

## PATHOLOGY LOGICS

*S. Lisa Washington*

**ABSTRACT**—Every year, thousands of marginalized parents become ensnared in the family regulation system, an apparatus more commonly referred to as the child welfare system. In prior work, I examined how the coercion of domestic violence survivors in the family regulation system perpetuates harmful knowledge production and serves to legitimize family regulation intervention. This Article focuses on another logic deeply embedded in the family regulation system: the pathologizing of impoverished and racialized groups. Scholars have discussed the pathologizing of marginalized groups to describe a host of different phenomena. In this Article, “pathology logic” refers to a logic that produces notions of individual responsibility, renders the structural conditions of poverty and racism invisible, and obscures resistance. Three key elements contribute to this logic. One, the policing of emotions by family regulation actors through ostensibly neutral behavioral descriptors. Two, the coercion of mental health evaluations and treatment that produce a formal clinical label. Three, the exacerbation and exploitation of emotional distress linked to family regulation intervention. The pathology label legitimizes intrusive state intervention into marginalized families’ lives and reifies their subjugation.

This piece makes three significant contributions to the ongoing debate over the family regulation system’s role in the carceral state. First, it provides a definition of pathology logics in “child welfare.” Next, it examines the procedural and institutional drivers of pathology logics. Finally, this Article traces the language of pathology logics by showing how ostensibly neutral behavioral descriptors are used to police emotions and label marginalized families “deficient.” Pathology logics distract from the structures that render families in marginalized communities hyper-visible to the state, conceal the interconnectedness of carceral systems, obscure the destabilizing effects of poverty and racism, and erase the expertise of directly impacted families by equating resistance with pathology. Pathology constructs who is and is not “capable” of parenting without state intervention. Instead of centering incremental reform, this Article concludes by highlighting ways to shift power.

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“We’re going to fix you . . . .”

—Jessamine Chan†

## INTRODUCTION

When Malcolm X was six years old, his father was murdered by white supremacists.<sup>1</sup> His mother was forced to raise him and his six siblings alone. The family fell into poverty and quickly became the subject of a family regulation<sup>2</sup> investigation.<sup>3</sup> State caseworkers routinely came to their home, questioned the children separately, documented these conversations, and surveilled their mother. Malcolm X recounts in his autobiography: “They acted as if they owned us, as if we were their private property.”<sup>4</sup> Over time, the family regulation system removed all seven children from their home. His mother, who initially fought back, gradually deteriorated after the removal of her children. She was committed to a mental hospital, where she remained for twenty-six years. Malcolm X and his siblings grew up in separate homes. He recounted:

I truly believe that if ever a state social agency destroyed a family, it destroyed ours. We wanted and tried to stay together. Our home didn’t have to be destroyed. But the Welfare, the courts, and their doctor, gave us the one-two-three punch. And ours was not the only case of this kind.

. . . [K]nowing how they had looked at us as numbers and as a case in their book, not as human beings. And knowing that my mother in there was a statistic that didn’t have to be, that existed because of a society’s failure . . . .<sup>5</sup>

While the story of Malcolm X and his family is situated in 1930s Michigan, it is neither outdated nor geographically unique. Indeed, in the

† JESSAMINE CHAN, *THE SCHOOL FOR GOOD MOTHERS* 75 (2022).

<sup>1</sup> MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 10 (1965).

<sup>2</sup> I use the term “family regulation system” instead of “child welfare system.” See S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1103 (2022). Other scholars also use the term “family regulation system” or “family policing system” to highlight the punitive and coercive nature of the “child welfare system.” See, e.g., Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/Y5SJ-6WJU>] (arguing that the “child welfare system” can be more accurately described as the “family regulation system”); Emma Williams, *‘Family Regulation,’ Not ‘Child Welfare’: Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586> [<https://perma.cc/VGF3-CR55>] (making the case that reclaiming and changing language is a key reform tool for both practitioners and scholars); Tarek Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. (forthcoming 2023).

<sup>3</sup> MALCOLM X, *supra* note 1, at 17.

<sup>4</sup> *Id.* at 13.

<sup>5</sup> *Id.* at 22.

United States, family separation is quite common.<sup>6</sup> In 2019 alone, 251,359 children entered the foster system.<sup>7</sup> Black families are overrepresented. While Black children represent about 14% of the population, they make up 23% of children in the foster system.<sup>8</sup> As a public defender in New York City, I worked alongside numerous parents in child neglect proceedings. In many of them—examples of which I recount below—parents faced an uphill battle against racialized, gendered, and classist pathologizing.

Alicia Green was a first-time parent.<sup>9</sup> She and her mother had diligently prepared for the new family member, and although he was eagerly

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<sup>6</sup> See, e.g., Elizabeth Brico, *Doctors Drug Test Black and Poor Families at Higher Rates, Risking Family Separation*, TALK POVERTY (Dec. 1, 2021), <https://talkpoverty.org/2021/12/01/doctors-can-drug-test-new-parents-without-consent-pick-depends-race-class/> [<https://perma.cc/4LY5-QCDC>] (discussing the case of Ericka Brewington, whose child was removed after postnatal drug testing done without her knowledge or consent); ABIGAIL KRAMER, BACKFIRE: WHEN REPORTING DOMESTIC VIOLENCE MEANS YOU GET INVESTIGATED FOR CHILD ABUSE 1–2 (2020), [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer\\_Mar312020\\_v1.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer_Mar312020_v1.pdf) [<https://perma.cc/HJQ9-QPDH>] (examining the common practice of opening a family regulation investigation after a domestic violence survivor files a report); Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. FOOTNOTE F. 68, 75 (2017) (discussing the case of Yolanda, whose newborn baby was forcibly removed from her in the middle of the night); Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 386–88 (2019) (discussing the case of Josephine, whose son Evan was removed and separated from his parents for a year after a false medical diagnosis); Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 131–34 (2020) (sharing her family’s own experience with the “intertwining of supposed rehabilitative services and regulative, coercive control” of the family regulation system); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 651–53 (2021) (telling the story of Angeline Montauban’s five-year-long fight to regain custody of her son, who was two years old when he was removed from her care and placed in the foster system).

<sup>7</sup> CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 – NO. 27, at 1 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [<https://perma.cc/8ZDM-PZCX>].

<sup>8</sup> *Black Children Continue to Be Disproportionately Represented in Foster Care*, KIDS COUNT DATA CTR. (Apr. 13, 2020), <https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity> [<https://perma.cc/Z8U4-E2G8>]; see also Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. 253, 262 (2020) (“[R]acism has been embedded in child welfare systems’ policies and structures to first exclude Black children from involvement and later to perpetuate oppression against them.”); MOVEMENT FOR FAM. POWER, “WHATEVER THEY DO, I’M HER COMFORT, I’M HER PROTECTOR.”: HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 26–29 (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> [<https://perma.cc/9S5K-J6XK>] (examining the historical context of racial disproportionality in the family regulation system).

<sup>9</sup> The Introduction recounts the stories of several parents ensnared in the family regulation system. To preserve confidentiality, all names and other details have been changed. My own research about the

anticipated, the first weeks with the baby were unexpected. Child Protective Services (CPS) had been in Ms. Green's life since he was born. While she was in the hospital, she disclosed that she had smoked marijuana sometime after giving birth. Shortly thereafter, CPS scheduled a "child safety conference" to address her admission and decide whether Ms. Green would be allowed to continue to care and bond with her newborn or whether to remove him from his home and place him in the foster system with a stranger. Up until then, Ms. Green had no prior experience with the family regulation system.

At this crucial stage, she—like most low-income parents in her position—was not represented by counsel. When Ms. Green learned that CPS was contemplating taking her baby away, she got into a heated argument with the CPS caseworkers. At the conference, CPS decided to file a neglect case in family court against Ms. Green, remove her baby, and place him with strangers. To get her baby back, they said, she would have to complete a drug treatment program, undergo a mental health evaluation, and complete both a parenting class and an anger management class. The petition—the charging document in family regulation cases filed with the court—accused Ms. Green of being erratic and aggressive during the child safety conference and falling asleep in the hallway before the conference. She was also accused of smoking marijuana without being in a rehabilitative drug treatment program. Later, Ms. Green said that yes, she had been tired—as a new mother she was still adjusting to sleepless nights. CPS surveillance in her home and the threat of losing her baby just weeks after his birth had been terrifying, exacerbating her inability to sleep. And yes, she had been upset, tired, and scared during the conference.

After reading CPS's petition containing the allegations, the judge ordered Ms. Green to leave her baby in the courtroom. With only ten minutes before the courthouse was scheduled to close that afternoon, the judge put the case on the docket for the next day. That afternoon, Ms. Green went home without her newborn son, who remained in the "Children's Center" with many other removed children awaiting more permanent placement with strangers.<sup>10</sup>

Tamara Jones had always been protective of her children. Two years before her children were removed from her care, Ms. Jones's ex-boyfriend

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family regulation system is informed by my experience working as a public defender and representing parents.

<sup>10</sup> See generally John Kelly, *In Foster Care, Emergency Shelters Frequently Come Under Fire*, IMPRINT (Mar. 11, 2019, 9:42 AM), <https://imprintnews.org/featured/foster-care-emergency-shelters-frequently-under-fire/34160> [<https://perma.cc/Y6RG-P62C>] (highlighting how foster children are often placed in unsafe temporary emergency shelters, known as "Children's Centers," for long periods of time).

was arrested for punching her and CPS investigated the family. When things did not improve in their relationship, Tamara decided to leave him and limit their relationship to co-parenting. But even after their separation, he would not leave her alone. He sent her threatening messages, followed her and her friends, and called her almost daily. Despite becoming increasingly afraid, she knew how attached the children were to their father. She continued to do pickups and drop-offs with him in public spaces.

Then one day, she decided to fight back. During a heated argument in which he accused her of having a new partner, her ex-boyfriend had the children locked in his car and refused to open the doors. Ms. Jones pleaded with him to let the children out of the car. When he did not, she panicked and, for the first time, she hit him. After someone called 911, Ms. Jones was arrested. The children were removed from her and placed with their father, who immediately filed for full custody. In family court, the judge ordered Ms. Jones to complete a parenting class and an anger management class to get her children back. It was only the beginning of a yearlong intervention by the family regulation system.

When Jackie Williams suspected that her husband was harming her son, she left him and their shared apartment. Without any family support in the city, she was forced to enter the shelter system. Families who seek shelter placement in New York City must go through the Prevention Assistance and Temporary Housing Office (PATH), the Department of Homeless Services (DHS)'s shelter-assessment center, where families spend hours waiting to be placed in a permanent shelter. Families often spend the entire day at PATH before they are assigned a shelter unit somewhere in the city—often far away from their place of employment or school. Applicants at PATH must affirmatively prove that they have no other place to go and provide identifying documents.

After many hours at PATH, Ms. Williams's toddler became agitated and started crying. She knew that the smartphone she had just placed on the conveyer belt could distract him. When Ms. Williams reached for the phone, a DHS officer grabbed her wrist. As Ms. Williams reflexively tried to escape the grip, she scratched the officer's hand. The officer called 911 and Ms. Williams was arrested for the first time in her life. Alerted by the police, CPS came to PATH, checked her son's body for marks and bruises, placed him in the foster system, and filed a neglect case against Ms. Williams. Determined to fight for the return of her child—they had never been separated before—Ms. Williams asked for an emergency hearing in court. After a hearing that lasted several weeks, the court ordered the return of her son under the condition that Ms. Williams undergo a mental health

evaluation, disclose the evaluation to CPS, and engage in parenting and anger management classes.

Danielle Smith and her children lived in public housing. Like many other public housing units, the family's home had a rodent and roach problem. Ms. Smith made numerous requests for repairs and extermination. Her landlord ignored them. She suspected that he wanted to evict her family to sell the unit, which he later did. Although CPS was aware that Ms. Smith had just secured a newly renovated apartment, they filed a neglect case, accusing her of harming her children by living in a "messy" apartment. Their report detailed the conditions of the home and suggested an underlying mental health issue. Ms. Smith was asked to complete a mental health evaluation, engage in therapy, complete a parenting skills class, and cooperate with in-home preventive services.

While these vignettes are based on my experience as a public defender and clinical teacher in New York City, the ways that the family regulation system targets marginalized families and communities is not New York-specific.<sup>11</sup> Indeed, there is reason to believe that robust holistic family defense practices<sup>12</sup>—as they exist in some public defense offices in New York City and a few other parts of the country<sup>13</sup>—offer more protection than other jurisdictions do, especially where indigent parents' right to counsel is

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<sup>11</sup> See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 3–6, 10–14 (2002) (relaying stories of several Illinois mothers' individual struggles to regain custody of their children after family regulation intervention); Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1789–92, 1803 (2019) (examining how the family regulation system surveils and controls low-income families in Rhode Island); Stephanie Smith Ledesma, *The Vanishing of the African-American Family: "Reasonable Efforts" and Its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 37–38 (2014) (discussing the disproportionate targeting of Black families by the family regulation system generally and providing statistics on Texas, California, and Florida in particular); see also Dettlaff & Boyd, *supra* note 8, at 253–56 (discussing the pervasive racial disparities in the family regulation system).

<sup>12</sup> Holistic defense refers to a defense model practiced in some public defense offices, in which lawyers and advocates work on interdisciplinary, collaborative teams to reach their clients' goals. Holistic defense does not merely address but anticipates enmeshed consequences of criminal legal system involvement. See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 627–33 (2006); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1071–74 (2004). Some examples of organizations that provide these services include Brooklyn Defenders Services, The Bronx Defenders, the Neighborhood Defender Service of Harlem, and Still She Rises.

<sup>13</sup> Still She Rises in Tulsa, Oklahoma is the first public defense office in the United States to exclusively represent mothers in both criminal and family court. Like Brooklyn Defenders Services, The Bronx Defenders, and the Neighborhood Defender Service of Harlem, Still She Rises works alongside mothers on interdisciplinary teams. See STILL SHE RISES: TULSA, <https://www.stillshe rises.org/> [<https://perma.cc/GM3K-NM6Y>].

limited.<sup>14</sup> These individual stories are just a few examples of the pervasive pathology logics that exist in the family regulation system.<sup>15</sup>

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Every year, thousands of Black and brown parents in marginalized communities all over the country are impacted by the family regulation system. They are coerced into undergoing mental health evaluations and participating in mental health treatment; subjected to intrusive surveillance of themselves, their family, and their community; required to disclose information that might be used against them; and met with labels that reinforce gendered and racialized stereotypes under the guise of child safety. Families are required to comply with family regulation actors to avoid the “civil death penalty”—the permanent severance of the parent–child relationship.<sup>16</sup>

Against the backdrop of penal-abolition demands, directly impacted parents, activists, and scholars have highlighted the shared carceral logic of the family regulation system and the criminal legal system.<sup>17</sup> Still, the mainstream narrative about the family regulation system is that it keeps children safe from abusive parents. Black parents in particular are depicted as less capable of parenting and less willing to protect their children

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<sup>14</sup> Thus far, the Supreme Court has not explicitly recognized a right to counsel for parents in family regulation cases. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981). Not all states recognize a categorical right to counsel for parents in family regulation cases. Oregon, Nevada, Missouri, Mississippi, Vermont, and Delaware afford only a discretionary appointment of counsel for accused parents in abuse, neglect, and dependency proceedings. See *Interactive Map*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/BY67-CHLQ>] (filter map for “Abuse/Neglect/Dependency – Accused Parents”).

<sup>15</sup> E.g., Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 771–72 (2021) (examining the pathology logic embedded in federal family regulation policy); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 129 (2017) (arguing that the state disrupts poor families because pathology logics dictate harsh intervention as the only way to keep children safe).

<sup>16</sup> See Washington, *supra* note 2, at 1131; Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins & Kelis Houston, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 866–67 (2021).

<sup>17</sup> E.g., Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 292–93 (2021) (discussing the parallels between the family regulation system and the criminal legal system); Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37, 84–85 (2022) (“[C]hild welfare’ and policing are not just parallel, mirrored realities. The two systems are connected and feed one another . . .”).



compared to white middle-class parents.<sup>18</sup> In response, scholars,<sup>19</sup> directly impacted families,<sup>20</sup> public defenders,<sup>21</sup> and community advocates<sup>22</sup> question the premise that the family regulation system keeps children safe.

In this Article, the term “pathologizing” refers to the myriad of procedural and institutional mechanisms that focus on or produce individual “deficits” while rendering the structural conditions of poverty and racism that underlie family safety invisible. I focus on three phenomena that contribute to this logic. *One*, the policing of emotional expressions in ostensibly neutral ways. *Two*, the coercion of mental health treatment and evaluations that produce clinical labels. *Three*, the exploitation and exacerbation of emotional distress to justify state intervention. This Article conceptualizes these three phenomena as related. In some cases, they operate as a series of steps that cumulate in the pathologizing of parents.

The family regulation system cements what I call the “poverty-to-family-regulation downward spiral.” By this I mean the cycle in which impoverished people experience heightened surveillance, which culminates in even more government intrusion through coercive services that ostensibly “correct deficient behavior” but instead perpetuate gendered, racialized, and ableist marginalization.<sup>23</sup>

<sup>18</sup> Tricia Stephens, *Black Parents Love Their Children Too: Addressing Anti-Black Racism in the American Child Welfare System*, 67 SOC. WORK 191, 192 (2022).

<sup>19</sup> E.g., Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L.F. 1, 5, 13–14, 27 (2022) (arguing that CPS’s own data shows that supporting families rather than surveilling and regulating them is more effective); Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J.L. & POL’Y 73, 73 (2012) (highlighting the ineffectiveness of the system in preventing mistreatment of children).

<sup>20</sup> See NAASHIA B., SHAMARA KELLY, MELISSA LANDRAU, YVONNE SMITH, HALIMAH WASHINGTON & IMANI WORTHY, RISE & TAKEROOT JUST., AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS’ VISION FOR INVESTING IN COMMUNITY CARE app. C at 33 (2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf> [<https://perma.cc/AN35-B85X>].

<sup>21</sup> Cloud et al., *supra* note 6, at 84 (“[T]he child welfare system is now structurally designed to police families in order to ‘monitor, regulate, and punish poor families of color’ instead of assisting families in actual need.” (quoting Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS.ORG: FRONTLINE, <https://perma.cc/K3HR-C5K6>)).

<sup>22</sup> B. ET AL., *supra* note 20, app. D at 33 (“Harm does occur in our society and within families, and steps must be taken to prevent and address harm—but reports and system intervention don’t ensure that children are protected. The family policing system does not create safety or effectively prevent or respond to harm. In fact, many children are harmed while in the foster system.”).

<sup>23</sup> E.g., NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 8–9, 15 (1999) (describing the gendered and racialized stigma single mothers face in custody disputes); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN’S L.J. 19, 21–28 (1995) (explaining that the majority of single-parent families are led by women and about half of children living in poverty are raised in single-parent households, and arguing that the poverty of these families is then pathologized); Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J.

Pathology logics have long been a tool of subjugation.<sup>24</sup> Health-justice scholarship addresses the important connections between poverty, race, and health inequalities.<sup>25</sup> Recent scholarship sheds some light on the relationship

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WOMEN & L. 341, 346–50 (2001) (arguing that welfare discourses are embedded in the “cultural perception of single motherhood as pathological”); Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournier, *The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 YALE L. & POL’Y REV. 157, 177–78 (2020) (observing that despite the promise of the Americans with Disabilities Act, in the family regulation system, disability is used to label parents “unfit”); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 128 (2016) (arguing that “child welfare policies and practices . . . are based on the presumption” that parents with an intellectual disability are “unfit to raise their children”); Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 L. & PSYCH. REV. 205, 226–40 (2015) (discussing the presumption of “unfitness” for parents with mental illness in termination of parental rights proceedings); Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1325–32 (2022) (highlighting the pervasiveness of the assumption that parents with disabilities “are inherently unfit or unable to learn the skills required to parent” and discussing how the medical model of disability is informed by the pathologizing of individuals).

<sup>24</sup> The “Moynihan Report” arguably catapulted the idea of Black family pathology into the mainstream. The report argued that the decline of the Black nuclear family contributed significantly to social inequality. See DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 30 (1965) (noting that many Black children “are in danger of being caught up in the tangle of pathology,” although acknowledging that “not every instance of social pathology . . . can be traced to the weakness of family structure” (emphasis omitted)); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 15 (1997); Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 50 (2010) (observing that the Moynihan Report made single Black mothers “damnable” and condemned fatherless Black families); I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185, 229 (2018) (arguing that feminists have often contributed to and relied upon a discourse that “is consistent with discourses that focus on sex workers as public nuisances, immoral, and pathological”); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1646 (2021) (examining the relationship between morality and the history of disorderly conduct offenses); Matthew P. Ponsford, *The Law, Psychiatry and Pathologization of Gender-Confirming Surgery for Transgender Ontarians*, 38 WINDSOR REV. LEGAL SOC. ISSUES 20, 21 (2017) (discussing the construction of trans people as disordered); Quaylan Allen & Henry Santos Metcalf, “Up to No Good”: *The Intersection of Race, Gender, and Fear of Black Men in US Society*, in *HISTORICIZING FEAR* 19, 20–25 (Winsome M. Chunn & Travis D. Boyce eds., 2020) (discussing social constructions and fear of Black masculinity).

<sup>25</sup> Phoebe Jean-Pierre, *Medical Error and Vulnerable Communities*, 102 B.U. L. REV. 327, 367 (2022); Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiyah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y L. & ETHICS 122, 130–36 (2020); Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 L. & SOC’Y REV. 275, 293–94 (2008) (examining the intersections of incarceration and health disparities); Yael Cannon, *Injustice Is an Underlying Condition*, 6 U. PA. J.L. & PUB. AFFS. 201, 219–51 (2020) (applying the principles of health justice to food insecurity and housing as a framework to inform how the law can mitigate health disparities); Wyatt Koma, Samantha Artiga, Tricia Neuman, Gary Claxton, Matthew Rae, Jennifer Kates & Josh Michaud, *Low-Income and Communities of Color at Higher Risk of Serious Illness if Infected with Coronavirus*, KAISER FAM. FOUND. (May 7, 2020), <https://www.kff.org/coronavirus-covid-19/issue->

between pathology, family regulation, and poverty.<sup>26</sup> *Pathologizing Poverty* by Professors Helena Hansen, Philippe Bourgois, and Ernest Drucker, in particular, describes how poor people have been forced to get diagnosed with a mental illness and medicated to qualify for welfare.<sup>27</sup> And Professor Khiara Bridges examines how the “moral construction of poverty” deems poor people inadequate and flawed based on their identity as poor: “[T]he state intervenes in poor families in the way that it does—dramatically, harshly, completely—because the moral construction of poverty counsels that rupturing families while trying to fix bad parents is the proper course of action.”<sup>28</sup>

This piece contributes to this literature by addressing the procedural mechanisms, institutional logics, and family-regulation-specific language that drive and perpetuate pathology logics within the family regulation system. This Article draws on an analysis of language, legal doctrine, narratives, and my own practice experience as a public defender to articulate how procedural mechanisms, institutional structures, legal concepts, and language perpetuate pathology logics.

This Article argues that pathology logics in the family regulation system perpetuate the oppression and subjugation of marginalized individuals, families, and communities.<sup>29</sup> Once the label of pathology attaches, it justifies intervention, surveillance, and even permanent family separation. In this way, “[c]hild welfare officials camouflage their actions behind a rhetoric of diagnosis and treatment.”<sup>30</sup> Pathology logics distract from the structures that render marginalized families hyper-visible to the

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brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus [https://perma.cc/VTJ3-ASLL]; ELIZABETH TOBIN-TYLER & JOEL B. TEITELBAUM, ESSENTIALS OF HEALTH JUSTICE: A PRIMER, at ix (2019).

<sup>26</sup> E.g., Mack, *supra* note 15, at 791–97 (2021) (arguing that the Family First Prevention Services Act from 2018, ostensibly there to prevent child removals and assist families, reifies the pathologizing of parents in marginalized communities); Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 492 (2021) (arguing that the pathology of Black unmarried mothers “was constructed in distinctly economic terms,” in which Black motherhood was discussed as the “root cause of poverty” responsible for “intergenerational Black dependency”).

<sup>27</sup> Helena Hansen, Philippe Bourgois & Ernest Drucker, *Pathologizing Poverty: New Forms of Diagnosis, Disability, and Structural Stigma Under Welfare Reform*, 103 SOC. SCI. & MED. 76, 76–82 (2014) (examining how the restriction of welfare support that made increased medicalization and permanent mental health diagnosis the only way to receive public-benefits support stigmatized poor people, thus making pathology a “valuable survival strategy”).

<sup>28</sup> BRIDGES, *supra* note 15, at 37–64, 129.

<sup>29</sup> To be clear, pathology is an instrument of oppression beyond the family regulation system. See, e.g., Ponsford, *supra* note 24, at 21 (examining the pathologizing of transgender individuals in Canada).

<sup>30</sup> Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 173 (2003).

state, conceal the interconnectedness of carceral systems, obscure the destabilizing effects of poverty and racism, and erase the expertise of directly impacted families and communities. The pathologizing of parents has a social function—pathology operates to construct who is and who is not “capable” of parenting without state intervention, and against which parents intrusive and even permanent intervention is justified.

The Article proceeds in four parts. Part I defines family-regulation-specific pathology logics for the purposes of this Article. It then traces the history of pathology logics from “unworthy poor” narratives and the Temporary Assistance for Needy Families program to more recent social services barriers. I argue that pathology logics are deeply embedded in the history of family regulation dating back to Indian boarding schools, slavery, and the Orphan Trains.

Part II discusses the distinct procedural and institutional drivers of pathology logics. It discusses “perpetual witnesses,” the changing of allegations, parallel processes, and the “labeling continuum” as procedural drivers of pathology logics. I argue that the pervasive nature of pathology logics in the family regulation system is particularly clear in two types of cases: one, when kinship networks and community members are excluded from supporting another family member or close friend because of a criminal record. And two, when the family regulation system prosecutes those whom it is tasked with protecting: children in the foster system who become parents.

Part III maps the language that perpetuates pathology logics by examining how the family regulation system polices emotions and weaponizes behavioral descriptors. Together, procedural mechanisms, institutional logics, and language make the family regulation system particularly vulnerable to pervasive notions of individual responsibility and deficits that must be “cured.” The “cure” is elusive where the “deficits” are caused, or at least exacerbated by, the family regulation system itself and the goalposts continuously change.

Part IV suggests ways that shifting power can successfully intervene in existing pathology logics.<sup>31</sup> I argue that a power shift requires (A) recognizing and valuing parental expertise, (B) investing in community knowledge and leadership, (C) shifting language, and (D) movement lawyering that supports community demands for financial resources and legal support.

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<sup>31</sup> See ANGELA J. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, *ABOLITION. FEMINISM. NOW.* 5 (Naomi Murakawa ed., 2022) (framing structural change as a “hallmark” of abolition feminism as opposed to “empty quick fixes that resolve little”).

## I. POVERTY, RACE, AND PATHOLOGY

### A. *Defining Family-Regulation-Specific Pathology Logics*

The terms “pathologizing” and “pathology” are used to describe a variety of phenomena.<sup>32</sup> In this Article, the term “pathologizing” refers to a logic deeply embedded within the family regulation system: a focus on individual responsibility that renders invisible the structural conditions of poverty and racism that underlie family safety. The mechanisms identified in this Article both facilitate and perpetuate pathology logics. I focus on three phenomena that contribute to this logic. In some cases, all three operate in a series of steps. In other cases, only some of them apply.

One, pathologizing occurs through the policing of emotions by actors within the family regulation system. Vague terms like “aggressive,” “erratic,” and “inappropriate” are stripped of their context to legitimize further family surveillance. The focus on individual behavior obscures the coercive dynamic between the parent and the state. For example, when a child is removed and taken into state custody by caseworkers, the parents’ reaction to the removal is frequently categorized as “erratic” or “aggressive.” Once a family regulation case commences, caseworkers document their regular interactions with the family, draft reports about their observations, and provide them to the court. These reports include the caseworker’s interpretations of a parent’s behavior, demeanor, and even state of mind.

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<sup>32</sup> For example, the medical field defines pathology as “the study of the essential nature of diseases” and the “structural and functional changes produced by them.” *Pathology*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/pathology> [<https://perma.cc/H5LC-X7VW>]. The health-justice literature discusses the misdiagnosing and overmedicalization of racially marginalized people as an issue of racial pathologizing. See *supra* note 25 and accompanying text; see also Paul Doyen, *The Overdiagnosis of Bipolar Disorder Within Marginalized Communities: A Call to Action*, 19 COLUM. SOC. WORK REV. 81, 82 (2021) (arguing that the misdiagnosing of marginalized communities has serious health consequences; exposes marginalized communities to social, internalized stigma and exclusion; and importantly, “mask[s] . . . oppressive social conditions”). Further, some have referred to the “Black-on-Black crime” rhetoric as pathologizing Black communities in Chicago and other Black communities. See, e.g., Breanna Edwards, *Why Does Violence in Chicago Attract So Much Attention, Even Though It’s Not the Murder Capital of the U.S.?*, ROOT (Aug. 21, 2018), <https://www.theroot.com/why-does-violence-in-chicago-attract-so-much-attention-1828327783> [<https://perma.cc/G867-FAWH>] (“It tells a story that black people are pathological . . . and so it allows them to displace people from our communities and it allows them to continue to divest from our communities.”). On the flip side, some scholars have used the concept of pathology to describe a system or an institutional logic, rather than individuals or their community. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512, 591 (2001) (criticizing pathologies within today’s criminal legal system); Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1337 (2021) (describing the pathologies of policing as extending “well beyond killings” and including “excessive force, invasive stops, [and] militarized terror”).

In this process, vague and subjective terms become the basis for judgement, thereby creating “a language of pathology.”<sup>33</sup> In the video “A Life Changing Visitor: When Children’s Services Knocks,” several parents of color share their experience with the family regulation system.<sup>34</sup> One woman poignantly describes the policing of her emotions in a highly stressful situation: “they don’t understand that this person is upset because you are talking about taking a part of them away.”<sup>35</sup> She recounts how CPS, backed up by the police, came to her home at midnight and removed her daughter. Because of her “emotional” reaction to the removal of her child, CPS accused her of having anger issues and mandated an anger management class.<sup>36</sup>

Two, the family regulation system pathologizes parents and their children by coercing mental health evaluations and treatment, typically resulting in a clinical label. While parents’ sensitive mental health information is protected by the Health Insurance Portability and Accountability Act (HIPAA),<sup>37</sup> CPS may require parents to disclose information about their evaluations, treatment, progress, and even therapy notes to be reunited with their child or avoid separation.<sup>38</sup> Parents may have to allow mental health professionals to disclose this information directly to CPS. Insurance reimbursement for mental health treatment is typically linked to a “formal clinical label.”<sup>39</sup> CPS can then use this diagnosis to further build a case against a parent and establish or confirm suspicions of parental pathology. Preexisting mental health diagnoses produced by other system involvement—or even from a time when the parents themselves were children in the foster system—may come back to haunt parents once targeted by the family regulation system.<sup>40</sup>

The process of labeling informs how parents interact with, or rather attempt to avoid, systems. One mother reports that “[b]eing scared of the child welfare system” impacts most aspects of her life:

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<sup>33</sup> See *infra* Section III.B (defining “a language of pathology”).

<sup>34</sup> Child Welfare Org. Project, *A Life Changing Visitor: When Children’s Services Knocks*, VIMEO (2013), <https://vimeo.com/71127830> [<https://perma.cc/4ZVB-Q9FS>].

<sup>35</sup> *Id.* at 11:57–12:09.

<sup>36</sup> *Id.* at 8:46–8:56.

<sup>37</sup> Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 25, 29, and 42 U.S.C.).

<sup>38</sup> Mack, *supra* note 15, at 798–99; Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 615 (2020).

<sup>39</sup> Stuart A. Kirk & Herb Kutchins, *Deliberate Misdiagnosis in Mental Health Practice*, 62 SOC. SERV. REV. 225, 226 (1988).

<sup>40</sup> See *infra* Section II.A.4.

It would be helpful if I could talk about my memory issues, my pain and my medications (which make me tired), but I'm afraid if I share these struggles with doctors, CPS will take my baby when I've worked so hard to get him back from foster care.<sup>41</sup>

Instead of providing support, CPS subjects parents to coercive mental health treatment. CPS's use of mental health information to justify past or future intrusions into the family explains parents' attempts to avoid the system altogether.<sup>42</sup>

Three, the family regulation system constructs pathology by exacerbating and exploiting emotional distress or mental-health-related issues due to CPS intervention, which is in turn used to justify CPS's continued involvement. Parents facing family regulation involvement experience an enormous amount of scrutiny. CPS caseworkers come to their home regularly—often unannounced—to question them, their children, their landlords, and their neighbors.<sup>43</sup> They enter and search intimate spaces of the home and conduct strip searches of children to rule out injuries.<sup>44</sup> All of this occurs under the looming threat of family separation. This threat can be extremely traumatizing for parents and their children, especially for parents who have been in the foster system themselves.

During my time as a public defender, I represented numerous parents who underwent a psychiatric evaluation in response to vague mental health concerns resulting from the policing of their behavior and emotions. Many of them were diagnosed with “adjustment disorder.” Adjustment disorder refers to an emotional or behavioral reaction to a stressful or traumatizing life event.<sup>45</sup> Often, the stressful event was the family regulation investigation itself. The separation from their children, the continued surveillance of their home, and their further marginalization triggered sadness, anger, and desperation. A research participant in a study conducted by Rise and TakeRoot Justice in 2021 shared the impact of a family regulation investigation on her emotional state:

I was a parole officer, I was an evaluation specialist for the Board of Ed, I lost those jobs. It just messed up my life for no reason. So, it affected me

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<sup>41</sup> ‘Fear of CPS Impacts Every Move I Make,’ RISE (June 2, 2021), <https://www.risemagazine.org/2021/06/fear-of-cps-impacts-every-move-i-make/> [https://perma.cc/ZGW8-K6D9].

<sup>42</sup> Fong, *supra* note 38, at 626–27.

<sup>43</sup> Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 131 (2019).

<sup>44</sup> Marsha B. Freeman, *Lions Among Us: How Our Child Protective Agencies Harm the Children and Destroy the Families They Aim to Help*, 8 J.L. & FAM. STUD. 39, 46 (2006).

<sup>45</sup> See Rahel Bachem & Patricia Casey, *Adjustment Disorder: A Diagnosis Whose Time Has Come*, 227 J. AFFECTIVE DISORDERS 243, 243–44 (2018).

emotionally in so many ways. Because I was doing so good, and this case happened, and I felt like I didn't need to be on this earth anymore. I was really angry.<sup>46</sup>

In sum, this Article uses the term “pathology logics” to conceptualize the ways the family regulation system—through a series of steps, procedural mechanisms, and language—legitimizes state intervention while reproducing and exacerbating structural inequality.<sup>47</sup>

### B. *The Gendered and Racialized History of Pathologizing Poverty*

The history of welfare in the United States provides context for pathology logics in the family regulation system today. The Industrial Revolution was marked by the narrative of the “unworthy poor,” distinguishing the “respectable working poor” from the “immoral poor” in need of public assistance.<sup>48</sup> These narratives attributed moral deficiency to individuals as a racialized trait.<sup>49</sup> A similar distinction between the “deserving poor” and the “undeserving poor” emerged in the Civil War Era.<sup>50</sup> Then in the '60s and '70s, several states shifted resources away from poor families by establishing the “man-in-the-house” rule,<sup>51</sup> residency

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<sup>46</sup> B. ET AL., *supra* note 20, at 15.

<sup>47</sup> For parallels in the criminal legal system, see Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1517–20 (2017) (arguing that problem-solving courts “further entrench the primacy of individual responsibility” and “continue to obscure the role of external social factors that contribute to criminal behavior”); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009) (observing drug courts' focus on individual responsibility).

<sup>48</sup> Jack Katz, *Caste, Class, and Counsel for the Poor*, 10 AM. BAR FOUND. RSCH. J. 251, 252, 254–55 (1985) (“A new ideology arose in the Industrial Revolution that attributed moral character deficiencies to the poor.”); see also GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* 41 (1984) (describing how poverty was viewed as “a natural, unfortunate, often tragic fact of life, but not necessarily a demeaning or degrading fact” before the Industrial Revolution); PAUL SPICKER, *STIGMA AND SOCIAL WELFARE* 9 (1984) (describing how there came to be a general “mistrust of the poor” and a growing belief that the poor had been “corrupted” at the time of the Industrial Revolution).

<sup>49</sup> See Bridgette Baldwin, *In Supreme Judgment of the Poor: The Role of the United States Supreme Court in Welfare Law and Policy*, 23 WIS. J.L. GENDER & SOC'Y 1, 3, 13–14 (2008) (addressing this as the “rising hegemony of the ‘moral majority’”); Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 480 (1966).

<sup>50</sup> See MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* 5, 7 (2d ed. 2013).

<sup>51</sup> This rule denied welfare benefits to women who lived with adult men. *King v. Smith*, 392 U.S. 309, 315 (1968) (describing how Alabama's man-in-the-house rule terminated welfare payments to “Mrs. Sylvester Smith and her four minor children” due to “Mr. Williams c[oming] to her home on weekends”); see, e.g., Rahim Kurwa, *The New Man in the House Rules: How the Regulation of Housing Vouchers Turns Personal Bonds into Eviction Liabilities*, 30 HOUS. POL'Y DEBATE 1, 1–2, 15–18 (2020) (arguing that the punitive regulation of housing turns family bonds into liabilities).



requirements,<sup>52</sup> “family cap” rules,<sup>53</sup> and keeping prior “home suitability” standards in place.<sup>54</sup> These restrictions disproportionately affected Black women and their children.<sup>55</sup> Throughout, poverty narratives emphasized individual moral failures and erased systemic influences.

In *Dandridge v. Williams*, the Supreme Court upheld the Maryland Department of Public Welfare’s upper limit of \$250 under the Aid to Families with Dependent Children (AFDC) program for all families, regardless of family size or need.<sup>56</sup> Maryland argued that it had a legitimate interest in “encouraging gainful employment,” incentivizing “family planning,” and “avoiding discrimination between welfare families and the families of the working poor.”<sup>57</sup> Maryland’s arguments relied on the interconnected beliefs that people living in poverty can be categorized as either moral or immoral, that poverty is a choice, and that poverty can be avoided through efforts to gain and maintain employment and by limiting reproduction.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) passed with bipartisan support.<sup>58</sup> As the name suggests, the law emphasized the purported moral culpability associated with poverty. PRWORA created the Temporary Assistance for Needy Families (TANF) program, which imposes mandatory work activities and advertises marriage as a solution for social instability,<sup>59</sup> again linking individual behavior, morality, and poverty.<sup>60</sup> As Professor Tonya Brito observes, TANF relies on a belief system that understands “families on welfare as deviant and characterizes mothers as irresponsible.”<sup>61</sup> The “welfare queen” and “matriarch” tropes are perhaps the most prominent

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<sup>52</sup> Black mothers challenged the constitutionality of residency requirements in several states. In *Shapiro v. Thompson*, the Supreme Court held that the residency requirements violated the Equal Protection Clause and the fundamental right to travel and struck them down. 394 U.S. 618, 627, 631 (1969).

<sup>53</sup> See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 473–74 (1970) (discussing Maryland’s family-cap rule, which was passed in the late ’60s).

<sup>54</sup> WINIFRED BELL, AID TO DEPENDENT CHILDREN 29, 29–35 (1965).

<sup>55</sup> GERTRUDE SCHAFFNER GOLDBERG & SHEILA D. COLLINS, WASHINGTON’S NEW POOR LAW: WELFARE “REFORM” AND THE ROADS NOT TAKEN, 1935 TO THE PRESENT 20 (2001).

<sup>56</sup> 397 U.S. at 473–74, 486.

<sup>57</sup> *Id.* at 483–84, 486.

<sup>58</sup> See H.R.3734 – *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/house-bill/3734> [<https://perma.cc/7ZSX-52LB>] (choose “Actions” tab).

<sup>59</sup> BRIDGES, *supra* note 15, at 38.

<sup>60</sup> See generally LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

<sup>61</sup> Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 428 (1999).

examples of the labeling of poor Black women as “lazy,” “aggressive,” and “defiant” mothers who pass bad values onto their children.<sup>62</sup>

As Professor Dorothy Roberts observes: “Although child welfare agencies abandoned an official policy of removing children on grounds of poverty alone, they never fully embraced the policy of supporting poor families.”<sup>63</sup> In 1989, the story of a homeless woman who gave birth in a New York City subway station exemplified the discourse around poverty, pathology, and Black motherhood that persists to date.<sup>64</sup> Although her baby was born medically well, CPS separated them after concluding that she was “unfit” to parent due to her homelessness. And, as Professor Patricia Williams points out, while CPS can intervene to remove children from their mother in “destitute circumstances, there is no law in the United States to provide a mother with the housing or health care or economic rights by which to provide for her child.”<sup>65</sup>

The pervasiveness of pathology logics is reflected in recent federal reform efforts. Public defender and policy advocate Miriam Mack discusses the logic that underlies the Family First Prevention Services Act (FFPSA), federal legislation that places a larger focus on preventing entry into the foster system.<sup>66</sup> Mack persuasively argues that FFPSA codifies the family regulation system’s “reliance on pathology” via a “myopic focus on parental behavior and ‘deficits.’”<sup>67</sup>

In 2019, the Trump Administration proposed several changes to the federal food stamp program that would limit who qualifies for food stamps

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<sup>62</sup> See, e.g., Alphonso, *supra* note 26, at 492 (“[T]hese tropes persisted in stigmatizing poor Black mothers as sexually-promiscuous ‘Jezebels,’ irresponsible child-bearers and ‘matriarchs,’ immoral ‘crackhead moms,’ and criminal ‘Welfare Queens.’”); *id.* (“[T]he pathology of Black unwed motherhood was constructed in distinctly economic terms, as a drain on public resources that generated cycles of intergenerational Black dependency.”); Brito, *supra* note 61, at 420 (examining how welfare benefits were linked to gendered, racialized, and classist norms of “fitness,” and “morality”). Teenage mothers, in particular, have long been pathologized as “unfit” and “immoral.” See KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 36 (1996); Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 816 (2000).

<sup>63</sup> ROBERTS, *supra* note 11, at 104–05.

<sup>64</sup> See *A Homeless Woman Gives Birth in Subway*, N.Y. TIMES (Mar. 22, 1989), <https://www.nytimes.com/1989/03/22/nyregion/a-homeless-woman-gives-birth-in-subway.html> [<https://perma.cc/FAB7-XJKS>].

<sup>65</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 25 (1991).

<sup>66</sup> *Family First Prevention Services Act*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 26, 2022), <https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx> [<https://perma.cc/5UDG-97WE>].

<sup>67</sup> Mack, *supra* note 15, at 791, 809.

through the federal Supplemental Nutrition Assistance Program (SNAP).<sup>68</sup> Shortly thereafter, the Department of Agriculture placed significant barriers on access for food stamps for millions of people.<sup>69</sup> These restrictions are based on the logic that individual failure to find employment causes poverty. Pathology logics have attributed, and continue to attribute, poverty to personal blame, individual flaws, and the purported intergenerational “culture of poverty” brought on by Black women.<sup>70</sup>

### C. *The Continuity of Pathology Logics in the Family Regulation System*

Poor and/or Black and brown mothers in the family regulation system experience a particular form of gendered and racialized pathologizing. Some scholars, public defenders, and directly impacted families have long argued that the family regulation system targets poverty, not child neglect.<sup>71</sup> The history of separating parents from their children to intervene in the intergenerational “culture of poverty”<sup>72</sup> can be traced back to the destruction of indigenous families and the “Orphan Trains.”

Pathology logics were a precondition to separating indigenous children from their families and communities and sending them to boarding schools

<sup>68</sup> Aimee Picchi, *Total Trump Food-Stamp Cuts Could Hit up to 5.3 Million Households*, CBS NEWS (Dec. 10, 2019, 3:18 PM), <https://www.cbsnews.com/news/trump-administration-says-food-stamps-need-reform-advocates-say-millions-will-suffer/> [<https://perma.cc/8H44-N5KD>].

<sup>69</sup> Lola Fadulu, *Hundreds of Thousands Are Losing Access to Food Stamps*, N.Y. TIMES (Aug. 15, 2021), <https://www.nytimes.com/2019/12/04/us/politics/food-stamps.html> [<https://perma.cc/GR2A-S3R7>].

<sup>70</sup> Huda, *supra* note 23, at 346.

<sup>71</sup> See ROBERTS, *supra* note 11, at 33–34 (arguing that poverty defines child neglect rather than poverty causing neglect); Emma S. Ketteringham, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html> [<https://perma.cc/ZG3N-Z6JW>] (arguing that child services have not “been equipped to address the daily manifestations of economic and racial inequality”); Adam H. Johnson, *The Appeal Podcast: The War on Drugs Continues in Family Court*, APPEAL (Sept. 26, 2019), <https://theappeal.org/the-appeal-podcast-the-war-on-drugs-continues-in-family-court/> [<https://perma.cc/4YXF-499C>] (featuring guest Elizabeth Tuttle Newman, who points out that the “child welfare system criminalizes poverty”); Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 J. GENDER SOC. POL’Y & L. 1023, 1043–44 (2003) (highlighting the story of James Norman, who “suffered the loss of his children at the hands of a child protective services agency on the basis of poverty, which was mistaken for child neglect”); Diane Redleaf, *Biden’s Child Welfare Focus Should Be Removing Poverty from Neglect*, IMPRINT (Dec. 21, 2020, 4:00 AM), <https://imprintnews.org/child-welfare-2/biden-child-welfare-focus-removing-poverty-neglect/50041> [<https://perma.cc/4WSU-H9CP>] (discussing poverty as a central barrier to child–parent reunification after forced separation).

<sup>72</sup> Bridgette Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, & “Worthiness” in Poverty Discourse and Policy*, 6 MOD. AM. 4, 9 (2010) (arguing that the “culture of poverty” theory perpetuated the position that poverty was not a product of social power structures but of individual deviant behavior that would be passed on from Black mothers to their children).

with the declared purpose of “civilizing” them.<sup>73</sup> American colonizers argued for early and sometimes permanent separation of children from their families and placement with white families<sup>74</sup> for their “own good”: “Kill the Indian, save the man.”<sup>75</sup> And between 1850 and 1929, the New York Children’s Aid Society—a foster system agency still in existence today—removed immigrant children from their parents, put them on trains involuntarily, and sent them to the Midwest, where many were exploited for farm labor.<sup>76</sup> These “Orphan Trains” were meant to save neglected children from their parents.<sup>77</sup>

During slavery, family separation fit squarely into the project of extracting economic value from Black bodies.<sup>78</sup> The relationship between enslaved Black parents and their children was “viewed wholly in terms of how much or little these bonds enhanced their productive and economic value.”<sup>79</sup> In the post-Emancipation era, many formerly enslaved Black parents, including Sojourner Truth, fought to regain custody of their children.<sup>80</sup> Some risked their lives by returning to plantations in search of their families.<sup>81</sup> In some states, apprenticeship laws were weaponized to

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<sup>73</sup> Lorie M. Graham, “*The Past Never Vanishes*”: A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 12 (1998); ELEAZAR WHELOCK, A BRIEF NARRATIVE OF THE INDIAN CHARITY-SCHOOL 9 (1766).

<sup>74</sup> Daniel E. Witte & Paul T. Mero, *Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*, 2008 BYU L. REV. 377, 380–402.

<sup>75</sup> This statement was made by Richard Henry Pratt, the founder of the Carlisle “Indian School” in Pennsylvania. David Wallace Adams, *Foreword* to RICHARD HENRY PRATT, BATTLEFIELD AND CLASSROOM, at xi (Robert M. Utley ed., Univ. of Okla. Press 2003) (1964).

<sup>76</sup> DUNCAN LINDSEY, THE WELFARE OF CHILDREN 13–14 (2010).

<sup>77</sup> NINA BERNSTEIN, THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE 198 (2001); LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 308 (1999) (discussing that those who separated immigrant children from their families “were . . . certain that they were acting in the best interests of the children . . . by teaching them the errors of their traditional practices”).

<sup>78</sup> See Alphonso, *supra* note 26, at 482–84 (arguing that the “economic utility standard” was used to justify the widespread separation of enslaved families).

<sup>79</sup> *Id.* at 482.

<sup>80</sup> Peggy Cooper Davis, “*So Tall Within*”—*The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 453, 460 (1996) (detailing Sojourner Truth’s journey to regain custody of her son during her enslavement and continuing into the Emancipation era); Sojourner Truth, *Narrative of Sojourner Truth, a Northern Slave*, in CLASSIC AFRICAN AMERICAN WOMEN’S NARRATIVES 64, 64–70 (William L. Andrews ed., 2003) (detailing the sale of Sojourner Truth’s son, their separation, and her fight for his return).

<sup>81</sup> See, e.g., *Letter from Capt. Wm. B. Fowle Jr. to Major Southard Hoffman on January 14, 1863*, in THE DESTRUCTION OF SLAVERY 86, 87 (Ira Berlin, Barbara J. Fields, Thavolia Glymph, Joseph P. Reidy & Leslie S. Rowland eds., 1985) (describing the brutal whipping of a mother who demanded the return of her daughter who remained enslaved); HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925, at 410 (1976) (describing how formerly enslaved women “walked perhaps ten or twenty miles to . . . try to procure the release of her children taken forcibly away from her and held to all intents and purposes in slavery”); *Letter from Sam Bowmen to His Wife on May 10, 1864*, in THE

retain child labor and prevent family reunification, if placement with a white family was determined “better for . . . the child.”<sup>82</sup> The purported best interest of the child and the racist assumption of Black parental “incompetency” was weaponized to maintain control over Black families via their children.<sup>83</sup>

While Black children were excluded from “child welfare” resources before the Civil Rights Movement,<sup>84</sup> they are overrepresented in the family regulation system today.<sup>85</sup> Race and class discrimination is pervasive at all stages of family regulation cases.<sup>86</sup> From the beginning of the process, Black families are more likely to be reported to the state for child maltreatment.<sup>87</sup> When a report is made, it is more likely to be substantiated if the family is not white.<sup>88</sup> Once children are separated from their families, Black children remain in the foster system longer than white children.<sup>89</sup>

Throughout the process, family regulation actors use pathologizing language when referring to Black parents.<sup>90</sup> Black parents have been

DESTRUCTION OF SLAVERY 483, 483–85 (Ira Berlin, Barbara J. Fields, Thavolia Glymph, Joseph P. Reidy & Leslie S. Rowland eds., 1985) (describing the physical assault of a Black soldier who returned to reunite with his children and wife).

<sup>82</sup> GUTMAN, *supra* note 81, at 402 (1976).

<sup>83</sup> Davis, *supra* note 80, at 459–65.

<sup>84</sup> ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 72–78 (1972); Dettlaff & Boyd, *supra* note 8, at 262–63.

<sup>85</sup> Dana Hamilton, *Report of the Race, Class, Ethnicity, and Gender Working Group*, 70 FORDHAM L. REV. 411, 412–13 (2001); CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 1, 2–4 (2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) [<https://perma.cc/C4AQ-JGG8>]; MARIAN S. HARRIS, RACIAL DISPROPORTIONALITY IN CHILD WELFARE, at xv (2014); MOVEMENT FOR FAM. POWER, *supra* note 8, at 60.

<sup>86</sup> Duncan Lindsey, CHILD POVERTY AND INEQUALITY 31 (2009); Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1491 (2007); Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 257 (2006); Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 788 (2001).

<sup>87</sup> John D. Fluke, Ying-Ying T. Yuan, John Hedderson & Patrick A. Curtis, *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVS. REV. 359, 371 (2003).

<sup>88</sup> Emily Putnam-Hornstein, Barbara Needell, Bryn King & Michelle Johnson-Motoyama, *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33, 37–39 (2013).

<sup>89</sup> Keva M. Miller, Katherine Cahn & E. Roberto Orellana, *Dynamics that Contribute to Racial Disproportionality and Disparity: Perspectives from Child Welfare Professionals, Community Partners, and Families*, 34 CHILD. & YOUTH SERVS. REV. 2201, 2201 (2012).

<sup>90</sup> This arguably matches the larger project of labeling and criminalizing Blackness and poverty in the carceral state. See Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child->

characterized as “aggressive,” “hostile,” “angry,” and “loud” in charging documents, investigation notes, and court reports without basis.<sup>91</sup> Alicia Green, for example (discussed in the Introduction), was characterized as “hostile” and “aggressive” in a child safety conference just days after giving birth to her first child. The fact that she had just been told that her newborn baby may be removed that same day was not mentioned as a possible—and relatable—reason for her anger. In Tamara Jones’s case, the fact that she had never gotten into a physical fight before and had reacted to a tense situation involving someone who had been physically violent with her in the past did not prevent her from being labeled “aggressive.” Pathology logics erased her story of survival. In the case of Jackie Williams and Danielle Smith, systemic housing inequality<sup>92</sup> and the shelter system’s role as a site of surveillance were disregarded and replaced with pathology logics.

While scholars more frequently point to the family regulation system’s long history of pathologizing, today’s specific *procedural* drivers and the *language* of pathology logics remain underexamined. The following Parts examine procedure and language, their impact on individual families, and their intergenerational and community-wide effects.

## II. THE PROCEDURAL AND INSTITUTIONAL DRIVERS OF PATHOLOGY LOGICS

This Part outlines the procedural mechanisms and institutional logics that pathologize those entangled in the family regulation system. By addressing them separately, I do not mean to suggest that they are

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welfare-agency-reform [<https://perma.cc/UD8W-DF8Y>] (explaining the New York City family regulation system’s bad reputation amongst families of color); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 336 (2014) (arguing that for impoverished Black women, state intervention takes the form of punishment); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1543–45, 1576–77 (2012) (examining modern versions of racially restrictive covenants and the use of public entities, such as police forces, to enforce these restrictions); ROBERTS, *supra* note 24, at 215 (discussing how welfare legislation in the 1990s exploited the narrative that the “likelihood that a young black man will engage in criminal activities . . . triples if he lives in a neighborhood with a high concentration of single parent families”). *See generally* Kaaryn S. Gustafson, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 51 (2011) (examining how since the 1990s, criminal law and welfare have been linked in ways that criminalize poverty).

<sup>91</sup> THE CTR. FOR THE STUDY OF SOC. POL’Y, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN’S CHILD WELFARE SYSTEM 31–32 (2009), <https://ocfs.ny.gov/main/recc/presentations/Race-Equity-Review-Michigan-2009.pdf> [<https://perma.cc/84PX-EKVQ>].

<sup>92</sup> *See also* Mack, *supra* note 15, at 797 (pointing out that while unstable housing remains one of the factors associated with the separation of families through the family regulation system, federal legislation such as the FFPSA “is not structured to provide housing or the material resources necessary to secure safe, stable housing”).

disconnected. In fact, procedural mechanisms and institutional logics are closely linked, reinforce one another, and are not always easily distinguishable. However, disentangling multiple aspects of the family regulation system illustrates the deeply embedded nature of pathology logics and their reproduction.

### A. Procedural Mechanisms

Several procedural characteristics of the family regulation system produce pathology logics. This Section highlights some of them.

#### 1. Creating “Perpetual Witnesses”

The system, by surveilling families for long periods of time, creates its own “perpetual witnesses.”<sup>93</sup> These witnesses have the conflicting task of supporting families using coercion. Family regulation caseworkers are tasked with being investigators, quasi-law enforcement,<sup>94</sup> child safety experts, and social workers. They request that parents openly share their struggles and disclose sensitive health information while investigating and testifying against them. They provide reports to the court detailing their subjective concerns regarding the family and leverage their power to separate families on an emergency basis or to dictate the terms of family reunification. There is an inherent disconnect between the power and threat in the hands of a caseworker and the expectation that a family continue to work with them amicably over extended periods of time. Although caseworkers are regularly called to testify against parents in neglect proceedings, investigate parents, and make decisions to keep intact or separate families, they are not required to inform parents about their rights in most states.<sup>95</sup>

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<sup>93</sup> Caseworkers are not the only actors within the system who are perpetually involved with the same family. Not only do judges remain assigned to a case from the initial arraignment phase to the very end of a case, they are also often reassigned to the case in the event that CPS files another case against the family years later. See Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 968 (2013) (discussing the possibility of incorporating “teams of judges” to mitigate confirmation bias).

<sup>94</sup> Scholars and activists have compared the role of caseworkers to that of law enforcement. E.g., Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 81 (2014); Victoria A. Copeland, Comment, “It’s the Only System We’ve Got”: *Exploring Emergency Response Decision-Making in Child Welfare*, 11 COLUM. J. RACE & L.F. 43, 74 (2021). In January 2021, the campaign #AbolishNYCACS distributed images saying “some cops are called caseworkers” in New York City. @UpFromTheCracks, TWITTER (Sept. 25, 2021, 8:14 PM), <https://twitter.com/UpFromTheCracks/status/1441934257287532544> [<https://perma.cc/H9QF-PX5R>].

<sup>95</sup> In New York, however, there is a parent-led movement (Parent Legislative Action Network) supported by public defense organizations to establish *Miranda* instructions in family regulation investigations. See S7553, 2019–2020 Leg. Sess. (N.Y. 2020). Following a decade of advocacy, Connecticut passed a “mini-*Miranda*” right in 2011. According to the law, parents and guardians are to

A family regulation investigation typically commences with a report to the respective State Central Registry (SCR).<sup>96</sup> Anyone can make a report anonymously. Mandated reporters, including law enforcement, teachers, and doctors, are under a duty to report when they suspect child neglect or abuse.<sup>97</sup> If a report makes it through the initial stage, the family regulation investigation begins.<sup>98</sup> Subsequent intervention, with or without court involvement, can last for months and sometimes, years.<sup>99</sup>

The investigating caseworker is one link in a hierarchical structure and web of other caseworkers—each with different functions at different case stages. While they are regularly referred to as “child protective specialists” or social workers, family regulation caseworkers are not required to have social-work degrees.<sup>100</sup> The caseworker’s investigation typically includes a home visit,<sup>101</sup> where caseworkers search closets, drawers, beds, and other parts of the home.<sup>102</sup> They interview children at home, in school, or in CPS offices—often multiple times.<sup>103</sup>

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be given written notice that they are not required to let CPS caseworkers into their homes or speak with them immediately, and that they may seek legal representation. They are also informed that any statement made by them can be used against them in family court or in an administrative court proceeding. CONN. GEN. STAT. § 17a-103d.

<sup>96</sup> Federal law requires that every state operate a child-maltreatment reporting system. 42 U.S.C. § 5101. For an example of one such state system, see N.Y. STATE OFF. OF CHILD. & FAM. SERVS., CONCERNED CITIZEN’S GUIDE TO IDENTIFYING AND REPORTING SUSPECTED CHILD ABUSE AND MALTREATMENT (2006), <https://ocfs.ny.gov/ohrd/assets/docs/ccg/Concerned-Citizens-Guide.pdf> [<https://perma.cc/Q8CM-URE3>] (providing information on New York’s reporting system).

<sup>97</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/8SHF-LPK4>] (collecting information on mandatory reporting and concluding that approximately forty-seven states designate professions that are under a mandate to report child neglect and abuse).

<sup>98</sup> Some states have reformed the SCR. The New York legislature, for example, passed a law in 2020 that shifts the standard of proof for substantiating a case from “some credible evidence” to a “a fair preponderance of evidence.” *New SCR Legislation Took Effect January 1st: What It Means for Parents*, RISE (Jan. 18, 2022), <https://www.risemagazine.org/2022/01/what-new-scr-legislation-means-for-parents/> [<https://perma.cc/RM2L-Q5ZF>].

<sup>99</sup> Burrell, *supra* note 43, at 138.

<sup>100</sup> *See id.*

<sup>101</sup> N.Y.C. ADMIN. FOR CHILD.’S SERVS., *A Parent’s Guide to a Child Abuse Investigation*, <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> [<https://perma.cc/33B6-HQYW>].

<sup>102</sup> Vivek Sankaran, *The Looming Housing Crisis and Child Protection Agencies*, IMPRINT (Sept. 16, 2020, 10:45 PM), <https://imprintnews.org/opinion/looming-housing-crisis-child-protection-agencies/47437> [<https://perma.cc/BBK9-C8QJ>] (arguing that family regulation investigations can feel like criminal investigations to the impacted families).

<sup>103</sup> Michelle Burrell, a former family defense attorney in New York City, recounts that many of her clients shared how embarrassed their children were when caseworkers came to speak with them in school. *See Burrell, supra* note 43, at 131; N.Y.C. ADMIN. FOR CHILD.’S SERVS., *supra* note 101.



Like the police, investigating caseworkers testify as witnesses in court. Unlike the police, caseworkers may remain involved in a family's life far beyond their initial investigation and develop—often coercive—relationships with families under their supervision.<sup>104</sup> Their involvement continues in and out of the courtroom. Caseworkers schedule meetings with the family. They monitor compliance and progress with the service plan they created.<sup>105</sup> They conduct home visits, testify against the parent at various court hearings, and attend court conferences, where they provide their assessment of family “functioning” and parental “compliance” with service and treatment plans to the court.

The central function of a family regulation caseworker is to assess the family on an *ongoing* basis without appearing adversarial.<sup>106</sup> These multiple roles are, at times, irreconcilable. Often, the caseworker has advocated filing a case of neglect or abuse in court, assisted in the physical removal of the child, and in some instances, testified against the parent in a removal hearing. Still, parents are expected to continue working with them to regain custody of their child or end the case against them.<sup>107</sup> I recall a contentious hearing for the reunification of a mother and her son. Both the mother and her caseworker testified. At the conclusion of the hearing, the judge turned to the mother to tell her that she would have to continue working closely with her caseworker, despite hearing the caseworker's testimony that she believed the mother to be incapable of parenting her son. She would have to continue disclosing private information to the caseworker, let her into her home, sign release forms for mental health treatment, and meet with her regularly,

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<sup>104</sup> Two clear examples of this inherently coercive relationship are caseworkers' reliance on armed police for the removal of children from their parents and caseworkers' ability to initiate court proceedings that can end in the permanent severance of the child–parent relationship. See DON LASH, “WHEN THE WELFARE PEOPLE COME”: RACE AND CLASS IN THE US CHILD PROTECTION SYSTEM 153 (2017).

<sup>105</sup> E.g., N.Y. STATE OFF. OF CHILD. & FAM. SERVS., *Chapter 8: Service Provision and Development of a FASP with a Protective Program Choice*, in 2022 CHILD PROTECTIVE SERVICES MANUAL, at E-1 (2022), <https://ocfs.ny.gov/programs/cps/manual/2022/2022-CPS-Manual-Ch08-2022Jun.pdf> [<https://perma.cc/9B4X-F9S8>]; see also Kara Finck, *Negotiating for Services for the Family in Court: Admissions to the Petition*, in REPRESENTING PARENTS IN CHILD WELFARE CASES 133, 136–37 (Martin Guggenheim & Vivek S. Sankaran eds., 2015) (pointing out that the agency may include services that are not directly responsive to the allegations).

<sup>106</sup> Fong, *supra* note 38, at 622 (“[W]hereas police might respond once to a call for service, CPS investigations involve multiple home visits . . . Professionals like police envisioned CPS's repeated check-ins—during the 45-day investigation but potentially months or years longer for cases opened for continuing services—as a means of rehabilitating and disciplining families.”).

<sup>107</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., UNDERSTANDING CHILD WELFARE AND THE COURTS 6 (2022), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [<https://perma.cc/XK4N-R2YW>] (“Professionals like caseworkers and lawyers have helped many parents and guardians in the past, and they can help you too.”).

despite the considerable damage to their relationship—a relationship that was coercive from its inception.

Family regulation caseworkers become perpetual witnesses to the family dynamic. In their role, they opine about the meaning and appropriateness of a parent’s behavior, demeanor, and general capabilities as a parent over extended periods of time. Although they are neither law enforcement nor social workers, they investigate and make crucial assessments about family needs on an ongoing basis. Families are asked, and sometimes ordered, to share information with these perpetual witnesses.

Some caseworkers have become critical of their own role in perpetuating harms in marginalized communities.<sup>108</sup> Michelle Seymore, a former child protection program manager in Minneapolis, describes the moral conflict arising from “being a member of a marginalized community” and working for an institution that harms that same community.<sup>109</sup> Her research suggests that caseworkers who themselves experience marginalization opt not to disclose their own lived experiences that may contextualize the harms inflicted by the family regulation system.<sup>110</sup>

## 2. Cases as “Moving Targets”

While the family regulation system mirrors and intersects with the criminal legal system,<sup>111</sup> the shifting and expanding of allegations makes it distinctly vulnerable to pathology logics. A family regulation case does not necessarily focus on a discrete event or allegation.<sup>112</sup> Instead, the allegations within the charging document can be amended throughout the proceedings. In New York State, for example, amendments to the charging document in family regulation cases are governed by the Civil Practice Law & Rules (CPLR). The CPLR contemplates that “pleadings” be “liberally

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<sup>108</sup> A study by the National Child Welfare Workforce Institute concludes that more than 40% of caseworkers find that their job requires them to act against their better judgement. Amy S. He, Erica L. Lizano & Mary Jo Stahlschmidt, *When Doing the Right Thing Feels Wrong: Moral Distress Among Child Welfare Caseworkers*, 122 CHILD. & YOUTH SERVS. REV. 1, 7 (2021).

<sup>109</sup> *Addressing Moral Injury in Our Profession*, ADOPTUSKIDS (Jan. 21, 2022), <https://professionals.adoptuskids.org/addressing-moral-injury-in-our-profession/> [<https://perma.cc/CZE7-E5UR>].

<sup>110</sup> *Id.* (discussing how one caseworker feared disclosing her own experience with domestic violence to her colleagues “when children were removed from homes where a mother was being battered,” and how other caseworkers who grew up in poverty decided not to share their belief that the system “vilifies poor people”).

<sup>111</sup> Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 50, 51–52 (2019) (highlighting the intersection of the “child welfare” system and the criminal legal system).

<sup>112</sup> TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM 88 (2016).

construed.”<sup>113</sup> Accordingly, CPLR 3025(c) allows for the amendment of pleadings before and after a judgement to conform them to the evidence elicited at a trial.<sup>114</sup> A parent objecting to such an amendment cannot rely on lateness of the amendment alone; they must demonstrate that the amendment causes *significant* prejudice as well.<sup>115</sup> What constitutes “significant prejudice” is a fact-specific and highly subjective assessment.<sup>116</sup> Other jurisdictions similarly allow for amendments to change the cause of action during and after the adjudicatory hearing.<sup>117</sup> This may mean that the allegations that triggered family regulation involvement become nearly irrelevant.<sup>118</sup> For example, what starts as an investigation into school absences can end with the vague assertion that there must be an “underlying issue” such as mental health or drug use.<sup>119</sup>

The focus of the proceedings on one caregiver may also change over time. For example, an investigation of a father for domestic violence against the mother can later lead to an investigation against the mother for recreational marijuana use when he shares with CPS that she uses drugs.

The metaphor of a “moving target” applies similarly when the initial allegations remain the formal focus of the case. For example, when

<sup>113</sup> N.Y. C.P.L.R. 3026 (MCKINNEY 2022).

<sup>114</sup> *Id.* R. 3025(c); see *Alomia v. N.Y.C. Transit Auth.*, 738 N.Y.S.2d 695, 698 (App. Div. 2002) (finding that parties should be free to amend pleadings “absent prejudice or surprise” and finding no such prejudice or surprise in allowing a party to add a negligence claim that was previously only alluded to).

<sup>115</sup> *Worthen-Caldwell v. Special Touch Home Care Servs., Inc.*, 911 N.Y.S.2d 122, 124 (App. Div. 2010).

<sup>116</sup> Nancy L. Montmarquet, *CPLR 3025(c)*, 59 ST. JOHN’S L. REV. 632, 634 (1985).

<sup>117</sup> For example, in *In re Lilith H.*, 744 S.E.2d 280, 290–91 (W. Va. 2013), the court held that the lower court had erred in concluding that the Rules of Procedure of Child Abuse and Neglect precluded the amendment of allegations during and after adjudication. Pursuant to Rule 19 of the Rules of Procedure, the court said, allegations may be amended during the adjudicatory hearing. *Id.* After the final adjudicatory hearing, allegations can be included in the initial petition and “the final adjudicatory hearing shall be re-opened for the purpose of hearing evidence on the new allegations in the amended petition.” *Id.* at 291. See also N.J. REV. STAT. § 9:6-8:50(b) (stating that “the court may amend the allegations to conform to the proof” elicited during adjudication); *In re Kayla S.*, No. A112611, 2006 WL 3587114, at \*3–4 (Cal. Ct. App. Dec. 11, 2006) (holding that the parents’ due process rights were not violated by amending the allegations at the conclusion of the hearing); *In re K.H.*, No. B291248, 2019 WL 2949860, at \*5–7 (Cal. Ct. App. July 8, 2019) (citing *In re Jessica C.*, 113 Cal. Rptr. 2d 597, 609 (Ct. App. 2001)) (holding that the trial court did not err in using its discretion to amend the petition to include allegations of medical neglect, because “[t]he basic rule from civil law . . . is that amendments to conform to proof are favored, and should not be denied unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice”).

<sup>118</sup> Lauren Shapiro, *Challenging the Removal of Children*, in REPRESENTING PARENTS IN CHILD WELFARE CASES 33, 44 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

<sup>119</sup> Schools are sites of surveillance for Black families. See Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools’ Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 575, 600 (2021) (“Educational personnel serve as the leading driver of child maltreatment allegations . . .”).

remaining concerns with a parent boil down to “noncompliance” with CPS enforcement, any actual safety concerns become secondary. In the above-discussed case of Danielle Smith, the initial allegations of a “messy home” remained the formal basis of the neglect proceeding long after she and her children had moved out of the apartment. After the drastic improvement of their living situation and the lack of safety concerns for the children, her compliance with CPS became the de facto focus of the case.

### 3. *Parallel Processes*

Even without the initiation of court proceedings, investigations into allegations of child maltreatment can permanently affect families. Many parents under family regulation investigation are never formally charged in family court.<sup>120</sup> Instead, after receiving a report, the respective state Office of Children and Family Services<sup>121</sup> places them on the SCR.<sup>122</sup> While the type of information detailed on the SCR varies from state to state, it typically contains the names of caregivers, the name of the child and their siblings, the nature of the allegations, and the outcome of the investigation.<sup>123</sup> After an investigation concludes, the allegations are deemed either substantiated or unsubstantiated. Again, the standard of proof for substantiating maltreatment against a caregiver varies from state to state.<sup>124</sup>

Individuals can seek removal of their name from the SCR through administrative review. Since only a fraction of substantiated cases are adjudicated in court,<sup>125</sup> many parents are likely unaware that they are on the

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<sup>120</sup> Diane L. Redleaf, *The Impact of Abuse and Neglect Findings Beyond the Juvenile Courthouse: Understanding the Child Abuse Register System and Ways to Challenge Administrative Child Abuse Register Determinations*, in REPRESENTING PARENTS IN CHILD WELFARE CASES 389, 389 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

<sup>121</sup> This is the name of the state agency in New York State. See *The Statewide Central Register of Child Abuse and Maltreatment*, N.Y. STATE: OFF. OF CHILD. & FAM. SERVS., <https://ocfs.ny.gov/programs/cps/> [<https://perma.cc/A79B-MUFP>]. Other states have different names for the agency that maintains the child-maltreatment register. In Wisconsin, for example, the relevant agency is the Department of Children and Families. See *Request for Child Protective Services Background Check for Certain Purposes*, WIS. DEP’T OF CHILD. & FAMS., <https://dcf.wisconsin.gov/cps/background-check-request> [<https://perma.cc/EHP5-D3PW>].

<sup>122</sup> Maltreatment registries exist in all states. See Redleaf, *supra* note 120, at 389–90.

<sup>123</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE OR NEGLECT REPORTS 2 (2018), <https://www.childwelfare.gov/pubPDFs/centreg.pdf> [<https://perma.cc/VS32-V7C8>].

<sup>124</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., DECISION-MAKING IN UNSUBSTANTIATED CHILD PROTECTIVE SERVICES CASES: SYNTHESIS OF RECENT RESEARCH 7–8 (2003), <https://www.childwelfare.gov/pubpdfs/decisionmaking.pdf> [<https://perma.cc/7MQ3-NBQS>]. See generally CHILD WELFARE INFO. GATEWAY, *supra* note 123 (detailing the standards of proof necessary in different states’ family courts in family regulation proceedings).

<sup>125</sup> Redleaf, *supra* note 120, at 390 (“In Illinois . . . more than 80 percent of cases in which initial investigations were indicated never result in judicial proceedings . . .”).

SCR or at least unaware of the SCR's long-lasting implications.<sup>126</sup> Those on the list are informed about the entries via mail at an address at which they may or may not (still) reside. This is particularly problematic for homeless parents and families in the shelter system, who are frequently moved to other shelters.<sup>127</sup> While there is no certainty about the exact number of parents and caretakers on the registry, "it is a staggering number, certainly in the hundreds of thousands and perhaps in the millions" in New York alone.<sup>128</sup>

When a case does get filed in court, the SCR and court process are typically not consolidated, even when both cases are based on identical allegations. Many parents find themselves navigating one of two procedural postures. In one potential scenario, CPS never files a case in family court but still investigates the family, adding the parent's name and the allegations against them to the SCR. This is particularly common in cases where there is no child removal and CPS does not identify a need to seek court orders but nonetheless believes there is evidence of child neglect.<sup>129</sup> The other potential posture includes a parallel family court case and SCR investigation.

How the case is resolved in family court—even with the same underlying allegations—has no imperative implication for the SCR process and vice versa.<sup>130</sup> Indeed, a case that is dismissed by a judge in family court can remain on the SCR<sup>131</sup> and impact a parent's ability to find or maintain employment,<sup>132</sup> be a foster parent, or serve as a resource for other family members entangled in the family regulation system. Caregivers may not

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<sup>126</sup> *Id.* at 398 ("Unfortunately, many caregivers do not understand that these processes are separate and learn only after the judicial process has concluded that there remains a registered finding that they did not appeal in a timely way.").

<sup>127</sup> See Nikita Stewart, *Shuffled Amongst Homeless Shelters, and Not Told Why*, N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/13/nyregion/nyc-homeless-shelters-transfers.html> [<https://perma.cc/4HP8-LSDG>].

<sup>128</sup> Chris Gottlieb, *Major Reform of New York's Child Abuse and Maltreatment Register*, N.Y.L.J. (May 26, 2020), <https://www.law.com/newyorklawjournal/2020/05/26/major-reform-of-new-yorks-child-abuse-and-maltreatment-register> [<https://perma.cc/HKX9-26E8>].

<sup>129</sup> In fact, most family regulation investigations never lead to a court case. Redleaf, *supra* note 120, at 389–90.

<sup>130</sup> Many years of advocacy directed at the discriminatory effects of the registry for low-income families have given rise to reform efforts in some states. In New York, as of January 2022, indicated cases on the registry will seal after eight years. Importantly, parents who have gotten their case dismissed in family court will no longer have to request and win an administrative hearing to clear their SCR record. See Michael Fitzgerald, *New York Limits Access to Parents' Names on Child Abuse and Neglect Registry*, IMPRINT (Apr. 3, 2020, 8:26 PM), <https://imprintnews.org/news-2/new-york-access-names-neglect-registry/42044> [<https://perma.cc/V3Q4-P7UV>].

<sup>131</sup> Redleaf, *supra* note 120, at 398 (asserting that winning a judicial proceeding may not establish an "affirmative claim of issue preclusion or estoppel in [a] subsequent administrative challenge to the Register").

<sup>132</sup> This is not necessarily limited to employment related to childcare; it can include employment in transportation, administration, home health, etc. See Gottlieb, *supra* note 128.

realize that a favorable outcome in family court does not clear their name from the SCR. As mentioned above, caregivers may challenge SCR entries through administrative review, but this requires that they know of the entry. Caregivers are often navigating the administrative review process on their own and will regularly do so without legal counsel. Indeed, even those parents who are represented in family court may not have representation in the administrative SCR process.<sup>133</sup>

Neglect and abuse registries perpetuate the intergenerational continuity of pathology logics. In oversurveilled communities disproportionately affected by “cross-system surveillance,”<sup>134</sup> registries implicate kinship networks—sometimes for decades. While the law contemplates kinship placements as an alternative to stranger foster care,<sup>135</sup> many parents will not be able to rely on their extended family or other members of their community due to a prior family regulation investigation. This is particularly problematic considering the high reversal rate of SCR entries,<sup>136</sup> indicating the unreliability of the registry even by its own standards. This means that children are placed in the foster system unnecessarily when a family member’s SCR entry could have been cleared.

The existence of caregivers’ names in the SCR labels them “unfit,” with long-lasting effects on their families as well as broad implications for their kinship networks.

#### 4. “Labeling Continuum”

Once a family regulation case commences, preexisting mental health diagnoses and other records may come back to haunt those already disproportionately subjected to surveillance and misdiagnoses. For example, criminal,<sup>137</sup> childhood mental health, or school records may be used in family regulation proceedings, producing what I call a “labeling continuum.”

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<sup>133</sup> Redleaf, *supra* note 120, at 391 (“Many lawyers who represent caregivers in child protection court proceedings know relatively little about child abuse registers.”).

<sup>134</sup> Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 506, 520 (2021).

<sup>135</sup> Federal law requires family courts to “consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.” 42 U.S.C. § 671(a)(19).

<sup>136</sup> See *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (attributing the fact that approximately “75% of those who seek expungement [from the New York SCR] are ultimately successful” to the subjective nature of the registry); *Jamison v. State, Dep’t of Soc. Servs., Div. of Fam. Servs.*, 218 S.W.3d 399, 409 (Mo. 2007) (en banc) (finding that the risk of erroneous entries in the Missouri’s Central Registry is high).

<sup>137</sup> See, e.g., *In re Kyle F.*, No. E2017-01821-COA-R3-PT, 2018 WL 1953210, at \*1–2, 1 n.1 (Tenn. Ct. App. Apr. 25, 2018) (discussing, in detail, a mother’s probation history and medication prescribed during her incarceration in a termination-of-parental rights case).

For example, in *New Jersey Division of Child Protection and Permanency v. M.C.*, the New Jersey Superior Court allowed consideration of a father's approximately seven-year-old juvenile record to determine whether he could continue unsupervised visitation with his child.<sup>138</sup> The father asserted confidentiality of his records under New Jersey's statute that shields juvenile records.<sup>139</sup> Notably, although the admissibility issue arose within a "child protective" proceeding, he was not accused of child maltreatment.<sup>140</sup> The parent under investigation was the mother of his child, making him a "non-respondent" parent in the neglect case.<sup>141</sup> The father had no adult criminal record and was fourteen years old at the time of the criminal investigation. His juvenile records included, among other documents, investigatory arrest reports, a psychological assessment, a psychiatric evaluation, and an educational assessment. The court noted that "[g]iven the strong policies underlying the need to assure a child's safety . . . the Family Part has wide authority to consider whether the otherwise-confidential juvenile records of a parent should be disclosed."<sup>142</sup>

*In re Kyle F.*, a Tennessee termination of parental rights case, discusses a mother's probation history and medication prescribed during her incarceration and pregnancy.<sup>143</sup> The criminal case that led to her probation, and ultimately her incarceration, preceded the birth of and pregnancy with her child. Other courts have similarly considered criminal history when determining parental "fitness."<sup>144</sup>

The use of criminal history not directly related to neglect or abuse of a child is concerning. For one, criminal legal system involvement says very little about someone's caretaking ability and bond with their child. Further, criminal records track disparities within the criminal legal system. Reliance on these records in the family regulation system can deepen disparities. Finally, these disparities are amplified by record errors. Bureaucratic errors in criminal records are not uncommon. Common errors include misinformation about vacated warrants and the failure to remove sealed and

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<sup>138</sup> 196 A.3d 589, 595–96 (N.J. Super. Ct. App. Div. 2018).

<sup>139</sup> *Id.* at 593 (citing N.J. STAT. ANN. § 2A:4A-60).

<sup>140</sup> *Id.* at 598.

<sup>141</sup> *Id.* at 594.

<sup>142</sup> *Id.* at 599.

<sup>143</sup> No. E2017-01821-COA-R3-PT, 2018 WL 1953210, at \*1–2 (Tenn. Ct. App. Apr. 25, 2018).

<sup>144</sup> *E.g.*, *In re N.L.R.*, No. 2034 MDA 2012, 2013 WL 11274820, at \*3 (Pa. Super. Ct. Apr. 12, 2013) (detailing a mother's criminal record from 2005 to 2010 in a termination-of-parental-rights case); *Div. of Fam. Servs. v. M.D.*, 854 A.2d 1160, 1161–63 (Del. Fam. Ct. 2004) (discussing the consideration of a prior criminal record of a father in a family regulation case). In Massachusetts, probation records are admissible "as evidence of a parent's character" in family regulation proceedings pursuant to Massachusetts Guide to Evidence § 1115(b)(1) (2022).

dismissed cases.<sup>145</sup> According to research by the Legal Action Center (LAC), at least 2.1 million criminal records contain errors.<sup>146</sup> These mistakes are often discussed as barriers to public benefits and employment, but records produced within the criminal legal system also impact family regulation determinations.<sup>147</sup> In some jurisdictions, the admissibility of sealed criminal records in family regulation cases is a highly contentious issue.<sup>148</sup>

Records produced outside of family court can remain relevant in family regulation determinations. Criminal court records in particular label parents as “criminal” and can serve to pathologize them with very little consideration for the accuracy of these records, their (lack of) connection with a person’s ability to parent, or the broader impact on communities targeted by the criminal legal system.

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Much is at stake in these “quasi-criminal” proceedings.<sup>149</sup> The stigma attached to “child neglect,” loss of custody, reduced employment

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<sup>145</sup> LEGAL ACTION CENTER, THE PROBLEM OF RAP SHEET ERRORS: AN ANALYSIS BY THE LEGAL ACTION CENTER 1–2 (2013), [https://www.lac.org/assets/files/LAC\\_rap\\_sheet\\_report\\_final\\_2013.pdf](https://www.lac.org/assets/files/LAC_rap_sheet_report_final_2013.pdf) [<https://perma.cc/DTQ6-Q556>].

<sup>146</sup> *Id.* at 1; see also CUNY Investigative Team, *The Rap-Sheet Trap: Mistaken Arrest Records Haunt Millions*, CITY LIMITS (Mar. 3, 2015), <https://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions/> [<https://perma.cc/LJ2M-BY55>].

<sup>147</sup> *E.g.*, *M.C.*, 196 A.3d at 596; see also Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395, 401–02 (2016) (discussing the impact of mistakes in criminal records on employment prospects).

<sup>148</sup> For example, New York courts have considered, with differing results, whether 911 tapes and domestic incident reports remain admissible in family court when the criminal record is dismissed and sealed. See *In re M.R.*, 120 N.Y.S.3d 589, 591 (Fam. Ct. 2020) (holding that 911 calls do not fall within the records sealed pursuant to a state criminal procedure law and are therefore admissible). New York’s First Judicial Department has held that a 911 recording was properly admitted in an employment-termination hearing because 911 hearings are “not official records relating to . . . arrest or prosecution, and thus were not subject to the sealing statute.” *Dockery v. N.Y.C. Hous. Auth.*, 869 N.Y.S.2d 130, 130 (App. Div. 2008). *But see Harper v. Angiolillo*, 680 N.E.2d 602, 604 (N.Y. 1997) (“Such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case.”); *In re Dondi*, 472 N.E.2d 281, 284 (N.Y. 1984) (holding, in an attorney disciplinary matter, that a tape recording “integral to both appellant’s arrest and his prosecution” must remain sealed). Ultimately, the issue of sealed record use in family regulation cases remains unsettled.

<sup>149</sup> See Kendra Weber, Comment, *Life, Liberty, or Your Children: California Parents’ Fifth Amendment Quandary Between Self-Incrimination and Family Preservation*, 12 CHAP. L. REV. 155, 158–59 (2008) (“Juvenile dependency proceedings are considered civil rather than criminal, because their primary purpose is not to punish parents, but to protect the child’s health and safety. However, physically removing a child from the home interferes with the child’s personal liberty and the right to remain with his or her family of origin. In turn, parents face significant state interference with the fundamental right to raise their children and, ultimately, the termination of their parental rights. Thus, dependency proceedings are more accurately referred to as ‘quasi-criminal.’”).



opportunities,<sup>150</sup> and immigration consequences are just some of the enmeshed consequences of family regulation intervention.<sup>151</sup> In the context of misdemeanor criminal cases, Professor Malcolm Feeley examines how the pretrial process itself is the punishment, with or without a later conviction.<sup>152</sup> Feeley argues that obtaining an attorney, numerous continuances, pretrial detention, and conditions of release are all “Aggregated Effects of the Pretrial Process.”<sup>153</sup>

In the family regulation system, the label of pathology or the process of pathologizing is at least one aspect of punishment. Even if a case eventually gets dismissed, parents have spent months, and sometimes years, under family regulation supervision.<sup>154</sup> Long before there is a legal finding of neglect or abuse, they experience intrusive state intervention, ranging from regular unannounced home visits and in-home surveillance to family separation and the curtailing of visitation rights.<sup>155</sup>

Seemingly neutral procedural mechanisms embedded in the family regulation system invite a focus on individual “deficits” and mask structural inequalities. Parents must navigate the complicated relationship with a “perpetual witness” and adapt to changing allegations over time. Allegations of maltreatment against them may remain accessible to CPS caseworkers for decades. The uncritical use of criminal court records in family regulation proceedings disproportionately impacts those who are already subject to surveillance in overpoliced communities.

### B. Institutional Logic

The procedural particularities of the family regulation system set the stage for an institutional logic that pathologizes individuals and their extended family and community. This institutional logic replaces the purported goal of child safety. This logic is particularly visible when the

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<sup>150</sup> E.g., ABIGAIL KRAMER, CHILD WELFARE WATCH & CTR. FOR N.Y.C. AFFAIRS, BACKFIRE: WHEN REPORTING DOMESTIC VIOLENCE MEANS *YOU* GET INVESTIGATED FOR CHILD ABUSE 1–2 (2020) [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer\\_Mar312020\\_v1.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer_Mar312020_v1.pdf) [<https://perma.cc/Z7NM-NUVS>] (telling the story of Anya, who lost her job as a nurse after the father of her child punched her and the family regulation system began a neglect investigation against her).

<sup>151</sup> Washington, *supra* note 2, at 1128.

<sup>152</sup> MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199 (1979); *see also* DANIEL FREED, THE IMBALANCE RATIO 25 (1973) (“Of the many paradoxes which beset the criminal justice system, few surpass the picture of judges and jailers imprisoning more accused offenders before their trials than after conviction.”).

<sup>153</sup> FEELEY, *supra* note 152, at 241.

<sup>154</sup> Bullock, *supra* note 71, at 1030; Ledesma, *supra* note 11, at 70.

<sup>155</sup> *See* Burrell, *supra* note 43, at 131; Fong, *supra* note 38, at 613–14; Cloud et al., *supra* note 6, at 73.

system itself (1) turns against the children it purportedly protects and when it (2) excludes large parts of a community from a parent's and child's support system.

### 1. *Turning on Foster Children*

Family law scholarship tends to focus on children as victims of their *adult* parents. Little attention has been paid to children in the foster system who themselves become parents under CPS investigation.<sup>156</sup> Available data indicates that the number of pregnant and parenting mothers in the foster system is quite high.<sup>157</sup> One study of the California foster system found that 53% of children whose mothers gave birth in the foster system were reported to CPS by age three, compared to just 10% for the state's general population of three-year-olds.<sup>158</sup> According to other studies, teenagers in the foster system are more likely to have their children removed, producing intergenerational continuity of family regulation involvement.<sup>159</sup>

Professor Sarah Katz tells the story of her former client W.B., a teenager who gave birth while in the foster system when she was seventeen years old.<sup>160</sup> Katz explains that W.B. was placed in the system at the age of fifteen when the state determined her mother had neglected her. W.B. had planned for the birth of her child—she worked with her caseworker, received prenatal

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<sup>156</sup> *But see, e.g.*, Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 537 (2006) (arguing that “when teenage parents are involved with the child welfare system . . . the child welfare system owes a special duty to those parents.”); Cynthia Godsoe & Eve Stotland, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL’Y 1, 21 (2006) (noting that the Los Angeles Child Welfare Services Handbook “makes clear the agency’s responsibility to provide supportive services for teens in foster care who become parents”).

<sup>157</sup> Emily Putnam-Hornstein, Ivy Hammond, Andrea Lane Eastman, Jacquelyn McCroskey & Daniel Webster, *Extended Foster Care for Transition-Age Youth: An Opportunity for Pregnancy Prevention and Parenting Support*, 58 J. ADOLESCENT HEALTH 485, 486 (2016) (finding that 19% of female foster children had given birth at least once before age nineteen and 35.2% before age twenty-one); MARK E. COURTNEY, AMY LYNN DWORSKY, GRETCHEN RUTH CUSICK, JUDY HAVLICEK, ALFRED PEREZ & THOMAS E. KELLER, *MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21*, at 52 (2007), [https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1059&context=socwork\\_fac](https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1059&context=socwork_fac) [<https://perma.cc/KF5N-QEG5>] (showing that of 261 female foster children in Wisconsin, Iowa, and Illinois, 185 (71%) became pregnant by age twenty-one).

<sup>158</sup> Andrea Lane Eastman & Emily Putnam-Hornstein, *An Examination of Child Protective Service Involvement Among Children Born to Mothers in Foster Care*, 88 CHILD ABUSE & NEGLECT 317, 322 (2019).

<sup>159</sup> *See* CHARLYN H. BROWNE, CTR. FOR THE STUDY OF SOC. POL’Y, *EXPECTANT & PARENTING YOUTH IN FOSTER CARE* 11 (2015), <https://cssp.org/wp-content/uploads/2018/08/EPY-developmental-needs-paper-web-2.pdf> [<https://perma.cc/9MRD-ZKFB>] (citing several other studies showing that children born to adolescent mothers in the foster system are more likely to become involved in the family regulation system).

<sup>160</sup> Katz, *supra* note 156, at 536–37.

care, and ensured that she and her newborn would have housing. And yet, the family regulation system in Philadelphia filed a neglect case against W.B., alleging that her baby was “without proper parental care and control” simply because W.B. was a seventeen-year-old in the system.<sup>161</sup> Katz concludes that “by giving up on teenage parents the child welfare system creates a self-fulfilling prophecy.”<sup>162</sup>

Katz also discusses the story of Elizabeth, another former client, to exemplify how the family regulation system masks systemic issues.<sup>163</sup> Elizabeth was placed in the foster system as a child because of allegations of physical abuse by her father. After having two children between the ages of fourteen and sixteen, Elizabeth was discharged from the system for being “noncompliant”—and at eighteen, that same system removed her children due to allegations of neglect and domestic violence between her and her boyfriend. By labeling a parent—even a severely traumatized teenage parent—as “non-compliant,” the family regulation system revokes important resources and ignores its own responsibility in caring for foster children. Katz concludes that while “Elizabeth could be easily dismissed as an unfit parent,” her story highlights the failures of the child welfare system, a system that was responsible for her and then “holds her accountable for failing to have learned the skills that it never taught her in the first place.”<sup>164</sup>

As these examples illustrate,<sup>165</sup> the family regulation system can and does file neglect and abuse cases against children who are still in state “care.”<sup>166</sup> Instead of focusing on the structural issues that brought the child

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<sup>161</sup> *Id.* at 536.

<sup>162</sup> *Id.* at 537.

<sup>163</sup> *Id.* at 548–49.

<sup>164</sup> *Id.* at 549.

<sup>165</sup> See also the case of Tatiana Rodriguez. Tatiana Rodriguez founded “Family Matters” in Boston, after experiencing the system failing her “once again.” She became involved with the family regulation system for the first time as a child, and again as a parent. After the removal of her son, it took two years of supervised visits before she was able to see him without supervision. The Scope, *The Family Project Putting Families First: A Mini Documentary Centering the Voices of Families Affected by DCF*, YOUTUBE (Jan. 11, 2022), <https://www.youtube.com/watch?v=rUmhnGjmAhw> [<https://perma.cc/HV7Y-P5T4>].

<sup>166</sup> See, e.g., Godsoe & Stotland, *supra* note 156, at 21 (arguing that Los Angeles subjects teen mothers in the foster system to “heightened review of their parenting abilities”); Kara Sheli Wallis, *No Access, No Choice: Foster Care Youth, Abortion, and State Removal of Children*, 18 CUNY L. REV. 119, 147 (2014) (“[W]hen a foster youth does successfully carry a pregnancy to term, she faces a significant risk that her child will be immediately removed from care due to increased scrutiny from child protective services . . . .”); AMY DWORSKY & JAN DECOURSEY, CHAPIN HALL AT THE UNIV. OF CHI., PREGNANT AND PARENTING FOSTER YOUTH: THEIR NEEDS, THEIR EXPERIENCES 34 (2009), [https://www.chapinhall.org/wp-content/uploads/Pregnant\\_Foster\\_Youth\\_final\\_081109.pdf](https://www.chapinhall.org/wp-content/uploads/Pregnant_Foster_Youth_final_081109.pdf) [<https://perma.cc/R8RZ-VUEM>] (finding that 11% of mothers in Illinois’s Teen Parenting Service Network had a child placed in the foster system).

into the system, it focuses on the deficits of the parent. In doing so, state actors can draw on very personal information collected over years. Children who enter the foster system undergo mental health evaluations, are frequently diagnosed with a mental health condition, and are sometimes medicated.<sup>167</sup> Their conversations with agency workers about sexual assault, mental health issues, and other traumatic experiences are documented in reports and become part of their foster and court record. These same documents can be used against them when they become parents under investigation.<sup>168</sup>

This surveillance and documentation makes parents who have been or still are in the foster system particularly vulnerable to pathology logics. As Halimah Washington described in her 2021 testimony to the New York State Assembly about her family's intergenerational experience with the family regulation system:

I am a Black Mama from New York City who is directly impacted by the family policing system with involvement going back multiple generations. My experience with the family policing system speaks to how it stays in people's lives for multiple generations, never helping, but continuing to cause harm and trauma.<sup>169</sup>

As these examples show, the family regulation system can exacerbate the conditions that lead to intergenerational involvement.

## 2. *Pathologizing the Collective*

The family regulation system not only pathologizes individual parents, but also their support systems and community networks.<sup>170</sup> Pathologizing large parts of a community is particularly problematic for Black families,

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<sup>167</sup> See Matthew M. Cummings, *Sedating Forgotten Children: How Unnecessary Psychotropic Medication Endangers Foster Children's Rights and Health*, 32 B.C. J.L. & SOC. JUST. 357, 381–82 (2012).

<sup>168</sup> See Godsoe & Stotland, *supra* note 156, at 28 (arguing that judges “may have access to psychological reports, psychiatric records, drug tests, and school records about the teen that would otherwise be unavailable to the court”).

<sup>169</sup> *Halimah Washington's Testimony to NY State Assembly*, RISE (Oct. 25, 2021), <https://www.risemagazine.org/2021/10/halimahs-testimony-to-nys-assembly/> [<https://perma.cc/YNC6-QEVC>].

<sup>170</sup> Some argue that a family member's proximity to “unfit” parents should favor the adoption by strangers, extending the logic of pathology to include those who may very well be a source of support and stability. See Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 339 (2004) (criticizing as “an odd twist” the court's decision to place one child with an aunt where the parents could continue to visit their child post-adoption because their “unfitness” should have favored a non-kinship placement that did not allow for post-adoption contact).

who tend to rely more heavily on kinship networks than white families.<sup>171</sup> Family members and close friends must be “cleared” to be considered as visitation resources and caregivers.<sup>172</sup> They are subjected to background checks and home clearances.

Both prior criminal legal and family regulation system involvement can impact families’ ability to rely on their family, friends, and community. Black and brown communities are overpoliced by law enforcement and marked by a “tightly-clustered concentration of CPS activity.”<sup>173</sup> According to a 2021 study by the Sentencing Project, Black people are incarcerated in state prisons at five times the rate of white people.<sup>174</sup> In twelve states, Black people make up more than half of the prison population.<sup>175</sup> Black people are targeted and oversurveilled by law enforcement.<sup>176</sup> Professor Nikki Jones discusses the “regular routine” of police presence and intervention in Black communities as the constant “gaze” of law enforcement.<sup>177</sup> Professor Devon Carbado examines how constant police presence in “economically and racially vulnerable” communities becomes “predatory policing.”<sup>178</sup> Law

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<sup>171</sup> Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOC. WORK 190, 193 (1996); Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623–24 (2001).

<sup>172</sup> U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE INFO. GATEWAY, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS 1–2 (2018), <https://www.childwelfare.gov/pubpdfs/background.pdf> [<https://perma.cc/TCV2-XUE3>].

<sup>173</sup> See Harvey et al., *supra* note 119, at 589.

<sup>174</sup> ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/5G85-W7A4>].

<sup>175</sup> These states are Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia. *Id.* at 5.

<sup>176</sup> Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485–97 (2016) (summarizing some of the ways that Black people and Black communities are disproportionately targeted by the police, including broken-windows policing, mass criminalization, racial segregation, and the criminality stereotype); Bennett L. Gershman, *Use of Race in “Stop-and-Frisk”: Stereotypical Beliefs Linger, but How Far Can the Police Go?*, 72 N.Y. ST. B.J. 42, 42 (2000); Jeffrey Fagan, *Race and the New Policing*, in 2 REFORMING CRIMINAL JUSTICE 87–99 (Erik Luna ed., 2017); Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and and [sic] Policing Black Communities*, 53 PHYLON 42, 44–55 (2016); see also Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 53–62 (1988) (arguing that slave patrols in the American South played a crucial role in the development of modern police forces).

<sup>177</sup> Nikki Jones, “The Regular Routine”: *Proactive Policing and Adolescent Development Among Young, Poor Black Men*, in PATHWAYS TO ADULTHOOD FOR DISCONNECTED YOUNG MEN IN LOW-INCOME COMMUNITIES: NEW DIRECTIONS IN CHILD AND ADOLESCENT DEVELOPMENT 33, 39–40 (Kevin Roy & Nikki Jones eds., 2014).

<sup>178</sup> Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 548, 560–61, 564 (2017).

enforcement and CPS workers are “partners in surveillance.”<sup>179</sup> In this way, the effects of family regulation surveillance and criminal legal punishment are interwoven.

When CPS conducts a background check on family and friends to “clear” them, the agency also investigates whether there has been any prior contact with the family regulation system. This contact can date back many years. In my time as a public defender, I represented a father who, while fighting to regain custody of his daughters in the foster system, asked the foster agency to place them with his elderly mother in the interim. The agency conducted a background check and learned that his mother had been investigated by CPS about thirty years ago. As a result, they refused to place the children with her. When the father tried to obtain information about the allegations and resolution of the investigation against his now elderly mother, who prior to the removal had spent a lot of time with his daughters, he was not provided with further information. It later turned out, only after he filed a motion to obtain the information, that the investigation from the 1990s centered around allegations of recreational marijuana use. At the time, the war on drugs had disrupted many Black communities in the United States, including his mother’s.<sup>180</sup> After the investigation, she went on to raise multiple children, never expecting that this case would one day disqualify her from helping her son and grandchildren.

Given the presence and notoriety of the family regulation system in Black communities, some family members and friends who could otherwise be helpful resources may choose not to get involved to avoid contact with the system.<sup>181</sup> If nobody in a parent’s support network can be cleared after the state removes a child from their home, the child is placed with a stranger in the foster system. The pathologizing of a parent’s family, friends, and community through racist police practices and surveillance has community-

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<sup>179</sup> Baughman et al., *supra* note 134, at 521–23; *see also* Edwards, *supra* note 111, at 51, 62 (finding that for families of color arrests are a strong predictor of reports to CPS); Washington, *supra* note 2, at 1124 (noting that “[p]olice officers frequently enforce or facilitate [the] physical separation” of families alongside CPS).

<sup>180</sup> *See* MOVEMENT FOR FAM. POWER, *supra* note 8, at 7, 15–29 (examining how the family regulation system has become “ground zero” for the drug war).

<sup>181</sup> Monica Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC’Y REV. 314, 337 (2016) (finding that some caretakers avoid calling the police to prevent involvement of the family regulation system).

wide effects.<sup>182</sup> These effects are rarely recognized by family regulation actors or the service providers they work with.<sup>183</sup>

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The procedural mechanisms and corresponding institutional logics of the family regulation system drive and reinforce pathology logics. These effects go beyond the individual. Indeed, pathology logics produce intergenerational and community-wide effects, especially where communities are under the constant gaze of state actors.

### III. THE LANGUAGE OF PATHOLOGY LOGICS

Procedural and institutional mechanisms do not operate in a vacuum. Legal language reinforces pathology logics. One way to describe this relationship is as follows: procedural mechanisms invite pathology logics and institutional logics further perpetuate these logics, while language informs and legitimizes pathology logics.

The relationship between the law, language,<sup>184</sup> and racial<sup>185</sup> and class subordination is well theorized.<sup>186</sup> How we, through language, construct social reality “can transform our understanding of that social reality.”<sup>187</sup> Scholarship discusses how language in the criminal legal system

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<sup>182</sup> Professor Dorothy Roberts identified another community effect in a Black neighborhood in Chicago. There, CPS presence caused distrust of neighbors and disruption of community ties. See Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 887–88 (2007).

<sup>183</sup> MOVEMENT FOR FAM. POWER, *supra* note 8, at 97, 173–74 n.250 (arguing that drug treatment programs mandated by CPS do not appreciate the “intergenerational policing and punishment of communities”).

<sup>184</sup> Some argue that law is language. See, e.g., MARIANNE CONSTABLE, OUR WORD IS OUR BOND, HOW LEGAL SPEECH ACTS 132 (2014) (“Thinking about law as language . . . or attending to how law is said and unsaid, heard and unheard . . . reorients various misunderstandings of law.”); JOHN M. CONLEY, WILLIAM M. O’BARR, & ROBIN CONLEY RINER, JUST WORDS: LAW, LANGUAGE AND POWER 1–14 (2019) (arguing that language is at the heart of the law).

<sup>185</sup> SpearIt, *Why Obama Is Black: Language, Law and Structures of Power*, 1 COLUM. J. RACE & L. 468, 471–75 (2012) (examining how the law and language are entrenched in ways that perpetuate “biased conceptions of race”).

<sup>186</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”); see also Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow*, 39 U.C. DAVIS L. REV. 1321, 1343 (2006) (describing “how language shapes our understanding of law, legal discourse, and social reality”).

<sup>187</sup> Oh, *supra* note 186, at 1344.

dehumanizes individuals,<sup>188</sup> co-opts transformative movements,<sup>189</sup> perpetuates or justifies existing power structures,<sup>190</sup> and further subordinates marginalized experiences.<sup>191</sup> A social movement led by directly impacted individuals challenges language and narratives produced by the carceral state.<sup>192</sup>

This Part examines how language used in the family regulation system perpetuates pathology logics. While more obvious forms of pathologizing through medical labels<sup>193</sup> like “paranoid” or “depressed” deserve close attention, the focus of this analysis is the use of vague, benign, and subjective language that is nonmedical. First, this Part examines how the family regulation system polices and distorts expressions of emotions through

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<sup>188</sup> E.g., Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 564 (2018) (examining how the use of the terms “felon” and “felony” in criminal law amplifies and entrenches existing inequalities); Nancy G. La Vigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, URBAN WIRE (Apr. 5, 2016), <https://www.urban.org/urban-wire/people-first-changing-way-we-talk-about-those-touched-criminal-justice-system> [<https://perma.cc/3HJ7-WXKT>] (“Language is powerful. When we talk about people who come into contact with the criminal justice system and refer to them as ‘offenders,’ ‘inmates,’ or ‘convicts,’ we cause these people’s offenses to linger long after they’ve paid their debt to society.”).

<sup>189</sup> See, e.g., Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021) (examining the meaning of “progressive prosecutor,” which is “presumed to be one powerful antidote to mass incarceration”).

<sup>190</sup> E.g., India Thusi, *Blue Lives and the Permanence of Racism*, 105 CORNELL L. REV. ONLINE 14, 25–27 (2020) (discussing how the narrative of “Blue Lives” in response to the “Black Lives Matter” movement attempts to silence Black people’s concerns while reinforcing the status quo); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 852, 910–24 (2019) (examining how “punishment bureaucrats” wield the language of “reform” to keep existing power structures firmly in place); Ristroph, *supra* note 188, at 610–11 (arguing that the label “felon” legitimizes the idea that criminal law is not just a social construct but prohibits “acts that are truly wrong, truly harmful, mala in se, or otherwise ‘natural’ crimes”); Anna Roberts, *Criminal Terms*, 107 MINN. L. REV. (forthcoming 2023) (manuscript at 11–29), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4135537](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4135537) [<https://perma.cc/2FGU-JKSC>] (discussing how the use of common terms in the criminal legal system bolsters the criminal legal system and insulates the system from radical critique).

<sup>191</sup> For example, the meaning of “public safety” and the ways it might be achieved are rarely examined from the perspective of those living in marginalized communities. A new study explores participatory research as a strategy for “redefining public safety and making safety equally accessible.” See Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. 191, 193 (2022).

<sup>192</sup> E.g., Eddie Ellis, *An Open Letter to Our Friends on the Question of Language* 1–2, CTR. FOR NULEADERSHIP ON URB. SOLS., <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf> [<https://perma.cc/8GYN-FY3D>] (urging use of the term “people” instead of “inmate, convict, prisoner, felon, or offender”).

<sup>193</sup> See Lorr, *supra* note 23, at 1323–26 (discussing how “medical diagnosis has been used to pathologize individuals and their behaviors”). For other scholarship by Professor Sarah Lorr focusing on the ways the family regulation system creates disability, see Sarah H. Lorr, *Disabling Families* (Feb. 27, 2023) (unpublished manuscript) (on file with *Northwestern University Law Review*).



vague behavioral descriptors. It then discusses how the compliance focused concepts of “insight,” “correction,” and “rehabilitation” cement the paradigm of individual responsibility.

## A. Policing Emotions

### 1. Behavioral Descriptors

Some scholars have highlighted the problems associated with imprecise or broad statutory language of family regulation law.<sup>194</sup> Instead of focusing on ambiguous statutory language, this Section examines how family regulation actors use language to police emotions.

A quick search on Westlaw or LexisNexis for “child protection” and “erratic,”<sup>195</sup> “emotional,”<sup>196</sup> “combative,”<sup>197</sup> or “aggressive”<sup>198</sup> will generate

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<sup>194</sup> *E.g.*, Bullock, *supra* note 71, at 1033, 1035 (“For the indigent parent, the core of the problem lies with the imprecise statutory definitions of child neglect, which encompass characteristics of poverty.”); Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 259 (2000) (“The notion of a risk of error is somewhat puzzling in the context of termination of parental rights because the standards are vague, and therefore the application of the standards to the facts is murky in many instances.”).

<sup>195</sup> *See, e.g.*, *In re* Christopher L., 730 N.Y.S.2d 110, 110 (App. Div. 2001) (“The finding of neglect is supported by a preponderance of the evidence showing untreated mental illness and drug abuse due to lack of cooperation with counselors and therapists, lack of cooperation with child protection investigators, an extremely unstable home environment and erratic behavior.”); *N.T.M. v. Minter-Smith*, No. 294148, 2010 WL 1461604, at \*1 (Mich. Ct. App. Apr. 13, 2010) (“Respondent’s behavior during visitation was erratic and, as a result, the trial court suspended respondent’s visitation until she completed a psychiatric evaluation through Community Mental Health to assess her behavior.”); *Dep’t of Hum. Servs. v. S.C.S.*, 290 P.3d 903, 907–08 (Or. Ct. App. 2012) (“[M]other’s mental and emotional health, manifesting itself in a pattern of exaggerated, erratic, and irrational behavior concerning the care of N, shows an inability to properly assess and make decisions concerning N’s needs, and gives rise to a reasonable likelihood of a risk of harm to N.”); *In re* Ashanti R., 888 N.Y.S.2d 130, 130 (App. Div. 2009) (“In addition to the evidence of an incident . . . which alone was sufficient to support the finding of neglect, we note also that the mother had previously engaged in a pattern of erratic conduct toward the children that demonstrated her inability to protect them from future harm.”).

<sup>196</sup> *See, e.g.*, *In re* P.T.W., 794 S.E.2d 843, 853 (N.C. Ct. App. 2016) (“The trial court’s finding that Respondent–Mother ‘consistently demonstrate[d] that she [could not] control her emotions’ was supported by competent evidence.”).

<sup>197</sup> *See, e.g.*, *id.* (“Respondent–Mother does not challenge the trial court’s related findings that she . . . [was] generally combative,’ or that the trial court ‘ha[d] observed [Respondent–Mother’s] combative demeanor in court.”); *In re* Welfare of the Children of: A.D., Parent, No. A15–0406, 2015 WL 4612017, at \*3 (Minn. Ct. App. Aug. 3, 2015) (“The district court found A.D. to be combative, non-responsive, and argumentative.”); *In re* Jason M., 59 A.3d 902, 916–17 (Conn. App. Ct. 2013) (“[S]he exhibited erratic and combative behaviors.”); *E.A. v. State*, 46 P.3d 986, 990 (Alaska 2002) (“E.A.’s evasive, combative conduct rendered provision of services practically impossible.”).

<sup>198</sup> *See, e.g.*, *In re* Robinson, No. 317257, 2014 WL 631287, at \*2 (Mich. Ct. App. Feb. 13, 2014) (“Respondent’s indifference to or acceptance of the pervasive aggressive conduct is evidence of her inability or unwillingness to protect the children from the risk of injury or abuse.”).

numerous family regulation decisions describing parental behavior.<sup>199</sup> For the purposes of this Article, I group these behavioral descriptors into separate, albeit overlapping, categories. Some descriptors suggest the vague notion of a *mental health issue* without a palpable concern or clear diagnosis. The words “erratic” or “emotional,” without further context, evoke the image of an irrational, perhaps even unpredictable person. Other descriptors suggest a *hostile* parent. The description of a parent as “combative,” “aggressive,” or “uncooperative” serves multiple functions. For one, it makes them appear less sympathetic or even blameworthy. But these descriptors may also evoke the image of a person whose behavior is unpredictable and therefore dangerous. Images of the “mentally unstable” and the “hostile” parent help legitimize intrusive state intervention and distract from the structural context of marginalized experiences.

These behavioral descriptors have dire consequences for parents. Alan Dettlaff, a former caseworker in the family regulation system, tweeted in February 2022: “When I was a CPS agent, Black mothers were often labeled ‘hostile & uncooperative’ when they showed any form of anger. Then this was used against them to take their children as they were deemed ‘non-compliant.’”<sup>200</sup> And in 2021, the *New Yorker* published the story of a mother’s eight-year-long journey to regain custody of her three children:

You must be as calm and deferential as possible. However disrespectful and invasive [the caseworker] is, whatever awful things she accuses you of, you must remember that child protection has the power to remove your kids at any time if it believes them to be in danger. . . . If you get angry, your anger may be taken as a sign of mental instability, especially if the caseworker herself feels threatened.<sup>201</sup>

In Alicia Green’s case, subjective descriptors erased the context of her behavior and individual circumstances: The reaction of a first-time mother in her early twenties in fear of separation from her child is described as “erratic” or “aggressive.” In Danielle Smith’s case, a “messy” home led to a

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<sup>199</sup> Several factors indicate that these descriptors are used more frequently to initiate an investigation, separate families, and find marginalized parents neglectful than the search results would indicate. For one, many trial-level family court cases are never published or do not include the factual basis for the decision. Additionally, while some language may not make it into a court decision, it may still inform the life of a case through reports of family regulation that caseworkers provide to the court, both written and verbal.

<sup>200</sup> Alan Dettlaff (@AlanDettlaff), TWITTER (Feb. 2, 2022, 7:58 AM), <https://twitter.com/AlanDettlaff/status/1488874561961545728> [<https://perma.cc/5C8L-WCDC>].

<sup>201</sup> Larissa MacFarquhar, *When Should a Child Be Taken from His Parents*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents> [<https://perma.cc/255T-PNRC>].

focus on vague, unsubstantiated mental health concerns, instead of assisting the family with obtaining safe housing or advocating on their behalf.

Behavioral descriptors are such effective labels because they comport with already existing narratives about poor families and the dominant child safety narrative,<sup>202</sup> which juxtaposes parent support and child safety,<sup>203</sup> pathologizes poor parents, and suggests that the family regulation system is primarily concerned with violence against children.<sup>204</sup> Behavioral descriptors focus on the individual and erase the context of behavior. In this way language can conceal power dynamics.<sup>205</sup> Indeed, narratives that subordinate marginalized experiences exacerbate harm<sup>206</sup> by further legitimizing the family regulation system, instead of challenging its core structure and position within the carceral state.

## 2. Interpretive Power

Family regulation caseworkers regularly interpret parents' behavior and appearance.<sup>207</sup> Their accounts can then be used to argue for family separation or other forms of state intervention. Their notes are documented and saved in an electronic system.<sup>208</sup> Their interpretations are provided to the

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<sup>202</sup> See JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* 81 (1998); Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 *GEO. J. ON POVERTY L. & POL'Y* 97, 98–103 (2012); Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 *COLUM. J. RACE & L.* 861, 887 (2021) (“[W]e must think critically about how the family and criminal death penalties interact. Both purport to build safety at the expense of human life.”). These narratives are so deeply embedded that some defense lawyers actively advocate *against* the parent they represent. See *Johnson v. J.K.C.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989) (“It seems that it was a foregone conclusion to everyone involved at the termination hearing that the result would be the termination of J.K.C., Sr., and L.K.C.’s parental rights. This conclusion comes from a statement by the parents’ attorney in which he stated: ‘I have talked to the father, James, and he understands what we are doing. We explained to him the other alternative is the children would be put up for adoption, and they will never see the children. He understands that and I think to get them all in the courtroom would be disruptive to the [c]ourt and we wouldn’t get anywhere.’” (alteration in original)); *In re J.M.B.*, 939 S.W.2d 53, 56 (Mo. Ct. App. 1997) (recounting that counsel for the mother argued in court that her parental rights “should be terminated” without revealing “on what grounds he based this opinion”).

<sup>203</sup> ROBERTS, *supra* note 11, at 108.

<sup>204</sup> Fraidin, *supra* note 202, at 98–99.

<sup>205</sup> Cover, *supra* note 186, at 1602 (“That one’s ability to construct interpersonal realities is destroyed by death is obvious, but in this case, what is true of death is true of pain also, for pain destroys, among other things, language itself.”).

<sup>206</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411, 2438 (1989) (“The dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it . . . This story is drastically at odds with the way most people of color would describe their condition.”).

<sup>207</sup> DIANE DEPANFILIS, U.S. DEP’T OF HEALTH & HUM. SERVS., *CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS* 140–44 (2018), <https://www.childwelfare.gov/pubPDFs/cps2018.pdf> [<https://perma.cc/ZQA7-L9Y7>].

<sup>208</sup> *Id.* at 140.

court through petitions (charging documents in family court), court reports, and testimony. This gives caseworkers an opportunity to influence judicial decision-making.<sup>209</sup> The national guideline for caseworkers includes a chapter on “effective documentation,” which “[e]mphasizes the importance of using behavioral descriptors.”<sup>210</sup> It also discusses the potential for subjective language and stereotypical descriptions:

Subjective language creates stereotypes and negative characterizations and leads to challenges with engaging families as partners, assessments that are biased, faulty decisions, eroded credibility, and family plans that are not individualized and tailored. Labels attached to specific family members early in the CPS process can follow the children and parents into later stages . . . .<sup>211</sup>

While the guideline recognizes the potential discriminatory effects of language in CPS-dominated narratives,<sup>212</sup> racial and class bias remains pervasive. Ostensibly neutral behavioral descriptors build on existing gendered and racialized stereotypes of motherhood and Blackness. They are entry points for personal judgment and gendered and/or racialized social norms of appropriateness.<sup>213</sup>

Take, for example, the description of a mother as “hostile” or “uncooperative.” White mothers have been stereotyped as nurturing, naturally selfless, and subordinate for decades.<sup>214</sup> Professor Dorothy Roberts has long argued that the stereotyping of Black mothers as “hostile” by the family regulation system is racialized.<sup>215</sup> In fact, a Michigan report concludes that Black parents were more frequently labeled “hostile,” “aggressive,” and “angry,” while caseworkers used “nuanced language” when describing white

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<sup>209</sup> WILLIAM G. JONES, U.S. DEPT. OF HEALTH & HUM. SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION 55 (2006) (“Court reports afford caseworkers some of the best opportunities to communicate information to the court and to influence its decision.”).

<sup>210</sup> DEPANFILIS, *supra* note 207, at 140–44.

<sup>211</sup> *Id.* at 142.

<sup>212</sup> See also Vivek Sankaran & Christopher Church, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed*, 73 SMU L. REV. F. 123, 135 (2020) (“[C]aseworkers dominate the discussions and do not allow families to lead in defining solutions to their challenges.”).

<sup>213</sup> See generally Iris M. Young, *Five Faces of Oppression*, in POWER AND PRIVILEGE UNMASKED 39, 59 (Susan J. Ferguson ed., 2016) (arguing that the universalization of a dominant group’s social norms is one aspect of oppression that stereotypes marginalized groups as deviant).

<sup>214</sup> Brito, *supra* note 61, at 420–21; see April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 92–93 (2001); Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 354 (1999).

<sup>215</sup> ROBERTS, *supra* note 11, at 66.

families.<sup>216</sup> The perception of Black mothers as deviant fits squarely into the broader characterization of Black people as hostile and dangerous.<sup>217</sup>

Caseworkers testify about their observations directly in court and discuss them at child safety conferences and at the family regulation agency with colleagues, supervisors, managers, and the family.<sup>218</sup> The caseworker's observations do not occur in a vacuum. They are based on the caseworker's ongoing supervision of the family, and are informed and influenced by what has been identified as a parental deficit. For example, if a parent is accused of having anger issues, the caseworker's reports will likely include, flag, and discuss any behavior that is perceived as aggressive or combative. If the case is based on vague mental health allegations, the reports will likely flag perceived "erratic" or "emotional" behavior. Cases that are based on vague allegations with a thin evidentiary basis may be bolstered by ambiguous language stripped of context.<sup>219</sup>

As discussed above, the relationship between caseworkers and families is defined by a considerable power differential. Parents must constantly interact with and disclose information to their caseworker—the person who holds the power to separate or reunite their family and reports to the court on an ongoing basis. This is particularly concerning when a case continues for many years and involves the same caseworker as a repeat player, who solidifies a narrative about the family first internally, then externally through

<sup>216</sup> THE CTR. FOR THE STUDY OF SOC. POL'Y, *supra* note 91, at 31–32.

<sup>217</sup> See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1051–52 n.175; see also Brito, *supra* note 61, at 434–35 (discussing the negative stereotypes and harmful imagery associated with Black mothers who receive public assistance). For the stereotyping of survivors of domestic violence as either "bad Mother" or "worthy victim," see Washington, *supra* note 2, at 1121–24 (citing Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 305).

<sup>218</sup> JONES, *supra* note 209, at 55–56 ("Speaking to the court and other participants in a case is another excellent opportunity to communicate information that may affect the court's decision . . . Caseworkers also may be called to give formal testimony at other stages of the court process, particularly the permanency hearing, and usually at any trial related to the termination of parental rights.").

<sup>219</sup> See generally *Indian Child Welfare Act of 1977: Hearing Before the U.S. S. Select Comm. on Indian Aff.*, 95th Cong. 135–36 (1977) (discussing potential consequences of ambiguities in vague statutory language); Burrell, *supra* note 43, at 131 (discussing cases where caseworkers relied on "vague allegations of a dirty or deplorable home"); Jane Brennan, *Emergency Removals Without a Court Order: Using the Language of Emergency to Duck Due Process*, 29 J.L. & POL'Y 121, 157 (2020) ("The unchecked discretion of child protective agencies, vaguely written laws, and a woeful lack of procedural protections in family proceedings have kept innocent families in and out of court and subject to monitoring by state agencies for years."); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 562 (2019) ("[D]espite the confusion caused by the undefined federal 'reasonable efforts' standard, most states did nothing to clarify what the law requires. As a result, in most states, individual agencies, and caseworkers are left to decide what efforts to make in each case. Courts also have no guidance in measuring what criteria should be weighed to determine whether the state agency made reasonable efforts to prevent removal.").

reports and testimony.<sup>220</sup> Other times, caseworkers are switched out frequently,<sup>221</sup> also making it difficult for the family to navigate this inherently coercive relationship.<sup>222</sup> The label imposed by one caseworker can have long-lasting effects on subsequent relationships with other caseworkers.<sup>223</sup> Descriptions travel through a centralized database from one colleague to another and provide the dominant narrative for the most crucial decision in a family's life: the legal termination of their relationship.<sup>224</sup>

## B. Policing Compliance

### 1. "Insight," "Rehabilitation," and "Correction"

While every state has its own specific family regulation system, albeit guided by federal policy,<sup>225</sup> synergies exist. One is the policing of compliance via the language and substantive theories of "insight," "rehabilitation," and "correction." A parent must prove "insight," "rehabilitation," or "correction" to remedy the behavior the family regulation system has identified as "deficient." A review of select family regulation

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<sup>220</sup> See, e.g., *S.T. v. Cabinet for Health & Family Services*, No. 2014-CA-000652-ME, 2015 WL 509676, at \*1–2 (Ky. Ct. App. 2015) (describing a situation where the testifying caseworker had been assigned to the case for two years); *In re Adele B.*, 229 A.3d 671, 678 (R.I. 2020) (indicating that at least one of the caseworkers was assigned for at least two years); *In re Adoption of K'Amora K.*, 97 A.3d 169, 171 (Md. Ct. Spec. App. 2014) (describing that the caseworker not only was assigned to the ongoing case, but had previously been assigned to a case involving appellant's other three children).

<sup>221</sup> Alexis M. Butler, *Administrative and Judicial Oversight of Child Protective Services: Who Is Regulating the Agency and What Options Do Parents Have?*, 12 TEX. TECH. ADMIN. L.J. 133, 147–48 (2010) (discussing the detrimental effects of high turnover rates of caseworkers in Texas); Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 367, 403–04 (2011) (discussing the high turnover of CPS caseworkers as one reason for their reluctance to support the reunification of families torn apart in deportation proceedings); Nicole Willis, Nancy Chavkin & Patrick Leung, *Finding "Health" and "Meaning" in Texas-Sized Turnover: Application of Seminal Management Principles for Administration and Research in U.S. Public Child Welfare Agencies*, 17 ADVANCES IN SOC. WORK 116, 116–17 (2016).

<sup>222</sup> Leroy H. Pelton, Commentary, *How Can We Better Protect Children from Abuse and Neglect*, 8 FUTURE CHILD. 126, 126–27 (1998); Darcey H. Merritt, *Lived Experiences of Racism Among Child Welfare-Involved Parents*, 13 RACE & SOC. PROBS. 63, 69 (2021); Roberts, *supra* note 182, at 886–87 ("[A]gencies fail to maintain a balance between coercion and support of families because their intimidating role tends to dominate.").

<sup>223</sup> THE CTR. FOR THE STUDY OF SOC. POL'Y, *supra* note 91, at 32 (describing how "subsequent [case]workers seemed wary of [the mother] and referred to her 'aggressive' nature," while a focus group described her as warm and good-humored).

<sup>224</sup> See, e.g., *In re Eden K.*, 717 N.W.2d 507, 515 (Neb. Ct. App. 2006) (stating that the caseworker was the sole witness in the termination proceeding); *In re J.S.*, No. 09-20-00294-CV, 2021 WL 2371244, at \*2–5 (Tx. App. 2021) (detailing the testimony of the caseworker); *In re Skye W.*, 704 N.W.2d 1, 3, 5 (Neb. Ct. App. 2005) ("The State called only one witness, the caseworker assigned to the case, to testify in support of the termination of Jennifer's parental rights.").

<sup>225</sup> Mack, *supra* note 15, at 771–78 (tracing the development of federal family regulation policy).

system cases traces how pathologizing language undergirds family regulation doctrine.

Many family regulation decisions at both the trial and appellate levels are never published or reported. Notably, even if we had comprehensive access to family regulation law produced by the courts, a significant part of the picture would remain missing. As discussed in Part II, some family regulation cases are never litigated in court but are documented on the maltreatment registry of the respective state. Many states provide no information on the number of people on the registry.<sup>226</sup> Indeed, family regulation law is strikingly underdocumented. Accordingly, this Section will not focus solely on federal decisions or a specific jurisdiction. Instead, this part examines select case law from multiple jurisdictions to highlight a shared logic. This is by no means a comprehensive account of the relationship between doctrine, language, and pathology logics.

In another piece, I examine how survivors of domestic violence are required to show “insight” to prevent the removal of their children.<sup>227</sup> However, as this Section will show, “insight,” “rehabilitation,” and “correction” apply beyond domestic violence cases. All three concepts are vague, require a subjective assessment, assume personal responsibility, and are rooted in pathology logics.

Courts often discuss these concepts to determine whether a family can reunite or whether state intervention remains necessary. To establish “insight,” “rehabilitation,” or the “correction” of behavior, a parent must first acknowledge the behavioral deficit identified by the family regulation system.<sup>228</sup> If a parent’s understanding of the issue, the necessity of state intervention, or the mechanism of state intervention deviates from the state’s perspective, the parent may be characterized as having no “insight,”<sup>229</sup> not

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<sup>226</sup> For New York State, see Gottlieb, *supra* note 128, at 2 (“[I]t is impossible to know the exact number of people on the registry because New York does not report it, it is a staggering number, certainly in the hundreds of thousands and perhaps in the millions.”).

<sup>227</sup> Washington, *supra* note 2, at 1149–60 (discussing the vague and subjective character of the “insight” doctrine in family regulation law).

<sup>228</sup> See, e.g., *In re Nathaniel T.*, 492 N.E.2d 775, 776 (N.Y. 1986) (“At a minimum, parents must ‘take steps to correct the conditions that led to the removal of the child from their home.’” (quoting *In re Leon RR*, 397 N.E.2d 374, 379 (N.Y. 1979))); *In re F.B.*, 990 P.2d 309, 311 (Okla. Civ. App. 1999) (“State filed its termination motion alleging only as grounds that Mother had failed to correct the conditions that led to the deprived finding.”).

<sup>229</sup> E.g., *In re Aria E.*, 82 A.D.3d 427, 428 (N.Y. App. Div. 2011) (finding that the mother’s “lack of insight into her parental duties,” despite her compliance with services, justified the removal of her child and placement with a relative); *In re D.M.*, 851 S.E.2d 3, 10 (N.C. 2020) (noting the trial court’s finding that appellant mother demonstrated a “lack of insight” as it relates to domestic violence, and affirming the lower court’s ruling that there was a reasonable probability of repetition of neglect); *J.S. v. Cabinet*

having “corrected” the individual deficits that led to the case,<sup>230</sup> or as being resistant to “rehabilitation.”<sup>231</sup>

Further, parents must comply with the “service plan” set out by the family regulation system to “correct” their purported individual deficits.<sup>232</sup> Among other things, this plan typically consists of services, evaluations, the disclosure of sensitive health information,<sup>233</sup> and regular communication with the agency.<sup>234</sup> In this way, parents carry the responsibility of proving that they “fixed” what led to the removal of their children.

Compliance with these requirements can be both logistically and emotionally challenging. Attending group classes regularly may conflict with a parent’s work schedule, which may force them to decide between employment and successful completion of their service plan. Classes and

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for Health & Fam. Servs., No. 2015-CA-000389-ME, 2016 WL 5335516 at \*3 (Ky. Ct. App. Sept. 23, 2016) (noting that the mother “has received numerous services to enhance her functioning and still has limits in insight that pose risk to her children if returned to her care”).

<sup>230</sup> *E.g.*, *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 667 (Minn. Ct. App. 2012) (“[A]lthough appellant may have completed the case plan to the best of her ability, the record clearly and convincingly shows that appellant did not improve her parenting skills to a degree that corrected the conditions that formed the basis for the TPR petition.”); *In re J.L.O.*, IV, 428 P.3d 881, 891 (Okla. 2018) (affirming termination of mother’s parental rights because it was “clear that Mother failed to correct the conditions that led to Child being adjudicated deprived”); *In re E.C.*, 849 S.E.2d 806, 809 (N.C. 2020) (“[A] trial court has ample authority to determine that a parent’s ‘extremely limited progress’ in correcting the conditions leading to removal adequately supports a determination that a parent’s parental rights in a particular child are subject to termination . . . .” (quoting *In re B.O.A.*, 831 S.E.2d 305, 314 (N.C. 2019)); *In re Zechariah J.*, 84 A.D.3d 1087, 1087–88 (N.Y. App. Div. 2011 (noting that “[a]t a minimum,” parents faced with termination of parental rights on ground of permanent neglect “must take steps to correct the conditions that led to the removal of the child from their home” (quoting *In re Nathaniel T.*, 67 N.Y.2d 838, 840 (1986))); *In re H.S.*, 67 N.E.3d 412, 419 (Ill. App. Ct. 2016) (affirming the lower court’s finding that the father “failed to make reasonable efforts to correct the conditions which required the children to be removed from their home”); *In re D.F.*, 772 N.E.2d 939, 950 (Ill. App. Ct. 2002) (“The court must determine whether the parent has made ‘earnest and conscientious strides’ toward correcting the conditions which led to the removal of the children.”).

<sup>231</sup> *E.g.*, *In re Eden F.*, 741 A.2d 873, 892 (Conn. 1999) (“Our review of the record reveals that the evidence credited by the trial court supports its conclusion that [the mother] had failed to attain a degree of rehabilitation sufficient to warrant the belief that, at some time in the foreseeable future, she would be capable of assuming a responsible position with respect to her children’s care.”); *In re Dakota K.*, 133 A.3d 257, 259 (Me. 2016) (finding that the father had failed to make a good faith effort to rehabilitate and reunite with his three children).

<sup>232</sup> *See* CHILD WELFARE INFO. GATEWAY, CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES 2 (2018), <https://www.childwelfare.gov/pubpdfs/caseplanning.pdf> [<https://perma.cc/BGJ9-9SSX>] (noting that as of April 2018, approximately twenty-six states and the District of Columbia require a service plan when a child is removed from their home or the family is receiving in-home services); *see, e.g.*, OKLA. STAT. tit. 10A §§ 1-4-807(E)(1), 1-4-807(E)(3), 1-4-904(B)(5) (requiring that after the removal of a child, the court must regularly review “compliance with the individualized service plan” and “the extent of progress that has been made toward alleviating or correcting the conditions that caused the child to be adjudicated deprived”).

<sup>233</sup> *See* Mack, *supra* note 15, at 798–99; Fong, *supra* note 38, at 615.

<sup>234</sup> Washington, *supra* note 2, at 1146.



other services can be costly, especially for uninsured parents. Requiring participation in services in a pre-adjudication phase is particularly risky for parents.<sup>235</sup> Participants are expected to be forthcoming and candid even when their statements and concrete engagement in services may be used against them in court. The coercive nature of classes and treatment may result in impairment of the therapeutic process.<sup>236</sup>

The completion of a service plan, cooperation with family regulation caseworkers, regular contact with their children, and their expressed desire to reunite with their children are not necessarily sufficient to regain custody.<sup>237</sup> Indeed, parents must express recognition of their purported deficits in ways that resonate with and convince the caseworkers and, ultimately, the court, typically through testimony.<sup>238</sup> What is deemed credible, authentic, and convincing is wrapped up in racialized and gendered understandings.<sup>239</sup>

## 2. Structural Harms

Compliance policing rewards those who can conform to gendered, racialized, and ableist views of appropriateness and capability. Parents are expected to “accept responsibility.”<sup>240</sup> These incentives and expectations, shift the focus from the systemic to the individual level and disguise the

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<sup>235</sup> For another article exploring the distinct challenges that noncitizen parents face, see S. Lisa Washington, *Famigration Web*, 103 B.U. L. REV. (forthcoming 2023).

<sup>236</sup> *Id.* at 1125.

<sup>237</sup> *E.g.*, *In re Jennifer R.*, 817 N.Y.S.2d 309, 312 (App. Div. 2006) (concluding that attendance at programs and visiting their children regularly is not sufficient to avoid termination of parental rights, and that instead, parents must recognize and change their “attitudes and patterns of behavior”); *In re S.P.*, No. B-XXXX-19, at \*9 (N.Y. Fam. Ct. Sept. 16, 2020) (concluding that “[w]hile Ms. P. may have participated in the required services, she ‘did not successfully address or gain insight into the programs that led to the removal of the [children] and continued to prevent the [children’s] safe return.’ This is especially true for the issue of domestic violence” (second and third alterations in original) (citation omitted) (quoting *In re Soraya S.*, 158 A.D.3d 1305, 1306 (N.Y. App. Div. 2020)); *In re Welfare of S.M.A.*, No. A07-2147, 2008 WL 2344990, at \*10 (Minn. Ct. App. June 10, 2008) (“We acknowledge that mother has had some successes during the pendency of this case, and she has clearly made efforts to comply with her case plan and address the issues that led to the children’s out-of-home placement. But we cannot agree with mother’s assertion that there has been an ‘overwhelming change in [mother’s] circumstances . . .’” (alteration in original)).

<sup>238</sup> *See, e.g.*, Washington, *supra* note 2, at 1146–47 (describing how, in domestic violence cases, mothers are required to comport with stereotypical narratives of victimhood to convince actors in the family regulation system that they are able to keep their children safe); *e.g.*, *In re Jennifer R.*, 817 N.Y.S.2d at 312 (“Of singular importance in determining whether the parents have learned to accept responsibility and modify their behavior is an evaluation of the parents’ own testimony, particularly their credibility, and the testimony of witnesses who have dealt with them in programs and observed them and the children.”).

<sup>239</sup> *See* Washington, *supra* note 2, at 1136.

<sup>240</sup> *E.g.*, *In re Jennifer R.*, 817 N.Y.S.2d at 312 (emphasizing that parents’ recognition of their need for behavioral change is central in custody determinations).

conditions and structures that underlie family safety in marginalized communities. Indeed, pathology logics disguise interrelated dimensions of structural inequality: lack of resources and underfunding, destabilizing effects of poverty, increased surveillance that funnels certain families into carceral systems, and overcriminalization of communities resulting in the erasure of their supportive function.

First, pathology logics that shift focus onto the individual do not account for the sites of surveillance that render families in marginalized communities hyper-visible to the state, including the family regulation system.<sup>241</sup> Some women have been drug tested in public hospitals in low-income neighborhoods without their consent.<sup>242</sup> Mandated reporters in public schools involve CPS and initiate investigations regularly.<sup>243</sup> Public housing, the public school system,<sup>244</sup> and public hospitals expose poor families to “greater government supervision.”<sup>245</sup>

Second, by emphasizing behavioral change through compliance, pathology logics ignore the considerably fraught relationship between service providers and marginalized communities, and the increased surveillance and reporting by service providers.<sup>246</sup> Third, pathology logics allow the system to avoid sufficiently accounting for the destabilizing effects of poverty and racism in a family’s life. For example, they fail to account for the limited availability of quality services in low-income communities.<sup>247</sup>

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<sup>241</sup> See Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 461–62 (1997); DOROTHY ROBERTS, *TORN APART* 175–83, 189 (2022).

<sup>242</sup> See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432–33 (1991); ROBERTS, *supra* note 24, at 171–75; *New Mother Files Complaint After Enduring Non-Consensual and Discriminatory Drug Testing, Reporting to DCFS Because of Poppy Seed Consumption*, ACLU OF ILL. (Feb. 3, 2022), <https://www.aclu-il.org/en/press-releases/new-mother-files-complaint-after-enduring-non-consensual-and-discriminatory-drug> [https://perma.cc/4ZL7-L79U].

<sup>243</sup> See Harvey et al., *supra* note 119, at 578, 588.

<sup>244</sup> See Asher Lehrer-Small, *Parents Who Kept Kids at Home for Fear of Covid Are Reported for Neglect*, GUARDIAN (Jan. 27, 2022), <https://www.theguardian.com/us-news/2022/jan/27/covid-kids-school-reported-for-neglect> [https://perma.cc/E8GV-Y3UX] (reporting how the New York City Administration for Children’s Services investigates parents who have kept their children at home for fear of COVID-19).

<sup>245</sup> Roberts, *supra* note 242, at 1432.

<sup>246</sup> Fong, *supra* note 11, at 1800–02 (providing examples of parents’ seeking unnecessary medical care for their children to avoid being accused of neglect and triggering CPS reports); Fong, *supra* note 38, at 619–20 (citing example of compliance resulting in increased surveillance and reporting).

<sup>247</sup> One mother detailed her experience struggling with drug treatment in the family regulation system:

Far worse than the delays, however, was the quality of care offered to me, especially regarding addiction treatment . . . . When I was given a referral for an addiction treatment provider, it was

Imagine a poor parent navigating the complicated and ever-changing public benefits system, while attending regularly scheduled court appearances, going to meetings with CPS, engaging in multiple services per week to satisfy concerns regarding their parenting, and taking care of their children, all while under the threat of family separation.

Researchers have uncovered the traumatizing effects of racism.<sup>248</sup> For example, psychologists have identified racism as one possible cause for a PTSD diagnosis.<sup>249</sup> And yet, the overemphasis of personal responsibility in

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to an abstinence based-program [sic] that openly espoused punitive practices. By that time, I had been separated from my daughters for six months, granted only one weekly supervised visit. Referral delays had also barred me from engaging with trauma therapy.

Elizabeth Brico, *How Child Protective Services Can Trap the Parents They're Supposed to Help*, TALK POVERTY (July 16, 2019), <https://talkpoverty.org/2019/07/16/child-protective-services-trap-parents/> [<https://perma.cc/7XKR-LDS9>]; see also Fong, *supra* note 38, at 619 (highlighting how some mandated reporters falsely assume that the family regulation system can connect families with supportive, high-quality services). And a report by the Children's Defense Fund shares the story of Samantha, whose baby was removed from her care and who was not provided with addiction support services:

For years, Samantha sought treatment for her addiction to opioids but, in her rural community in northern Maine, was never able to access the intensive services that would help her recover . . . . She worked with a doctor at her local community clinic to lessen her dependence. Every week they called the only rehab center that would treat Samantha without insurance to see if they had space for her. After two long years separated from her daughter, Samantha secured a place in rehab and received the help she so desperately needed. She has been drug-free ever since, has a job helping others in her community find housing and is training to be a drug counselor so she can support people facing similar struggles. But Sarah, like so many children of the opioid crisis, is still being raised in the foster care system instead of with her mother who just needed a little help.

CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 26 (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/02/The-State-Of-Americas-Children-2020.pdf> [<https://perma.cc/Q7HH-YKVW>].

<sup>248</sup> E.g., David H. Chae, Karen D. Lincoln & James S. Jackson, *Discrimination, Attribution, and Racial Group Identification: Implications for Psychological Distress Among Black Americans in the National Survey of American Life*, 81 AM. J. ORTHOPSYCHIATRY 498, 501 (2011) (finding negative psychological effects on Black Americans due to racial and nonracial discrimination); Victoria M. O'Keefe, LaRicka R. Wingate, Ashley B. Cole, David W. Hollingsworth & Raymond P. Tucker, *Seemingly Harmless Racial Communications Are Not So Harmless: Racial Microaggressions Lead to Suicidal Ideation by Way of Depression Symptoms*, 45 SUICIDE & LIFE-THREATENING BEHAV. 567, 573 (2015) (finding that racial microaggressions may lead to increased suicidal ideation); Cato T. Laurencin & Joanne M. Walker, *Racial Profiling Is a Public Health and Health Disparities Issue*, 7 J. RACIAL ETHNIC HEALTH DISPARITIES 393, 394–95 (2020) (racial profiling classified as a public health and health disparity issue); DOTTIE LEBRON, LAURA MORRISON, DAN FERRIS, AMANDA ALCANTARA, DANIELLE CUMMINGS, GARY PARKER & MARY MCKAY, *FACTS MATTER! BLACK LIVES MATTER! THE TRAUMA OF RACISM* 9–17 (2015), [https://mcsilver.nyu.edu/wp-content/uploads/2020/06/trauma\\_of\\_racism\\_report.pdf](https://mcsilver.nyu.edu/wp-content/uploads/2020/06/trauma_of_racism_report.pdf) [<https://perma.cc/PWN5-PGEJ>].

<sup>249</sup> E.g., Monnica T. Williams, Isha W. Metzger, Chris Leins & Celenia DeLapp, *Assessing Racial Trauma Within a DSM-5 Framework: The UConn Racial/Ethnic Stress & Trauma Survey*, 3 PRAC. INNOVATIONS 242, 248–49 (2018).

the family regulation context continues to discount the systemic production and perpetuation of intergenerational trauma.

The label of pathology is long-lasting. In some jurisdictions, parents who were previously prosecuted by the family regulation system are presumed “unfit” in subsequent cases.<sup>250</sup> Some jurisdictions’ derivative neglect doctrines rely on and arguably extend this presumption. In New York for example, courts can determine that a parent’s “fundamental defect”<sup>251</sup> or “fundamental flaw”<sup>252</sup> justifies the assumption that they present a danger to *any* child in their care. This language is not only vague and highly subjective,<sup>253</sup> but evokes the image of a “broken” parent, an “unfixable object.” This assumption can extend far into the future.<sup>254</sup> The burden is with

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<sup>250</sup> *E.g.*, *In re Welfare of Child of V.N.M.*, No. A18-1986, 2019 WL 3293805, at \*2 (Minn. Ct. App. 2019) (“The hearing judge . . . denied father’s motion, finding that because father’s previous termination of parental rights is a valid order, it created a presumption that he is palpably unfit and served as a basis for the county to petition to terminate father’s parental rights to N.N.”); *In re Welfare of J.W.*, 807 N.W.2d 441, 442 (Minn. Ct. App. 2011) (“A parent may rebut the statutory presumption of palpable unfitness in Minn.Stat. § 260C.301, subd. 1(b)(4) (2010), which is triggered if the parent’s parental rights to one or more other children previously were involuntarily terminated, by introducing evidence that would justify a finding that the parent now is not palpably unfit.”); KAN. STAT. ANN. § 38-2271(a)(1) (“[A] parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes, by clear and convincing evidence, that: (1) A parent has previously been found to be an unfit parent in proceedings under K.S.A. 2012 Supp. 38-2266.”). While the Iowa Supreme Court does not recognize a burden shift from the State to the parent facing termination proceedings, it does view a history of past terminations as “highly relevant in proving the parents lack the ability or willingness to respond to services.” *See In re J.H.*, 952 N.W.2d 157, 167 (Iowa 2020).

<sup>251</sup> *E.g.*, *In re Amber C.*, 38 A.D.3d 538, 540 (N.Y. App. Div. 2007) (“The focus of the inquiry to determine whether derivative neglect is present is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent’s understanding of the duties of parenthood.” (quoting Dutchess Cnty. Dep’t of Soc. Servs. *ex rel* Douglas E. v. Douglas E., 595 N.Y.S.2d 800, 801 (1993))); *In re Dante S.*, 181 A.D.3d 1311, 1312 (N.Y. App. Div. 2020) (finding derivative neglect where evidence of neglect of the parents’ other children indicated a “fundamental defect” in their “understanding of the duties of parenthood”); *see also* 47 N.Y. Jurisprudence 2d Domestic Relations § 1823.

<sup>252</sup> *E.g.*, *In re Melissa L.*, 714 N.Y.S.2d 154, 155–56 (App. Div. 2000) (concluding that abuse of one child was evidence of a fundamental flaw that endangered all children in the parent’s care); *In re Annalise L.*, 170 A.D.3d 835, 836 (N.Y. App. Div. 2019) (holding that a derivative neglect finding may be entered where a parent failed to correct “fundamental flaws”); *see also* KEITH A. BRASWELL ET AL., NEW YORK JURISPRUDENCE DOMESTIC RELATIONS § 1823 (2d. 2022) (noting that courts must consider whether parents’ neglect “can be said to evidence fundamental flaws in the respondent’s understanding of the duties of parenthood”).

<sup>253</sup> Robert May, *Derivative Neglect in New York State: Vague Standards and Over-Enforcement*, 40 COLUM. J.L. & SOC. PROBS. 605, 614 (2007).

<sup>254</sup> The “proximate in time” requirement between the initial case and the derivative neglect finding has been interpreted as dispositive. *See In re N.H.*, 52 N.Y.S.3d 209, 212 (Fam. Ct. 2017) (“In determining whether a child born after the underlying acts of neglect should be adjudicated derivatively neglected . . . [t]here is no bright-line rule to define what constitutes ‘sufficiently proximate in time’ as there are situations whereby a significant passage of time may be a dispositive factor and in other cases the circumstances may evince a continuing pattern over a significant period of time which demonstrate[s] that the problematic conditions continue to exist.”).

the parent to prove that they have significantly changed to now match the expectations of the family regulation system.

### 3. *Minimizing Resistance*

In family regulation proceedings, the pressure to cooperate and thereby agree with the individual-deficit narrative is heightened. Parents are expected to treat an inherently adversarial process as nonadversarial to prove “correction” of, “insight” into, or “rehabilitation” of their purportedly deficient behavior. As examined above, the relationship between caseworkers, the family, and ultimately, the community, is defined by unequal power.<sup>255</sup> Parents are indexed as “compliant,” “not compliant,” “improved,” or “fundamentally defective.” This perception is conveyed to the court and colors how any form of parental resistance is understood. For example, a parent who has been labeled “combative” and “aggressive” will likely be required to complete an anger management class, as was the case with Alicia Green. A person who is either unwilling to complete such a class or who challenges its merits is labeled “combative.” The myth of a nonadversarial, cooperative process persists, placing the onus on individual parents to comply with prescribed treatments, all while relying on the self-justifying narrative of child safety.

Arguably, the environment of family court can resemble that of a problem-solving court, in which the threat is not incarceration, but family separation. In fact, Professor Jane Spinak has argued that family courts are the “paradigmatic problem-solving court” because their focus is not limited to the discrete charges.<sup>256</sup> In the criminal legal context, a problem-solving court is ostensibly geared towards helping or treating an individual. However, as Professor Erin Collins observes, the problem-solving model extends the length of surveillance, providing “defendants with ample opportunity to violate the terms of their participation agreement,”<sup>257</sup> and repeating the same structural inequities that come with increased contact with the state. Additionally, the problem-solving model prevents larger system change by typically focusing on the individual instead of the structural forces that perpetuate system involvement.<sup>258</sup>

In response to these dynamics, defense attorneys and scholars have voiced concerns over the tension between the pressure to comply and the

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<sup>255</sup> See *supra* notes 98–114 and accompanying discussion.

<sup>256</sup> Jane Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008).

<sup>257</sup> Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1524 (2017).

<sup>258</sup> See Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1628 (2021) (examining how problem-solving courts “hold fast to the message that ‘justice’ means . . . threatening (if not imposing) incarceration”).

right to an adversarial defense in problem-solving courts.<sup>259</sup> Others have discussed pressures to comply in criminal court more generally.<sup>260</sup> For example, Professor Eve Hanan argues that the “emotional tone” in the social space of the criminal courtroom subtly silences defendants. Hanan describes how “social–emotional power” polices defendants’ expression and elicits compliance.<sup>261</sup> Arguably, these emotional pressures are exacerbated in family court, where the myth of a nonadversarial, rehabilitative process persists and the narrative of child safety is self-legitimizing.<sup>262</sup>

In family regulation cases, the pressure to display compliance is not subtle. Pathology logics embedded in family regulation law and language explicitly favor cooperation and punish resistance. Family regulation cases are heard in family court. Proceedings often take place in small courtrooms with all counsel sitting at a shared table, the space is designed for the performance of cooperation in the face of an inherently adversarial process, in which one of the most fundamental rights of families is at stake: the right to stay together.

Parents entangled in the family regulation system are presumed immoral and incapable. Parents are expected to perform compliance and worthiness, often for many months and even years.<sup>263</sup> The procedural mechanisms described in Part II exacerbate the performative feature of

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<sup>259</sup> See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 47 (2000); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 38 (2006); Spinak, *supra* note 256, at 267; Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 78–79 (2007) (“[T]he specialty court model may encourage a culture of underzealous representation by some defenders that may set a dangerous precedent for the overall professional role of the defender in our criminal justice system.”); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012).

<sup>260</sup> See, e.g., ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 255 (“The penal technique of performance allows court actors to ration scarce social control resources according to a logic of risk and desert. Defendants must prove some capacity for self-governance by performing certain actions [sic] terms laid out by the court—arrive on time, sit and wait quietly, go to a program, complete community service—and earn either leniency or sanctions depending on how they perform.”).

<sup>261</sup> M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 497–98, 531 (2021).

<sup>262</sup> See Fraidin, *supra* note 202, at 98–103 (arguing that the “grand narrative of child welfare” overwhelmingly shapes our understanding of the family regulation system itself and the families it affects); see also Sinden, *supra* note 214, at 354 (highlighting that a core feature of the family regulation system is the promotion of the narrative that “we’re all on the same side,” despite the considerable power differential between parents and system actors).

<sup>263</sup> For a similar phenomenon in misdemeanor criminal court, see Hanan, *supra* note 261, at 522 (“Rather than express their needs and contest the unfairness of the disposition, which risks appearing disruptive and disorderly, defendants perform mildness, agreeability, and order.”); see also KOHLER-HAUSMANN, *supra* note 260, at 255.

the system. The substantive concepts of “insight,” “correction,” and “rehabilitation” silence parents who are expected to “cure” their “erratic,” “combative,” “emotional,” or “immoral” behavior. Resisting the label of individual blame is risky, especially when resistance rejects a well-established narrative.<sup>264</sup> Against this background, parents and advocates have voiced their concerns about backlash in response to resistance.<sup>265</sup>

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The doctrine and related language of family regulation emphasize individual responsibility. The pathologizing of parents legitimizes this logic as “child protective.” Voices in opposition are punished, discredited, or silenced.<sup>266</sup> Which narratives are lost when resistance is structurally disincentivized? Those that offer a more complete picture of the circumstances of family poverty and the impacts of the depth and breadth of the carceral state; in other words, the context and perpetuating structures of pathology logics.

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<sup>264</sup> See Washington, *supra* note 2 at 1148–49. For an example of how resistance to individual responsibility is pathologized and the structures and power dynamics of the family regulation system are masked, see *In re Adoption of K’Amora*, 97 A.3d 169 (Md. Ct. Spec. App. 2014). The court in that case affirmed the trial court’s decision to terminate parental rights shortly after giving birth. *Id.* at 170. It pointed out that the “birth mother” rejected individual responsibility by placing blame on system actors: “[t]he inconsistencies [were] everyone else’s fault.” *Id.* at 177. The court also highlighted bonding difficulties between the “birth mother” and her baby, but did not discuss how power dynamics and the removal of the baby shortly after birth may have contributed to bonding difficulties. *Id.* at 171–72. And it problematized the “birth mother’s” “major depression disorder” diagnosis, but failed to discuss it in the context of having her child removed shortly after birth. *Id.* at 173.

<sup>265</sup> Burton & Montauban, *supra* note 6, at 652 (“Because I raised concerns, filed grievances, and complained to my local elected officials about the abuse of power, mismanagement, and the neglect and abuse of children in foster care that I personally encountered, I experienced various forms of backlash meant mostly to silence me and break me down.”).

<sup>266</sup> See Washington, *supra* note 2 at 1149.

## IV. DISMANTLING PATHOLOGY LOGICS

“[R]emember to imagine and craft the worlds you cannot live without, just as you dismantle the ones you cannot live within.”

—Ruha Benjamin<sup>267</sup>

“When we dare to speak in a liberatory voice, we threaten even those who may initially claim to want our words. In the act of overcoming our fear of speech, of being seen as threatening, in the process of learning to speak as subjects, we participate in the global struggle to end domination.”

—bell hooks<sup>268</sup>

While the events of 2020 did not initiate the conversation on divestment and defunding of the criminal legal system, they catapulted the discussion into the mainstream discourse.<sup>269</sup> When we push to divest financially from punitive institutions, we must simultaneously resist their embedded logics to avoid replicating them elsewhere. This Part suggests four opportunities for transforming the family regulation system: (1) recognizing parental expertise, (2) divesting from pathologizing language and narratives, (3) investing in community knowledge, and (4) building legal and policy advocacy around community knowledge.

A. *Recognizing Parental Expertise*

Pathology logics justify the disregard of parental expertise.<sup>270</sup> The myopic focus on deficiency erases the knowledge that marginalized parents hold. Individuals are experts on their own lived experience, just as parents are intimately familiar with their own children’s needs. From a constitutional perspective, this is in no way controversial. In fact, the Supreme Court has repeatedly confirmed parents’ prerogative to rear their children as a

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<sup>267</sup> Ruha Benjamin (@ruha9), TWITTER (Nov. 2, 2017, 3:13 PM), <https://twitter.com/ruha9/status/926180439827591168> [<https://perma.cc/8NNZ-KDSH>].

<sup>268</sup> BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 18 (Routledge 2015) (1989).

<sup>269</sup> See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N. Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/KY8W-5WK2>]; see also The Daily Show with Trevor Noah, *Derecka Purnell - Making the Argument for Abolishing the Police*, YOUTUBE (Sept. 30, 2021), <https://www.youtube.com/watch?v=vUtpuU4mzOM> [<https://perma.cc/HSG8-5MBD>].

<sup>270</sup> In the criminal legal context, Professor Ngozi Okidegbe discusses the inclusion of marginalized knowledge in societal knowledge production. See Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2046–52 (2022). See generally Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV., 1185, 1214–17 (2020) (discussing the ways incarcerated people’s experiences are excluded from knowledge production in the sentencing context); Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2821 (2022).



fundamental right.<sup>271</sup> A parent's right to parent, rear, and bond with their children only becomes controversial for parents who have been labeled pathological.

Removing children from their family, whether temporarily or permanently, justifies the exclusion of parental expertise. Areas of expertise include a child's education, medical needs, special preferences, and importantly, cultural upbringing. Parents entangled in the family regulation system have voiced concerns about the disregard for their expertise, preferences, and culture.<sup>272</sup> Disregarding or discrediting parental knowledge not only disempowers and perpetuates epistemic harms, but it can also be harmful to a child's development, care, and safety.

For example, a parent who has a close relationship with their child's school, meets with teachers regularly, and attends extracurricular events may find that relationship broken when foster parents, together with the foster agency, decide to place the child in a different school. The parent's objection to the change may be characterized as combative. Or, a parent complains about bruises they observed during a visit with their child, who is now in the foster system. The parent flags this for the caseworker, who does not believe the parent. There is no follow-up. It takes months for CPS to investigate the foster parents. At this point, another child has reported being abused by the foster parent. The investigation eventually confirms the use of violence against multiple children in the foster home.<sup>273</sup>

Parental expertise should play a crucial role in deciding whether to separate a family. Some jurisdictions explicitly require that judges balance the alleged risk against the harm of removal in child removal hearings.<sup>274</sup>

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<sup>271</sup> *Meyer v. Nebraska*, 262 U.S. 390, 398–401 (1923) (holding that the Fourteenth Amendment includes the power of parents to control their children's education); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

<sup>272</sup> B. ET AL., *supra* note 22, at 5–6, 14 (concluding that parents find that CPS devalues their culture and values).

<sup>273</sup> These are examples from my practice experience as a public defender. To preserve confidentiality, I do not name the clients or provide any identifying details.

<sup>274</sup> For example, New York has incorporated this balancing test through case law. *See Nicholson v. Scoppetta*, 820 N.E.2d 840, 852 (2004) ("The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring."). The District of Columbia Superior Court Rules provide a number of factors to balance in child removal decisions. *See* D.C. SUPER. CT. R. NEGLECT & ABUSE PROC. 13(b); D.C. CODE ANN. § 16-2310(b). Notably, most jurisdictions do not require a balancing of harms. *See Trivedi, supra* note 219, at 560–62.

Professor Shanta Trivedi has discussed the need for careful balancing in every case.<sup>275</sup> Arguably, the Constitution requires the balancing of interests in every child removal proceeding.<sup>276</sup> While numerous factors may be considered within a balancing test,<sup>277</sup> there is little conversation about the role of parental expertise as a factor worth weighing.

To be sure, even if balancing tests become a more prominent part of decision-making, as they should, they will do little to disrupt pathology logics in the family regulation system more fundamentally. For one, procedurally, balancing tests are conducted by the courts in emergency hearings, but days, weeks, and even many months can go by before completion of a hearing.<sup>278</sup> And as discussed in Section II.A.2, even if a parent wins an emergency hearing, the threat of another removal or shifting allegations forces parents to continuously “perform.” System actors, caseworkers in particular, can cast doubt upon parental expertise on an ongoing basis.

Fundamentally, pathology logics cement the assumption that while certain factors need to be considered, parent expertise does not weigh heavily once the parent has been discredited as “deficient.” A balancing test is only as robust as a decision-maker’s willingness to divest from “deficiency” logics. In and of itself, a test—while potentially useful in an individual case—does little to dismantle deeply embedded logics. The balancing test falls prey to the same pathology logics that undergird the family regulation system’s procedure, language, and substantive legal concepts. This is not to say that advocates should not use every opportunity to highlight the

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<sup>275</sup> Trivedi, *supra* note 219, at 565.

<sup>276</sup> *Id.* at 565 (“The Constitution arguably requires consideration of the harm of removal as a part of such balancing, because there is a fundamental liberty interest in the family unit and the bonds within it, and any state interference causing the traumatic destruction of these bonds requires heightened scrutiny.”); For the emphasis the Supreme Court places on a balancing between family integrity and the state’s interests, see generally *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (weighing the right of parents to rear their children and the state’s interest in furthering child welfare); *Meyer*, 262 U.S. at 400–01 (1923) (weighing state interests and parents’ power to control their children’s education).

<sup>277</sup> The D.C. Superior Court Rules list several factors pursuant to D.C. CODE § 16-2310:

- (1) The child’s attitude toward removal and ties to the parent, guardian or custodian, as well as the child’s relationships with other members of the household;
- (2) The disruption to the child’s schooling and social relationships which may result from placement out of the neighborhood; and
- (3) Any measures which can be taken to alleviate such disruption.

D.C. SUPER. CT. R. NEGLECT & ABUSE PROC. 13(e).

<sup>278</sup> *E.g.*, Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting From Medical Providers Harms Families*, 11 COL. J. RACE & L. 733, 757–58 (2021) (discussing a child’s removal, during which a seven-year-old child remained separated from his parents, that went on for two months and involved twenty court appearances, all while waiting for an emergency hearing).

importance of parent knowledge; however, the expertise of marginalized parents will only truly matter if the ideology that pathologizes them is dismantled.

The consideration of parental expertise is crucial beyond individual cases. Caseworkers are deemed experts—or “specialists”—on families and their children. CPS priorities shape our understanding of family safety. Lived experience, however, is not always regarded as a form of expertise.<sup>279</sup> Critical legal scholarship has long discussed marginalized and directly impacted communities as knowledge sources.<sup>280</sup> The family regulation system is one of many systems that raise questions about the relationship between the construction of expertise and power.<sup>281</sup> For example, Professor Ngozi Okidegbe discusses community knowledge as one source of noncarceral knowledge central to the disruption of algorithmic discrimination in the criminal legal context.<sup>282</sup>

Parental expertise is not only crucial in individual cases. It also contributes to a broader project of knowledge formation around violence, safety, and the legitimacy of family regulation intervention in particular and carceral systems more broadly. The pathology label effectively distorts the value of parental expertise both in the context of a case and the project of societal knowledge building. Valuing parental expertise has the potential to assist in dismantling entrenched logics about marginalized families. This, however, will require a more fundamental rethinking of expertise in the family regulation context.

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<sup>279</sup> See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 852 (2021) (discussing traditional understandings of expertise before examining how a “power lens” challenges them). See generally Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2819–27 (2022) (examining a growing move to include direct experience as expertise).

<sup>280</sup> See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987); I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 25–28 (2019).

<sup>281</sup> See, e.g., Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 454, 459 (2022) (advocating an approach to criminal legal system that includes lived experience); Johnson et al., *supra* note 191, at 193, 218 (incorporating community-based participatory research to examine the meaning of safety and how best to achieve it); Simonson, *supra* note 279, 849–52 (discussing a reframing of expertise that locates expertise in those subject to subjugation within the criminal legal system); Monica Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 211 (2019) (suggesting that rethinking the community’s role in criminal justice reform could be transformative).

<sup>282</sup> Okidegbe, *supra* note 270, at 2014.

*B. Divesting from Pathologizing Language*

While language can exacerbate harms, it can also be a tool for transformation.<sup>283</sup> Understanding the procedural drivers of pathology logics and how pathologizing language is embedded within substantive family regulation law expands our understanding of the family regulation system’s position within the carceral web.

Divesting from language that reinforces pathology logics is one, albeit insufficient, step towards shifting our social reality around child and family safety and support. To live up to its transformative potential, this shift in language must be accompanied by a deeper shift in ideology.<sup>284</sup> Take for example the shift in language in the criminal legal system. The term “progressive prosecutor” has been used by prosecutors’ offices as a self-legitimizing strategy during the legitimacy crisis of the criminal legal system.<sup>285</sup> In this context, language functions as a tool to minimize perceptions of power and individual responsibility.<sup>286</sup>

Another example of the ways ostensibly progressive or transformative language can in fact perpetuate existing structures, or simply distract from the project of dismantling them, is the narrative around “punitive segregation” in prisons. In early 2022, Eric Adams, mayor of New York City, announced that he opposed “solitary confinement,” a torturous practice,<sup>287</sup> but endorsed “punitive segregation.”<sup>288</sup> In an immediate backlash, “punitive segregation” was identified as solitary confinement by another name.<sup>289</sup> Both examples are cautionary tales for those interested in not just reframing language but dismantling structural inequity.

The Center for Nuleadership on Urban Solutions advocates for the replacement of dehumanizing language and concepts to describe

<sup>283</sup> See Delgado, *supra* note 206, at 2437–38.

<sup>284</sup> See DAVIS ET AL., *supra* note 31, at 1 (confronting that “[c]oncepts . . . can become brittle, empty terms—tools to wield against others—rather than living, generative, and rigorous frameworks”).

<sup>285</sup> Alexandra L. Cox & Camila Gripp, *The Legitimation Strategies of “Progressive” Prosecutors*, 31 SOC. & LEGAL STUD. 657, 658, 674 (2022).

<sup>286</sup> *Id.* at 670–73.

<sup>287</sup> Press Release, United Nations Hum. Rts.: Off. of the High Comm’r, United States: Prolonged Solitary Confinement Amounts to Psychological Torture (Feb. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture> [<https://perma.cc/2A4V-QG84>].

<sup>288</sup> Erin Durkin, *Adams’ Solitary Confinement Stance Sets Up Fight with City Council*, POLITICO (Jan. 7, 2022, 5:00 AM), <https://www.politico.com/news/2022/01/13/adams-solitary-confinement-stance-sets-up-fight-with-city-council-527051> [<https://perma.cc/88RD-NV6G>].

<sup>289</sup> See, e.g., Tiffany Cabán (@tiffany\_caban), TWITTER (Dec. 21, 2021, 6:58 AM), [https://twitter.com/tiffany\\_caban/status/1473276814328049665](https://twitter.com/tiffany_caban/status/1473276814328049665) [<https://perma.cc/DW2Q-89VN>].

incarcerated folks simply as people.<sup>290</sup> Others have advocated for the transition to “people-first language.”<sup>291</sup> This effort not only shifts language within the criminal legal system, but challenges *who* defines this language. In the family regulation system specifically, directly impacted families and advocates resist the concepts of “fundamental deficiency” and “individual responsibility” by shedding light on structural harms of the system. The use of the terms “family regulation system” or “family policing system” in recent scholarship shifts the narrow focus on individual parents to a broader interrogation of structural inequities.<sup>292</sup> Challenging individual responsibility narratives requires a reckoning with principles that build upon this construct. This includes the uncritical application of the “compliance,” “insight,” and “rehabilitation” concepts discussed in Section III.B.1 above.

### C. Investing in Community Knowledge and Leadership

Pathology logics are rooted in a “deficiency orientation” that understands financially impoverished communities as “deficient victims incapable of taking charge of their lives and of their community’s future.”<sup>293</sup> Dismantling this deeply embedded logic requires the centering of those who are most impacted by state intervention and building supportive structures around them.

A recent *New York Times* article featured a privately funded program that provides parents with financial support, showcasing the connection between financial assistance and family well-being.<sup>294</sup> But current support systems for marginalized families are too often linked to coercive surveillance and control. For example, preventive services, ostensibly in place to prevent abuse and neglect, expand surveillance and are often misaligned with a family’s actual financial and childcare needs. As Don Lash

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<sup>290</sup> CENTER FOR LEADERSHIP ON URBAN SOLUTIONS, *An Open Letter to Our Friends on the Question of Language*, <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf> [<https://perma.cc/2AWT-FAPZ>] (posting a letter signed by herself and twenty-nine other New York city council members urging Eric Adams to reverse his “pro-solitary confinement position”).

<sup>291</sup> See Erica Bryant, *Words Matter: Don’t Call People Felons, Convicts, or Inmates*, VERA (Mar. 31, 2021), <https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates> [<https://perma.cc/Z68M-ZYKN>] (encouraging the adoption of “people-first language”).

<sup>292</sup> See *supra* note 2 and accompanying text.

<sup>293</sup> JOHN P. KRETZMANN & JOHN L. MCKNIGHT, BUILDING COMMUNITIES FROM THE INSIDE OUT: A PATH TOWARD FINDING AND MOBILIZING A COMMUNITY’S ASSETS 4 (1993).

<sup>294</sup> Andy Newman, *How \$1000 a Month in Guaranteed Income Is Helping N.Y.C. Mothers*, N.Y. TIMES, (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/nyregion/guaranteed-income-nyc-bridge-project.html> [<https://perma.cc/55BQ-P63M>].

points out, incremental reforms of child welfare thus far continue to rely on a paradigm that conflates poverty, child safety, and personal responsibility.<sup>295</sup>

What I call the “poverty to family regulation downward spiral,” a cycle in which impoverished people experience heightened surveillance which culminates in even more government intrusion through coercive services, ultimately leaves underresourced parents with even fewer resources, less time, and fewer employment opportunities.<sup>296</sup> This downward spiral can be disrupted by directing power back into communities. Disruption that reflects community priorities requires the centering of community knowledge. It demands exploring what safety and support look like for families living in vibrant but financially impoverished communities.

A meaningful intervention requires that stakeholders recognize community members as actors, not clients. It further requires the identification of community-based assets and, finally, financial support of these community-based assets and community building. Bringing together community voice, knowledge, and government resources is one step to dismantle the deficiency orientation that guides governmental involvement in marginalized communities.

The work to collectivize and uplift community knowledge is already under way and led by those directly impacted. For example, in 2021 the parent-led organization RISE published a participatory research study.<sup>297</sup> The study involved ten focus groups, engaging 48 people, and a survey of 58 parents impacted by the family regulation in New York City.<sup>298</sup> Of the participants, 60% identified as Black, 16% as Latinx, 12% as white, and 4% as Asian.<sup>299</sup> The study makes six primary findings. One overarching theme is that although 28% of participants reported an income under \$10,000, financial support was the least offered service.<sup>300</sup> Services were targeted at correcting behavior, not changing the financial circumstances of families.<sup>301</sup>

Mother’s Outreach Network is another organization aimed at empowerment of Black mothers through grassroots mobilization, mutual aid, and education in Washington, D.C. Bronx (Re)birth is a grassroots organization in the Bronx, New York that supports Black birthing persons

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<sup>295</sup> See LASH, *supra* note 104, at 157.

<sup>296</sup> Washington, *supra* note 2, at 1120, 1140, 1142; Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, 139 PEDIATRICS 1, 2 (2017) (arguing that low-income families may experience family regulation involvement as an “additional hardship, both emotionally and sometimes financially”).

<sup>297</sup> B. ET AL., *supra* note 20.

<sup>298</sup> *Id.* at 9.

<sup>299</sup> *Id.* at 10.

<sup>300</sup> See *id.* at 10, 13.

<sup>301</sup> See *id.* at 13.

outside of carceral punishment systems.<sup>302</sup> And Parents for Responsive Equitable Safe Schools is a parent-led collective that empowers parents and students across New York City. The collective focuses on the impacts of COVID-19 on families.<sup>303</sup> These groups are just some examples of organizations that offer community support and generate community expertise.

Opportunities for directly impacted parents to generate and share their expertise are a good step, but when organizations work with community members in marginalized neighborhoods, the organizations should compensate the members for providing their expertise. The challenge here is that additional income can interfere with a person's eligibility for assistance, jeopardizing social security benefits, Medicaid, or both. Directly impacted people should have opportunities to share their expertise in ways that value and compensate them without the threat of losing other already scarce resources.

#### D. Community-Informed Advocacy

Movement lawyers work alongside and uplift directly impacted communities in their effort to transform systems. Lawyers become embedded in the community as the community identifies needs and goals. Legal strategies are informed by and respond to community objectives. Instead of viewing communities as clients, movement lawyers center the community as the actor. Mother's Outreach Network is an example of movement lawyering in the family regulation space.<sup>304</sup> Embedded in the D.C. community, the organization provides legal education and legal representation for low-income Black mothers navigating welfare systems. In working alongside the community, Mother's Outreach Network identifies economic stability as a major issue for mothers ensnared in the family regulation system.

Expanding financial resources and furthering income justice for marginalized parents are crucial objectives. Instead, pathology logics justify opposite solutions. The "downward spiral" of family regulation often involves the shifting of resources away from parents,<sup>305</sup> the loss of housing,<sup>306</sup>

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<sup>302</sup> BX (RE)BIRTH COLLECTIVE, <https://www.bxrebirth.org/> [<https://perma.cc/45CQ-WXHL>].

<sup>303</sup> PARENTS FOR RESPONSIVE EQUITABLE SAFE SCHOOLS, <https://www.pressnyc.org> [<https://perma.cc/5DVX-PZE8>].

<sup>304</sup> MOTHER'S OUTREACH NETWORK, <https://mothersoutreachnetwork.org> [<https://perma.cc/U7B9-9DHV>].

<sup>305</sup> MOVEMENT FOR FAM. POWER, *supra* note 8, at 24–27.

<sup>306</sup> See Jason M. Rodriguez & Marybeth Shinn, *Intersections of Family Homelessness, CPS Involvement, and Race in Alameda County, California*, 57 CHILD ABUSE & NEGLECT 41, 42–43 (2016).

and the loss of employment or employment opportunities.<sup>307</sup> At the same time, the system occupies much time and space in a family's life through mandated services, court appearances, and home visits.

One way to expand financial resources for low-income families is through guaranteed minimum income. Several privately funded Universal Basic Income pilots explore the effects of financial stability for families.<sup>308</sup> These pilots are grounded in a framework of racial equity. But providing increased income to low-income families on a larger scale is ultimately a policy choice that requires the dismantling of deficiency and immorality narratives associated with poverty.

Directly impacted communities and movement lawyers have also identified the need for legal assistance in navigating state maltreatment registries. Courts rely heavily on caseworker assessments and prior CPS involvement as evidence of parental "deficits." This implicates families intergenerationally and marginalized communities more broadly. While many states provide for a right to legal assistance in neglect or abuse proceedings in family court, parents must typically navigate the administrative process of clearing their state record without legal advice.<sup>309</sup> Many caregivers are likely unaware of being on a maltreatment registry.<sup>310</sup> Pro bono projects, though few and far between, offer some legal support.<sup>311</sup>

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<sup>307</sup> See Jennifer L. Hook, Jennifer L. Romich, JoaAnn S. Lee, Maureen O. Marcenko & Ji Young Kang, *Trajectories of Economic Disconnection Among Families in the Child Welfare System*, 63 SOC. PROBL. 161, 164, 175 (2016); MOVEMENT FOR FAM. POWER, *supra* note 8, at 63; Chris Gottlieb, *Race Bias in Child Welfare Investigation*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/opinion/letters/child-welfare-investigations.html> [<https://perma.cc/BL2D-ASY4>].

<sup>308</sup> In Stockton, California, the Economic Security Project is funding a Universal Basic Income project. See Sarah Holder, *Stockton Extends Its Universal Basic Income Pilot*, BLOOMBERG (June 2, 2020), <https://www.bloomberg.com/news/articles/2020-06-02/stockton-extends-its-universal-basic-income-pilot> [<https://perma.cc/A5LM-VGNC>]. In Washington, D.C., a coalition is providing 500 families with direct cash assistance. See Scott Kratz, *How a Washington, DC Coalition Is Using Place-Based Cash Relief to Advance an Equitable COVID-19 Recovery*, BROOKINGS (Sept. 29, 2020), <https://www.brookings.edu/blog/the-avenue/2020/09/29/how-a-washington-dc-coalition-is-using-place-based-cash-relief-to-advance-an-equitable-covid-19-recovery> [<https://perma.cc/X962-WWZU>].

<sup>309</sup> See Redleaf, *supra* note 120, at 391.

<sup>310</sup> See *id.* (pointing out that even some lawyers may not be aware of the SCR process).

<sup>311</sup> See, e.g., *Family Defense Clinic Secures Legislative Victory Reforming NY's Social Services Law*, N.Y.U. (July 27, 2020), <https://www.law.nyu.edu/news/family-defense-clinic-new-york-child-welfare-legislation> [<https://perma.cc/563N-2L3E>] ("A three-year advocacy effort by NYU Law's Family Defense clinic and its partners came to a victorious close in April when New York Governor Andrew Cuomo signed budget legislation that included major reform of New York's Social Services Law."); see also *The Bronx Defenders' Law School Clinics*, BRONX DEFENDERS (2015), <https://www.bronxdefenders.org/programs/the-bronx-defenders-law-school-clinics/> [<https://perma.cc/X24Q-6KXS>] (describing the Bronx Defenders' partnership with the Cardozo School of Law to launch the Gertrud Mainzer Family Defense Clinic).



Movement lawyering offers a fundamental shift in power and knowledge building by centering the needs and demands of directly impacted communities. Community knowledge exposes the scattered, incomprehensive landscape of financial assistance and access to legal assistance for marginalized families. Instead of focusing on the “deficiency” of individuals, movement lawyers, driven by community knowledge, lay bare the deficiency of structures that rely on pathology logics for self-legitimizing purposes.

#### CONCLUSION

The policing of emotions, the exacerbation of mental distress, and the labeling of behaviors are core aspects of pathology logics in the family regulation context. Once attached, the label of pathology is pervasive. It triggers and legitimizes intrusive family surveillance and temporary or permanent family separation. But pathology logics do not merely impact individual parents: they have intergenerational and community-wide effects. This is particularly problematic for Black communities, which rely heavily on kinship networks and extended community for support. The family regulation system’s “tightly-clustered concentration” exacerbates the surveillance, punishment, and pathologizing of Black communities.<sup>312</sup>

By surveilling families for long periods of time, the system creates its own “perpetual witnesses.” These witnesses have the conflicting task of supporting through coercion. Over the course of months and years, families become entrapped in a financial and emotional downward spiral, ultimately leaving them with fewer resources and opportunities. Pathologizing labels are effective tools because they comport with already existing dominant narratives about poor, Black and brown communities.

Pathologizing language further perpetuates gendered, racialized, and classist notions of morality and individual responsibility. Ostensibly neutral language masks the overwhelming power dynamics that exist when the state moves to intervene in families.

But pathology logics have an even greater masking function on a systemic scale. They discount the conditions that render marginalized communities hyper-visible to state surveillance, and they disguise the interconnectedness of carceral systems. By focusing on gendered and racialized notions of personal responsibility, pathology logics allow the state to avoid sufficiently accounting for the destabilizing effects of marginalization.

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<sup>312</sup> See Harvey et al., *supra* note 119, at 588–89.

These deeply embedded pathology logics are not easily dismantled. And yet, directly impacted communities and families are using their “liberatory voice”<sup>313</sup> to shed light on the ways the family regulation system harms them. Making space for and investing in their voices, valuing their expertise, and financially supporting them are important steps toward dismantling pathology logics.

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<sup>313</sup> See HOOKS, *supra* note 268, at 29 (arguing that a central piece of liberation is creating an “oppositional discourse”).