

When COVID Capitalism Silences Children

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ABSTRACT

The lingering COVID-19 pandemic has ushered in policy developments that mar child and family wellbeing while effectively suppressing U.S. children in civic life. Although the prevailing framework for child-parent-state conflicts already antagonized families and disenfranchised youth, “COVID Capitalism” threatens to silence children on virtually every level. Not only does fiscal, emotional, medical, and social precarity now increasingly beleaguer children and families, but various measures taken by governments and the private sector since the onset of the pandemic reinforce children’s subordinate status. These developments exist amidst a backdrop that this author previously coined the empathy gap, wherein the public perception and response to struggling families depends largely upon preconceived notions about racial identity. Despite the reduced medical severity of the Coronavirus for individuals under age eighteen, children are acutely vulnerable to other impacts of a pandemic due to their critical period of development and the drastic modification of routines and resources that ordinarily foster stability.¹

This Article illuminates the legal and political decisions that states, the federal government, and other entities are making in the COVID era to overtly bolster racial capitalism, including elevating profits over human life, deregulating industries, incentivizing a diminished social safety net, exploiting an over-extended workforce, and ignoring public health. Ultimately, the U.S. is at a critical juncture. A devastating pandemic

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1. A plethora of major studies and meta-studies reveal this point. *See, e.g.*, Leigh M. Vanderloo, Sarah Carsley, Mary Aglipay, Katherine T. Cost, Jonathon Maguire & Catherine S. Birken, *Applying Harm Reduction Principles to Address Screen Time in Young Children Amidst the COVID-19 Pandemic*, 41 J. DEV. & BEHAV. PEDIATRICS 335, 335–36 (2020); Wen Yan Jiao, Lin Na Wang, Juan Liu, Shuan Feng Fang, Fu Yong Jiao, Massimo Pettoello-Mantovani & Eli Somekh, *Behavioral and Emotional Disorders in Children During the COVID-19 Epidemic*, 221 J. PEDIATRICS 264, 265 (2020).

reverberates yet offers an unparalleled opportunity to reimagine the status quo and potentially transform destructive systems. Instances of youth mobilization are ironically burgeoning across the country, even as major attempts at suppression and austerity persist. However, unless policymakers, scholars, and the public reprioritize the social safety net and invest in youth and family empowerment, public health, socioeconomic wellbeing, and our planetary fate in the Anthropocene² are in irreversible jeopardy.

I. INTRODUCTION

This Article scrutinizes the impact of COVID Capitalist policies in the U.S. through the unique lens of youth and family empowerment, illuminating both the interconnectedness of family members—contrary to the damaging, prevailing legal framework—and the need to re-focus public policy priorities. In fact, COVID Capitalism silences children by simultaneously imperiling their socioeconomic wellbeing, repressing their civic engagement, and diminishing their future prospects. The term “COVID Capitalism” is utilized by a variety of scholars, advocates and policy-makers to “designate[] the ways capitalism and the novel coronavirus alter and amplify one another.”³ While the term has no

2. See Mark Hertsgaard, *Covering Young Climate Activists Isn't an Act of Favoritism—It's an Act of Journalism*, NATION (Mar. 17, 2021), <https://www.thenation.com/article/environment/climate-media-youth-activists/> [<https://perma.cc/MSR6-ZHGM>]. See generally John P. Rafferty, *Anthropocene Epoch*, BRITANNICA (Feb. 10, 2023), <https://www.britannica.com/science/Anthropocene-Epoch> [<https://perma.cc/6F3H-CX2T>] (defining “Anthropocene Epoch” as “unofficial interval of geologic time, making up the third worldwide division of the Quaternary Period (2.6 million years ago to the present), characterized as the time in which the collective activities of human beings (*Homo sapiens*) began to substantially alter Earth's surface, atmosphere, oceans, and systems of nutrient cycling”). “A growing group of scientists,” including Dutch Nobel Prize winner Paul Crutzen, “argue that the Anthropocene Epoch should follow the Holocene Epoch (11,700 years ago to the present) and begin in the year 1950. The name *Anthropocene* is derived from Greek and means the ‘recent age of man.’” *Id.* As one example of this impact: “By 2005, humans had converted nearly two-fifths of Earth's land area for agriculture . . . [and] [a]n additional one-tenth . . . was given over to urban areas According to some estimates, humans have harvested or controlled roughly one-quarter to one-third of the biomass produced by the world's terrestrial plants . . . [annually] since the 1990s,” towards crop yields and technological developments that facilitated an exponential rise in the human population. *Id.*; see also *The Words You Need to Know to Talk About Climate Change Today*, DICTIONARY.COM (Apr. 22, 2021), <https://www.dictionary.com/e/climate-change-terms/> [<https://perma.cc/E67U-YWR9>] (defining “mass extinction” as “the extinction of a large number of species within a relatively short period of geological time, thought to be due to factors such as a catastrophic global event or widespread environmental change that occurs too rapidly for most species to adapt. Modern scientific reporting suggests that climate change could directly lead to a future mass extinction event. According to the fossil record, there have been at least five mass extinctions in Earth's history.”).

3. Thomas Nail, *What Is COVID Capitalism?*, 23 DISTINKTION: J. SOC. THEORY 327, 327 (2022).

uniform definition or application, most who employ the term recognize that COVID exacerbates existing oppression and inequality (both amplifying and re-fueling existing capitalist structures); that COVID has led to profits, bailouts, and deregulation which spread the damage of unfettered capitalism (especially through subsidies and exorbitant incentives for pharmaceuticals); and that capitalist extraction and urbanization increase exposure to new viruses.⁴ COVID Capitalism also denotes the brutal nature of prioritization in capitalist states (governments), wherein profit-making takes priority over life-making endeavors like hospital funding and expansion, food distribution, and wage compensation from state funds—even amidst a public health crisis where questions of economy and social welfare are thrust together in an unprecedented way.⁵ One of the most obvious examples of prioritizing profit-making over life-making is state, local, and federal governments' penchant for restarting “business as usual” as soon as possible despite high infection rates or other disconcerting public health situations.⁶ COVID Capitalism has also normalized supply chain breakdowns and price gouging, along with magnified “vulture capitalism”—a phenomenon where predatory investors, often coined “distressed debt specialists,” take advantage of bankruptcy laws to restructure or acquire imperiled companies while stripping employees of benefits or offloading them to the state, then flip their corporate acquisition at a profit.⁷ Indeed, if the essential feature of capitalism is the profit motive, and private actors own and control property in accordance with self-interests, then a pandemic jeopardizes capitalism's dependence upon a healthy, able-bodied

4. *Id.* at 327, 338; see Tithi Bhattacharya, *Covid Capitalism*, MONTHLY REV. ONLINE (Nov. 25, 2021), <https://mronline.org/2021/11/25/covid-capitalism/> [<https://perma.cc/X294-VP4V>].

5. Bhattacharya, *supra* note 4.

6. *Id.*; Nail, *supra* note 3.

7. See generally *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 10, 2022), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and> [<https://perma.cc/Z2ZX-ZF3V>] (discussing rising prices for consumer goods in the COVID era); Matthew Ponsford & Ruairi Casey, *Coronavirus Is Creating the Perfect Crisis for the 'Vulture Capitalist' Takeover of Cities*, JOURNALISM FUND EUR. (Nov. 11, 2021), <https://www.journalismfund.eu/supported-projects/coronavirus-creating-perfect-crisis-vulture-capitalist-takeover-cities> [<https://perma.cc/2BH2-LBGQ>] (discussing both the U.S. and abroad); Quinn Slobodian, *The Vulture Capitalists Are Counting on Us to Do Nothing*, NATION (Apr. 30, 2020), <https://www.thenation.com/article/society/coronavirus-vulture-capitalism/> [<https://perma.cc/6EDJ-46P2>]; Matthew Ponsford & Ruairi Casey, *Vulture Funds Plan to Use the Pandemic to Pillage the Global Economy*, MONTHLY REV. ONLINE (Feb. 17, 2021), <https://mronline.org/2021/02/17/vulture-funds-plan-to-use-the-pandemic-to-pillage-the-global-economy/> [<https://perma.cc/XS8V-HTYV>]; Megan Rose Dickey, *Freada Kapor Klein Warns of 'Vulture Capitalists' During Pandemic*, TECHCRUNCH (Apr. 30, 2020, 9:15 AM), <https://techcrunch.com/2020/04/30/freada-kapor-klein-warns-of-vulture-capitalists-during-the-pandemic> [<https://perma.cc/QPQ4-KDY3>].

workforce just as failures to bolster a tattered social safety net assail capitalism's overall sustainability.⁸

Some experts also discuss the degree to which COVID Capitalism is borne from the longstanding U.S. system of racial capitalism, which historically oppresses marginalized children while also centering ableism.⁹ According to Black feminist sociologist Whitney N. Laster Pirtle, “[r]acism and capitalism mutually construct harmful social conditions that fundamentally shape COVID-19 disease inequities” to ultimately exacerbate poor health outcomes; multiple risk factors for low-income communities, people of color, and women; shape access to resources; and replicate historical patterns of inequities within pandemics.¹⁰ According to Pirtle, interventions should thus “address social inequality to achieve health equity.”¹¹ Even commentators who refuse to condemn racial capitalism concede the “lesson of Covid capitalism” is that “the free market alone comes up short in solving enormous problems,” and “the government” must therefore “guide the economy and act as the ultimate absorber of risk.”¹²

Part II of this Article describes the legal and sociocultural landscape upon which COVID Capitalism has appeared, explaining the *child-parent-state* constitutional framework and its damaging focus on contested rights and

8. See Sarwat Jahan & Ahmed Saber Mahmud, *What Is Capitalism?*, INT’L MONETARY FUND: FIN. & DEV., June 2015, at 44–45; Bhattacharya, *supra* note 4.

9. Racial capitalism is inherently ableist, as it values individuals only in relation to their contributions to the market economy, or the lack thereof. On the connection between ableism and capitalism, see, for example, Ruth Flood, *Disability, Covid and Capitalism*, MONTHLY REV. ONLINE (Oct. 26, 2020), <https://mronline.org/2020/10/26/disability-covid-and-capitalism/> [<https://perma.cc/PHD9-PD4H>]; Abbigale Shi, *Mind Your Business: Ableism Is Rooted in Capitalism*, DAILY FREE PRESS (Nov. 19, 2020, 11:25 PM), <https://dailyfreepress.com/2020/11/19/mind-your-business-ableism-is-rooted-in-capitalism/> [<https://perma.cc/A76Y-ZY2B>]; Ableism, YORK UNIV.: UNLEADING, <https://www.yorku.ca/edu/unleading/ableism/> [<https://perma.cc/7RPF-QESQ>] (last visited Mar. 12, 2023); Beatrice Adler-Bolton & Artie Vierkant, *Capitalism & Disability: A Symposium on the Work of Marta Russell*, LAW & POL. ECON. (Oct. 3, 2022), <https://lpeproject.org/blog/capitalism-disability-a-symposium-on-the-work-of-marta-russell/> [<https://perma.cc/K5W7-HC2Z>]; Christine Mitchell, *Disabled People Are Tired: Public Health and Ableism*, DISABILITY VISIBILITY PROJECT (Mar. 7, 2022), <https://disabilityvisibilityproject.com/2022/03/07/disabled-people-are-tired-public-health-and-ableism/> [<https://perma.cc/F5XU-K3T7>]; *Event Announcement, Rethinking Public Health: Merging Disability Justice with Anti-Capitalism*, MCGILL UNIV. NEWS & EVENTS: CHANNELS (Mar. 10, 2023), <https://www.mcgill.ca/channels/channels/event/rethinking-public-health-merging-disability-justice-anti-capitalism-346487> [<https://perma.cc/M9BZ-AVHJ>].

10. Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47 HEALTH EDUC. & BEHAV. 504, 504 (2020).

11. *Id.*

12. Neil Irwin, *The Pandemic Is Showing Us How Capitalism Is Amazing, and Inadequate*, N.Y. TIMES (Nov. 14, 2020), <https://www.nytimes.com/2020/11/14/upshot/coronavirus-capitalism-vaccine.html> [<https://perma.cc/4M8X-33TL>].

children's immaturity. The empathy gap is also briefly discussed as essential context. Part III then delineates the various ways that COVID Capitalism harms and silences children, in terms of the precarity that children and families have been thrust into, as well as state efforts to diminish the social safety net and repress free expression and civic engagement. Part III concludes by briefly highlighting the resilience and remarkable impact of contemporary youth activists who nevertheless reject status quo systems and frameworks in the COVID era. Part IV then recommends a way forward through several paths that are briefly described, yet worthy of increasing attention: (1) rejection and reversal of COVID Capitalist policy priorities; (2) divestment from harmful systems (including the family policing system and prison industrial complex) and direct reinvestment in children and families; (3) the reorienting of status quo approaches to youth towards an empowerment and capacity-building paradigm, including specific advances like increased youth development programming, youth voting, and intergenerationally collaborative activism; and (4) expansion of the few successful yet short-lived economic interventions that brought families true support during the pandemic.

A. Terminology and Parameters

A thorough discussion of the pitfalls of the family policing system (also called the family regulation system or the child welfare system) and the carceral system are beyond the scope of this article, and yet this work is part of a broad interdisciplinary, intercultural effort to demand abolition of these oppressive systems in favor of re-investment in communities and community empowerment.¹³ Herein, the terms child, youth, minor, young

13. For extensive discussion of the U.S. family regulation system's and the carceral system's foundation upon socioeconomic discrimination, racism and xenophobia, heteropatriarchy, and ableism, as well as documentation of these systems' existence as state violence, see generally Child Welfare Information Gateway, *Child Welfare Practice to Address Racial Disproportionality and Disparity*, CHILD WELFARE INFO. BUREAU (Apr. 2021), [hereinafter CHILD WELFARE PRACTICE] <https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/> [https://perma.cc/5WB8-HZH6]; *Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. OF STATE LEGIS. (Jan. 26, 2021), <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx> [https://perma.cc/8PRF-A9GC]; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–59* (2012); DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); Max Nesterak, *Uprooted: The 1950s Plan to Erase Indian Country*, APM REPORTS (Nov. 1, 2019), <https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country> [https://perma.cc/93DY-HWCY]; MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940* (2009); Nancy D. Polikoff & Jane

person, and juvenile will be used interchangeably to describe individuals under age eighteen, as eighteen is the most commonly utilized, presumptive age of majority in the U.S. Indeed, states and the federal government place a plethora of limitations on individuals below age eighteen, including (and not limited to) exclusion from voting; curtailed speech, privacy, and association rights; school attendance requirements; restricted access to alcohol, tobacco, and firearms; and restriction from signing contracts or accessing funds.¹⁴ This paper acknowledges ongoing scholarship and precedent regarding youth rights and human development,

M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 433 (2021); Vivek Sankaran, *With Child Welfare, Racism Is Hiding in the Discretion*, THE IMPRINT (June 21, 2020, 11:00 PM), <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616> [<https://perma.cc/5UH3-2APA>]; Alan Dettlaff, Kristen Weber, Maya Pendleton, Bill Bettencott, & Leonard Burton, *How We endUP: A Future Without Family Policing*, UPEND MOVEMENT (June 18, 2021), <http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf> [<https://perma.cc/A8L7-GZ6W>].

14. The boundaries determining the age at which U.S. residents can exercise certain rights vary widely among the states, sometimes appearing arbitrary or bereft of scientific or legal rationale. Copious neuroscientific and psychosocial research demonstrates that while youth cognitive abilities—implicating deliberation and logical reasoning—typically resemble the abilities of adults by age 15, psychosocial and hormonal development are incomplete until our mid to late 20s. See, e.g., *Young Adult Health and Well-Being: A Position Statement of the Society for Adolescent Health and Medicine*, 60 J. ADOLESCENT HEALTH 758, 758–59 (2017); *Drawing Legal Age Boundaries: A Tale of Two Maturities*, AM. PSYCH. ASS'N (July 3, 2019), <https://www.apa.org/pubs/highlights/spotlight/issue-143> [<https://perma.cc/K7R2-7T5G>]; Charisa Smith, *No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking*, 71 U. MIAMI L. REV. 1, 6 (2016) [hereinafter Smith, *No Quick Fix*]; Charisa Smith, *#WhoAmI?: Harm and Remedy for Youth of the #MeToo Era*, U. PA. J. L. & SOC. CHANGE 295, 300 (2020) [hereinafter Smith, *#WhoAmI*]; Charisa Smith, *At the Crossroads of Rape Culture: Noncarceral Approaches for #MeToo Era Youth*, 36 OHIO ST. J. ON DISP. RESOL. 773, 782 (2021) [hereinafter Smith, *At the Crossroads*]; Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, J. APPLIED RSCH. ON CHILD.: INFORMING POL'Y FOR CHILD. RISK, 2013, at 1, 2 [hereinafter Smith, *Nothing About Us Without Us*]; Charisa Smith, *Don't Wait Up—Issues in Juvenile Justice*, 28 N.J. FAM. LAW. 144, 145 (2008) [hereinafter Smith, *Don't Wait Up*] (citing interviews with various medical experts and academics regarding research on “differences between the decision-making capabilities and brain maturation of juveniles and adults”); Lori S. Kornblum, Daniel Pollack & Bruce Semon, *Peer-on-Peer Child Sexual Abuse: A Proposed Updated Definition of ‘Peer’*, LAW: N.Y.L.J. (Jan. 25, 2021, 11:15 AM), <https://www.law.com/newyorklawjournal/2021/01/25/peer-on-peer-child-sexual-abuse-a-proposed-updated-definition-of-peer/> [<https://perma.cc/BZJ5-DE8C>]; Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1017 (2003) (advocating for developmental immaturity as a mitigating factor for sentencing of juveniles). Compare Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1164–65 (2020) with Grace Icenogle, Laurence Steinberg, Natasha Duell, Jason Chein, Lei Chang, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fant, Jennifer E. Lansford, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana M. Uribe Tirado, Liane P. Alampay, Suha M. Al-Hassan, Hanan M. S. Takash & Dario Bacchini, *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 LAW & HUM. BEHAV. 69, 69–85 (2019).

while past work of this author directly addresses such issues.¹⁵ Although this work aspires to elevate and support youth empowerment, it is inherently imperfect for a lack of direct youth input in the writing, and with an admission that the author's own perspective is not that of a member of the centered population (youth). Future scholarship, advocacy, and collaboration on this topic can and should more directly involve youth, while also employing diverse modes of communication that reach a much wider audience.

II. THE LEGAL LANDSCAPE: FAMILY RIGHTS TRIANGULATION

Preceding and throughout the COVID-19 pandemic, the U.S. legal landscape regarding children and parents has featured a specious constitutional framework that enables states to maintain an often-illogical hodgepodge of legal standards. Our legal response to children's unique status is commonly referred to as *the parent-child-state constitutional framework*, and it has evolved from over a century of precedents and sociocultural change. *The parent-child-state constitutional framework* relies upon over-simplistic understandings of interpersonal relationships, however, antagonizing the rights and interests of family members and unnecessarily triangulating between children, caregivers, and the government.

The status quo paradigm involves a confusing array of notions of maturity and regulated youth conduct among the states, with varied rules regarding children's decision-making, physical liberty, protection, and access.¹⁶ For example, states have innumerable and diverse requirements dictating specific conduct of minors, such as the right to marry, the ability to consent to sex, the right to legally drive, the right to cease mandatory K-12 education, and the right to reproductive healthcare and abortion. This assortment of laws and mechanisms ostensibly exists to protect youth—individuals with (typically) diminished mental capacity, lesser physical capability, and scarcer life experience when compared to adults—from outside abuse, manipulation, and exploitation as well as from their own potential choices.¹⁷ At times, the legal parameters involving children

15. See *supra* note 13.

16. See, e.g., Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547 (2000); Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1397 (1999).

17. For centuries, English common law had acknowledged the concept of diminished capacity—that children lacked many of the physical, mental, and moral resources of adults. Under *parens*

connect squarely with psychology, physiology, other social or natural sciences, or sound legal rationale, but at times such prevailing laws are completely unrelated to human development.¹⁸ Line-drawing based on chronological age always exists for practicality's sake, even though the youth population is far from monolithic.¹⁹ Regardless, the current legal landscape has the impact of neglecting the inherent interconnectedness between children and their families while cultivating persistent yet destructive adversarialism when family members and their status come in contact with the law.²⁰ Although COVID-19 certainly complicates and

patriae—literally, “parent of the country”—the state was responsible for all persons who were considered dependent, including minors, the disabled, and the mentally incapacitated. See generally Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, A CENTURY OF JUV. JUST. 3 (2002); Stephen Robertson, *Age of Consent Laws*, CHILD. & YOUTH IN HIST., <https://chnm.gmu.edu/cyh/case-studies/230> [<https://perma.cc/JF6H-68MS>]; LINDA HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1999); Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1321 n.39 (2015).

18. See, e.g., CHILD WELFARE INFORMATION GATEWAY (U.S. CHILDREN'S BUREAU/ACF/ACYF/HHS), LEAVING YOUR CHILD HOME ALONE: FACT SHEET FOR FAMILIES (Dec. 2018), <https://www.childwelfare.gov/pubpdfs/homealone.pdf> [<https://perma.cc/2ZHD-7RYK>] (regarding widely variant laws on children's ages, maturity, and potential supervisory neglect by guardians); Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741 (2016) (regarding Supreme Court jurisprudence on juvenile sentencing and criminal procedure, which relied upon developmental science evidence as well as a murky “common sense” analysis of children's ages and maturity that police officers are purportedly capable of applying); Lawrence T. White Ph.D., *Is the Maturity Gap a Psychological Universal? New study finds logical reasoning precedes impulse control in most countries*, PSYCHOLOGY TODAY (Mar. 2, 2019), <https://www.psychologytoday.com/us/blog/culture-conscious/201903/is-the-maturity-gap-psychological-universal> [<https://perma.cc/VC7R-4REV>] (regarding the so-called “maturity gap” as studied in 11 nations, which appears to be a psychological universal, and which may lend itself to more nuanced legal boundaries); Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham & Marie Banich, *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOLOGIST 7, 583–94 (2009), https://www.courts.ca.gov/documents/BTB_23_THURSDAY_LUNCH_PLENARY_7.pdf [<https://perma.cc/NPV4-HYS2>] (regarding the American Psychological Association's (APA's) own inconsistent stance on the psychological maturity of adolescents, and myriad legal implications); Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, AMER. BAR. ASSOC. (Aug. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/ [<https://perma.cc/U8UK-LE93>] (regarding developmental experts' findings on juvenile brain development, and implications for legal practice and decision-making); Ramin Skibba, *Age-Based Justice System Approach Overlooks That Adolescence Extends Beyond Age 18, Scientists Say*, INSIDE SCI. (Nov. 15, 2018), <https://www.insidescience.org/news/age-based-justice-system-approach-overlooks-adolescence-extends-beyond-age-18-scientists-say> [<https://perma.cc/QP24-Q7Y2>] (regarding the legal system's shortcomings where adolescent development is concerned, and the need for “a more nuanced view of the juvenile-adult boundary”).

19. Smith, *#WhoAml*, *supra* note 14, at 340.

20. See generally, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 643–44 (2006); Tamara Walsh & Heather Douglas, *Lawyers' views of decision-making in child protection matters: the tension between adversarialism and collaborative approaches* (Sept. 2012),

exacerbates the status quo, the predominant framework is nonetheless problematic.

Substantive due process precedents since the early 20th century have defined the boundaries of the State's and parents' protective authority over children, even as the legal landscape persists in paying inadequate attention to children's agency or to the complexity of intimate relationships. Currently, the U.S. reinforces parents' essential role in making decisions about their children, accepts children's ability to make limited, yet important decisions regarding their lives and civic participation, and confirms children's unique status as persons with incomplete development and capacity.²¹ The U.S. Supreme Court has repeatedly affirmed that, although not unfettered, parents have a fundamental liberty interest in the "care, custody, and management" of their children.²² This principle has deep roots in Roman law, English law, and biblical principles guiding the American colonial experiment.²³ More recently, courts, legislatures, and executive agencies have strengthened children's First Amendment and due process rights in contexts such as education, political participation, reproductive decision-making and

(discussing both the U.S. and other national contexts, arguing "[i]n order for the best outcomes to be achieved for children and their families, research suggests that decisions should be made collaboratively, and proceedings should be less adversarial in nature"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620073; Rosemary Hunter, *Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law*, 30 J. L. & SOC'Y 156 (<http://www.jstor.org/stable/1410764>); R. Porter, V. Welch & F. Mitchell, *Adversarialism in informal, collaborative, and 'soft' inquisitorial settings: lawyer roles in child welfare legal environments*, J. SOC. WELFARE & FAM. L. (Sept. 10, 2019) (<https://www.semanticscholar.org/paper/Adversarialism-in-informal%2C-collaborative%2C-and-in-Porter-Welch/3625692329dfc7ee6be2b62c2df1bf1e814c1072>).

21. See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); G.A. Res. 61/146, at 1–2 (Dec. 19, 2006).

22. *Troxel*, 530 U.S. at 66 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); see generally *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Parental Rights Cases to Know*, AM. BAR ASS'N. (Feb. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/february-2016/parental-rights-cases-to-know/ [<https://perma.cc/9UAA-AD25>].

23. See, e.g., BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 15–47 (2008); Huntington, *supra* note 20, at 643–44 (citing 1 William Blackstone, *Commentaries* 452–53 (1765) and *Patria Potestas*, Black's Law Dictionary (11th ed. 2019)); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 1–16 (1988) (discussing the role of the "Godly" family in Puritan New England).

juvenile court defense.²⁴ Further, the mature minor doctrine has emerged in common law, enabling children to exert autonomy in select matters like their own medical treatment (especially in the face of intrafamilial conflict), while state emancipation processes allow youth to petition for adult autonomy on an individualized basis.²⁵ As the current framework simultaneously recognizes children's rights and reiterates children's immaturity, diminished culpability, and need for nurturance and guidance, it ends up precluding a necessary middle ground on matters of both maturity and contested relationships.²⁶

The unfortunate intractability of family rights triangulation becomes particularly apparent in the case of families subject to punitive state intervention, forced separation, and surveillance through the family policing system. Throughout the U.S., the family policing system targets families of color in low-income communities in situations that are overwhelmingly linked to underlying poverty and socioeconomic disadvantage, while also penalizing marginalized families for behavior that is widespread across the population (such as the use of alcohol and drugs—both legal and illegal) and not necessarily related to child maltreatment.²⁷ Once the family policing system has jurisdiction, courts and agencies place children and parents (and often other family members) on opposing sides of litigation, scrutinizing children's interests with the presumption that parental wrongdoing alone factors into the child's

24. See *Prince*, 321 U.S. at 165–66; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *In re Gault*, 387 U.S. 1, 13 (1967); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 511–12 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964)); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972); *In re E.G.*, 549 N.E.2d 322, 327–28 (Ill. 1989).

25. Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 151–52 (2000); see ALEXANDER M. CAPRON & IRWAN M. BIRNBAUM, 3 TREATISE ON HEALTH CARE LAW § 19.04 (Hooper Lundy & Bookman eds., 2016), referred to in Smith, *No Quick Fix*, supra note 14.

26. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568–70 (2005), referred to in Smith, *No Quick Fix*, supra note 14 at 53 n.260.

27. See, e.g., DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, 125–26, 234 (2002) [hereinafter ROBERTS, SHATTERED BONDS]; Charisa Smith, *Over-Privileged: Legal Cannabis, Drug Offending & the Right to Family Integrity*, 67 S.D. L. REV. 569, 577–78 (2022) [hereinafter Smith, *Over-Privileged*]; Charisa Smith, *From Empathy Gap to Reparations: An Analysis of Caregiving, Criminalization, and Family Empowerment*, 90 FORDHAM L. REV. 2621, 2623–24 (2022) [hereinafter Smith, *From Empathy Gap to Reparations*]. See generally MOVEMENT FOR FAM. POWER, “WHATEVER THEY DO, I’M HER COMFORT, I’M HER PROTECTOR.”: HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> [https://perma.cc/58KN-A9D5]; KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017).

wellbeing, danger, or harm.²⁸

Legal norms in the *parent-child-state framework*, whether in public or private family law cases, also encompass culturally biased notions of behavior and relationships that compound social marginalization and fragmentation.²⁹ For example, despite being outdated, context-based, and vague, the “best interests of the child” standard is relied upon as a guiding factor in all proceedings involving children.³⁰ The Adoption and Safe

28. See MOVEMENT FOR FAM. POWER, *supra* note 27, at 35–36; BRIDGES, *supra* note 27; ROBERTS, SHATTERED BONDS, *supra* note 27, at 6; Smith, *Over-Privileged*, *supra* note 27, at 579; Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2628.

29. Public family law is the realm of proceedings and claims that involve the state’s intervention upon members of a family—for example, family policing system intervention to remove a child when maltreatment by a caregiver is alleged, juvenile court jurisdiction over a youth accused of a crime, or civil court intervention when one family member alleges domestic violence. Private family law is the realm of proceedings and claims involving one litigant against another—for example, matrimonial controversies or custody disputes between caregivers or grandparents. See generally, e.g., BRIDGES, *supra* note 27; Naomi R. Cahn & June Carbone, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 113 (2013) (arguing that there is a separate system of family law for families who are from low-income or historically marginalized communities, and thus deprived of opportunities to privately order their families. Low-income, marginalized families are therefore most vulnerable to state-initiated action); Elizabeth MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. POV. L. & POL’Y 473 (2015), <https://scholars.law.unlv.edu/facpub/93> (first citing L.B. Day, *The Development of the Family Court*, 136 ANNALS. AM. ACAD. POL. & SOC. SCI. 105, 108 (1928) (describing the traditional civil court’s powers as “latent and only called into action by the efforts of the parties in the case”), and then citing REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES 74 (1919), at 20–30 (discussing historically limited access to the courts for private divorce litigants, especially those without wealth to afford filing fees and legal representation)); see also *Constructing a Legal Education for a Career in Family Law*, NYU LAW, <https://www.law.nyu.edu/academicservices/advising/academicadvising/family> [<https://perma.cc/5G2H-EGEG>] (explaining “Family law may be divided into two categories—public and private. . .”).

30. See Martin Guggenheim, *Let’s Root Out Racism in Child Welfare, Too*, IMPRINT (June 15, 2020), <https://imprintnews.org/child-welfare-2/lets-root-out-racism-child-welfare-too/44327> [<https://perma.cc/BE9J-DAXF>]; MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 38–39, 41, 80 (2005); Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL’Y REV. 307, 311 (2015) [hereinafter Smith, *Conundrum of Family Reunification*]; 42 U.S.C. § 671(a)(15)(A) (prioritizing the “child’s health and safety”); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975); Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785, 814–18 (2010); Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL’Y 29, 35–36 (2001); ROBERTS, SHATTERED BONDS, *supra* note 27, at 125–26 (2002); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61 (1994); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 629–30 (2011).

Families Act of 1997³¹ (ASFA) as well as numerous state laws focus on a child's "best interests" while perpetuating stakeholder discretion at every stage in the family policing system. Legal actors with scarce investigative resources or expertise make "best interests" determinations "informed primarily by Eurocentric, upper middle class concepts of nuclear family that tend to reject or misconstrue alternative understandings of extended familial ties, multigenerational family structures, indigenous tribal membership, non-heteronormative caregiving, or the sufficiency of single parenthood."³² Aside from "best interests", other examples of biased norms and evidentiary standards abound in the parent-child-state framework.³³ In fact, the American experiment has expressly relied upon systematic, forced separation and state intrusion upon families of color for reasons linked to cultural bias, discrimination, and socioeconomic disadvantage. Since the founding of the first juvenile court in Chicago in 1899, extensive evidence demonstrates that family courts impose traditional, white, middle-class cultural and gender norms on Black people, Native Americans, immigrants, and poor families in the same manner that Native American boarding schools pathologized indigenous families and exerted state control to fulfill the aims of white supremacist Christianity.³⁴ Such paternalistic, carceral protectionist approaches

31. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amendments to scattered sections of 42 U.S.C.).

32. Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2638 (discussing the "traditional" norms surrounding parenting and families) (citing Donald M. Thomson & Susan E. Molloy, *Assessing the Best Interests of the Child*, 18 AUSTRALIAN EDUC. & DEVELOPMENTAL PSYCH., no. 2, 2001, at 5, 5-8 ("critiquing the 'best interests' standard and discussing persistent cultural biases")).

33. See generally Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2637-39 ("Problematic concerns include (1) unwieldy mandatory reporting laws for professionals and government officials; (2) broad caseworker discretion to search property, investigate, and remove children from their homes without providing Miranda-type warnings; (3) parental inability to decline participation in investigations or coercive programming; (4) informal yet highly influential court proceedings where parents' attorneys are held to different standards than CPS attorneys; and (5) inadequate access to parents' counsel in most jurisdictions."); see also generally Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014).

34. See Smith, *No Quick Fix*, *supra* note 14, at 50; Fitzgerald, *supra* note 30, at 61-62; King, *supra* note 30, at 629-30; *History & Culture: Boarding Schools*, N. PLAINS RESERVATION AID, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools [<https://perma.cc/A7A3-8AHM>] (last visited Apr. 2, 2022). Mass graves are still being uncovered at Native American boarding schools in the U.S. and Canada. "[T]he remains of ten Native American children were discovered on the grounds of Carlisle Indian Industrial School in Pennsylvania in June 2021, highlighting the tragic consequences of this era of government policy." Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2633-34; Mary Louise Kelly, Lauren Hodges & Patrick Jarenwattananon, *U.S. Boarding Schools Were the Blueprint for Indigenous Family Separation in Canada*, NPR (June 3, 2021, 4:12 PM), <https://www.npr.org/>

continue to be instituted in order to justify state overreach, divide families, exact punitive sanctions against caregivers, and implement surveillance under the pretext of care.³⁵

Further, the entire rights-based framework for cognizing children's needs, parental interests, and a state response is a flawed one, which discounts the impact of structural and institutional barriers to justice while over-emphasizing individualistic rights.³⁶ Renowned family law scholar Clare Huntington specifically discusses the flaws of a rights-based framework in the family policing context, arguing that even if well-implemented, a rights-based model disserves both parents and children. Huntington (and others) asserts that the rights-based model ignores the broad forces constantly impacting child maltreatment and its reporting, including poverty and systemic (and historical) disadvantage, racially or politically

2021/06/03/1003020286/u-s-boarding-schools-were-the-blueprint-for-indigenous-family-separation-in-cana [https://perma.cc/RD45-JZL8]; Jenna Kunze, *The Remains of 10 Children at the Carlisle Indian Boarding School Are Returning Home*, NATIVE NEWS ONLINE (June 17, 2021), https://nativenewsonline.net/currents/the-remains-of-10-children-at-the-carlisle-indian-boarding-school-are-returning-home [https://perma.cc/KN2P-HKJ7]. “The National Native American Boarding School Healing Coalition is demanding an inquiry into these unmarked graves.” Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2634 n.74. See also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004); ROBERTS, SHATTERED BONDS, *supra* note 27, at 234 (“Judges had the power to place Black children in the care and service of whites if they found the[ir] parents to be unfit”); Anthony Fieldman, *Manifest Destiny*, MEDIUM (May 5, 2021), https://anthonyfieldman.medium.com/manifest-destiny-53ba82df7e73 [https://perma.cc/32WH-SBVN]; Jean Stefancic, *Terrace v. Thompson and the Legacy of Manifest Destiny*, 12 NEV. L.J. 532, 536 (2012); Michael Yudell, *Proposed 1920s Orphanage Study Just One Example in History of Scientific Racism*, CONVERSATION (Feb. 23, 2015, 5:57 AM), https://theconversation.com/proposed-1920s-orphanage-study-just-one-example-in-history-of-scientific-racism-37015 [https://perma.cc/4ZPW-JQ3M].

35. See Godsoe, *supra* note 17, at 1357; Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2634.

36. See, e.g., Huntington, *supra* note 20, at 664, 667–68, 670–71; Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD./REVUE D'ETUDES CONSTITUTIONNELLES 1, 7–8 (1993); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. F. 942, 955–57 (2018) [hereinafter Guggenheim, *The (Not So) New Law of the Child*] (critiquing Anne Dailey and Laura Rosenbury's *The New Law of The Child* for over-emphasizing competing autonomy rights and interests, and for failing to address the crucial impact of structural inequality); Cheryl Bratt, *Top-Down or From the Ground?: A Practical Perspective on Reforming the Field of Children & the Law*, 127 YALE L.J. F. 917, 920–21 (2018) (confirming that the “dominant narrative” about children and the law emphasizes “triangulation” of competing rights, critiquing Dailey and Rosenbury's article for over-relying on the state to vindicate children's rights, and suggesting a “grassroots, child-directed approach” towards both socio-cultural reform and potential legal reform); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1374–79 (2020) (describing the prevailing framework as “a zero-sum contest,” with “state authority, parents' rights, and children's rights pitted against one another,” and then setting forth a new “Child Wellbeing framework—a research-grounded understanding of child wellbeing motivated by the insight that advancing child wellbeing generally promotes social welfare and that a just system of legal regulation must address racial and class bias”).

motivated decision-making within the system, and socio-political forces driving child related policy-making on every level.³⁷ As previously mentioned, underlying poverty and sociocultural conditions also play a critical role in creating the legal standards that actually define child maltreatment (neglect and affirmative abuse).³⁸ By fostering conflict and a zero-sum game, rather than engendering collaboration between the undeniably intertwined state and family members, the status quo rights-based framework diminishes possibilities for reconciliation and long-term problem-solving. Yet, when examining the reality behind family policing cases, it becomes clear that eliminating family separation and linking child well-being to caregiver support are key to facilitating children's own interests.³⁹ Likewise, on a more basic level the prevailing rights-based paradigm faultily assumes both practical and legal autonomy among adversarial actors when in fact most parents in the family policing system face socioeconomic struggle and political disenfranchisement, while children have scarce venues for developing or expressing their own interests in this context and many others.⁴⁰

The prevailing *parent-child-state constitutional framework* which forms the backdrop for COVID Capitalism and its influence on families also neglects (at best) or ignores (at worst) longstanding developments in behavioral health, sociology, and international human rights regarding the very nature of families and their function in society. Extensive literature and best practices in myriad fields recognize *family systems theory*—a concept that children are inextricably embedded in families, which exist in communities and within a wider societal system.⁴¹ *Family systems*

37. Huntington, *supra* note 20, at 656–57; Nedelsky, *supra* note 36, at 7–8.

38. Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2638–39 (citing Huntington, *supra* note 20, at 664, 667–68, 670–71).

39. See Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregivers' Rights and Children's Rights*, 15 NEV. L.J. 236, 276–78 (2014).

40. See generally Guggenheim, *The (Not So) New Law of the Child*, *supra* note 36; Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529 (2022); Huntington, *supra* note 20, at 654 n.89, 663–64, 666; Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15, 18, 20 (1986); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 48 (1991).

41. See generally UNIV. PRESS OF AM., *INTRODUCTION TO THE TIES THAT BIND: QUESTIONING FAMILY DYNAMICS AND FAMILY DISCOURSE IN HISPANIC LITERATURE* 13 (Sara E. Cooper ed., 2004); Elizabeth A. Mulroy, *Theoretical Perspectives on the Social Environment to Guide Management and Community Practice: An Organization-in-Environment Approach*, 28 ADMIN. SOC. WORK 77, 93 (2004); Irene Stevens & Pat Cox, *Complexity Theory: Developing New Understandings of Child Protection in Field Settings and in Residential Child Care*, 38 BRITISH J. SOC. WORK 1320, 1322, 1324 (2007); Kay Wendlandt & Carol Morgaine, *Family Systems Theory* (Winter 2001), <https://web.pdx.edu/~cbcm/CFS410U/FamilySystemsTheory.pdf> [<https://perma.cc/SM83-WC9R>]

theory reveals that significant emotional, financial, educational, and health dilemmas, both in the short and long term, result for children and caregivers when families are unnecessarily torn apart or intervened upon.⁴² Thus, the drawbacks of isolating family members' divisible legal rights and relying on tools of family separation ultimately far outweigh the potential benefits.⁴³

A. *The Partial Citizenship Conundrum*

Although specific developments from COVID Capitalism egregiously jeopardize and silence children, the pre-COVID status quo legal landscape already significantly curtailed youth agency and influence by enshrining their inherent status as partial citizens. Previously mentioned precedents including child defendants' rights cases and the mature minor doctrine have somewhat bolstered children's rights and freedoms. However, minors have always been, and remain, partial citizens of the U.S. because they are excluded from most Constitutional protections in the Bill of Rights. Firstly, only individuals over age eighteen have the right to legally vote in any jurisdiction and federal election. Secondly, youth exercise extremely limited civil rights compared to adults.⁴⁴ All schools are both a representative of the state and a surrogate for caregivers "in loco parentis" when students are under their supervision,⁴⁵ which means that multiple societal entities (far more than those two—including civic programs and

(unpublished course materials for Portland State University course CFS 410U); Fred Wulczyn, Deborah Daro, John Fluke, Sara Feldman, Christin Glodek & Kate Lifanda, *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations* 11 (Jan. 2010), <https://www.icmec.org/wp-content/uploads/2015/10/UNICEF-Adapting-a-Systems-Approach-to-Child-Protection-2010.pdf> [https://perma.cc/7GXT-L3SB] (unpublished working paper). See also Smith, *Conundrum of Family Reunification*, *supra* note 30, at 319.

42. COOPER, *supra* note 41, at 13; Mulroy, *supra* note 41, at 79; see Smith, *Conundrum of Family Reunification*, *supra* note 30, at 318–19, 323, 330; Charisa Smith, *Unfit through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 CHARLOTTE L. REV. 377, 398, 402 (2014) [hereinafter Smith, *Unfit through Unfairness*].

43. COOPER, *supra* note 41, at 13; Mulroy, *supra* note 42, at 77; Stevens & Cox, *supra* note 41; Wendlandt & Morgaine, *supra* note 41; Wulczyn, Daro, Fluke, Feldman, Glodek & Lifanda, *supra* note 41; See Laufer-Ukeles, *supra* note 39, at 276–78; Smith, *Conundrum of Family Reunification*, *supra* note 30, at 318–19, 323, 330; Smith, *Unfit through Unfairness*, *supra* note 42, at 398, 402; Nedelsky, *supra* note 36.

44. See, e.g., Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 713 (2009), cited in Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 265 n.14 (2014) ("Although the United States provides very basic floors of education, child protection, and temporary aid to needy families, it is not deeply engaged with the question of what children might need, as children, to have autonomy (i.e., 'actual choices') as adults.").

45. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336–37 (1985).

cultural or religious institutions) are invested in monitoring youth and consequently restraining their conduct. First Amendment rights to speech, expression, movement and association are also reduced for minors in all contexts.⁴⁶ If anything, law enforcement scrutiny of status offenses (offenses where youth are punished for activity that would be otherwise permissible if committed by adults, such as running away, truancy from school, or incorrigibility) ensures that the second class citizenship of minors is constantly reinforced through legal system design.⁴⁷ Children also have extremely limited Fourth Amendment rights to privacy with personal property and minimal ability to refuse searches and seizures.⁴⁸ Juvenile defendants still lack the right to bail and the right to a jury trial.⁴⁹ Various systems and state agencies also exercise stronger authority (and at times even violence) over youth than adults, while also exerting authority over caregivers in the purported name of youth.⁵⁰

While various public, quasi-public, and private systems and interventions exist to support children, most approaches remain highly paternalistic and proceed as if children's partial citizenship is a non-issue. Courts and child-serving agencies (i.e. schools, the family policing system (child protective), mental hygiene and substance abuse services departments, health and youth services departments) rely on a "carceral protectionist"

46. *E.g.*, *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506–07, 515 (1969). The U.S. Supreme Court held that youth have some level of—though not an unqualified amount of—First Amendment rights to speech and expression in school. Minors do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.

47. On status offenses, *see* Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH L. REV. 5, 9–10 (2013); *What Are Status Offenses and Why Do They Matter?*, ANNIE E. CASEY FOUND. (Apr. 6, 2019), <https://www.aecf.org/blog/what-are-status-offenses-and-why-do-they-matter> [<https://perma.cc/M259-LYE5>]; *see also* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 598–99 (2005) (“Laws frequently treat children differently from adults. Minors cannot drive, vote, serve in the military, marry, or skip school. Tort, contract, and criminal law all have special rules for minors, and family law assumes that minors will be subject to their parents’ supervision until they reach the age of majority.”) (footnotes omitted); Todres, *supra* note 44, at 285–86.

48. *T.L.O.*, 469 U.S. at 340–42. The U.S. Supreme Court held that school officials can search students’ property and persons without a warrant, and without the requisite probable cause standard of criminal law, if the search is reasonably related to a suspicion that the student violated school rules or engaged in illegal activity. *Id.* A simple “reasonableness standard” applies and is far less stringent than adults’ standard of probable cause. *See id.* at 343.

49. Kathleen Michon, *Constitutional Rights in Juvenile Cases*, NOLO, <https://www.nolo.com/legal-encyclopedia/constitutional-rights-juvenile-proceedings-32224.html> [<https://perma.cc/BW92-YH39>].

50. *See generally* Clare Huntington & Elizabeth S. Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 Fam. L.Q. 91 (2020); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1463 (2018); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29–31; Appell, *supra* note 44; Todres, *supra* note 44, at 296–97.

or even infantilizing approach that incorporates close adult supervision, surveillance, mandated psychological or medical programming, and links to formal reporting rather than approaches that foster independent living or capacity-building.⁵¹ Although some interventions are beginning to focus on more empowering youth programs that provide support for independence or consequential decision-making, COVID Capitalism threatens what scarce progress has occurred while creating additional dilemmas. Regardless of their partial citizenship, the status quo legal landscape also keeps too many youth disconnected from needed guidance, resources, interpersonal supports, and opportunities.⁵² Further, a population that scholar Jonathan Todres coins *independent children* are particularly unaccounted for in research, law, and policy, remaining under-protected while their daily lives continue without a regular adult caregiver, whether due to being thrown out of their home, a choice to run away, immigration reasons, a need to undertake adult responsibilities, or other reasons.⁵³ At times, *independent children* often only receive legal attention or social support after they have resorted to survival crimes or exploitative work, or have become victimized themselves.

B. Sociocultural Backdrop: The Empathy Gap

The COVID-19 pandemic ensued not only in a legal landscape that inappropriately triangulates the rights of children, caregivers, and the state, but also within a sociocultural context where the empathy gap dominates responses to families with differing identities. Previous work of this author explained the nature and pervasiveness of the deep empathy gap in

51. See generally, e.g., I. India Thusi, *Harm, Sex and Consequences*, 2019 UTAH L. REV. 159 (2019); Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586 (2015); S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J. F. 163 (2022); Mae C. Quinn, *Childist Objections, Youthful Relevance, and Evidence Reconceived*, 127 DICK. L. REV. 535 (2023); J. Shoshanna Ehrlich, *Too Young for Marriage But Not for Abortion: Keeping Teens in the “Driver’s Seat of Their Lives” Through the Intended Purpose Approach to the Shifting of Age Boundaries*, 45 HARV. J. L. & GENDER 125 (2022); Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127 (2016); Elizabeth Fordyce, *Too Young to Understand, but Old Enough To Know Better: Defining the Rights of Transition-Age Youth in the Child Welfare System*, 94 DENV. L. REV. 567 (2017); Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228 (2018); Smith, *No Quick Fix*, *supra* note 14; Godsoe, *supra* note 17.

52. See generally Smith, *Nothing About Us Without Us*, *supra* note 14, at 13; Clare Ryan, *supra* note 14; Cheryl Bratt, *supra* note 36; Amy T. Campbell, *Addressing the Community Trauma of Inequity Holistically: the Head and the Heart Behind Structural Interventions*, 98 DENV. L. REV. 1, 41 (2020); Claire Chiamulera, *Child Well-Being Post-Recession: Casey Report Tracks State Trends*, 32 CHILD L. PRAC. 190, 191 (2013).

53. Todres, *supra* note 44, at 264–65, 274–75.

U.S. society, law, and culture where matters of intrafamilial strife and caregiver struggle are concerned.⁵⁴ The empathy gap not only involves divergent public compassion for similarly situated individuals with different identities, but signifies the scientifically proven degree to which white Americans connect more deeply with those of their own racial group, feel more empathy for them and their challenges, and “thus demand policy solutions that will ease relatable”—as opposed to unrelatable or racially pathologized—types of suffering.⁵⁵ The American empathy gap is particularly on display when comparing the government’s commitment to ameliorating the suffering among white families impacted by opioids with its disregard for low-income families of color ravaged by the family policing system.⁵⁶ Presumptions are perpetually made about government interference with purportedly deviant families, despite evidence that the family policing system (1) uses drug allegations as a pretext for initiating surveillance and family separation and (2) fails to ameliorate struggles caused by drug misuse, poverty, health disparities, failing schools, housing instability, and mental health challenges.⁵⁷

The gargantuan contrast between private and public family law proceedings in the status quo framework also evinces an empathy gap and the ubiquity of disparate treatment. Processes, presumptions, rights guarantees, and outcomes vastly differ in the private and public family law contexts. To a large extent, in situations where private litigants represented by paid counsel initiate claims against other private litigants to settle intrafamilial disputes, the U.S. legal landscape provides ample opportunity for litigants to exercise choice and autonomy. In contrast to “poor people’s courts”, or family courts where unmarried caregivers and youth of color are targeted for state intervention or surveillance, the courts

54. See generally Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2629–32.

55. *Id.* at 2623, 2626–27. See also Rachel D. Godsil, Linda R. Tropp, Phillip Atiba Goff & John A. Powell, *The Science of Equality, Volume 1: Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care* 23–24 (2014), <http://perception.org/wp-content/uploads/2014/11/Science-of-Equality.pdf> [<https://perma.cc/C8RM-PNDP>]; Alexis McGill Johnson & Rachel D. Godsil, *Transforming Perception: Black Men and Boys* 8 (2013), <http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf> [<https://perma.cc/KQS5-U3RU>]; Janay Cody, Rachel D. Godsil & Alexis McGill Johnson, *What Are We Up Against?: An Intersectional Examination of Stereotypes Associated with Gender* 9 (2019), https://perception.org/wp-content/uploads/2020/02/Story-at-Scale-Research-Review_Dec-2019.pdf [<https://perma.cc/KS53-HM57>]; German Lopez, *When a Drug Epidemic’s Victims are White*, *Vox* (Apr. 4, 2017, 8:00 AM), <https://www.vox.com/identities/2017/4/4/15098746/opioid-heroin-epidemic-race> [<https://perma.cc/5YHD-EZPX>] (discussing anecdotes of the drug epidemic shared by state lawmakers); Mary Crossley, *Opioids and Converging Interests*, 49 *Seton Hall L. Rev.* 1019, 1027 (2019).

56. See Crossley, *supra* note 55, at 1026–28; Lopez, *supra* note 55.

57. See Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2629, 2632.

deciding private matrimonial and custodial disputes operate under a default of nonintervention and presumed credibility of the parties. Yet, courts that focus on state-initiated intrusion into families' lives violate any notions of privacy, exert excessive investigative authority regarding evidence of all kinds, have discretion to mandate myriad programs and services for any members of a family, and rarely provide an opportunity for impacted individuals to solve their own problems.⁵⁸

III. COVID CAPITALISM: SILENCING THROUGH MULTIPLE MEANS

A. *Precarity and Fatality in Democracy's Decline*

The COVID-19 pandemic and its accompanying recession continue to place U.S. children and families in precarity just as U.S. policymakers deprioritize most life-affirming and empowering measures. These developments ultimately silence children by curtailing their available resources and development, magnifying their vulnerability, and stifling their potential (sometimes current) civic participation. Despite involving the shortest recession in recorded history, having lasted between February and April 2020,⁵⁹ the COVID-19 pandemic ushered in a reality wherein

58. For example, family courts and state agencies can subpoena medical records, psychological records, and mandatory drug testing measures for any party in a case. *See, e.g., BRIDGES, supra* note 27, at 4; Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, CALIF. L. REV., Vol. 111, (Forthcoming 2023), file:///Users/charisasmith/Downloads/SSRN-id4219985.pdf; Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Special Needs Doctrine*, 87 TUL. L. REV. 353, 358 (2011). Although states differ in their position on family policing agencies' purview and evidentiary thresholds when a caregiver faces punitive home intrusion, the Supreme Court of Pennsylvania has soundly rejected the notion that a standard "short of probable cause" could suffice. *In re Y.W.-B.*, 265 A.3d 602, 625 (Pa. 2021). The court held that "the Fourth Amendment applies equally whether the government official is a police officer conducting a criminal investigation or a caseworker conducting a civil child welfare investigation." *Id.* at 627. The court affirmatively stated that there is no "social worker" exception to the Fourth Amendment. *Id.* at 625–27; *Pennsylvania Supreme Court Limits Power of Child Welfare Agencies to Search Family Homes*, CMTY. LEGAL SERVS. OF PHILA. (Jan. 4, 2022), <https://clsphila.org/family/supreme-court-home-search-decision/#:~:text=In%20a%20landmark%20ruling%2C%20the,probable%20cause%20under%20the%20law> [https://perma.cc/UHK5-KU4E]. *See also generally* Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense against Family Policing*, 132 YALE L.J. F. 659 (2022); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 619 (2020); Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. REV. 77 (2016).

59. The COVID-19 recession lasted from February 2020 to April 2020. Rakesh Kochhar & Stella Sechopoulos, *COVID-19 Pandemic Pinches Finances of America's Lower- and Middle-Income Families*, PEW RSCH. CTR. (Apr. 20, 2022), <https://www.pewresearch.org/social-trends/2022/04/20/covid-19-pandemic-pinches-finances-of-americas-lower-and-middle-income-families/> [https://perma.cc/W2M2-HKWL].

most families struggle to balance employment, childcare, and/or care for dependent adults, and where the U.S. and other places experienced historic unemployment, increased poverty, food insecurity, and strain on the already-tattered social safety net.⁶⁰ Amidst health crises and financial hardships, caregivers of color simultaneously faced increased overcriminalization and demonization due to the pandemic, as family policing systems processed more educational neglect cases when low-income caregivers of color either could not access virtual school or kept their children at home for health reasons.⁶¹

Financial hardships during the brief COVID-19 recession were endured mostly by lower- and middle-income families, but many children continue existing squarely in the realm of precarity years after the shutdowns, with toxic stress and material threats to education and wellbeing reverberating for a generation.⁶² UNICEF has even stated that “[d]isruptions to key services and soaring poverty rates pose the biggest threat to children” during the lingering pandemic, as the crisis poses a drastic risk to “[t]he future of an entire generation.”⁶³ Nearly one-in-five middle-income families reported receiving unemployment benefits in 2020.⁶⁴ Likewise, low-income communities of color and women were most impacted

60. Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2640 (first citing Naomi R. Cahn & Linda C. McClain, *Gendered Complications of Covid-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 44–45 (2020); and then citing Barbara Stark, *Inequality, Covid-19, and Human Rights: Whose Lives Matter?*, 27 ILSA J. INT’L & COMP. L. 251, 254 (2021)).

61. Jenna Lauter, *Parents Get Reported for Neglect After Keeping Kids Home During COVID Surge*, ACLU N.Y. (Feb. 24, 2022, 1:00PM), <https://www.nyclu.org/en/news/parents-get-reported-neglect-after-keeping-kids-home-during-covid-surge> [<https://perma.cc/Q8R7-S9FZ>]; Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2640 (first citing Asher Lehrer-Small, *Parents Who Kept Kids at Home for Fear of Covid Are Reported for Neglect*, GUARDIAN (Jan. 27, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/jan/27/covid-kids-school-reported-for-neglect> [<https://perma.cc/4SVD-BEWN>]; and then citing Christina Veiga & Amy Zimmer, *They Believed Home Was Safer than School. Now Some NYC Parents Are Accused of Educational Neglect*, CHALKBEAT N.Y. (Nov. 19, 2021, 5:00 AM), <https://ny.chalkbeat.org/2021/11/19/22790130/nyc-parents-acc-educational-neglect-covid-concerns-remote-schooling> [<https://perma.cc/B3K3-9B5T>]).

62. See David R. Williams, *Stress Was Already Killing Black Americans. Covid-19 Is Making It Worse.*, WASH. POST (May 13, 2020, 3:14 PM), <https://www.washingtonpost.com/opinions/2020/05/13/stress-was-already-killing-black-americans-covid-19-is-making-it-worse/> [<https://perma.cc/8SDC-MWJZ>]; Press Release, UNICEF, UNICEF Calls for Averting a Lost Generation as COVID-19 Threatens to Cause Irreversible Harm to Children’s Education, Nutrition and Well-being (Nov. 18, 2020), <https://www.unicef.org/press-releases/unicef-calls-averting-lost-generation-covid-19-threatens-cause-irreversible-harm> [<https://perma.cc/AKW7-GVLP>] (calling for a re-centering of children’s education, health, nutrition and well-being by governments and their partners in order to avert irreversible harm to an entire generation).

63. UNICEF, *supra* note 62.

64. Kochhar & Sechopoulos, *supra* note 59.

economically,⁶⁵ while children and working parents were also especially hard-hit.⁶⁶ In general, black families tend to have one-tenth the wealth of white families, which means that they are less able to utilize and access emergency funds when disasters like a pandemic arise.⁶⁷ This precariousness in financial and housing stability of course coexisted with unprecedented amounts of physical illness and death which also inordinately plagued communities of color and riddled youth (and adult) congregate care and incarceration facilities.⁶⁸ By January 2021, about 31% of lower-income adults still reported that “their family’s situation had worsened in the last year, compared with 18% of middle-income adults and 11% of upper-income adults.”⁶⁹ Further, in January 2021 nearly half of lower-income adults and nearly half of middle-income adults also reported that they or a member of their household had experienced job or wage loss since the pandemic began.⁷⁰ Although COVID-related economic impact payments are credited with reducing the U.S. poverty rate, a more complete picture reveals more severe, lingering socioeconomic strife and deepening poverty because any state-driven

65. See Cahn & McClain, *supra* note 60, at 21–22; Stark, *supra* note 60, at 256–57; Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at COVID-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L.Q. 357, 406–08 (2021).

66. See Johnson & Trautman, *supra* note 65, at 456; Kelly Glass, *Black Families Were Hit Hard by the Pandemic. The Effects on Children May Be Lasting.*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/06/29/parenting/coronavirus-black-children-inequality.html> [<https://perma.cc/UK2B-9MEK>].

67. See Glass, *supra* note 66.

68. Regarding the disproportionate spread of the COVID-19 virus and its health impacts upon communities of color, see, for example, Daniel C. DeSimone, *COVID-19 Infections by Race: What's Behind the Health Disparities?*, MAYO CLINIC (Oct. 6, 2022), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802> [<https://perma.cc/PD5Y-YXZQ>]; Don Bambino Geno Tai, Irene G. Sia, Chyke A. Doubeni & Mark L. Wieland, *Disproportionate Impact of COVID-19 on Racial and Ethnic Minority Groups in the United States: A 2021 Update*, 9 J. RACIAL & ETHNIC HEALTH DISPARITIES 2234, 2334–35 (2022); *Racial and Ethnic Health Disparities—Before and During the Pandemic*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 28, 2021), <https://www.gao.gov/blog/racial-and-ethnic-health-disparities-and-during-pandemic> [<https://perma.cc/GF9E-G892>]. Regarding the increased spread of COVID-19 in youth congregate care and incarceration facilities, see, for example, Laura I. Appelman, *Pandemic Eugenics: Discrimination, Disability, & Detention During COVID-19*, 67 LOY. L. REV. 329, 343, 349, 378 (2021); Jessica K. Heldman, Margaret A. Dalton & Robert C. Fellmeth, *COVID-19 and Preventing Harm to Vulnerable Children*, 57 SAN DIEGO L. REV. 865, 867–68, 873, 905 (2020).

69. Kochhar & Sechopoulos, *supra* note 59. “[M]iddle-income’ adults in 2021 are those with an annual household income that was two-thirds to double the national median income in 2020, about \$52,000 to \$156,000 annually in 2020 dollars for a household of three. ‘Lower-income’ adults have household incomes less than \$52,000 and ‘upper-income’ adults have household incomes greater than \$156,000. The income it takes to be middle income varies by household size The boundaries of the income tiers also vary across years as the national median income changes.” *Id.*

70. *Id.*

financial supports were extremely short-lived.⁷¹ Monthly (versus annual) poverty rates increased from 15% to 16.7% between February and September 2020, even after CARES Act's income transfers were taken into account.⁷² Families' monthly resources remain continually stretched as the pandemic persists, and that struggle is particularly acute for families with children and communities of color.⁷³ Further, even though the CARES Act offset potential poverty increases in April and May 2020, it did not prevent a rise in deep poverty—defined as a monthly income lower than half the monthly poverty threshold.⁷⁴ Even as CARES Act's stimulus checks and unemployment benefits “lifted more than eighteen million individuals out of poverty” in April 2020, that number plummeted to around four million people in August and September once the CARES Act's unemployment supplement (\$600 per week) expired.⁷⁵ By September 2020, the U.S. monthly poverty rate was higher than previous months and higher than pre-COVID-19 levels.⁷⁶ Later economic supports, like the expanded child tax credit from Congress' March 2021 American Rescue Plan, even “reached families that [did not] earn enough income to owe taxes.”⁷⁷ The expanded credit enabled families to utilize funds in monthly installments during 2021, instead of utilizing it all at once in the following year, and Columbia researchers assert that difference alone “kept roughly 3.5 million children out of poverty in each month for which data is available.”⁷⁸

The plight of COVID-era youth in the U.S. is both novel and harsh, as previous inequities and challenges have been magnified and state

71. See generally Zachary Parolin, Megan Curran, Jordan Matsudaira, Jane Waldfogel & Christopher Wimer, *Estimating Monthly Poverty Rates in the United States* (Jan. 21, 2022) (unpublished working paper) (on file with author) [hereinafter *Monthly Poverty Rates*] (describing poverty rates after COVID-19). COVID-related economic payments included unemployment insurance and two rounds of federal CARES Act payments to U.S. households in 2020 in the form of refundable tax credits totaling around “\$400 billion in direct financial assistance.” Kochhar & Sechopoulos, *supra* note 59. These payments “did not affect the gross (pre-tax) income of households.” *Id.*; see also Asha Banerjee & Emma Williamson, *Fighting Austerity for Racial and Economic Justice*, *CTR. FOR L. & SOC. POL'Y* (Oct. 5, 2020), <https://www.clasp.org/publications/report/brief/fighting-austerity-racial-economic-justice/> [https://perma.cc/N75T-VKJX].

72. *Monthly Poverty Rates*, *supra* note 71, at 31, 34.

73. See *id.* at 11–12.

74. See *id.* at 34–35.

75. *Id.* at 32, 34.

76. *Id.* at 31.

77. Priyanka Boghani, *What Happened to Poverty in America in 2021*, PBS (Dec. 22, 2021), <https://www.pbs.org/wgbh/frontline/article/poverty-america-2021-covid-pandemic/> [https://perma.cc/6SRD-9YT9].

78. *Id.*

responses are either detrimental, lacking or nonexistent.⁷⁹ The pandemic is worsening the future outlook for children of color in all aspects, but especially in terms of health, education, and economic disparities.⁸⁰ The existing education gap has widened during COVID, as one in five students lacked a computer or internet access when schools shut down and virtual learning began, and students of color were disproportionately impacted.⁸¹ Various factors caused a sharp decline in instructional quality once schools went virtual in Spring 2020, and impediments to effective instruction persist.⁸² Additionally, students of all backgrounds returned to in-person school far less prepared and overwhelmingly demonstrate learning delays of at least several months.⁸³ Experts further “assert that the pandemic has caused societ[y] to revalue the role of schools” as parents from all socioeconomic groups encountered shuttered school buildings and daycare providers during 2020—and in some cases, long after that time.⁸⁴ Long after shutdowns, state departments of education and local school districts face increased challenges delivering the legally mandated regular and special education services that children require.⁸⁵ Some experts argue that the pandemic has set special education back years, and that students need aggressive remedies to recoup what was lost, even considering an extremely unjust pre-COVID education system.⁸⁶

79. See Heldman, Dalton & Fellmeth, *supra* note 68, at 867–68.

80. See generally Benita R. Miller & Anne Williams-Isom, What Covid-19 Is Revealing About NYC Schools: Are We Learning Our Lessons?, 48 *FORDHAM URB. L.J.* 521 (2021).

81. Alaina Goschke, Note, Virtual Learning in a Pandemic and Its Effects on Lower-Income Students: How the Education Gap Is Widening Beyond Repair, 19 *IND. HEALTH L. REV.* 157, 161 (2022); see also Sara Gruber, Note, Equal Education Means Equal Education: Confronting Education Access Disparities for New York Students amid the Covid-19 Pandemic During the 2020-2021 School Year, 28 *CARDOZO J. EQUAL RTS. & SOC. JUST.* 389, 396 (2022). See generally Kimberly Jenkins Robinson, Strengthening the Federal Approach to Educational Equity During the Pandemic, 59 *HARV. J. ON LEGIS.* 35, 52–57 (2022).

82. Robinson, *supra* note 81, at 46–47.

83. *Id.* at 48.

84. Smith, *At the Crossroads*, *supra* note 14, at 799 (citing Emily Boudreau, *Schools and Community Resilience*, *HARV. GRADUATE SCH. EDUC.* (June 30, 2020), <https://www.gse.harvard.edu/news/uk/20/06/schools-and-community-resilience> [<https://perma.cc/W2ZB-XVPB>]); JACQUELINE SHEN, IMPACT OF THE COVID-19 PANDEMIC ON CHILDREN, YOUTH AND FAMILIES 7–8 (Matthew Pecoraro & Christopher Bellonci eds., 2020), https://jbcc.harvard.edu/sites/default/files/impact_of_the_covid-19_pandemic_on_children_youth_and_families_.pdf [<https://perma.cc/2BGT-JJ3C>]. See generally JACOB FAY, MEIRA LEVINSON, ALLISON STEVENS, HARRY BRIGHOUSE & TATIANA GERON, SCHOOLS DURING THE COVID-19 PANDEMIC: SITES AND SOURCES OF COMMUNITY RESILIENCE (2020), <https://ethics.harvard.edu/files/center-for-ethics/files/20schoolsduringpandemic2.pdf> [<https://perma.cc/25RP-WHEC>] (describing ways to restore schools’ ability to support communities).

85. Heldman, Dalton, & Fellmeth, *supra* note 68, at 886–96.

86. *Id.* at 895–97.

While all segments of the population grapple with increased mental health symptoms during the pandemic, there have been particularly concerning mental declines among youth, along with myriad other indicators of plummeting child wellbeing.⁸⁷ In general, extreme crises like a pandemic compound trauma for survivors of previous trauma, while increasing the daily challenges and risks faced by marginalized youth. In one national study, thirty-five percent of parents reported either significant or extreme concern about their children's mental health challenges during the 2020-2021 school year, while eighty percent of parents reported some level of concern about their child's mental, emotional, or social health since the start of the pandemic.⁸⁸ Youth who have endured previous sexual abuse, harassment, bullying, or intrafamilial abuse have increased suicide risks during a pandemic.⁸⁹ "Students with disabilities encounter newfound barriers attempting to obtain vital educational, clinical, and social support, while youth . . . in vulnerable socioeconomic conditions are disproportionately impacted by COVID-19 illness and death—in addition to facing heightened financial distress"⁹⁰ that would magnify despair and

87. See Karen Dineen Wagner, *New Findings About Children's Mental Health During COVID-19*, PSYCHIATRIC TIMES (Oct. 7, 2020), <https://www.psychiatrictimes.com/view/new-findings-children-mental-health-covid-19> [<https://perma.cc/5RA4-R49X>]; see also Debora Marques de Miranda, Bruno da Silva Athanasio, Ana Cecília Sena Oliveira & Ana Cristina Simoes-e-Silva, *How Is COVID-19 Pandemic Impacting Mental Health of Children and Adolescents?*, 51 INT'L J. OF DISASTER RISK REDUCTION 1, 1 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481176/> [<https://perma.cc/FZ7Y-JB8P>].

88. Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & CO. (July 27, 2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning> [<https://perma.cc/H6YD-L62N>].

89. Smith, *At the Crossroads*, *supra* note 14, at 800 (first citing L. Absher, J. Maze & M. Brymer, *The Traumatic Impact of COVID-19 on Children and Families: Current Perspectives from the NCTSN*, THE NAT'L CHILD TRAUMATIC STRESS NETWORK 1 (2020), <https://www.nctsn.org/sites/default/files/resources/special-resource/traumatic-impact-covid-childrenfamilies.pdf> [<https://perma.cc/4M48-SM5U>]; and then citing Jörg M. Fegert, Benedetto Vitiello, Paul L. Plener & Vera Clemens, *Challenges and Burden of the Coronavirus 2019 (COVID-19) Pandemic for Child and Adolescent Mental Health: A Narrative Review to Highlight Clinical and Research Needs in the Acute Phase and the Long Return to Normality*, 14 CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 1, 5–6 (2020), <https://capmh.biomedcentral.com/articles/10.1186/s13034-020-00329-3> [<https://perma.cc/XA2K-WR3U>]).

90. *Id.* at 800–01 (first citing U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS,iv (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/AZ5Y-487Z>]; then citing Alex Zimmerman, *1 in 4 NYC Students with Disabilities Aren't Getting Mandated Services This School Year, New Data Shows*, CHALKBEAT N.Y. (Feb. 10 2021, 6:36 PM), <https://ny.chalkbeat.org/2021/2/10/22277334/special-education-coronavirus-nyc>

trauma.⁹¹ Youth in the pandemic also face unprecedented amounts of gender-based violence and harassment, including cyber abuse, even as obstacles to accessing support and intervention multiply.⁹² “[I]ntimate partner violence and sexual abuse generally tend to increase in periods of

[<https://perma.cc/S3R7-E7V7>]; then citing Rheana Murray, *Special Needs Students and Teachers Face Hurdles That Seem Impossible*, TODAY (Sept. 11, 2020, 2:48 PM), <https://www.today.com/parents/special-education-students-face-unique-hurdles-during-covid-19-t190290> [<https://perma.cc/5PKF-24QY>]; and then citing Stephanie H. Ameis, Meng-Chuan Lai, Benoit H. Mulsant & Peter Szatmari, *Coping, Fostering Resilience, and Driving Care Innovation for Autistic People and Their Families During the COVID-19 Pandemic and Beyond*, 11 MOLECULAR AUTISM 1, 3 (2020).

91. *Id.* at 801 (first citing *What Is Health Equity?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/48UJ-5ARU>] (last modified July 1, 2022); then citing Angela Marie Johnson & Haniyeh Zamani, *Addressing the Cumulative Cost of COVID-19 for Communities of Color*, MICH. MED. (April 6, 2021, 6:46 PM), <https://labblog.uofmhealth.org/rounds/addressing-cumulative-cost-of-covid-19-for-communities-of-color> [<https://perma.cc/29LZ-XZV9>]; then citing Gregorio A. Millet, Austin T. Jones, David Benkeser, Stefan Baral, Laina Mercer, Chris Beyrer, Brian Honermann, Elise Lankiewicz, Leandro Mena, Jeffrey S. Crowley, Jennifer Sherwood & Patrick S. Sullivan, *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS EPIDEMIOLOGY 37, 40–41 (2020), <https://pubmed.ncbi.nlm.nih.gov/32419766/> [<https://perma.cc/7DQ5-UF2D>]; and then citing Joseph R. Betancourt, *Communities of Color Devastated by COVID-19: Shifting the Narrative*, HARV. HEALTH PUBL’G (Oct. 22, 2020), <https://www.health.harvard.edu/blog/communities-of-color-devastated-by-covid-19-shifting-the-narrative-2020102221201> [<https://perma.cc/8ZW2-CLRR>]).

92. *See, e.g.*, Rachel I. Silliman Cohen & Emily Adlin Bosk, *Vulnerable Youth and the COVID-19 Pandemic*, 146 PEDIATRICS 1, 1–2 (2020), <https://publications.aap.org/pediatrics/article/146/1/e20201306/37081/Vulnerable-Youth-and-the-COVID-19-Pandemic?autologincheck=redirected> [<https://perma.cc/4KFN-8JM9>]; *Cyberbullying Concerns Grow as Kids Spend More Time Online During Covid Pandemic*, CBS NEWS MIA. (Nov. 5, 2020), <https://www.cbsnews.com/miami/news/cyberbullying-concerns-kids-online-during-covid-pandemic> [<https://perma.cc/VD63-EHTM>]; Kasia Kerridge, *Cyberbullying Growing Concern as Kids Are Online More During COVID-19 Pandemic; What Parents Should Look Out For*, KKTV (Oct. 29, 2020, 8:36 AM), <https://www.kktv.com/2020/10/29/cyberbullying-growing-concern-as-kids-are-online-more-during-covid-19-pandemic-what-parents-should-look-out-for> [<https://perma.cc/7CDU-PXB5>]; Sarah Darmanjian, *Organizations Say Rise in Cyberbullying Likely During Covid-19 Isolation*, NEWS 10 (Apr. 8, 2020, 4:42 PM), <https://www.news10.com/news/organizations-say-rise-in-cyberbullying-likely-during-covid-19-isolation> [<https://perma.cc/ZYV2-2ABU>]; *Heightened Risk During COVID-19: Cyberbullying & Harassment*, EQUAL RTS. ADVOCS., <https://www.equalrights.org/issue/covid-cyberbullying/> [<https://perma.cc/8MC3-A2J4>] (last visited Mar. 15, 2023); Mochamad Iqbal Jatmiko, Muh. Syukron & Yesi Mekarsariet, *Covid-19, Harassment and Social Media: A Study of Gender-Based Violence Facilitated by Technology During the Pandemic*, 4 J. SOC’Y & MEDIA 319, 320–22 (2020); Chuka Emezue, *Digital or Digitally Delivered Responses to Domestic and Intimate Partner Violence During COVID-19*, NAT’L LIBR. MED. (Jul. 30, 2020), www.ncbi.nlm.nih.gov/pmc/articles/PMC7394520 [<https://perma.cc/FB37-ETWK>]; Pouria Babvey, Fernanda Capela, Claudia Cappa, Carlo Lipizzi, Nicole Petrowski & Jose Ramirez-Marquez, *Using Social Media Data for Assessing Children’s Exposure to Violence During the COVID-19 Pandemic*, 116 CHILD ABUSE & NEGLECT 1, 9–11 (2021); Justin W. Patchin & Sameer Hinduja, *Tween Cyberbullying in 2020* 4–5 (2020), https://i.cartoonnetwork.com/stop-bullying/pdfs/CN_Stop_Bullying_Cyber_Bullying_Report_9.30.20.pdf [<https://perma.cc/HVJ9-EB4J>]. *See generally* Smith, *At the Crossroads*, *supra* note 14, 802–06 (describing this trend).

social strife and economic turmoil such as a pandemic.”⁹³ Additionally, continued economic instability and vulnerability to illness strain the fragile safety nets that could potentially protect at-risk youth, including those that are LGBTQIA+, homeless, in foster care, in juvenile confinement facilities, or struggling with substance use disorders.⁹⁴ “Scholars posit that increased risks of harm and even death for these youth, coupled with reduced access to healthcare and safe havens, will likely extend beyond the pandemic itself.”⁹⁵ For these reasons, “the Centers for Disease Control and Prevention recommend that community-based public health strategies ‘should prioritize young adults’ and ‘racial/ethnic minorities,’ who experience ‘disproportionately worse mental health outcomes, increased substance use, and elevated suicidal ideation.’”⁹⁶

B. COVID Capitalism and The Wheels of Suppression

As if the aforementioned negative outcomes for children aren’t concerning enough, policymakers are instituting widespread austerity measures⁹⁷ that have become a core element of COVID Capitalism, and that ultimately jeopardize and suppress children as a constituency. Overall, the pandemic

93. Smith, *At the Crossroads*, *supra* note 14, at 804 (first citing Méliissa Godin, *As Cities Around the World Go on Lockdown, Victims of Domestic Violence Look for a Way Out*, TIME (Mar. 18, 2020, 1:58 PM), <https://time.com/5803887/coronavirus-domestic-violence-victims> [<https://perma.cc/Y6BS-27DJ>]; then citing Vera Castaneda, *‘We’ve Never Seen Such a Demand in Our History’: Domestic Violence Resource Centers See an Uptick in Calls*, DAILY PILOT (Aug. 7, 2020, 1:06 PM), <https://www.latimes.com/socal/daily-pilot/entertainment/story/2020-08-07/weve-never-seen-such-a-demand-in-our-history-domestic-violence-resource-centers-see-an-uptick-in-calls> [<https://perma.cc/AB9Y-S849>]; and then citing Laura Santhanam, *How to Help Kids Build Resilience amid Covid-19 Chaos*, PBS (Dec. 16, 2020, 5:05 PM), <https://www.pbs.org/newshour/health/how-to-help-kids-build-resilience-amid-covid-19-chaos> [<https://perma.cc/9K47-GN4H>]).

94. See, e.g., Marsha Levick, *No Exit: How Litigation Failed Incarcerated Youth During the Covid-19 Pandemic*, 93 TEMP. L. REV. 489, 497–99 (2021); Anita Weinberg & Lilia Valdez, *Child Welfare, Reasonable Efforts, and COVID-19*, 41 CHILD.’S LEGAL RTS. J. 162, 167–69 (2021).

95. Smith, *At the Crossroads*, *supra* note 14, at 804–05 (first citing Cohen & Bosk, *supra* note 92, at 1; and then citing Laura D. Lindberg, David L. Bell & Leslie M. Kantor, *The Sexual and Reproductive Health of Adolescents and Young Adults During the COVID-19 Pandemic*, 52 PERSPS. ON SEXUAL & REPROD. HEALTH 75, 77 (2020)).

96. Smith, *At the Crossroads*, *supra* note 14, at 801 (quoting Mark É Czeisler, Rashon I. Lane, Emiko Petrosky, Joshua F. Wiley, Aleta Christensen, Rashid Njai, Matthew D. Weaver, Rebecca Robbins, Elise R. Facer-Childs, Laura K. Barger, Charles A. Czeisler, Mark E. Howard & Shantha M.W. Rajaratnam, *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic—United States, June 24–30, 2020*, CTRS. FOR DISEASE CONTROL AND PREVENTION 1049, 1057 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf> [<https://perma.cc/CAF6-D4VX>]).

97. Banerjee & Williamson, *supra* note 71. The Center for Law and Social Policy defines austerity measures as “economic policies . . . that aim to reduce public debt through harsh spending cuts” (often to infrastructure and education), a reduction of public benefits, and frequently through increased fines and fees that raise revenue yet shift costs from government to constituents. *Id.*

and its accompanying economic crisis have sparked severe budget cuts in many states and localities, and officials are directing child-serving systems towards the most meager solutions possible in order to balance general budgets.⁹⁸ Although this author's work generally argues for family policing system abolition,⁹⁹ it is notable that the pandemic has motivated cuts to social services for children in foster care, resulting in minimal government spending on such services at present.¹⁰⁰ Likewise, resources for court-involved youth—including attorney and clinician counseling, visits with birth parents, physical therapies, and pre-adoption visits—dwindled during shutdowns and remain alarmingly scarce despite returns to some level of in-person system functions across the country.¹⁰¹ Further, temporary COVID-era executive actions regarding unemployment insurance, suspension of student debt payments, and a federal eviction moratorium failed to sufficiently redress state budget dilemmas.¹⁰² As budget crises and shortfalls linger among the states, policymakers persist in touting austerity measures that jeopardize children and families. Although federal education legislation during the pandemic attempted to aid marginalized communities and public schools through increased federal funding and revised conditions for the receipt of funds, that legislation failed to account for concentrated poverty or to provide jurisdictions with vital guidance and monitoring.¹⁰³ In many Republican-led states, governors even used CARES Act funding to abandon public education, in favor of supporting private schools, school choice mechanisms, and home schooling.¹⁰⁴ Additionally, lawmakers ignored outcry from experts and constituents and allowed the desperately needed early childhood aid from the federal pandemic response to lapse in late

98. Appleman, *supra* note 68, at 382; *see also* Banerjee & Williamson, *supra* note 71, at 3 (citing *States Grappling With Hit to Tax Collections*, CTR. ON BUDGET & POL'Y PRIORITIES (June 30, 2020), <https://www.cbpp.org/research/state-budget-and-tax/states-grappling-with-hit-to-tax-collections> [<https://perma.cc/ZKZ5-UVUE>]) (describing major budget shortfalls in Fiscal Year 2021); *see also* Susan Kang, *As COVID-Era Funding Dries up, Activists Fight Austerity in City Budget Battles*, TRUTHOUT (Feb. 5, 2023), <https://truthout.org/articles/as-covid-era-funding-dries-up-activists-fight-austerity-in-city-budget-battles/> [<https://perma.cc/H2JL-S9KK>].

99. Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2642–44.

100. Appleman, *supra* note 68, at 373–83.

101. *Id.*

102. Wesley Tharpe, *Trump Executive Actions Won't Alleviate, and Could Worsen, States' Budget Woes*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 11, 2020, 1:45 PM), <https://www.cbpp.org/blog/trump-executive-actions-wont-alleviate-and-could-worsen-states-budget-woes> [<https://perma.cc/CF9C-CB7V>].

103. Robinson, *supra* note 81, at 59–66 (discussing education policy provisions within, and state and local use of funding from, the American Rescue Plan, the CARES Act, and the Appropriations Act, as well as executive branch actions by both the Trump and Biden Administrations).

104. *Id.* at 60–62.

2022—creating a verified national “crisis” in the child care and early childhood education industries, which are already overstretched and disproportionately comprised of women of color and immigrant women.¹⁰⁵

Though austerity measures have become the neoliberal state reflex when hardships arise, they are extremely destructive for children, families, communities, the economy, and prospects for economic recovery.¹⁰⁶ State and local budget cutbacks create and exacerbate disparities in education and employment access by reducing opportunities and increasing costs.¹⁰⁷ Such policy choices also have “a devastating effect on health and health equity” among the populace, while ironically reducing social capacity to respond to epidemics and pandemics.¹⁰⁸ As a key feature of recent global public policy and of COVID Capitalism, austerity involves privatization

105. See, e.g., Banerjee & Williamson, *supra* note 71, at 7; Catarina Saraiva & Reade Pickert, *Child Care Faces \$24 Billion Fiscal Cliff as Pandemic Aid Ends*, BLOOMBERG (Dec. 20, 2022), <https://www.bloomberg.com/news/articles/2022-12-20/will-us-child-care-costs-rise-industry-braces-for-end-of-covid-era-aid> [<https://perma.cc/4AVC-EJMJ>]; Ann Schimke, Samantha Smylie & Koby Levin, *Child Care Providers Brace for Future Without Biden’s Proposed Early Childhood Funding*, CHALKBEAT (Aug. 3, 2022, 3:48 PM), <https://www.chalkbeat.org/2022/8/3/23290933/federal-spending-bill-cuts-child-care-preschool-biden-manchin> [<https://perma.cc/RQ46-CHMZ>]; Christopher Hickey, *Not the Year for Women and Parents: Child Care Provisions Were Cut from the Inflation Reduction Act. It’s Not the First Time*, CNN (Aug. 12, 2022), <https://www.cnn.com/2022/08/12/politics/inflation-reduction-children-families/index.html> [<https://perma.cc/F86A-7AWK>]; Megan Leonhardt, *‘Now We Sit on the Precipice of Collapse’: Childcare Shortages and Empty Classrooms Could Get Even Worse*, FORTUNE (Nov. 8, 2022), <https://fortune.com/2022/11/08/us-childcare-centers-on-verge-of-collapse-post-covid/> [<https://perma.cc/SY7Q-FNTQ>]; James Barron, *Budget Slashes 3-K for New York City Children*, NY TIMES, (Jan. 13, 2023) <https://www.nytimes.com/2023/01/13/nyregion/budget-slashes-3-k-for-new-york-city-children.html> [<https://perma.cc/SSA4-NMQ7>]; Sophie Quinton, *Federal Aid Is Propping Up Child Care. It Isn’t a Long-Term Fix*, PEW (Jan. 12, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/01/12/federal-aid-is-propping-up-child-care-it-isnt-a-long-term-fix> [<https://perma.cc/H742-JQNX>].

106. See generally, e.g., Banerjee & Williams, *supra* note 71, at 2 (describing what austerity measures are); A.M. Viens, *Neo-Liberalism, Austerity and the Political Determinants of Health*, 27 HEALTH CARE ANALYSIS 147 (2019). There has been a strong and widespread global trend toward neoliberalism since the 1980s. Jonathan D. Ostry, Prakash Loungani, & Davide Furceri, *Neoliberalism: Oversold?*, 53 FIN. & DEV. 38, 38 (2016) (regarding the “strong and widespread global trend toward neoliberalism since the 1980s,” this international source finds reasons both to critique and to “cheer . . . the neoliberal agenda.”).

107. Banerjee & Williamson, *supra* note 71, at 8–10; Elise Gould, *Back-to-School Jobs Report Shows a Continue Shortfall in Public Education Jobs*, ECON. POL’Y INST. (Oct. 5, 2018), <https://www.epi.org/press/back-to-school-jobs-report-shows-a-continue-shortfall-in-public-education-jobs/> [<https://perma.cc/G7KF-VGS9>]; Austin Nichols & Margaret Simms, *Racial and Ethnic Differences in Receipt of Unemployment Insurance Benefits During the Great Recession 1–4* (Unemp. Inst., Brief No. 4, June 2012), <https://www.urban.org/sites/default/files/publication/25541/412596-Racial-and-Ethnic-Differences-in-Receipt-of-Unemployment-Insurance-Benefits-During-the-Great-Recession.PDF> [<https://perma.cc/U7QB-GLWV>].

108. Viens, *supra* note 106, at 147; see also Vicente Navarro, *The Consequences of Neoliberalism in the Current Pandemic*, 50 INT’L J. HEALTH SERVS. 271, 272 (2020) (discussing prior large epidemics (Ebola, SARS, MERS) and COVID-19).

and deregulation of labor markets and industries, subordinating human needs in favor of profits and savings.¹⁰⁹ Yet, austerity measures paradoxically damage the economy itself, as they reduce current and prospective contributions of students, workers, and consumers.¹¹⁰ One Pew Charitable Trusts study even demonstrates that austerity measures during the 2008 Great Recession caused a “Lost Decade” between 2008-2018 wherein states missed out on over \$250 billion in tax revenue and proved unable to return to pre-crisis levels of spending and investment.¹¹¹ Lost tax revenue after the Great Recession became apparent precisely because states wound up spending far less than they had spent pre-2008 on higher education, public sector jobs, and supports to help workers and their families meet basic economic needs.¹¹² Historically, however, direct federal aid to state budgets has proven one of the most impactful ways to strengthen a distressed economy.¹¹³ Research shows that additional investment in a plethora of public sector programs and infrastructure yields greater economic activity than the original investment.¹¹⁴ Although federal lawmakers have seriously debated omnibus legislation to strengthen the social safety net and bolster child wellbeing after 2021, impulses towards austerity prevail. Most recently, in August 2022, a budget reconciliation package enacted several narrow climate and health care provisions while rejecting most of the extensive, vital proposals in the “Build Back Better Act” that could have finally buoyed child-serving

109. Kevin Farnsworth & Zoe Irving, *Austerity: Neoliberal Dreams Come True?*, 38 CRITICAL SOC. POL’Y 461, 463, 476 (2018).

110. See generally Banerjee & Williamson, *supra* note 71; Farnsworth & Irving, *supra* note 109; Viens, *supra* note 106; Navarro, *supra* note 108, at 272–73.

111. Banerjee & Williamson, *supra* note 71, at 5, 5 n.19; ‘Lost Decade’ Casts a Post-Recession Shadow on State Finances, PEW (June 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/lost-decade-casts-a-post-recession-shadow-on-state-finances> [<https://perma.cc/YQL2-GT5A>].

112. See Banerjee & Williamson, *supra* note 71, at 5.

113. *Id.* at 8, 16; see Heather Boushey & Matt Separa, *Unemployment Insurance Dollars Create Millions of Jobs*, CTR. FOR AM. PROGRESS (Sept. 21, 2011), <https://www.americanprogress.org/issues/economy/news/2011/09/21/10367/unemployment-insurance-dollars-create-millions-of-jobs/> [<https://perma.cc/V6UA-BQME>]; Dottie Rosenbaum, Stacy Dean & Zoe Neuberger, *The Case for Boosting SNAP Benefits in Next Major Economic Response Package*, CTR. ON BUDGET & POL’Y PRIORITIES (May 22, 2020), <https://www.cbpp.org/research/food-assistance/the-case-for-boosting-snap-benefits-in-next-major-economic-response-package#:~:text=Every%20dollar%20in%20new%20SNAP%20benefits%20spent%20when%20the%20economy,SNAP%20benefits%20during%20a%20recession> [<https://perma.cc/ZZ2U-4L5K>]; Mark Zandi, *Testimony Before the House Budget Committee: Perspectives on the Economy*, MOODY’S ANALYTICS 15, 18 (July 1, 2010) <https://www.economy.com/mark-zandi/documents/Final-House-Budget-Committee-Perspectives-on-the-US-Economy-070110.pdf> [<https://perma.cc/QW4S-6VWH>].

114. Banerjee & Williamson, *supra* note 71, at 8.

systems and supported workers and families.¹¹⁵ The legislation ultimately failed to fund Universal pre-K and lower child care costs, expanded school nutrition programs, paid family and sick leave, an enhanced child tax credit, earned income tax credit, home health care, lower college costs, affordable housing, homelessness services, legal assistance for eviction defense, and Medicaid coverage gap.¹¹⁶

C. *The Digital Divide: Suppression and Missed Opportunity*

COVID Capitalism also silences children by reinforcing, and failing to ameliorate, the Digital Divide. The term “Digital Divide” is intentionally broad, referring to the various inequities that riddle the modern digital and online worlds.¹¹⁷ U.S. children of different racial and ethnic identities and socioeconomic status have had vastly disparate access to high-speed internet and technological hardware or devices before, during, and after pandemic school shutdowns, with communities of color, rural communities, and students with disabilities facing the greatest challenges.¹¹⁸ Pre-pandemic research confirms that about fifteen to

115. President Biden signed the “Inflation Reduction Act of 2022” into law on August 16, 2022. Maegan Vasquez & Donald Judd, *Biden Signs Inflation Reduction Act into Law*, CNN (Aug. 16, 2022, 10:29 PM), <https://www.cnn.com/2022/08/16/politics/biden-inflation-reduction-act-signing/index.html> [https://perma.cc/28D2-J6VT].

116. Tami Luhby & Katie Lobosco, *What’s in the Democrats’ Package on Climate, Health Care and Taxes*, CNN (Aug. 16, 2022, 4:08 PM), <https://www.cnn.com/2022/07/15/politics/biden-build-back-better-manchin/index.html> [https://perma.cc/9JG3-J6RM]; see also Sahil Kapur & Carol E. Lee, *Who Lost Biden’s Agenda? Democrats Offer Competing Theories for Failure of ‘Build Back Better’*, NBC NEWS (Apr. 17, 2022, 3:30 AM), <https://www.nbcnews.com/politics/congress/lost-bidens-agenda-democrats-offer-competing-theories-failure-build-ba-rcna24552> [https://perma.cc/5Q7K-S8XH]; *President Biden Signs Scaled-Down Reconciliation Bill into Law*, NAT’L LOW INCOME HOUS. COAL. (Aug. 22, 2022), <https://nlihc.org/resource/president-biden-signs-scaled-down-reconciliation-bill-law> [https://perma.cc/4SDC-MRPS].

117. See, e.g., PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 3–4 (2001) (defining the term “digital divide”); Jan A.G.M. van Dijk, *Digital Divide Research, Achievements and Shortcomings*, 34 POETICS 221, 222 (2006) (discussing common misunderstandings about the term “digital divide” and the history of the term).

118. See generally NORRIS, *supra* note 117, at 10–12 (discussing the stratification of access to technology within countries pre-COVID-19 pandemic); Ashley R. Nyce, *Children, Disability, and the Digital Classroom: Rethinking Access and Assistive Technology for Low-Income Children with Disabilities in the Digital Age*, 55 CONN. L. REV. 135, 145–48 (2022) (discussing the importance of digital access for children’s learning); Lauren Musu, *The Digital Divide: Differences in Home Internet Access*, INST. OF EDUC. STAT.: NAT’L CTR. FOR EDUC. STATS. BLOG (Oct. 31, 2018), <https://nces.ed.gov/blogs/nces/post/the-digital-divide-differences-in-home-internet-access> [https://perma.cc/5V2Q-S3D8]; John Busby, Julia Tanberk & Tyler Cooper, *BroadbandNow Estimates Availability for all 50 States; Confirms that More than 42 Million Americans Do Not Have Access to Broadband*, BROADBANDNOW RSCH. (Oct. 13, 2022),

sixteen million students lacked sufficient internet connectivity, an adequate learning device, or both.¹¹⁹ In a 2018 national survey, about 17% of teens ages thirteen to seventeen reported repeated inability to complete their homework due to unreliable computer access or internet connections, with Black teens and those in lower-income households experiencing the gravest challenges.¹²⁰ Access to technology and the internet is now a true necessity for remote learning when applicable, as well as for children's daily homework and projects, not to mention making and maintaining social connections, obtaining health and mental health information, engaging with entertainment, and overall identity development.¹²¹ When faced with abrupt school closures and mandated remote learning in the spring of 2020, U.S. leaders, educators, and families were understandably shaken.¹²² One study from spring 2020 revealed that six out of ten parents from low-income households encountered at least one serious technological obstacle to their child's schoolwork completion, including reliance on only a cellphone for digital homework, reliance on public Wi-Fi, or incomplete schoolwork due to lack of access to a computer.¹²³

Although jurisdictions utilized pandemic CARES Act funding to successfully expand internet connectivity and provide more school districts, students and teachers with learning devices, such measures failed to eliminate the disparities rife within the Digital Divide.¹²⁴ Black and

<https://broadbandnow.com/research/fcc-broadband-overreporting-by-state> [<https://perma.cc/W7J8-BRQD>]; SUMIT CHANDRA, AMY CHANG, LAUREN DAY, AMINA FAZLULLAH, JACK LIU, LANE MCBRIDE, THISAL MUDALIGE & DANNY WEISS, CLOSING THE K-12 DIGITAL DIVIDE IN THE AGE OF DISTANCE LEARNING 5 (2020), https://www.common-sense-media.org/sites/default/files/uploads/pdfs/common_sense_media_report_final_7_1_3pm_web.pdf [<https://perma.cc/SA3Q-24KZ>] (discussing the impact of the digital divide on the existing homework gap and the impact of the COVID-19 pandemic on both).

119. CHANDRA ET AL., *supra* note 118, at 3.

120. Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital 'Homework Gap'*, PEW RSCH. CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/> [<https://perma.cc/5MAE-U3XX>].

121. See Goschke, *supra* note 81, at 173 (discussing the importance of school to the social development of children); Gruber, *supra* note 81, at 396 (discussing the disparities in ability to access online education for elementary, middle, and high school students in New York). See generally Smith, *At the Crossroads*, *supra* note 14, at 792 (citing EQUAL RTS. ADVOCs. *supra* note 92) (discussing the fact that children experience sexual and gender-based violence both in the physical and digital world).

122. Robinson, *supra* note 81, at 44.

123. *Id.* (citing Emily A. Vogels, *59% of U.S. Parents with Lower Incomes Say Their Child May Face Digital Obstacles in Schoolwork*, PEW RSCH. CTR. (Sept. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork/> [<https://perma.cc/AWG2-HHBK>]).

124. For school age children, federal COVID-19 relief reduced the lack of access to high-speed internet by 20–40% and the lack of access to a learning device by 40–60%, although disparities continue. See Robinson, *supra* note 81 at 44–45.

Latinx students are still three to four percentage points less likely than white students to have reliable access to devices, and three to six percentage points less likely to have reliable internet access, while English language learners and students with disabilities have the toughest time utilizing tech resources.¹²⁵ The Digital Divide also further widens existing gaps in educational access and outcomes.¹²⁶ Additionally, as of July 2022 close to half of the entire U.S. population was not using the internet at broadband speeds, either due to insufficient infrastructure, personal financial challenges, or a lack of requisite skills and knowledge to utilize the technology.¹²⁷

The Digital Divide is not merely a gap in knowledge or educational access however, but rather a representation of societal breakdown where children's personal and socioeconomic development, self-expression, and civic participation is concerned. At this point in history, despite certain recognizable drawbacks, reliance on technology largely dictates the formation and depth of relationships among members of society, while also determining children's pathways to socioeconomic opportunities, cultural identity, community involvement, and political alignment.¹²⁸ Young people have already proven themselves a powerful force for widespread transformation in the U.S. political landscape, largely through their use of digital tools.¹²⁹ Children and youth need technology and web connectivity for constant sources of information and news—particularly when faced with health challenges or concerns that they hesitate to bring to adults; for authentic sources of support—especially in the face of emotional strain, experiences of exclusion or abuse, disability and difference, and socio-political oppression; and to discern and share their creativity and passions—which often sparks a career path and enables

125. *Id.* at 45 (quoting Dorn et al., *supra* note 88).

126. Nyce, *supra* note 118, at 153.

127. Bhaskar Chakravorti, *How Biden's "Internet for All" Initiative Can Actually Fulfill Its Mission*, HARV. BUS. REV. (July 12, 2022), <https://hbr.org/2022/07/how-bidens-internet-for-all-initiative-can-actually-fulfill-its-mission> [<https://perma.cc/D7PX-MLYE>].

128. *See generally* Carmen Steele, *The Impacts of Digital Divide*, DIGIT. DIVIDE COUNCIL (Sept. 20, 2018), <http://www.digitaldividecouncil.com/the-impacts-of-digital-divide/> [<https://perma.cc/9QWE-BZEV>] (summarizing the impact of the digital divide on education, the economy, social, society, and culture); Nyce, *supra* note 118 at 153–54 (describing the impact of the digital divide on access to “today’s educational, personal, and professional environments”); DeVan L. Hankerson & Lydia X.Z. Brown, *Technology as a Civil Right and a Move Toward Disability Justice: Ensuring Digital Access for Disabled Students in the Pandemic*, 13 DREXEL L. REV. 869, 883–91 (2021) (discussing the disability digital divide and the impact on accessible education).

129. *See generally* Charisa Smith, *Youth Visions and Empowerment: Reconstruction Through Revolution*, 75 RUTGERS L. REV. (forthcoming 2023) [hereinafter Smith, *Youth Visions and Empowerment*] (regarding the innovative features and tactics of various youth movements in the 21st Century).

youth to create their own “platform.”¹³⁰ Online gaming and communities are likewise important for problem-solving, collaboration, and critical thinking, which experts confirm prepares youth for future productive roles in society.¹³¹ Conversely, consequences of the Digital Divide include children’s diminished prospects for education, future employment, health, and even a stable personal life.¹³²

While August 2021 marked a historic moment with the passage of a federal bill purporting to close the Digital Divide that stifles America’s children, tech policy experts warn that a shallow analysis of racial capitalism, along with certain aspects of the new program itself, could end up squandering the opportunity.¹³³ In a show of historic bipartisanship in the era of COVID Capitalism, federal legislators from both major parties enacted the Biden Administration’s Infrastructure Investment and Jobs Act—Public Law No. 117-58—which included \$65 billion in federal funding for broadband internet investment and was referred to by broadband experts as a once-in-a-generation opportunity to finally close the Digital Divide.¹³⁴

130. See generally Isabela Granic, Hiromitsu Morita & Hanneke Scholten, *Beyond Screen Time: Identity Development in the Digital Age*, 31 PSYCH. INQUIRY 195, 205–07 (2020); Sharon Rochelle Kaplan-Berkley, *The Development of Young Children’s Social Identity in an Era of Digital Tools*, 52–53 (Aug. 25, 2018) (Ph.D. dissertation, Lesley University) (Digital Commons), https://digitalcommons.lesley.edu/cgi/viewcontent.cgi?article=1142&context=education_dissertations [<https://perma.cc/NY9E-88VU>]; Monica Anderson & Jingjing Jiang, *Teens, Social Media and Technology 2018*, PEW RSCH. CTR. (May 31, 2018) (discussing teens use of social media and technology and their views on its impact on their lives), <https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/> [<https://perma.cc/T5PA-E2DD>]; *4 Benefits of Technology for Teens*, TEEN REHAB (Jan. 14, 2021, 9:37 AM), <https://www.teenrehab.org/resources/helping-your-teen/benefits-of-technology-for-teens/> [<https://perma.cc/9783-B2ZA>] (listing socialization and relationship building, development of problem solving skills, enhanced educational and digital learning tools, and interactive creativity and digital expression as benefits of technology for teens); Mayo Clinic Staff, *Teens and Social Media Use: What’s the Impact?*, MAYO CLINIC (Feb. 26, 2022), <https://www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/teens-and-social-media-use/art-20474437> [<https://perma.cc/54P5-KR34>] (discussing the benefits and harms of social media on teens); Sherri Gordon, *Surprising Ways Your Teen Benefits From Social Media*, VERYWELL FAM. (Nov. 02, 2022), <https://www.verywellfamily.com/benefits-of-social-media-4067431> [<https://perma.cc/E8YQ-VMXV>]; Amy Orben, *Teens, Screens and Well-Being: An Improved Approach*, AMY ORBEN, <https://amyorben.com/uploads/thesis/index.html#teens-and-screens> [<https://perma.cc/FDN9-R9KG>].

131. Granic et al., *supra* note 130, at 201–14.

132. See generally Gruber, *supra* note 81 at 400–01 (citing Richard L. Venezky, *The Digital Divide Within Formal School Education: Causes and Consequences*, in *LEARNING TO BRIDGE THE DIGITAL DIVIDE* 63 (OECD ed., 2000)).

133. See generally Sampak Garg, *The Infrastructure Bill Won’t Be Enough to Close the Digital Divide*, GCN (Oct. 18, 2021), <https://gcn.com/cloud-infrastructure/2021/10/the-infrastructure-bill-wont-be-enough-to-close-the-digital-divide/316394/> [<https://perma.cc/R4TF-MS25>].

134. Marguerite Reardon, *Digital Divide Fix Gets a Boost as Biden Signs \$1.2 trillion*

However, tech experts assert that it is downright “dangerous” for lawmakers to use misleading rhetoric about closing the Digital Divide when the divide encompasses highly complex socioeconomic concerns like disparate access to hardware, opportunities for literacy and skill development, availability, and affordability.¹³⁵ Essentially, *Communications Today* authors echo scholar Jan Van Dijk in insisting that “[t]o actually end the digital divide . . . we need to end inequality,” including “systemic and endemic social, political, and economic marginalization” of historically oppressed groups like BIPOC communities and individuals with disabilities.¹³⁶ Bhaskar Chakravorti, Dean of Global Business at The Fletcher School at Tufts University and founding Executive Director of Fletcher’s Institute for Business in the Global Context, also argues that this federal initiative will fall short in its current form.¹³⁷ Specifically, Chakravorti asserts that the design of the Broadband Equity, Access, and Deployment (BEAD) program could lead to a misallocation of resources and gaps in coordination and implementation.¹³⁸ He describes several challenges that ultimately evince broader flaws of COVID Capitalism—namely, prioritizing the coverage of miles over coverage of people; inadequate funding levels; a fragmented national strategy and coordination framework that leaves an opening for “intense lobbying by companies” to demand minimal regulation; and several execution roadblocks.¹³⁹ Chakravorti makes numerous recommendations for overcoming these design challenges.¹⁴⁰ Yet, a broader reckoning with racial capitalism and rampant inequality is also crucial for closing the persistent Digital Divide that hinders children, their civic engagement, and their futures.

D. Civic Repression and Surveillance

Although a discussion of the complex, often nuanced connection between COVID Capitalism and socio-political repression is beyond the scope of

Infrastructure Bill, CNET (Nov. 15, 2021, 2:57 PM), <https://www.cnet.com/home/internet/digital-divide-fix-gets-a-boost-as-biden-signs-1-2-trillion-infrastructure-bill/> [https://perma.cc/3JPU-EXAL].

135. USA—Closing the Digital Divide, COMM’NS TODAY (Feb. 2023), <https://www.communicationstoday.co.in/usa-closing-the-digital-divide/> [https://perma.cc/C3W9-QEKF]. See generally van Dijk, *supra* note 117 (discussing the various types of access that are encompassed by the digital divide).

136. USA—Closing the Digital Divide, *supra* note 135.

137. Chakravorti, *supra* note 127.

138. *Id.*

139. *Id.*

140. *Id.*

this article, numerous scholars, practitioners, and advocates document this phenomenon.¹⁴¹ In general, capitalist states—particularly in times of crisis and massive inequality—tend to rely on repressive functions such as labeling, policing, and surveillance to maintain control over a population (workforce).¹⁴² Further, corporate control over the production and dissemination of media in the once-free press deepens the dilemma American democracy faces in the COVID era.¹⁴³ In an age when six companies control over 90% of the nation’s media outlets, choice and objectivity become an illusion, and both journalistic self-censorship and macro-level bias may be inherent in any level of reporting.¹⁴⁴ Perhaps unsurprisingly, a small number of major corporations also control all public access to digital information due to their ownership of search engines like Google and various social media platforms.¹⁴⁵ Accordingly, youth who attempt to be outspoken and stake out political terrain in the COVID era experience the same repression that adult activists experience during this historical period, including targeting and surveillance by law enforcement, harassment from private sector entities and political officials, trolling and bullying by other civilians on and offline, and threats to their personal security and privacy.¹⁴⁶ Yet, due to their status as partial

141. See, e.g., Bhattacharya, *supra* note 4.

142. *Id.*

143. See generally Matt Guardino, *How Corporate Media Mergers Weaken News Coverage*, SCHOLARS STRATEGY NETWORK (Oct. 22, 2019) (providing background on corporate control of media and its impact on free expression), <https://scholars.org/contribution/how-corporate-media-mergers-weaken-news-coverage> [<https://perma.cc/UFM3-QSHL>]; David E. Nye, *Democracy & Corporate Control of the Media*, in CONTEMPORARY AMERICAN SOCIETY (7th ed. 2009), <https://www.ssc.wisc.edu/~wright/ContemporaryAmericanSociety/Chapter%2019%20-%20The%20Media%20—%20Norton%20August.pdf> [<https://perma.cc/6FE8-6RK5>] (Final Draft August 2009); Arturo Carmona & Joseph Torres, *Why Media Mergers Are Bad News for Communities of Color*, FREE PRESS (May 5, 2015), <https://www.freepress.net/blog/why-media-mergers-are-bad-news-communities-color> [<https://perma.cc/87CH-29K3>].

144. Nickie Louise, *These 6 Corporations Control 90% of the Media Outlets in America. The Illusion of Choice and Objectivity*, TECH STARTUPS (Sept. 18, 2020), <https://techstartups.com/2020/09/18/6-corporations-control-90-media-america-illusion-choice-objectivity-2020/> [<https://perma.cc/5R54-44QV>].

145. *Id.*

146. See, e.g., Cheryl Corley, *Black Lives Matter Fights Disinformation to Keep the Movement Strong*, NPR (May 25, 2021), <https://www.npr.org/2021/05/25/999841030/black-lives-matter-fights-disinformation-to-keep-the-movement-strong> [<https://perma.cc/CWC5-NCTS>]; *Youth in Focus: Youth Activism’s Role in Pushing Climate Action Forward*, NYU L. <https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=83877> [<https://perma.cc/E83W-J3DZ>] (featuring youth activist speakers— Xiye (Giii) Bastida (Fridays for Future & Re-Earth Initiative), Disha Ravi (Fridays for Future India), Ayisha Siddiq (Polluters Out & Fossil Free University)); Nylah Burton, *Meet the Young Activists of Color Who Are Leading the Charge Against Climate Disaster*, VOX (Oct. 22, 2019), <https://www.vox.com/identities/2019/10/11/20904791/young-climate-activists-of-color> [<https://perma.cc/4QUF-87TM>] (quoting youth climate activist Isra Hirsi and others).

citizens, youth are also paradoxically subjected to enhanced repression, surveillance, and censorship by school systems, guardians, and other adults who are responsible for child-serving systems.¹⁴⁷

E. Glimpsing Resilience and Power: Youth Activism in the COVID Era

Despite myriad sources of repression and precarity, youth in the COVID era nevertheless demonstrate remarkable resilience and the fortitude to create revolutionary change. Other work of this author describes the innovative, liberatory, and collaborative nature of 21st century youth activism, wherein civically engaged youth refuse to adopt single-issue analyses and silos, while problematizing the entire, underlying paradigm of militaristic racial capitalism and demanding a thoroughly transformed world in the wake of climate catastrophe.¹⁴⁸ Youth at the forefront of movements, including the March for Our Lives for gun control, climate activism, the Movement for Black Lives (M4BL), and the #MeToo movement, insist upon intersectional approaches to identity politics and coalition-building, just as they lament the erosion of the rule of law and a lack of credibility among politicians and the media.¹⁴⁹ While building upon past moral fusion movements, contemporary youth activists are transforming the legal landscape by simultaneously voting in record numbers, resisting prior presumptions about the law's fairness and utility, yet also incorporating legal strategies as a necessary tool for creating liberation and economic prosperity.¹⁵⁰

Likewise, this author's recent experience engaging in political workshops and discussions with youth—although limited—reveals a similar thread of tenacity and strength among youth even amidst COVID Capitalism's constant wheels of suppression. In the fall of 2021, New York City area high school activists committed to a training on legal rights and history, while taking on civic leadership in a participatory, multimedia art endeavor that questioned the U.S. Constitution and status quo systems as

147. See generally Smith, *Youth Visions & Empowerment*, *supra* note 129 (regarding the punitive responses youth activists report experiencing from their school districts and other trusted adults).

148. See generally *id.*

149. *Id.* See generally GEORGIA WRIGHT, <https://www.wrightgeorgia.com/inherited> [<https://perma.cc/KRD5-GASG>] (Georgia Wright and Julianna Bradley host *Inherited*). See Hertsgaard, *supra* note 2; Seth Borenstein & Suman Naishadham, *Fed Up Young Climate Activists: 'Adults Aren't Listening'*, ASSOCIATED PRESS (Nov. 10, 2022), <https://apnews.com/article/science-mexico-climate-and-environment-government-politics-543dafba41cd5da908d47195ec5255a2> [<https://perma.cc/L5Q6-JZ25>] (discussing the corporate media and critiques of it, including by youth activists).

150. Smith, *Youth Visions and Empowerment*, *supra* note 129.

part of a “Year of Uncertainty” exhibition created by artists Alex Strada and Tali Keren.¹⁵¹ In this workshop and project, youth addressed the tension between constant experiences of control or infantilization in schools, communities, and legal systems on the one hand, and their own keen awareness of socio-political issues and current activism on the other hand. Overwhelmingly, these student activists articulated a sentiment of being both underestimated, misled, and betrayed by adults and the systems that purport to center children in the age of COVID Capitalism. During a culminating workshop exercise that called for political agenda-setting and prioritizing in their own microcosm of democracy, these youth asserted that among a plethora of concerning issues, education justice was most critical to them. Calling for revitalized school funding, a culturally relevant curriculum, de-militarized schools free of policing, enhanced opportunities for civic engagement and peer leadership, and an investment in mental health and medically accurate sex education, these young people proved themselves worthy of admiration and further trust. Despite contemporary youth’s exceptional resistance and resilience, however, our COVID Capitalist democracy continues to prioritize socio-legal measures that attempt to silence, impair, and hinder the children who will undoubtedly inherit our society.

IV. A WAY FORWARD: RE-IMAGINING AND EMPOWERMENT

A. Paradigm Shift: Rejecting Adult Supremacy and the Adversarial Framework

While countless aspects of COVID Capitalist democracy are in need of transformation, a key, initial step involves shifting the orientation of child-serving systems and programs away from the stifling framework of family rights triangulation and children’s partial citizenship, towards a new paradigm of youth empowerment, family systems philosophy, and strengths-based approaches. To reject COVID Capitalist measures that jeopardize and silence youth, the state and society must support endeavors that help youth exercise self-determination and evolve towards their fullest potential. Whereas minors currently have diminished rights and choices amidst systemic paternalism, a youth empowerment perspective refuses to

151. See generally Brian Lehrer, *The Brian Lehrer Show: Your 28th Amendment?*, WNYC (Dec. 8, 2021), <https://www.wnyc.org/story/your-28th-amendment/> [https://perma.cc/5AE7-8KTF]; Alex Strada & Tali Keren, *Proposal for a 28th Amendment? Is it Possible to Amend an Unequal System?* 10.02.21 – 02.13.22, QUEENS MUSEUM, <https://queensmuseum.org/exhibition/alex-strada-tali-keren/> [https://perma.cc/T6L8-T66P].

continue denying children socioeconomic and political power. Resisting a narrow focus on rights, youth empowerment approaches consider youth capacity, adult responsibility, and youth needs.

Youth empowerment generally refers to an approach that centers belief in the inherent capabilities, self-determination, and worth of children and youth.¹⁵² Youth empowerment programs support youth in building their own capacity to attempt new challenges, take risks, practice critical thinking, encounter failure as a step toward progress, build healthy self-esteem, demonstrate academic growth and achievement, eschew peer pressure, and maintain tenacity in the face of adversity.¹⁵³ Many endeavors towards youth empowerment encourage peer leadership, deeper social connections, resilience-building in the face of trauma, and open exploration of future life prospects.¹⁵⁴ Often, programs geared towards youth empowerment serve youth from historically oppressed communities of color, those especially susceptible to court involvement, sexual minority youth, and youth whom society underestimates due to poverty and systemic injustice.¹⁵⁵ Typically, a youth empowerment framework allies young people with a caring adult mentor who can support their continued decision-making and multi-faceted growth, as the young person gains increasing autonomy, opportunities, and responsibility while understanding societal expectations and rationales.¹⁵⁶ Too often, as scholar Emily Buss points out, legal systems and society at large act as a de-facto child-rearer by reacting to youth behavior only after it arises, without articulating clear initial expectations for behavior or growth, and without communicating what supports are available.¹⁵⁷ Further, Buss characterizes the status quo legal framework as a dynamic relationship

152. E.g., Hally Spiller, *Why Is Youth Empowerment Important?*, BOYS & GIRLS CLUBS AM. (Sept. 2, 2021), <https://www.bgca.org/news-stories/2021/September/why-is-youth-empowerment-important> [<https://perma.cc/R3Q4-FRPA>]; *Benefits of Youth Empowerment*, CAP. YOUTH EMPOWERMENT PROGRAM (Apr. 1, 2022), [hereinafter *Benefits of Youth Empowerment*] <https://www.cyep.org/benefits-of-youth-empowerment/> [<https://perma.cc/MRG4-FT39>]; *Three Pillars of the Youth Empowerment Mission*, YOUTH EMPOWERMENT SAN DIEGO, [hereinafter *Three Pillars*] <https://www.youthempowermentsd.com/three-pillars-of-youth-empowerment> [<https://perma.cc/6DSN-RSYL>].

153. E.g., Spiller, *supra* note 152; *Benefits of Youth Empowerment*, *supra* note 152; *Three Pillars*, *supra* note 152.

154. E.g., Spiller, *supra* note 152; *Benefits of Youth Empowerment*, *supra* note 152; *Three Pillars*, *supra* note 152.

155. See, e.g., Spiller, *supra* note 152; *Benefits of Youth Empowerment*, *supra* note 152; *Three Pillars*, *supra* note 152.

156. See, e.g., Spiller, *supra* note 152; *Benefits of Youth Empowerment*, *supra* note 152; *Three Pillars*, *supra* note 152. See Ryan, *supra* note 14, at 1160–78 (discussing “supported decision-making” (SDM) and the general law and policy landscape surrounding emerging adulthood).

157. See generally Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741 (2016).

between law and children’s psychosocial development, as opportunities beget capabilities and disadvantaged youth are failed by public systems.¹⁵⁸ Importantly, although the prevailing legal landscape operates on principles of adult supremacy and children’s inherent incapacity (and frequently as youth experience this, their inherent inferiority), both scientific evidence and some emerging legal precedents affirm the need for youth empowerment and reconsideration of status quo age boundaries.¹⁵⁹ Specifically, studies now show that minors’ “cognitive capacity reach[es] adult levels around age 16” barring issues of disability and developmental delay, while their psychosocial maturity (which impacts risk-taking, peer pressure, and thrill-seeking) evolves far “beyond age 18, creating a ‘maturity gap’ between cognitive and psychosocial development.”¹⁶⁰ This research supports the expansion of venues for minors under age eighteen to engage in more robust, deliberative decision making, along with the expansion of opportunities for youth to receive guidance in skill-building, healthy experimentation, and affirming identity-formation.¹⁶¹ Further, such scientific evidence reinforces the wisdom of burgeoning initiatives such as expanding the franchise to youth under age eighteen and fostering intergenerational, collaborative activism.¹⁶²

B. Re-Imagining Support and Self-Determination

Likewise, legal and policy approaches to children should also center family systems theory to bring legal responses in line with best practices in behavioral health, family therapy, and human rights and remedy the harm caused by the current family policing system. This approach would re-imagine what support for children looks like in a world where marginalized caregivers are not unjustly targeted for family separation. Instead, the family policing system as it presently exists would be abolished in favor of presumptions of non-intervention and the direct

158. See generally *id.*

159. See generally Vyvian Raoul, *Against Adult Supremacy*, NEW INTERNATIONALIST (Feb. 6, 2018) (discussing adult supremacy as a concept, particularly from the perspective of youth activists and indigenous communities), <https://newint.org/2018/02/06/against-adult-supremacy> [<https://perma.cc/E8Y6-7SHK>]; NO!: AGAINST ADULT SUPREMACY: ANTHOLOGY (2017); Colby Tootoosis, *The Cunning of the Adult Supremacist*, FREEDOM RISING (Apr. 27, 2020), <https://www.colbytootoosis.com/writings/adult-supremacy> [<https://perma.cc/3D2Z-6GLK>].

160. Icenogle et al., *supra* note 14, at 69, 71.

161. See, e.g., *id.* at 79–83.

162. See Smith, *Youth Visions and Empowerment*, *supra* note 129 (discussing expanded youth voting and intergenerational activism).

resourcing of marginalized families when hardships arise.¹⁶³ Further, as discussed in Part II, family systems theory would more appropriately guide state actions toward children by recognizing the inherent interconnection between the wellbeing and interests of children and their caregivers of origin. Rather than excessively emphasizing individualized rights and adversarialism, courts and child-serving systems should prioritize decisions that maintain family cohesion, illuminate kinship care during crises, and ultimately center the expertise of impacted families themselves.¹⁶⁴ While few jurisdictions have truly divested from family policing systems in order to reinvest in impacted families and communities, some promising initiatives involve divestment from carceral systems or school policing and reinvestment in youth and family resources.¹⁶⁵ Further, promising models for broader Family Empowerment are also instructive. Caregivers who face hardship benefit from community-based approaches to economic challenges, mental health crises, and interpersonal conflict, including transformative justice interventions and discrete safety planning.¹⁶⁶ In addition to renewing federal investment in the social safety net,

163. See, e.g., MOVEMENT FOR FAM. POWER, *supra* note 27 (discussing recommendations on decreasing family separation and diminishing the harm of the family policing system); Smith, *From Empathy Gap to Reparations*, *supra* note 27, at 2642–44; ‘Abolition Is the Only Answer’: A Conversation with Dorothy Roberts, RISE (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [<https://perma.cc/S4HK-RC6K>]; Smith, *Over-Privileged*, *supra* note 27, at 612–21.

164. See *supra* Part II.

165. See Smith, *At the Crossroads*, *supra* note 14, at 851–56 (describing developments across the U.S. regarding divestment from school policing and re-investment in youth and community programming); see also Stephen Sawchuk, Sarah Schwartz, Eesha Pendharkar & Ileana Najarro, *Defunded, Removed, and Put in Check: School Police a Year After George Floyd*, EDUCATIONWEEK (June 4, 2021), <https://www.edweek.org/leadership/defunded-removed-and-put-in-check-school-police-a-year-after-george-floyd/2021/06> [<https://perma.cc/ZC4F-MNDZ>]; Maya Riser-Kositsky, Stephen Sawchuk & Holly Peele, *School Police: Which Districts Cut Them? Which Brought Them back?*, EDUCATIONWEEK (June 4, 2021), <https://www.edweek.org/leadership/which-districts-have-cut-school-policing-programs/2021/06> [<https://perma.cc/36Z9-U49G>]; Jill Cowan, Shawn Hubler & Kate Taylor, *Protesters Urged Defunding the Police. Schools in Big Cities Are Doing It.*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/us/los-angeles-school-police.html> [<https://perma.cc/FX9W-9WGZ>].

166. See generally, e.g., *Strategies*, MOVEMENT FOR FAM. POWER, <https://www.movementforfamilypower.org/solution-and-strategies> [<https://perma.cc/7GMP-DJ5P>]; BAY AREA TRANSFORMATIVE JUST. COLLECTIVE, <https://batjc.wordpress.com> [<https://perma.cc/RMB2-SRFB>]; ADRIENNE MAREE BROWN, *HOLDING CHANGE: THE WAY OF EMERGENT STRATEGY FACILITATION AND MEDIATION* (2021); ADRIENNE MAREE BROWN, *WE WILL NOT CANCEL US: AND OTHER DREAMS OF TRANSFORMATIVE JUSTICE* 14 (2020); GENERATION FIVE, *TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE* 4 (2007), https://criticalresistance.org/wp-content/uploads/2020/05/G5_Toward_Transformative_Justice-Document.pdf [<https://perma.cc/F899-YDNQ>].

reinvesting in successful COVID relief measures, and rejecting austerity policies, states should implement solutions that policy experts coin “automatic stabilizers,” to consistently bolster child wellbeing and boost economic growth.¹⁶⁷ “Automatic stabilizers tie benefits to economic conditions,” so that Congress does not need to persistently pass legislation when crucial programs need continuation.¹⁶⁸ Further, these initiatives would support children and families when forthcoming health and economic crises arise.¹⁶⁹ Lastly, in order to foster self-determination and empower children and families, constituents of various jurisdictions should prioritize community control and self-governance on multiple levels—including school boards, participatory budgeting, and community oversight of law enforcement and vital child-serving agencies.¹⁷⁰

V. CONCLUSION

Although the medical and public health impacts of the COVID-19 pandemic have now waned, states continue resorting to COVID Capitalist measures that endanger and repress children at a crucial time in their lives. Yet, myriad opportunities for transformation exist—both the transformation of prevailing legal frameworks and that of material conditions for children and families. This work recommends several promising pathways to change while arguing that empowered children themselves hold the key to toppling racial capitalism and increased sociopolitical repression. Future research should strive to elevate the voices of marginalized youth and families themselves, while recognizing both the necessity and inherent shortcomings of legal problem-solving.

167. Banerjee & Williamson, *supra* note 71.

168. *Id.*

169. *Id.*

170. See, e.g., PARTICIPATORY BUDGETING PROJECT, <https://www.participatorybudgeting.org/> [<https://perma.cc/E53L-AJG6>].