# CRITICAL FAMILY REGULATION SCHOLARSHIP

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Family law scholarship is increasingly reflective of the state's centrality in the lives of marginalized families. One way this shift has taken place is through a focus on the family regulation system. As increased attention is directed towards this system, two competing narratives have emerged. The mainstream narrative describes the family regulation system as one that, although flawed, protects children from maltreatment. The counter-narrative questions the system's efficacy and purpose and situates it within a long history of surveillance, family separation, and subordination.

Against the background of these critiques, this Essay explores the family regulation system's knowledge production problem. Knowledge production problem here refers to the compelling, excluding, and discrediting of certain knowers and their epistemic contributions. To the extent that scholarship addresses knowledge production in the family regulation context, it typically emphasizes silencing practices. Far less attention has been paid to the way the family regulation system compels knowledge that comports with existing family regulation scripts. This Essay provides a cursory look at how the law and institutional design of family regulation compress marginalized families' experiences and constrains their ability to participate in the knowledge production process around state intervention. The compelling of family regulation scripts impacts not only individual families but also agenda setting, understandings of, and solutions around child safety.

This Essay examines how emerging scholarship has drawn on experiential epistemologies and interdisciplinary research to intervene in the mainstream narrative around the efficacy and impact of the family regulation system despite these barriers. After discussing the need for critical analyses of the system and identifying examples of emerging critical family regulation scholarship, this Essay conceptualizes this scholarship's promise and grapples with future implications.



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## INTRODUCTION

Family law scholarship is increasingly reflective of the state's centrality in the lives of marginalized families.[1] This is most visible in recent scholarship's focus on the family regulation system.[2] In family regulation cases the state curtails parental rights by monitoring families inside and outside of their homes, removing children from their parents, and in some cases, permanently severing the parent-child relationship.

As increased attention is directed towards this system, two competing narratives have emerged. The mainstream narrative describes the family regulation system as one that, although flawed, protects children from abusive parents.[3] The counter-narrative questions the

1. To be sure, some scholars have long emphasized the "two-tiered model" of family law. While one tier is concerned with private disputes of middle-class families, the other is reserved for state intervention into marginalized families. Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (*Part I*), 16 STAN. L. REV. 257 (1964); (*Part II*), 16 STAN. L. REV. 900 (1964); (*Part III*), 17 STAN. L. REV. 614 (1965); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002) ("White middle-class and affluent families almost always come to family court voluntarily to handle private matters, even though they may be seeking a coercive resolution to a dispute. Poor and minority families, on the other hand, are disproportionately compelled to appear before family court judges against their will." (footnotes omitted)). *See also* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702 (1998) ("For many poor women, single mothers, and women of color, the battle to retain custody of their children is often not with the children's father, but with the state.").

2. *See, e.g.*, Mariela Olivares, *The Unpragmatic Family Law of Marginalized Families*, 136 HARV. L. REV. F. 363, 371–76 (2023) (making the case that family court is "inherently racist and classist" by discussing, amongst other examples, the experience of marginalized families with the family regulation system); Tianna N. Gibbs, *Centering Family Violence in Family Law as Racial Justice*, 30 VA. J. SOC. POL'Y & L. 43, 45–46, 53–54 (2023) (arguing that a focus on racial justice in conceptions of family justice can "ensure that efforts to center family violence in family law do not amplify" the harms of the family regulation system).

3. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 26 (2022) [hereinafter ROBERTS, TORN APART] ("In addition to being fooled by its benevolent guise, many politically astute people don't even see the child welfare system as a significant part of the state. Sociologists, political scientists, economists, and legal scholars have barely interrogated the role of family policing in perpetuating structural inequalities . . . ."); Tehra Coles, Zainab Akbar, Emma Ketteringham & Lauren Shapiro, *The Sad Omission of Child Welfare from Mainstream Discussion on Race*,

family regulation system's efficacy and purpose, situating it within a long history of subordination.[4] Instead of focusing on what the system purports to do, these critics emphasize the system's impacts.[5]

But the production of counter-knowledge faces distinct challenges. This Essay explores what I call the family regulation system's knowledge production problem. Knowledge production problem here refers to the compelling, excluding, and discrediting of certain knowers and their epistemic contributions. The substantive laws that govern and the procedural design that undergirds family regulation court proceedings shape impacted families' vulnerability to distinct epistemic harms by which "whole set[s] of knowledges are disqualified."[6]

To the extent that current scholarship addresses the family regulation system's knowledge production problem, the emphasis is typically on silencing practices.[7] Far less attention has been paid to the ways the state compels marginalized families to engage in knowledge production. But the compelling of specific knowledge that comports with already existing family regulation scripts is an important part of the story. Family regulation scripts require parents to frame their experience with state intervention in specific ways, whether their experience comports with the state's expectations or not. In other words, family regulation scripts require performance.[8]

In prior work, I have begun to focus on compelled knowledge in the context of survivors of domestic violence.[9] And Stephanie Glaberson has problematized the reduction of families to "informants" or "data points,"

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IMPRINT (Aug. 6, 2020, 5:58 PM), https://imprintnews.org/opinion/sad-omissionchild-welfare-mainstream-discussion-race/46315 [https://perma.cc/QJ4R-JMXF] (discussing that any "meaningful reform" to the family regulation system has been thwarted by "characterizing any attempt as a threat to 'protect' the community" and keep children safe).

4. *E.g.*, ROBERTS, TORN APART, *supra* note 3, at 33–46; ALAN J. DETTLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 105–19 (2023).

5. DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 30 (2011) ("We look more at what legal regimes do rather than what they say about what they do.").

6. Terrell Carter & Rachel López, *If the Subaltern Could Speak*, 109 MINN. L. REV. (forthcoming 2024) (manuscript at 16) (cleaned up) (quoting Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 280–81 (Cary Nelson & Lawrence Grossberg eds., 1988)).

7. *See, e.g.*, Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 77–78 (2019).

8. *See infra* Part I.

9. S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022) [hereinafter Washington, *Survived & Coerced*].

as opposed to epistemic agents, through algorithmic governance.[10] This Essay builds on these contributions by discussing how substantive law and procedural design reproduce family regulation scripts in court proceedings.

The compelling of family regulation scripts impacts more than individual families. It influences agenda setting, understandings of, and solutions to issues of child safety. In other words, family regulation scripts affect our ability to correctly identify problems and limit the universe of solutions to those problems.[11] This is not to say that the system's knowledge production problem is the product of intent. Rather, it is the result of laws and institutional design paired with deep-seated preexisting narratives about marginalized knowers.

Against this background, a strain of family regulation scholarship has drawn on experiential epistemologies to intervene in the mainstream narratives about the efficacy and impact of the family regulation system. Some scholars have explicitly drawn on their own experience in family court representing both children and parents.[12] For example, Professor Cynthia Godsoe draws on her experience representing children in New York family court to discuss lawyers' role in perpetuating the harms of family regulation proceedings.[13] Some scholars have discussed how the family regulation system has impacted their own families.[14] Others have produced participatory law scholarship in developing system critiques alongside impacted parents.[15] Several other scholarly contributions emphasize direct experience when discussing the impact of family regulation intervention on marginalized parents.[16] For example, in a recent article, Professor Shanta Trivedi combines legal analysis with the

10. Stephanie K. Glaberson, *The Epistemic Injustice of Algorithmic Family Policing*, 14 UC IRVINE L. REV 404, 445–47 (2024) (citing MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 133–34 (2007)) (discussing Miranda Fricker's concept of "epistemic objectification").

11. Dorothy Roberts, *Building a World Without Family Policing*, LPE PROJECT (July 17, 2023) https://lpeproject.org/blog/building-a-world-without-family-policing/ [https://perma.cc/CEH3-Z4C9] ("Family policing is a barrier to galvanizing the radical change and revolutionary care required to keep children safe and thriving.").

12. *See infra* Part III.

13. Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 943 (2023).

14. Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 131–34 (2020).

15. Outside of the family regulation context, Rachel López has drawn on interdisciplinary research to theorize participatory law scholarship. Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1818 (2023) (arguing that "partnering with those who have no legal training but have expertise in law's dysfunction can help us to see the 'truth' of the law more clearly").

16. *See infra* Part III.

words of directly impacted parents to situate their experiences within other critiques of the system.[17] This methodological move fits well within what Professor Rachel López theorizes as "participatory law scholarship."[18]

Having discussed the centrality of family regulation scripts and their impact on knowledge production in and about the system, this Essay identifies the emergence of what I call critical family regulation scholarship, its promise, and its risks. The experiential orientation of emerging family regulation scholarship is one feature of critical family regulation scholarship. A critical approach to family regulation scholarship understands marginalized groups as epistemic agents capable of producing and sharing knowledge outside of the compressed narratives incentivized by preconfigured scripts. This experiential angle draws on strains of critical legal theory, standpoint epistemology, and epistemic oppression theory. It also emphasizes the payoffs of bringing an interdisciplinary lens to legal scholarship.

This Essay proceeds in three parts. Part I introduces the family regulation system's knowledge production problem by doing two things: first, situating family regulation scripts within the larger power structures of the system; and second, discussing the vulnerability of marginalized knowers to being discredited. Part II discusses how legal concepts operationalize the compelling of knowledge from marginalized families, not as epistemic agents but as informants. Part III discusses how, shaped by critical legal scholarship, emerging family regulation scholarship draws on experiential epistemologies and interdisciplinary approaches to intervene in the mainstream narrative around the efficacy and impact of the family regulation system despite these barriers. It concludes by offering tenets of critical family regulation scholarship.

## I. FAMILY REGULATION SCRIPTS

As scholars raise a plethora of structural issues with the family regulation system, one narrative continues to permeate popular discourse: Although flawed, the system's primary role is to protect children from maltreatment by placing them in safer homes. This "meta-narrative"[19] shapes our collective understanding of the parents subject to family regulation intervention and the role of the state in keeping children

17. Shanta Trivedi, "Am I Still a Parent?": The Child Welfare System's Devastating Effects on Parents (June 8, 2024) (unpublished manuscript) (on file with author).

18. *See supra* note 15.

19. Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 37 (2010).

safe. It persists even where research casts serious doubt on the efficacy of our current system of family regulation.[20] The dominant narrative quiets competing narratives of unnecessary family separation, discrimination, and serious harm inflicted on children in the foster care system.[21]

Critiques of the family regulation system's disparate treatment of marginalized families and its poor outcomes for the children whom it is tasked with protecting are longstanding.[22] Much newer are critiques that focus directly on what I call the family regulation system's knowledge production problem. Family regulation scripts—scripts that require parents to perform submission to and appreciation of state intervention—are an important part of this knowledge production problem.

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20. *Id.* at 25.

21. *Id.* at 21–30.

22. Scholarship suggests that the family regulation system has always primarily intervened in the lives of poor families and families of color, while very rarely implicating white middle-class families. Many have discussed the relationship between neglect allegations and poverty. *See* Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541 (2024); KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 114 (2017); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1483–84 (2012); DUNCAN LINDSEY, THE WELFARE OF CHILDREN 175 (2d ed. 2004); NAOMI R. CAHN, *Placing Children in Context: What Is Right for Children: Parents, Foster Care, and Poverty*, *in* WHAT IS RIGHT FOR CHILDREN? 145, 156 (Martha Albertson Fineman & Karen Worthington eds., 2009) ("Wealthier families have always received more protection for their familial-based decision making.").

Abuse allegations are plagued with some of the same issues that implicate allegations of neglect. In fact, scholars and practitioners have discussed that similar underlying facts in these cases have vastly different outcomes depending on the resources and identity of the parents and children involved. While some parents are accused of being abusive when they seek medical care for their child, others encounter empathy and care. *See, e.g.*, 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, 384 (2019) ("[W]e have found that early litigation exposes the fact that, much like elsewhere in child protective law, these serious physical abuse cases are often based on misperceptions and are susceptible to both mistake and overreach."); Wendy G. Lane, David M. Rubin, Ragin Monteith & Cindy W. Christian, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1603 (2002) (finding that children of color "with accidental injuries were more than 3 times more likely than their white counterparts to be reported for suspected abuse"); Joanne N. Wood, Matthew Hall, Samantha Schilling, Ron Keren, Nandita Nitra & David M. Rubin, *Disparities in the Evaluation and Diagnosis of Abuse Among Infants with Traumatic Brain Injury*, 126 PEDIATRICS 408, 412 (2010) (finding that Black infants and uninsured and publicly insured infants were more likely to receive a skeletal survey). Although focusing on criminal proceedings, Professor Deborah Tuerkheimer mentions that flawed Shaken Baby Syndrome diagnoses have "powerful family court implications." *See* Deborah Tuerkheimer, *The New Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 6 n.29 (2009).

The discussion of scripts has a long tradition in feminist and critical legal studies.[23] Scripts exist against the backdrop of longstanding gendered and racialized narratives. In the family regulation context specifically, parents are expected to conform to scripts of pathologically poor parents,[24] uninvolved fathers,[25] or bad Black mothers.[26] They are expected to follow the script of the remorseful and selfless parent.[27]

Family regulation scripts injure because they are reductive or impulsive, alienate families from their own lived experience, and misinform the public. Parents who are able and willing to perform family regulation scripts are more likely to navigate the system successfully. On the flipside, failure to comply with gendered and racialized expectations can prolong family regulation proceedings.[28]

As Part II discusses, family regulation laws and procedural design reproduce family regulation scripts. This Section provides context to the compelling of specific narratives in family regulation proceedings by discussing two things: the specific stakes of failing to conform to them and the vulnerability of some families to credibility discounts.

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23. Judith Butler conceptualized gender as a performative act shaped by "stylized repetition of acts." *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 141 (1990). This concept has been applied in many other contexts. *See, e.g.*, I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449 (2021) (reviewing AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020)). Michel Foucault observed how performance provides the penal state with an opportunity to examine and evaluate a person's behavior as an expression of disciplinary power, even absent other forms of punishment. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 189 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

24. Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341, 346–50 (2001); BRIDGES, *supra* note 22, at 129 (2017) (discussing the stigmatization of single mothers living in poverty).

25. Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY L. & POL'Y 127, 137–38 (2011).

26. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 106 (1993) [hereinafter Roberts, *Motherhood*] (observing that courts "often consider Black women less fit to mother"); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438–39 (1991) ("The myth of the 'bad' Black woman was deliberately and systematically perpetuated after slavery ended.").

27. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 154 (2000) ("[Society's] conception is that a 'good mother' is entirely self-sacrificing, that mothers should transcend their experiences and act on behalf of children regardless of their own lives.").

28. S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1571–77 (2023) [hereinafter Washington, *Pathology Logics*].

### *A. Situating Family Regulation Scripts*

The pressure to internalize and express scripts of submission and dependence must be understood within the larger context of the family regulation system's power structures. Judges and caseworkers hold unique power over marginalized families. This is true both in terms of the nature of the right at stake and the discretion afforded to judges and caseworkers in determining if and how to curtail it. The family regulation system intervenes into families in two primary ways: separation and supervision.

Every year, hundreds of thousands of children are removed from their homes and placed in the foster care system. In 2021, the states removed 206,812 children from their homes.[29] Family regulation involvement is so common that one in three children in the United States experience an investigation before the age of eighteen.[30]

With or without family separation, caseworkers have broad discretion in deciding how to monitor a family.[31] As part of their supervision of the family they enter the family's home regularly.[32] They check bedrooms, closets, and drawers. They "routinely conduct searches of children's bodies, down to their underwear."[33] They speak with neighbors, teachers, and landlords. As "perpetual witnesses," caseworkers regularly report to the court about the parents' behavior, supervised interactions with their child, and progress in services.[34] When parents fail to comport with the expectations of these "street-level bureaucrats," this failure is not attributed to the state but to the parent.[35]

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29. 29 U.S. DEP'T HEALTH & HUM. SERVS. AFCARS REP. 2 (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf [https://perma.cc/Q7CJ-8XHV].

30. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017).

31. DIANE L. REDLEAF, THEY TOOK THE KIDS LAST NIGHT: HOW THE CHILD PROTECTION SYSTEM PUTS FAMILIES AT RISK 44 (2018).

32. 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).

33. Eli Hager, *Police Need Warrants To Search Homes. Child Welfare Agents Almost Never Get One.*, PROPUBLICA (Oct. 13, 2022, 8:00 AM), https://www.propublica.org/article/child-welfare-search-seizure-without-warrants [https://perma.cc/L4EW-R5VG].

34. Washington, *Pathology Logics*, *supra* note 28, at 1545–48.

35. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 56 (1983) ("If clients refuse to continue interacting with street-level bureaucracies, the fault may always be attributed to the client. 'Escapees,' 'dropouts,' 'incorrigibles,' and 'socially disorganized' are labels that imply that the exit of the client is attributable to a defect of the client.").

For some families, the possibility of family regulation intervention is an important part of everyday life. For others, it remains largely invisible. As Professor Khiara Bridges observes, the state regularly curtails the right to family privacy for poor families.[36] Indeed, Black, poor, and disabled parents are much more likely to come under family regulation system scrutiny.[37] In some states these disparities are particularly pronounced.[38] Black children are overrepresented in the foster care system and remain there for longer periods of time.[39] The disparities continue in termination proceedings, in which the court decides whether to permanently sever the legal relationship between the parent and the child. According to the National Institutes of Health, one in forty-one Black children in the United States will lose their legal relationship with their parent.[40] In some U.S. cities that number is as high as one in sixteen.[41]

Noncitizen and mixed status families are particularly vulnerable to family regulation intervention.[42] Orders issued and documents produced in family court can impact their ability to remain in the United States.[43] On the flipside, immigration enforcement during a pending family regulation case can affect a parent's ability to reunify with their child, especially when the federal government detains or deports the parent.[44] While some family courts have made explicit that immigration status

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36. BRIDGES, *supra* note 22, at 114–17.

37. *See id.* at 45–55.

38. For example, according to a recent analysis, Arizona's Department of Child Safety investigates one out of three Black children in Arizona's largest county (Maricopa), making family separation a "constant threat" for Black families. *See* Eli Hager, Philip Agnel & Hannah Rappleye*, For Black Families in Phoenix, Child Welfare Investigations Are a Constant Threat*, PROPUBLICA (Dec. 8, 2022, 8:00 AM), https://www.propublica.org/article/for-black-families-in-phoenix-child-welfare-investigations-are-constant-threat [https://perma.cc/4CD9-WBJM].

39. Cheri Williams & Kimberly Offutt, *Black Children Are Overrepresented in the Foster Care System: What Should We Do About It?*, CHILD.'S BUREAU EXPRESS (2020), https://cbexpress.acf.hhs.gov/article/2020/august-september/black-children-are-overrepresented-in-the-foster-care-system-what-should-we-do-about-it/e538c0031b92c150517620efe54bcb65.

40. Shereen White & Stephanie Marie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let's Talk About It That Way*, ABA (Oct. 13, 2022), https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/racial-discrimination-child-welfare-human-rights-violation-lets-talk-about-it-way/.

41. Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, *Contact with Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, 118 PNAS e2106272118, at 2–3 (2021).

42. *See* S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117 (2023) [hereinafter Washington, *Fammigration Web*].

43. *See id.* at 123–28.

44. *See id.* at 124.

alone does not justify the termination of a parent's relationship with their children, there are examples of family courts considering immigration detention or deportation when deciding whether to irrevocably end the legal parent-child relationship.[45] The vulnerability of noncitizen families is considerable given already-existing pressures to conform to specific scripts of survival to obtain relief in immigration proceedings.[46] Parents with disabilities are also disparately impacted. A recent study suggests that allegations against parents with disabilities are more likely to be substantiated.[47] These parents are also more likely to lose their parental rights in termination proceedings.[48] A growing body of legal scholarship discusses the targeting of disabled parents and the construction of disability by the family regulation system.[49] While LGBTQ+ parents of color ensnared in the family regulation system are rarely the center of legal academic discourse,[50] they are another marginalized group facing distinct harms. Professor Nancy Polikoff has shown that the family regulation system discriminates against Black lesbian mothers.[51] And Professor Courtney Joslin and Attorney Catherine Sakimura observe that

45. *See, e.g.*, *In re H.J.Y.S*, No. 10-19-00325-CV, 2019 WL 8071614, at *4–5 (Tex. App. Feb. 26, 2019); *B.V. v. Dep't of Child. & Fams.*, 328 So. 3d 48, 51–53 (Fla. Dist. Ct. App. 2021); *Perez-Velasquez v. Culpeper Cnty. Dep't of Soc. Servs.*, No. 0360-09-4, 2009 WL 1851017, at *2–3 (Va. Ct. App. June 30, 2009); *In re Doe*, 281 P.3d 95, 101–02 (Idaho 2012).

46. Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 754–58 (2017) ("[Applicants in domestic-violence based asylum cases must tell] a particular type of story to the asylum adjudicator, namely, that she is docile and powerless. She must show that she could never muster the strength or internal fortitude to stand up to her abuser and leave, that she was viewed as, and likely even felt like, chattel.").

47. Sharyn DeZelar & Elizabeth Lightfoot, *Who Refers Parents with Intellectual Disabilities to the Child Welfare System? An Analysis of Referral Sources and Substantiation*, CHILD. & YOUTH SERVS. REV., no. 119, 105639, Dec. 2020, at 1, 4–5 (finding the likelihood of substantiation of a CPS report to be fifty-eight percent higher for parents with an intellectual disability).

48. Traci LaLiberte, E. Lightfoot, S. Mishra & Kristine Piescher, *Parental Disability and Termination of Parental Rights in Child Protection*, MINN-LINK, Spring 2015, https://drive.google.com/file/d/1JjCeER0b_Erba4GMDBiObOt3YSA-fq-6/view [https://perma.cc/MKW6-BS3A].

49. Professor Sarah Lorr examines "the cocreation of race and disability" in the family regulation system, uncovering the intersectional dimensions of racialized and ableist logics embedded in the system. *See* Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1328–29 (2022).

50. For three recent exceptions, see Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 FAM. L.Q. 87, 90 (2018), S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J. F. 163, 173–76 (2022), and Courtney G. Joslin & Catherine Sakimura, *Fractured Families: LGBTQ People and the Family Regulation System*, 13 CALIF. L. REV. 78 (2022).

51. Polikoff, *supra* note 50, at 107.

LGBTQ+ parents are at higher risk of becoming ensnared in the family regulation.[52]

### *B. Discrediting Marginalized Knowers*

Not only are marginalized people more likely to become ensnared in the system and experience worse outcomes, but their status as knowers is also more likely to be dismissed and discredited. A rich literature has problematized the discrediting and silencing of women and people of color, Black women in particular.[53] Some scholars address credibility discounts of marginalized groups specifically in the context of legal proceedings that perpetuate the essentialization of survivors.[54] For example, Professor Leigh Goodmark has discussed that lesbian, trans, and survivors of color who fail to conform to traditional gender roles are more likely to be subjected to punitive intervention, including criminalization.[55] Goodmark shows how these "imperfect victims" are unable to perform in ways that comport with the criminal legal system's notions of innocence and worthiness.[56]

A few ethnographic studies provide more specific insights into the silencing and discrediting of parents in family regulation proceedings. Scholar Jessica López-Espino has used the term "metapragmatic dismissals" to describe how parents are silenced and discredited in family court, even before they enter the courtroom.[57] Similarly, Professor Vicki Lens describes how in family regulation proceedings, "[p]arents' voices

52. Joslin & Sakimura, *supra* note 50, at 95–101.

53. *E.g.*, Emma Coleman Jordan, *Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, *in* CRITICAL RACE FEMINISM 169, 169–72 (Adrien Katherine Wing ed., 1997); Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123, 130 (1997); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 165 (1996) (discussing credibility discounts of Black women); 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 n.175.

54. *See, e.g.*, Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount,* 166 U. PA. L. REV. 1, 40–41 (2017); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1085 (2006); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER & SOC. POL'Y & L. 733, 739 (2003).

55. LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 9–12 (2023).

56. *Id.*

57. Jessica López-Espino, *Giving and Taking Voice: Metapragmatic Dismissals of Parents in Child Welfare Court Cases*, 49 L. & SOC. INQUIRY 1453 (2024).

were rarely heard, as others spoke for and about them."[58] Lens concludes that the parents in her study were unable to actively shape their own stories with "their own words."[59] These observations are not dissimilar to what criminal legal scholars have noted about criminal court proceedings.[60] From mandated reporters who are more likely to be suspicious of neglect and abuse in marginalized families[61] to the state's ability to frame family functioning in its own words,[62] practices of discrediting are part of the family regulation system's functioning.

At times, the discrediting of marginalized knowers reveals a lack of cultural competency. Kristie Puckett-Williams, a campaign manager for the ACLU of North Carolina and a mother directly impacted by family regulation intervention, observed that "[i]f you say your child was burned because you were braiding your daughter's hair . . . if you are a white social worker who has never had braided synthetic hair, you may believe the mom is making that story up."[63]

The proliferation of confidentiality laws in family regulation proceedings facilitates the silencing of impacted families. As of this writing, twenty-five states and the District of Columbia have confidentiality laws that exclude the public and press from family regulation proceedings in court.[64] This generally means that only the

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58. Lens, *supra* note 7, at 77.

59. *Id*.

60. Eve Hanan has discussed the pressure on defendants to perform submission and engage in highly scripted speech in criminal proceedings. *See* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 498 (2021).

61. For example, medical providers are more likely to report families of color than white families for the same injuries. Elizabeth Hlavinka, *Racial Disparity Seen in Child Abuse Reporting*, MEDPAGE TODAY (Oct. 5, 2020), https://www.medpagetoday.com/meetingcoverage/aap/88958 [https://perma.cc/F3VC-Q2RA].

62. State agents provide allegations against the parents at the onset of the case, often presented as a detailed narrative. Later, state agents provide regular reports about the family from their own perspective. Washington, *Survived & Coerced*, *supra* note 9, at 1100 n.5; Washington, *Pathology Logics*, *supra* note 28, at 1535.

63. Michael Fitzgerald, *Rising Voices for 'Family Power' Seek To Abolish the Child Welfare System*, IMPRINT (July 8, 2020, 11:45 PM), https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141 [https://perma.cc/KD5C-S2CX].

64. ALA. CODE 12-15-129 (2024); ARK. CODE ANN. § 9-27-325(i)(1); CAL. WELF. & INST. CODE § 346 (West 2024); DEL. CODE ANN. tit. 10, § 1063 (2024); DC CODE § 16-2316(e)(3); HAW. REV. STAT. § 571-41(b) (2023); IDAHO CODE ANN. § 16-1613(1) (2024); KY. REV. STAT. ANN. § 610.070(3); LA. CHILD. CODE ANN. art. 407 (2024); MASS. GEN. LAWS ch. 119, § 38 (2024); MISS. CODE ANN. § 43-21-203(6); MO. REV. STAT. § 211.171(7) (2024); N.H. REV. STAT. ANN. § 169-C:14 (2024); N.D. CENT. CODE § 27-20.4-14(5) (2023); OKLA. STAT. tit. 10A, § 1-4-503(A)(1)(a) (2024); 42 PA. CONS. STAT. § 6336(e) (2024); 14 R.I. GEN LAWS § 14-1-30 (2024); S.C. CODE ANN.

parties to the proceedings are permitted inside the courtroom, and that they are prohibited from divulging what took place inside. The files and documents produced in these proceedings are also confidential in most states.[65] In states with an open court presumption, such as New York,[66] Texas,[67] and Florida,[68] judges make use of their discretion to close the proceedings to the public. For this reason, family regulation courts have been described as "secretive, insular place[s]."[69] At first glance the logic of confidentiality is consistent with the family regulation system's mandate of child protection. Indeed, courts have repeatedly emphasized that children's best interest justifies the exclusion of the public and press in these proceedings.[70] But confidentiality has costs. Professor Matthew Fraidin argues that confidentiality laws strengthen the silencing of narratives that reveal the pervasive dysfunction of the system, to the detriment of both parents and children.[71] Indeed, closed court proceedings, limited access for the press, and the risks associated with disclosure limit opportunities to intervene in already-existing knowledge about child safety and the system's role in it. Parents who choose to publicize their concrete experiences risk sanctions.[72]

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§ 63-5-590 (2024); S.D. CODIFIED LAWS § 27-7A-36 (2024); TENN. R. JUV. PROC. 114(a); UTAH R. JUV. P. 50; VT. STAT. ANN. tit. 33, § 5110 (2024); VA. CODE ANN. § 16.1-302(C) (2024); W. VA. CHILD ABUSE & NEGLECT PROC. R. 6a(a); WIS. STAT. § 48.299(1)(A) (2021–22); WYO. STAT. ANN. § 14-3-424(b) (2024).

65. *See, e.g.*, OFF. STATE CTS. ADM'R, FLA. CTS., A PARENT'S GUIDE TO JUVENILE DEPENDENCY COURT 2 https://www.flcourts.gov/content/download/218184/file/dependencybooklet.pdf [https://perma.cc/H4MF-6GS].

66. N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (2021)/

67. FLA. STAT. § 39.507(2) (2024).

68. TEX. FAM. CODE ANN. § 105.003(b) (West 2020).

69. Richard Wexler, *Civil Liberties Without Exception: NCCPR's Due Process Agenda for Children and Families*, NAT. COAL. FOR CHILD PROT. REFORM: SOLS.: DUE PROCESS, https://nccpr.org/solutions-due-process/ [https://perma.cc/G5Q2-Y6SH] (quoting Karen De Sá, *Dependent on Same Lawyers*, MERCURY NEWS (Aug. 9, 2008, 5:44 AM), https://web.archive.org/web/20240116193340/https://www.mercurynews.com/2008/08/09/dependent-on-same-lawyers/).

70. *E.g.*, *San Bernardino Cnty. Dep't of Soc. Servs. v. Superior Ct.*, 283 Cal. Rptr. 332, 338–39 (Cal. Ct. App. 1991); *Nat. Parents of J.B. v. Fla. Dep't of Child. & Fam. Servs.*, 780 So. 2d 6, 9 (Fla. 2001).

71. Fraidin, *supra* note 19.

72. *See id.* at 33–35, 41; Seaborn Larson, *Parents Seek To Reverse Gag Order in MT Child Removal Case*, HELENA INDEP. REC. (Feb. 6, 2024), https://helenair.com/news/state-regional/government-politics/montana-transgender-child-removal-parents-governor-gianforte/article_84d9ba5c-c471-11ee-9b75-c3aaec0785bb.html [https://perma.cc/8MFG-CUAW]; Jeffrey Billman, Whitney Clegg & Nick Ochsner, *No-Win Scenario*, ASSEMBLY (Nov. 28, 2023), https://www.theassemblync.com/politics/courts/child-welfare-court-system/ [https://perma.cc/6F42-LRCK] ("This is a confidential courtroom, Miss Simpson. You cannot share anything that happens in this

One way to make sense of silencing and discrediting—at least within the courtroom—is simply by viewing it as a manifestation of the adversarial process. To be sure, the adversarial process is structured around representation by lawyers. And for good reason. Parents' admissions in and outside of the courtroom can be used against them. Accordingly, parents represented by counsel will have been advised to remain silent. But even in the face of potential risks, this kind of silencing is not uncomplicated. Professor Eve Hanan has argued that defendants' silence in criminal court comes at a cost to both them and society.[73] Hanan observes that the silencing of criminal defendants is part of a "larger . . . struggle over 'narrative social power'" that discredits and devalues the experiences of system involved people.[74] These lessons are applicable to family regulation proceedings, where silencing practices bump up against a compliance logic that rewards certain scripts. The following section will discuss the compelling of knowledge as an important aspect of knowledge production in family regulation.

## II. REPRODUCTION OF FAMILY REGULATION SCRIPTS: COMPELLING KNOWLEDGE

Philosophers provide helpful frameworks for understanding the impact of discrediting and silencing on the production of knowledge.[75] According to Professor Miranda Fricker, epistemic injustice demotes a knower "from subject to object," from epistemic agent to a "source of information" or, here, to a vehicle for family regulation scripts.[76] Others have described this dynamic not as objectification of a knower but as an example of circumscribed or derivative subjectivity.[77] For the purposes of understanding the epistemic implications of the compelling of family regulation scripts, Professor Emmalon Davis's observation of testimonial injustice is illuminating: "[H]er capacities are shaped and co-opted to

courtroom."); John Hill, *A Gag Order in a Foster Death: When Child Welfare Secrecy Goes Too Far*, HONOLULU CIV. BEAT (Dec. 19, 2022), https://www.civilbeat.org/2022/12/a-gag-order-in-a-foster-death-when-child-welfare-secrecy-goes-too-far/ [https://perma.cc/9C48-8WL5].

73. Hanan, *supra* note 60, at 500–01.

74. *Id.* at 501.

75. Perhaps most prominently, Miranda Fricker coined the term "epistemic injustice" to refer to distinct harms to knowers who are discredited and excluded from societal meaning making. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1, 129–30 (2007).

76. *Id.* at 133 (calling this phenomenon "epistemic objectification" (emphasis omitted)).

77. *E.g.*, Gaile Pohlhaus, Jr., *Discerning the Primary Epistemic Harm in Cases of Testimonial Injustice*, 28 SOC. EPISTEMOLOGY 99, 105 (2014).

meet the needs of the dominant."[78] A person's epistemic subjectivity then is "externally constricted by dominantly situated hearers."[79] The compelling of specific scripts harms the knower while furthering dominant narratives.

Families ensnared in the system are expected to provide legitimating knowledge and conform to family regulation scripts. They are disincentivized from meaningfully sharing epistemic resources or revising epistemic resources in ways that make room for their actual experiences.[80] While they are not completely stripped of their ability to provide knowledge, their epistemic contributions are circumscribed by family regulation scripts. In this way, marginalized families' experiences are compressed. Scripts that legitimate the system and confirm already-existing narratives replace them.[81]

The compelling of family regulation scripts must be understood against the background of a long history of expecting Black women to accept a subordinated status. As Professor Patricia Hill Collins observes, the "controlling image" of Black women as obedient servants was meant to influence Black women as mothers.[82] Black women were expected not only to internalize their subordinated status but also to instill this kind of "deference behavior" in their children.[83] Similarly, the matriarch and welfare queen tropes were linked to the regulation of not only Black women but also their families.[84]

Part II discusses how the law both entrenches and legitimates family regulation scripts. It provides examples of substantive laws and procedural design that make the family regulation system fertile ground for the reproduction of gendered and racialized scripts. These examples are just that: This Section does not attempt to provide a comprehensive

78. Emmalon Davis, *Typecasts, Tokens, and Spokespersons: A Case for Credibility Excess as Testimonial Injustice*, 31 HYPATIA 485, 489 (2016).

79. *Id.* *See also* Pohlhaus, *supra* note 77, at 105 ("[Epistemic others] do not receive the same epistemic support with regard to their distinct lived experiences in the world.").

80. Kristie Dotson, *Conceptualizing Epistemic Oppression*, 28 SOC. EPISTEMOLOGY 115, 119–20 (2014).

81. Godsoe, *supra* note 13, at 947–49.

82. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 70–78 (1991) (discussing the controlling images of Black women as obedient domestic servants, matriarchs, and welfare queens).

83. *Id.* at 72.

84. The matriarch, mammie, and welfare queen tropes put Black women in an impossible situation: Black mothers are both encouraged to be submissive workers, criticized for being "strong figures in their own homes," and stigmatized for being poor. Together, these images "provide . . . ideological justification" for the structural conditions that disadvantage her and her children. *Id.* at 75–78.

overview of the substantive or procedural levers of knowledge production in the family regulation system.

### *A. Reproduction Through Substantive Law*

The fact that scripts play a role in legal systems is not unique to family law. One reason they are particularly forceful in the family regulation context, though, is that there is arguably no way to make sense of the substantive law independent of these scripts. While there is not one coherent body of family regulation law (given the variation across states[85]), there are widespread principles that produce the kind of uniformity that allows for analyses of shared concepts.[86] Some of these unifying concepts are not just vague[87]: They are inextricably linked to gendered, classist, and racialized notions of parenting. Much like the relationship between race and criminalization,[88] the relationship between race, gender, and the evaluation of good versus bad parenting is dialectical.[89]

Key concepts of neglect laws are illustrative here. Take for example, neglect based on improper or inadequate supervision. As many scholars have pointed out, this cause of action is incredibly vague and subjective.[90] Still, a number of states include the failure to provide a child with proper supervision or guardianship, or similarly vague terms, under their

85. Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulatory System*, 11 COLUM. J. RACE & L. 767, 771 (2021) ("[N]o two states' family regulation systems are identical.").

86. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1198 (2016).

87. Critiques have mostly focused on vagueness of neglect law. *See, e.g.*, Cynthia Godsoe, *Racing and Erasing Parental Rights*, 104 B.U. L. REV. (forthcoming 2024) (manuscript at 18) ("The language is so sweeping and subjective that it includes much innocent, non-harmful parenting behavior, and makes it nearly impossible for parents to know what they are permitted to do and what not.").

88. Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 152 (2014).

89. *E.g.*, Roberts, *Motherhood*, *supra* note 26, at 97–98; Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 948–51 (1997); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 399–409 (1996); *see generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

90. Godsoe, *supra* note 87 (manuscript at 18); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 562 (2019); Mical Raz, *Anti-Trans Law Weaponizes Child Protection Systems that Have Long Harmed Kids*, WASH. POST (Mar. 10, 2022, 6:00 AM), https://www.washingtonpost.com/outlook/2022/03/10/anti-trans-lawsweaponize-child-protection-systems-that-have-long-harmed-kids.

definition of neglect.[91] In fact, neglect based on inadequate supervision constitutes a large portion of neglect cases.[92] These allegations are disproportionately brought against women of color and immigrant women.[93] There is some evidence that lower and appellate courts infuse their own gendered and classist understanding of parenting into determinations about proper parenting.[94] These understandings fill out vague concepts like "fitness," "appropriate guardianship," and "proper supervision."[95]

Hyperindividualization is another way family regulation scripts are reproduced. The insight doctrine serves as one example. Insight is a vague and highly subjective term that requires more than a parent's outward compliance.[96] A parent with insight accepts responsibility for the circumstances that led to family regulation involvement, complies fully with the expectations of state agents, and convinces the state that they

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91. *See, e.g.*, IOWA ADMIN. CODE r. 441-175.21 (2024) ("adequate supervision of the child"); N.J. STAT. ANN. § 9:6-8.9(d)(2) (West 2024) ("failure to do . . . any act necessary for the child's . . . moral well-being"); OHIO REV. CODE ANN. § 2151.03(A)(2) (LexisNexis 2024) ("lacks adequate parental care because of the faults or habits of the child's parents"). Courts frequently rely on proper supervision or guardianship to make neglect determinations. *See, e.g.*, *In re Sama A.*, 205 N.Y.S.3d 159, 161–62 (2024); *In re Q.S.*, 2023-Ohio-712, ¶ 111, 210 N.E.3d 610, 636–37 (Ct. App.); *In re M.J.L.*, No. 2127 EDA 2013, 2014 Pa. Super. Unpub. LEXIS 3214, at *7-8 (Mar. 12, 2014); *In re Kurt H.*, 152 A.3d 408, 410–12 (R.I. 2017).

92. CAITLIN FULLER & DIANE L. REDLEAF, FAM. DEF. CTR., WHEN CAN PARENTS LET CHILDREN BE ALONE?: CHILD NEGLECT POLICY AND RECOMMENDATIONS IN THE AGE OF FREE RANGE AND HELICOPTER PARENTING 3, 8–9 (2015) (reviewing cases from 2007–14), https://web.archive.org/web/20240203001855/https://www.familydefensecenter.net/wp-content/uploads/2015/08/When-Can-Parents-Let-Children-Be-Alone-FINAL.pdf.

93. *Id.* at 20–21.

94. Some scholars have found that in decisions regarding the termination of parental rights, lower and appellate courts focus not only on actual harm to children but instead on mothers' specific parenting and lifestyles. Murphy, *supra* note 1, at 709–10.

95. While the infusion of these beliefs might not be as obvious as they once were, we still find examples in lower and appellate court decisions that draw on classist and gendered notions of parenting in, admittedly, more subtle ways. *See, e.g.*, *In re A.L.G.*, No. 07-21-00020-CV, 2021 WL 2488922, at *4 (Tex. App. June 17, 2021) (discussing as part of the trial court's evidentiary basis a counselor's statements that another home might be more suited for a child in teaching them to be college-bound, productive members of society); *Doe v. Iowa Dep't of Hum. Servs.*, 786 N.W.2d 853, 854–55 (Iowa 2010) (noting the trial court found a lack of proper supervision because the mother repeatedly exposed her child to domestic abuse by the father). Importantly, these decisions alone cannot provide a comprehensive picture of the ways dimensions of difference impact practice. Professor Sarah Lorr makes this point: "Although caselaw is critical for understanding the system's own description of what it does and how it operates, the law does not always depict the full truth, and it rarely explains the experiences of the people whose lives are at stake." Sarah H. Lorr, *Disabling Families*, 76 STAN. L. REV. 1255, 1286 (2024).

96. Washington, *Survived & Coerced*, *supra* note 9, at 1149–50.

have internalized parenting lessons conveyed over the course of family regulation involvement.[97] Insight is tested through observation of speech, demeanor, and other behavior.[98] State agents have ample opportunity to make such observations in a family's home, during supervised visitation, and in court.[99] They are also able to obtain information from service providers.[100] Focusing on a parent's insight distracts from the structures that place many of these families at the margins of society and make them vulnerable to state intervention.[101] The disconnect between the structures that disadvantage poor families of color and the expectations of expressions of individualized responsibility is consistent with the pathologizing of poverty, Blackness, and disability.[102]

Sociologist Kelley Fong provides ethnographic accounts of the pressure to perform insight during the investigatory phase of family regulation. In one mother's case she observes that "anything less than perfect compliance became a reason to prolong the case and continue supervising her parenting."[103] Angela Montauban, an impacted parent and advocate, writes that despite her completion of her reunification service plan, state agents stalled reunification because she "did not gain any insight," which she said was attributed to her due to her criticism of the system.[104] As Professor Dorothy Roberts notes, "the degree of parents' cooperation" and compliance with state agents is considered "evidence of the child's risk of harm."[105] Similarly, Professor Godsoe has described cooperation with system actors as "the most important factor in assessing a parent's 'worth.'"[106]

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97. *Id.* at 1151.

98. Burrell, *supra* note 32, at 139 ("If parents are uncooperative with the caseworkers, they are seen by the court as dangerous and lacking insight.").

99. *See, e.g.*, *In re Q.S.*, 2023-Ohio-712, ¶¶ 17, 40–42, 56–59, 66, 70, 82–84, 86–90, 210 N.E.3d 610, 618, 622–23, 626–28, 630–31 (Ct. App.).

100. Washington, *Survived & Coerced*, *supra* note 9, at 1143.

101. Gupta-Kagan, *supra* note 22, at 1553–54; Sarah A. Font & Kathryn Maguire-Jack, *It's Not "Just Poverty": Educational, Social, and Economic Functioning Among Young Adults Exposed to Childhood Neglect, Abuse, and Poverty*, 101 CHILD ABUSE & NEGLECT 104356, at 2 (2020).

102. BRIDGES, *supra* note 22, at 37–64, 129.

103. KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 173 (2023).

104. 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, 655 (2021).

105. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 66 (2002).

106. Godsoe, *supra* note 87 (manuscript at 26).

While insight can play a role throughout the family regulation process, courts often discuss it in the context of termination proceedings. Several recent decisions showcase the important role of insight in these proceedings. For example, in a case before the Michigan Court of Appeals, the court noted that although reunification was possible at the beginning of the case, the mother's lack of insight and other issues demonstrated that the neglectful conditions were not resolved and termination of parental rights was appropriate.[107] In an Iowa case the court similarly found that despite the father's positive efforts to improve, he "lack[ed] insight into the trauma he has caused his children."[108] A Kentucky court affirmed a lower court's decision to terminate the rights of a mother based upon a finding that, despite completing some of her case plan for reunification, "her insight [had] not improved enough over the last three years."[109] The Arkansas Court of Appeals made a similar finding about a mother who, although she had made progress, in the lower court's words "lack[ed] insight necessary to protect the children and keep them safe."[110]

Importantly, pressure to produce the kind of knowledge that signals insight does not merely impact parents who are accused of maltreatment. It can also impact parents who are not accused of any wrongdoing.[111] It is not uncommon for family regulation proceedings to shift focus throughout the life of a case, including a shift from one caretaker to another.[112] This possibility incentivizes parents that are not yet accused of maltreatment to comport with family regulation supervision, which includes performing in ways that comport with family regulation scripts.[113] The most important example of this are survivors of domestic

107. *In re Gilson/Reitz*, No. 368485, 2024 WL 2795746, at *3 (Mich. Ct. App. May 30, 2024).

108. *In re J.L.*, No. 22-1279, 2022 WL 16631216, at *2 (Iowa Ct. App. Nov. 2, 2022).

109. *E.J.F. v. A.J.E.*, No. 2023-CA-0602, 2024 WL 1121665, at *4 (Ky. Ct. App. Mar. 15, 2024).

110. *Kirk v. Ark. Dep't of Hum. Servs.* 2024 Ark. App. 16, at *11, 2024 WL 173078, at **5.

111. In some jurisdictions these parents are referred to as "non-respondent parents," as opposed to the respondent parent. *See* Susanti Sarkar, *New York Appeals Court Case Focuses on Non-Abusive Parent Being Subjected to Home Supervisions*, IMPRINT (Dec. 14, 2023, 4:21 PM), https://imprintnews.org/top-stories/new-york-appeals-court-case-focuses-on-non-abusive-parent-being-subjected-to-home-supervisions/246709 [https://perma.cc/9WEM-5MR6].

112. Washington, *Survived & Coerced*, *supra* note 9, at 1142–43.

113. An ongoing lawsuit in New York challenges the practice of monitoring parents that are not accused of anything. In that case, a mother who experienced domestic violence but was not accused of any wrongdoing was ordered to comply with family regulation supervision, including unfettered access to her home at any time. Sarkar, *supra* note 111.

violence who find themselves in family court due to their (former) partner's abusive behavior.

### *B. Reproduction Through Procedural Design*

Specific aspects of the family regulation system's procedural design also aid in the reproduction of family regulation scripts and limit the production of counter-knowledge. This section focuses on two aspects: one, the system's subjudicial orientation, and two, the dominance of informality and informal judicial practices that allow for few effective ways to challenge judicial decision-making.

The sub- or pre-judicial phase of the family regulation system is an important site of knowledge production. By the time a family regulation case is filed in court, the state has typically had extensive contact with the family. In some cases, there has been months or even years of contact between family regulation agents and the family.[114] During that time, state agents have had the opportunity to closely monitor the family and document their observations without any judicial oversight.[115] Parents are expected to provide the state with access to their home, children, and private health information.[116] This subjudicial process allows state agents to test the parent's ability to comport with family regulation scripts over time and to use their findings to pressure specific scripts in later parts of the proceedings.[117] As Fong discusses, this stage can be used as leverage to achieve parents' compliance with state agents.[118] The subjudicial phase is where most family regulation investigations end.[119] But in thousands of cases every year, this is only the beginning of family regulation involvement. Armed with evidence gathered over the course of weeks, months or years, the state exerts an enormous amount of pressure on parents to comply with scripts of submission and remorse.

The dominance of local, informal judicial practices in the family regulation system and the lack of effective opportunities to challenge

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114. *E.g.*, *In re Q.S.*, 2023-Ohio-712, ¶¶ 7–8, 210 N.E.3d 610, 616 (Ct. App.); *see also* Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 WASH. & LEE L. REV. 857, 864–65 (2020) (noting lack of clarity on timelines for investigations in some states).

115. FONG, *supra* note 103, at 98–100.

116. *Id.* at 99.

117. *Id.* at 101.

118. *Id.* at 100–01.

119. Indeed, most family regulation investigations do not find that a child was maltreated. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2022, at 20 (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2022.pdf [https://perma.cc/USQ2-6YT2].

them dials up the pressure to produce the scripts that conform to the state's expectations. Indeed, others have discussed that the system's problem-solving orientation conflicts with parents' procedural protections.[120] From a knowledge production perspective, this informal orientation facilitates the ability of state agents to gather specific kinds of knowledge from families.

As Professor Jane C. Murphy has pointed out, the pressure to conform to specific images of motherhood is heightened in family regulation proceedings where there are limited ways to challenge the underlying logics that animate expectations to conform.[121] In this vein Murphy observes that "appellate courts rarely examine the underlying values and judgments that courts use to apply the standards."[122] Indeed, as others have problematized, many pressing issues are never litigated in these proceedings, and when they are, the decisions are typically not published.[123] In instances where a trial court's focus on family regulation scripts is eventually effectively challenged, the initial decision has enormous practical implications. This is especially true for the decision to separate a family. Once this decision is made, it will tend to "self-strengthen[] so that the decision in the final stage of the case is more likely to go in the direction of the initial decision."[124] For this reason, mothers who fail to conform to family regulation scripts "bargain under a very dark shadow."[125] In the absence of effective procedural levers to challenge decision-making, parents are incentivized to avoid adversarial postures and instead conform.

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Both the substantive law and procedural design of family regulation compress impacted families' experiences by compelling specific knowledge. Together, this results in highly resilient narratives about child safety, which in turn inform the identification of child safety problems and the solutions we map on to them.

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120. Anna Arons, *The Empty Promise of the Fourth Amendment*, 100 WASH. U. L. REV. 1057, 1062 (2023) ("Fourth Amendment violations are the natural outgrowth of the problem-solving model endemic to the family regulation system.").

121. Murphy, *supra* note 1, at 706.

122. *Id.*

123. William B. Reingold, Jr., *Finding Utility in Unpublished Family Law Opinions*, 19 U. ST. THOMAS L.J. 607, 608 (2023); Lorr, *supra* note 95, at 1285.

124. Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 146 (1995).

125. Sanger, *supra* note 89, at 470.

## III. TOWARDS CRITICAL FAMILY REGULATION SCHOLARSHIP

This Essay has discussed how the law constrains marginalized families' ability to participate in the knowledge production process around family regulation. This not only limits their ability to articulate their experience and needs in ways that resonate with the listener (the courts and agencies), it also affects society's ability to make meaning of their experience.

Against this background, emerging legal scholarship emphasizes alternative lines of inquiry that produce the kind of theory that better accounts for the limits and opportunities of meaning making in the family regulation context. I call scholarship in this vein critical family regulation scholarship. This scholarship understands marginalized groups as subjects of knowledge production—not just as sources of knowledge but as epistemic agents capable of producing and sharing knowledge outside of the compressed narratives incentivized by preconfigured scripts. The experiential angle of critical family regulation scholarship draws on strains of critical legal theory, standpoint epistemology, and epistemic oppression theory. A critical approach emphasizes the payoffs of bringing an interdisciplinary lens to legal scholarship. Critical family regulation scholarship attempts to account for the experience of families along a number of dimensions of difference, including gender, race, class, and disability.

This methodological move can be situated within the traditions of critical race theory and feminist theory, as these literatures are characterized by their attentiveness to lived experience as one kind of expertise.[126] Some scholars have explicitly drawn on their own experience in family court representing both children and parents.[127] Other emerging scholarship in this space is explicitly participatory.[128] These theoretical and methodological underpinnings are complemented by an interdisciplinary approach, drawing from, among other fields, social work and sociology.

On one level, experiential epistemologies have the potential to transform epistemic informants confined to specific narratives into epistemic agents in dominant knowledge production processes.[129] This is

126. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 58 (2019) (discussing that CRT is defined not merely by its substantive contributions but also by its methodological ones).

127. *See, e.g.*, *supra* note 13 and accompanying text.

128. *See, e.g.*, L. Frunel & Sarah H. Lorr, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 477 (2022).

129. This is not to say that they are not already producers of knowledge. As scholars have pointed out, "marginalized communities have their own knowledge

especially important given already-existing barriers to political participation for subordinated groups.[130] While accounting for lived experience and marginalized people's knowledge need not yield any particular substantive result,[131] it does open up opportunities for meaningful participation in relational meaning making. As discussed in Part II, the primary way that marginalized families currently contribute to knowledge production within family regulation court processes is through performing specific scripts that legitimate the process and injure the knower. Critical family regulation scholarship creates avenues for other forms of participation in meaning making processes outside of this dynamic. This is especially critical in a system that compresses direct experience.

On another level, critical family regulation scholarship has surfaced important lines of inquiry. For one, it has invigorated a focus (or refocus) on the day-to-day realities of family court functioning, rather than an idealized conception of what family court ought to be.[132] For example, while state laws ostensibly protect parents from unnecessary removal of their children, in practice, crucial timelines and other rules are regularly violated or side-stepped.[133] Focusing on the practical realities of family regulation proceedings reveals the limits of caselaw-focused analyses.[134]

Emerging experiential scholarship provides some idea of the concrete perspectives we are missing that could advance child safety and family wellbeing. For example, this kind of scholarship has provided more texture to the implications of anti-Black racism on families, its

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production and validation processes." *See* Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1726 (2023).

130. *Id.* at 1710–12 (discussing some of the barriers to political participation for subordinated groups and the dilution of their political power); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1805 (2020) (discussing "the antidemocratic nature of the carceral state"); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1600–04 (2017) (discussing the criminal legal system as a vehicle for political exclusion of Black people).

131. Okidegbe, *supra* note 129, at 1740–41 (arguing that although shifting power to marginalized groups does not guarantee a more equitable outcome, it is a necessary first step "if algorithms are ever to become consistent with the democratic participation of all").

132. Prior work on family courts had been written in a similar vein. *See, e.g.*, Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 434–35 (1996).

133. S. Lisa Washington, *Time & Punishment*, 134 YALE L.J. (forthcoming 2024) (manuscript at 31).

134. Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense Against Family Policing*, 132 YALE L.J. F. 659, 660 (2022) ("[T]he process by which families become locked in judicial proceedings has largely operated unfettered and remains underexamined.").

manifestation in judicial decision-making, and potential solutions.[135] And perhaps most importantly, it has contributed to a growing—but already major—shift in discourse from the family regulation system as a benevolent system to one with many of the same features and implications as the criminal legal system.[136] The focus on experiential epistemologies and empirical social sciences has complicated child safety as the purported goal of family regulation and spotlighted the long- and short-term human impact on children, parents, and communities.[137]

The interdisciplinary component of critical family regulation scholarship emphasizes the historical and structural context of marginalized families' vulnerability to state intervention.[138] The interdisciplinary lens employed in some of this scholarship has encouraged a focus on subjudicial proceedings that are much more representative of the day-to-day realities of state intervention into families' lives. For example, drawing on sociological findings, legal scholars (sometimes in collaboration with social scientists) illustrate the larger context of family regulation court proceedings, including institutional pathways into the system.[139]

While there is much to gain from experiential epistemologies, there are also risks. For one, experiential epistemologies carry the risk of essentializing certain groups and their experiences.[140] But essentializing

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135. Angela Olivia Burton & Joyce McMillan, *How Judges Can Use their Discretion To Combat Anti-Black Racism in the United States Family Policing System*, 61 FAM. CT. REV. 265, 267 (2023).

136. *E.g.*, Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557, 558–59 (2022) (comparing prison abolition and the abolition of adoptions); Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68, 72–73 (2017).

What contributed to this turn away from formal categorizations as "civil" and "criminal" is a focus on the ways directly impacted people experience the system. This turn is perhaps most pronounced in the immigration context. *See, e.g.*, Washington, *Fammigration Web*, *supra* note 42, at 139; Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATL. Q. 621, 623 (2014) ("The glaring problem with the legal doctrine that constructs immigration detention as nonpunitive is that it is a fiction. Detention is punitive, and it is experienced as such by immigrants."); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349–50 (2014) ("[I]ndividuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement.").

137. Trivedi, *supra* note 90, at 526.

138. JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES 2–4 (2023).

139. *E.g.*, Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 578–79 (2021).

140. ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 63 (1999); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2038 (1991).

marginalized peoples' experiences need not be an inevitable byproduct of attending to them. Identifying shared experiences can go hand in hand with acknowledgement of intersectionality and nuance. In this vein, it is important to account for families that occupy identities along multiple axes of difference.

Since critical family regulation scholarship includes the element of direct experience in various forms (for example, lived experts or practice expertise), there is a risk of extraction—the very issues a critical approach is meant to dismantle not reproduce. Here, the risks of participatory law scholarship, a term coined by Rachel López, are instructive. López observes that the power relationships between academics and lived experts make the relationship vulnerable to imposition of participation. But as López suggests, extraction is avoidable where people are seen as holders of knowledge with "intrinsic worth"[141]

Given the family regulation system's emphasis on compliance and submission, the kind of transparency that is required of experiential epistemologies presents risks for lived experts who do share knowledge that deviates from the dominant account of state intervention into their lives. In the disability justice context, Professor Jasmine Harris has discussed the importance of transparency even in the face of risks.[142] Harris argues that if disclosure became more common, the risks would no longer fall on a handful of people.[143] Similarly, the stigma of family regulation involvement might be mitigated if counter-narratives were more commonplace.

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There is growing momentum for what I call a critical approach to the study of state intervention into marginalized families' lives. This approach includes experiential epistemologies and interdisciplinary research and attempts to mitigate the family regulation system's pervasive knowledge production problem. In particular, it accounts for the ways lived experiences are excluded and replaced with gendered, classist, and racialized family regulation scripts.

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141. López, *supra* note 15, at 1826–27 (quoting José Wellington Sousa, *Relationship as Resistance: Partnership and* Vivencia *in Participatory Action Research*, *in* HANDBOOK ON PARTICIPATORY ACTION RESEARCH AND COMMUNITY DEVELOPMENT 396, 406 (Randy Stoecker & Adrienne Falcón eds., 2022)).

142. Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1742–49 (2021).

143. *Id.* at 1745–46.

## CONCLUSION

The law and institutional design of family regulation constrains marginalized parents' ability to participate in the knowledge production process around state intervention into their family. This not only limits their ability to articulate their experience and needs in ways that resonate with the listener, but also affects our ability to make meaning of their experience outside of already existing understandings. Critical family regulation scholarship provides a useful intervention. This scholarship understands marginalized groups as subjects of knowledge production—not just as sources of knowledge but as epistemic agents capable of producing and sharing knowledge outside of the compressed narratives incentivized by preconfigured scripts. Further, the interdisciplinary lens employed in some of this scholarship has encouraged a focus on subjudicial proceedings that are much more representative of the day-to-day realities of state intervention into families' lives. Emerging experiential scholarship provides some idea of the concrete perspectives we are missing that could advance child safety and family well-being.