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## **Survived & Coerced: Epistemic Injustice in the Family Regulation System**

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# ESSAY

## SURVIVED & COERCED: EPISTEMIC INJUSTICE IN THE FAMILY REGULATION SYSTEM

S. Lisa Washington\*

*Recent calls to defund the police were quickly followed by calls to fund social service agencies, including the family regulation apparatus. These demands fail to consider the shared carceral logic of the criminal legal and family regulation system. This Essay utilizes the term “family regulation system” to more accurately describe the surveillance apparatus commonly known as the “child welfare system.” The general premise of this system is that it is nonadversarial and rehabilitative, geared toward child safety. In practice, involved parents, including survivors of domestic violence, encounter an intrusive, disempowering surveillance system. The removal of children and extensive supervision mechanisms operate as powerful coercion tools, especially for survivors, who may find the state actively engaging in unwanted family separation. Family regulation cases, which already disproportionately affect Black and Brown families, further perpetuate the subjugation of marginalized experiences. Survivor narratives that do not align with the expectations of the system are discredited and instrumentalized to justify family separation and the termination of parental rights.*

*The family regulation system depends on compelling Black and Brown families to participate in the reproduction of existing knowledge to legitimize its purported goal of child safety. This system, ostensibly there to protect children, facilitates harmful knowledge production by coercing false narratives and excluding alternate knowledge. This Essay analyzes knowledge production within the family regulation system through the framework of epistemic injustice theory, examining how hegemonic power structures discredit and subjugate marginalized knowledge. This Essay makes the novel argument that the concept of a survivor’s “lack of insight” into their own abuse is a form of epistemic injustice. The cycle of subjugating marginalized knowledge is embedded in a carceral power structure that labels poor mothers “weak” and “dependent.” In response*

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\* William H. Hastie Fellow at the University of Wisconsin Law School. I am grateful for Anna Akbar, Erin Collins, Courtney Cross, Cynthia Godsoe, Twinette Johnson, Amy Kimpel, Jennifer Lackey, Christopher Lau, Jamelia Morgan, Ngozi Okidegbe, Jocelyn Simonson, India Thusi, and Kate Weisburd for their comments and feedback. Thank you also to the participants and organizers of the 2021 Decarceration Law Professors Workshop and the 2021 CrimFest. Finally, the editors of the *Columbia Law Review* provided superb editorial suggestions. I thank them for their thorough engagement with this Essay. All errors are my own.

*to the current reckoning with carceral systems, a growing social movement led by directly impacted parents demands an end to their silencing and the crediting of their knowledge.*

|   |      |
|---|------|
| INTRODUCTION .....  | 1099 |
| I. SURVIVOR NARRATIVES: BETWEEN RESISTANCE AND COERCION .....                                     | 1109 |
| A. Domestic Violence Narratives in the Criminal Legal System .....                                | 1112 |
| 1. Early Narratives of Domestic Violence in the Criminal Legal System .....                       | 1112 |
| 2. The Anti-Violence Movement and the Carceral Response .....                                     | 1114 |
| 3. Stereotypical Survivor Narratives in the Criminal Legal System .....                           | 1117 |
| B. Contemporary Narratives of Victimhood in the Family Regulation System .....                    | 1120 |
| 1. Stereotyped Mothers .....  | 1121 |
| 2. Tools of Silencing and Knowledge Coercion .....  | 1124 |
| a. Family Separation .....  | 1124 |
| b. The Pathologizing of Marginalized Parents as a Compliance Mechanism .....                      | 1126 |
| c. Enmeshed Consequences as a Control Mechanism ..  | 1128 |
| d. Termination of Parental Rights: The Civil Death Penalty .....                                  | 1131 |
| II. EPISTEMIC INJUSTICE IN THE FAMILY REGULATION SYSTEM .....                                     | 1134 |
| A. Epistemic Injustice Theory .....   | 1134 |
| 1. Testimonial Injustice .....  | 1135 |
| 2. Hermeneutical Injustice .....  | 1138 |
| 3. Damaged Knowledge as a Subjugation Tool in the Legal System .....                              | 1139 |
| a. The “Marginalization Effect” .....   | 1140 |
| b. The “Collective Disadvantage Effect” .....   | 1141 |
| B. Procedural “Moments” of Knowledge Coercion and Exclusion in the Family Regulation System ..... | 1142 |
| 1. Emergency Child Removal Hearings .....   | 1143 |
| 2. In-Court Trial Testimony .....   | 1146 |
| 3. Testimony in Termination of Parental Rights Proceedings .....                                  | 1148 |
| III. INSTRUMENTALIZING “INSIGHT”—MAPPING THE LANGUAGE OF EPISTEMIC INJUSTICE .....                | 1149 |
| A. Conceptualizing “Insight” .....  | 1149 |

|   |      |
|---|------|
| B. “Insight” and Domestic Violence in Selected Family Regulation Case Law ..... | 1151 |
| 1. <i>Georgianne G. v. Superior Court</i> .....                                 | 1152 |
| 2. <i>In re M.M.</i> .....  | 1153 |
| 3. <i>In re Jayden J.</i> .....   | 1155 |
| 4. <i>In re D.M.</i> .....  | 1155 |
| 5. Preliminary Conclusions .....  | 1156 |
| C. Understanding “Insight” Through the Lens of Epistemic Injustice .....        | 1158 |
| CONCLUSION .....  | 1160 |

### INTRODUCTION

*“It is important to share how I know survival is survival and not just a walk through the rain.”*

— Audre Lorde<sup>1</sup>

I met Jordan Roberts<sup>2</sup> in family court arraignments.<sup>3</sup> Like all my clients, Ms. Roberts did not seek me out. She was not in court voluntarily. The fear of state-induced family separation brought her to Bronx Family Court that morning. She spent most of her day waiting next to numerous other fearful parents. Ms. Roberts could not afford to hire a private attorney. She was left with two options: represent herself or accept the person that the court appoints. In this case, that was me. Ms. Roberts is a Black mother of two girls. She lives in a supportive housing placement with her children. With little family support, Ms. Roberts will later describe her partner, Michael Smith—a Black man—as her biggest source of support. She was never able to say this out loud in the courtroom. Mr. Smith is not the biological father of her daughters but has been in their lives for many years. He does homework with them, picks them up from school, and watches them when Ms. Roberts goes to work. They know him as “dad.”

I guided Ms. Roberts into one of the tiny interview rooms of Bronx Family Court and apologized for the smell and stuffiness of the room as I tried to quickly identify which chair was clean enough for her to sit on. Although this was her first time in family court, as a Bronx resident, she

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1. Black Women Writers at Work 104 (Claudia Tate ed., 1983).

2. For the purpose of confidentiality, all names have been changed.

3. My experience with the family regulation system is informed by my time practicing as a public defender in the Bronx, New York, as well as supervising law students in a family defense clinic in New York City.

had heard of the Administration for Children's Services (ACS)<sup>4</sup> from family, friends, and other community members. She had certainly heard enough to be fearful. One of the first things she asked was: "Will they take my kids?" The truth is, in that moment, I could not know for certain. I did know that on this first day, Ms. Roberts and I only had about ten minutes to speak about her case; ten minutes to speak about her relationship, her children, her life, her story. Then, we got called into the courtroom.

ACS's story was documented in their petition<sup>5</sup> to the court. By the time Ms. Roberts and I stepped into the courtroom, the judge had already read the seven pages accusing Ms. Roberts of child neglect. In many ways, Ms. Roberts's story of victimhood was defined before she ever stepped into the courtroom. Ms. Roberts was accused of failing to protect her children by staying in a relationship with her partner, the man her children call dad. The petition alleged that he punched the wall in their home, causing property damage. ACS stated he had a drinking problem. They said he was a danger to Ms. Roberts and her children. She admitted to me that there had been issues in their relationship, especially after Mr. Smith lost his job, but she did not want to separate from him. She told me there had been ups and downs, but he had never been physically violent with her, and she was not scared of him. Because she was terrified of losing her children, Ms. Roberts agreed to abide by an order of protection on behalf of her children and herself. She did not want to, but she recognized that not agreeing could very well lead to her daughters being placed in stranger foster care.

That day, Ms. Roberts went home with her children, the unsolicited protection of a family court order, and the judge's instruction that her children's release depended on her enforcement of the order and her engagement in counseling services for domestic violence victims. Months went by. Ms. Roberts did not want to engage in domestic violence services. She did not identify with the label of a victim, but she went anyway. Shortly before her trial in family court, ACS learned that Ms. Roberts had allowed Mr. Smith into her home on multiple occasions. ACS conducted an emergency removal of the children. Without them, Ms. Roberts's mental health declined rapidly. Now, ACS wanted her to see a psychiatrist. Seeing her children at supervised agency visits was difficult. She was never allowed to be alone with them. All of their interactions were documented by an ACS worker. Going to agency supervised visits meant having to inevitably separate from her children all over again at the end of each visit.

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4. The Administration for Children's Services (ACS) is the name for "Child Protective Services" in the State of New York. See About ACS, NYC, Admin. for Child.'s Servs., <https://www1.nyc.gov/site/acs/about/about.page> [https://perma.cc/QZ2J JWUX] (last visited Oct. 17, 2021).

5. The petition is the state's charging instrument in family regulation cases. In practice, petitions include the neglect or abuse allegations against the parent(s) in the form of an often very detailed narrative.

At the neglect trial in family court, Ms. Roberts had a dual role. She was accused of neglecting her children by failing to protect them from exposure to domestic violence. She was subpoenaed as one of ACS's witnesses against Mr. Smith. At the same time, she was facing her own allegations for "failure to protect." Ms. Roberts did not want to testify, but with her daughters in foster care and her goal to get the judge to "give her another chance," she had few good options. If she did not come to court, her chances of getting her children home were slim. If she testified to what she truly believed—that she was not a victim, that she did not need ACS in her family's life, and that her children were not in danger—the judge would almost certainly draw the inference that she had no "insight" into the impact that the alleged domestic violence was having on her children. Ms. Roberts took the stand to tell the story of abuse that was expected of her. At this point, she had been told that she was a victim. She had been told that she needed protection. She had been told that she needed to engage in domestic violence counseling to get her children back. She had been told that she needed to gain "insight" into her own abuse. Ms. Roberts looked vulnerable and nervous as a court officer guided her to the witness table. Ms. Roberts did not cry, but when the ACS attorney asked her about her relationship with her partner over and over again, she vomited. She vomited multiple times during the appearance. A court officer handed her a trash can. The judge instructed the ACS attorney to continue his questioning. Ms. Roberts continued to vomit. I asked for a break. The judge denied the request. I wanted to object, but there is no legal objection for making a witness testify about a story that is not theirs. A narrative that feels so uncomfortable in her own body that it makes her stomach turn. It would take almost another year for Ms. Roberts to regain custody of her daughters, even as she did everything the family regulation system asked of her.

A few months before the physical shutdown of family court in New York City, Chelsey Williams, a Black woman and mother in the Bronx, reached out to ACS for help. She had decided to leave her abusive husband. New to the country and without employment, she relied on him for financial support and housing stability. Her outreach led to a family regulation investigation against her husband *and* her. ACS eventually decided to file a case against both parents in family court, charging them with neglect by "engaging in domestic violence" and refusing to medicate their child, who the school assumed might be on the autism spectrum and might have attention deficit hyperactivity disorder (ADHD).

Ms. Williams had the same conversations with her ACS caseworker repeatedly. She explained that she had never been adamantly against medication for her son. She did, however, want to make an informed decision after a psychiatric evaluation with a qualified provider. She also explained that her husband had failed to include her and their child on his insurance plan. Ms. Williams was genuinely perplexed about her treatment by the family regulation system. She pointed out that she was the one

who asked for help. Indeed, when her husband began demeaning and threatening her, Ms. Williams decided to leave, packed a few plastic bags, and entered the New York City shelter system.

Months later, Ms. Williams was able to gain some independence from her husband, but not from the system she now faced due to her own outreach. For almost a year, ACS insisted on conducting announced and unannounced home visits, even at the height of the COVID-19 outbreak in New York City. ACS referred her to domestic violence counseling services and parenting classes and refused to settle her case unless she showed “significant improvement” through these services. Ms. Williams articulated what she needed repeatedly: time to find employment, assistance with finding stable housing, and physical and legal separation from her husband. Attending twice weekly counseling sessions and making herself available for ACS home visits while caring for her child for the majority of the week took much of her time and energy. The pending ACS case made it impossible for her to file for a divorce or finalize a custody agreement. Yet for over a year, ACS insisted on monitoring Ms. Williams and her child, while her husband remained relatively unbothered by ACS.

All throughout the case, Ms. Williams was frustrated with the lack of effort ACS made to provide support outside of mandated counseling sessions. When she articulated her needs, she was redirected to counseling services. When Ms. Williams finally found permanent housing, it was without the help of ACS. Her case was finally dismissed nearly two years after she was charged with neglect. At that point, Ms. Williams had endured countless ACS home visits and numerous hours of generic parenting classes and unwanted domestic violence victims counseling.

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Recent calls to defund the police<sup>6</sup> were often followed by demands to redirect resources to social service agencies,<sup>7</sup> such as the family regulation

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6. See Jessica M. Eaglin, To “Defund” the Police, 73 *Stan. L. Rev. Online* 120, 123 (2021) (arguing that calls by grassroots activists to defund the police must be seen as a discursive tactic in the context of structural marginalization of Black people); Sam Levin, Movement to Defund Police Gains ‘Unprecedented’ Support Across US, *Guardian* (June 4, 2020), <https://www.theguardian.com/us-news/2020/jun/04/defund-the-police-us-george-floyd-budgets> [<https://perma.cc/344Z-UFDI>] (“Government officials have long dismissed the idea as a leftist fantasy, but the recent unrest and massive budget shortfalls from the Covid-19 crisis appear to have inspired more mainstream recognition of the central arguments behind defunding.”).

7. See Civ. Guard of Ind. Protest, Defund the Police to Increase Funds for Child Protection and Development Programs, *change.org*, <https://www.change.org/p/howard-county-sherrifs-department-de-fund-the-police-to-increase-funds-for-child-protection-and-development-programs> (on file with the *Columbia Law Review*) (last visited Jan. 11, 2022); David Miller, Defunding the Police: A Complex, Complicated Road to Police Reform, *The Univ. of Ala. Sch. of Soc. Work* (June 25, 2020), <https://socialwork.ua.edu/blog/defunding-the-police-a-complex-complicated-road-to-police-reform/> [<https://perma.cc/C8HQ-C7N2>] (pointing out the relationship between social service agencies, like the family

system—more commonly referred to as the “child welfare system.” These calls fail to recognize the entanglement and shared carceral logic of these systems.<sup>8</sup> Like Professor Dorothy Roberts does, this Essay utilizes the term “family regulation system” to more accurately describe the surveillance apparatus that is known as the “child welfare system.”<sup>9</sup> This term also better highlights the punitive nature of a system that mirrors and intersects with the criminal legal system.<sup>10</sup> It has long been established that the family regulation system, much like the criminal legal system, disproportionately impacts poor parents and parents of color.<sup>11</sup>

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regulation system, and law enforcement and arguing that “this kind of pairing is foundational for those who champion the ‘defund police’ movement”); Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, Imprint (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/B2TJ-W3XA>] [hereinafter Roberts, *Abolishing Family Regulation*] (discussing calls to defund the family regulation system).

8. See Heather Bergen & Salina Abji, *Facilitating the Carceral Pipeline: Social Work’s Role in Funneling Newcomer Children From the Child Protective System to Jail and Deportation*, 35 *J. Women & Soc. Work* 34, 35 (2020) (arguing that punitive interventions by the family regulation system are guided by a carceral logic comparable to and working in conjunction with the crimmigration system); Venezia Michalsen, *Abolitionist Feminism as Prisons Close: Fighting the Racist and Misogynist Surveillance ‘Child Welfare’ System*, 99 *Prison J.* 504, 506 (2019) (“Black mothers in particular are surveilled in the community by [the child welfare system] in ways that mirror the surveillance of Black and brown boys and men by the police, correctional, probation, and parole officers of the criminal punishment system.”).

For a more general analysis of carceral studies, see Erica R. Meiners, *Ending the School-to-Prison Pipeline/Building Abolition Futures*, 43 *Urb. Rev.* 547, 549–53 (2011). For a general analysis of the carceral system convergence, see Patricia Hill Collins, *On Violence, Intersectionality and Transversal Politics*, 40 *Ethnic & Racial Stud.* 1460, 1461–64 (2017).

In June of 2021, the *Columbia Journal of Race and Law* conducted a symposium focused on abolition of the family regulation system and a reimagination of child safety and wellness. See *The Columbia Journal of Race and Law Announces Its Volume 11 Symposium*, *Colum. J. Race & L.* (Feb. 4, 2021), <https://journals.library.columbia.edu/index.php/cjrl/announcement/view/376> [<https://perma.cc/3DE9-WR6X>]. The symposium highlights the intersection between the criminal legal and family regulation systems, while elevating the voices of community members, activists, and directly impacted parents. *Id.*

9. See Roberts, *Abolishing Family Regulation*, *supra* note 7 (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), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language> [<https://perma.cc/3FAJ-P5PB>] (making the case that reclaiming and changing language is a key reform tool for both practitioners and scholars).

10. See Tina Lee, *Catching a Case: Inequality and Fear in New York City’s Child Welfare System* 88 (2016) (drawing parallels between the criminal legal system and the child welfare system); Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 *Russell Sage Found. J. Soc. Scis.* 50, 51 (2019) (highlighting the intersection of the child welfare system and the criminal legal system); Collier Meyerson, *For Women of Color, the Child-Welfare System Functions Like the Criminal-Justice System*, *Nation* (May 24, 2018), <https://www.thenation.com/article/archive/for-women-of-color-the-child-welfare-system-functions-like-the-criminal-justice-system/> [<https://perma.cc/EA78-FXY7>].

11. Marian S. Harris, *Racial Disproportionality in Child Welfare 1–14* (2014); *Child Welfare Info. Gateway*, HHS, *Child Welfare Practice to Address Racial Disproportionality and Disparity 2* (2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf)



This Essay uses the term “survivor” to mean a woman who the family regulation system has labeled a “victim” of domestic violence.<sup>12</sup> The label “survivor”—especially for those who do not self-identify as such—can be problematic and may not capture all the complex experiences of those affected.<sup>13</sup> At the same time, this Essay intentionally uses the term to challenge the stereotypical narrative that women who become entangled in the family regulation system based on domestic violence allegations are

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[<https://perma.cc/V7UA-LGYG>] (“A significant body of research has documented the overrepresentation of certain racial and ethnic groups in the child welfare system . . .”); Lisa Sangoi, 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 60 (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> [<https://perma.cc/C4WY-5WT4>] (highlighting that, in New York City, one in three Black or Latinx children comes in contact with the family regulation system).

12. Although men experience domestic violence, this Essay focuses on women’s experiences for two reasons. First, women experience domestic violence at higher rates than men. See Div. of Violence Prevention, CDC, National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release 7–9 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [<https://perma.cc/K2R6-7VP8>] (indicating that one in four women and one in ten men in the United States experience sexual violence, physical violence, or stalking by an intimate partner and have reported an intimate partner violence–related impact at some point in their life); Nat’l Coal. Against Domestic Violence, Domestic Violence, <https://ncadv.org/STATISTICS> [<https://perma.cc/VV4Z-8LUC>] (last visited Apr. 9, 2022). Second, women who experience domestic violence are generally subject to more serious harms than men. See Emma E. Fridel & James Alan Fox, Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017, 6 *Violence & Gender* 27, 27–35 (2019). Another reason for focusing on women is that the family regulation system targets women in particular. See Erin Cloud, Rebecca Oyama & Lauren Teichner, Family Defense in the Age of Black Lives Matter, 20 *CUNY L. Rev. Forum* 68, 72–82 (2017) (arguing that the family regulation system acts as a social control mechanism for Black women and Black pregnancy); Meyerson, *supra* note 10. Accordingly, although women are not the only survivors of domestic violence, this Essay utilizes she/her pronouns for survivors.

13. See, e.g., Negar Katirai, *Retraumatized in Court*, 62 *Ariz. L. Rev.* 81, 83 n.1 (2020) (suggesting that when deciding between “victim” or “survivor,” “[t]he best practice may be to follow the lead of the person who has experienced the violence, since the journey from victim to survivor is unique to each person”); Anna Roberts, *Victims, Right?*, 42 *Cardozo L. Rev.* 1449, 1498–99 (2021) (criticizing the use of labels like “victim” or “survivor” at the pre-adjudication stage).

helpless victims<sup>14</sup> and weak mothers.<sup>15</sup> Survivors of domestic violence can get drawn into the family regulation system in several different ways. They may become the subject of a neglect case for failing to protect their child from the emotional effects of domestic violence.<sup>16</sup> In these cases, both the survivor and the alleged abuser face neglect allegations. This was the case for both Ms. Roberts and Ms. Williams. Survivors may also endure family regulation system surveillance when there are no pending allegations against them. Even if Child Protective Services (CPS) decides to file a neglect case only against the alleged abuser, the court has jurisdiction over the child and by extension over the survivor if the child lives with her. During my time as a public defender in the Bronx, I routinely encountered survivors who were never accused of neglect and yet had to endure invasive questioning, unannounced home visits, and in some cases even drug testing and mental health evaluations. In some instances, the domestic violence survivor was not initially charged with neglect and only later became the subject of a family regulation proceeding. Indeed, the complex and punitive nature of family regulation cases is linked to the way proceedings evolve and party roles change once state intervention hangs over a parent's head.

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14. To date, Lenore Walker's theory of "learned helplessness"—the theory that "battered women become helpless and dependent on their batterers"—continues to inform the carceral response to domestic violence. See Lenore E. Walker, *The Battered Woman* 11–12, 16–19 (1979) [hereinafter Walker, *Battered Woman*]; Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 *Victimology* 525, 526–30 (1977) (discussing the theory's basic components and the factors responsible for inducing a faulty belief system that supports women's feelings of helplessness) [hereinafter Walker, *Learned Helplessness*]; Kate Cavanagh, *Understanding Women's Responses to Domestic Violence*, 2 *Qualitative Soc. Work* 229, 230 (2003) (arguing that although stereotypical assumptions about survivors "have been refuted for many years, their explanatory power continues to exert significant influence in practice" (citation omitted)).

Walker did, however, acknowledge that societal power structures played a role in perpetuating domestic violence. See Walker, *Battered Woman*, *supra*, at 43 (noting that "[m]any [women] stay [in abusive relationships] because of economic, legal, and social dependence").

15. See Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking* 154 (2000) (discussing the dilemma faced by women choosing between their partners and their children because of a societal conception that "a 'good mother' is entirely self-sacrificing").

16. Even when "failure to protect" a child is not named explicitly as a form of neglect in the state's child protective statute, state courts have interpreted child protective laws to include, as a form of neglect, a child's presence in or witness of domestic violence. See, e.g., *In re A.G.*, No. C090836, 2020 WL 7332319, at \*3 (Cal. Ct. App. Dec. 14, 2020); *In re Interest of J.R.*, 860 S.E.2d 798, 799–800 (Ga. Ct. App. 2021); *In re W.M.*, No. 20A-JC-1697, 2021 WL 1081785, at \*1 (Ind. Ct. App. Mar. 22, 2021); *In re Pa.J.*, No. 20A-JC-280, 2020 WL 4357236, at \*2 (Ind. Ct. App. July 30, 2020); *In re Joseph P.P.*, 99 N.Y.S.3d 482, 484–85 (N.Y. App. Div. 2019); *In re Michael G.*, 752 N.Y.S.2d 772, 772–73 (N.Y. App. Div. 2002); *In re Interest of L.W.*, 609 S.W.3d 189, 200 (Tex. App. 2020); *In re S.T.*, No. 20-0956, 2021 WL 2272638, \*1–3 (W. Va. June 3, 2021).

While current scholarship addresses the punitive nature of mandatory arrests and prosecution for survivors of domestic violence,<sup>17</sup> it has not fully considered the coercive nature of the family regulation system from a survivor perspective. Scholars like Professor Roberts have stressed that the family regulation system is a coercive surveillance apparatus entrenched in the same carceral logic as the criminal legal system.<sup>18</sup> This Essay builds on these findings and connects them with epistemic injustice theory to highlight the specific harms that the family regulation system inflicts on survivors of domestic violence. While current scholarship recognizes the punitive nature of the family regulation system, it misses the link between punishment and knowledge production.

Failure to cooperate with the state in family regulation cases with domestic violence allegations can lead to permanent family separation. Ostensibly, the family regulation system is a nonadversarial, rehabilitative system focused on child safety.<sup>19</sup> For survivors, however, surveillance by the family regulation system can be a silencing process. Indeed, narratives of survival that do not align with narratives of dependence and victimhood

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17. See, e.g., Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 *Violence Against Women* 84, 85–92 (2020) (arguing for a non-carceral approach to domestic violence from a feminist legal studies perspective); Priscilla A. Ocen, *Incapacitating Motherhood*, 51 *U.C. Davis L. Rev.* 2191, 2224–30 (2018) (arguing that the separation of children from their mothers is a form of incapacitation); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. Rev.* 1474, 1488–90 (2012) (focusing on the potentially permanent legal effects of incarceration for Black mothers and their children).

18. On June 16, 2021, Professor Roberts gave the keynote at the “Strengthened Bonds” Symposium hosted by the *Columbia Journal of Race and Law*. See *Colum. J. Race & L., Strengthened Bonds Symposium Introductions, Keynote, and Responses*, YouTube, at 23:23–53:23 (July 13, 2021), <https://www.youtube.com/watch?v=NMZffrsE-b8> (on file with the *Columbia Law Review*). Her keynote describes the family regulation system as a “multi-billion-dollar apparatus that relies on terrorizing families by taking their children away or weaponizing their children with the threat of removal to impose intensive surveillance and regulation on them.” *Id.* at 27:43–28:00.

19. See, e.g., N.Y. Soc. Serv. Law § 384-b.1(a)(iii) (McKinney 2019) (“[T]he [S]tate’s *first obligation* is to *help* the family with services to *prevent* its break-up or to *reunite* it if the child has already left home.” (emphasis added)); *In re Mary S.*, 230 *Cal. Rptr.* 726, 728 (Cal. Ct. App. 1986) (“Dependency proceedings are civil in nature, designed not to prosecute a parent, but to protect the child.”); *Lois R. v. Superior Court*, 97 *Cal. Rptr.* 158, 162 (Cal. Ct. App. 1971); Julian W. Mack, *The Juvenile Court*, 23 *Harv. L. Rev.* 104, 106 (1909).

are devalued and countered with punishment.<sup>20</sup> Survivors are at risk of losing their children<sup>21</sup> if they choose not to comply.<sup>22</sup> They are similarly at risk if they choose to comply in a way that does not comport with expectations of the family regulation system. In Ms. Roberts's case for example, her failure to end her relationship with her partner resulted in the removal of her children.<sup>23</sup> In Ms. Williams's case, her failure to acknowledge that mandated services were helpful to her—although they were not—resulted in the prolonging of her case, and consequently, her inability to obtain a divorce for many months.<sup>24</sup> Reports of domestic violence in the home can lead to family separation in a system that blames survivors and coerces them into compliance with the state, ultimately perpetuating “a sense of constraint in institutional interactions.”<sup>25</sup> This is particularly egregious in cases that only come to CPS's attention because a survivor reached out for help, as was the case for Ms. Williams.

What Ms. Roberts and Ms. Williams experienced is not rare. This Essay argues that the family regulation system facilitates damaged knowledge production by requiring false or inauthentic victimhood narratives and excluding alternate knowledge.<sup>26</sup> The family regulation system depends on compelling Black and Brown women to participate in the reproduction of

20. In *Nicholson v. Williams*, a class action lawsuit against New York's family regulation system, the United States District Court for the Eastern District of New York wrote: “The evidence reveals widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect the children.” 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002).

21. For the state's power to remove children from their parents, see Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 555–57, 560–62 (2019).

22. Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. Davis L. Rev. 1009, 1043 (2000); Courtney Cross, *Criminalizing Battered Mothers*, 2018 Utah L. Rev. 259, 270–76; Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 Loy. L. Rev. 565, 567 (2004); Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 J. Gender Race & Just. 105, 110–11 (2014); Elizabeth Brico, *State Laws Can Punish Parents Living in Abusive Households*, TalkPoverty (Oct. 25, 2019), <https://talkpoverty.org/2019/10/25/failure-protect-child-welfare/> [<https://perma.cc/8XTX-CHZB>] [hereinafter Brico, *State Laws Punish Parents*].

23. *Supra* notes 2–5 and accompanying text.

24. *Supra* notes 2–5 and accompanying text. This intersects with the concept of “insight” discussed *infra* Part III.

25. Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 Soc. Forces 1785, 1786 (2019).

26. Stephanie Ledesma points to two controlling narratives within the family regulation system: One, the family regulation system protects children from “deviant” parents; two, it saves poor parents who are incapable of properly taking care of their own children. See 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, 31 (2014); see also Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 65 (1997).

existing knowledge to legitimize its purported goal of child safety.<sup>27</sup> This Essay draws on the framework of epistemic injustice to explain and dismantle coercive knowledge production within the family regulation system. Professor Miranda Fricker coined the term epistemic injustice.<sup>28</sup> She theorizes that epistemic injustice is a distinct form of injustice, by which a person is harmed in their “capacity as a knower.”<sup>29</sup> Societal power structures and stereotypical assumptions inform which knowledge is discredited and subjugated.<sup>30</sup>

The epistemic injustice lens offers insight into the marginalization of Black and Brown voices in punitive family regulation cases, which already disproportionately affect families of color,<sup>31</sup> ultimately reinforcing the cycle of subjugating marginalized knowledge.<sup>32</sup> This Essay applies epistemic injustice theory to examine how the vague concept of “insight” is utilized to interrogate and silence survivor knowledge and perpetuate stereotypes.<sup>33</sup> This Essay argues that the exclusion of alternate knowledge operates not only to legitimize the family regulation system but also to maintain broader hegemonic power structures. The subjugation of Black and Brown women’s alternate victimhood narratives is rooted in their identity as poor, of color, and women.

The epistemic injustice framework informs this Essay’s argument that those directly impacted by the carceral state should be centered in

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27. For the family regulation system to intervene in a child–parent relationship, there must be an allegation of abuse or neglect by a parent or caregiver. In domestic violence cases, the exposure to domestic violence can constitute the basis for a neglect allegation. See *infra* section II.B. In this way, a coerced victimhood narrative may legitimize the family regulation intervention.

28. See Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* 1 (2007) (explaining that epistemic injustice consists of “testimonial injustice,” when “prejudice causes a hearer to give a deflated level of credibility to a speaker’s word,” and “hermeneutical injustice,” when “a gap in collective interpretive resources puts someone at an unfair disadvantage . . . [in] making sense of their social experiences”).

29. *Id.*

30. *Id.* at 249–57; Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 40–41 (2017).

31. Dana Hamilton, *Report of the Race, Class, Ethnicity, and Gender Working Group*, 70 Fordham L. Rev. 411, 412–13 (2001).

32. For a discussion on gender, race, and class subordination through speech, see generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1, 4 (1990) (“[T]he web of subterranean speech norms and coerced speech practices that accompany race, gender, and class domination . . . undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them.” (footnote omitted)).

33. In the criminal legal context, Professor Erin Collins examines how specialized evidence rules in domestic violence cases perpetuate stereotypes about domestic violence survivors. See Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. Rev. 397, 455 (2015) (“[B]y allowing the jury to consider past acts of abuse in assessing a recanting complainant’s credibility, courts signal that her recantation is not a result of independent and rational decision making, but rather the inescapable psychological byproduct of abuse.”).

solution-driven conversations. A meaningful intervention in epistemic injustice must go beyond counternarratives. Indeed, there is a growing social movement led by or centered around directly impacted, marginalized parents. For instance, in the *Columbia Journal of Race and Law's* June 2021 symposium,<sup>34</sup> many of the panels and papers were co-led and co-written by women directly impacted by the family regulation system.<sup>35</sup> Rise, a New York City-based organization focused on preventing unnecessary system involvement and reforming the family regulation system, is led by directly impacted parents.<sup>36</sup> Survived & Punished is an anti-carceral grassroots organization working to decriminalize survivors of gender-based violence and dismantle the structures that underlie violence.<sup>37</sup> In the summer of 2020 and early 2021, several parent-led protests called attention to the intersections of the criminal legal and family regulation system.<sup>38</sup>

Part I traces the history of marginalized narratives about domestic violence from an instrument of resistance to an object of coercion. In this Part, this Essay examines victimhood narratives in the criminal legal and family regulation system. Part II utilizes epistemic injustice theory to explain the systematic exclusion of poor women of color's multifaceted survivor narratives in the family regulation system. This Essay argues that coercive mechanisms discredit and exclude authentic narratives. Part III examines how the vague and subjective concept of "insight" dictates domestic violence narratives and perpetuates epistemic injustice in the family regulation system. Part IV concludes that the findings of Parts I and II dictate the reimagination of support for parents, especially survivors. A meaningful intervention in epistemic injustice should center authentic survivor knowledge and uplift a growing social movement led by directly impacted parents and community members.

## I. SURVIVOR NARRATIVES: BETWEEN RESISTANCE AND COERCION

Legal practice is full of storytelling moments. The government tells a story through a criminal complaint or, in family regulation proceedings, a

34. Colum. J. Race & L., *supra* note 8.

35. See *id.* (hosting panels featuring, among others, impacted mothers, community organizers, people of faith, and allied advocates to speak about an abolitionist approach to reimagining child welfare).

36. About Rise, Rise, <https://www.risemagazine.org/about/> [<https://perma.cc/Y9QG-LL2Q>] (last visited Oct. 10, 2021).

37. About S&P, Survived and Punished, <https://survivedandpunished.org/about/> [<https://perma.cc/HGY7-SAEC>] (last visited Oct. 10, 2021).

38. See Elize Manoukian, Ellen Moynihan & Dave Goldiner, Black Parents March to Demand Racial Justice in NYC Child-Welfare System, N.Y. Daily News (June 20, 2020), <https://www.nydailynews.com/news/politics/ny-protest-black-lives-matter-20200620-sqiy27g45fn7jyynwrmyd7la-story.html> (on file with the *Columbia Law Review*); Black Families Matter: Parents Rally on MLK Day to Abolish ACS, Rise (Jan. 21, 2021), <https://www.risemagazine.org/2021/01/parents-rally-on-mlk-day-to-abolish-acs/> [<https://perma.cc/25CK-AMV5>] [hereinafter Rise, Black Families Matter].

petition. The story illustrates the basis for governmental intervention. The direct testimony of a defendant in a criminal case, or of the respondent<sup>39</sup> in a family regulation proceeding, can be that individual's opportunity to tell *their* story in opposition. Beyond trials and fact findings, narratives play a central role in negotiations, sentencing, and virtually every court appearance. Lawyers frequently present counternarratives as a defense strategy.<sup>40</sup>

Marginalized people have long used narratives, including legal stories, as an instrument to intervene in the mainstream production of knowledge. Professor Richard Delgado describes these stories as the "counter-reality" of the subjugated.<sup>41</sup> Derrick Bell utilizes counter storytelling to challenge the legal and political status quo.<sup>42</sup> Critical race and feminist scholars have utilized a variety of strategies to address intersectional oppression through storytelling.<sup>43</sup> "Slave narratives" served as a

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39. The family regulation system refers to parents or other caretakers who are accused of neglecting or abusing a child as "respondents." See, e.g., N.Y. Fam. Ct. Act § 1012(a) (McKinney 2021).

40. See John B. Mitchell, Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?, 6 *Clinical L. Rev.* 85, 105–11 (1999) ("The model I employ for my clinical supervision in criminal advocacy rests on narrative theories, and can best be defined as one constantly directing and sensitizing the students towards competing narratives."). Professor Jenny Carroll highlights that "[t]he narrative available for a defense is defined, bounded" and "not without limitations." Jenny E. Carroll, The Resistance Defense, 64 *Ala. L. Rev.* 589, 628 (2013). Carroll juxtaposes counternarratives, boundary-pushing defense narratives, and the "resistance defense." *Id.* at 592. Carroll notes that while counternarratives and boundary-pushing defenses "place the defendant's narrative in the context of the existing structure," the resistance defense challenges "the ability of the law . . . to account for their lives and stories." *Id.* at 593–99.

41. See Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 *Mich. L. Rev.* 2411, 2412 (1989).

42. Derrick Bell, The Power of Narrative, 23 *Legal Stud. F.* 315, 347 (1999) ("[T]he 'enduring value of narratives in general, and counter-stories in particular, inheres in their potential to affect their listeners precisely by engendering seemingly irreconcilable perceptions of societal attitudes.'" (quoting Stephen Shie-Wei Fan, Note, Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants, 97 *Colum. L. Rev.* 1202, 1216 (1997))).

43. See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 12–14 (1992) ("The provocative format of story . . . allows me to take a new look at . . . 'racial themes.' Easier to recognize than describe, they are essentials in the baggage of people subordinated by color in a land that boasts of individual freedom and equality."); Patricia Ewick & Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 *Law & Soc'y Rev.* 197, 199–200 (1995) (examining how narratives both reproduce and challenge existing power structures); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 *Mich. L. Rev.* 1, 15–16, 17, 20–21, 62–63 (1991) (discussing how reports on domestic violence are intertwined with the women's narrative of their marriage); Patricia Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 *Mich. L. Rev.* 2128, 2135 (1989) (telling the story of the "Ujamaa House incidents" at Stanford University and her perspective on them to reflect on the marginalization of Black contributions to "Western Civilization").

powerful abolitionist tool in the Civil War era.<sup>44</sup> To date, counternarratives remain a powerful tool in the fight for racial justice.

While they have and continue to serve as a powerful tool for change,<sup>45</sup> marginalized narratives have also been the subject of exploitation. Narrative exploitation in this context means the misappropriation of a person's lived experience through storytelling by someone who does not share that experience—for example, when a prosecutor publicly defends a “law and order” stance on behalf of a victim of domestic violence, regardless of whether the survivor of the crime supports that position.<sup>46</sup> Accounts of domestic violence in particular have shaped both public discourse and system responses to domestic violence.<sup>47</sup> The hegemony of victimhood narratives continues to shape the criminal legal and family regulation responses to domestic violence, often to the detriment of survivor knowledge.

The following sections will trace the history of domestic violence narratives in the criminal legal (section I.A) and family regulation (section I.B) systems. These sections contextualize today's carceral response to

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44. The term “slave narratives” refers to stories told by formerly enslaved people that center the cruelty of slavery and the author's eventual journey to freedom. See Charles H. Nichols, *Who Read the Slave Narratives?*, 20 *Phylon Q.* 149, 149 (1959) (explaining that slave narratives were “biographies of fugitives” that “contain[ed] the victim's account of the working of this great institution” (quoting Ephraim Peabody, *Narratives of Fugitive Slaves* 64 (1849))). “Slave narratives” served as a tool to disrupt mainstream narratives and stereotypes about formerly enslaved people. *Id.* (“The narratives begin a tradition of protest in Negro writing, and concerned as they were with the realities of Negro life in America, no doubt affected the larger community's attitudes toward the Negro.”); see also William L. Andrews, Introduction, in *The Civitas Anthology of African American Slave Narratives* 1, 3 (William L. Andrews & Henry Louis Gates, Jr. eds., 1999) (“[A]ntislavery slave narratives . . . set the mold for what would become . . . a form of autobiography that blended personal memory and a rhetorical attack on slavery to produce a powerful expressive tool both as literature and as propaganda.”).

45. For an examination of feminist narratives in legal scholarship, see generally Kathryn Abrams, *Hearing the Call of Stories*, 79 *Calif. L. Rev.* 971, 971 (1991) (examining “the emergence of feminist narrative scholarship as a distinctive form of critical legal discourse”); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 *Mich. L. Rev.* 485, 488 (1994) (examining how lawyering can be shaped to include more client narrative and voice in constructing case theory).

46. Professor Cheryl Hanna argues that even severe sanctions against a victim of domestic violence may be appropriate, if she otherwise refuses to cooperate with the prosecution. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 *Harv. L. Rev.* 1849, 1892 (1996) (“[P]rosecutors must be willing — in at least some instances — to mandate participation, including having women picked up by police officers and brought to court if they refuse to appear.”).

47. See, e.g., Charlotte Fedders & Laura Elliott, *Shattered Dreams: The Story of Charlotte Fedders* 77–78, 82–83, 93 (1987) (describing Fedders's personal experience with domestic violence); Patricia Brennan, ‘A Cry for Help’, *Wash. Post* (Oct. 1, 1989), <https://www.washingtonpost.com/archive/lifestyle/tv/1989/10/01/a-cry-for-help/b6d4472a-51a1-4c09-9781-f1805a20cd5f/> (on file with the *Columbia Law Review*) (telling the story of Tracey Thurman's domestic violence case).



domestic violence and its effects on survivors entangled in the family regulation system.

A. *Domestic Violence Narratives in the Criminal Legal System*

Professor Leigh Goodmark writes about the importance and dangers of narratives from a feminist perspective. Goodmark highlights the tension between narratives as a tool of empowerment and the risk of not being “heard” by the listener:

Narratives both help women understand their own experiences and enable women to reach out to others for assistance in addressing the violence against them. A danger lurks in the narratives, however: If the narrative the woman constructs does not resonate with the hearer, the battered woman’s ability to engage that hearer in her struggle may be imperiled. As a result, how battered women construct their narratives is essential.<sup>48</sup>

Mainstream narratives, while incredibly powerful, can distort events, perpetuate stereotypes, and harm already marginalized groups.<sup>49</sup> The following section examines the history of the mainstream “victimhood narrative.” Victimhood narratives, as they exist in the family regulation system, are linked to the criminal legal response to domestic violence. To better understand coerced knowledge production in the family regulation system, a cursory look at the history of domestic violence, its criminalization, the feminist anti-violence movement, and its co-option is necessary.

1. *Early Narratives of Domestic Violence in the Criminal Legal System.* — Until the end of the nineteenth century, the common law explicitly granted men the right to use physical violence against their wives, as long as they did not cause permanent injury.<sup>50</sup> The right to “chastise[]” was embedded in the overall subordination of women—legal, financial, and societal.<sup>51</sup> Feminist movements from the 1850s through the 1870s organized to eradicate the legal right to “wife abuse” specifically, and the

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48. Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *Yale J.L. & Feminism* 75, 82 (2008) [hereinafter Goodmark, *When She Fights Back*].

49. Cf. Gerald P. López, *Lay Lawyering*, 32 *UCLA L. Rev.* 1, 3 (1984) (“[S]tock stories help us understand and decide; they also may disguise and distort.”). For the harm that stereotypical victimhood narratives cause to women seeking asylum, see Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 *Ohio St. L.J.* 733, 752–57 (2017).

50. See, e.g., *Bradley v. State*, 1 *Miss. (1 Walker)* 156, 157–58 (1824) (“If the defendant now before us, could shew from the record in this case, he confined himself within reasonable bounds, when he thought proper to chastise his wife, we would deliberate long before an affirmance of the judgment.”); *State v. Black*, 60 *N.C. (Win.)* 262, 263 (1864) (explaining that, since a husband is responsible for his wife’s acts, he could use a “degree of force as is necessary to control an unruly temper and make her behave herself” and the law would not intervene unless the wife suffered “permanent injury”).

51. 1 *William Blackstone, Commentaries* \*432.

hierarchical structure of marriage generally.<sup>52</sup> In 1871, Alabama became the first state to rescind this right, with Massachusetts quickly following.<sup>53</sup> The end of common law “chastisement” law was accompanied by class- and race-focused narratives. Blackstone characterized domestic violence as persisting mostly among the “lower rank of people.”<sup>54</sup> Elizabeth Cady Stanton, a leader of the women’s rights movement in the late 1800s, characterized domestic violence as an issue existing predominantly in poor communities.<sup>55</sup> *Fulgham v. State*, the first case repudiating marital chastisement, dealt with the conviction of an emancipated slave for assault and battery of his wife.<sup>56</sup> In its decision, the court quotes the lower court’s characterization of marital “chastising” as “a relic of barbarism.”<sup>57</sup> Similarly, *Harris v. State*, the case ending the same doctrine in Mississippi, involved a Black man convicted of assaulting his wife.<sup>58</sup>

Some argued that the most effective response to “wife beating” was physical punishment.<sup>59</sup> Whipping—they believed—was the only punishment that could control “the vicious classes.”<sup>60</sup> Men engaging in spousal abuse needed to be “physically dominated . . . in order to be subject to social control.”<sup>61</sup> In 1882, Maryland enacted a bill that allowed punishment for physical domestic violence at the whipping post.<sup>62</sup> Delaware followed in 1901 and so did Oregon four years later.<sup>63</sup> What began as an effort by the women’s movement to break oppressive structures was co-opted by a “law and order” narrative. The criminalization of family violence increasingly intersected with the desire to control immigrants and Black men, both characterized as belonging to “dangerous classes.”<sup>64</sup> The

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52. See, e.g., Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2128–29 (1996).

53. See *Fulgham v. State*, 46 Ala. 143, 145–47 (1871); *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871). See also Siegel, *supra* note 52, at 2130–36.

54. Blackstone, *supra* note 51, at \*433.

55. Lois W. Banner, *Elizabeth Cady Stanton: A Radical for Woman’s Rights* 74 (Oscar Handlin ed., 1980) (describing Stanton as seeing “[r]efined sensualism [as] a crime among wealthy men; [while] rape and wife beating were working-class crimes”).

56. *Fulgham*, 46 Ala. at 145; Siegel, *supra* note 52, at 2134.

57. *Fulgham*, 46 Ala. at 144.

58. 14 So. 266, 266 (Miss. 1894).

59. See, e.g., Phebe A. Hanaford, *The Whipping Post for Wife Beaters*, 17 *Medico-Legal J.* 108, 109 (1899). Around the same time, the Klu Klux Klan justified attacks on Black men by claiming they had done so in response to wife beating. See H.R. Rep. No. 42-11, at 361 (1872).

60. Clark Bell, *Wife Beaters and Their Punishment*, 21 *Medico-Legal J.* 317, 321 (1903).

61. Siegel, *supra* note 52, at 2138.

62. Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy Against Family Violence From Colonial Times to the Present* 88, 109 (1987).

63. *Id.*

64. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, 11 *Crime & Just.* 19, 36 (1989) (“Middle-class fears of violent crime were joined with a desire to reimpose

discussion around whipping as punishment for physical domestic violence in the District of Columbia centered around practices of the “foreign population” that needed to be “checked before contaminating” the “native-born.”<sup>65</sup>

In the South, Black men were disproportionately targeted and punished for physical violence against their spouses.<sup>66</sup> For example, between 1889 and 1894, fifty-eight of sixty men prosecuted for physical domestic violence against their wives in Charleston, South Carolina, were Black.<sup>67</sup> Poor white immigrants in the North also experienced disproportionate prosecution.<sup>68</sup> The disparities in the criminal legal response to domestic violence were rooted in the persistent narrative that violence among poor couples is particularly prevalent among poor couples.<sup>69</sup> On the flip side, in civil cases, this same narrative was instrumentalized against poor women to preclude them from divorcing their husbands on the basis of domestic violence. In *Bailey v. Bailey*, the court concluded that the alleged domestic violence did not amount to “extreme cruelty”<sup>70</sup> and therefore did not warrant a divorce.<sup>71</sup> The court also claimed that violence among “lower classes” occurs “almost as freely as rude . . . words.”<sup>72</sup>

The narrative around family violence in the late-nineteenth century quickly centered social control, instead of protecting women, their bodies, and autonomy.<sup>73</sup>

2. *The Anti-Violence Movement and the Carceral Response.* — When physical “chastisement” became illegal in all states, law enforcement and prosecutors generally remained reluctant to investigate and pursue

a rural, Protestant morality on an urban-industrial society. Northerners worried about immigrants, and Southerners about blacks . . .”).

65. 40 Cong. Rec. 2447 (1906).

66. See Elizabeth Pleck, *The Whipping Post for Wife Beaters, 1876–1906*, in *Essays on the Family and Historical Change* 127, 135–37 (Leslie Page Moch & Gary D. Stark eds., 1983) (“In the South, most of the men arrested or convicted for wife beating were black.”).

67. Elizabeth Pleck, *Wife Beating in Nineteenth-Century America*, 4 *Victimology* 60, 65 (1979).

68. *Id.* (“In Pennsylvania[,] most of the men arrested for wife beating were immigrants: German, Irish, English, Hungarians, and Italians.”).

69. See, e.g., *Bailey v. Bailey*, 97 Mass. 373, 379 (1867) (“Among the lower classes, blows sometimes pass between married couples who in the main are happy, and have no desire to part. Amidst very coarse habits . . . a word and a blow go together.” (quoting Leonard Shelford, *A Practical Treatise of the Law of Marriage and Divorce*, at \*428 (1841))).

70. For statutory definitions of cruelty, see Chester G. Vernier & Benjamin C. Duniway, *American Family Laws*, 2 *Divorce and Separation* § 66 (1932).

71. *Bailey*, 97 Mass. at 379.

72. *Id.*

73. David Peterson del Mar, *What Trouble I Have Seen: A History of Violence Against Wives* 80–82 (1996) (describing how a desire for social control united supporters for whipping post laws in Portland yet “Oregon’s legislators and judges seldom exhibited much respect for women as they argued over a measure ostensibly for women’s benefit”).

charges.<sup>74</sup> Domestic violence was characterized as a private family matter in which the state should interfere only minimally.<sup>75</sup>

In the 1960s and 1970s, feminists relied on grassroots organizing to challenge the dichotomy of the private and public spheres.<sup>76</sup> The gathering of shared experiences resulted in collective knowledge building.<sup>77</sup> In this way, women were able to identify that what had been characterized as “private” was really a structural issue of power.<sup>78</sup> Carol Hanisch argued that the perpetuation of patriarchal societal power structures in the family made the personal political.<sup>79</sup> Frances Olson articulated the artificiality of the distinction between the private and public spheres in that “[t]he state is responsible for the background rules that affect people’s domestic behaviors.”<sup>80</sup> The feminist grassroots movement in the 1960s and 1970s centered autonomy. The movement recognized housing insecurity as a major systemic obstacle for women who wanted to separate from their partners.<sup>81</sup> Activists created the first women’s shelter for domestic violence survivors in the 1970s as a support mechanism.<sup>82</sup> They were inhabited and operated by women who self-identified as survivors. Women in the shelters autonomously decided if and how long they stayed, participated in the organization of the shelters, shared their goals, and voiced if and how they

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74. Siegel, *supra* note 52, at 2170–71 (detailing how judges, police officers, and social workers at the time looked to preserve familiar relationships over punishing the abusers).

75. Liberal theorists argued for maximum freedom from state intervention in the private sphere, including the home and family. See Kimberly D. Bailey, *Lost in Translation: Domestic Violence, “The Personal Is Political,” and the Criminal Justice System*, 100 *J. Crim. L. & Criminology* 1255, 1259–60 (2010).

76. *Id.* at 1263 (explaining how through gathering women to share their personal experiences, participants started to see the political nature of those experiences).

77. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 84–87 (1989) (describing how small gatherings of women where participants discussed their personal experiences led these groups to see similarities in their experiences and the systematic way that women were treated in society).

78. *Id.* at 94–95.

79. Carol Hanisch, *The Personal Is Political*, in *Notes From the Second Year: Women’s Liberation* 76, 76 (Shulamith Firestone & Anne Koedt eds., 1970) (arguing that the struggle for women’s liberation was not merely a “personal” issue, but a “political” movement that required structural changes through political action).

80. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 *U. Mich. J.L. Reform* 835, 837 (1985); see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 *Iowa L. Rev.* 1253, 1256 (2009) (highlighting how ostensibly private family and public criminal law have historically worked together to shape “a binary view of intimate life”).

81. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 *Hous. L. Rev.* 237, 295 (2005) (“Criminalization does not address battered women’s need for housing and economic or emotional support.”).

82. *Id.* at 257.

wanted support. Hierarchical structures were rejected in favor of a decentralized, bottom-up approach.<sup>83</sup> The centering of each woman's individual voice and experience was pivotal in the movement's mission for liberation.<sup>84</sup> Liberation also meant that women were not mandated to participate in services, stay in a shelter, or even separate from their partner. The goal was to provide options and challenge underlying paternalistic structures that precluded choices.

In the 1990s, the "growing hegemony of the feminist carceral response"<sup>85</sup> dominated the anti-violence movement.<sup>86</sup> With the Violence Against Women Act (VAWA),<sup>87</sup> criminalization, prosecution, and incarceration became the primary response to domestic violence.<sup>88</sup> While VAWA

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83. See *id.* at 259 ("By employing a consensus model, [policies] and procedures were decided upon by the entire community through a dialectical process wherein disagreement was not only common but welcome. Rules were shaped based on the day-to-day experiences of all members of the community regardless of position.").

84. See Lisa A. Goodman & Deborah Epstein, *Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health, and Justice* 49–70 (2008) (arguing that a refocusing on the strategies of the early feminist liberation movement could significantly improve support for survivors of domestic violence); Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* 138–41 (2012) [hereinafter Goodmark, *A Troubled Marriage*] (advocating for an "anti-essentialist reconstruction of the legal system" that places the "relationships, needs, goals, desires, and choices of individual women at the center of the legal response to domestic violence").

85. Mimi E. Kim, *VAWA @ 20: The Mainstreaming of the Criminalization Critique: Reflections on VAWA 20 Years Later*, 18 CUNY L. Rev. Footnote Forum 52, 53, 56 (2014).

86. Elizabeth Bernstein coined the term "carceral feminism" to describe the reliance on law enforcement, prosecution, and incarceration within the feminist anti-violence movement. See Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 *Signs* 45, 51 (2010) (explaining how sexual politics and feminism have become "intricately intertwined with broader agendas of criminalization and incarceration"). Others have used the term "over-reliance" to describe the carceral movement trend. See, e.g., Shamita Das Dasgupta & Patricia Eng, *Ms. Found. for Women, Safety & Justice for All: Examining the Relationship Between the Women's Anti-Violence Movement and the Criminal Legal System* 6 (2003), [http://www.ncdsv.org/images/Ms\\_SafetyJusticeForAll\\_2003.pdf](http://www.ncdsv.org/images/Ms_SafetyJusticeForAll_2003.pdf) [<https://perma.cc/8AYY-E2PD>] (discussing the myriad viewpoints on what constitutes "over-reliance" on the legal system in ending violence against women, including over-resourcing, over-extension of powers, and undue compulsion). For a historical perspective, see generally Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (2020) (analyzing the relationship between feminism and mass incarceration).

87. VAWA was enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered titles of the U.S.C.). It was reauthorized in 2000, 2005, and 2013. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered titles of the U.S.C.).

88. VAWA defines "domestic violence" through the framework of the criminal law. See 34 U.S.C. § 12291(a)(8) (2018) (defining "domestic violence" to include felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, a person with whom the victim shares a child, or a person who is living or has lived with the victim as a spouse or intimate partner).

provided funding for support outside of the criminal legal system in later reauthorizations, the carceral response remained the primary focus of the federal government.<sup>89</sup> While mainstream feminism welcomed a carceral response to domestic violence, some questioned and opposed state violence as a pathway to liberation.<sup>90</sup> In response to the feminist movement's reliance on prosecution and incarceration, anti-carceral feminist movements challenged the reliance on the carceral state to protect women. To date, the anti-carceral feminist movement is largely driven by women of color, in response to the disproportionate effects of mass incarceration in Black communities and the legacy of underprotection and targeting of Black women and girls by the criminal legal system.<sup>91</sup>

3. *Stereotypical Survivor Narratives in the Criminal Legal System.* — “Color-blind” laws—ostensibly implemented to challenge the disproportionate arrests of Black men and the history of underprotection of Black women and girls—continue to force many survivors into cooperating with law

89. Notably, discourse around domestic violence often begins with a clarifying statement that violence cuts across race and class and is not solely an issue of the marginalized. The implied need for clarification exemplifies just how deep-seated stereotypical narratives about domestic violence in marginalized communities are. See, e.g., *Women and Violence: Hearings Before the S. Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 139 (1990) (testimony of Susan Kelly-Dreiss, Executive Director, Pennsylvania Coalition Against Domestic Violence) (“However, contrary to common misperceptions, domestic violence is not confined to any one socioeconomic, ethnic, religious, racial or age group.”).

90. Professor Mari Matsuda was one of the first to oppose the uncritical partnering with law enforcement as the solution to domestic violence. She criticized the willingness of many feminists to partner with law enforcement. See Mari J. Matsuda, *Where Is Your Body? And Other Essays on Race, Gender, and the Law* 39–40 (1996) (“As a feminist, however, I cannot celebrate crime legislation that advances the protection of women without providing for racial justice. . . . I cannot rejoice at crime legislation that is the deadliest in American history, horrifically expanding the list of capital crimes.”). In 1981, Professor Angela Davis expressed concerns about a partnership between feminists and law enforcement. See Angela Y. Davis, *Women, Race & Class* 146–68 (1981). Feminist activist Susan Schechter urged against partnering with the carceral state in the fight for women’s liberation. See Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement* 177 (1982) (“In reality, the criminal justice system leaves many women frustrated. Even successful reforms only correct the problem for a limited [few] . . . [L]egal solutions have not provided battered women with the . . . resources . . . need[ed] to free themselves from dependence on violent men.”). Professor Mimi Kim, a feminist scholar and shelter worker in a women’s shelter in the 1990s, recounts the experience of witnessing the feminist movement converge with the carceral state. See Kim, *supra* note 85, at 53 (“I was among those shelter workers struck by the incongruence of a movement we embraced and a criminal legal system we abhorred.”).

91. Chaédria LaBouvier, *How Many Viral Videos Will It Take? Another Reminder of the Vulnerability of the Black Girl in America*, ELLE (Oct. 28, 2015), <http://www.elle.com/culture/career-politics/a31527/do-we-need-another-video-to-remind-us-that-black-girls-are-the-most-vulnerable/> [https://perma.cc/4LQ4-M93E]; see also Homa Khaleeli, #SayHerName: Why Kimberlé Crenshaw Is Fighting for Forgotten Women, *Guardian* (May 30, 2016), <https://www.theguardian.com/lifeandstyle/2016/may/30/sayhername-why-kimberle-crenshaw-is-fighting-for-forgotten-women> [https://perma.cc/NZK9-SXMB] (describing Crenshaw’s campaign to raise awareness about women killed by the police).

enforcement. Mandatory arrests, prosecution laws, and policies dictate intervention into some of the most personal matters of their lives.<sup>92</sup>

The narratives underlying mandatory approaches reflect the idea that intervention is necessary for the survivor's "own good."<sup>93</sup> Survivors are characterized as unable to "see that criminal intervention can assist in the shared goal of getting their abuser to stop the violence,"<sup>94</sup> and therefore the state must act on their behalf. Survivors are depicted as psychologically damaged and unable to make rational decisions for themselves and their family without state intervention.<sup>95</sup> Another common narrative attributes a survivor's unwillingness to cooperate with the carceral state to the actions of their abuser, not their own wishes.<sup>96</sup> All of these narratives share in the idea that the criminal legal system—if they only cooperated with it—keeps survivors safe<sup>97</sup> (despite evidence that mandatory prosecutions increase violence for some survivors<sup>98</sup>). Therefore, the argument goes, domestic violence cases need to be prosecuted aggressively.<sup>99</sup> Despite the efforts of some feminist scholars to dismantle stereotypical narratives of victimhood,<sup>100</sup> they persist in both the criminal legal and family regulation system.

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92. For mandatory arrests and prosecutions in domestic violence cases generally, see Hanna, *supra* note 46, at 1859–60 ("By 1988, all but two states had . . . permit[ted] warrantless arrest when the officer has probable cause to believe that someone has committed a misdemeanor or violated a restraining order."); Miccio, *supra* note 81, at 245–46, 265 ("Once police responded to a 'domestic violence' call *and* there was probable cause to believe that a crime between intimates existed, they were mandated to arrest the offending party.").

93. See, e.g., Hanna, *supra* note 46, at 1891–92 (arguing that Maudie Wall, a survivor of domestic violence who was jailed overnight for refusing to participate with the prosecution, would have been worse off without forceful state intervention).

94. Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 *UCLA Women's L.J.* 173, 178 (1997).

95. See Goodmark, *When She Fights Back*, *supra* note 48, at 82–83 (describing the essentializing of "learned helplessness"); Mahoney, *supra* note 43, at 38–39 (arguing that these opinions "present an image of utterly dysfunctional women"—women with low self-esteem and learned helplessness).

96. See Laurence Busching, *Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford*, 71 *Brook. L. Rev.* 391, 393 (2005) ("[M]any, if not most, victims refused to testify, sign affidavits, or otherwise cooperate with the prosecution of their abusers.").

97. *Id.* at 395 (arguing that "[i]n the view of many prosecutors and victim advocates," evidence-based prosecutions "helped keep victims safe" while, notably, not mentioning whether victims shared this view).

98. See Lawrence W. Sherman, *Policing Domestic Violence: Experiments and Dilemmas* 3 (1992); Barbara Hart, *Battered Women and the Criminal Justice System*, 36 *Am. Behav. Scientist* 624, 626 (1993) ("Batterers may, in fact, escalate their violence to coerce a battered woman into 'reconciliation,' to retaliate for the battered woman's participation in the prosecution process, or to coerce her into seeking termination of the prosecution."); Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence From Mandatory and Recommended Arrest Laws*, 93 *J. Pub. Econ.* 85, 97 (2009).

99. Wills, *supra* note 94, at 181–82.

100. See, e.g., Goodmark, *When She Fights Back*, *supra* note 48, at 92–110.

While some survivors welcome a criminal legal response to violence, many survivors do not wish to engage with carceral forms of intervention.<sup>101</sup> Reasons vary, are complex, and are not fully captured by mainstream narratives of victimhood.<sup>102</sup> Some survivors support abolitionist movements because of their own experience with state violence.<sup>103</sup> Some fear the risk of retraumatization by law enforcement or the fear of increased police presence in their home or neighborhood.<sup>104</sup> Those who do not wish to cooperate with the police and prosecution may experience mandatory prosecution<sup>105</sup> as emotional violence.<sup>106</sup> Indeed, mandatory approaches ignore the legacy of targeting and underprotection of women and girls of color. Aggressive prosecution strategies can perpetuate harm by shifting the power and control dynamic from the individual relationship to a system level. The carceral response to violence is limited to addressing a specific instance of violence and unable to provide a solution to violence within larger societal power structures. As Mariame Kaba points out:

Even if the criminal punishment system were free of racism, classism, sexism, and other isms, it would not be capable of effectively addressing harm. For example, if we want to reduce (or end) sexual and gendered violence, putting a few perpetrators in prison does little to stop the many other perpetrators. It does nothing to change a culture that makes this harm imaginable, to hold the individual perpetrator accountable, to support their transformation, or to meet the needs of the survivors.<sup>107</sup>

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101. Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 182 (2003) (“Pursuing prosecution past that point may not be in the interests of the victim because it may increase the risks of retaliation while forcing her commitment to a process with little direct benefit.”); Tom Linger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 751 (2005) (stating that “[a]pproximately 80 percent of victims decline to assist the government in prosecutions of domestic violence cases”).

102. Cavanagh, *supra* note 14, at 229, 232 (noting that victim response must be viewed in the wider social structural contexts); Coker, *supra* note 22, at 1048–49 (arguing that for women of color, participating with law enforcement can come at great costs).

103. See, e.g., *Survived & Punished*, *supra* note 37 (describing itself as a coalition of survivors, advocates, attorneys, policy experts, and scholars working to defend survivors and defund the carceral system).

104. For the many reasons that marginalized survivors may support abolitionist movements, see *Survivors for Divestment*, #DefundPrisonsDefendSurvivors, <https://www.defendsurvivorsnow.org/survivors-for-divestment.html> (on file with the *Columbia Law Review*) (last visited Jan. 12, 2022) (collecting reflections from survivors of sexual or domestic violence, advocating to defund, divest from, or abolish criminal punishment systems).

105. See *supra* note 98.

106. See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 Harv. L. Rev. 550, 586–94 (1999) (providing an overview of a range of emotional abuse).

107. Mariame Kaba, *So You’re Thinking About Becoming an Abolitionist*, LEVEL (Oct. 30, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> (on file with the *Columbia Law Review*).



An increasing number of feminists criticize mass incarceration.<sup>108</sup> Many argue for the redirection of law enforcement funding to social service agencies, including the family regulation system. Calls to redirect resources to the family regulation system reveal a failure to recognize that this system mirrors the criminal legal system. In practice, it is a punitive, intrusive, and disempowering surveillance system. Frequently, engagement in counseling services and cooperation with CPS is mandated. This approach disempowers survivors who live in fear of being separated from their children should they fail to comply with service plans and intrusive home visits conducted by multiple different caseworkers throughout the life of a case. Narratives that do not align with the expectations of CPS are discredited and silenced.<sup>109</sup> Surveillance by CPS, as a form of state violence, scrutinizes families who are already subject to increased surveillance by the police and immigration officials, converging the impacts of the family regulation, criminal legal, and immigration systems.<sup>110</sup>

### B. *Contemporary Narratives of Victimhood in the Family Regulation System*

In 2019, approximately 4.3 million children were the subject of a family regulation investigation or other response for allegations of neglect or abuse.<sup>111</sup> Many of these neglect investigations involved a caregiver with a

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108. This shift can be described as a “movement pivot.” Cf. NoVo Found., *Building Movement Conversations: A Conversation Guide: Engaging to End Violence Against Girls and Women Through the Move to End Violence Vision & Pivots* (2015), [https://movetoendviolence.org/wp-content/uploads/2015/05/building\\_movement\\_conversations\\_guide\\_english.pdf](https://movetoendviolence.org/wp-content/uploads/2015/05/building_movement_conversations_guide_english.pdf) [<https://perma.cc/DMS8-49ZN>] (using the framework of “pivots” to describe suggested changes to the focus of the Move to End Violence). Works by Leigh Goodmark and Aya Gruber are exemplary for this shift. See generally Goodmark, *A Troubled Marriage*, *supra* note 84, at 86 (describing the limits of prosecution and incarceration in the context of domestic violence); Gruber, *supra* note 86, at 18 (advancing a framework to “remove one more barrier on the long road to unmaking mass incarceration”). See also Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 *Ohio St. J. Crim. L.* 335, 356–60 (2020) (arguing in favor of a “more inclusive and intersectional approach to sexual harms” apart from incarceration to better embody “the true spirit of #MeToo”); Beth E. Richie, *Keynote—Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 *U. Mia. Race & Soc. Just. L. Rev.* 257, 268–73 (2015) (“Prison abolition represents a chance to think critically and rationally about the work to end gender violence.”).

109. See *infra* section II.B.

110. Social scientists redefine the term state violence to include state surveillance methods. See M. Gabriela Torres, *State Violence*, in 2 *The Cambridge Handbook of Social Problems* 381, 381–98 (A. Javier Treviño ed., 2018) (“Social scientists define state violence broadly, ranging from direct political violence and genocide to the redefinition of state violence as the neoliberal exit of the state from the provision of social services and the covert use of new technologies of citizen surveillance.”).

111. Child’s Bureau, HHS, *Child Maltreatment 2019*, at 18 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/PMK2-9AEG>].

domestic violence “risk factor,” as reported by CPS.<sup>112</sup> In 19.1% of cases, the report to CPS was triggered by law enforcement.<sup>113</sup> The “child protective” laws of the various states emphasize a rehabilitative “social services approach to intervention.”<sup>114</sup> A closer look at the family regulation system, however, reveals a punitive surveillance system that mimics the criminal legal system. Professor Dorothy Roberts and activist Lisa Sangoi argue that the “mass removal of Black children from their families in some ways parallels the U.S. criminal legal system’s mass removal of Black men and women from their communities.”<sup>115</sup> Others have argued that defending families against family regulation surveillance “belongs next to the fight against police brutality and criminal justice reform.”<sup>116</sup> In June 2020, Black parents in New York City marched from Brooklyn Family Court to Manhattan Family Court chanting: “ACS is the Family police.”<sup>117</sup> Again, during Martin Luther King, Jr. weekend of 2021, parents in New York City rallied to abolish ACS.<sup>118</sup>

The same carceral logic undergirds the criminal legal and family regulation system and affects similar, if not identical, communities, neighborhoods, and families—often simultaneously.

1. *Stereotyped Mothers.* — The overarching narrative about those who have experienced domestic violence is that they are weak, that they are “bad mothers,”<sup>119</sup> and that they favor their partner over their children.<sup>120</sup> They are described as having no “insight” into the abusive cycle they are purportedly trapped in.<sup>121</sup> Surveillance, mandated services, and separation are utilized to “save” children from their own mothers.<sup>122</sup> Black, Brown, and indigenous families are disproportionately affected.<sup>123</sup> Professor

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112. *Id.* at 23 (reporting that 28.8% of family regulation-involved children have a caregiver with a “domestic violence risk factor”).

113. *Id.* at 9.

114. See N.Y. State Off. of Child. & Fam. Servs., New York State Child Protective Service Manual, ch. 6, at L-1 (2022) (“The law emphasizes a social services approach to intervention . . . to provide protection for the child and rehabilitative services for the family. The law anticipates a role for law enforcement involvement in certain investigations . . . since many actions, such as sexual abuse, are also crimes . . .”).

115. Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, Appeal (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/> [<https://perma.cc/DE4H-65VF>].

116. Cloud et al., *supra* note 12, at 72.

117. Manoukian et al., *supra* note 38.

118. Rise, *Black Families Matter*, *supra* note 38.

119. Dorothy E. Roberts, *Motherhood and Crime*, 79 *Iowa L. Rev.* 95, 105–06 (1993).

120. Schneider, *supra* note 15, at 154 (“It is even more difficult to imagine that a [woman] who is battered could be a good mother.”).

121. See *infra* section III.B.

122. See *infra* section III.B.

123. Harris, *supra* note 11, at 1–14.

Natalie Nanasi argues that the “essentialization of battered women as helpless, passive, and powerless . . . perpetuates the victimization of domestic violence survivors.”<sup>124</sup> Professor Kaaryn Gustafson characterizes the targeting of poor mothers by the family regulation and criminal legal systems as a “degradation ceremony.”<sup>125</sup>

*Nicholson v. Williams*,<sup>126</sup> one of New York’s most prominent decisions in family regulation law, discusses the removal of children from marginalized survivors of domestic violence. Sharwline Nicholson, a single mother of two, was coerced and punished after her daughter’s father, Mr. Barnett, assaulted her. When Ms. Nicholson told Mr. Barnett that she no longer wished to continue their long-distance relationship, he became enraged and punched, kicked, and threatened her.<sup>127</sup> He fractured several of her ribs and broke her arm.<sup>128</sup> This was the first time he had physically attacked her.<sup>129</sup> When Mr. Barnett left, Ms. Nicholson immediately called 911.<sup>130</sup> During the assault, her son Kendell was in school, while her daughter Destinee was in a separate room in her crib.<sup>131</sup> Before going to the hospital, Ms. Nicholson arranged for a neighbor to take care of her children.<sup>132</sup>

When Ms. Nicholson learned that she would have to remain in the hospital overnight, she provided the police with the names and contact information for multiple family members who were willing to take care of Kendell and Destinee.<sup>133</sup> That same night, ACS (CPS in New York) directed the investigating police precinct to transport the children to ACS’s emergency unit.<sup>134</sup> The next day, Ms. Nicholson received a call from an ACS caseworker she had never met or spoken with.<sup>135</sup> She was informed that ACS was in possession of her kids and that she would have to come to court to get information about their whereabouts.<sup>136</sup> Ms. Nicholson asked for an immediate discharge from the hospital.<sup>137</sup> Although she had done all she could to keep her children safe—she contacted the police, left the apartment, and identified family support—the state placed her children

124. Nanasi, *supra* note 49, at 738.

125. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. Irvine L. Rev. 297, 336, 351 (2013) (“Law and policies deny low-income individuals their dignity, intrude on their privacy, exacerbate economic disparity, marginalize, criminalize, and reinforce the idea that low-income mothers are both deservingly poor and inherently criminal.”).

126. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

127. *Id.* at 169.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

in stranger foster care.<sup>138</sup> In the family court hearing, the assigned case-worker testified that “after a few days of the children being in foster care, the mother will usually agree to ACS’s conditions for their return,”<sup>139</sup> openly acknowledging and normalizing the way that state-induced fear is instrumentalized to enforce compliance with state surveillance.<sup>140</sup> Inherent in the narrative presented by CPS is that a survivor’s resistance needs to be broken in a coercive cycle of control. While the lawsuit of domestic violence survivors in *Nicholson*<sup>141</sup> against CPS in New York may have improved their treatment somewhat,<sup>142</sup> survivors are still routinely and severely punished by the family regulation system.

In 2020, Abigail Kramer publicized the story of Anya.<sup>143</sup> After her ex-partner shoved and punched her in a church, the police were called.<sup>144</sup> CPS got involved and investigated for two months.<sup>145</sup> CPS caseworkers came to Anya’s home unannounced, checked her rooms, as well as the refrigerator and drawers, spoke with neighbors, and checked her baby.<sup>146</sup> Although nobody directly accused Anya of neglect, she constantly worried about CPS’s power to remove her newborn.<sup>147</sup> When Anya was fired from her job as a nurse due to the CPS investigation, she learned that her name was added to the State Central Registry (SCR) with substantiated allegations of neglect.<sup>148</sup> When Anya’s lawyer requested the SCR records, Anya learned that she was accused of “instigating a confrontation and engaging

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138. For a comprehensive summary of the factual background that led to the removal of Ms. Nicholson’s children and their placement in stranger foster care, see *id.* at 169–72.

139. *Id.* at 170; see also *infra* section I.B.2.

140. The federal decision in *Nicholson* refers to the agency’s treatment of domestic violence survivors as “double abuse” stemming from “benign indifference, bureaucratic inefficiency, and outmoded institutional biases.” *Nicholson*, 203 F. Supp. 2d at 163. The exposure of the family regulation system’s treatment of poor survivors of color in *Nicholson* at least partially transformed child protective cases in New York. But both in New York and nationwide, the shift from surveillance to support is nowhere near complete.

141. *Id.*

142. Adriana Kohler, *The Battered Mother’s Struggle in New York: The Laws and Policies that Led to the Removal of Children From Their Abused Mothers Based on the Child’s Exposure to Domestic Violence*, 13 U. Pa. J.L. & Soc. Change 243, 264 (2010) (arguing that the court’s “careful legal analysis” in *Nicholson* “motivated individualized review of the specific needs of each family” and “promoted a more comprehensive, holistic assessment to decide how best to help a family in crisis”).

143. 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/6PFM-XTKD>]. Note that the article only refers to her first name, Anya.

144. *Id.* at 1.

145. *Id.*

146. *Id.*

147. *Id.* at 2.

148. *Id.*

in an altercation” with her ex-boyfriend.<sup>149</sup> While she was able to eventually get her name cleared in an administrative process, she lost months of employment and faced housing insecurity.<sup>150</sup>

In 2019, TalkPoverty featured the story of Candis Cassioppi, a woman based in Georgia.<sup>151</sup> Right after giving birth, her newborn baby was removed from her custody in the hospital.<sup>152</sup> The family regulation investigation against Ms. Cassioppi was prompted by an assault that occurred prior to her baby’s birth.<sup>153</sup> The child’s father assaulted her while she was pregnant.<sup>154</sup> She initially sought medical attention and cooperated with the police, but ultimately declined to press charges.<sup>155</sup> To regain custody of her son, the court ordered her to engage in a domestic violence group.<sup>156</sup>

The stories of these three women exemplify narratives rooted in stereotypes of “good mothers and worthy victims.”<sup>157</sup> Similar to Jordan Roberts and Chelsey Williams, the three women experienced how a violent act against *them* led to questioning of *their* parenting abilities and in some cases, to the removal of their children, court-ordered services, or loss of employment.

2. *Tools of Silencing and Knowledge Coercion.* — The family regulation system has multiple tools at its disposal that play a role in determining how survivors feel they must approach a pending case.

a. *Family Separation.* — Perhaps the clearest act of punishment in family regulation proceedings is the physical removal of children from their parents and the subsequent uphill battle for their return. The act of removal by the state—in and of itself—is a violent physical act. Police officers frequently enforce or facilitate this physical separation. In the criminal legal context, scholars have argued that imprisoning mothers for their behavior benefits their children and family.<sup>158</sup> This notion is even more present in the family regulation context, where separation is used as a coercive instrument to enforce compliance with a reunification plan: “[A]fter a few days of the children being in foster care, the mother will usually agree to ACS’s conditions for their return without the matter ever

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149. *Id.*

150. *Id.*

151. Brico, *State Laws Punish Parents*, *supra* note 22.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Cross, *supra* note 22, at 305.

158. See John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 *Crime & Just.* 121, 125 (1999) (explaining that, under one theory of the effects of parental imprisonment on children, removing a parent who is a “drain or threat rather than an asset to the family” can ultimately benefit children by providing relief from the “difficulties associated with the removed parent”).

going to court.”<sup>159</sup> These “conditions” are broad and affect deeply personal matters.

Mental health evaluations and ongoing mental health treatment of both parents and children are among the most common and intrusive of these conditions.<sup>160</sup> Professor Roberts documents her conversations with mothers entangled in the family regulation system in Chicago: “The psychological evaluation, in particular, played an important role in delaying the mothers’ reunification with their children.”<sup>161</sup> Forensic science suggests that coerced therapy or even perceived coerced therapy is “linked to an impaired therapeutic process and outcome compared to voluntary treatment.”<sup>162</sup> A patient’s perceived agency and participatory decisionmaking ability is crucial for successful treatment.<sup>163</sup> Parents coerced into treatment find themselves in a dilemma that is detrimental to their own mental health and their goals of family reunification and freedom from surveillance.

This coercive dynamic is aggravated by the continued infringement upon the client–patient relationship. Once CPS obtains a release form for a parent’s treatment information, they can communicate with the therapist directly to gather information about treatment compliance, attendance, and “insight” into the allegations before the court, which are—at this juncture—merely allegations in the legal sense.<sup>164</sup> Access to a parent’s therapist allows CPS to shape or at least influence the substance and goals of the treatment plan. While mental health services are perhaps best suited to highlight the punitive nature of the family regulation system, they are not the only coerced services. Other common services are parenting classes, anger management courses, domestic violence counseling, and drug treatment programs.<sup>165</sup>

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159. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 170 (E.D.N.Y. 2002) (citing a CPS worker’s testimony in family court).

160. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. Rev. 577, 583 (1997).

161. Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 40–42 (2002) [hereinafter Roberts, *Shattered Bonds*].

162. Henning Hachtel, Tobias Vogel & Christian G. Huber, *Mandated Treatment and Its Impact on Therapeutic Process and Outcome Factors*, *Frontiers Psychiatry*, April 2019, at 1, 5.

163. See Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions With Juvenile Offenders: A Meta-Analytic Overview*, 4 *Victims & Offenders* 124, 143 (2009) (finding that interventions that embodied therapeutic philosophies were more effective than those based on strategies of control or coercion); Norma C. Ware, Toni Tugenberg & Barbara Dickey, *Practitioner Relationships and Quality of Care for Low-Income Persons With Serious Mental Illness*, 55 *Psychiatric Servs.* 555, 555–59 (2004) (explaining that patients benefited from feeling like they exercised a measure of control over their treatment).

164. See 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, 798–99 (2021).

165. *Id.* at 781.

b. *The Pathologizing of Marginalized Parents as a Compliance Mechanism.* — Even when there is no physical separation, once a neglect or abuse case is filed in court, the family is under court and CPS supervision. Frequently, supervision includes mandated participation in services for the parents and their children. Preventive services are often a central component of family supervision.<sup>166</sup> These services are purportedly designed to reduce the likelihood of child neglect and abuse within the family unit. After a preventive agency is assigned to a family, preventive caseworkers provide the family with a service plan and visit the home regularly, which frequently leads to dual surveillance by preventive services and CPS.<sup>167</sup> A main feature of preventive services is the in-home services component.<sup>168</sup> Like CPS, preventive workers make referrals for mental health and substance treatment programs, family therapy, anger management classes, parenting skills programs, and a host of other services.<sup>169</sup> The preventive worker will also provide regular written and verbal updates to CPS and the court regarding their view of the family's functioning, their findings gathered at home visits, and updates on a parent's compliance with services.<sup>170</sup> The underlying logic of this approach is that "cur[ing]" a "parent's failing" through state intervention will keep children safe.<sup>171</sup>

The pathologizing of parents also manifests through the policing of emotional expressions in extremely tense situations. Parents who express anger, despair, or extreme sadness in reaction to family separation or invasive surveillance are regularly referred to anger management programs and therapy to address their "anger issue" or "depression."<sup>172</sup> During my

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166. See J. Khadijah Abdurahman, Comment, Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children's Services, 11 Colum. J. Race & L. Forum 75, 81 (2021) (describing New York City's transition to a prevention services model in which families deemed "at risk of imminent removal" are subject to surveillance, monitoring, and other forms of coercive control).

167. See Dorothy E. Roberts, Digitizing the Carceral State, 132 Harv. L. Rev. 1695, 1723 (2019) (reviewing Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (2018)). For an illuminating account of a mother's experience with CPS and prevention services, see Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 Colum. J. Race & L. 501, 525–26 (2021).

168. Child.'s Def. Fund, Am. of Acad. Pediatrics, ChildFocus, FosterClub, Generations United, Juv. L. Ctr. & Nat'l Indian Child Welfare Ass'n, *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders I* (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf> [<https://perma.cc/C337-FZNC>].

169. Appell, *supra* note 160, at 582–83.

170. Baughman et al., *supra* note 167, at 527; see also Abdurahman, *supra* note 166, at 99 n.90.

171. Appell, *supra* note 160, at 606.

172. See, e.g., *id.* at 597 (explaining how Janice, a mother who needed depression and substance abuse treatment, suffered *more* after the state removed her children—a major support device and reason for sobriety—as she became even more depressed and had difficulty responding to treatment).

time as a public defender, many of my clients who were referred to counseling services and required to undergo a mental health evaluation were diagnosed with “adjustment disorder.” Adjustment disorder is a stress-related condition in response to a stressful or traumatizing event.<sup>173</sup> Ironically, the traumatizing event was often the family regulation intervention itself. Nonetheless, the mere existence of a diagnosis was then instrumentalized to mandate further counseling and in some cases medication. The video *A Life Changing Visitor: When Children’s Services Knocks* includes testimony by parents impacted by the family regulation system.<sup>174</sup> One woman remembers being accused of anger management issues: “They feel that they can have you do an anger management class because you are displaying anger. Yes, I am angry. You just removed my children.”<sup>175</sup> Some parents describe how they broke down after their child was removed from them by CPS.<sup>176</sup> Several of the parents in the video recount the painful experience of being pathologized and judged by someone they had never met before.<sup>177</sup>

The family regulation system is focused on individual blame, rather than *structural* issues of race, class, and gender that impact parenting and child safety. Quickly, the focus becomes whether a parent complies with an extensive service plan, shows “insight” in therapy sessions, and cooperates with the assigned preventive agency, while maintaining a “cooperative disposition.”<sup>178</sup> The system points to individual shortcomings to conceal and distract from structural issues at play. Professor Khiara Bridges notes: “[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>179</sup>

Past and current reform efforts are focused on enlarging the family regulation system by introducing more, ostensibly better, comprehensive services.<sup>180</sup> For example, the Family First Prevention Services Act (Family

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173. See Rahel Bachem & Patricia Casey, *Adjustment Disorder: A Diagnosis Whose Time Has Come*, 227 *J. Affective Disorders* 243, 244 (2018) (“[Adjustment Disorder] is a diagnosis that attempts to encapsulate the reality that all individuals experience stressful life events and some may be so severely affected that their level of distress and incapacity impair their day to day functioning.”).

174. Greer Film, *A Life Changing Visitor: When Children’s Services Knocks*, Vimeo, <https://vimeo.com/71127830> (on file with the *Columbia Law Review*) (last visited Feb. 5, 2022).

175. *Id.* at 08:46–08:56.

176. *Id.* at 04:00–04:17.

177. *Id.* at 07:59–09:15.

178. Roberts, *Shattered Bonds*, *supra* note 161, at 40–41, 80.

179. Khiara M. Bridges, *The Poverty of Privacy Rights* 129 (2017).

180. Mack, *supra* note 164, at 791–805 (arguing that the Family First Act perpetuates the surveillance, control, and punishment of marginalized families).



First Act)<sup>181</sup> purportedly shifts “child welfare” policy from family separation to prevention by increasing funding for services prior to a child’s removal.<sup>182</sup>

A growing social movement—partly led by parents—argues for the dismantling of systems that disproportionately surveil marginalized families.<sup>183</sup> This abolitionist movement rejects continued funding of the existing family regulation system and advocates for community investment, rather than earlier surveillance through state-facilitated preventive services. Survivor organizations, such as Survived & Punished, specifically advocate for the end of a carceral response to domestic violence and a divestment from the family regulation system.<sup>184</sup>

c. *Enmeshed Consequences as a Control Mechanism.* — The family regulation system’s overlap with other systems amplifies its punitive nature. The consequences of system entanglement are often referred to as “collateral” consequences<sup>185</sup>—a euphemism for the direct cumulative effects of systems that disproportionately affect poor communities of color. The term “enmeshed” highlights that one issue may not always be secondary or less important than another issue; instead, they are interrelated and produce cumulative effects. For example, a pending criminal case may not always be more important to someone than fighting immigration detention or getting their child out of foster care.

While *Padilla v. Kentucky*<sup>186</sup> has shaped our understanding of the crimmigration system, we are only beginning to identify and acknowledge the implications of the family regulation system in the context of deportation proceedings and other adverse immigration consequences. In recent years, reports and pictures of caged children and family separation at the

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181. Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018).

182. See Kele Stewart & Robert Latham, COVID-19 Reflections on Resilience and Reform in the Child Welfare System, 48 Fordham Urb. L.J. 95, 121–24 (2020) (“Family First allows federal reimbursement for mental health services, substance use treatment, and in-home parenting skill training to prevent children from entering foster care . . .”).

183. See, e.g., Rise, supra note 36 (describing the organization as a New York-based organization founded and led by parents affected by the family regulation system); JMacForFamilies, <https://www.jmacforfamilies.com/> [<https://perma.cc/RU8W-G54P>] (last visited Jan. 13, 2022) (describing a coalition of parents impacted by the family regulation system and The Movement for Family Power, an organization that utilizes movement lawyering strategies to end the foster care system’s policing of marginalized families).

184. See Survived & Punished, supra note 37.

185. For collateral consequences generally, see, e.g., Invisible Punishment: The Collateral Consequences of Mass Imprisonment 1–12 (Marc Mauer & Meda Chesney-Lind eds., 2002); see also Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 700 (2002); Michael Pinard, Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity, 85 N.Y.U. L. Rev. 457, 459 (2010).

186. 559 U.S. 356, 374 (2010) (holding that pursuant to the Sixth Amendment, a criminal defense attorney must advise their client that a plea agreement may carry the risk of deportation).

U.S. border gained broad media attention.<sup>187</sup> Separation of immigrant families is not limited to the border and can intersect with the family regulation system. Deportation of a parent followed by permanent family separation is a punitive measure that can be triggered by family court involvement in several different ways.<sup>188</sup> For one, in neglect and abuse proceedings, courts frequently order temporary orders of protection at the initial stage of a case.<sup>189</sup> Orders of protection issued by a family court judge are registered and shared with federal law enforcement.<sup>190</sup> Federal immigration authorities have access to this database and may be alerted by a new order.<sup>191</sup> Thus, these orders likely increase the chance of deportation and other adverse immigration consequences.

Further, admissions by a parent in family court can trigger devastating immigration consequences.<sup>192</sup> As the federal government continues enforcement of deportation and detention across the country,<sup>193</sup> the punitive intersection of the crimmigration and family regulation systems becomes increasingly pronounced. In immigration relief proceedings, the burden is with the applicant. The mere existence of a neglect or abuse case can be used to call into question the “moral character” of the applicant and deny relief.<sup>194</sup> Immigration courts have broad discretion in considering not only criminal cases but family court involvement.<sup>195</sup> The implications of enmeshed system involvement do not begin or end with *Padilla*.

Other enmeshed consequences of the family regulation system are employment and housing related. A report to the SCR, subsequent investigation, and indication of child maltreatment can immediately impact

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187. See, e.g., Richard Fausset, *Immigrant Children Cry Out in Audio Recorded at Detention Center*, N.Y. Times (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/immigrant-children-detention-center-audio.html> (on file with the *Columbia Law Review*).

188. Immigrant Def. Project, *Understanding Immigration & Orders of Protections* (2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/Understanding-Immigration-and-Orders-of-Protection.pdf> [<https://perma.cc/X7RA-PE84>].

189. Tal D. Eisenzweig, *In the Shadow of Child Protective Services: Noncitizen Parents and the Child-Welfare System*, 128 Yale L.J. Forum 482, 509 (2018).

190. Immigration Defense Project, *supra* note 188.

191. *Id.*

192. See Immigration and Nationality Act of 1952, 8 U.S.C. § 1227(a)(2)(E) (2018).

193. See, e.g., Eric Gay, *U.S. Plans to Deport Massive Number of Haitians From Del Rio, Texas*, An Official Says, NPR (Sept. 17, 2021), <https://www.npr.org/2021/09/17/1038482663/u-s-plans-to-deport-massive-number-of-haitians-from-del-rio-texas-an-official-sa> [<https://perma.cc/38D6-7E6D>].

194. See 8 C.F.R. § 316.10(a)(1) (2021) (“An applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character.”).

195. Eisenzweig, *supra* note 189.

both current and future employment opportunities.<sup>196</sup> In Anya's case<sup>197</sup> it led to the loss of her job as a nurse and subsequent housing instability. The legal standard for indication in the SCR, in most states, merely requires some credible evidence of neglect or abuse.<sup>198</sup> The decision to "indicate" or "unfound" a case is made by child protective caseworkers without judicial involvement. While there is no public data on how many people are on the SCR, for New York State alone, the numbers are estimated to be in the hundreds of thousands.<sup>199</sup> The SCR is not accessible to the public, but many employers run SCR clearance checks as part of their hiring process.<sup>200</sup> This affects employment beyond childcare positions in the areas of transportation, home health aide services, custodial services, and others.

The family regulation system can have a destabilizing effect on families in the shelter system. Even the temporary removal of a child residing in a family shelter with their parents can lead to the loss of the shelter placement for the entire family.<sup>201</sup> Public housing and shelter placements are tied to the household composition. A single mother with a child is entitled to a placement within a family shelter but will lose the placement just weeks after the removal of her children. The lack of housing can later become the barrier for family reunification.<sup>202</sup> In New York City, the

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196. In 2020, New York State passed a bill to reform the SCR. The overall positive changes will not go into effect until 2022. The new statute requires a higher standard for indication of cases ("a fair preponderance of evidence" instead of "some credible evidence"). See S. 7506B, 2020 Leg., Reg. Sess. (N.Y. 2020). The new law also shortens the time that a case remains on the SCR from potentially up to nearly twenty-eight years to eight years. See *id.*

197. See Kramer, *supra* note 143, at 1–2.

198. A finding in family court would require the higher standard of preponderance of the evidence. See, e.g., N.Y. Fam. Ct. Act § 1046(b)(i) (McKinney 2021) ("[A]ny determination that the child is an abused or neglected child must be based on a preponderance of evidence . . ."). Note that both standards are significantly lower than the prosecution's burden to prove a criminal case beyond a reasonable doubt.

199. Each year, New York City alone adds thousands of new indicated cases to the SCR. See Admin. for Child.'s Servs., Abuse/Neglect Investigations by Community District, 2015–2019, <https://www1.nyc.gov/assets/acs/pdf/data-analysis/abuseneglectreport15to19.pdf> [<https://perma.cc/68C3-C6T8>] (last visited Oct. 12, 2021).

200. 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: Advice and Guidance for Family Defenders 389, 393 (Martin Guggenheim & Vivek Sankaran eds., 2015).

201. Corey S. Shdaimah, "CPS Is Not a Housing Agency"; Housing Is a CPS Problem: Towards a Definition and Typology of Housing Problems in Child Welfare Cases, 31 *Child. & Youth Servs. Rev.* 211, 216 (2009).

202. H. Elenore Wade, Note, Preserving the Families of Homeless and Housing-Insecure Parents, 86 *Geo. Wash. L. Rev.* 869, 881–82 (2018) (examining the intersections of homelessness and allegations of child neglect).

Department for Homeless Services can discharge a family for “fail[ure] to constitute a family.”<sup>203</sup> Other states have similar shelter policies.<sup>204</sup>

The limitation of upward mobility through employment barriers, combined with the displacement of families in the shelter system, exemplifies how the family regulation system exacerbates poverty through punishment despite its purported child welfare mission. Notably, employment destabilization through the family regulation system can occur even without court involvement.

d. *Termination of Parental Rights: The Civil Death Penalty.* — The most permanent punishment in the family regulation context—sometimes referred to as “the civil death penalty”—is the termination of parental rights.<sup>205</sup> In the words of the Supreme Court, the state moves to “destroy weakened familial bonds.”<sup>206</sup> Termination proceedings irrevocably sever the legal parent–child relationship and all other family ties of the child stemming from it, which includes the sibling and grandparent relationship. Typically, after the legal family relationship is terminated, the parent or family member can no longer visit or communicate with the child. By law, this child is no longer their child, grandchild, sibling, nephew, niece, cousin, or other family member. The Supreme Court has recognized this to be a “unique kind of deprivation”<sup>207</sup> in which the state seeks to end a “fundamental liberty interest.”<sup>208</sup>

The federal adoption law enacted in 1997, the Adoption and Safe Families Act (ASFA),<sup>209</sup> which amended the Child Welfare Act,<sup>210</sup> marks a shift of focus from preserving family ties through family reunification to fast-tracked adoptions.<sup>211</sup> Nominally, the primary goal after the removal of a child remains family reunification. However, ASFA places statutory deadlines on the time that a child can remain in foster care before “freeing” them for adoption, in an effort to place pressure on the state courts to achieve permanency and reduce the foster care population.<sup>212</sup> When the foster care agency has successfully changed the goal from reunification to

203. See N.Y. Comp. Codes R. & Regs. tit. 18, §§ 900.2(b)(2), 8(a)(2)(viii) (2020).

204. For the intersection of homelessness and CPS involvement, see generally Jason M. Rodriguez & Marybeth Shinn, *Intersections of Family Homelessness, CPS Involvement, and Race in Alameda County, California*, 57 *Child Abuse & Neglect* 41, 42–44 (2016) (discussing how housing instability can lead to family regulation involvement and vice versa).

205. N. R. Kleinfeld, *The Girls Who Haven’t Come Home*, N.Y. Times (July 6, 2013), <https://www.nytimes.com/2013/07/07/nyregion/the-girls-who-havent-come-home.html> (on file with the *Columbia Law Review*).

206. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

207. *Id.* at 759 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

208. *Id.*

209. *Adoption and Safe Families Act of 1997*, Pub. L. No. 105-89, 111 Stat. 2115.

210. *Adoption Assistance and Child Welfare Act of 1980*, Pub. L. No. 96-272, 94 Stat. 500.

211. Roberts, *Shattered Bonds*, *supra* note 161, at 105.

212. *Id.* at 104–13.

adoption, they are no longer required to plan with the parents. Every time the state places a child in foster care, the ASFA timeline starts, and a family is at risk of irrevocable separation.<sup>213</sup> The initial goal after the removal of a child from their parents remains family reunification, but the timeline in which that goal can change to adoption is significantly shortened. These short statutory deadlines are contrary to existing knowledge of treatment, recovery, healing processes, and importantly, the circumstantial socioeconomic factors that inform families' needs.<sup>214</sup>

The large support of ASFA in the 1990s along with its characterization as child centered<sup>215</sup> is partially based on the fictitious belief that a child's well-being conflicts with parental rights.<sup>216</sup> Supporters of ASFA championed it as being in the best interest of children as opposed to the interest of parents,<sup>217</sup> instead of viewing the family as a unit, worthy of support rather than punishment. ASFA focuses on the length of time that a child has spent in foster care as the determining factor for changing the goal from family preservation to adoption.<sup>218</sup> Parents are in a race against the ticking ASFA clock to complete the service plan provided by the foster care agency. The proceedings in and out of court center around the services a parent has or has not completed, their interactions with agency workers, and their behavior as documented from the perspective of the agency caseworker.<sup>219</sup> In domestic violence cases, this often includes, but is not limited to, engagement in domestic violence victims counseling services.<sup>220</sup> The focus of the case shifts from immediate safety considerations to a documented compliance determination by the foster care agency.

The punitive nature of ASFA's short reunification deadlines became particularly pronounced during the COVID-19 global health crisis. With

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213. See Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 *New Eng. L. Rev.* 129, 136 (2001) (emphasizing a shift from family preservation to permanent separation through ASFA).

214. See Roberts, *Shattered Bonds*, *supra* note 161, at 154 ("It is usually difficult for parents with drug or alcohol problems to successfully complete a treatment program and conform to other agency requirements within the established time limit.").

215. 143 *Cong. Rec.* H10789 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly) ("This legislation we can all agree on is putting children on a fast track from foster care to safe and loving and permanent homes. This is what this is all about.").

216. See Roberts, *Shattered Bonds*, *supra* note 161, at 108 ("Members of Congress waved these stories about tragic child abuse cases as evidence that federal policy should abandon its emphasis on family unity.").

217. *Id.*

218. *Id.* at 109–10 (describing how ASFA accelerates the termination of parental rights by mandating that "states file a petition to terminate the rights of parents whose child has been in foster care for fifteen of the previous twenty-two months").

219. See *infra* sections III.A–B.

220. See *infra* sections III.A–B.

limited or no access to physical courthouses, many states suspended statutory deadlines.<sup>221</sup> Families entangled in the family regulation system faced particularly harsh physical separation, with limited ability to challenge continued foster care placement or suspension of visitation. On March 25, 2020, the Illinois Department of Children and Family Services (DCFS) suspended all in-person child–parent and sibling visits for children in the Illinois foster care system.<sup>222</sup> Parents promptly challenged DCFS’s blanket visitation ban, arguing that it exacerbated already existing harms to families during the pandemic. The Chancery Division of the Cook County Circuit Court dismissed the case without issuing a temporary restraining order to suspend DCFS’s ban.<sup>223</sup> The court did not make a substantive decision, but rather found that it lacked jurisdiction in that “the Child Custody Court . . . is best able to assess the rights and responsibilities of the parties.”<sup>224</sup> The decision was harshly criticized.<sup>225</sup>

At this moment, it is impossible to definitively predict how the pandemic will impact the legal death of families in the long term. Thus far, it has placed families with foster care involvement at higher risk for permanent separation through visitation suspension, minimal access to the courts and service providers, increased housing instability, and financial insecurity.

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Together, various tools of coercion and punishment perpetuate epistemic injustice in the family regulation system for involved parents, including domestic violence survivors.

221. For example, in New York, the Governor issued Executive Order 202.8, which suspended or modified statutory deadlines. N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), [https://www.governor.ny.gov/sites/default/files/atoms/files/EO\\_202.8.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.8.pdf) [<https://perma.cc/B5QT-BWPA>]. In California, the statewide emergency order of Chief Justice Tani G. Cantil-Sakauye modified statutory deadlines in criminal court. Statewide Emergency Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council (Mar. 30, 2020), <http://www.lacourt.org/newsmedia/uploads/142020431048StatewideOrderbytheChiefJustice-ChairoftheJudicialCouncil03-30-2020.pdf> [<https://perma.cc/C5YE-WA9B>].

222. Dan Petrella, DCFS Set to Resume Parental Visits After 3-Month Coronavirus Shutdown, but Advocates Say It’s ‘Much Too Little Too Late’, Chi. Trib. (June 19, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-dcfs-parental-visits-20200619-uq7k14bie5b6hlap3zmsifqzs4-story.html> (on file with the *Columbia Law Review*).

223. *Buxton v. Ill. Dep’t of Child. & Fam. Servs.*, Case No. 20 CH 4100, at 3 (Ill. Cir. Ct. May 18, 2020), <https://www.povertylaw.org/wp-content/uploads/2020/05/Buxton-v-DCFS-Decision.pdf> [<https://perma.cc/39U4-UHJY>].

224. *Id.*

225. The Movement for Family Power and the Shriver Center on Poverty Law issued a joint statement disagreeing with the court’s decision: “[T]he Chancery Division . . . has . . . the duty to hear constitutional challenges to DCFS’ actions, especially when those constitutional challenges cannot be entertained in Child Protection court, as is the case here.” See Family Unity Remains Essential Despite Illinois Court Ruling, Shriver Ctr. on Poverty L. (May 19, 2020), <https://www.povertylaw.org/article/family-unity-remains-essential-despite-illinois-court-ruling/> [<https://perma.cc/W92U-WZ76>].

## II. EPISTEMIC INJUSTICE IN THE FAMILY REGULATION SYSTEM

This Part analyzes the relationship between knowledge production and coercion tools of the family regulation system through the lens of epistemic injustice theory. In a performative process, survivors are expected to articulate their internalized knowledge about their experience with domestic violence authentically and repeatedly, all while under the enormous pressure of CPS surveillance and the looming threat of child removal.

This Essay argues that in the family regulation context, epistemic injustice operates in three distinct ways. One, already existing knowledge about victimhood and child safety is reproduced to legitimize the family regulation system itself. Narratives that do not align with stereotypical assumptions about survivors of domestic violence are discredited. Two, survivors are excluded from shaping knowledge about child safety. In combination, both forms of epistemic injustice prevent individual resistance *and* a systemic shift from surveillance to support of survivors and their families. Three, both the discrediting and exclusion of survivor knowledge must be seen in the context of a coercive environment. The epistemic injustice framework helps explain why the individual, not structural oppression, is identified as a threat to child safety. This Essay further examines these points by introducing the relevant aspects of epistemic injustice theory (section II.A) and highlighting the central “moments” of knowledge production in the family regulation system (section II.B).

### A. *Epistemic Injustice Theory*

Epistemic injustice<sup>226</sup> theory is situated in political philosophy<sup>227</sup> and informed by feminist legal theory<sup>228</sup> and critical race studies.<sup>229</sup> Epistemology describes how the episteme, “an anonymous codification structure,” dictates the “knowledge formation” of a society at a particular

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226. See generally Fricker, *supra* note 28 (exploring epistemic injustice).

227. See Amy Allen, *Power/Knowledge/Resistance: Foucault and Epistemic Injustice*, in *The Routledge Handbook of Epistemic Injustice* 187, 187–93 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017) (arguing that Michel Foucault, a political philosopher, could be characterized as an epistemic injustice scholar before the term existed).

228. See Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *Hypatia* 236, 236, 242–48 (2011) (noting the epistemic violence inflicted on women of color through silencing practices); Nancy Tuana, *Feminist Epistemology: The Subject of Knowledge*, in *The Routledge Handbook of Epistemic Injustice*, *supra* note 227, at 125, 125 (“The subject of knowledge has been a central concern of feminist epistemological analyses since their inception.”).

229. See Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 9 (2d ed. 2000) [hereinafter Collins, *Black Feminist Thought*] (“For African-American women, critical social theory encompasses bodies of knowledge and sets of institutional practices that actively grapple with the central questions facing U.S. Black women as a collectivity. . . . African-American women as a *group* remain oppressed within a U.S. context characterized by injustice.”).

moment in time.<sup>230</sup> In other words, epistemology is the theory of knowledge, asking questions such as: What is knowledge? How is knowledge formed? Who participates in knowledge formation?

Epistemic injustice theorizes the relationship between knowledge formation and power. Professor Fricker coined the term epistemic injustice and describes it as a distinct injustice by which someone is harmed in their “capacity as a knower.”<sup>231</sup> Which knowledge is credited and which is subjugated is rooted in societal power structures and informed by stereotypical assumptions.<sup>232</sup> Notably, even prior to Fricker, numerous Black feminists and other feminists of color<sup>233</sup> produced scholarship that can be categorized as epistemic injustice scholarship.<sup>234</sup>

Epistemic injustice can be divided into two interrelated categories: testimonial injustice and hermeneutical injustice.<sup>235</sup> Together these categories provide a useful framework to conceptualize the specific harm that survivors in the family regulation system experience in their “capacity as knowers.”<sup>236</sup>

1. *Testimonial Injustice.* — Testimonial injustice<sup>237</sup> describes the discrediting of the “speaker’s word”<sup>238</sup> based on stereotypes.<sup>239</sup> “Testimonial” does not mean that the information must be presented through formal testimony. Any form of speech can be testimonial in this context.<sup>240</sup>

Negative credibility attributions are highly “resistan[t] to counter-evidence.”<sup>241</sup> The long history of discrediting Black women’s speech, for example, is embedded in sexist and racist stereotypical narratives about

230. Anke Bartels, Lars Eckstein, Nicole Waller & Dirk Wiemann, *Postcolonial Literatures in English: An Introduction* 153 (2019).

231. Fricker, *supra* note 28, at 20.

232. *Id.* at 249–57; see also Tuerkheimer, *supra* note 30, at 42–46.

233. See, e.g., Collins, *Black Feminist Thought*, *supra* note 229, at 3; Hazel V. Carby, *White Woman Listen! Black Feminism and the Boundaries of Sisterhood*, in *The Empire Strikes Back: Race and Racism in 70s Britain* 212 (Centre for Contemporary Cultural Studies ed., 1982).

234. Rachel McKinnon argues that while these scholars did not label their work epistemic injustice scholarship, they nonetheless examined and theorized concepts that can be seen as epistemic injustice. See Rachel McKinnon, *Epistemic Injustice*, 11 *Phil. Compass* 437, 438 (2016).

235. Fricker, *supra* note 28, at 1.

236. *Id.* at 20.

237. *Id.* at 1.

238. *Id.*

239. Fricker suggests that many stereotypes about marginalized groups involve credibility judgments: “Many of the stereotypes of historically powerless groups . . . involve an association with some attribute inversely related to competence or sincerity or both . . . .” *Id.* at 32.

240. *Id.* at 60.

241. *Id.* at 35.



sexuality and femininity.<sup>242</sup> Women have been stereotyped and pathologized as liars based solely on their identity as women for centuries, especially in the sexual assault context.<sup>243</sup> Black women in particular face both gendered and racialized credibility discounts based on their intersectional identities.<sup>244</sup> For court proceedings, scholars have pointed out that Black women encounter “numerous obstacles to being considered a believable, reasonable person.”<sup>245</sup> Poverty exacerbates credibility discounts of Black women.<sup>246</sup> In the family regulation system, the discrediting of a survivor’s speech is bound up in her intersectional identity as a Black and/or poor woman.<sup>247</sup>

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242. See Ronald L. Ellis & Lynn Hecht Schafran, *Achieving Race and Gender Fairness in the Courtroom*, in *The Judges’ Book* 91, 113 (2d ed. 1994) (“Black women who are battered face a particular kind of bias. . . . Some court officials presume that violence is the norm in the black community, so these women need no specific protection.”); Gary LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* 219–20 (1989) (highlighting the tendencies of jurors to not believe Black women in rape cases); Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 *J. Gender Race & Just.* 625, 633–34 (2000) (noting the historical characterization of Black women as “deviant”).

243. See 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: A Reader* 169, 172 (Adrien Katherine Wing ed., 1997) (discussing how “[t]he Freudian notion of women’s hysterical fabrication of claims of sexual abuse” influenced public skepticism of Anita Hill’s accusations against then-Judge Clarence Thomas); Alfred S. Taylor, *Medical Jurisprudence* 447 (Edward Hartshorne ed., 3d ed. 1853) (“Professor Amos remarked . . . that for one real rape tried on the Circuits, there were on the average twelve pretended cases!”); 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). A man’s “word,” however, sufficed as a guarantee or promise. See Adrienne Rich, *On Lies, Secrets, and Silence: Selected Prose 1966–1978*, at 185–86 (1979).

244. See Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 *Harv. Women’s L.J.* 127, 165 (1996) (“This evaluative scheme most disadvantages African American women. It is arguable, for example, that rape shield provisions do not assist African American complainants, since sexual promiscuity is imputed to them even in the absence of specific evidence of their sexual history.” (footnote omitted)). For a broader discussion of intersectionality, see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241 (1991).

245. Yarbrough & Bennett, *supra* note 242, at 647.

246. 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, 1006–07 (“The imagery and stereotypes that were raised by the prosecutor’s comparison of Pamela Hill and Nicole Simpson cannot be missed. . . . Pamela Hill is black, poor, an unwed mother, and considered violent.”). The “welfare queen” trope is one of the most harmful stereotypical depictions of Black women. This stereotype characterizes Black mothers as manipulative, neglectful liars, who take advantage of welfare services. See *id.* at 1051 n.175.

247. Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *Signs* 42, 49–50 (1988) (examining how Black women face compounded oppression through racism, sexism, and classism).

Professor Fricker theorizes that only a credibility deficit is a form of testimonial injustice, not credibility excess.<sup>248</sup> Credibility excess refers to the heightened attribution of credibility to someone's speech.<sup>249</sup> Some scholars, however, believe that credibility excess can be a form of testimonial injustice. According to Professor Jennifer Lackey, a credibility excess can take the form of testimonial injustice when a person's reported knowledge is credited "*only under conditions devoid of, or with diminished, epistemic agency.*"<sup>250</sup> In other words, it is testimonial injustice when only coerced knowledge—knowledge elicited by the state through a coercive process—is regarded as credible knowledge or as more credible than knowledge expressed without state coercion.<sup>251</sup> Lackey applies her understanding of testimonial injustice to explain why false confessions are "highly resistant to counterevidence."<sup>252</sup> While Lackey identifies credibility excess as testimonial injustice specifically in the context of confessions, the underlying concept is applicable to coerced survivors in the family regulation system. Survivors are affected by testimonial injustice both when their authentic knowledge is discredited and when they are forced to participate in knowledge production within a coercive environment.

The damage caused by testimonial injustice is multifold. Testimonial injustice dehumanizes a person by discrediting their status as a knower, based on stereotypical assumptions.<sup>253</sup> In the introductory case example, Ms. Williams did communicate her knowledge to the CPS caseworker. Her specific requests for support were ignored. Instead, CPS intervened by making Ms. Williams participate in domestic violence and parenting counseling sessions. In doing so, CPS suggested—at least implicitly—that Ms. Williams was a mother incapable of making an informed and autonomous decision about how best to support herself and her child. Importantly, the ongoing family regulation case actively prevented her from filing for a divorce from her abusive partner and seeking custody.<sup>254</sup>

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248. See Fricker, *supra* note 28, at 21. This understanding of testimonial injustice is contentious. See Emmalon Davis, *Typecasts, Tokens, and Spokespersons: A Case for Credibility Excess as Testimonial Injustice*, 31 *Hypatia* 485, 486–96 (2016).

249. For credibility excess, Fricker gives the example of someone receiving unduly high credibility in what he said just because he spoke with a certain accent. See Fricker, *supra* note 28, at 19–20.

250. Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 *J. Crim. L. & Criminology* 43, 59 (2020). Lackey calls this form of testimonial injustice "agential testimonial injustice." *Id.* at 61.

251. *Id.* at 59–60 (arguing that coercion, manipulation, sleep deprivation, and deception can reduce a person's epistemic agency).

252. *Id.* at 52 (emphasis omitted).

253. As Fricker points out, sharing knowledge is "essential to human value." See Fricker, *supra* note 28, at 44 ("[T]he epistemic wrong bears a social *meaning* to the effect that the subject is less than fully human.").

254. Ms. Williams reached out to several survivor support organizations. They were unable to assist her in filing for a divorce due to her pending family court case.

If knowledge is elicited in a coercive environment, it may diminish a person's perceived agency over their own experience. Ms. Roberts, when subpoenaed to testify against her partner, felt that she had to choose between getting her children back and testifying authentically. Ms. Roberts wanted to continue a relationship with her partner. She believed that he should continue to be a father figure for her daughters. She was convinced that while there had been fights with him, there was no domestic violence. The fear of continued separation from her children, however, prevented her from testifying authentically. As a result, she lost agency over the expression of her knowledge. The disconnect between her authentic experience and the narrative that was expected of her caused so much internal pressure that it made her ill.

Systematic testimonial injustice perpetuates structural oppression by eliciting knowledge that comports with already existing stereotypical narratives, while ignoring or silencing authentic knowledge.<sup>255</sup>

2. *Hermeneutical Injustice.* — Hermeneutical injustice occurs when socially marginalized knowers are excluded from contributing to collective knowledge production.<sup>256</sup> Hermeneutical injustice prevents a knower from participating in the forming of the collective social understanding of something. This leads to the underrepresentation of marginalized perspectives and the lack of frameworks to conceptualize marginalized experiences.<sup>257</sup> Because the existing hermeneutical resources are biased, hermeneutically marginalized groups are unable to articulate their experiences in ways that resonate both with the listener and comport with their lived experiences.<sup>258</sup> Professor Fricker describes hermeneutical epistemic injustice as “the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice.”<sup>259</sup> As an example, she discusses the concept of “sexual harassment” through the lens of hermeneutical injustice by examining the story of Carmita Woods, a woman who experienced unwanted sexual advances by her boss, before sexual harassment was conceptualized as a phenomenon.<sup>260</sup> Carmita Woods, when attempting to articulate her experience, struggled to find words.<sup>261</sup> The lack of frameworks to conceptualize

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255. See Fricker, *supra* note 28, at 58 (noting that systematic testimonial injustice can be a “silent by-product of residual prejudice in a liberal society” (citation omitted)); Tuerkheimer, *supra* note 30, at 46 (arguing that “testimonial injustice tends to exacerbate oppression . . . of the prejudged groups to which [the speaker] may belong”).

256. Fricker, *supra* note 28, at 158.

257. *Id.* at 155 (theorizing that collective knowledge becomes “unduly influenced by more hermeneutically powerful groups” and will tend to prejudice marginalized groups).

258. *Id.* at 159.

259. *Id.* at 155 (emphasis omitted).

260. *Id.*

261. *Id.* at 150.

an oppressive work environment disadvantaged her in the process of sharing and contributing to existing knowledge.<sup>262</sup> Professor Eve Hanan examines how prisoners experience a distinct form of hermeneutical injustice when they have “no effective method to speak to the authorities”<sup>263</sup> and raise medical complaints. Hanan argues that epistemic injustice “silences or discredits incarcerated people’s accounts of prison,” and ultimately excludes prisoner knowledge from shaping sentencing policy and sentencing practice.<sup>264</sup>

Our collective understanding of things comes to be defined by those with epistemic power. By advantaging powerful groups and erasing marginalized groups from collective understanding building, hermeneutical injustice obscures and damages collective knowledge production and spreading. As a result, damaged knowledge may then shape public policy and legislation. Fricker develops hermeneutical injustice primarily in the context of gender injustice.<sup>265</sup> Other scholars have focused on race and hermeneutical injustice.<sup>266</sup>

3. *Damaged Knowledge as a Subjugation Tool in the Legal System.* — Scholars initially discussed and applied the framework of epistemic injustice within philosophy discourses.<sup>267</sup> In recent years, the epistemic injustice framework has gained traction in the legal academy.<sup>268</sup> Most recently, epistemic injustice has been utilized as a framework in criminal legal scholarship.<sup>269</sup> In the family regulation context, however, epistemic injustice remains underexamined.

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262. *Id.*

263. M. Eve Hanan, *Invisible Prisons*, 54 *U.C. Davis L. Rev.* 1185, 1218 (2020).

264. *Id.* at 1219, 1242–43.

265. Fricker, *supra* note 28, at 155; see also Katharine Jenkins, *Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices*, 34 *J. Applied Phil.* 191, 191–93, 198 (2017) (applying Fricker’s account of hermeneutical injustice to “the phenomenon of persistent social misconceptions, or myths, surrounding forms of sexual or intimate violence, specifically rape and domestic abuse”).

266. See, e.g., Kristie Dotson, *A Cautionary Tale: On Limiting Epistemic Injustice*, 33 *Frontiers* 24, 26–29 (2012) (discussing examples of testimonial injustice in the context of race and racism); McKinnon, *supra* note 234, at 438 (“For example, there’s ample evidence that we’re more likely to believe a statement if it comes from a white man than a black woman, even if both speakers are equally credible (and even if the latter is more credible).”).

267. See generally José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and Resistant Imaginations* (2013) (examining, with a focus on race and gender, how epistemic conditions further marginalize oppressed groups).

268. See, e.g., Michael Sullivan, *Epistemic Justice and the Law*, in *The Routledge Handbook of Epistemic Injustice*, *supra* note 227, at 293, 293–302; Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 *Wash. L. Rev.* 1133, 1150–63 (2012).

269. See Hanan, *supra* note 263, at 1190–91 (relying on epistemic injustice as “an analytic lens for viewing the seeming paradox of the wide availability of accounts of prison’s cruelties and their lack of influence in sentencing policy and practice”). Professor Lackey argues that epistemic injustice explains why false confessions in the criminal legal system

Both hermeneutical and testimonial epistemic injustice ultimately damage collective knowledge production through false or incomplete knowledge. Damaged knowledge then shapes the collective understanding of truth. As Michel Foucault pointed out, what is upheld as true depends on “what types of discourse” society “accepts and makes function as true.”<sup>270</sup> Indeed, through epistemic injustice certain knowledge is accepted as true, while some knowledge is discredited or excluded from shaping collective truth.

In the family regulation context, hermeneutical injustice excludes parents from contributing to the collective understanding of child safety. Survivors are excluded from contributing their authentic knowledge about domestic violence and its effects on their family. Further, they are unable to share their lived experience of system violence in a *collective* knowledge building process, which ultimately damages our collective pool of knowledge. The family regulation system’s focus on pathologizing individuals instead of focusing on structural issues is an example of the pervasive effects of damaged knowledge. If marginalized parents’ expressions of knowledge were truly credited, the discourse around child safety would center around a family’s actual needs. The focus would be on public housing, employment, access to medical treatment, and other structural issues of poverty.

a. *The “Marginalization Effect”*. — Damaged knowledge reproduces and exacerbates socioeconomic disadvantage by excluding those who are disproportionately impacted from sharing their concerns and contributing to solutions—all while uplifting the concerns of those least affected. In this way, epistemic injustice perpetuates hegemonic societal power structures.

Professor Fricker argues that epistemic injustice reduces social and political knowledge building.<sup>271</sup> Damaged knowledge about child safety and domestic violence can have long-lasting effects on families entangled in the family regulation system. For example, the narrative that a woman who experiences domestic violence is “psychologically damaged” is instrumentalized to justify state intervention.<sup>272</sup> Every attempt to share conflicting knowledge through the woman’s experience is interpreted as

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are privileged over statements made without state coercion. See Lackey, *supra* note 250, at 59–63. Emily Brissette examines the silencing of defendants at arraignments through the lens of epistemic injustice. See Emily Brissette, *Bad Subjects: Epistemic Violence at Arraignment*, 24 *Theoretical Criminology* 353, 359–62 (2020). For the silencing of defendants in the criminal legal system generally, see Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 *N.Y.U. L. Rev.* 1449, 1458–69 (2005). Professor Tuerkheimer argues that credibility discounting of women in the sexual violence context is a form of epistemic injustice. See Tuerkheimer, *supra* note 30, at 41–50.

270. Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972–1977*, at 131 (1980).

271. Fricker, *supra* note 28, at 115–17.

272. For an example, see *infra* section III.B (detailing Georgeanne G.’s story).

proof of her “damaged state” and thus reifies the belief that she lacks credibility. Her lack of interest in services for victims of domestic violence ostensibly proves that she has no “insight” into her own abuse experience.<sup>273</sup> Her inability or unwillingness to testify about domestic violence is characterized as a parenting flaw because she is perceived as putting her partner before her children. The family regulation system pathologizes women who share knowledge that does not align with victimhood narratives and the need for state intervention by challenging their right to parent.<sup>274</sup>

b. *The “Collective Disadvantage Effect”*. — While legal scholars should care about epistemic injustice for the sake of the most marginalized survivors and their families, there are more general reasons to care.

As Professor Monica Bell points out, a marginalized mother’s reliance on the criminal legal or family regulation system comes at great cost for her and her family.<sup>275</sup> Once initiated, state intervention can affect a mother’s financial status,<sup>276</sup> housing stability,<sup>277</sup> ability to maintain a relationship with her partner, the overall safety and liberty of a loved one,<sup>278</sup> and the extent to which she is free from state surveillance.<sup>279</sup> Domestic violence survivors who reach out for help have been surveilled and punished by the family regulation system.<sup>280</sup>

Further, damaged knowledge does not only exacerbate marginalization of already disadvantaged groups. Collective knowledge influences legal policy, legislation, and legal interpretation with potentially disadvantaging consequences for society at large, including historically

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273. See *infra* sections III.A–B (providing case examples).

274. See *infra* sections III.A–B.

275. Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 *Law & Soc’y Rev.* 314, 316 (2016) (pointing out that a women’s use of the police can have unpredictable consequences for herself and others in and outside of the criminal legal system) [hereinafter Bell, *Situational Trust*]; Christopher Wildeman & Sara Wakefield, *The Long Arm of the Law: The Concentration of Incarceration in Families in the Era of Mass Incarceration*, 17 *J. Gender Race & Just.* 367, 367–89 (2014).

276. See generally Kaaryn S. Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (2011) (examining how, since the 1990s, criminal law and welfare have been linked in ways that further punish poor families).

277. See Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 *Soc. Sci. Rsch.* 1196, 1196–213 (2011) (summarizing the “mechanisms through which incarceration risks compromising prisoners’ housing security upon reentry”).

278. Bell, *Situational Trust*, *supra* note 275, at 316 (arguing that incarceration impacts familial bonds and financial stability).

279. Edwards, *supra* note 10, at 50–53.

280. In March 2002, a class action lawsuit was brought on behalf of survivors of domestic violence against CPS of New York City. The United States District Court for the Eastern District of New York concluded that evidence before the court showed “widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children.” See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002).

privileged groups. In this way, the epistemic harm inflicted upon an individual also damages the collective “epistemic ecosystem.”<sup>281</sup> While her research does not directly address the consequences of damaged knowledge through the lens of epistemic injustice, Professor Bridges does examine “how white privilege actively produces white disadvantage,”<sup>282</sup> as exemplified by the recent prosecution of pregnant white women for opioid use.<sup>283</sup> What historically served as a framework to disproportionately police and punish Black women during the “crack cocaine epidemic,”<sup>284</sup> has resurfaced as a criminalization tool during the opioid crisis, now disproportionately affecting poor, pregnant white women.<sup>285</sup> In the opioid context, the same frameworks that have been historically used against Black women now lead to disparate outcomes for poor white women.

B. *Procedural “Moments” of Knowledge Coercion and Exclusion in the Family Regulation System*

Throughout the course of a family regulation investigation and the parallel court proceeding, there are numerous identifiable instances of coercive knowledge production and knowledge exclusion. Unlike a criminal charge, allegations in the family regulation system do not merely focus on a discrete moment in time. Indeed, over the course of months—and sometimes years—the court considers the government’s shifting analysis of a parent’s ability to safely parent their child.<sup>286</sup> What begins as an investigation against the alleged aggressor of domestic violence can turn into

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281. Tuerkheimer, *supra* note 30, at 44.

282. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 *Harv. L. Rev.* 770, 775 (2020) [hereinafter *Bridges, Opioid Epidemic*] (“[W]e ought to understand that white privilege can lead to disadvantageous results just as capably as it can lead to advantageous ones.”).

283. *Id.* at 810; Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 *Wm. & Mary L. Rev.* 809, 841 n.213 (2019) (“The second wave [of fetal assault prosecutions] began in the mid-2000s with the rise of methamphetamine and opiates. In this second wave the prosecutions shifted, again both empirically and as a matter of rhetoric, to poor white women, “meth babies,” and “oxy-tots.” (citation omitted)); see also Amnesty Int’l, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA* 22 (2017), <https://www.amnesty.org/en/documents/amr51/6203/2017/en/> [https://perma.cc/RBT9-7678].

284. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 60 (2010).

285. Bach, *supra* note 283, at 815, 834–35; Bridges, *Opioid Epidemic*, *supra* note 282, at 803, 814–25. For the different depictions of white and Black mothers struggling with opioid addiction, see Joyce McMillan, *How the Media Portrays Black and White Drug Users Differently*, *Salon* (May 27, 2018), <https://www.salon.com/2018/05/27/how-the-media-portrays-black-and-white-drug-users-differently/> [https://perma.cc/8T6Y-4PXX].

286. The initial allegations can be amended during the course of the court proceeding. See Nancy L. Montmarquet, *The Survey of New York Practice—CPLR 3025(c): Amendment of the Pleadings to Conform to the Evidence Adduced at Trial Precluded When Proposed*

an investigation against the survivor.<sup>287</sup> In this way, family regulation cases constantly evolve and morph over time, sometimes quickly and other times more slowly.

This section examines some of the distinct procedural “moments” of knowledge production and knowledge exclusion in family regulation cases. This section will address if, when, and how survivor knowledge is discredited and excluded.

1. *Emergency Child Removal Hearings.* — Emergency child removal hearings are a significant point of coerced knowledge production. Whenever the state requests a child removal or has already conducted a removal—prior to establishing that there was actual neglect by the parent or a caretaker—the parents have the right to request a reunification hearing.<sup>288</sup> While the specifics of these hearings vary between states,<sup>289</sup> they all place the burden on the state to prove that the child’s health or life would be at imminent risk without removal.<sup>290</sup> Unlike at trial, in many states, evidentiary hearsay rules do not apply at emergency hearings.<sup>291</sup> CPS typically calls their own investigative caseworker as their main witness.<sup>292</sup> The caseworker is allowed to testify not only about their observations, but also about observations of neighbors, law enforcement personnel, teachers, therapists, and anyone else they spoke with.<sup>293</sup> CPS can also submit their own reports about the family and reports by service providers.<sup>294</sup> The court can—and often does—draw a negative inference from a parent’s failure to

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Amendment Would Add New Theory of Liability Based on Previously Unpleaded Facts Resulting in Prejudice, 59 St. John’s L. Rev. 632, 634 (1985).

287. This can happen, for example, when survivors become the subject of a “failure to protect” investigation. See Cross, *supra* note 22, at 270–76 (“Survivors who remain in unsafe relationships risk being charged with failing to protect their children by exposing their children to domestic violence or child abuse: these charges may occur through criminal prosecution, through the child welfare system, or both.”).

288. Child Welfare Info. Gateway, HHS, Understanding Child Welfare and the Court 2–3 (2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [<https://perma.cc/3FTE-L4YV>].

289. In New York State, for example, these hearings are governed by article 10, sections 1027 and 1028 of the Family Court Act. See N.Y. Fam. Ct. Act §§ 1027, 1028 (McKinney 2010).

290. See, e.g., 705 Ill. Comp. Stat. Ann. 405/2-10(2) (West 2022); Mont. Code Ann. §§ 41-3-301(1), 41-3-306 (West 2021); N.J. Stat. Ann. § 9:6:8.32 (West 2021); N.Y. Fam. Ct. Act § 1028(a); Va. Code § 63.2-1517 (2019).

291. See, e.g., Me. Rev. Stat. Ann. tit. 22, § 4034(4) (2016); N.J. Stat. Ann. § 9:6:8.32 (requiring “competent” evidence only for abuse and neglect trials); N.Y. Fam. Ct. Act § 1046(c); Iowa Ct. R. 8.19; Mich. Ct. R. 3.965(B)(12); 15 Ky. Prac. Domestic Rels. L. 6:16. In Montana, “[h]earsay evidence of statements made by the affected child is admissible” in emergency removal hearings. See Mont. Code Ann. § 41-3-432(3).

292. William G. Jones, Child Welfare Info. Gateway, HHS, Working With the Courts in Child Protection 27 (2006), <https://www.childwelfare.gov/pubPDFs/courts.pdf> [<https://perma.cc/EL7V-KEFP>] (emergency hearings); *id.* at 55–56 (factual hearings generally).

293. *Id.* at 53.

294. *Id.* at 55.



testify in their own case.<sup>295</sup> Further, CPS may call the survivor to question her about the domestic violence allegations, her response to domestic violence, her relationship history, and her “protective capacity.”<sup>296</sup> The testimony will likely revolve around whether the survivor is engaged in domestic violence victims counseling, willing to do a parenting class, and arguably most importantly, whether her understanding of the domestic violence allegations and consequences comports with the understanding of CPS. In the case of Ms. Williams, it did not. While Ms. Williams did not deny the existence of domestic violence in her relationship, she did not agree with CPS’s solution to the issue. Ms. Williams wanted a separation, a divorce, and stable housing for herself and her child. Instead, she was placed in a shelter far away from her son’s school without a functioning kitchen and was ordered to attend both a weekly parenting skills class and a domestic violence victims class. The ongoing neglect case in family court

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295. Supreme Court jurisprudence has long established that the Fifth Amendment’s right against self-incrimination applies in civil proceedings. See *Maness v. Meyers*, 419 U.S. 449, 461 (1975) (“This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.”); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (“The Fifth Amendment . . . protects the individual against being involuntarily called as a witness against himself in a criminal prosecution [and] privileges him not to answer official questions . . . in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”).

This does not, however, necessarily mean that a court cannot draw a negative inference from a parent’s failure to testify. Parents may find themselves in a dilemma here. Their refusal to testify and rebut the state’s allegations may severely decrease their chances of retaining or regaining custody of their child. If they waive their Fifth Amendment right and testify, their testimony could be used in a present or future criminal proceeding. In New York State, for example, courts are allowed to force a parent to decide between testifying on their own behalf and risking criminal legal repercussion. See *In re Ashley M.V.*, 966 N.Y.S.2d 406, 407 (N.Y. App. Div. 2013); *In re Nicole H.*, 783 N.Y.S.2d 575, 576 (N.Y. App. Div. 2004) (“Inasmuch as proceedings under article 10 of the Family Court Act are civil rather than criminal in nature, any inference drawn from the mother’s failure to testify does not violate her Fifth Amendment rights in a criminal case pending at the time of the hearing.”); *N.Y.C. Comm’r of Soc. Servs. v. Elminia E.*, 521 N.Y.S.2d 283, 284–85 (N.Y. App. Div. 1987).

Some states have adopted statutory immunity to resolve this dilemma. One of them is California. California law provides: “Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under Section 300 shall not be admissible as evidence in any other action or proceeding.” *Cal. Welf. & Inst. Code* § 355.1(f) (1999). Other states follow a judicial immunity model. See, e.g., *N.J. Stat. Ann.* § 9:17-50(b) (West 2021):

Upon refusal of any witness, including a party, to testify under oath or produce evidence, the court may order the witness to testify under oath and produce evidence concerning all relevant facts. If the refusal is upon the ground that the testimony or evidence might tend to incriminate the witness, the court, after notice to the prosecutor, may grant the witness immunity from all criminal liability on account of the testimony or evidence that the witness is required to produce.

296. Professor Goodmark discusses the stereotypical narrative that women who experienced domestic violence are helpless, passive, and unable to protect themselves and their children. See Goodmark, *When She Fights Back*, *supra* note 48, at 82–85.

against her and her ex-partner prevented her from obtaining a divorce and getting custody of her son. Despite communicating this to her caseworker repeatedly, CPS insisted on supervising her for over a year.

The *Nicholson* class action lawsuit against CPS of New York highlights the family regulation system's punitive response to the misalignment of the CPS narrative and a survivor's own belief at the emergency hearing stage. In the case of Sharline Nicholson, the CPS caseworker testified that, generally, a mother and victim of domestic violence will agree to CPS's conditions for her children's return home after a few days of forced separation.<sup>297</sup> He further testified that he believed Ms. Nicholson neglected her children by "refusing to deal with the reality of the situation."<sup>298</sup> He testified that she did not obtain an order of protection against her abuser and failed to cooperate with services for domestic violence victims.<sup>299</sup> The caseworker knew Ms. Nicholson had in fact attempted to obtain an order of protection at a local precinct, but she was told that she could not get an order of protection against someone residing out of state without knowing the address.<sup>300</sup> The family court in Brooklyn, after a separation of one week, ordered the release of her children under the condition that Ms. Nicholson leave her apartment and reside with her cousin in another borough.<sup>301</sup> When a CPS caseworker subsequently determined that the cousin's home lacked appropriate beds for the children, they were held in stranger foster care for an additional two weeks.<sup>302</sup> CPS could have provided beds for the children but chose not to.<sup>303</sup>

In the case of Michele Garcia, another plaintiff in the *Nicholson* lawsuit, a CPS caseworker concluded at the emergency child removal hearing that leaving her husband, obtaining an order of protection, and moving in with a relative was not enough to preserve the family unit because Ms. Garcia did not "see herself as a victim of domestic violence" and "blatantly refused to cooperate" with CPS.<sup>304</sup> The court record further indicated that after the removal of her children by CPS, Ms. Garcia was now "very receptive to services and . . . willing to do whatever it [took] for her to get her children back."<sup>305</sup> The court presiding over the lawsuit noted that the "children were, of course, hostages to compliance."<sup>306</sup>

In emergency hearings, survivors of domestic violence are coerced into producing a predetermined narrative to retain or regain custody of

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297. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 170 (E.D.N.Y. 2002).

298. See *id.* at 171.

299. *Id.*

300. *Id.*

301. *Id.* at 172.

302. *Id.*

303. *Id.* at 171–72.

304. *Id.* at 184.

305. *Id.* at 185.

306. *Id.*

their children. This narrative consists of admitting to being and identifying with the label of a “domestic violence victim.” They must demonstrate their affirmative appreciation for “help” from CPS and “insight” through family regulation intervention. It may not be enough to take autonomous steps to protect themselves and their children. Instead, the family regulation system relies on a survivor’s cooperation with their standard, preformulated demands, which typically include group classes, regular communication with CPS caseworkers, and compliance with home visits.<sup>307</sup>

2. *In-Court Trial Testimony.* — In Jordan Roberts’s case, there are several identifiable moments of knowledge coercion and knowledge exclusion. One distinct moment is her witness testimony at the neglect trial. Much has been said about subpoenaing a survivor of domestic violence to testify in criminal court against her (former) partner.<sup>308</sup> For example, Professor Linda Mills argues that forcing survivors to testify in criminal court under the threat of incarceration may have a “terrorizing” effect.<sup>309</sup>

In family regulation cases, the court regularly issues subpoenas at the request of CPS. Survivors who do not wish to testify against their current or ex-partner find themselves in a particularly vulnerable situation. Not only are they at risk of being held in contempt of court, with consequences ranging from monetary sanctions to incarceration, they also risk having their testimony used against them. Survivors can be accused of “failure to protect”<sup>310</sup> their child from the emotional harm caused by witnessing domestic violence. If a survivor’s testimony deviates from the dominating victimhood narrative,<sup>311</sup> they risk being accused of “lacking insight”<sup>312</sup> into

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307. When Ms. Nicholson finally regained custody of her children, CPS went on to file a warrant against her because she had failed to participate in unannounced home visits with the CPS caseworker. She was subsequently arrested and produced in family court. See *id.* at 172–73.

308. See, e.g., Goodmark, *A Troubled Marriage*, *supra* note 84, at 112 (discussing that prosecutors can subpoena survivors and request bench warrants when they fail to appear in court); Collins, *supra* note 33, at 404–10 (examining the contemporary criminal legal response to domestic violence through the lens of dominance feminism); Cross, *supra* note 22, at 268; Hanna, *supra* note 46, at 1892 (arguing that although this approach “can be criticized as punitive and victimizing” prosecutors should insist on mandating a survivor’s participation, “including having women picked up by police officers and brought to court if they refuse to appear”).

309. Mills, *supra* note 106, at 590–91 (“Insofar as the state threatens to imprison the battered woman in the same way that the batterer threatens to punish her, however, this form of government-sanctioned terrorizing mimics her abusive dynamic with the batterer.”).

310. Cross, *supra* note 22, at 271. Survivors risk both criminal and family regulation prosecution if they remain with their partner. See *id.* at 270–76; Dunlap, *supra* note 22, at 566–67, 579–81.

311. See Goodmark, *When She Fights Back*, *supra* note 48, at 91 (describing the prevailing narrative for victims of domestic violence as “[b]attered women are weak, dependent, passive, fearful, white, straight women who need the court’s assistance because they are not able to take positive action to stop the violence against them”).

312. The vague and subjective term of insight is a central feature of family regulation cases. See *infra* section III.C.

their own experience of abuse. Jordan Roberts's case exemplifies the dilemma of a survivor's dual role at a family court trial: She was subpoenaed as a witness against Michael Smith but also accused of neglect in the same trial. Even if Ms. Roberts was not subpoenaed, her failure to appear and testify in court would put her at risk of losing her own case. Importantly, her children are in foster care. Her ability to speak about the allegations would inevitably affect the court's determination of whether and when they can be returned to her care. Minimizing the allegations against her partner would reinforce the narrative that she was favoring her partner over her children. Getting her children out of foster care and back home means having to tell a story of victimhood and redemption, even if this does not reflect her lived experience. It will also mean separating from her partner permanently. Since Mr. Smith is not their biological father, the court—after entering a finding of neglect—can issue a final order of protection on behalf of the children until they turn eighteen years old.<sup>313</sup>

One of the cases in the *Nicholson* class action lawsuit further highlights this dilemma. Ms. Michelle Norris—one of the plaintiffs accused of being a victim of domestic violence—was informed by a CPS caseworker during a home visit that if she “‘went into court and made an admission to domestic violence’ the next day, she would probably get her baby back right away.”<sup>314</sup> At the time, her son had been removed from her care for over five months.<sup>315</sup>

During the pendency of a family regulation case, survivors are under constant threat of child removal. The release of children to the survivor is often conditioned on her leaving her (former) partner.<sup>316</sup> If she fails to do so, she may be in violation of a court order and risks losing custody of her children.<sup>317</sup> Knowing that their children can be removed from them places survivors in a particularly vulnerable position. Not testifying can mean being held in contempt. Testifying in a way that minimizes the allegations or signals that state intervention is not welcome can have severe consequences as well. Ms. Roberts, under an enormous amount of pressure, ultimately testified against Mr. Smith, but not without repeatedly vomiting in the courtroom trash bin during her questioning.

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313. New York's Family Court Act provides:

The court may enter an order of protection independently of any other order made under this part, against a person who was a member of the child's household or a person legally responsible [and] . . . who is not related by blood or marriage to the child or a member of the child's household. An order of protection entered pursuant to this subdivision may be for any period of time up to the child's eighteenth birthday . . .

N.Y. Fam. Ct. Act § 1056(4) (McKinney 2020).

314. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 187 (E.D.N.Y. 2002).

315. *Id.*

316. See Cross, *supra* note 22, at 274–75 (“Often . . . cases are brought when a survivor is advised by a child welfare social worker to either get a protection order or quickly leave the relationship and she fails to do so.”).

317. *Id.* at 275–76.

3. *Testimony in Termination of Parental Rights Proceedings.* — Another important “moment” of coerced knowledge production and exclusion is at the stage of parental rights termination proceedings. When the state intends to not only intervene in but *end* a parent’s fundamental right to parent their child,<sup>318</sup> it has the burden to prove the existence of permanent neglect or parental abandonment<sup>319</sup> by clear and convincing evidence.<sup>320</sup> When the family regulation proceeding has reached the stage of termination, the narrative about the parents, as told by CPS, is firmly established.

The legal focus—and with it the narrative focus—shifts from immediate safety concerns that caused actors within the family regulation system to initiate the court case to everything that has happened or did not happen since.<sup>321</sup> In the above-mentioned case of Ms. Williams, for example, CPS’s focus quickly shifted from her plan to leave her partner to compliance with domestic violence and parenting classes. At that point, she had separated from her husband and moved out of the home.

The service plan and regular reports CPS provides to the court set the stage for the “termination narrative” long before a termination trial commences. The judge that arraigns the case on the first day is the same judge who makes the decision in an emergency child removal hearing, issues the neglect or abuse finding against the parent, and makes the final decision that preserves or permanently ends the parent–child relationship.<sup>322</sup> The testimony of a survivor facing termination is a crucial, if not the most crucial, part of the termination trial. There are two possible ways for a survivor to engage with this particular “moment of knowledge production.” One, she can accept the established narrative of victimhood, noncompliance, and helplessness; or two, she can intervene in the narrative. The second

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318. For the fundamental liberty right of parents to their children protected by the Fourteenth Amendment, see generally *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 . . .”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (recognizing and applying the right of parents to “direct the upbringing and education of children”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . .”).

319. These are the most common causes of actions in termination proceedings. Some states have additional causes of action. New York State, for example, allows for termination proceedings based on mental illness and intellectual disability. See N.Y. Soc. Servs. Law § 384-b(4)(c) (McKinney 2019).

320. *Santosky v. Kramer*, 455 U.S. 745, 768–70 (1982). Prior to this decision, a majority of states had already adopted the “clear and convincing evidence” standard. See *id.* at 749 n.3.

321. Professor Roberts discusses the case of a woman whose infant son died suddenly and without a determined cause. After her son’s tragic death, CPS removed her other five children from her care and filed a neglect case in family court against her. The mother was never accused of being responsible for the death of her son, but of drinking beer, leaving her children unattended, and living in a “dirty” home. Roberts also details how ever-changing mental health evaluations are used to prolong children’s placement in stranger foster care and prevent reunification. See Roberts, *Shattered Bonds*, *supra* note 161, at 38–40.

322. For more on cognitive dissonance in judicial decisionmaking, see generally Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 *Ct. Rev.* 114 (2013).

option is extremely risky. Clearly, intervention efforts by the survivor have thus far been unsuccessful. By this later stage of the case, CPS's narrative has solidified. The central question for the court is typically whether the domestic violence survivor has shown "insight." On the other hand, the first option means contributing to an inauthentic narrative and reproducing disempowering knowledge. Option one is not only the path of least resistance but may also be the only path to regain custody of her children, who are lingering in stranger foster care.

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The framework of epistemic injustice theory helps conceptualize knowledge coercion and exclusion within the family regulation system as a subjugation tool. Epistemic injustice causes individual and collective harms. While marginalized survivors are discredited and excluded from shaping the narrative around child safety and family violence, the collective knowledge pool is harmed by false and/or incomplete knowledge production. For survivors entangled in the family regulation system, hearings to regain or maintain physical custody of their children, neglect trials against them or their (former) partners, and termination of parental rights proceedings are distinct procedural moments of knowledge coercion. Within these procedural "moments of coercion," the concept of "insight" can be weaponized to coerce, discredit, and exclude survivor knowledge. The following Part discusses how.

### III. INSTRUMENTALIZING "INSIGHT"—MAPPING THE LANGUAGE OF EPISTEMIC INJUSTICE

This section explores how the concept of "insight" dictates domestic violence narratives and perpetuates epistemic injustice in the family regulation system. Section III.A conceptualizes this vague, highly subjective term. Section III.B explores the use of "insight" in select family court decisions with a focus on domestic violence survivors. Section III.C then examines the findings of sections III.A and III.B through the lens of epistemic injustice theory to highlight a particular entry point for harmful knowledge production in the family regulation system.

#### A. *Conceptualizing "Insight"*

While parental "insight" is invoked frequently in practice, it is rarely discussed in family law scholarship. The term "insight" is vague and highly subjective.<sup>323</sup> What "insight" means will vary on a case-by-case basis and depends on the perception and assessment of the CPS caseworker, the foster

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323. There is little doctrinal analysis of the "insight" concept and how it dictates narratives in the family regulation system. There is, however, a scholarly conversation about "insight" outside of family regulation law. The critique of "insight" is perhaps most prominent in the criminal legal system, particularly in the parole context. Notably, some courts

care agency, and the court. While “insight” is relevant beyond domestic violence cases, this analysis will focus on its impact on survivors.<sup>324</sup> The concept of “insight” is utilized to articulate a barrier to family reunification or to justify a removal at any stage of a family regulation case. In the context of domestic violence, it is often discussed in termination proceedings.

“Insight” requires more than external compliance with the regime of family regulation. Engaging in domestic violence counseling and cooperating with caseworkers, therapists, and other counselors is viewed as a mere precondition to “insight.”<sup>325</sup> Parents encounter a similar phenomenon when they are asked to articulate how they “benefited” and what

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have cited parole decisions when relying on “insight” in family regulation cases. See, e.g., *Georgeanne G. v. Superior Court*, 267 Cal. Rptr. 3d 834, 843 (Ct. App. 2020) (citing *In re Shaputis*, 265 P.3d 253, 270, 278 (Cal. 2011) [hereinafter *In re Shaputis I*]).

In the parole context, similar to the family regulation system, “insight” remains a nebulous yet heavily relied upon concept. In California, for example, “insight” is a major factor in parole decisionmaking. See *In re Rodriguez*, 122 Cal. Rptr. 3d 691, 701 (Ct. App. 2011); *In re Gomez*, 118 Cal. Rptr. 3d 900, 912 (Ct. App. 2010). Other jurisdictions similarly focus on “insight.” See, e.g., *Silmon v. Travis*, 741 N.E.2d 501, 503 (N.Y. 2000). The Supreme Court of California held that “despite years of rehabilitative programming and participation in substance abuse programs,” *Shaputis* had “failed to gain insight into his previous violent behavior.” See *In re Shaputis*, 190 P.3d 573, 575 (Cal. 2008) [hereinafter *In re Shaputis I*], reh’g denied, *Shaputis (Richard)* on H.C., No. S188655, 2012 Cal. LEXIS 2218 (Mar. 14, 2012). After *In re Shaputis I*, “insight” was cited in appellate decisions twice as much as before. Keith Wattle, *Insight Into California’s Life Sentences*, 25 Fed. Sent’g Rep. 271, 272–73 (2013). Insight also became a “new mechanistic ground for parole denials.” Lilliana Paratore, “Insight” Into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice, 21 Berkeley J. Crim. L. 95, 108 (2016). Several criminal legal scholars have criticized the artificial narratives that are produced by the focus on “insight” in parole decisions. See, e.g., Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 Iowa L. Rev. 491, 523–29 (2008) (highlighting the inherent tension of the parole process for prisoners who maintain their innocence in a hearing that focuses on remorse and rehabilitation). The “insight” inquiry polices “satisfactory expression of knowledge” about a crime’s “motives and causes.” See Victor L. Shammass, *The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight*, 42 Pol. & Legal Anthropology Rev. 142, 143 (2019). Another critique focuses on the lack of environmental considerations. Some scholars argue that the coercive nature of the prison environment can impact “insight,” perceived “insight,” and importantly, a person’s ability to articulate “insight” compellingly. See *id.* at 150.

324. “Lack of insight” occupies a central role in cases where the neglect allegations are based on a parent’s mental health. See, e.g., *In re D.T.*, 222 A.3d 593, 605 (D.C. 2019) (citing a magistrate judge’s finding that a mother’s “untreated mental illness and ‘lack[] [of] insight into her circumstances” created an unwarranted risk that she would modify or terminate guardianship if reunified with her child (alterations in original)); *In re Nialani T.*, 83 N.Y.S.3d 206, 208 (App. Div. 2018) (referring to “evidence in the record that the mother lacked insight into her ongoing mental illness and psychiatric hospitalizations”); *In re Elijah I.M.*, 61 N.Y.S.3d 650, 652 (App. Div. 2017) (“The record further showed that the mother had limited insight into her condition, a long-standing pattern of only intermittent compliance with medication and psychotherapy treatment, and recurrent hospitalizations.”).

325. See *infra* section III.B.

they “learned” from family regulation intervention. The accusation that a parent lacks “insight” goes beyond whether they cooperated with CPS intervention, completed all required programs, and followed court orders. It requires an acknowledgment of parental shortcomings in the way that the family regulation system wants them acknowledged. It requires parents to speak about what they learned throughout the proceedings, even if painful separation of their family is a core feature of family regulation intervention. It requires the substance and demeanor with which they articulate their experience to match the narrative that actors in the family regulation system have established as authentic and appropriate.<sup>326</sup> In short, “insight” means comporting with the expectations of the family regulation system both externally *and* internally. “Insight” quite literally allows for a judgment about what someone *knows* and how they express their knowledge.

In domestic violence cases in particular, a lack of “insight” may be discussed even when the survivor has complied with domestic violence victims counseling, parenting classes, court orders, and otherwise cooperated with CPS. A survivor may be expected to speak about her intimate relationship history and the impact that domestic violence had on her and her children. This may mean acknowledging and internalizing some of the stereotypical narratives about victimhood. As a result, survivors may feel as though they are forced to participate in their own dehumanization.

#### B. “Insight” and Domestic Violence in Selected Family Regulation Case Law

By the very nature of the term, the application of “insight” is fact specific. The goal of this analysis is not to define the term or comprehensively outline every trend across jurisdictions. There are many more family law cases that discuss the insight of survivors in relation to their own abuse all over the country.<sup>327</sup> The purpose of this section is to highlight the dynamics between the legal framework of “insight,” a survivor’s knowledge,

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326. Implicit bias obscures perceptions of appropriate or authentic remorse. See Nicole Gonzalez Van Cleve, *Crook County: Racism and Injustice in America’s Largest Criminal Court*, at xii (2016) (explaining how “extreme racial punishment embeds itself in [legal] processes”); Shima Baradaran, *Race, Prediction, and Discretion*, 81 *Geo. Wash. L. Rev.* 157, 165–66 (2013) (summarizing research demonstrating that implicit racism pervades the criminal legal system); M. Eve Hanan, *Remorse Bias*, 83 *Mo. L. Rev.* 301, 329–42 (2018) (citing to implicit bias studies related to criminality perceptions and qualitative research on implicit bias in the courtroom); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 *W. Va. L. Rev.* 307, 338–39 (2010) (detailing studies demonstrating how “evidence-based racial cues likely were implicit in nature and may have activated stereotypes even without the participants’ awareness”); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 *Minn. L. Rev.* 2035, 2035–39 (2011) (“[J]udges sometimes incorporate empirically testable social science claims into their legal reasoning without even noticing that they are doing so.”).

327. See, e.g., *In re Damian G.*, 174 A.3d 232, 234–35 (Conn. App. Ct. 2017) (upholding a finding that a mother “has not shown the ability to absorb insights from her domestic violence counseling and her parenting education”); *In re Children of Alice R.*, 180 A.3d



and the narrative that can end a survivor's legal relationship with her child. These narratives are then examined through the framework of epistemic injustice.

1. *Georganne G. v. Superior Court.* — In *Georganne G. v. Superior Court*, the Court of Appeals of the Second District of California reviewed the superior court's decision to terminate reunification services for Georganne G., to set a hearing to terminate her rights, and to implement the foster care agency's plan of adoption for her son Lucas.<sup>328</sup> In 2017, the court entered a finding of neglect against Georganne for using marijuana and "engaging" in domestic violence with Lucas's father, who had struck her in front of Lucas.<sup>329</sup> While the case was pending, Georganne separated from Lucas's father and began dating Arthur, who had a prior conviction for the rape of his ex-wife.<sup>330</sup> There was no past or current violence between Georganne and Arthur.<sup>331</sup>

The superior court ordered Georganne to complete a program for domestic violence victims and parenting classes, and also to engage in individual counseling.<sup>332</sup> The court also ordered her to have no contact with her then-partner, Arthur, due to his past conviction.<sup>333</sup> When the CPS caseworker learned that Georganne had violated the court order and lived with Lucas and Arthur, Lucas was removed from her care immediately.<sup>334</sup> Notably, there was no allegation of past or present violence toward Georganne or Lucas. The removal was based solely on Arthur's past conviction and Georganne's violation of the court order.<sup>335</sup>

For eighteen months thereafter, the foster care agency observed a strong, affectionate bond between Georganne and her son.<sup>336</sup> She submitted nineteen negative drug tests and completed a domestic violence program.<sup>337</sup> After eighteen months of supervision by CPS, there was still no sign of any violence between Georganne and Arthur.<sup>338</sup> When the

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1085, 1087 (Me. 2018) (upholding a finding that while "neither parent admits any abusive behaviors . . . neither demonstrates any insight that would prevent such behaviors in the future"); *In re S.P.*, No. B-XXXX-19, 2020 WL 5625182, at \*9 (Fam. Ct. Sept. 16, 2020) (concluding that while "Ms. P. may have participated in the required services, she 'did not successfully . . . gain insight into the programs that led to the removal of the [children] and continued to prevent the [children's] safe return'" and that "[t]his is especially true for the issue of domestic violence" (first and second alterations in original) (quoting *In re Soraya S.*, 70 N.Y.S. 737, 739 (App. Div. 2018))).

328. *Georganne G. v. Superior Court*, 267 Cal. Rptr. 3d 834, 839–40 (Ct. App. 2020).

329. *Id.* at 859.

330. *Id.*

331. *Id.* at 869.

332. *Id.* at 859.

333. *Id.*

334. *Id.* at 860.

335. *Id.* at 868–69.

336. *Id.* at 861.

337. *Id.* at 862.

338. *Id.* at 868–69.

foster care agency advocated for changing the current plan from reunification to termination, Georgeanne testified on her own behalf. She testified that, while she would like to continue her relationship with Arthur, she was willing to separate from him to get Lucas out of foster care and back in her care.<sup>339</sup> At summations, the attorney for the child based her decision to support the goal of adoption on Georgeanne's purported "lack of insight":

She's not gained insight into what led to the court's interfering in this case and jurisdiction. She still is dependent upon [Arthur] despite no contact orders. Basically, she's chosen [Arthur] over Lucas in that she continues to rely on him. Perhaps that's out of necessity. But she's—I think with the progress she made, if she had more insight she could have reunified with Lucas, but this is a big sticking point for her.<sup>340</sup>

At the end of the hearing, the attorney for CPS concluded:

She's not independent, she's co-dependent on him [Arthur]. She knows what his conviction is. . . . Yet, she sees no problem. She's in conjoint counseling with him. She's trying to make a family with him when one of the counts that was sustained on Lucas's case was domestic violence with the father of Lucas. So she has chosen another individual who has those tendencies. I don't believe that she can keep [Arthur] away from Lucas.<sup>341</sup>

At the end of the hearing, the superior court granted CPS's application, terminated reunification services, and changed the permanency goal to adoption.

2. *In re M.M.*. — In *In re M.M.*,<sup>342</sup> the Court of Appeals of Iowa reviewed a mother's appeal of a juvenile court's decision to terminate her parental rights.<sup>343</sup> The neglect case against the mother was initiated after a single incident of domestic violence between her and the father in July 2015.<sup>344</sup> The allegations were that she "engaged" in domestic violence with the father, the alleged aggressor.<sup>345</sup> At the time, the child was present in the home and subsequently removed from the parents and placed in stranger foster care.<sup>346</sup> The mother was ordered to complete a domestic violence counseling program for victims.<sup>347</sup> She maintained a relationship with the father of her child and relocated to Missouri for family support,

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339. *Id.* at 862.

340. *Id.* at 862–63 (alterations in original).

341. *Id.* at 863 (second alteration in original).

342. *In re Interest of M.M.*, No. 17-0237, 2017 WL 2461889 (Iowa Ct. App. 2017).

343. The decision does not fully name the appellant mother, providing only her initials: K.C. *Id.*

344. *Id.* at \*2.

345. *Id.*

346. *Id.*

347. *Id.*

where she became pregnant with a second child by him.<sup>348</sup> This child remained in her care throughout the proceedings without any safety concerns.<sup>349</sup> The mother followed her service plan and cooperated with supervision by CPS. The district court's record reflects:

The social worker testified the mother engaged in the services offered. She was consistent with substance-abuse treatment. She was receptive to Family Safety, Risk, and Permanency (FSRP) services. She was cooperative with the safety plan. The mother engaged in domestic violence therapy. The therapist testified the mother has made good progress. The therapist testified the mother was regular in her appointments. The mother learned to understand domestic violence and its causes.<sup>350</sup>

Nonetheless, the agency successfully sought to end her legal relationship with her child, and her rights were terminated by the district court.<sup>351</sup> In reversing the decision, the appellate court placed emphasis on the mother's "insight" into her experience of being a victim of domestic violence:

This case arose out of a single incident of domestic abuse. While any single incident is one too many, we are not presented with a case where the father has a lengthy history of violence. The mother has moved away from the father. The mother has obtained insight into issues of domestic violence, including prevention and coping mechanisms.<sup>352</sup>

The dissenting opinion also focused on "insight," but came to a different conclusion:

The Court recognizes Mother's attorney tried hard to rehabilitate her client's statements on direct examination to show Mother acknowledges the domestic assault, has gained insight, and could safely parent this child. . . . However, the County Attorney's direct examination showed Mother has no real or independent understanding of what domestic violence is or its impact on children. . . . [H]er behavior immediately following the incident, and then throughout the Child in Need of Assistance case, show[s] she does not recognize their relationship is abusive.

. . . .

In addition, the department of human services worker testified that the mother can repeat back things that she has learned from the services provided but continues to lack a protective capacity . . . .<sup>353</sup>

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348. *Id.*

349. *Id.* at \*2-3.

350. *Id.* at \*3.

351. *Id.* at \*2.

352. *Id.* at \*3.

353. *Id.* at \*4 (Vogel, J., dissenting in part) (second alteration in original).

3. In re Jayden J.. — In *In re Jayden J.*,<sup>354</sup> the Third Department of the New York Supreme Court Appellate Division reviewed a mother's appeal of a family court order terminating her parental rights. The appellate court affirmed the family court's decision.<sup>355</sup> While the decision does not utilize the word "insight" verbatim, its conclusion is based on the notion that underlies "insight":

[T]here is no dispute that respondent maintained contact with the child and that she participated in various services and programs offered or recommended by petitioner. However, despite initial progress from the services provided, the record reflects that respondent gleaned little meaningful benefit from those services. Significantly, respondent continually involved herself in abusive and volatile relationships, despite completing two separate educational programs regarding domestic violence.<sup>356</sup>

4. In re D.M.. — In *In re D.M.*,<sup>357</sup> the Supreme Court of North Carolina reviewed and affirmed the district court's decision to terminate the parental rights of both parents. The focus of the neglect petition, initially filed in August 2015, was the "parents' problems with domestic violence and substance abuse."<sup>358</sup> At the time, the mother admitted that she had recently stopped smoking marijuana.<sup>359</sup> In August 2015, she left the home with her children and entered a domestic violence shelter.<sup>360</sup> In October 2015, she was ordered to complete a domestic violence program, follow all recommendations of the program, and "refrain from engaging in physical altercations with respondent-father."<sup>361</sup> In September 2016, the parents began arguing and were subsequently arrested.<sup>362</sup> The children were removed from their care.<sup>363</sup> At a hearing in 2018, the court found that in the interim, the mother had completed a parenting class, accepted a referral for domestic violence counseling, and awaited the assignment of a counselor.<sup>364</sup> After several negative drug tests, she was discharged from her drug treatment program and secured full-time employment.<sup>365</sup> However, the court found that the children could not be returned to her care because she was "still engaged in mental health treatment and attempting to secure stable housing and employment."<sup>366</sup> The same year, the

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354. 955 N.Y.S.2d 232 (App. Div. 2012).

355. *Id.* at 234.

356. *Id.* at 233–34.

357. 851 S.E.2d 3 (N.C. 2020).

358. *Id.* at 6.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 7.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 7–8.

Department of Social Services of North Carolina filed a motion seeking to terminate both parents' parental rights.<sup>367</sup> A termination trial was held in family court and ended with the termination of parental rights for both parents.<sup>368</sup>

In her appeal, the mother challenged the trial court's assessment of her "involvement with domestic violence."<sup>369</sup> She argued that she complied with domestic violence counseling.<sup>370</sup> She completed a domestic violence assessment in September 2017 and engaged in counseling for approximately seven months.<sup>371</sup> In her intake form she indicated that she wanted to address "domestic violence[] [and] coping skills" during counseling.<sup>372</sup> The Supreme Court affirmed the trial court's assessment of the mother's lack of "insight" into domestic violence:

[Respondent-mother] has an extensive history of being in domestic violence relationships with her partners . . . . The Court finds that there may be no reported domestic violence incidents between these parties since 2016, this does not mean to this Court that [respondent-mother] or [respondent-father] have expressed meaningful insight about how domestic violence impacts them or could cause harm to their children.<sup>373</sup>

In affirming the termination of the mother's parental rights, the court pointed out that a "parent's failure to adequately address the issue of domestic violence can be sufficient to support a determination that there is a likelihood of future neglect."<sup>374</sup>

5. *Preliminary Conclusions.* — While there are many things worth pointing out about the existing and missing narratives of these decisions, this section highlights only three aspects. One, some decisions rely on language that suggests that the survivor participated in domestic violence. This choice of language at best blurs the lines and at worst conceals a person's experience of survival. Notably, in *In re D.M.*, the court described the mother's behavior as "engaging in domestic violence"<sup>375</sup> and "participat[ing] in interpersonal relationships involving domestic violence."<sup>376</sup> This description does not acknowledge that the mother is the survivor of violence, not the aggressor. The decision in *Georgetanne G.* speaks of "domestic violence with the father" and "engaging" in domestic violence.<sup>377</sup> Similarly, in *In re Jayden J.* the appellate decision purports that

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367. *Id.* at 8.

368. *Id.*

369. *Id.* at 15.

370. *Id.*

371. *Id.*

372. *Id.* at 16.

373. *Id.* at 12 (second and third alterations in original).

374. *Id.* at 17.

375. *Id.* at 10.

376. *Id.* at 17.

377. *Georgetanne G. v. Superior Court*, 267 Cal. Rptr. 3d 834, 836, 839 (Ct. App. 2020).

the mother “continually involved herself in abusive . . . relationships.”<sup>378</sup> This choice of language exemplifies the contradictory roles that the criminal legal and family regulation system assigns to survivors. While they are labeled “victims” in the criminal legal system, they are treated as perpetrators by the family regulation system.<sup>379</sup>

Two, some parts of the decisions include pathologizing narratives and assumptions. All the above decisions rely on the idea that a domestic violence program is necessary—although not sufficient—for survivors, without providing any details of the format or curriculum of these programs.<sup>380</sup> When the women do not complete the program or when they experience continued violence despite completing the program, the quality or suitability of the program is not called into question, even when the court finds that the program is not producing the desired outcome. Instead, the overarching conclusion is that the issue must be with the individual, not with the family regulation system’s failed plan. The pathologizing narrative is perhaps most striking in *Georgeanne G.* In that case, the court found Georgeanne neglectful after she had been assaulted by her ex-partner in the presence of their child. Long after she had separated from him, the court brought up her “history” with him and connected it to her current peaceful relationship: “[S]he has chosen another individual who has those tendencies.”<sup>381</sup> Relationship “history” is also invoked in *In re Jayden J.*, where the court concluded that the mother, a survivor of domestic violence, “continually involved herself in abusive and volatile relationships.”<sup>382</sup> This pathologizing narrative is further bolstered by things left unsaid. While some decisions characterize the survivor as codependent<sup>383</sup> and mention the survivor’s financial struggles and economic disadvantage,<sup>384</sup> these decisions fail to consider the social structures that may impact a survivor’s decision to remain in a relationship.

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378. 955 N.Y.S.2d 232, 234 (App. Div. 2012).

379. In some instances, survivors may also be charged criminally. See Cross, *supra* note 22, at 270–76.

380. See, e.g., *Georgeanne G.*, 267 Cal. Rptr. 3d at 838–39; *Jayden J.*, 955 N.Y.S.2d at 234 (upholding a termination of parental rights because the survivor “failed to make permanent, meaningful changes” despite her participation in the domestic violence program).

381. *Georgeanne G.*, 267 Cal. Rptr. 3d at 839.

382. *In re Jayden J.*, 955 N.Y.S.2d at 234.

383. *Georgeanne G.*, 267 Cal. Rptr. 3d at 839 (the foster care agency in a report to the court wrote that Georgeanne G. is “not independent, she’s co-dependent on him”).

384. See, e.g., *id.* at 845 (highlighting that Georgeanne G. acknowledged that she was “financially dependent” on her partner); *In re D.M.*, 851 S.E.2d 3, 10 (N.C. 2020) (pointing to the trial court’s determination that the mother lacks “stable housing and gainful employment”). For a discussion of the prosecution of poverty in the family regulation system generally, see David Pimentel, Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished, 71 Okla. L. Rev. 885, 897–911 (2019); Elizabeth Brico, Poverty Isn’t Neglect, but the State Took My Children Anyway, TalkPoverty (Nov. 16, 2018), <https://talkpoverty.org/2018/11/16/poverty-neglect-state-took-children/> [https://perma.cc/SZ7V-JNLV].

Three, none of the above decisions grapple with the tension of asking the survivor to permanently leave a controlling intimate relationship, while coercing her through a compliance-driven system. Despite the scientific literature suggesting that coercive or perceived coercive counseling is counterproductive to treatment,<sup>385</sup> courts do not interrogate the cycle of coercion and its impact on a survivor's progress or reliance on state actors.<sup>386</sup>

C. *Understanding "Insight" Through the Lens of Epistemic Injustice*

Epistemic injustice helps frame how "insight" reifies damaged knowledge production in the family regulation system. For one, the family regulation system stigmatizes survivors for experiencing domestic violence in their relationships, whether currently or in the past—so much so that their perspectives and individual needs are discredited. Even when a survivor has completed counseling services and is cooperative, the system credits her knowledge only when she can show "insight."<sup>387</sup> When the family regulation system tests a survivor's expression of knowledge, her ability to share her own complex experience is significantly reduced. The concept of "insight" dictates a specific victimhood narrative and reifies problematic notions of helplessness.

As Part II discusses, agential testimonial injustice suggests that knowledge produced in a coercive environment can be associated with credit excess. Agential testimonial injustice occurs when a survivor's knowledge is credited most when they lack epistemic agency.<sup>388</sup> Survivors in the family regulation system find themselves in a coercive environment over a prolonged period of time. The prolonged nature of family regulation cases is particularly striking when compared to parallel criminal proceedings. The criminal case against a survivor's partner may be long dismissed, while the family regulation system case—based on the same allegations—goes on for months or years.<sup>389</sup> Throughout all of that time, parents are under court-ordered supervision.<sup>390</sup> Their ability to parent is judged by their continued cooperation with CPS and their expression of

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385. Hatchel et al., *supra* note 162, at 5 ("Evidence suggests that perceived coercion in treatment is linked to an impaired therapeutic process and outcome compared to voluntary treatment.").

386. See *id.* (discussing the relationship between perceived coercion and therapeutic progress); Lipsey, *supra* note 163, at 128, 143–44 (discussing the benefits of interventions that embody "therapeutic" philosophies over those based on strategies of control and coercion); Ware et al., *supra* note 163, at 555–59 (noting that patients can experience strict enforcement of limits on practitioner–client interactions as "alienating and diminishing").

387. See *supra* section III.B.

388. See *supra* section II.A.1.

389. Kramer, *supra* note 143, at 1 ("Child welfare cases, on the other hand, often last long after criminal charges disappear—and intervention doesn't depend on a conviction.").

390. See *supra* section I.B.2.

knowledge.<sup>391</sup> The “insight” concept assumes that survivors will be able to share authentic expressions of knowledge within this lengthy, coercive process. It assumes that although counseling services are mandated, they will be a meaningful tool for survivors. It further suggests that a survivor’s ability to testify in court under enormous pressure to keep their children or get them back is reflective of their authentic knowledge. There is little to no interrogation of these tensions or the replication of a control pattern within the family regulation system.

Further, the “lack of insight” narrative has hermeneutical injustice implications.<sup>392</sup> Survivors are excluded from shaping the narrative around what safety and well-being could look like for themselves and their families. Instead, they are expected to reproduce existing knowledge and confirm stereotypical assumptions. In this way, they are kept from adding their perspective to the collective pool of knowledge. Indeed, the narratives underlying “insight” continue to reflect much of the stereotypical narratives about a survivor’s decisionmaking ability. For example, CPS and courts equate a survivor’s unwillingness to cooperate with the family regulation or criminal legal systems with a “lack of insight” into their circumstances and the impact of domestic violence on their children.<sup>393</sup> What is characterized as a “lack of insight” may be a survivor’s belief that the carceral state will not keep her or her family safe.<sup>394</sup> For some survivors, safety may mean housing or financial stability. The reluctance to share and trust state actors with intimate family matters can be a manifestation of “collective memory and current-day collective experience” of mistreatment by the carceral state.<sup>395</sup> A myriad of considerations could influence a survivor’s reluctance to call the police or request an order of protection. Especially for marginalized families, relying on the state for protection can come at a large cost.<sup>396</sup> Undocumented survivors, for example, have good reason to mistrust and not cooperate with the carceral state.<sup>397</sup>

Perhaps a survivor’s rational preference is to rely on family support or relocate out of the jurisdiction, instead of relying on the carceral state for

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391. See *supra* Part III.

392. See *supra* section II.A.2.

393. See, e.g., *supra* section III.B.1.

394. Bailey, *supra* note 75, at 1280 (discussing why some survivors do not believe that the criminal legal system keeps them safe).

395. Bell, *Situational Trust*, *supra* note 275, at 329; see also *id.* at 334 (mentioning police mistreatment and pointing out that disadvantaged mothers perceive child services as “precarious and punitive”).

396. *Id.* (“Calling the police on neighbors about minor disagreements escalates conflict and, in the aggregate, may erode neighborhood trust. Calling the police on family members deepens the reach of penal control into communities and homes.”).

397. See Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 *Law & Soc’y Rev.* 337, 354–57 (2011) (discussing fears among undocumented immigrants of workplace raids, family separations, and deportations).



intervention. Ms. Williams, as discussed above, while reluctant to engage with CPS and engage in domestic violence counseling, wanted nothing but to physically and legally separate from her partner. And still, her reluctance to engage and comply with the family regulation system was construed as a “lack of insight” into domestic violence. Ms. Williams was clear about the help she needed. She asked for help with permanent housing after leaving her husband; she asked for financial help after being cut off from her only source of money, and instead received only a referral for counseling and a parenting class.

A survivor’s resistance of the family regulation system is construed as a “lack of insight.” The disregard of survivor knowledge relies on the narrative that survivors are “weak” mothers,<sup>398</sup> who suffer from “learned helplessness.”<sup>399</sup> It is also entrenched in the paternalistic idea that women lack agency.<sup>400</sup> However, a lack of “insight” may not at all be a lack of care for their children or their own well-being. This Essay suggests instead that it may be a rejection—whether intentional or not—of a system that disregards their knowledge and perpetuates a cycle of power and control—a system that labels the same person “victim” in criminal court and then labels them unknowledgeable and not credible in family court.

#### CONCLUSION

The family regulation system punishes survivors for what they believe, share, and do not share about their intimate relationships. The subjective, vague “insight” narrative is instrumentalized to question internal knowledge and its expression.<sup>401</sup> Epistemic harms are a pervasive but undertheorized part of the family regulation system. Multifaceted coercion tools operate to discredit, silence, and exclude any speech that does not align with CPS.<sup>402</sup> Survivors who challenge CPS’s narrative are explicitly or implicitly accused of choosing their partner over their child, not being knowledgeable about their own circumstances, or simply being weak and dependent.<sup>403</sup> These assumptions allow for the conclusion that they are unsuitable parents.<sup>404</sup>

This narrative perpetuates the already pervasive focus on individual blame, rather than addressing abusive power structures in the carceral

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398. See Schneider, *supra* note 15, at 154 (“Hard as it is for society to imagine that a woman who is battered is ‘reasonable,’ it is even more difficult to imagine that a [woman] who is battered could be a good mother.”).

399. Walker, *Learned Helplessness*, *supra* note 14, at 526.

400. See Siegel, *supra* note 52, at 2122 (“A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system.”).

401. *Supra* section III.C.

402. *Supra* section III.B.2.

403. *Supra* section III.B.

404. *Supra* Part III.

state. Survivors are expected to engage with the carceral state when they experience domestic violence. Instead of intervening in power structures and offering real support, survivors are entrapped in yet another cycle of control. The family regulation system's lack of regard for survivor knowledge has racial and class implications.<sup>405</sup> The vast majority of women entangled in the family regulation system are poor and of color. The marginalization of their knowledge is bound up in their identity as poor and of color. The framework of epistemic injustice<sup>406</sup> explains how the discrediting and exclusion of knowledge perpetuates the subjugation of the most marginalized.

Harm in families occurs. Parents and their children are affected by domestic violence. How do we address harm in ways that do not further subjugate marginalized knowledge? An epistemic-injustice-informed approach would arguably not only search for solutions outside of the carceral state but center directly impacted families, instead of dictating solutions. Quality legal representation is typically described as the central solution to unequal power dynamics.<sup>407</sup> However, defense attorneys contribute a counternarrative that is constrained by the outer limits of the state's narrative.<sup>408</sup> A true intervention in the subjugation of marginalized knowers requires a movement that centers directly impacted parents. Indeed, there is a growing social movement led by and centering directly impacted survivors of state violence and domestic violence.<sup>409</sup> The Movement for Family Power uses "movement lawyering principles to center directly impacted people and grassroots activism"<sup>410</sup> in their campaigns to end the punishment and policing of the family regulation system. If family safety truly matters to us, we must interrogate how those disproportionately impacted by the carceral state define safety and support. Including community perspectives as part of participatory research is one possible intervention in

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405. *Supra* section I.B.

406. *Supra* section II.A.

407. This is not to say that a quality defense is not vital. In fact, a study of holistic legal representation in family regulation cases shows that parents who are represented by an interdisciplinary legal team are able to reunify with their children much more quickly than those who are not. See Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 *Child. & Youth Servs. Rev.* 42, 51 (2019) (finding that children spent 118 fewer days in foster care when their parents were represented by an interdisciplinary legal office attorney).

408. For a closer look at client-attorney dynamics and attorney constraints, see Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 *Mercer L. Rev.* 715, 725 (2018) ("Effective assistance of counsel sets a very low bar, as do malpractice doctrines in most states.").

409. See *supra* notes 34-35 and accompanying text.

410. For the value and vision statements of Movement for Family Power, see *Our Areas of Work*, Movement for Fam. Power, <https://www.movementforfamilypower.org/indexa> [<https://perma.cc/K6XQ-WWP6>] (last visited Oct. 17, 2021).

the subjugation of marginalized knowledge.<sup>411</sup> The demand for a centering of survivor knowledge is not new. In fact, feminist voices within the anti-violence movement have criticized the carceral response to domestic violence for decades.<sup>412</sup> Yet, their language has been utilized to further bolster the criminal legal response to domestic violence.

A deeper interrogation of epistemic injustice in the family regulation system should focus on at least three questions: One, what does knowledge building beyond counternarratives look like? Two, how can a shift away from individual narratives to a collective centering of knowledge through social movements intervene in epistemic injustice? Three, what does responsible sharing of knowledge look like for those who are not directly impacted by the family regulation system? The answers to these questions are just a starting point to dismantle epistemic injustice in the carceral state.

This Essay concludes with a quote from Joyce McMillan, a Black woman and activist, who directly experienced the impact of the family regulation system: “A system that tries to silence the voice of a person seeking the change is not only dishonest but foul and repulsive—seeking to only change their image not their practices.”<sup>413</sup>

On Martin Luther King, Jr. weekend of 2021, McMillan organized a rally against CPS in New York City to reframe mainstream child safety narratives and center directly impacted families.<sup>414</sup> In the aftermath of the rally, CPS in New York City, in an attempt to silence her and other parents, threatened to terminate their \$50,000 contract with McMillan’s employer<sup>415</sup> unless they fired her.<sup>416</sup>

Coerced knowledge produced by the family regulation system, a system ostensibly there to protect children and rehabilitate parents, leaves

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411. For one of the first codesigned, community-based, participatory studies about safety, see Lauren Johnson, Cinnamon Pelly, Ebony 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.* (forthcoming) (manuscript at 34, 37), <https://ssrn.com/abstract=3877542> [<https://perma.cc/P6EX-4C5T>] (reporting that study participants defined safety as a combination of freedom from harm and the comfort of close social relationships and saw poverty and racism as major barriers to both aspects of safety).

412. Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 *J. Ethnic & Cultural Diversity Soc. Work* 219, 223–28 (2018) (showing how women of color advanced a critique of criminalization from the 1970s).

413. Law for Black Lives, Facebook (Feb. 11, 2021), <https://www.facebook.com/Law4BlackLives/photos/2934556220106627> (on file with the *Columbia Law Review*).

414. Eileen Grench, *NYC Child Welfare Officials Helped Get Her Fired Over Social Media Posts. Activism Got Her Back on the Job*, City, <https://www.thecity.nyc/work/2021/2/11/22277355/nyc-child-welfare-acs-fired-over-social-media-posts> [<https://perma.cc/S3GG-6HW2>] (last updated Feb. 11, 2021); Rise, *supra* note 38.

415. McMillan works as a coordinator in the “We Are Parents Too” Program of Sinergia, a nonprofit that helps parents with developmental disabilities. Grench, *supra* note 414.

416. *Id.*

us collectively with a skewed vision of what real support for survivors and their families in marginalized communities looks like. As directly impacted communities work to reimagine real support for marginalized families, scholars and other advocates must better understand the depth and breadth of the carceral state, including the role of the family regulation system within it.

