accessible childcare.”<sup>165</sup> Additionally, examining mutual aid work—which has long existed within the abolition movement,<sup>166</sup> but which has become more visible during the COVID-19 pandemic and economic collapse—has been instructive. Legal scholar Dean Spade explains, mutual aid is “work to meet each other’s survival needs that’s based in a shared understanding that the systems we live under aren’t gonna meet them and are actually causing the crises.”<sup>167</sup> Mutual aid, meets immediate needs, builds movements and solidarity, and function as spaces “where we practice the world we’re trying to live in.”<sup>168</sup> Fundamentally, I believe that our rebuilding must be rooted in care and support that rejects rugged individualism and the stigmatization of interdependence, vulnerability, and need.

---

<sup>163</sup> Kaba & Duda, *supra* note 162. See also We Be Imagining Podcast, *supra* note 132.

<sup>164</sup> See *Vision for Black Lives*, M4BL, <https://m4bl.org/policy-platforms/> [<https://perma.cc/Z55M-Y5S5>] (last visited Mar. 18, 2021). See also *End The War on Black Women*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-black-women/> [<https://perma.cc/BF27-8S6F>] (last visited Mar. 18, 2021).

<sup>165</sup> *End The War on Black Women*, *supra* note 164; see also *End The War on Black Communities*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-on-black-communities/> [<https://perma.cc/4BEM-ARW2>] (last visited Mar. 18, 2021).

<sup>166</sup> One of the most famous mutual aid projects in the United States is the Black Panther Party’s survival programs, including its health care clinics in the community and free breakfast program. See Darryl Robertson, *A Conversation with Prof. Alondra Nelson on the Black Panther Party’s Fight for Health Care*, MEDIUM (Apr. 22, 2020), <https://darrylrobertson3491.medium.com/a-conversation-with-prof-alondra-nelson-on-the-black-panther-partys-fight-for-health-care-126caedaf894> [[perma.cc/57C5-8TQ9](https://perma.cc/57C5-8TQ9)]. See also Dean Spade, *Mutual Aid is Essential to Our Survival Regardless of Who is in The White House*, TRUTHOUT (Oct. 27, 2020), <https://truthout.org/articles/mutual-aid-is-essential-to-our-survival-regardless-of-who-is-in-the-white-house/> [<https://perma.cc/XEA4-48G4>].

<sup>167</sup> BARNARD CTR. FOR RSCH. ON WOMEN, WE KEEP EACH OTHER SAFE: MUTUAL AID FOR SURVIVAL AND SOLIDARITY 3 (2020), <http://bcrw.barnard.edu/wp-content/uploads/2021/02/we-keep-each-other-safe-transcript.pdf> [<https://perma.cc/KF4W-HH5U>].

<sup>168</sup> *Id.*

Finally, and most importantly, Kaba reminds us that “[t]he work of abolition insists that we foreground the people who are behind the walls—that we listen to them, that we take their ideas seriously.”<sup>169</sup> Similarly, the work of abolishing the family regulation system must be centered on, and guided by, the families and communities that are caught up in it, resist it, and survive its violence and control.

#### VI. CONCLUSION

Enacted only in 2018, it is too early to tell precisely the impact the Family First Act will have on families enmeshed in the family regulation system. What is clear, however, is that the family regulation system is a policing system designed to uphold and further white supremacy. What is also clear is that the Act is, at its core, a continuation of prior federal family regulation policy. The ideologies and techniques that drove the modern foster system prior to the Act—pathology, expansive control, and punishment—are the very same ideologies and techniques that drive the Act. From its myopic focus on parental behavior and “deficits;” to the omission of structural factors that produce inequality; to the continued surveillance of families in the system; and to the state’s power of forcing compliance and exercise expansive control, the Family First Act reflects yet another federal family regulation policy recalibration undertaken to ensure the system’s survival. Given this reality, we must do what the Family First Act does not. Guided by PIC abolitionist principles, we must disrupt, dismantle, and ultimately abolish the family regulation system. Only then can we and build its place community-based structures that center dignity, self-determination, care, and support.

---

<sup>169</sup> Kaba & Duda, *supra* note 162.

