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The Epistemic Injustice of Algorithmic Family Policing

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The child welfare system is the system through which U.S. state authorities identify and intervene in families seen as posing a risk of abuse or neglect to their children. Impacted families, advocates, and scholars have joined in a growing chorus in recent years, demonstrating how this system—which many now refer to as the “family policing” system—destroys families and communities as opposed to supporting them. Many now call for the system’s abolition, arguing that the system, while masquerading as one of care and benevolence, is in fact an integral part of the carceral web constituted by criminal policing, prisons, jails, and other punitive and oppressive institutions. Far from being a system designed to support families, it instead is a system of subordination and control.

While this movement has been growing, the family policing system, like its criminal counterpart, has been turning to risk-prediction algorithms to help it with its work. In prior scholarship, I documented the development of these predictive tools and highlighted a number of preliminary associated risks. This piece brings a new lens to the issue, arguing that a key mechanism by which the family policing system accomplishes its subordinating design is through the regulation of knowledge production and sharing. The system selectively and systematically discredits the knowledge of the parents it targets. Borrowing a concept from political philosophy, this piece identifies this harm as that of “epistemic injustice”: the distinct form of injustice that occurs when a person or group is harmed in its capacity as a holder of knowledge. Through perpetrating epistemic injustice, the system acts to maintain the social order. As the system turns to algorithms to rank and categorize its targets, it reinforces old ways of doing business and creates new mechanisms by which to assign and police epistemic worth.

This piece explores the ways that family policing’s turn to “big data” risk-prediction algorithms scales up and expands the system’s already pervasive epistemic injustice.

* Director of Research & Advocacy at the Center on Privacy & Technology at Georgetown Law. This work grows out of my experience representing parents in family policing cases in Brooklyn, New York. Like all writings, it is a product of my own lived experience and that which I have been able to access through the knowledge-producing activities of others. It is inherently limited, partial, and full of distortion. I am thankful to all those who helped me shape the ideas included in this piece and encouraged me along the way, including Sarah H. Lorr, Shanta Trivedi, Laura Matthews-Jolly, Clare Huntington, Michele Gilman, Sara Colangelo, Emily Tucker, S. Lisa Washington, J. Khadijah Abdurahman, David C. Vladeck, and the participants in the Law and Technology Group at the 2022 Clinical Law Review Writers’ Workshop. All errors are my own.

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INTRODUCTION

It was a truth I didn't have language for . . . It was a truth that I had lived . . . I saw someone [speak] about it. And someone put a name to it. And someone said, I see it too.

Joyce McMillan¹

There is a growing movement to abolish what many know as the “child welfare system”: the system through which state authorities identify children perceived to be at risk of abuse and neglect in their homes, separate them from their families when deemed appropriate, and shepherd them to permanent homes when returning to their families of origin is seen as impossible. Impacted people, advocates, and organizers now call this system by different names, such as the “family regulation” or “family policing” system, in an attempt to more accurately describe what it does.²

1. Irin Carmon, *Dorothy Roberts Tried to Warn Us*, N.Y. MAGAZINE (Sept. 6, 2022), (*available at* <https://nymag.com/intelligencer/2022/09/dorothy-roberts-tried-to-warn-us.html>) [<https://perma.cc/2TWB-ZQLX>].

2. This Paper will use the term “family policing.” This language change, while perhaps superficial, is an effort to name what the system actually does: regulate and police. *See* Megan Conn, *Pressure Builds to Reduce Racial Disproportionality in New York's Child Welfare System*, IMPRINT (Jan. 19, 2021), <https://imprintnews.org/child-welfare-2/new-york-calls-grow-address-racism-child-welfare/51073> [<https://perma.cc/37LK-SJ5K>] (describing Joyce McMillan billboard proclaiming that “[s]ome cops are called caseworkers”). It avoids masking what many affected families and advocates

Rather than prioritizing true child welfare, this movement sees the system as an extension of the carceral web that contains and is constituted by police and prisons.³ This carceral web is rooted in the country's history of slavery and the racial capitalism to which slavery was foundational. It currently enacts a public policy "fixat[ed]" on "attributing blame" and meting out punishment for inequity "rather than remedying its effects or abolishing its causes."⁴ Though cloaked in professed benevolence, the family policing system is a key support in this structure.

At the same time, the family policing system, like its criminal counterpart, has been digitizing and automating. Family policing authorities are "increasingly employing big data and artificial intelligence" algorithms to support their decision-making.⁵ These algorithms pull together large quantities of administratively-held data: information maintained by public systems like the family policing system itself, the criminal legal system, the public benefits system, and public services like hospitals.⁶ From this data, tool designers assert they can produce predictive risk scores for individual children or families, identify geographical "hot spots" they claim show the locations "where children are 'at the greatest risk of maltreatment,'" or do a number of other tasks.⁷ In a previous piece, I identified this development and raised a number of preliminary concerns with it.⁸ These concerns include the fundamentally political and subjective (as opposed to neutral and mathematical) project of defining terms such as "maltreatment" or "neglect" necessary to construct any such tools; the associated inability to identify outcome variables (data points the algorithms can predict) that actually map to the purported concerns of the system; the ways that historical bias and systemic racism in the underlying data

see as its true function with care-oriented terms. The change is inspired by and in-line with leading thinkers in the field. *See, e.g.*, Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-a-lso-means-abolishing-familyregulation/44480> [<https://perma.cc/T9AR-SY2X>]; Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing our Language*, IMPRINT (July 28, 2020), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changinglanguage/45586> [<https://perma.cc/ZBL6-JB6L>]. Many attribute coinage of the term "family policing system" to Victoria Copeland and Brianna Harvey. *See, e.g.*, ALAN J. DETTLAUF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 13 (2023).

3. *E.g.*, Roberts, *supra* note 2.

4. Dorothy Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1724 (2019) (reviewing VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018)).

5. Dorothy Roberts, *Policing Families*, 14th Annual Berkeley Center for Law & Technology Privacy Lecture (Oct. 28, 2021), <https://www.law.berkeley.edu/research/bclt/past-events/2021-events/bclt-privacy-lecture-policing-families/> [https://web.archive.org/web/20240311155815/https://www.kaltura.com/index.php/extwidget/preview/partner_id/1368891/uiconf_id/41443412/entry_id/1_yi2uywj8/embed/iframe?].

6. Stephanie K. Glaberson, *Coding Over the Cracks: Predictive Analytics and Child Protection*, 46 FORDHAM URB. L.J. 307 (2019).

7. *E.g.*, Anjana Samant, Aaron Horowitz, Kath Xu & Sophie Beiers, *Family Surveillance by Algorithm*, ACLU (Sept. 29, 2021), <https://www.aclu.org/fact-sheet/family-surveillance-algorithm> [<https://perma.cc/2QAF-6MPP>].

8. Glaberson, *supra* note 6.

will inevitably infect algorithmic outputs; and the lack of transparency and potential for misuse of these tools; among others.⁹ Each of these concerns is important and we should not lose sight of any of them. But focusing exclusively on these sorts of concerns¹⁰ risks missing the big picture, trapping us in “adjudicating” the “downstream impact” these tools have and failing to acknowledge “the core structural issues at work.”¹¹

To fully understand how this system operates, we must interrogate all the mechanisms by which it does its work.¹² One key mechanism is the regulation of epistemic worth, which determines who gets to produce knowledge and whose knowledge counts. In recent years, political philosophers have provided a name for the particular injustice that occurs when “someone is harmed in their ‘capacity as a knower’”—epistemic injustice.¹³ Applying the lens of epistemic injustice, this piece argues that a key mechanism by which the family policing system accomplishes its subordinating design is through the regulation of knowledge production and sharing. At its core, the family policing structure is a mechanism to site knowledge of and judgment about parenting away from parents deemed undesirable and place it instead with authority figures deemed more acceptable. By identifying and policing who holds epistemic authority and whose contributions hold epistemic value regarding the welfare of children, the system acts to maintain the existing social order. The development of risk-prediction algorithms marks a fissure in the pathway of how knowledge is produced and valued in the system.¹⁴ And while scholarship has described the particular epistemic harms the system perpetrates on

9. *Id.*

10. Scholar Frank Pasquale has offered a “periodization” of “algorithmic accountability advocacy and research” in which the “first wave” “focuses on improving existing systems,” while the “second wave of research has asked whether they should be used at all—and, if so, who gets to govern them.” Frank Pasquale, *The Second Wave of Algorithmic Accountability*, LPE PROJECT (Nov. 25, 2019), <https://lpeproject.org/blog/the-second-wave-of-algorithmic-accountability/> [<https://perma.cc/CP7Y-YP24>]. The concerns identified in the preceding paragraph would largely fall within the “first wave.”

11. J. Khadijah Abdurahman, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children’s Services*, 11 COLUM. J. RACE L. F. 75, 85 (2021).

12. See Victoria Copeland, *Dismantling the Carceral Ecosystem: Investigating the Role of “Child Protection” and Family Policing in Los Angeles* 1, 18 (2022) (Ph.D. dissertation, UCLA) (eScholarship.org) (“Failed attempts to reform the ‘child welfare’ system without addressing its underlying ideological attachments and often violent forms of addressing harm deepen its role as an arm of the carceral state.”).

13. S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1108 (2022); MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).

14. See, e.g., Knowledge Production, SAGE J.: BIG DATA & SOCIETY, <https://journals.sagepub.com/page/bds/collections/knowledge-production> [<https://perma.cc/XA2K-RUNN>] (last visited Feb. 20, 2024) (“The emergence of datafied, algorithmic modes of knowledge production invites us to revisit long-standing questions about epistemology, representation and truths”); Anja Bechmann & Geoffrey C. Bowker, *Unsupervised by any Other Name: Hidden Layers of Knowledge Production in Artificial Intelligence on Social Media*, BIG DATA & SOC’Y, Jan.–June 2019, at 1 (“Artificial Intelligence (AI) in the form of different machine learning models is applied to Big Data as a way to turn data into valuable knowledge.”).

survivors of domestic violence,¹⁵ none has yet applied epistemic injustice theory to the family policing system's current automating state. This paper will be the first to explore how the family policing system's algorithmic turn both reflects and risks worsening this particular form of injustice. In its algorithmic turn, the family policing system is now automating the epistemic injustice it perpetrates.

As explained further below, the system's turn to algorithmic decision-making is the logical—or perhaps illogical—conclusion of a process begun in the early 1800s, through which the fundamentally social and political question of how best to support children has steadily been reduced to a system of categorization and triage.¹⁶ The system has, for many years, been driving toward automation.¹⁷ This drive, while nominally about accuracy and efficiency, has in truth been about closing the system off—not just from the knowledge of the communities it impacts but also from the knowledge of those operating its levers. Through this process, it has become virtually impossible to create shared knowledge and understanding among all those involved. The turn to algorithms is a microcosm of this centuries-long process, but one that illuminates it clearly. When used in the bureaucratic manner with which the system is now experimenting, algorithms do not create new knowledge but in fact disdain and destroy it in a myriad of ways, extending the epistemic injustice of the system in new directions.

The paper will identify five new directions. First, these tools enact a form of “algorithmic gaslighting.”¹⁸ They not only obscure their own intentions (appearing to predict future “risk” posed by the family environment when, in fact, they reflect historical system-imposed harm and appear to be neutral when they in fact represent specific values and ideologies) but also capitalize on fear the system itself creates. This fear causes us to cling to prediction and scoring as the “way out” of societal problems, motivated by a belief that the problem is too complex to be confronted otherwise.¹⁹ Second, these data-driven tools are not just an outgrowth of but also a driving force behind the expanding surveillance web that is the modern family policing system. The ever-present surveillance of the system—now made digital—itself enacts epistemic harm by stifling creativity, uniqueness, and knowledge production at even the individual, internal level.²⁰ Third, these tools privilege carceral data sources and define certain groups (i.e., data scientists) as epistemic authorities over others (i.e., impacted people and even on-the-ground child welfare

15. Washington, *supra* note 13.

16. *See infra* Part I.A.

17. *Id.*

18. “Gaslighting” describes situations in which “a (usually) more powerful person or group intentionally or unintentionally causes a weaker one to distrust her/their own perceptions.” Sara Cohen Shabot, *‘Amigas, Sisters: We’re Being Gaslighted’ Obstetric Violence an Epistemic Injustice*, in *CHILD BIRTH, VULNERABILITY AND THE LAW* (Pickles and Herring, eds., 2020). For further discussion of “gaslighting,” see *infra* Part II.A.1.

19. *See infra* Part III.A. (quoting Sun-Ha Hon, *Prediction as Extraction of Discretion*, 10 *BIG DATA & SOC’Y*, Jan.–June 2023, at 927).

20. *See infra* Part III.B.

workers themselves). In so doing, they disproportionately discredit impacted communities while objectifying those same communities, treating them as mere sources of information rather than complete epistemic agents.²¹ Fourth, the system as audience receives any information the tools do provide through a carceral lens, using it in a feedback loop to confirm and grow the system's own carceral knowledge instead of doing anything to disrupt the cycle.²² Fifth, the use of these tools suppresses opportunity for the democratic contestation that could lead to increased knowledge production and better informed policies.²³ In these ways, the algorithmic turn in family policing upholds a key structure in the carceral framework.

The piece proceeds in four Parts. Part I summarizes the history of the development of the modern family policing system, describing the system's purported goals and legal functioning and tracing the system's drive toward automation. Part II defines and describes the theory of epistemic injustice. It then discusses ways the system epistemically oppresses the communities it targets independent of its modern automation drive, with a focus on the system's conflation of poverty with neglect. Part III argues that algorithmic family policing entrenches and expands the epistemic injustice the system already perpetrates, describing in detail the five mechanisms by which it does so described above. Finally, Part IV moves toward a vision of what epistemic justice could look like. This Part argues for a system that respects and prioritizes the knowledge of the individuals and communities most affected by this form of state violence.²⁴

I. FAMILY POLICING BY ALGORITHM

A. *The Rise of Algorithmic Family Policing*

Today's family policing system—and its algorithms—are the modern manifestation of centuries of U.S. policies and institutions that have surveilled, categorized, ranked, and thereby controlled U.S. populations deemed suspect or undeserving. As policy choices subjugated or held certain populations in poverty, the moral construction of poverty arose to place the blame for social inequity on those suffering its effects and target them for surveillance and control.²⁵

The story starts before the founding, when the twin institutions of slavery and poverty regulation served as the foundations of the country's surveil-and-categorize approach.²⁶ Data-driven methods of surveillance and control arise in this period,

21. See *infra* Part III.C.

22. See *infra* Part III.D.

23. See *infra* Part III.E.

24. See generally Liat Ben-Moshe, *Dis-orientation, Dis-epistemology and Abolition*, 4 FEMINIST PHIL. Q., June 2018.

25. See, e.g., EUBANKS, *supra* note 4; KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017).

26. Illustrating just how deeply entrenched the intertwined histories of poverty regulation and racial slavery/capitalism are to the American project, 1662 saw not only the nation's first poorhouse but also was the year in which "[o]ne of America's first laws," Virginia's "Hereditary Slavery Law," made children born to an enslaved woman and a white man legally slaves:

not only reducing humans to their numerical values but also allowing far-away plantation owners to remotely monitor and control Black enslaved life in the colonies.²⁷ Plantations running on enslaved labor kept ledgers identifying the plantations' property holdings—the human beings enslaved there.²⁸ Colleges and universities kept financial and administrative records reflecting the jobs done by purchased and leased people: “Significant events in their lives, can be traced in cashbook and daybook entries, along with transactions for whiskey, sugar, and meat.”²⁹

Over the ensuing decades, different legal regimes structured the provision of aid to those in need, but the themes of surveillance and categorization persisted. In the late 1800s, for example, the “scientific charity movement” advocated “more rigorous, data-driven methods to separate the deserving poor from the undeserving” and continued the trend of withdrawing epistemic authority from those deemed unworthy as an element of aid provision.³⁰ Families seeking public support became “cases” managed by “caseworkers” who were taught to “assume[] that the poor were not reliable witnesses” and to, in turn, interrogate with keen skepticism “the *reliability* of the evidence” presented for their dessert of aid.³¹ Twentieth-century New Deal programs created a “two-tiered welfare state” that was gendered and raced in which “white male wage workers thrown into temporary unemployment” were seen now as “deserving” and offered robust “social insurance” programs that were administered in a “dignified” manner, while public

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free [sic], Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe [sic] held bond or free only according to the condition of the mother

Laws of Virginia, Act XII (1662). For further discussion of poorhouses and the ways in which they subjected those seeking support to harsh conditions and removed agency and decision-making authority—particularly about their families—from them, see EUBANKS, *supra* note 4, at 17.

27. Thanks to J. Khadijah Abdurahman for this point. See also DAINA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH* (2017).

28. See, e.g., John David Smith, “*Keep em in a Fire-Proof Vault*”—*Pioneer Southern Historians Discover Plantation Records*, S. ATL. Q., 383–86 (1979); Harrison Family Plantation Ledger, 1846–1883 (Univ. N.C.), <https://finding-aids.lib.unc.edu/05370/> [<https://perma.cc/8EYB-A2X8>] (last visited Feb. 20, 2024) (“The collection consists of a 48-page ledger book that documents the Harrison family plantation both as a part of the estate of James Harrison and after the estate was settled. Included is a page with the heading ‘A Statement of the Lotts of Negroes Belonging to the Heir of James Harrison. Died. Divided 5 January 1846.’ This page lists the names and values of 24 slaves and the family members to whom they were willed.”).

29. Elsa Barraza Mendoza, *Catholic Slaveowners and the Development of Georgetown University’s Slave Hiring System, 1792–1862*, 8 J. OF JESUIT STUD. 56, 58 (2020); see also PRESIDENT’S COMMISSION ON SLAVERY AND THE UNIVERSITY, REPORT TO PRESIDENT TERESA A. SULLIVAN 16 (2018), https://slavery.virginia.edu/wp-content/uploads/2021/03/PCSU-Report-FINAL_July-2018.pdf [<https://perma.cc/ELJ8-TGB3>]; Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 DIACRITICS 65, 79 (describing Slave Code legislation that “stun[s]” in the “simultaneity of disparate items in a grammatical series: ‘Slave’ appears in the same context with beasts of burden, *all* and *any* animal(s), various livestock, and a virtually endless profusion of domestic content from the culinary item to the book.”).

30. EUBANKS, *supra* note 4, at 21.

31. *Id.* at 22.

assistance programs “doled out humiliating relief to poor single mothers.”³² From this source, the modern family policing system sprung to life. In the second half of the twentieth century, federal policy strangled the meager direct cash aid available to families through these public assistance programs.³³ As the social safety net was hollowed out, “[t]he public trie[d] to absolve itself of the obligation to support poor families by calling the negative consequences of welfare reform ‘child neglect’ and holding mothers responsible.”³⁴ Amendments to the Social Security Act opened up deep federal funding streams for states to use toward placing children in out-of-home foster care.³⁵ By 1967, federal law “required every state to provide foster care assistance.”³⁶

A series of federal laws then constructed the modern family policing edifice. The Child Abuse Prevention Treatment Act of 1974 (CAPTA), Adoption Assistance and Child Welfare Act of 1980 (AACWA), and Adoption and Safe Families Act of 1997 (ASFA) together created a regime where affirmative support to families became largely insufficient or unavailable. Child welfare became an individual responsibility and its absence an individual—as opposed to social—failure, and government entities deputized what safety net existed to act as the eyes and ears of power.³⁷ In line with federal exhortations, each state has created a system to receive and triage reports of suspected child abuse and neglect.³⁸ To feed this system, CAPTA required states to pass laws identifying certain individuals as “mandated reporters.”³⁹ These laws require individuals in certain roles, such as social workers, teachers, counselors, therapists, child care providers, and law enforcement officers to report suspicions of child maltreatment to the state’s child

32. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 205 (1956).

33. EUBANKS, *supra* note 4, at 16.

34. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 178 (2002); *see also* MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 185 (2005) (“No longer a social problem, child welfare is conveniently defined as a matter of individual failure.”); MICAL RAZ, *ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY* (2020) (describing the Parents Anonymous group and the impact of their approach of “actively ignoring socioeconomic and racial inequalities and focusing on individual responsibility and intrapsychic explanations of abuse” on policymaking).

35. H. COMM. ON WAYS AND MEANS, 112TH CONG., *THE GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS* (2012), [https://greenbook-waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/legislative-history#:~:text=The%20Social%20Security%20Amendments%20of%201967%20\(P.L.,part%20of%20its%20AFDC%20program](https://greenbook-waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/legislative-history#:~:text=The%20Social%20Security%20Amendments%20of%201967%20(P.L.,part%20of%20its%20AFDC%20program) [<https://perma.cc/S887-3NQS>].

36. *Id.*

37. *See, e.g.*, RAZ, *supra* note 34, at 55–58.

38. *See* Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, WASH. & LEE L. REV. 857, 864–65; Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COL. J. RACE & L., 501, 509–530 (2021).

39. 42 U.S.C. § 5106a(b)(2)(B)(i) (2019) (state plans must include “provisions or procedures for an individual to report known and suspected instances of child abuse and neglect, including a State law for mandatory reporting by individuals required to report such instances”).

protective authority.⁴⁰ Some states make failing to report a crime.⁴¹ In some states, individuals stand to lose their licenses or ability to continue in their professional role if they fail to report.⁴² In other words, CAPTA deputized virtually all those in helping professions—all those to whom a family might turn when in need of aid—to act as the family policing system’s eyes and ears.⁴³ Approximately two-thirds of all such reports are made by mandated reporters, the vast majority of which turn out to be baseless.⁴⁴

Child Protective Services (CPS) investigations are now staggeringly common. A 2021 study looking at data from the twenty most populous U.S. counties found that roughly one in every three children will have a CPS investigation during their childhood.⁴⁵ Black children are particularly likely to experience an investigation, with rates as high as 62.8%.⁴⁶ Nationally, more than three million children a year “received an investigation or alternative response” from a child protective authority in 2019 and 2020.⁴⁷ A little over 200,000 children—three of every thousand American kids—entered foster care in 2020, with more than 400,000 children in

40. See, e.g., Shereen A. White, Shanta Trivedi, Shakira Paige, Meredith Giovanelli & Makena Mugambi, *Help Not Hotlines: Replacing Mandated Reporting for Neglect with a New Framework for Family Support*, FAM. INTEGRITY & JUST. Q., Spring 2022.

41. CHILD’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2023) <https://www.childwelfare.gov/resources/mandatory-reporting-child-abuse-and-neglect/> [<https://perma.cc/ET3K-F5BJ>]; CHILD’S BUREAU, PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT (2019) <https://www.childwelfare.gov/resources/penalties-failure-report-and-false-reporting-child-abuse-and-neglect/> [<https://perma.cc/8UQB-YTVX>].

42. See, e.g., Board of Registered Nursing, *Abuse Reporting Requirements* (Nov. 2010), <https://www.rn.ca.gov/pdfs/regulations/npr-i-23.pdf> [<https://perma.cc/5TEM-NAY7>].

43. Baughman et al., *supra* note 38.

44. In 2019 more than two-thirds of all reports of suspected child maltreatment came from “professionals” (who generally all are mandated reporters). Of those, teachers made up the biggest chunk, calling in more than 20% of reports. Following teachers, legal and law enforcement professionals, medical personnel, social services staff, and mental health personnel called in the remaining majority. The vast majority (74.9%) of these reports alleged neglect, not abuse. CHILD’S BUREAU, CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS 3–4 (2021) <https://www.childwelfare.gov/pubpdfs/canstats.pdf> [<https://perma.cc/37GN-S8SQ>] (“Nationally, 4.1 million cases were called into child maltreatment hotlines in 2019.”); Of those, “2.4 million were screened as potentially credible, with fewer than four hundred thousand (slightly less than ten percent) determined to be credible upon further investigation. This means that millions of families are subject to an intrusive and traumatic investigation with no benefit to child safety, the purported purpose of mandated reporter laws.” Baughman, *supra* note 38.

45. Scholar J. Khadijah Abdurahman argues that we need to “document the reaches of” the “carceral system” that is family policing by not just focusing on those children who are removed from their homes, which represent a tiny portion of those the system touches, but by engaging deeply with the “modal” family policing encounter: investigation and “prevention.” Abdurahman, *supra* note 11, at 90–91.

46. Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildman, *Contact with Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, 118 PROC. NAT’L ACAD. SCI., July 27, 2021, at 1. The counties surveyed in the study ranged from 32.9% to 62.8% for Black children. *Id.* That means that even at the low end, one third of all Black families could expect to experience an investigation. Rates for other groups hovered around 20%. *Id.*

47. DEP’T HEALTH & HUM. SERV.’S, ADMIN. CHILD. AND FAM.’S, ADMIN. CHILD., YOUTH, AND FAM.’S, CHILD’S BUREAU, CHILD MALTREATMENT 2020 107–08, Table 7-3 (2022).

foster care at any given time.⁴⁸

And so, today's family policing system is cast as the last line of defense for children in need of saving. As a result, the system is inundated with and overwhelmed by reports of suspected child maltreatment called in largely by individuals deputized to serve as the system's eyes and ears even as they are held out as lifelines for families in need. It is onto this stage that algorithmic risk projection has made its entrance, promising a system floundering to keep up with misplaced demand a silver bullet of efficiency, rationality, and consistency.

Throughout this process, the system has sought techniques and technologies to predict and categorize the populations it targets.⁴⁹ As Marsha Garrison has documented, epidemiological research into the factors correlated with child "maltreatment" proceeded over several decades in the last century, identifying factors such as "poverty and stress" that are "strongly linked" to "maltreatment."⁵⁰ As this research developed, "child protection policymakers" began "zealously introducing—and misapplying—public-health risk analysis in child-protection decision making."⁵¹ That process resulted in the development and introduction of a number of, at first rudimentary and now ever-more complex, algorithms that purport to support agency decision-making. "Probably the best known is the set of Structured Decision Making ("SDM") tools developed by the Children's Research Center ("CRC"); by 2007, SDM decision-making tools had been, or were being, implemented in sixteen states and at least one foreign jurisdiction."⁵² These tools "employ the methods of epidemiology; using samples of actual cases in which, after an initial investigation, a subsequent maltreatment report has been either filed or substantiated," and use this information to "determine which case characteristics are significant predictors of filing and substantiation recurrence."⁵³ The developers of these tools claim that they "classify families into risk groups that have high, medium, or low probabilities of continuing to abuse and neglect their children."⁵⁴ Over the course of the first decades of the twenty-first century, these actuarial risk assessment tools "c[a]me to dominate the field."⁵⁵

48. *Child Welfare and Foster Care Statistics*, THE ANNIE E. CASEY FOUND. (May 16, 2022), <https://www.aecf.org/blog/child-welfare-and-foster-carestatistics#:~:text=Children%20Entering%20Foster%20Care,1%2C000%20for%20two%20decades> [<https://perma.cc/7NPA-SPLH>] ("In 2020, 213,964 children under 18 entered foster care in the United States, a rate of 3 per 1,000. The rate of entry has hovered at 3 or 4 per 1,000 for two decades."); CHILD'S BUREAU, THE AFCARS REPORT (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf> [<https://perma.cc/9ZTB-88J7>] (showing number of children in foster care on September 30 of each year from 2016–2020).

49. See Copeland, *supra* note 12.

50. Marsha Garrison, *Taking the Risk Out of Child Protection Risk Analysis*, 21 J.L. & POL'Y 5, 7 (2012).

51. *Id.*

52. *Id.* at 22.

53. *Id.*

54. NAT'L COUNCIL ON CRIME AND DELINQ., THE IMPROVEMENT OF CHILD PROTECTIVE SERVICES WITH STRUCTURED DECISION MAKING: THE CRC MODEL 11 (1999).

55. Garrison, *supra* note 50, at 25. The development of these actuarial methods in family

In the past decade or so, the drive in actuarial family policing got a shot in the arm from the artificial intelligence and machine learning crowd. Since approximately 2014, “child protective” agencies across the country have incorporated a new generation of algorithmic and data-driven tools into their decision-making, adopting the methods of machine learning and artificial intelligence to scale up the first generation of actuarial tools.⁵⁶ One of the first and certainly the most well-known of these tools, the Allegheny Family Screening Tool (AFST), began operation in 2016, predicting questionable proxies for risk to children and producing risk scores that workers are to consider at the point of triaging incoming calls alleging suspicions of child maltreatment.⁵⁷ But like their criminal policing counterparts, family policing agencies continue experimenting with a variety of tools, forging ahead on this technologizing project in fits and starts.

The tools employed by family policing systems come in a variety of forms. In a 2021 report, researchers with the American Civil Liberties Union (ACLU) conducted a nationwide survey documenting the then-extant state of development of these predictive tools across the country.⁵⁸ Their report, *Family Surveillance by Algorithm*, identified a number of “tool types” proliferating across jurisdictions, including “Open Case Review, Screening, Hot Spot Model, Re-Entry Prediction, Predictive Risk Modeling Supervision Tool, Pre-Reunification Risk Model, Service Termination Conference Model, Reunification Predictive Risk Model, Removal, and Service-Matching.”⁵⁹ Of those actively in use as of the ACLU’s publication, the most popular types were the Hot Spot Model, Screening tools, and the “Open Case Review” model.⁶⁰

The “Hot Spot Model” describes a set of tools developed and marketed by Texas nonprofit “Predict Align Prevent.”⁶¹ The organization says they are “dedicated to stopping child maltreatment before it happens.”⁶² Like criminal policing hot-spot-detection tools, family policing hot-spot tools use “geospatial risk analysis” or “geospatial machine learning predictions to—they say—“identify the

regulation agencies is part of a larger trend of increasing reliance on empirical evidence across family law and the legal system writ large. As scholar Clare Huntington has documented, family law decision-makers increasingly and “regularly draw on sociology, psychology, neuroscience, data analytics, and related social and hard sciences to make critical choices about the legal regulation of families.” Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 229 (2018).

56. See COMM’N TO ELIMINATE CHILD ABUSE AND NEGLECT FATALITIES, *Within Our Reach: A National Strategy to Eliminate Child Abuse and Neglect Fatalities* (2016) (recommending that states “undertake a retrospective review of child abuse and neglect fatalities to help them identify family and systemic circumstances that led to child maltreatment deaths in the past five years,” “use this information to identify children at highest risk now,” and “shar[e] data electronically and in real time”).

57. See, e.g., Glaberson, *supra* note 6.

58. Samant et al., *supra* note 7.

59. *Id.*

60. *Id.*

61. *Id.*

62. PREDICT ALIGN PREVENT, *About Us*, <https://www.predict-align-prevent.org/about-us> [<https://perma.cc/7BUG-L5WD>] (last visited Feb. 21, 2024).

places where children are at greatest risk of maltreatment.”⁶³ The idea is that this place-based risk prediction will influence state and local government decisions about where to direct policing or, in the case of family policing, “services” and surveillance.⁶⁴ Hot-spot-type tools appear to be in use in jurisdictions including Little Rock, Arkansas, Manchester and Coos Counties, New Hampshire, New Jersey, and Richmond, Virginia.⁶⁵

A second popular type of algorithmic tool, and the one most discussed, are the screening tools.⁶⁶ These tools draw on administratively-held data—data from the criminal legal, public benefits, family policing, and public health infrastructure—to provide individualized risk predictions for families and children.⁶⁷ The most well-known example of this type of tool is the AFST.⁶⁸ Tools of this type are already in use in other jurisdictions, but the landscape remains ever-changing. In June 2022, the Associated Press reported that Oregon was dropping its tool, called “Safety at Screening.”⁶⁹ The Agency did not provide details as to why the tool was being dropped, saying only that “it can’t be used with the state’s new screening process.”⁷⁰

Family policing agencies use risk-prediction tools like the AFST at the point of screening reports of suspected child maltreatment. When a reporter—as discussed above, most often a mandated reporter⁷¹—calls in a report, the state’s apparatus must determine if the report is valid and worth investigating (i.e., whether to “screen in” the call). To support this decision, the Allegheny County design team created an algorithmic tool that pulls data inputs from a vast data storehouse the county keeps about individuals that have had contact with any number of government-run social services.⁷² The tool incorporates data “documenting a family’s prior involvement with child protective authorities” as well as “data from the County’s jail, juvenile probation, public welfare, behavioral health, and census

63. PREDICT ALIGN PREVENT, *What Does Predict Align Prevent Do?*, https://www.predict-align-prevent.org/_files/ugd/fbb580_6722073cac624c7aa591606fb2449651.pdf [https://perma.cc/5P9W-2284] (last visited Feb. 21, 2024).

64. *Id.*

65. Samant et al., *supra* note 7.

66. *See id.*

67. Glaberson, *supra* note 6, at 328.

68. ALLEGHENY CNTY., *Allegheny Family Screening Tool*, <https://www.alleghenycounty.us/Human-Services/News-Events/Accomplishments/Allegheny-Family-Screening-Tool.aspx> [https://perma.cc/ZXJ3-BPP3] (last visited Feb. 21, 2024).

69. AP, *Oregon is Dropping An Artificial Intelligence Tool Used in Child Welfare System*, NAT’L PUB. RADIO (June 2, 2022, 1:12 PM ET), <https://www.npr.org/2022/06/02/1102661376/oregon-drop-s-artificial-intelligence-child-abuse-cases> [https://perma.cc/A24E-LXFD].

70. *Id.*

71. *See supra* text accompanying notes 39–44.

72. Rhema Vaithianathan, Emily Putnam-Hornstein, Nan Jiang, Parma Nand & Tim Maloney, *Developing Predictive Risk Models to Support Child Maltreatment Hotline Screening Decisions: Allegheny County Methodology and Implementation* (2017), <https://www.alleghenycountyanalytics.us/wp-content/uploads/2017/04/DevelopingPredictive-Risk-Models-package-with-cover-1-to-post-1.pdf> [https://perma.cc/JJV4-VRBS].

systems.”⁷³ The data pulled into the algorithmic model

includes, among other things, dates of past bookings into the Allegheny County Jail or past involvement with the Allegheny County Juvenile Probation Office, whether and when a family received public benefits such as Temporary Assistance for Needy Families (TANF) or the Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps), whether and when an individual received behavioral health services, including diagnoses, as well as information such as a family’s zip code, linked with Census information on the poverty status of each zip code area.⁷⁴

The tool analyzes more than 100 variables drawn from these data sets and produces a “risk score” for each child.

Of course, to design an algorithm to predict anything, a number of choices must be made. For example, in addition to identifying and contending with the data that will be fed into the model, tool designers also must identify an “outcome variable”: what the tool will predict.⁷⁵ This decision is not simply mathematical or neutral.⁷⁶ It is inherently subjective and political. It certainly was with the Allegheny County model (and must be for all family policing models). There simply is no clear measure of whether child maltreatment is occurring in the real world and no data point one can set as the “outcome” the model is to predict.⁷⁷ For a host of reasons, “incidences of child maltreatment” is not a data point we as a society or do—or

73. Glaberson, *supra* note 6 at 332–33.

74. *Id.* at 333. There are some differences between the first version of the tool and the second, which appeared to be the active tool at the time of this writing. For instance, the developers have stated that a number of the behavioral health inputs used in the first version of the model were removed from the second because “systematic changes occurred in how behavioral health diagnoses were defined and categorized” in the underlying data in the intervening years. Rhema Vaithianathan, Emily Kulick, Emily Putnam-Hornstein & Diana Benevides Prado, *Allegheny Family Screening Tool: Methodology, Version 2*, at 3 (2019), https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/Methodology-V2-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-7.pdf [<https://perma.cc/X94S-43KP>]. They say that “[t]hese changes meant that the behavioral health classifications in the research data used to build the model did not align with definitions currently ‘feeding’ the algorithms” and that “[t]here was no information available that would allow these classifications to be harmonized across the time periods.” *Id.* Accordingly, they removed these inputs, but state that they are actively “working to restructure the behavioral health fields to reincorporate them into the model. *Id.* The variables will likely focus on service type and severity, with additional predictors to identify if there were any prior services under each diagnostic category. *Id.* The behavioral health variables that remain in the V2 model reflect aggregated indicators for whether each individual on the referral received any prior behavioral health service, as well as the number of days since the last behavioral health service.” *Id.*

75. *See* Glaberson, *supra* note 6, at 329–30.

76. *See id.*, at 329, 341–42.

77. *See id.*; Anjana Samant, Noam Shemtov, Kath Xu, Sophie Beiers, Marissa Gerchick, Ana Gutierrez, Aaron Horowitz, Tobi Jegede & Tarak Shah, *The Allegheny Family Screening Tool’s Overstatement of Utility and Risk*, 20 LOGIC(S) 158 (Dec. 13, 2023), <https://logicmag.io/policy/allegheny-family-screening-tools-overestimation-of-utility-and-risk/> [<https://perma.cc/7B58-ZPUU>].

could—effectively collect.⁷⁸ There are, of course, studies that purport to assess the level of child maltreatment in the population. But we have never developed a method for identifying each and every case of child maltreatment that occurs on the ground.⁷⁹ The reasons why are many. To name two, first, we do not as a society agree on a single definition of what child maltreatment is. Legal “[d]efinitions of ‘neglect’ are notoriously vague” and “can range from a child missing school to severe deprivations of basic life necessities, and everything in between.”⁸⁰ Second, data requires observation and collection. But we do not observe or collect information about all children equally. We systematically over-surveil and judge certain communities, while leaving others alone. To the extent there is any data about child maltreatment, it is hopelessly skewed to mirror extant power dynamics.

Accordingly, algorithm developers seeking to predict risk of maltreatment for a child must identify a proxy to serve as the outcome of interest. The AFST has gone through two versions so far (V1 and V2). The V1 algorithm was in fact two models that fed into one ultimate score: a “re-referral model,” which “was trained to predict whether a child would be reported again within two years of being screened out,” and the “placement model,” which “was trained to predict whether a child would be removed from their home and placed in foster care within two years of being screened in.”⁸¹ In the V2 model, the developers pared back to just predicting out-of-home placement.⁸²

The tools present a wide variety of additional problems that fall within the dominant algorithmic accountability framework of “fairness, accountability and transparency.”⁸³ For example, the tools may be inaccurate in specific and harmful ways.⁸⁴ They may be biased, reifying historical patterns of structural inequity and discrimination.⁸⁵ They may present privacy and transparency concerns, and agencies may use them in ways for which they are not designed or without appropriate safeguards.⁸⁶

78. Glaberson, *supra* note 6, at 341–42.

79. *Id.*

80. *Id.* at 341.

81. Hao-Fei Cheng, Logan Stapleton, Anna Kawakami, Venkatesh Sivaraman, Yanghui Di Cheng, Diana Qing, Adam Perer, Kenneth Holstein, Zhiwei Steven Wu, & Hiayi Zhu, *How Child Welfare Workers Reduce Racial Disparities in Algorithmic Decisions*, PROCS. 2022 CHI CONFERENCE ON HUM. FACTORS COMPUT. SYS. 1, 4 (2022).

82. Vaithianathan, et al., *supra* note 72, at 3.

83. See, e.g., *ACM Conference on Fairness, Accountability, and Transparency*, ACM FACCT CONFERENCE, <https://facctconference.org/> [<https://perma.cc/FS37-WNK9>] (last visited Feb. 21, 2024); *Fairness, Accountability, and Transparency in Machine Learning*, FAT/ML, <https://www.fatml.org/> [<https://perma.cc/KL9V-J6N8>] (last visited Feb. 21, 2024).

84. See Glaberson, *supra* note 6, at 337–44 (discussing flaws in the data, error in the model, and the problem of zombie predictions).

85. See *id.* at 344–48. See also Emily Tucker, *Deliberate Disorder: How Policing Algorithms Make Thinking About Policing Harder*, 46 N.Y.U. REV. L. & SOC. CHANGE 3 (2022) (“[W]hat it means to be accurate within a given system is to correctly apply the principles according to which the system runs. If the principles are diseased, then repairs to accuracy will spread disease; and if the system is automated, that spread will accelerate.”).

86. Glaberson, *supra* note 6, at 348–56.

Scholar Frank Pasquale has offered a “periodization” of “algorithmic accountability advocacy and research.”⁸⁷ According to this periodization, the “first wave” “focuses on improving existing systems.”⁸⁸ The “FAT” concerns described here fall into this “first wave.” According to Pasquale, the “second wave of research has asked whether they should be used at all—and, if so, who gets to govern them.”⁸⁹

The law has been slow, to say the least, at reacting to this development. To date no legal constraints exist that would place any meaningful limits on how agencies can or should use these tools.⁹⁰ Allegheny County, for example, professes to limit the use of the risk score generated by the AFST to only the call screener and their supervisor, and to keep it from the workers who then conduct the investigation into the family and make decisions down the line.⁹¹ But there is no enforceable legal mechanism to cabin the score’s use in this way. Advocates have not yet reported seeing risk scores introduced at hearings or trials, in which judges are asked to decide whether to remove or return children or determine whether alleged abuse or neglect, in fact, occurred. But the evidentiary rules in family policing court hearings are notoriously lax. In New York, for example, at all but the fact-finding hearing (the family policing equivalent of the trial), hearsay is not just allowed but often provides the majority of the agency’s evidence.⁹²

And for many families, court-based hearings may not, ultimately, be where the true harm of the system is wrought. As demanded by federal funding requirements, each state maintains a central registry of child maltreatment allegations.⁹³ Reports are added to the registry through a process controlled by the state and the evidentiary standards for what allegations warrant inclusion is usually extremely low.⁹⁴ Inclusion in this registry can have serious consequences for families—even

87. Pasquale, *supra* note 7. *The Second Wave of Algorithmic Accountability*, LPE BLOG (Nov. 25, 2019), <https://lpeproject.org/blog/the-second-wave-of-algorithmic-accountability/> [<https://perma.cc/3SYN-Y7P4>].

88. *Id.*

89. *Id.*

90. In October 2022, the Biden-Harris Administration put out a “Blueprint for an AI Bill of Rights.” WHITE HOUSE, *Blueprint for an AI Bill of Rights*, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/> [<https://perma.cc/YK43-V9CJ>] (last visited Feb 21, 2024). While advocates greeted the release warmly, many noted that it was simply an outline and unenforceable in its current form. *See, e.g.*, Janet Haven, *How to Read the White House’s Blueprint for an AI Bill of Rights*, MEDIUM: DATA & SOC’Y (Oct. 4, 2022).

91. Allegheny County Department of Human Services, *Frequently-Asked Questions*, at 10, (Apr. 2019), (https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/FAQs-from-16-AC-DHS-26-PredictiveRisk_Package_050119_FINAL-8.pdf) [<https://perma.cc/EGN4-Y4CX>].

92. In criminal and delinquency cases, similar tools have been introduced. *See, e.g.*, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016). To the extent legal decision-makers consider and rely on these tools’ scores, they may become not just evidence but a source of law in themselves. *See* Frederick Schauer, *The Restatements as Law*, in *THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY* 425 (Andrew S. Gold & Robert W. Gordon, eds., 2023) (describing the theory that “what counts as a legal authority” depends on “what sources judges and other legal officials take as authoritative in reaching their decisions”).

93. Sen, et al., *supra* note 38, at 864.

94. *Id.* at 864–66; Glaberson, *supra* note 6.

families that make it through a CPS investigation intact. States may require certain employers to check employees against the registry and refuse to hire or fire anyone with a listed case. Having one's name on the registry often prevents people from working in any capacity with children and may interfere with an individual's ability to find a job in a variety of fields, including home health care provision.⁹⁵ Given that women, especially women of color, are more likely to be employed in these fields, registry inclusion is particularly harmful to mothers' ability to provide for their children in the future.⁹⁶ There is no legal constraint that would keep the agency from considering the results of a predictive risk score in determining whether to include an individual in its registry.

B. The Movement to Abolish Family Policing

In late May 2020, the world watched in horror as George Floyd begged for his life. As he repeatedly choked out, "I can't breathe," Minneapolis police officer Derek Chauvin kept his knee on Mr. Floyd's neck for nine minutes and twenty-nine seconds, strangling the life out of him as bystanders looked on and cellphone cameras rolled.⁹⁷ Mr. Floyd's death recalled the police killing of Eric Garner years earlier, who also was heard uttering the same plea before succumbing to NYPD Officer Daniel Pantaleo's choke hold on a Staten Island sidewalk in 2014.⁹⁸ It recalled the deaths of Philando Castile, Freddie Grey, Sandra Bland, Amadou Diallo, and so many more Black people who had lost their lives to police violence.⁹⁹ Spurred by the outrage over Floyd's death, people across the country took to the streets during the summer of 2020 to demand radical change. For the first time in recent memory, calls for reform were drowned out by calls to defund and to abolish the police.

Both leading up to and since the fervent summer of 2020, exactly what it may mean to abolish the police has been the subject of much scholarship, conversation, and debate. What would it mean to "defund" or "abolish"? And who exactly are the "police"? Liat Ben-Moshe, for one, defines "carceral abolition" as "the myriad movements and frameworks that call for abolition of penal and carceral spaces and logics."¹⁰⁰ Mariame Kaba has written that "prison-industrial complex abolition" is not simply a "negative project" but "a vision of a restructured society in a world where

95. Sen et al., *supra* note 38, at 867–68. It may also interfere with parents' ability to volunteer at their children's school, on teams, or with clubs. *See id.* at 868–69; MICH. COMP. LAWS § 722.627(3) (permitting access to any employer if employment or volunteer work "will include contact with children").

96. *See* Univ. Pa. L. Sch. Civ. Practice Clinic & Temple Univ. Beasley Sch. of L. Sheller Ctr. for Soc. Just., *Pathways to Poverty: How the ChildLine and Abuse Registry Disproportionately Harms Black Families* (2023), <https://www.law.upenn.edu/live/files/12705-pathways-to-poverty-how-the-childline-and-abuse> [<https://perma.cc/JL2J-36QU>].

97. *E.g.*, Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 minutes 29 seconds, Longer Than Initially Reported.*, N.Y. Times, March 30, 2021.

98. *E.g.*, Ashley Southall, *'I Can't Breathe': 5 Years After Eric Garner's Death, an Officer Faces Trial*, N.Y. Times, May 12, 2019.

99. *See, e.g.*, *Say Their Names Text List, #SAYTHEIRNAMES*, <https://sayevery.name/say-their-names-list> [<https://perma.cc/EE9T-66FZ>] (last visited Feb. 21, 2024).

100. Ben-Moshe, *supra* note 24.

we have everything we need: food, shelter, education, health, art, beauty, clean water, and more things that are foundational to our personal and community safety.”¹⁰¹

Motivated, perhaps, by these visions of a supportive and supported society, calls to pull funding from criminal policing agencies in 2020 often ended up coupled with calls to direct those funds to social services agencies: child protective workers, preventive services, and the like.¹⁰² Social workers were touted as the replacement for cops. But as Dorothy Roberts argues, “These proposals ignore how the misnamed ‘child welfare’ system, like the misnamed ‘criminal justice’ system, is designed to regulate and punish black and other marginalized people.”¹⁰³ Transferring funding from criminal policing agencies to family policing agencies would only end up entrenching and expanding the carceral net and dressing it in false benevolence. For this reason, Roberts argued that “abolishing policing also means abolishing family regulation.”¹⁰⁴ Professor Roberts is by no means alone.¹⁰⁵

A movement to abolish family policing has been growing. Impacted parents and their allies, such as Joyce McMillan, Suzanne Sellers, Ashley Albert, and the organizations they have founded and supported, such as Parent Legislative Action Network (PLAN),¹⁰⁶ Rise,¹⁰⁷ and JMacForFamilies;¹⁰⁸ national organizations like Families Organizing for Child Welfare Justice,¹⁰⁹ the Repeal ASFA Coalition,¹¹⁰ the UpEND Movement,¹¹¹ and the Movement for Family Power;¹¹² and many more are speaking clearly about the ways the family policing system oppresses the families

101. MARIAME KABA, *So You're Thinking About Becoming an Abolitionist*, in WE DO THIS 'TIL WE FREE US 1 (2021).

102. See Roberts, *supra* note 3.

103. *Id.*

104. *Id.*

105. See, e.g., Roxanna Asgarian, *The Case for Child Welfare Abolition*, IN THESE TIMES (Oct. 3, 2023); Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427 (2021); Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 860 (2021); Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE. L. 1 (2022); Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE. L. 1 (2022); Michael S. Wald, *Replacing CPS*, 12 COLUM. J. RACE. L. 1 (2022).

106. Parent Legislative Action Network, <https://jmacforfamilies.org/plancoalition> [https://perma.cc/XBA4-YG5Z] (last visited Feb. 21, 2024).

107. See generally RISE MAGAZINE, <https://www.risemagazine.org/> [https://perma.cc/LGM5-X2DX] (last visited Feb. 21, 2024).

108. See generally JMACFORFAMILIES, <https://jmacforfamilies.org/> [https://perma.cc/55B7-NZB4] (last visited Feb. 21, 2024).

109. See generally FAMILIES ORGANIZING FOR CHILD WELFARE JUST., <https://www.focwj.org/index.php> [https://perma.cc/7HUT-S6SW] (last visited Feb. 21, 2024).

110. See generally REPEAL AFSA COAL., <https://www.repealasfa.org/> [https://perma.cc/SCQ7-5ZUA] (last visited Feb. 21, 2024).

111. See generally UPEND MOVEMENT, <https://upendmovement.org/> [https://perma.cc/AK66-9EFD] (last visited Feb. 21, 2024).

112. See generally MOVEMENT FOR FAMILY POWER <https://www.movementforfamilypower.org/> [https://perma.cc/X6SQ-3NTE] (last visited Feb. 21, 2024).

it targets and is a part of the carceral net that upholds and reinforces the unequal social order. These advocates are “spotlighting the racism in the child welfare system’s design and practices, demanding that the system be dismantled, and working to replace it with concrete, community-based resources for children and their families.”¹¹³ They are putting forward a vision of a future where support, not surveillance, is the norm and all families have access to the material, emotional, and relational resources they need to thrive.

II. EPISTEMIC INJUSTICE

One thing that the abolitionists have taught us is that we need to understand the family policing system as a whole and in context to observe the ways it operates as an integral part of the interlocking web of oppression that enforces the existing social order. Though cloaked in professed benevolence, the family policing system is a key support in this structure. It is part and parcel of the same system that manifests in various iterations as the criminal legal system, the prison industrial complex, and the poverty regulation economy. To fully understand how this system operates, we must interrogate all the mechanisms by which it does its work.

One key mechanism is the regulation of epistemic worth. As it pertains to mothers and mothering knowledge, the regulation of who has epistemic currency—and who does not—is central to the subordination of women and the communities to which they belong. As Dorothy Roberts explored in her seminal work, *Killing the Black Body*, “Being a mother is considered a woman’s major social role Because women have been defined in terms of motherhood, devaluing this aspect of a woman’s identity is especially devastating.”¹¹⁴ Throughout American history, Black women in particular have been painted with a variety of brushes: “Jezebel and the immoral Black mother,” “mammy and the negligent Black mother,” “the matriarch and the Black unwed mother,” and the “welfare queen and devious Black mother,” as the sections of Roberts’ chapter proclaim.¹¹⁵ One thing each of these stereotypes have in common, and one reason they are each so particularly devastating and useful to upholding regnant power, is their undermining of the Black mother’s worth as a holder of mothering knowledge and judgment.¹¹⁶ This systematic and power-inflected discrediting of specific group’s epistemic value can be understood as an “epistemic injustice.” In the sections that follow, I define this concept and then apply it to the family policing system to see how the system enacts this particular type of injustice.

113. DOROTHY E. ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 280 (2022).

114. DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 10 (1997).

115. *Id.* at 10–19; see also Spillers, *supra* note 29 at 65; PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT*, 76–106 (1991) (discussing “controlling images”).

116. See Spillers, *supra* note 29, at 79.

A. Epistemic Injustice Theory

The concept of “epistemic injustice” describes the “distinct” form of injustice that occurs when “someone is harmed in their ‘capacity as a knower.’”¹¹⁷ Black feminists and women of color writing in the feminist legal, critical race theory, and other traditions have commented on and developed the concept over many years, “remark[ing] upon the kind of silencing that follows from not gaining the appropriate recognition” as a holder of knowledge.¹¹⁸ In 1993, Dorothy Roberts, for example, noted that “[t]he most critical weapon of oppressors . . . is the control of knowledge” and described ways in which those in power do so.¹¹⁹ Patricia Hill Collins documented how, “[b]ecause elite White men control Western structures of knowledge validation, . . . U.S. Black women’s experiences as well as those of women of African descent transnationally have been routinely distorted within or excluded from what counts as knowledge.”¹²⁰ Building on this foundation, political philosopher Miranda Fricker coined the term “epistemic injustice” in 2007.¹²¹ Epistemic injustice is, in some ways, core to the “white supremacy culture” in which we are all swimming.¹²² Structural racism, prejudice and bias, and systemic inequity result in conditions in which certain individuals and groups experience this particular type of harm—this particular silencing and inability to understand and be understood—more than others.¹²³ To flesh out the contours of the theory of epistemic injustice, Fricker offers a helpful taxonomy of two distinct facets of epistemic injustice: “testimonial” and “hermeneutical” injustice.

1. Testimonial Injustice

An individual suffers testimonial injustice “if prejudice on the hearer’s part

117. Washington, *supra* note 13, at 1132.

118. Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 233, 252 n.5 (2011) (collecting “no means exhaustive” sources); *see also* Rachel McKinnon, *Epistemic Injustice*, 11 PHIL. COMPASS 437 (2016) (highlighting Black feminists and feminists of color who, although they may not have labelled their work as addressing “epistemic injustice” by name, laid the ground); COLLINS, *supra* note 115; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

119. Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 617 (1993).

120. COLLINS, *supra* note 115, at 269, 270–90 (discussing the “subjugated knowledge of subordinated groups” and the ways in which dominant paradigms work to discredit and exclude).

121. FRICKER, *supra* note 13.

122. Tema Okun, *Worship of the Written Word*, WHITE SUPREMACY CULTURE, <https://www.whitesupremacyculture.info/worship-of-written-word.html> [https://perma.cc/D3FP-WY6D] (last updated Aug. 2023). As Okun describes, one of the core characteristics of “white supremacy culture” is “worship of the written word.” *Id.* A part of this worship is “an inability or refusal to acknowledge information that is shared through stories, embodied knowing, intuition and the wide range of ways that we individually and collectively learn and know.” *Id.*

123. *See, e.g.*, COLLINS, *supra* note 115, at 133–38 (describing the factors contributing to collective silence around Black women’s sexuality, including “suppression of Black women’s voice by dominant groups, Black women’s struggles to work within the confines of norms of racial solidarity, and the seeming protections offered by a culture of dissemblance”); *id.* at 269–90.

causes him to give the speaker less credibility than he would otherwise have given.”¹²⁴ The “wrong of testimonial injustice is that a central feature of being human is being a knower, and testimonial injustice disrespects people *qua* knower.”¹²⁵ In this way, “testimonial injustice disrespects people *qua* persons.”¹²⁶

“Gaslighting” has also been recognized to be its own specific form of epistemic injustice.¹²⁷ The term comes from the 1944 movie “Gaslight,” in which Ingrid Bergman’s character Paula is slowly driven mad by her husband, Gregory, who hopes to institutionalize her and steal her inherited jewels.¹²⁸ Gregory’s scheme involves manipulating Paula into believing she has lost her grip, “making her doubt her own perceptions, convincing her to distrust her own knowledge and judgment.”¹²⁹ The film has become iconic, serving as the foundation for the concept of “gaslighting” in which “a (usually) more powerful person or group intentionally or unintentionally causes a weaker one to distrust her/their own perceptions.”¹³⁰ An additional hallmark of gaslighting is the perception the perpetrator creates that they represent a place of safety; that they are not trying to harm their partner even as they do and are, in many cases, their partner’s only resource of support.

McKinnon argues that “gaslighting” creates “unique moral and epistemic harms.”¹³¹ Not only does gaslighting “create[] all the same harms as the more generic forms of testimonial injustice,” but it can also act as a betrayal, undermining the speaker/victim’s “moral trust” in the person or institution to which they turned with their account.¹³²

This type of epistemic injustice can become circular, creating a “positive feedback loop” that McKinnon refers to as the “epistemic injustice circle (of hell).”¹³³ Here, “something such as an identity prejudice based on emotion is treated as a reason to discount a speaker’s testimony.”¹³⁴ The normal reaction to being disbelieved “is to become *more* emotional,” and this heightened emotionality is, in turn “treated as a *further* reason to discount the speaker’s testimony.”¹³⁵

124. FRICKER, *supra* note 13, at 4.

125. Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 171 (Ian James Kidd, José Medina & Gail Pohlhaus, Jr. eds., 2017).

126. *Id.*

127. *Id.* at 168; Shabot, *supra* note 18, at 14, 18; see also Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 449–50 (2019).

128. GASLIGHT (Metro-Goldwyn-Mayer Studios, Inc. 1944).

129. Shabot, *supra* note 18, at 18.

130. *Id.*; see also Epstein & Goodman, *supra* note 127, at 449–50.

131. McKinnon, *supra* note 125, at 171.

132. *Id.*

133. *Id.* at 169.

134. *Id.*

135. *Id.*; see also Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 312–16 (2020) (describing the credibility discount assigned to survivors of sexual harassment “as women” reaching back to Aristotle’s claim that “women were less logical and more emotionally dysregulated than their male counterparts”). Epstein

2. *Hermeneutical Injustice*

The term hermeneutical injustice, for its part, describes the process by which marginalized groups, by virtue of their diminished societal power and their very marginalization, are prevented from participating equally in co-creating “social meanings.”¹³⁶ Put differently, it is “the injustice of having some significant area of one’s social experience obscured from collective understanding owing to hermeneutical marginalization.”¹³⁷ The “central case” of this type of injustice is that of a “woman who suffers sexual harassment prior to the time when we had this critical concept, so that she cannot properly comprehend her own experience, let alone render it communicatively intelligible to others.”¹³⁸

The members of the Combahee River Collective in their seminal 1978 statement described, without naming as hermeneutical injustice, this same phenomenon. They wrote that “Black feminists often talk about their feelings of craziness before becoming conscious of the concepts of sexual politics, patriarchal rule, and most importantly, feminism, the political analysis and practice that we women use to struggle against our oppression.”¹³⁹ Prior to coming together for study and consciousness-raising, they say, “[W]e had no way of conceptualizing what was so apparent to us, what we knew was really happening.”¹⁴⁰ And Patricia Hill Collins described this form of injustice as a common theme in midcentury Black feminist writings.¹⁴¹

Fricker identifies two different types of hermeneutical injustice, or “social silencing.” First, there may be preemptive silences, in which some groups may “not be asked for information in the first place.” Second is the idea of “epistemic objectification.” In this “kind of silencing,” individuals’ or groups’

contributions are in fact used for knowledge-production and knowledge-transmission purposes, but nonetheless, they are not

compares the credibility discount assigned to women survivors of sexual harassment with the similar experiences of Black people and poor people, noting that “women who are members of minority groups risk being doubly disbelieved.” Epstein notes the role that emotionality plays in each of these credibility prejudices, describing how “[w]riters as far back as the late Middle Ages saw peasant expression of anger as reflecting an ‘instinct opposed to thought.’”

136. FRICKER, *supra* note 13, at 6. *See also* Roberts, *supra* note 119, at 617–18 (“The most powerful mechanism for controlling knowledge functions at the level of social meaning. This view of knowledge recognizes the inextricable bond between knowledge and power How we experience the world—our very categories of thought—is determined by our social relationships.”)

137. FRICKER, *supra* note 13, at 158; *see also* JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE* 91 (2013) (“[H]ermeneutical injustice will be treated, roughly, as the kind of injustice that appears when there are wrongful interpretive obstacles that affect people differently in how they are *silenced*, that is, in their inability to express themselves and to be understood.”).

138. FRICKER, *supra* note 13, at 6.

139. COMBAHEE RIVER COLLECTIVE, *COMBAHEE RIVER COLLECTIVE STATEMENT* (1978), https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf [<https://perma.cc/AQB2-BRBG>].

140. *Id.*

141. COLLINS, *supra* note 115, at 130.

treated as informants—subjects of knowledge or “epistemic agents who convey information”—but only as sources of information—objects or “states of affairs from which the inquirer may be in a position to glean information.”¹⁴²

Taken together, these various concepts name a variety of phenomena by which individuals with authentic and valuable knowledge might be silenced, oppressed, or harmed in their capacities as holders of knowledge through the individual or systemic prejudices, inequities, or social conditions relating to their race, class, or positionality. With these concepts in hand, we turn back to the family policing system to see how it enacts epistemic injustice on those it targets.

B. Epistemic Injustice in the Family Policing System

Epistemic injustice is a key feature of how the family policing system works. At its core, the family policing structure is a mechanism to site knowledge of and judgment about parenting away from parents deemed undesirable, and with authority figures deemed more acceptable. Prejudices based on race, class, and positionality—the roles individuals may play in relation to the system—influence who is caught up in the system, resulting in myriad, systematic forms of both testimonial and hermeneutical injustice. In this system, parents accused of abuse or neglect of their children have the “least possible claim” to epistemic authority, being “thought of as ‘bad parents’” and therefore worthy of little credibility.¹⁴³ Their accounts are systematically disbelieved in favor of crediting other epistemic authorities, such as caseworkers and service providers.¹⁴⁴ Their experiences of a harsh and abusive system are largely unintelligible to the general public, who see the system as a benevolent presence.¹⁴⁵ And the system’s infiltration of communities

142. MEDINA, *supra* note 137, at 91–92 (quoting FRICKER, *supra* note 13, at 132).

143. LAURA VAN DERNOOT LIPSKY, TRAUMA STEWARDSHIP 235 (2009) (profile of Harry Spence); *see also* upEND Podcast, *Family Defenders*, (Nov. 21, 2023), <https://upendmovement.org/episode1-5/> [<https://perma.cc/3ELE-VG49>] (Joyce McMillan describes her family affording her lessened credibility simply due to the fact of her involvement with CPS: “I had a large family, but my family was torn between what really happened because Child Protective Services would not remove a child for no reason. So there was this at times, unspoken and other times said out loud thing, that you’re not telling us something. Something happened. You did something. They wouldn’t just take your child. . . . I think that CPS strategically works to alienate the person that they’re investigating from anyone who would otherwise be their support by making these subliminal statements and putting these ideas in their head about what they wouldn’t do . . . Leaving people to see you as a suspect versus as a person who’s being victimized by a government system that has shown complete overreach and direct intention of impacting someone who looks like me and other people who look like me, who come from certain communities.”).

144. *See also* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

145. In a recent profile of Dorothy Roberts, Joyce McMillan describes the revelatory experience of reading about her own experience of this system reflected in Roberts’ work: “‘It was a truth I didn’t have language for,’ she says. ‘It was a truth that I had lived in the shelter. I saw someone spoke about it. And someone put a name to it. And someone said, I see it too.’” Irin Carmon, *Dorothy Roberts Tried*

through reporting frays at the social bonds necessary for open dialogue and collective knowledge creation.¹⁴⁶

The first to apply epistemic injustice theory to family policing is scholar S. Lisa Washington, who used the theory to illuminate the particular harms the system perpetrates on survivors of domestic violence.¹⁴⁷ As Washington documents, the family policing system both coerces inauthentic knowledge production from survivors and also excludes them from sharing and acting on authentic knowledge.¹⁴⁸ The primary way it does so is through instrumentalizing the concept of “insight.”¹⁴⁹ “Insight” is necessarily “vague and highly subjective,” but, as used by family policing authorities, it ultimately quantifies the individual’s required “internal *and* external” subjection to the system’s epistemic demands.¹⁵⁰ When the system refers to “insight,” it means whether the individual has not only done what he or she was supposed to do—going to the required parenting classes, engaging with anger management, attending drug treatment, visiting with children in a supervised setting, enforcing an order of protection against a partner—but also whether he or she has internalized the lessons the system seeks to impose.¹⁵¹ It “quite literally allows for a judgment about what someone *knows* and how they express their knowledge.”¹⁵² Throughout a survivor’s engagement with the system, it demands that she manifest sufficient “insight” into her situation such that the system’s conception of her story is affirmed and no alternative narrative is presented.¹⁵³ “Insight,” in its nebulous subjectivity, is also the mechanism by which

to *Warn Us*, N.Y. MAGAZINE (Sept. 6, 2022), <https://nymag.com/intelligencer/2022/09/dorothy-roberts-ried-to-warn-us.html> [<https://perma.cc/2TWB-ZQLX>].

146. Copeland, *supra* note 12, at 122 (“The system does more than separate families as punishment, it changes the entire fabric of communities by attempting to diminish community power both materially and politically.”).

147. Washington, *supra* note 13, at 1097.

148. *See id.* at 1140–58. In keeping with Washington’s description, this Section uses “the term ‘survivor’ to mean women who the family regulation system has labeled a ‘victim’ of domestic violence,” and uses female pronouns (she/her). *Id.* at 1104. Washington states that “[a]lthough men experience domestic violence,” her piece focused on women’s experience because (1) “[w]omen experience domestic violence at higher rates than men” and are often “subject to more serious harms” when they do, and (2) “the family regulation system targets women in particular.” *Id.* at n.12. For these reasons, this piece does the same.

149. *See id.* at 1149. As Washington acknowledges, the system’s reliance on “insight” to control its subjects is not limited to its treatment of survivors of domestic violence. To the contrary, it does the same thing to individuals struggling with substance use and mental health issues. *See id.* at 1150.

150. *Id.* at 1149.

151. For a compelling example of this effect in action, see *In re G. M. Dixon*, 981 N.W.2d 62, 62 (Mich. 2022) (McCormack, J., dissenting) (dissenting from denial of leave in appeal of termination decision where the government’s position as to why termination was required involved allegations that, although mother had engaged in her service plan and done virtually everything asked of her, “the respondent-mother had failed to benefit from services . . . offered”).

152. Washington, *supra* note 13, at 1151.

153. Washington identifies a series of “moments” during the course of a family regulation case in which knowledge is coercively produced and unjustly excluded: emergency child removal hearings, in-court trial testimony, and termination of parental rights proceedings. For in-depth discussion of the epistemic injustice the system perpetrates at each of these moments, see *id.* at 1142–49.

the system can move the goal posts, making compliance with a list of services or concrete demands insufficient to escape its grasp. Absent sufficient “insight”—which system actors will judge—the system will continue grinding away at family ties. Only once an individual has given over not only their physical body to surveillance, supervision, attendance, and testing, but also their interiority to the system’s epistemic requirements, will they be released from its grasp. Through policing “insight,” the system coerces its subjects to endorse its narratives.

But the system’s epistemic injustice goes far beyond just its treatment of survivors of domestic violence. It is a core feature of how the system treats all families it targets. This is especially true with regard to poor families (the majority of families enmeshed in the system). Much has been written about the way the system conflates poverty with neglect.¹⁵⁴ What has not been discussed is how this conflation manifests in epistemic injustice. It does so in at least two distinct ways. To start, vague definitions of neglect, coupled with under-resourced and inhumane social supports, create deep chasms in which families’ experiential knowledge of their situations is cast aside in favor of authority figures’ judgements about what parents should do. And second, the systematic conflation of poverty as neglect is itself a form of institutional gaslighting. The system turns the blame on the individual for lack of resources instead of acknowledging the structural barriers families confront, turning sites that purport to offer help into sites of surveillance, coercion, and danger. And it turns parents’ rational emotional responses to these conditions against them. The following sections describe and provide concrete examples of each of these manifestations of epistemic injustice in turn. First, through discussion of inadequate housing claims, the section illustrates how the system disproportionately undervalues targeted families’ parenting judgment. And second, through discussion of the Jazmine Headley case and families’ access to public benefits, it describes how the system institutionally gaslights its subjects.

1. Poverty and Parenting Judgment: Inadequate Housing

State statutes define neglect to include a “failure” on the part of a parent or caregiver to provide a child with “adequate” material supports, such as food, shelter, and clothing.¹⁵⁵ Many states include a carve-out for conditions of poverty that often read something like “although financially able to do so or offered financial or other reasonable means to do so.”¹⁵⁶ To some degree, these carve-outs are a necessary and important step toward recognizing the constraints that poverty places on the

154. See, e.g., Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, THE IMPRINT (Jan. 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> [<https://perma.cc/X9AN-CKFP>]; Family Poverty is Not Child Neglect Act, H.R. 6322, 115th Cong. (2018).

155. E.g., Ala. Code § 26-14-1; Cal Welf. & Inst. Code § 300; D.C. Code § 16-2301(9)(A); Fla. Stat. § 39.01(14).

156. See, e.g., Fla. Stat. § 39.01(14) (2023); N.Y. Fam. Ct. Act § 1012 (McKinney 2021); 40 R.I. Gen. Laws § 40-11-2 (2018).

ability of even the most conscientious parent to provide care. But vague statutory terms such as “adequate” and “reasonable” become wide open expanses through which epistemic injustice can drive. They create opportunities for the system to transfer epistemic power away from parents and into the hands of caseworkers, administrators, and judges who systematically disregard families’ lived experiences and judgement as to what type of care might be “adequate” under the circumstances and what means are “reasonable.”

Take, for example, claims of inadequate housing. Cases often are called in alleging that children are living in unsafe or unsanitary housing conditions or that families are without housing in which their children can live.¹⁵⁷ In many of these cases, the system disregards families’ experiential knowledge, determining for itself what the best course of action for each family is over the considered judgment of parents who may have a clear-eyed view of the lack of true support the social safety net provides.

In most jurisdictions, renters have the right to live in a habitable environment, but families often face numerous obstacles to enforcing this right. Washington, D.C. created a special court calendar to expedite cases involving claims of housing code violations.¹⁵⁸ The Housing Conditions Calendar sees itself as a problem-solving court, but it offers few quick fixes.¹⁵⁹ To get to the point of filing a housing conditions case, renters have usually suffered through unacceptable conditions for months and attempted negotiating with their landlords for repairs to no avail.¹⁶⁰ Once a case is filed, a family cannot expect to have an initial hearing for at least a month and usually the only outcome is that an inspector will be sent to the home.¹⁶¹ Cases may last for months as landlords avoid service, obfuscate, drag their feet, or attempt to deflect blame and responsibility.¹⁶² And, as imperfect as D.C.’s housing conditions calendar may be, it is a service that is not available in many jurisdictions.

For families living in subsidized properties, poor housing conditions can result in even more complications. The federal government’s “major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and

157. I have litigated some of these cases myself and spoken with colleagues and advocates in other jurisdictions who have reported the same.

158. D.C. Super. Ct. Admin. Ord. No. 19–18. The calendar also gives renters a vehicle to raise these claims without having to withhold rent and then wait for an eviction case for nonpayment of rent to be initiated against them. *Id.*

159. For true, life-threatening emergencies, emergency motion practice is possible. *See* D.C. CTS. CASE MGMT. PLAN FOR THE HOUS. CONDITIONS CIV. CALENDAR, <https://www.dccourts.gov/sites/default/files/Housing-Conditions-Case-Management-Plan.pdf> [<https://perma.cc/F8V9-RLFZ>] (last visited Feb. 22, 2024). However, during the COVID-19 pandemic, even securing time in front of a judge to have such a motion heard became difficult.

160. In D.C., the law requires that the tenant give the landlord notice before any claim accrues. *See* D.C. Super. Ct., *supra* note 158.

161. *See* D.C. CTS., *supra* note 159 (“The clerk’s office will schedule an initial hearing on the Housing Conditions Civil Calendar on the next available date no sooner than 21 days after the date of filing.”).

162. As I write this, for example, I mark the one-year anniversary of one of my own housing conditions calendar cases.

sanitary housing in the private market” is the Housing Choice Voucher program, formerly known as Section 8.¹⁶³ To rent a property with a housing choice voucher, a family must find a property on the open market that is within their federally-determined budget—no easy feat in many housing markets—and that meets the federal government’s Housing Quality Standards.¹⁶⁴ When they find a property, the local public housing agency is supposed to inspect the unit and, if it is acceptable, contract with the landlord (the Housing Assistance Program (HAP) contract).¹⁶⁵ The local agency is supposed to conduct regular inspections thereafter.¹⁶⁶ If the authority finds violations of the housing quality standards and the landlord does not address them in time, the agency may cancel the HAP contract and stop paying its portion of the rent.¹⁶⁷ Once this happens, the family usually has no choice but to move—often to another neighborhood away from their social networks—or risk losing their voucher and becoming homeless.¹⁶⁸ For this reason, many families are rightfully fearful of reporting issues.

Options for homeless families are also limited and potentially dangerous. In New York City, families enjoy a “right to shelter.”¹⁶⁹ In most states, there is no such

163. U.S. DEP’T OF HOUS. & URB. DEV., HOUSING CHOICE VOUCHERS FACT SHEET, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/E7JUPR36>].

164. See, e.g., 24 C.F.R. § 982.401 (2023).

165. U.S. DEP’T OF HOUS. & URB. DEV., HOUS. ASSISTANCE PAYMENTS CONT., https://www.hud.gov/sites/documents/DOC_11737.PDF [<https://perma.cc/X9W9-43LP>].

166. 24 C.F.R. § 982.405(a).

167. See, e.g., 24 C.F.R. § 982.453. If the family lives in a government-run building, such as in a D.C. Housing Authority property, they may have the ability to apply to move to a different unit, but they will be at the mercy of the government agency and the speed with which it sees fit to move. See, e.g., Theresa Vargas, *D.C. Mom Begg to Move After Finding Mice in Food and Children’s Bed*, WASH. POST (Apr. 20, 2022, 3:08 PM EDT), <https://www.washingtonpost.com/dc-md-va/2022/04/20/mo-m-mice-affordable-housing/> [<https://perma.cc/2A9G-USDV>].

168. Although federal law provides that renters should not be liable for the government’s portion of the rent in this scenario, the family may nevertheless find themselves faced with eviction proceedings where landlords demand the full market rent—a quantity the family often could never afford to pay. Compare 24 C.F.R. § 982.310(b) (2022) (“The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA.” “The PHA failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner. During the term of the lease the owner may not terminate the tenancy of the family for nonpayment of the PHA housing assistance payment.”) with D.C.M.R. § 14-5329.6 (2017) (“If the tenant remains in the unit after the cancellation of the HAP contract, the tenant may be liable for payment of DCHA’s portion of the contract rent.”); see also *Licht v. Moses*, 813 N.Y.S.2d 849 (N.Y. App. Div. 2006); *Curtis v. Surrette*, 726 N.E.2d 967 (Mass. App. Ct. 2000); *Prospect Place HDFC v. Gaildon*, 800 N.Y.S.2d 355 (N.Y. App. Div. 2005); *Livecchi v. Pyatt*, No. 2022-CV-9073, 2003 WL 21246096, at 1 (N.Y. City Ct. May 15, 2003).

169. See, e.g., *Plotnick v. City of New York*, 148 A.D.2d 721, 722 (N.Y. App. Div. 1989) (“The City of New York is mandated by law and by consent decree to provide housing to every homeless family and individual who so requests.”); *Coalition of Bedford-Stuyvesant Block Ass’n Inc. v. Cuomo*, 651 F. Supp. 1202 (E.D.N.Y. 1987) (“[T]he City, after much litigation, is now legally required to shelter all eligible homeless men, women and families.”); *Callahan v. Carey*, N.Y.L.J., at 10 (N.Y. Sup. Ct. Dec. 11, 1979), settled by consent decree, *Callahan v. Carey*, No. 42582/79, slip op. (N.Y. Sup. Ct. 1981), aff’d, 118 A.D.2d 1054 (N.Y. App. Div. 1st Dep’t 1986).

thing.¹⁷⁰ But even in New York, the process of securing needed shelter is torturous. When a parent finds themselves in need of emergency shelter in New York City, they must physically go with their children to a city office in the Bronx: the Prevention Assistance and Temporary Housing Center (PATH).¹⁷¹ The family may spend the entire day at PATH waiting to be seen, engaging in interviews, or waiting to be transported elsewhere.¹⁷² Families often receive preliminary “conditional placements” at city shelters.¹⁷³ After spending the entire day at PATH, they may be transported to a shelter that is in fact a hotel far away from children’s schools or the family’s neighborhood and community.¹⁷⁴ Initial, conditional placements are supposed to last for up to ten days to cover the period during which the city agency assesses the family’s eligibility for shelter, but they can be much shorter or much longer than that.¹⁷⁵ At times, if a family cannot be seen or complete the initial interview process in time, they will be housed at a temporary shelter for just one night and told to return to PATH in the morning to continue the process. This can happen for multiple nights if PATH is particularly short-staffed or seeing high volumes of need. And, at times, the initial eligibility process can last for longer than the prescribed ten days as the city agency works its way through its determination, keeping the family in limbo in the temporary placement. Families who have been through this process “describe their experience at PATH and with the eligibility determination process as a grueling ordeal, compounding the trauma and crisis they are often already experiencing.”¹⁷⁶

Although there is a right to shelter, that does not mean that all families that endure this rollercoaster process end up receiving beds: the city rejected three

170. Although some jurisdictions have professed that being without housing alone should not mean children are taken from their families, where there is no right to shelter and no concomitant public resources available to provide emergency shelter when needed, homelessness often leads to children being taken into foster care. *See, e.g.*, Patrick J. Fowler, Anne F. Farrell, Katherine E. Marcal, Saras Chung & Peter S. Hovmand, *Housing and Child Welfare: Emerging Evidence and Implications for Scaling up Services*, 60 AM. J. CMTY. PSYCH. 134 (2017).

171. In recent years there was a push to allow parents to apply at PATH for shelter without dragging their children along. *See* Josefa Silva, Cassidy Teminsky & Jessica Yager, *Improving PATH Dismantling Barriers to Shelter for Homeless Families with Children*, WIN Policy Brief Series (July 2021), https://winnyc.org/wp-content/uploads/2021/07/Improving_PATH_policybriefv2.pdf [<https://perma.cc/4WJW-SCKK>]; The Legal Aid Society, *Homeless Families: Know Your Rights!*, at 4, <https://legalaidnyc.org/wp-content/uploads/2023/07/KYR-Booklet-Families-PATH-Final-2023-English.pdf> [<https://perma.cc/VYB6-H6Z2>] (last visited Feb. 22, 2024).

172. Silva, et al., *supra* note 171.

173. *See, e.g.*, NYC Dep’t of Homeless Servs., Learn More About Prevention and Temporary Housing Brochure, *available at* <https://www.nyc.gov/assets/dhs/downloads/pdf/path-brochure.pdf> [<https://perma.cc/5RSP-Y25U>] (last visited Mar. 29, 2024).

174. *Id.*

175. *See* Homes for the Homeless, *Snapshot: Families at HFH Trapped in Conditional Status*, *available at* https://www.hfhny.org/wp-content/uploads/2022/07/HFH_Summer-snapshot_062922A.pdf [<https://perma.cc/C8L2-TBRQ>] (last visited Mar. 29, 2024) (finding that “85% of families wait longer than 10 days to become eligible” and “[t]he median length of conditionality for HFH clients is nearly 40 days.”).

176. *Id.* at 6.

quarters of all 2021 family shelter applications.¹⁷⁷ Families can be rejected for a number of reasons, many of which involve the agency’s distrust of the families’ knowledge and reports (in other words, epistemic injustice).¹⁷⁸ The agency looks at where the family members report having lived for the previous two years. If the agency determines that—in its judgment—any of those locations are viable locations for the family to reside again, or if the agency is unable to verify any of the prior housing locations, they will reject the family.¹⁷⁹ A rejection starts the process over again. Either the family returns to PATH to reapply, cycling back through the whirlwind of days on the floor of the bureaucratic office and nights in rotating, temporary, far-flung, cramped, uncomfortable, and unsafe shelters, or giving up on the prospect of accessing public shelter altogether.

I once had a client who continually was rejected from shelter with her two-year-old child because the Agency distrusted her account and decided that she could return to a number of prior addresses that were in fact unsafe, closed to her, or simply no longer existed. My client was an individual with an intellectual disability, and although she put forward an incredible effort to comply with the city’s demands and establish her eligibility, she simply could not navigate these repeated, byzantine denials on her own. As a result of being repeatedly kicked out of shelter, she had ended up under the suspicion of New York’s family policing authority, the Administration for Children’s Services, which had removed her children from her care. Once my office became involved and assigned a housing attorney to assist, we conducted the research and put together the paper trail that eventually ended up helping her attain shelter eligibility. It was a process she could not have completed on her own, and one that left her and her young family in the cold despite a right to shelter existing on the books.

And even if a family is successful in getting into a shelter, the risks do not end there. In some ways, they multiply. Conditions in city shelters are often dire: many reportedly are infested with rats and other vermin, unsanitary and unsafe for children and their families.¹⁸⁰ And families in shelter are subject to a “fishbowl

177. Suhail Bhat & Josefa Velasquez, *Three in Four Family Shelter Applications Rejected in 2021, Setting Record*, THE CITY, (Jan. 30, 2022, 6:26 PM), <https://www.thecity.nyc/2022/1/30/22909663/family-shelter-applications-rejected> [<https://perma.cc/BP6D-U6BN>]. In July 2019, 59% of families who applied for shelter (over 1,500 families) were found ineligible. *Seeking Stability: What Applying for Shelter Truly Means for New York City’s Homeless Families*, INSTITUTE FOR CHILDREN, POVERTY & HOMELESSNESS (Sept. 24, 2019), <https://www.icphusa.org/commentary/seeking-stability/> [<https://perma.cc/ZF5G-TB27>].

178. Silva et al., *supra* note 171, at 7.

179. *See id.*

180. *See, e.g.*, Jennifer Peltz, *Investigators Find Rat Infestations, Decrepit Conditions at NYC Family Homeless Shelters*, NEWS4 N.Y. (Mar. 12, 2015), <https://www.nbcnewyork.com/news/local/departments-of-investigations-nyc-family-homeless-shelters-report/826586/> [<https://perma.cc/EP5L-SQF5>]; *Mother Says Rat Infestation at Hunts Point Family Shelter Has Gotten Worse*, NEWS 12 WESTCHESTER (Oct. 5, 2021), <https://westchester.news12.com/mother-says-rat-infestation-at-hunts-point-family-shelter-has-gotten-worse> [<https://perma.cc/D8C7-L296>]; Theresa Vargas, *Two Girls Went Missing From the Same D.C. Shelter 8 Years Ago. One Came Back. The Other Was Relisha Rudd*, WASH. POST (Mar. 5, 2022), <https://www.washingtonpost.com/dc-md-va/2022/03/05/relisha-rudd-eight-years->

effect” of “heightened scrutiny,” placing them at “greater risk for being investigated for child maltreatment and becoming entangled in the family regulation system.”¹⁸¹

Yet, agencies and courts enforce “inadequate shelter” claims with little regard for the lived experience and knowledge of the families they police. Families facing substandard and even unhealthy conditions in their homes know that the legal protections on the books are insufficient and are themselves risky.¹⁸² They, at times, make educated and well-informed judgements about the relative risks of remaining in substandard conditions or make unconventional choices about where to stay¹⁸³ rather than attempting to navigate unwelcoming and inaccessible government services that will not, in fact, meet the family’s needs and risk opening the family up to invasive and possibly existential threats. But these judgments are systematically discounted in favor of the epistemic authority of the state. Families’ well-founded aversion to shelter and other social supports and fears of CPS entanglement rarely enter into the record and when they do, they are not taken seriously.¹⁸⁴

2. Poverty and Parenting: Institutional Gaslighting

In late 2018, Jazmine Headley took her infant son with her to a Brooklyn public benefits office.¹⁸⁵ She was a single mother, working to support her young family, and relying on a publicly funded day-care voucher to ensure he was well cared for during her workday. The baby’s day care had recently told her the voucher had been stopped, and she had taken the day off from work to address the issue. A few hours later, the internet watched in horror as a cell phone video went viral showing officers violently ripping the baby from her arms as she repeatedly screams “You’re hurting my son,” the baby cries, and onlookers yell “Oh my god.”¹⁸⁶ The

missing/ [https://perma.cc/6EZF-N2TX].

181. Baughman et al., *supra* note 38, at 513; Jung Min Park et al., *Child Welfare Involvement Among Children in Homeless Families*, 83 CHILD WELFARE 423, 432–33 (2004).

182. See *supra* notes 169–184; see also Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. ON POVERTY L. AND POL’Y 97 (2019).

183. To return to the client whose story I described above, after multiple unsuccessful attempts at securing shelter, an opportunity arose for her to take her toddler on a road trip with a friend. Having barely left the city in her own life, and with no stable place to live despite heroic efforts to navigate city systems, she chose to provide her child with what she believed to be a once-in-a-lifetime experience. The little family left the city and traveled, safely, across the country. The child saw plains, the Rocky Mountains, and the neon lights of Vegas. She was well cared for throughout. But when my client returned to New York, ACS was waiting for her. I met her when she was brought into family court in handcuffs, on the strength of a petition that twisted the story into an unrecognizable narrative.

184. See S. Lisa Washington, *Weaponizing Fear*, YALE L.J. F. 163, 176 (2022). See also Jessica López-Espino, *Giving and Taking Voice: Metapragmatic Dismissals of Parents in Child Welfare Court Cases*, LAW & SOC. INQUIRY, 1–26 (2023) (describing “a socio-legal ecology of distrust that silences parents and forecloses alternative narratives by insulating and promoting the voices of child welfare professionals” in observed California court sessions).

185. Ashley Southall & Nikita Stewart, *They Grabbed Her Baby and Arrested Her. Now Jazmine Headley Is Speaking Out.*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/ny-region/jazmine-headley-arrest.html> [https://perma.cc/HYR6-JVBD].

186. *Id.* It is worth noting that, like videos of police killings of Black men, Ms. Headley’s experience came into public view in large part because of the efforts of others present at the office to

officers arrested Ms. Headley, charging her with, among other things, resisting arrest and child endangerment.¹⁸⁷ According to a lawsuit she later filed, one of the guards threatened to have New York’s child protective services take her son.¹⁸⁸ In the end, the charges were dropped against her, but she was detained and separated from her baby for days, for the first time in his life.¹⁸⁹

Ms. Headley’s story is stark, but not unique. Ms. Headley’s federal complaint recounts the stories of numerous other individuals who were mistreated while seeking government aid.¹⁹⁰ Professor Roberts has written that “[t]he public aid office has become a site for threatening Black mothers with arrest and child removal for the crime of seeking help to raise their children.”¹⁹¹ But the problem does not just lie in the physical site of the public benefits office.

The federal policies described *supra*, in Part I.A., have turned all of society’s helpers into sites of surveillance, distrust, danger, and abuse. They have created a structure of institutional gaslighting, where “[f]amilies are pulled into the family regulation system through systems that they are told to rely on for support: the public assistance office, substance abuse programs, mental health clinics, their child’s school, the local police department, or a prevention services program.”¹⁹² Instead of providing the support promised, these institutions instead pose danger to the individual and family. But instead of acknowledging the danger, they continue to claim benevolence and place blame for any negative outcomes on the family’s own failings. And once they are pulled in, the gaslighting continues. Impacted mothers describe the “ineffable pain of losing a child to a system that came to us calling itself a savior.”¹⁹³ Harry Spence, well-known “fixer” of troubled public agencies and former commissioner of Massachusetts’ Department of Social Services, describes the experience of “overwhelm” in the system:

We try to keep the children safe, but the challenges are so huge and the resources so slim that we’re overwhelmed, and we can’t take care of the children the way we wish. And then we work with families who are overwhelmed and then say they exact same thing

film and disseminate the encounter. This type of “observing and recording by an entity not in a position of power or authority, . . . often done through the use of handheld or wearable cameras,” has been named “sousveillance.” SIMONE BROWNE, DARK MATTERS 19 (2015) (quoting Steve Mann, *Veillance and Reciprocal Transparency*, 2013 IEEE INT’L SYMP. ON TECH. & SOC’Y 1, 3).

187. See, e.g., Amended Complaint at 104, *Headley v. City of New York, et al.*, No. 19-cv-045 43-RLM (E.D.N.Y. Jan. 30, 2020); Southall & Stewart, *supra* note 185.

188. See Amended Complaint, *supra* note 187, at 66; Dorothy E. Roberts, *I Have Studied Child Protective Services for Decades. It Needs to Be Abolished.*, MOTHER JONES (Apr. 5, 2022), <https://www.motherjones.com/crime-justice/2022/04/abolish-child-protective-services-torn-apart-dorothy-roberts-book-excerpt/> [<https://perma.cc/MA7H-2H6F>].

189. Southall & Stewart, *supra* note 185.

190. Amended Complaint, *supra* note 187.

191. Roberts, *supra* note 188.

192. Baughman et al., *supra* note 38, at 510.

193. Albert et al., *supra* note 105, at 868.

about their parenting.¹⁹⁴

And when parents, like Ms. Headley, react with justifiable frustration or emotion to this experience, they are caught in an “epistemic injustice circle (of hell)”: the system’s gaslighting “cause[s] [its] victims to become more upset, which the [system] take[s] as further reason to discount the victim’s” knowledge and judgment.¹⁹⁵

III. AUTOMATING EPISTEMIC INJUSTICE

In its algorithmic turn, the family policing system is now automating the epistemic injustice it perpetrates, extending “the long history of how new methods of producing knowledge generate a redistribution of epistemic power.”¹⁹⁶ If the goals of the abolitionist movement to build a society that has no need for policing institutions are to be taken seriously, the ways the existing system regulates the creation and sharing of knowledge, including through automation, must be clearly theorized.¹⁹⁷ As the system, in the name of efficiency, consistency, and, yes, bias reduction, turns to purportedly neutral algorithmic, machine-based, data-driven tools, it risks both the continued creation of damaged knowledge and narratives, and the continued exclusion of the experiences of impacted communities from the collective production of useful knowledge.

This development is the latest example of a system that, as described above, already privileges certain forms of knowledge and knowledge production and remains closed to others. But the turn to technology brings with it new and scaled-up opportunities for epistemic harms. In the section that follows, I describe five specific ways in which family policing’s algorithmic turn presents new forms of epistemic injustice.

First, these tools enact their own form of “algorithmic gaslighting.” Second, these data-driven tools are not just an outgrowth of, but also a driving force behind the expanding surveillance web that is the modern family policing system, which itself has knowledge-suppressing power. Third, these tools privilege carceral data

194. LIPSKY, *supra* note 143, at 234. The harm of this type of institutional gaslighting may compound the trauma of investigations and family separations on their own. Professor Emerit of Psychology Jennifer J. Freyd, PhD has described the phenomenon of “institutional betrayal,” the “institutional action and inaction that exacerbate the impact of traumatic experiences.” Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH., 575, 575–87 (2014). *See also* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 119, 120 (2013). According to Freyd and her colleagues, the relational context in which a traumatic experience occurs can influence the severity of its aftereffects. Trauma experienced within the context of a close interpersonal relationship is “especially damaging.” Where trauma occurs within a context or at the hands of an institution to which one must look for safety, the same increase in severity will occur. *See id.* at 119.

195. McKinnon, *supra* note 125, at 169; *see also* Washington, *supra* note 184.

196. Sun-ha Hong, *Prediction as Extraction of Discretion*, 2022 FACCT 925 (2023).

197. *See* MEDINA, *supra* note 137, at 12–13 (“[I]dealizations about our epistemic interactions desensitize us about the ubiquitous hermeneutical and testimonial injustices we are surrounded by in our everyday practices, minimizing the importance of the epistemic obstacles and problems that differently situated subjects are differentially exposed to in their daily activities.”).

sources and define as epistemic authorities certain groups (i.e., data scientists) over others (impacted people). Fourth, the system as audience receives the information the tools provide through a carceral lens, using them in a feedback loop to confirm and grow the system's own carceral knowledge. Fifth, the use of these tools suppresses opportunity for the democratic contestation that could lead to more robust knowledge production.

A. Algorithmic Gaslighting

Family policing's algorithmic turn perpetrates its own version of gaslighting.¹⁹⁸ First, rhetoric surrounding “artificial intelligence” or “machine learning” tools like these obscure their creators' and their users' intentions.¹⁹⁹ Algorithms that purport to predict the risk level of a child's situation, in a context where the only intervention available is intervention in the family and separation of the child from their caregiver, masquerade as predictions of the risk posed to the child by the parents. But, in reality, the screening tools like the AFST do no such thing. In their reliance on proxies such as re-referral or placement in foster care, they in fact measure the risk the *system* poses to the child—not the parent.²⁰⁰ Despite materials and trainings that may attempt to make this distinction clear, it may inevitably be clouded when the risk score is presented free of deep context.²⁰¹

But the gaslighting goes deeper. The adoption of these tools represents the activation of a particular value system and ideology, even as the adopters disclaim and deny the prospect of such an ingrained viewpoint.²⁰² Scholar Sun-Ha Hong has written that these tools represent their own “relational grammar: a way of thinking and talking about how facts are made, and who tends to declare those facts about whom,” more than they are simply “a set of calculative techniques.”²⁰³ Hong's point echoes that of scholar Julie Cohen, who has argued that “Big Data is the ultimate expression of a mode of rationality that equates information with truth and more

198. See *supra* text accompanying notes 127–135.

199. See Emily Tucker, *Artifice and Intelligence*, CENTER ON PRIVACY & TECHNOLOGY (Mar. 8, 2022), <https://medium.com/center-on-privacy-technology/artifice-and-intelligence%C2%B9-f00da128d3cd> [<https://perma.cc/YZ88-BT8M>] (explaining the Center's decision to “stop using the terms ‘artificial intelligence,’ ‘AI,’ and ‘machine learning’” in its work because of those terms' obfuscating potential to foster misconceptions about how such tools work, in a manner that accretes power to the tools' controllers).

200. See Glaberson, *supra* note 6, 342–43.

201. See Emily M. Bender, Timnit Gebru, Angelina McMillan-Major & Shmargaret Schmittchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?*, 2021 FACCT 610, 612, 616 (2021) (discussing the tendency of even sophisticated AI researchers to confuse language model “performance gains” for advancement in machine natural language understanding when one has nothing to do with the other).

202. See Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1924 (2013).

203. Hong, *supra* note 196, at 926. Hong writes that “descriptions of a facial recognition tool as ‘predicting’ criminality, or a generative adversarial network as ‘learning,’ are not simply (misleading) descriptions of technical method; they perpetuate a more basic sentiment about how things must relate to each other.” In making the connections between, for example, the structure of an individual's face and the quality of “criminality,” these tools enforce “background tendencies in how we reason and model that makes it ‘plausible’ to try and predict one with the other in the first place.” *Id.*

information with more truth, and that denies the possibility that information processing designed simply to identify ‘patterns’ might be systematically infused with a particular ideology.”²⁰⁴ In this way, data science provides an “organizing idea” which imposes a very specific model of knowledge” marked by a “belief in a hidden mathematical order that is ontologically superior to the one available to our everyday senses.”²⁰⁵ Like Paula in *Gaslight*, we cling to this belief as a result of fear—“fear that the world is too labyrinthine to be threaded by reason; fear that the senses are too feeble and the intellect too frail.”²⁰⁶

Like *Gaslight*’s Gregory, the family policing system as currently constituted drives that fear. It tells us that children are at risk, and we need eyes on them in order to “save” them.²⁰⁷ This fear results in mandated reporting laws, requiring all of society’s helpers to act as the system’s deputies, funneling vague and all-too-often unfounded suspicions of child maltreatment its way.²⁰⁸ Those reports unnecessarily flood the system. Predictive tools capitalize on the fear that this systemic overwhelm

204. Cohen, *supra* note 202, at 1924.

205. Hong, *supra* note 196, at 927 (quoting Dan McQuillan).

206. *Id.* at 927 (quoting Dasto and Galison)

207. See *supra* Section I.A. See also, e.g., LIPSKY, *supra* note 143, at 239 (profile of Harry Spence: “[W]e in child welfare carry this ‘rescuing the child from the family’ fantasy, which is so horrific and so deep in the culture. The world has no idea what it bit off to chew when it decided to take up child welfare.”); Abdurahman, *supra* note 11, at 101 (child welfare agencies claim “to prevent the violence they enact—through new services only they can provide”).

208. See *supra* Part I.A. There have been a few natural experiments in recent years that illustrate the flaws in the mandatory report system. In Pennsylvania, after the sex abuse scandal surrounding Jerry Sandusky and Penn State University, the state vastly expanded its mandated reporting system. Mike Hixenbaugh, Suzy Khimm & Agnel Philip, *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead*, PROPUBLICA (Oct. 12, 2022), <https://www.propublica.org/article/mandatory-reporting-strains-systems-punishes-poor-families> [https://perma.cc/Y9M6-YBQW]. This policy change was followed by a torrent of reports, 80% of which alleged low-level neglect and not serious abuse, and most of which were ultimately deemed unfounded. *Id.* Teachers’ reports were the least likely to lead to the identification of confirmed instances of child maltreatment. *Id.* Despite the huge surge in reports, the number of identified child victims of maltreatment remained the same. *Id.* And, some argue that the flood of reports is one reason why the state has seen a rising number of children dying from alleged abuse—that the “surge in unfounded reports has overburdened the system, making it harder to identify and protect children who are truly in danger.” *Id.*

The COVID-19 pandemic provided New York City with a natural experiment to test the worth of abolishing its mandated reporting system. Anna Arons, *An Unintended Abolition*, 12 COL. J. RACE & L.F. 1, 3 (2022); See also, e.g., CAMPBELL KA, WOOD JN, BERGER RP. CHILD ABUSE PREVENTION IN A PANDEMIC—A NATURAL EXPERIMENT IN SOCIAL WELFARE POLICY. JAMA PEDIATR. 2023;177(12):1263–1265. DOI:10.1001/JAMAPEDIATRICS.2023.4525. As the world shut down due to the virus in early 2020, New York’s family policing system was put “on pause.” Arons, *An Unintended Abolition*, at 7. Children were not in school, where teachers could observe and report on them, and families were not entering the offices of other “helpers” with an obligation to report. *Id.* at 7-10. Accordingly, New York reports fell drastically. *Id.* at 13. And despite fearmongering in the press and public discourse about the danger to children absent the system’s prying mandated eyes, the result was stark. *Id.* n. 89. Reports dropped, but children remained safe. *Id.* Rather than rising, there was a decrease in verifiable instances of child injuries or deaths due to maltreatment. *Id.* at 19-20. There was no evidence of a rise in neglect. *Id.* And there was no observable “rebound effect” when things opened up. *Id.* at 20-21. Children stayed safe “not because of the family policing system’s presence but, rather, in its absence.” *Id.* at 21.

creates. The screening and “hot spot” tools purport to help triage the flood of reports, gaslighting system actors into believing that prediction is the way out of the problem the system itself has caused. Rather than seeing and confronting the manipulation, they trap us in merely tinkering with its effects.

B. Silencing Through Enhanced Surveillance

In the late eighteenth century, English philosopher and theorist Jeremy Bentham introduced the world to the concept of the panopticon. In Bentham’s vision, carceral discipline is conducted through the use of a physical structure that allows for uninterrupted—yet invisible—surveillance: Guards occupy a central observation tower, around which a circle of prison cells hold prisoners. From the tower, the guards can see all of the prisoners. From their cells, the prisoners can never tell whether they are being watched. At any given moment, they might be under the guard’s gaze. In this way, Bentham theorized, their behavior would be permanently altered. The threat of constant surveillance, even if it is not in practice actually constant, would change the way those being watched acted.²⁰⁹

In today’s “datafied” society, the panopticon is being built; it is just made out of ones and zeroes instead of concrete and iron.²¹⁰ As we go about our daily lives, we leave a trail of information in our wake. Our cell phones track our locations, corporations track our clicks and our purchases, and government agencies track our every interaction with them. And with the advent of algorithmic risk-prediction tools, that data might at any point be used to rank and categorize us to identify those of us the government should target as dangers, and those it should leave alone.

In the case of family policing algorithms, the tools’ reliance on administrative data means that information about some of the most intimate facts of families’ lives becomes grist for the algorithmic mill. As discussed above, the algorithms draw on information about families’ prior involvement with the family policing system itself as well as criminal legal institutions.²¹¹ But they don’t stop there. They also draw in information about families’ use of public benefits, their interactions with behavioral health systems, and more.²¹² And though some localities using these tools have published some information about how this data feeds into the tools in a nod to transparency, that information remains largely opaque. From the reports published by the Allegheny County team, for example, it is possible to glean that the first version of the AFST included “behavioral health fields” which were removed from the second version, but that the design team is actively working to put those fields back in.²¹³ So, while we know that some “behavioral health” information has made

209. For further discussion of Bentham’s panopticon, its role in surveillance studies, and “analytical concepts derived from” it, see BROWNE, *supra* note 186, at 31–50.

210. Copeland, *supra* note 12, at 5 (discussing Foucault’s concept of the “carceral continuum”).

211. *See supra* Section I.A.

212. *See id.*

213. The developers write that “a majority of the behavioral health fields used in AFST V1 were excluded in V2,” because “systematic changes occurred in how behavioral health diagnoses were

it into the model—and will again—we cannot tell what exactly that information is. Are these models tracking individuals’ access of mental health services? How frequently they attend therapy? What their diagnoses are? Their treatment plans? We cannot drill down to the level of detail we would need to understand exactly what information is being tracked and used. The same goes for information about families’ criminal histories, public benefits use, demographics, and any other category of information included in these models. Their surveillance of poor families, in this way, is complete: they are the digital panopticon, viewing potentially everything and perhaps nothing at all. But we can never know for sure.²¹⁴

Notably, this panoptic surveillance impacts poor families specifically and to the exclusion of families with means. The types of interactions that lead to data trails—use of public benefits, access of public hospital services, and the like—are interactions experienced primarily by those without means. For families with means, the same events that lead to an administrative data file for a poor family is dealt with privately and without creating such a data stream. Where a poor individual may access mental health services through public entities, for example, someone with means will use private insurance and go to a private doctor.

And all this is occurring as the system works to further expand its ability to gather information about families even as foster care rolls may decrease.²¹⁵ Scholar J. Khadijah Abdurahman argues that while the renewed emphasis on preventive services embodied in the FFPSA seems like a progressive reform, it in fact represents an expansion of the “carceral net.”²¹⁶ In Abdurahman’s account, this “prevention” is in fact surveillance.

Predictive analytics are not just part of this expanded surveillance web, but are “central to the project.”²¹⁷ Under the FFPSA, states are incentivized to expand the carceral net by drawing more and more families into surveillance relationships with preventive services agencies.²¹⁸ These agencies are filled with mandated reporters who have been deputized to serve as the system’s eyes and ears, drawing more

defined and categorized,” making it so that new data did not align with old. Allegheny Family Screening Tool: Methodology, Version 2, *supra* note 74, at 4. The developers wrote, however, that “the team is working to restructure the behavioral health fields to reincorporate them into the model.” *Id.* The developers note that “[t]he behavioral health variables that remain in the V2 model reflect aggregated indicators for whether each individual on the referral received any prior behavioral health service, as well as the number of days since the last behavioral health service.” *Id.*

214. See also BROWNE, *supra* note 186, at 21 (describing “totalizing surveillance” accomplished when, “in the time of slavery [the] citizenry (the watchers) was deputized through white supremacy to apprehend any fugitive who escaped from bondage (the watched), making for a cumulative white gaze”).

215. See Hong, *supra* note 196, at 928 (“The move toward data-driven policing often involves new systems of documentation and data-collection, as well as existing data taking on new uses and importance.”).

216. Abdurahman, *supra* note 11, at 82 (quoting Roberts).

217. *Id.* at 84.

218. See Dorothy Roberts, *supra* note 4, at 1723 (Risk assessment tools “sweep[] into the carceral net low-risk individuals who previously would not have been on the government’s punitive radar at all. Struggling parents who are targeted by automated models become subject to agency monitoring and therefore more vulnerable to losing custody of their children even though they are unlikely to harm them.”).

families into its web.²¹⁹ But they also enter into contracts and Memorandums of Understanding (MOUs) with state and local governmental bodies that require them to track and report data about the families then under their gaze, building the surveillance web and feeding the hungry data machines waiting in the wings to analyze and categorize their lives. Under the FFPSA, Abdurahman notes, Title IV-E funds are the “payor of last resort for prevention services.”²²⁰ Because the majority of preventive services identified by the act are “behavioral health programs typically covered by Medicaid,” Abdurahman finds that “[i]f you take away the services funded by Medicaid from the core section of the Family First Prevention Act, all that remains of the ‘prevention-focused infrastructure’ is data collection and predictive risk modeling.”²²¹

As in Bentham’s panopticon, the constant awareness of being watched exerts an influence on targeted families. It removes the “breathing room” in which individuals can develop thoughts and ideas and do the “work of self-making.”²²² It “has the effect of marginalizing anyone who deviates from the norm and thereby imposes normalizing pressure on them,” “discourag[ing] difference and stifl[ing] eccentricity.”²²³ This constant surveillance changes behavior not just at the level of physical movement but, importantly, it also changes the way its targets think and feel. It constricts their ability to engage in free thought and epistemic production.²²⁴ Parents are hindered in their ability to form considered judgments about what is best for themselves and their families. Take the example of mental health services. A parent may come to believe that seeking mental health services is the route to improving or maintaining their family’s situation. But they may also come to know that seeking such a service will open their family up to state surveillance—through contact with mandated reporters, enrollment in preventive service rolls that report back to the authorities, and the generation of administrative data that then will feed into algorithms and may up the family’s risk score.²²⁵ This knowledge may hinder

219. See Baughman et al., *supra* note 38, at 509–30 (“Families are pulled into the family regulation system through systems that they are told to rely on for support: the public assistance office, substance abuse programs, mental health clinics, their child’s school, the local police department, or a prevention services program.”); see also BROWNE, *supra* note 186, at 21.

220. Abdurahman, *supra* note 11, at 96.

221. *Id.*

222. Cohen, *supra* note 202, at 1911.

223. BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 191 (2006); Copeland, *supra* note 12, at 17 (discussing “normality”).

224. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1946–50 (2013); see also Danielle Keats Citron & David Gray, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262 (2013).

225. See, e.g., Shereen A. White, Shanta Trivedi, Shakira Paige, Meredith Giovanelli, & Makena Mugambi, *Help Not Hotlines: Replacing Mandated Reporting for Neglect with a New Framework for Family Support*, FAM. INTEGRITY & JUST. Q., Spring 2022, at 140 (citing Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 SOC. FORCES 1785 (2018)); Megan Aston, Sheri Price, Martha Paynter, Meaghan Sim, Joelle Monaghan, Keisha Jefferies & Rachel Ollivier, *Mothers’ Experiences with Child Protection Services: Using Qualitative Feminist Poststructuralism*, NURSING REP. Nov. 2021, at 919, <https://www.ncbi.nlm.nih.gov/pmc/articles/PM>

the parent from acting on their belief about the best course of action for their family, and may even influence them to develop a new belief.

Impacted mother and advocate April Lee described precisely this when speaking recently to ProPublica reporters. After struggling with a personal trauma, “she confided in a doctor. ‘I was honest,’ Lee said. ‘Like ‘I’m f—ing struggling. I’m struggling emotionally.’”²²⁶ As a result, Lee suspects someone from the clinic placed a call to her state’s child welfare hotline, leading to an investigation that ended with her children being removed from her care.²²⁷ Lee now works for a Philadelphia-based legal services organization as a “client liaison,” working with parents undergoing their own family regulation investigations:

[We] see that in a lot of our cases You have someone that went to their doctor to say, “Hey, I relapsed.” That’s a call to the [state’s child protection hotline,] ChildLine. Or you have a family that might go into a resource center saying, “Hey, we’re homeless.” That’s a call to the ChildLine. You have children that show up to school without proper clothing. That’s a call to the ChildLine.²²⁸

In these cases, the knowledge and fear that seeking help will open a family up to investigation and separation “makes it harder for them to get the help they need.”²²⁹ Knowing that the risk does not end with the individual encounter but could have a long tail as data from the encounter lingers on and stands to later increase a family’s risk score can only increase this effect.

As another example, take the role of what scholar Elizabeth Kukura calls “maternal ambivalence”—mothers’ “mixed feelings about becoming pregnant, giving birth, a new baby, or being a parent.”²³⁰ As Kukura has previously described, women’s feelings of ambivalence about motherhood are not just normal and natural, but may in fact be productive.²³¹ Scholars writing in the field of psychoanalysis have shown how maternal ambivalence and even “powerful negative feelings toward our children might offer a creative force rather than a destructive one.”²³² It can not only help a mother understand her child better, but also herself

C8715453/ [https://perma.cc/MH22-SF9K] (documenting how Nova Scotia mothers “spoke about entrusting Child Protection Services workers for guidance and support, particularly access to mental health services and counselling, only to then experience disappointment with how they were treated through the withholding of information and supports by Child Protection Services” and noting that mothers in the study “did not differentiate between healthcare providers in the health system, such as nurses, and child protection workers”—seeing them as intertwined and untrustworthy).

226. Hixenbaugh et al., *supra* note 208.

227. *Id.*

228. *Id.*

229. *Id.*

230. Elizabeth Kukura, *Embracing Maternal Ambivalence*, 90 FORDHAM L. REV. 2909, 2915–16 (2022).

231. *Id.*

232. *Id.* at 2915.

and her context.²³³ It may be through maternal ambivalence, in fact, that some mothers come to generate the kinds of thoughts, ideas, and impetus toward resistance that drives them to advocate for changes to their social condition.²³⁴ In other words, maternal ambivalence may be one of the forces that could lead us to the hopeful future horizon of which the abolitionists speak. But panoptic surveillance stifles this creative process. Mothers experiencing feelings of ambivalence, surrounded by mandated reporters and risking feeding data streams that will hang around indefinitely in the ether, poised to be used at any future time to calculate their level of “risk,” are likely to avoid sharing those feelings, tamp them down internally, and even avoid allowing the thoughts to form at all. In this way, we lose a potentially valuable site of generative epistemic resistance. In this way, big data and predictive analytics build a digital panopticon to modify not just parenting behavior but parenting knowledge creation.

Of course, the suppressive power of enhanced surveillance is present with or without risk-prediction algorithms. Wherever the eyes of the state have reach, parents’ interactions with public systems opens them up to coercive surveillance. What is new, however, is the opacity and pervasiveness of the surveillance. Whether an individual worker at a benefits or mental health office decides to place a call is one thing. But the long life of data, and its opaque incorporation into risk prediction tools, is quite another.

C. Defining the Epistemic Authorities

As discussed above, the “central case” of testimonial injustice involves the “credibility deficit”: when a holder of knowledge “receives less credibility than she otherwise would have.”²³⁵ While credibility may not be a “finite good that can be in danger of becoming scarce in the same way that food and water can,” credibility judgments do involve “implicit comparisons and contrasts.”²³⁶ These comparisons lead to “disproportions,” in which oppression results in some groups getting “disproportionately more credibility and others disproportionately less.”²³⁷ The proliferation of family policing algorithms promises to place ever more epistemic power and value in individuals farther and farther away from the lived experience of the system, demarcating who does and does not have epistemic power. It does so in two distinct ways. First, algorithmic family policing privileges those who already are seen as holding epistemic power, artificially inflating those individuals’ and entities’ power while systematically downgrading targeted families’ ability to

233. *See id.*

234. *See* COLLINS, *supra* note 115, at 129 (“A changed consciousness encourages people to change the conditions of their lives.”), 206–07 (discussing Black women’s activism as in some cases arising from their “response to the needs of” and “obligations to” their children).

235. FRICKER, *supra* note 13, at 4.

236. MEDINA, *supra* note 137, at 62.

237. *Id.* *See also* Epstein, *supra* note 127, at 316 (“Credibility assessments are inherently comparative in nature.”).

wield it. And second, the algorithmic turn in family policing objectifies its targets, dehumanizing families by turning them into mere data points from which information can be gleaned rather than active epistemic agents capable of engaging in discursive progress. In the section that follows, I will discuss each form of epistemic injustice in turn.

1. *Privileging Power*

The reliance on risk prediction algorithms extends the system's already pervasive epistemic injustice by placing the authority to make judgments, enact policy, and encode rules farther away from those with lived experience on the ground, away even from the workers who have met and gotten to know the families, and instead in the hands of the coders, researchers, and administrators who envision, design, and create these tools.²³⁸ This development further privileges those who already disproportionately wield power.²³⁹ Those in these roles are disproportionately highly-educated, wealthy, and white.²⁴⁰ Their identities and positionality affect how they see and understand, and what knowledge they hold and encode into these tools.

But the siting of epistemic privilege does not stop with the individuals on whom knowledge-related authority is conferred during this process. It extends to the data, the information that is made authoritative, as well.

A fundamental question that must be asked when parsing the knowledge produced by algorithmic family policing is about the constituent data that makes up an algorithmic predictive tool. What, exactly, is this data? Our current actuarial age pushes us to worship at the altar of data, that it promises to provide “better, more objective knowledge.”²⁴¹ But this promise is, in truth, a fantasy. Data is never neutral.²⁴²

Data does not simply exist in the world. It is created and crafted, a product of its context in every way. Though the term “raw data” gets bandied about, data itself is not “raw” information. To the contrary, “by the time that information becomes

238. A regular experience in these systems already is that of the decision-making conference in which the worker who knows the family is unceremoniously overridden by a supervisor or administrator who had never met the family. *See* Glaberson, *supra* note 6, at 317 n.46. Reliance on algorithms not only magnifies this experience, but also risks a future in which any workforce remaining in the system distrusts their own judgment and indeed may lose whatever facility and training they currently have to make such vital decisions. *See, e.g.*, Devansh Saxena & Shion Guha, *How Algorithms Are Harming Child Welfare Agencies and the Kids They Serve*, DATA & SOCIETY: POINTS (Apr. 12, 2023), <https://medium.com/datasociety-points/how-algorithms-are-harming-child-welfare-agencies-and-the-kids-they-serve-596cc776c034> [<https://perma.cc/46HY-F5Y2>].

239. Cohen, *supra* note 202, at 1924 (“Big Data . . . seems likely to . . . favor certain kinds of knowledge, over others.”).

240. SASHA COSTANZA-CHOCK, DESIGN JUSTICE 73 (2020) (“Professional design jobs in nearly all fields are disproportionately allocated to people who occupy highly privileged locations within the matrix of domination. . . . [I]n the United States, women overall hold 26 percent of tech jobs, Black women hold just 3 percent of computer programming jobs, and Latinas hold 2 percent.”).

241. Rebecca Kukla, *Objectivity and Perspective in Empirical Knowledge*, 3 EPISTEME, 80, 81 (2006).

242. *See, e.g.*, CATHERINA D’IGNAZIO & LAUREN F. KLEIN, DATA FEMINISM (2020).

data, it's already been classified in some way."²⁴³ To become useful "data" for any purpose, including algorithmic risk prediction, information must be "made tractable."²⁴⁴ It must be reduced to a form in which a computer can engage with it, meaning that it must be "placed into some kind of category."²⁴⁵ This act of quantification and categorization is inevitably influenced by the "close relationship between data and power."²⁴⁶ Existing hierarchies of power and epistemic currency dictate what data is created in the first place, and by whom. As we have seen, the data that is fed into family policing algorithms all comes from powerful institutions—what scholar Ngozi Okidegbe calls "carceral knowledge sources"²⁴⁷—not from those at the bottom (even if it may be *about* those at the bottom).²⁴⁸ Because data is itself a product of extant power relations, "data can never speak truth to power on its own."²⁴⁹

What's more, "what gets counted counts" but not everything that counts can be counted.²⁵⁰ Many of the most important "inputs" into questions about children's welfare are not and can never be "data." Human interactions cannot be reduced to algorithmic inputs. Love, connectedness, resilience, shared history, the sense of belonging to a community—each of these human experiences is simply not quantifiable, and thus not grist for an algorithm. As a group of "directly impacted mothers, community organizations, and allied advocates" wrote in a recent paper, "We demand a world where systems do not dictate the futures of families, nor are the complexities of human pain, love and need, reduced to checklists and algorithms."²⁵¹

And as the legal apparatus continues importing actuarial techniques from the quantitative and social science set, it must be aware that these questions of what knowledge is seen as legitimate have not been answered and are in fact live and burning there.²⁵² This issue was at the heart of a controversy in child welfare social work practice that bubbled up in late 2021 and early 2022. In October 2021, a collection of social work professors lead by Richard P. Barth, Dean of Social Work

243. *Id.* at 103.

244. *Id.*

245. *Id.*

246. *Id.* at 14–15. D'Ignazio and Klein write that this close relationship is perhaps most clearly visible in the historical arc that begins with the logs of people captured and placed aboard slave ships, reducing richly lived lives to numbers and names. It passes through the eugenics movement, in the late nineteenth and early twentieth centuries, which sought to employ data to quantify the superiority of white people over all others. It continues today in the proliferation of biometrics technologies that, as sociologist Simone Browne has shown, are disproportionately deployed to surveil Black bodies. *Id.*

247. Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV., 2007, 2057 (2022).

248. For discussion of the epistemic harm inherent in being used as a source of information in this way, rather than an active epistemic agent capable of acting as an "informant," see *infra* Section III.C.2.

249. Hong, *supra* note 196, at 932.

250. D'IGNAZIO & KLEIN, *supra* note 242, at ch.4; see also Hong, *supra* note 196 at 927 ("Prediction, like any knowledge regime, has a self-fulfilling element: it sees what it knows to see, and it measures what it can typically imagine measuring.").

251. Albert et al., *supra* note 105, at 871.

252. This question is, of course, not new. It dates back at least as far as the 20th century feminist movement, if not to Aristotle and Descartes. See, e.g., D'IGNAZIO & KLEIN, *supra* note 242, at 97–100.

at the University of Maryland, published a paper in response to the rising calls for family policing system abolition entitled *Research to Consider While Effectively Re-Designing Child Welfare Services*.²⁵³ In it, the team expressed their agreement that “major reforms are warranted,” but faulted the abolitionists for, as the authors claimed, “voic[ing] skepticism about the value of empirical research.” The authors then set out to provide a “summary of current empirical research related to 10 areas of child welfare . . . so that as reform proposals advance, they can benefit from a clear understanding of what, on average, is occurring.”²⁵⁴ The piece then identified ten “misconceptions commonly expressed in the field” that they felt could be debunked by reliance on the empirical literature, which they labeled as “quer[ies]” to be answered:

- Are Low-Income Children Inappropriately Referred to Child Protective Services due to Implicit Bias?
- Are Families who Receive Public Social Services and Have Contact With Mandated Reporters Disproportionately Likely to be Referred to Child Protective Services?
- Is the Racial Disproportionality of Black Children in CPS Substantially Driven by Bias?
- Are Decisions to Substantiate or Place in Foster Care Largely Driven by Racial Bias?
- Is Child Neglect Synonymous With Family Poverty?
- Is Child Neglect Harmful to Children?
- Are Research-Supported Practices Effective for Families of Color?
- Do Foster Children “Grow Up” in Foster Care?
- Does Foster Care Cause Poor Outcomes for Children and Youth?
- Is Adoption Breakdown Common for Former Foster Children?²⁵⁵

The piece set off something of an academic firestorm. In quick succession, seven different sets of scholars published fairly scathing critiques, which then prompted the original authors to respond in kind. One of the most heated portions of the exchange centered on the question “What counts as Evidence in Child Welfare Research?” In a piece under that title, a group of researchers that collectively self-identified as “academics with diverse BIPOC social identities” and which included “the important perspective of those with lived experience . . . with the child welfare system,” argued that the Barth group erred by focusing exclusively on “large-scale population studies with administrative data.”²⁵⁶ The group argued

253. Richard P. Barth, Jill Duerr Berrick, Antonio R. Garcia, Brett Drake, Melissa Jonson-Reid, John R. Gyourko & Johanna K.P. Greeson, *Research to Consider While Effectively Re-Designing Child Welfare Services*, RSCH. ON SOC. WORK PRAC. 1 (2021).

254. *Id.* at 2.

255. *Id.*

256. Emiko A. Tajima, Angelique G. Day, V. Kalei Kanuha, Jessica Rodriguez-Jenkins & Jessica A. Pryce, *What Counts as Evidence in Child Welfare Research?*, 32(5) RSCH. ON SOC. WORK PRAC., 514, 514–20 (2022).

that “it is critical to look at all forms, sources, methodologies, and even divergent standpoints of evidence,” and that to suggest—as they argue the Barth group did—that “the only legitimate ‘evidence’ emanates from standard Western measures and methods . . . discounts the wealth of deep and expansive data generated by community studies, collaborative and participatory methods, case studies, field work, storytelling and story collecting, archival and historical sources, and participant observer/observation in the qualitative tradition.”²⁵⁷ The group went on to argue that “there is complexity, power, and value-based subjectivity in child welfare decision-making that is not well captured in large-scale administrative data.”²⁵⁸

Notably, the original Barth article relied heavily on the work of many of the very same researchers who are responsible for developing family policing’s algorithmic risk-prediction tools.²⁵⁹ The very same questions about how knowledge is created that were being debated in these academic papers are central to the development of these algorithms. What types of knowledge, held and manipulated by whom, should inform decisions about child welfare?

2. Datafication, Objectification

Another way algorithmic family policing stands to perpetrate its own form of epistemic injustice is through the objectification of the families the system targets. By reducing individuals to data points and closing the system off from receiving more robust and complete information from them, the algorithmic turn dehumanizes them, “wrongfully depriv[ing] the[m] of a certain fundamental sort of respect.”²⁶⁰

As we have seen, family policing algorithms are made up of data about individual families. In this way, they do not wholly exclude targeted families from the project of child welfare-related knowledge creation. To the contrary, the families under the system’s gaze hold valuable information that the system needs and, indeed, vacuums up. But there is an important feature of the way the system uses this information that distinguishes this treatment of families from any form of true engagement with them and their complete humanity.

Fricker describes “the distinction between someone’s being treated as an ‘informant’ and their being treated as a ‘source of information.’”²⁶¹ “Informants” on the one hand “are epistemic agents who convey information.” They are whole

257. *Id.*

258. *Id.* at 515. See also Arvind Narayanan, *The Limits of the Quantitative Approach to Discrimination*, James Baldwin Lecture Series, PRINCETON UNIV. (Oct. 11, 2022), https://mediacentral.princeton.edu/media/James+Baldwin+Lecture+SeriesA+%22The+Limits+Of+The+Quantitative+Approach+To+Discrimination%22/1_09yt2nc4 [<https://perma.cc/W9DT-BPH9>] (“We need to let go of our idea of an epistemic hierarchy where some forms of evidence are superior to others.”).

259. See Barth et al., *supra* note 253, at 4 (citing to work by Emily Putnam-Hornstein, Erin Dalton, and Rhema Vaithianathan, among others).

260. FRICKER, *supra* note 13, at 132–33. See also Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQ. L. 1, 19 (2019) (“Actuarial decisionmaking treats human beings as collections of data points . . . in a way that is objectifying.”).

261. FRICKER, *supra* note 13, at 132.

human beings, perceived in their wholeness and seen as capable of engaging in epistemic exchange. “Sources of information,” on the other hand, may be something less than human. They are “states of affairs from which the inquirer may be in a position to glean information.”²⁶²

In its project of reducing families to data points, algorithmic risk prediction erases targeted individuals as complete epistemic agents. It extracts from them the information the system chooses to see, but refuses to consider them in their completeness.²⁶³ In this way, it “strongly recalls the original violence that accompanied the slave trade, when human lives . . . were reduced to numbers and names.”²⁶⁴ This type of reduction “amounts to a sort of dehumanization.”²⁶⁵ It deprives its subjects of epistemic agency, of “opportunities to ‘learn, think, imagine, judge, speak, write, and act’”—opportunities which, if afforded, could “transform[] not only the individual (from victim to activist, for example) but the community, and the society as well.”²⁶⁶ Danielle Keats Citron reminds us that Jean-Paul Sartre described this type of objectification as engendering “pure shame”—“not shame in others knowing something undesirable about us, but rather shame in knowing that we are being seen as objects, or as less than human.”²⁶⁷

The very project of algorithmic risk prediction implies that (certain) children, parents, and families can and should be seen as objects, categorized, and quantified. It supplies a logic by which the predicted aspect—in this case, bad parenting—“appears as a state that inheres in the person.”²⁶⁸ It says that the future is preordained. There is a numerical answer and we are nothing more than the sum of the component parts the machine determines to be relevant. In so doing it “reproduces a mythology of Black inferiority, in part by codifying a transposition of demographic traits that correlate to poor social outcomes” and implying they are

262. *Id.*

263. See Copeland, *supra* note 12, at 161–62 (quoting caseworker as saying “there’s so much that we’re not capturing in terms of just the resilience and . . . how ingenious people, like how genius people are in terms of figuring things out and making shit work . . . , like understanding that families really do ‘make it work’ in so many adverse situations and they really have beautiful social networks that they draw upon”).

264. *Id.* (describing the experience of “converting . . . meeting minutes into data” as part of The Colored Conventions Project (CCP), which aims to “create a machine-readable corpus of meeting minutes from the nineteenth-century Colored Conventions: events in which Black Americans, fugitive and free, gathered to strategize about how to achieve legal, social, economic, and educational justice”) See also Spillers, *supra* note 29, at 73 (describing account from 1700–1702 in which “the names of ships and the private traders” who would receive their cargo are “specifically descri[bed],” but the only evidence of the Black men, women and children bought and sold were represented only as “exactly arithmetical” representations of the “No. Negroes” and “Sum sold for per head”).

265. FRICKER, *supra* note 13, at 133.

266. Linda McClain, *Experimental Meets Intersectional: Visionary Black Feminist Pragmatism and Practicing Constitutional Democracy*, 69 DRAKE L. REV. 823, 853 (2021) (THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN 1, 2 (Stanley M. James & Ahena P.A. Busia eds., Routledge 1993)).

267. DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY, 114 (2022).

268. Hong, *supra* note 196, at 928.

instead “the cause” of these outcomes.²⁶⁹ It makes us think that it is possible “to calculate the souls” of those the system targets.²⁷⁰

D. Carceral Reception

Another way that family policing by algorithm contributes to the system’s epistemic injustice is through the system’s carceral reception of any information generated through algorithmic tools. One way that epistemic injustice becomes visible is through the “particular form[s] of ignorance” it produces in social audiences.²⁷¹ The “larger pattern of injustice” that structures the social and epistemic world “makes certain things highly visible and audible and others nearly invisible and inaudible.”²⁷² In the case of family policing by algorithm, the system has certain carceral blinkers. Only certain messages are intelligible to it—messages around risk to children posed by their parents, as opposed to risk children may face from other sources like the system itself—and only certain interventions appear possible, such as removing children from their parents. Even if we assume that family policing algorithms do or could provide valuable information, because of the hermeneutical gaps in systemic knowledge, information is intelligible to the system only through a carceral lens. Therefore, even a perfect algorithmic tool may be incapable of creating positive change, instead contributing to an epistemic feedback loop in which any information provided to the system is transformed into carceral information or transforms the system into an ever-more carceral institution.

Bernard Harcourt, for his part, discusses a facet of this problem as it manifests in actuarial prediction in criminal spaces. Harcourt writes:

How is it, after all, that purported correlation between prior incarceration and future criminality have led us to profile prior criminal history for purposes of sentencing and law enforcement rather than to conclude that there is a problem with prisons, punishment, or the lack of reentry programs? What conclusions should we draw from the observation that certain groups may be offending at higher rates than others with regard to specific crimes? The numbers, the correlations, the actuarial methods themselves do not answer the questions. It is, again, what we *do*

269. Abdurahman, *supra* note 11, at 84–85.

270. *Id.* at 84.

271. MEDINA, *supra* note 137, at 24. This type of blinkered epistemic existence causes a form of hubris in which the system convinces itself that its way of seeing is the only way to see. Using the metaphor of blindness, Jose Medina describes just how deep the gaps in knowledge in this situation go. Medina describes a concept of “meta-blindness,” which “is unlike any regular sort of blindness in the following respect: a blind person has no access to a whole range of stimulations but typically has an acute awareness that there is much more to the empirical world than what she or he can perceive.” *Id.* Hermeneutical injustice, by contrast, causes a “meta-blindness” in which the audience “arrogantly assumes that there is nothing else to perceive beyond what she or he can see or hear.” *Id.* at 76.

272. *Id.* at 71. “[O]bstacles and limitations in the social imaginary . . . produce the inability to see and hear certain things.” *Id.*

with the numbers that is far more telling.²⁷³

In this way, actuarial tools, like risk prediction algorithms developed to support family policing decision-making, feed into the already violent orientation of the system with whatever information they may be able to provide interpreted by the system as further support for its carceral interventions. Other methods of interpretation may simply be invisible.

An example from a recent study is illuminating here. In *How Child Welfare Workers Reduce Racial Disparities in Algorithmic Decisions*, researchers document an incident in which a local judge “mandated” that the child protective authority “look into [a] family after their child came to a juvenile probationary hearing.”²⁷⁴ The family’s child “was currently incarcerated” and the “family had a number of prior referrals and used a lot of public behavioral health services (50+ times).”²⁷⁵ When the case worker ran the family’s AFST score it was, unsurprisingly, high. The caseworker nevertheless screened out the referral, finding that “because the child was already incarcerated,” (i.e., removed from the parents) “it would be no use to investigate the family.” The researchers chalked this situation up to the algorithm “over-scoring” the family and “neglect[ing] highly-relevant context.”²⁷⁶

Applying the epistemic injustice lens, however, this account takes on a different patina. The AFST here, for better or worse, is providing some information. The system, however, has only one way of interpreting that information. The AFST blares red, saying this child is “at risk.” The caseworker looks at the case and says, too bad, the one intervention available to us—family separation—would be of no use here. Case closed.

Because of the knowledge gaps functioning here, the system—embodied in the caseworker—cannot see any alternate narrative. But there is one, clear as day on the surface of this story. Every indication is that this family could use *support*. We don’t, in fact, need an algorithm to tell us that. But in this instance, the algorithm’s prediction dovetails with what the on-the-ground evidence also points to. The system, however, is incapable of responding compassionately to this information. This narrative is unintelligible to it. The system has one way to receive information, and it is closed to everything else.

The story is, of course, not black and white. There is some indication in the research about algorithmic family-policing tools that suggests certain actors may be able to see around systemic lacunae, to the epistemic gaps the abolitionist movement hopes to see filled. In 2022, the outside computer science researchers responsible for the above-mentioned study published a series of papers on Allegheny County workers’ use of the AFST. The study’s main finding, unsurprisingly but perhaps still alarmingly, was that “the Allegheny Family

273. HARCOURT, *supra* note 223, at 188.

274. Cheng et al., *supra* note 81, at 10.

275. *Id.*

276. *Id.*

Screening Tool on its own would have made more racially disparate decisions than workers.”²⁷⁷ But, contrary to a number of studies that have found humans cowed by algorithmic systems, the researchers also found that “workers were able to reduce this disparity in the algorithm.”²⁷⁸ One explanation for this outcome is that the tool is doing just what advocates have worried it would do but that this ultimately is a feature rather than a bug. Instead of providing accurate predictions of anything about the family, it is merely holding a mirror up to the system, providing a numerical representation of how a systemically racist, classist, and ableist system, according to its own historical patterns, would treat this family. When workers are able to integrate this conception of the tool, they are then able to use its scores as a fulcrum from which to make systemic racism visible and accessible and adjust their behavior accordingly.

The interviews these researchers conducted with workers provide some support for this view. Based on interviews, the researchers found that workers “thought that the AFST over- and under-scored referrals specifically based on system involvement, i.e. welfare, public medical services, criminal history, or CYF history,” and that workers “compensated for what they thought were the AFST’s racial disparities cause by systemic racial biases in CYF reporting and county data collection.”²⁷⁹ One worker reported, for example, that “white people are not reported as much as Black kids” and that they “get a lot of reports on African-Americans and a lot of them are bogus.”²⁸⁰ Another stated “I also think [the AFST is] very biased . . . [T]he whole system is racially biased. . . . It’s the people entering the information [i.e. reporting families] that’s affecting the [AFST] score.”²⁸¹

In the end, the story may be complicated. But we should remain attuned to the way information produced by algorithmic tools can be understood, interpreted, used, and coopted by a system stuck in carceral patterns and limited to violent interventions.

E. Cutting Off Contestation

As the preceding material has shown, algorithmic tools do not simply do neutral science. To the contrary, algorithmic models “are opinions embedded in mathematics.”²⁸² By their very nature, algorithmic tools require policymaking in their formulation.²⁸³ That policymaking, however, is shrouded in a neutral, scientific

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* 21 (Reprint ed. 2017).

283. Danielle Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1288 (2008); Hong, *supra* note 196, at 928 (“[T]he very choice to predict the social enters into a politics of erasing ambiguity. Articulating criminality or productivity as an object of prediction invariably leverages working definitions and heuristics already employed by the investors, engineers, and entrepreneurs involved in the production process—but rarely those of ‘targeted’ populations.”); Eubanks, *supra* note 4, at 224 (“Human

vener. Instead of being done through normal, democratic channels, decision-making is sited elsewhere—behind regressions, machines, and lines of code, with the tool designers. Not only does this cut off the normal routes for democratic contestation in the rule-formulation process, but it also makes it more difficult to contest algorithmically shrouded policies on the back end. But it is those processes through which knowledge is created. After all, “dissent is epistemically productive.”²⁸⁴ By cutting off avenues for democratic policymaking and contestation, the use of algorithmic tools systematically and inequitably impoverishes opportunities for epistemic engagement.²⁸⁵

“[P]ublic discussion of the policies and performances of administrative agencies” is one of the vital “democratic institutions” that holds “epistemic import” in the process of making “dynamic social learning and self-correction possible.”²⁸⁶ This democratic engagement “requires resistance” in the form of “epistemic friction and the mutual contestation of perspectives.”²⁸⁷ For democracy to function as it should, we must “exploit the benefits of productive dissent.”²⁸⁸ To do so, “we need to recognize and take advantage of the heterogeneous situated knowledge of diverse agents” such that “all agents and groups [are] in communication” and able to “interact epistemically, so that they can interrogate each other and cooperate” and their “diverse experiences and reactions” can “be used for critically revisiting and perfecting decisions and policies.”²⁸⁹

When governmental entities enact policies, our system generally requires avenues for this type of contestation—this epistemic engagement. The law understands these avenues as elements of “due process.” In the administrative state structure that grew up over the course of the last century, the twin mechanisms of procedural due process and Administrative-Procedures-Act-style “constraints on rulemaking” “provided a common structure for debating and addressing concerns about the propriety of administrative actions.”²⁹⁰ Agencies generally “exercise broad discretion to pursue either adjudication or rulemaking,” but whatever choice they make, they must abide by the “distinct set of procedures” the selected option brings

discretion is not removed from social service decision-making when we introduce digital tools. It is just *moved*—from frontline caseworkers to engineers, computer programmers, and economists.”).

284. MEDINA, *supra* note 137, at 6 (quoting John Dewey).

285. See Emily Tucker, *Deliberate Disorder: How Policing Algorithms Make Thinking About Policing Harder*, 46 N.Y.U. REV. L. & SOC. CHANGE 86 (2022) (arguing that “the fixed definitions that underly policing algorithms (what counts as transgression, which transgressions warrant state intervention, etc.) relate to an ancient, fundamental, and enduring political question, one that cannot be expressed by equation or recipe: the question of justice” and that “[t]he question of justice is not one to which we can ever give a final answer, but one that must be the subject of ongoing ethical deliberation within human communities”).

286. MEDINA, *supra* note 137, at 6.

287. *Id.* at 11.

288. *Id.* at 6.

289. *Id.* at 6.

290. Citron, *supra* note 283, at 1252.

with it.²⁹¹ Where individual rights were at stake in agency adjudicatory proceedings, procedural due process afforded some semblance of fair contest.²⁹² Where agencies opt for more blanket actions like rulemakings, the federal APA and its state and local counterparts generally set the ground rules, enforcing the creation of opportunities for democratic (epistemic) engagement in the policy formulation process.²⁹³

As Danielle Citron compellingly demonstrated in *Technological Due Process*, the rise of automation upends this tidy structure.²⁹⁴ As Citron explained, “computer systems collapse individual adjudications into rulemaking, making it difficult, if not impossible, to determine whether a decision resulted from factual errors, distorted policy, or both.”²⁹⁵ Government automation also “strips procedural integrity from administrative rulemaking, including the elimination of notice-and-comment participation, transparency, and political accountability.”²⁹⁶

This failure of democratic accountability and opportunities for engagement is true of family policing algorithms. Whereas agency policies traditionally may have been made through administrative directives, coders now may embed policy choices into algorithmic design where they remain shrouded from public view. Take, for example, the case of a newborn child born to a parent with prior involvement with the system. In New York City, the Administration for Children’s Services has promulgated a policy regarding treatment of such cases—Child Safety Alert #14.²⁹⁷ An algorithm could do the same, without the same level of transparency and concomitant opportunity for contestation.

Advocates have attempted to challenge this type of behind-the-code policymaking in cases arising in the benefits, education, and immigration spaces to varying degrees of success.²⁹⁸ But even where litigation might be successful on its own terms, when it comes to the question of epistemic engagement it has proven ineffective. The cases litigated to date have, for the most part, “revealed a common pattern: agencies do not understand and cannot control the machines to which they have delegated their authority.”²⁹⁹

In this way, the turn to algorithmic decision-making impoverishes

291. *Id.*

292. *Id.*

293. *See id.*

294. *Id.* at 1257–58 (“the procedural guarantees of the last century have been overmatched by the technologies of this one”).

295. *Id.* at 1258.

296. *Id.*

297. *See, e.g.*, N.Y.C. ADMIN. FOR CHILD.’S SERVS., GUIDE TO WORKING WITH YOUNG PARENTS IN OUT OF HOME CARE 96 (2018) <https://www1.nyc.gov/assets/acs/pdf/youth/2018/homecare.pdf> [<https://perma.cc/GHC8-V65V>].

298. *See, e.g.*, *K.W. v. Armstrong*, 180 F. Supp. 3d 703, 706 (D. Idaho 2016); *Arkansas Dep’t of Hum. Servs. v. Ledgerwood*, 2019 Ark. 100, 1, 571 S.W.3d 1, 2 (2019); *Houston Federation of Teachers, Local 2415 v. Houston Independent School District*, 251 F.Supp.3d 1168 (S.D. Tex., 2017); *Velesaca v. Decker*, 458 F. Supp. 3d 224 (S.D.N.Y. 2020).

299. Ryan Calo & Danielle K. Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 818 (2020).

opportunities for democratic contestation, thereby limiting the voices that can contribute knowledge to social understanding.

IV. TOWARD EPISTEMIC JUSTICE

We demand a world where systems do not dictate the futures of families, nor are the complexities of human pain, love and need reduced to checklists and algorithms. . . . In this world, we govern our own communities, and have participatory policy making. Parents and community leaders support each other. We come together with our children, eat food, make decisions, and watch the babies play.

Repeal ASFA Coalition³⁰⁰

The preceding sections have shown that the family policing system acts to uphold the existing social order in large part through epistemic injustice—the systematic devaluing of the knowledge held by the targeted community. The system’s turn to risk-prediction algorithms marks an extension of this feature of social control and presents new opportunities for epistemic oppression of the families and communities it targets.

That the existing system is carceral and harmful does not mean that the underlying project—promoting child and family welfare—must be. Getting to the root of where we currently go wrong requires first laying bare the structures—such as epistemic injustice—that operate under the surface. Once we see these structures clearly, we can craft strategies to combat them. If we focus only on the symptoms—the algorithms and their biased outputs, for example—we’ll never reach the roots and merely remain trapped in “adjudicating” the “downstream impact.”³⁰¹ We’ll ask the wrong questions and therefore continue to get the wrong answers. But if the question is “How do we better pursue child and family welfare?” as opposed to “How do we better run our existing family policing system?”, then the answer must involve acknowledging, fostering, and hearing the knowledge generated by impacted communities.

Responses to this Article will range but will certainly include critiques that “the algorithms are already here” and “we can’t just throw it all out and start again.”³⁰²

300. REPEAL ASFA, OUR WORK, <https://www.repealasfa.org/our-work> [<https://perma.cc/DGD5-PRK6>] (last visited Feb. 23, 2024). Repeal ASFA is a coalition of “directly impacted mothers, community organizations, and allied advocates across the country, fighting for family liberation.” REPEAL ASFA, WHO ARE WE?, <https://www.repealasfa.org/who-we-are> [<https://perma.cc/K8GZ-VJXH>] (last visited Feb. 23, 2024).

301. Abdurahman, *supra* note 11, at 85.

302. The question that gets asked any time critiques of algorithmic prediction are raised is always “Well, what would you have us do?”. If not algorithms, then what? Return to the individuated clinical judgment of caseworkers, who we’ve all acknowledged can be biased and inconsistent? Here I agree with Bernard Harcourt: “No. Clinical judgment is merely the human, intuitive counterpart to the actuarial.” HARCOURT, *supra* note 223, at 237. Harcourt writes that instead, we “should look inward”—to the “most central intuition”—to the foundational ideas and motivations of the system at issue. *Id.* In Harcourt’s focus on the criminal legal system, the “most central intuition” is “the idea that any person committing a criminal offense should have the same probability of being apprehended

There are families wrapped up in the system now. There are children identified as at risk now. The system will not fall and be rebuilt overnight. But here it is important to listen to abolitionist writers and organizers who encourage us to see abolition as a practice, not an end. As Mariame Kaba has said, abolition is a horizon.³⁰³ It will continue moving away from us as we approach, but we can nevertheless keep it in our sights. As Deva Woodly describes the Movement for Black Lives' conception of liberation, it is not "binary" (either/or) but an ongoing "process of flight toward freedom . . . the ongoing undoing of common understandings, systems, and practices that (re)produce oppressive conditions."³⁰⁴

The existing system divides and categorizes and assigns value to and detracts value from the knowledge held by the communities it polices. An abolitionist vision, on the other hand, could provide a "radical epistemology," "facilitat[ing] other ways of knowing."³⁰⁵ It "invites us to abandon our attachment to definitive types of knowing and especially to knowing all(s)."³⁰⁶ And it encourages us to let "go of attachments to forms of knowledge that rely on certainty (what are the definitive consequences of doing or not doing); prescription and professional expertise (tell us what should be done); and specific demands for futurity (clairvoyance- what will happen)."³⁰⁷ In other words, in many ways the "relational grammar" of risk prediction algorithms may be antithetical to true progress toward a just society.

In place of the traditional, certain, prescriptive, professional, clairvoyant types of knowledge we currently prioritize, we could build a new, different, and altogether better system through reliance on the knowledge, understanding, stories, and word of those most impacted by current policies. Through this "act of creating an alternative version of the world," we might "help[] to heal the anguish of oppression."³⁰⁸ By listening to and lifting up those voices, who knows what kind of society we could create?³⁰⁹

as similarly situated offenders." *Id.* Harcourt therefore recommends randomization: randomly sampling for criminal legal enforcement. A similar logic could be applied to family regulation. *Id.* We could wish that any child experiencing or any parent engaging in abuse or neglect should have the same probability of coming to the attention of the system as any similarly situated child. Such a goal does not, however, go far enough to answer to the "most central intuition" of social policy. It presumes that the intervention the system provides is one that holds social value. But we can now acknowledge that the family regulation system is an extension of the carceral logic that animates the criminal legal system. The interventions it offers are themselves often harmful. And to the extent they are harmful, such an approach would merely advocate spreading the harm equitably as opposed to the inequitable ("disproportionate") impact we see today.

303. See, e.g., Mariame Kaba, *Towards the Horizon of Abolition, in WE DO THIS 'TIL WE FREE US* 185 (2021).

304. DEVA R. WOODLY, RECKONING: BLACK LIVES AND THE DEMOCRATIC NECESSITY OF SOCIAL MOVEMENTS 61–62 (2022).

305. Ben-Moshe, *supra* note 24, at 4.

306. *Id.*

307. *Id.* See also Narayanan, *supra* note 258 ("We need to let go of our idea of an epistemic hierarchy where some forms of evidence are superior to others.").

308. Roberts, *supra* note 119, at 636.

309. MEDINA, *supra* note 137, at 75. ("[T]he experience of being hermeneutically disadvantaged

In 2005, Professor Dorothy Roberts wrote about the history of what she called “Black Club Women.”³¹⁰ In the early Twentieth Century as the white “child saving” movement gathered steam, Black women found themselves “excluded from elite white women’s campaigns” at the same time that Black children in need were “ignored by the institutions” the white “child savers” founded.³¹¹ Black women with some means then organized together in “women’s clubs and church groups,” “essentially establish[ing] a separate child welfare system” for Black families—one suffused with their “own philosophy,” their own “perspective,” which “differed drastically from the punitive approach” the white movement prioritized (and which survives in the modern system today).³¹² Seen through the Black Club Women’s lens, the project of child welfare was tied inextricably to “racial advancement and justice.”³¹³ Accordingly, the apparatus Black women built in this period was marked by three features that placed it in stark contrast with the white-constructed system. First, it considered children’s social context, recognizing “the relationship between the well-being of individual children and their group identity and social surroundings.”³¹⁴ Second, it was concerned with lifting up the community as a whole, “focused on improving the general welfare of children rather than responding to particular cases of child maltreatment.” And third, it was supportive, “promot[ing] children’s welfare by supporting, rather than punishing, mothers.”³¹⁵ It was, in many ways, “more progressive than today’s” system.³¹⁶

Today, instead of privileging carceral data, computer scientists, and technocrats, we can instead choose to inform law and policy with new ways of thinking about child and family welfare and wellbeing. We can take inspiration from the concept of “design justice.” As described by Sasha Costanza-Chock, a design justice approach “does not focus on developing systems to abstract the knowledge, wisdom, and lived experience of community members” but instead prioritizes “trying to ensure that community members are actually included in meaningful ways.”³¹⁷ It would “center community needs over tools” and “avoid ‘parachuting’

can become an epistemic advantage—or at least the seed or foundation for possible epistemic advantages, the springboard for learning processes that can lead to alternative epistemic perspectives or the expansion of existing ones. Because the hermeneutically privileged (or non-disadvantaged) do not have the experience of being unable to properly conceptualize certain things, they have little opportunity to realize (and little motivation to accept) that there is more to see and talk about than what the culturally available hermeneutical tools enable people to recognize. By contrast, the hermeneutically disadvantaged may be more attentive to the “hermeneutical gaps,” able to see and hear what the dominant groups cannot.).

310. Dorothy Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 FL. ST. U. L. REV. 957 (2005).

311. *Id.* at 957.

312. *Id.* at 958–59.

313. *Id.* at 958.

314. *Id.*

315. *Id.*

316. *Id.* at 971.

317. COSTANZA-CHOCK, *supra* note 240, at 84.

technologists into communities.”³¹⁸

Attempts at such forms of knowledge production can be seen in the growing stable of parent organizing and community-based participatory research³¹⁹ projects and organizations attacking the family policing problem.³²⁰ In 2021, New York City-based parent leadership organization Rise along with legal, research, and policy organization TakeRoot Justice conducted one such project to “document[] parents’ experiences with the family policing system and explore[] a collective vision to transform our society’s structures, policies and practices related to family and community support.”³²¹ The result was a report published in September 2021: *An Unavoidable System: The Harms of Family Policing and Parents’ Vision for Investing in Community Care*.³²² The project yielded a number of concrete recommendations of steps New York City could take to reduce the harm its family policing system causes and build toward a better future. Those recommendations included:

- Reducing reports to the Statewide Central Register of Child Abuse and Maltreatment
- Divesting from the Administration for Children’s Services (ACS) and investing in communities
- Reducing investigations and the harm of investigations
- Shrinking the Statewide Central Register, and
- Providing reparations.³²³

The work of these organizations is important and inspiring, but it is not enough. On a systemic level, we need structures that allow those in power to listen

318. *Id.* at 99.

319. *See, e.g.*, Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795 (2023); MICHELLE FINE & MARIA ELENA TORRE, ESSENTIALS OF CRITICAL PARTICIPATORY ACTION RESEARCH 5 (Am. Psych. Ass’n 2021); Marie-Claude Tremblay, Debbie H. Martin, Alex M. McComber, Amelia McGregor & Ann C. Macaulay, *Understanding Community-based Participatory Research Through a Social Movement Framework: A Case Study of the Kahnawake Schools Diabetes Prevention*, 18:487 BMC PUB. HEALTH 1 (2018) (“Community-based participatory research (CBPR) is an approach to research that involves collective, reflective and systematic inquiry in which researchers and community stakeholders engage as equal partners in all steps of the research process with the goals of educating, improving practice or bringing about social change . At its core, CBPR questions the power relationships that are inherently embedded in Western knowledge production, advocates for power to be shared between the researcher and the researched, acknowledges the legitimacy of experiential knowledge, and focuses on research aimed at improving situations and practices. This approach to research is recognized as particularly useful when working with populations that experience marginalization—as is the case for some Indigenous communities—because it supports the establishment of respectful relationships with these groups, and the sharing of control over individual and group health and social conditions.” (internal citations omitted)).

320. *See also, e.g.*, THINK OF US, DEPARTMENTS, <https://www.thinkof-us.org/about/center-for-lived-experience> [<https://perma.cc/9PQV-W2HC>] (last visited Feb. 23, 2024).

321. ERIN MARKMAN, IRENE LINARES, TRACY SERJENIAN & NORA MCCARTHY, AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS’ VISION FOR INVESTING IN COMMUNITY CARE (2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf> [<https://perma.cc/42XX-96DR>].

322. *Id.*

323. *Id.* at 7.

for and to the knowledge of those the system currently targets without objectification.³²⁴ Impacted families know what they need. Marginalized mothers know what their children need. A hopeful future lies not in building better algorithms, but in abolishing old ways of doing business, old ways of policing whose voices matter and whose knowledge is valid, and embracing the rich knowledge targeted families hold.

CONCLUSION

The migrating birds return each year, for now anyway, and I have not yet been reduced to an algorithm.

Jenny Odell³²⁵

The modern family policing system is built on structures that are rooted in and reinforce existing inequities. One such structure is epistemic injustice. Risk-prediction algorithms built to support the current system will inevitably reflect and reify its existing features—including the epistemic injustice it perpetrates. Instead of seeking to encode today's inequities, we should design new ways of co-creating knowledge about what will keep children safe and families thriving.

* * *

324. See Collins, *supra* note 115, at 129 (“People are rarely powerless, no matter how stringent the restrictions on our lives.”); BROWNE, *supra* note 186, at 21–24.

325. JENNY ODELL, HOW TO DO NOTHING: RESISTING THE ATTENTION ECONOMY 202 (2019).