

THE EMPTY PROMISE OF THE FOURTH AMENDMENT IN THE FAMILY REGULATION SYSTEM

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ABSTRACT

Each year, state agents search the homes of hundreds of thousands of families across the United States under the auspices of the family regulation system. Through these searches—required elements of investigations into allegations of child maltreatment in virtually every jurisdiction—state agents invade the home, the most protected space in Fourth Amendment jurisprudence. Accordingly, federal courts agree that the Fourth Amendment’s warrant requirement applies to family regulation home searches. But almost universally, the abstract recognition of Fourth Amendment protections runs up against a concrete expectation on the ground that state actors should have easy and expansive access to families’ homes. Legislatures mandate searches and loosen warrant requirements; executive agencies coerce consent from families and seek court orders that violate the Fourth Amendment; and the judiciary rubberstamps these efforts and fails to hold the executive and the legislative branches to their constitutional obligations. Families under investigation—who are almost all poor and are disproportionately Black, Latinx, and Native—are left with nowhere to retreat.

This Article argues that the casual home invasions of the family regulation system are not just another story of lawless state action carried out by rogue actors or of an adversarial system failing to function. Instead, this is a story of a problem-solving system functioning exactly as it was designed. The problem-solving model emphasizes informality, information-

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gathering, and cooperation—values that sit uncomfortably with the individual rights-based principles underlying the Fourth Amendment. By uniting each branch of government in a project of surveillance, the problem-solving model reduces the potency of the separation of powers as a check on government overreach, while at the same time undercutting checks and balances outside the separation of powers. Protecting individual rights and preventing government overreach in the family regulation system will require more than rejecting the problem-solving model in favor of an adversarial model, as the criminal legal system shows. Guided by the heuristic of non-reformist reforms, the Article suggests a continuum of measures—some immediate, some over the course of generations—that will unravel the family regulation system’s wide net of surveillance and safeguard the welfare of children in a holistic sense. Ultimately, we must fundamentally rethink “child welfare services” and move from a model that holds individuals responsible for large-scale societal problems to one that addresses those problems on a societal level.

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INTRODUCTION

A father stands before a Kentucky family court judge.¹ The father, under investigation by Kentucky's family regulation agency, objects to caseworkers—state agents—entering his home without a search warrant and without his consent. The father argues that such a home search violates his Fourth Amendment rights. When he mentions the Fourth Amendment, the judge interrupts, admonishing, “When you are winning you need to keep your mouth shut. You’re winning because I haven’t taken the children from your home.”² This is not the judge’s first such comment. Earlier, he had warned, “If you don’t cooperate, I can take the children out of the house—easy.”³ Now the judge continues, telling the father that the Fourth Amendment does not apply in this context and that he does not have a Fourth Amendment right not to cooperate with state caseworkers who demand entry into his home.⁴

The judge’s statement of the law is wrong: the Sixth Circuit held seven years before this court appearance that “a social worker, like other state officers, is governed by the Fourth Amendment’s warrant requirement.”⁵ With that, the Sixth Circuit joined a growing consensus among federal circuit courts in acknowledging that the warrant requirement applies to family regulation home searches and that it permits family regulation caseworkers to conduct searches only with a warrant, consent, or under a recognized warrant exception.⁶ But in Kentucky, as in jurisdictions

1. This account is drawn from *Clark v. Stone*, 998 F.3d 287 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 773 (2022). It incorporates facts from the Sixth Circuit’s decision and the parties’ filings in the Sixth Circuit and the district court, *Clark v. Stone*, 475 F. Supp. 3d 656 (W.D. Ky. 2020).

2. Defendant Bernadette Stone’s Supporting Memorandum of Law for Judgment on the Pleadings, or in the Alternative, for Summary Judgment at 10, *Clark v. Stone*, 475 F. Supp. 3d 656 (W.D. Ky. 2020) (No. 19-cv-166).

3. *Id.*

4. *Clark*, 998 F.3d at 292, 301.

5. *Andrews v. Hickman County*, 700 F.3d 845, 859 (6th Cir. 2012).

6. Eight circuits have held that caseworkers’ home searches are presumptively unreasonable unless caseworkers obtain a court order or consent or the search is justified by exigent circumstances or probable cause that a child’s health is endangered seriously. *See J.C. v. District of Columbia*, 199 A.3d 192, 200 (D.C. 2018) (probable cause); *Andrews v. Hickman County*, 700 F.3d 845, 859 (6th Cir. 2012) (exigent circumstances); *Gates v. Tex. Dep’t of Protective & Regul. Servs.*, 537 F.3d 404, 419–20 (5th Cir. 2008) (citations omitted) (consent and exigent circumstances); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240 (10th Cir. 2003) (exigent circumstances); *Doe v. Heck*, 327 F.3d 492, 509, 513 (7th Cir. 2003), *as amended on denial of reh’g* (May 15, 2003) (court order, probable cause, and exigent circumstances); *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999) (exigent circumstances); *Good v. Dauphin Cnty Soc. Servs.*, 891 F.2d 1087, 1092 (3d Cir. 1989) (exigent circumstances); *see also Siliven v. Ind. Dep’t of Child Servs.*, 635 F.3d 921, 926–27 (7th Cir. 2011) (probable cause). While other circuits have reserved the question, *see, e.g., Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999); *Doe v. Moffat*, 116 F.3d 464, 464 n.1 (1st Cir. 1997) (unpublished), only one circuit has held that

throughout the United States, well-settled principles of constitutional norms play virtually no role at the lowest court levels.⁷ Here, those courts are the specialized state courts that preside over cases where the government alleges parents have neglected or abused their children. (States call these courts by different names; I refer to them here as “dependency courts.”)⁸

Each year, hundreds of thousands of parents across the country are subjected to home searches by state agents operating under the auspices of the family regulation system.⁹ These searches may take place in the absence of court orders or, as in the Kentucky case, under the authority of court orders (“entry orders”) that fail to meet the requirements of a valid search warrant.¹⁰ Most searches stem from allegations of neglect, rather than abuse, and the vast majority of investigations are closed without substantiating any allegations of child maltreatment.¹¹ Unsurprisingly, the government’s sprawling surveillance and search practices focus almost exclusively on

these searches are subjected to a lowered standard, *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993), and even that decision has been applied unevenly. *See infra* Section II.B.

7. *See, e.g.*, Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 965 (2021) (discussing the ways in which “[m]unicipal courts deviate substantially from the classic model of courts”); Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 247 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (“Legal rules are selectively used and enforced, legal processes are subverted and transformed, and legal actors diverge from their officially sanctioned roles. This we know.”).

8. *Compare, e.g.*, PA. R. JUV. CT. PRO. 1100 (“dependency proceedings”), with TULSA CNTY. JUV. DIV. POL’YS AND PROCS. PT. TWO II.D.2.B. (“Juvenile deprived proceeding”), and N.Y. FAM. CT. ACT art. 10 (McKinney 2021) (“Child Protective Proceedings”). Though dependency proceedings may be initiated against parents or other caregivers, *see e.g.*, N.Y. FAM. CT. ACT § 1012(g) (McKinney 2021), I use “parents” throughout for the sake of simplicity.

9. *See infra* Section I.A. As scholars have pointed out in the criminal law context, the idea of a unified “system” is misleading. *See, e.g.*, Bernard Harcourt, *The Influence of Systems Analysis on Criminal Law and Procedure: A Critique of a Style of Judicial Decision-Making* (Columbia L. Sch. Pub. L. Rsch. Paper, Paper No. 14-562, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062900 [<https://perma.cc/EA7R-GN6B>]; Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1826 (2020). The same is true here. Each state has developed its own mix of statutes, regulations, and agencies to regulate families. *See* Childs.’ Bureau, U.S. Dep’t of Health & Hum. Servs., *State Laws on Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/can/> [<https://perma.cc/W8N6-S9A2>] (last visited Feb. 9, 2023) (explaining that “[a]ll States have enacted laws and policies that define State roles and responsibilities in protecting vulnerable children from abuse and neglect” and collecting states’ laws and policies). Because this Article considers commonalities across these various systems—and for ease of reference—I use “family regulation system” to refer to this collection of systems.

10. *See infra* Sections I.A, III.A.1. *see also* *Clark v. Stone*, 998 F.3d 287, 301 (6th Cir. 2021) (“[T]he court order fell well below the requirements of a valid warrant. The order contains no facts that detail probable cause, nor does it describe with any particularity the area of the home to be searched.”).

11. *See* CHILDS.’ BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 29–30 (2021) [hereinafter CHILDS.’ BUREAU], <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment> [<https://perma.cc/6ZXN-GFP7>]; *see also infra* notes 47–49 and accompanying text.

poor families and, to an astonishingly disproportionate degree, on Black, Latinx, and Native families.¹²

This story of search practices in the family regulation system may sound familiar to those steeped in the enforcement of criminal law. There, too, the state disproportionately targets and punishes poor Black, Latinx, and Native people.¹³ There, too, the law in practice bears little resemblance to law on the books.¹⁴ And there, too, low-level governmental actors, be they police, prosecutors, or judges, are granted wide latitude with little oversight, leaving them free to create their own norms and rules.¹⁵ Many have argued that the Fourth Amendment does little to protect individual rights in this world where police may avail themselves of any number of warrant exceptions, judges decide warrant applications in minutes and grant nearly all of them, and the remedy of suppression is granted vanishingly infrequently.¹⁶ But the casual home invasions of the family regulation system should not be taken as just another example of lawless state action carried out by rogue actors. Instead, these Fourth Amendment violations are the natural outgrowth of the problem-solving model endemic to the family regulation system.

12. See *infra* Section I.B; ROB GEEN, LYNN FENDER, JACOB LEOS-URBEL & TERESA MARKOWITZ, ASSESSING THE NEW FEDERALISM PROGRAM, URBAN INSTITUTE, WELFARE REFORM'S EFFECTS ON CHILD WELFARE CASELOADS 8 (2001), <https://www.urban.org/sites/default/files/publication/61111/310095-Welfare-Reform-s-Effect-on-Child-Welfare-Caseloads.PDF> [<https://perma.cc/WP7U-N3LT>] (finding that more than half of children in foster care come from homes eligible for welfare and that as many as 90% of families receiving in-home services through family regulation agencies are eligible for welfare); Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017) (finding that 53% of Black children will be subjected to a family regulation investigation by age 18, as compared with 37% of children across all races). In this sense, the Kentucky father was an outlier, as a white, politically connected man with the means to pursue a civil rights suit. See Jacob Clark for Grayson/Hardin County KY District 18 House Representative, FACEBOOK, <https://www.facebook.com/Clark4KY> [<https://perma.cc/H2EP-CRCV>] last visited Feb. 9, 2023); Gov. Beshear Responds to Threats on Government Buildings and the Petition for His Impeachment, WKYT (January 12, 2021, 8:52 PM), <https://www.wkyt.com/2021/01/13/gov-beshear-responds-to-threats-on-government-buildings-and-the-petition-for-his-impeachment> [<https://perma.cc/MW4G-GSJ3>] (recounting Kentucky Governor Andy Beshear's response to comments by Mr. Clark).

13. Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities Throughout the Criminal Legal System*, URB. INST. (Aug. 2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf> [<https://perma.cc/54RZ-K6VW>]; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/U7EQ-SJBE>].

14. Kohler-Hausmann, *supra* note 7, at 247.

15. See *id.* at 266–67.

16. See, e.g., Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 742 (2019) (summarizing critiques of Fourth Amendment jurisprudence); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2183 (2002); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

The “problem-solving” label has been tagged to any number of courts and adjudicative models.¹⁷ I use it here to refer to a system-wide orientation that purports to “rehabilitate” litigants rather than punish them. This model prizes informality, information-gathering, and collaboration while diminishing parents’ substantive individual rights and their ability to assert those rights.¹⁸ It expands judicial power by allowing judges to order investigations and encouraging them to pry into intimate details of families’ lives in the name of “rehabilitating” them.¹⁹ This model reaches beyond the courthouse door. Legislatures task executive agencies with conducting wide-ranging investigations that include home searches for even the most spurious allegations and ease requirements for court orders to facilitate searches.²⁰ Executive agencies, in carrying out these mandates, fall back on the expectations of cooperation and collaboration to extract consent from parents—and cast parents who object as safety risks to their own children.²¹ In and out of court, the emphasis on informality and cooperation over formal adversarial proceedings serves to inflate executive power and to dim parents’ chances for any judicial review, let alone meaningful judicial review.²² All of this points to an uncomfortable truth: the problem-solving orientation of the family regulation system is fundamentally at odds with the Fourth Amendment.

The conflict between the Fourth Amendment and the problem-solving model comes into clearer focus if we imagine how a similar approach might play out in a criminal case. Say an anonymous person calls 911 to report that they saw Person X on the street holding a small baggie of a controlled substance. If police operated under a model analogous to that of the family regulation system, this report would trigger two statutory requirements for police: first, to investigate Person X,²³ and second, to search Person X’s home—not just for a controlled substance but for anything anywhere in the home that might show Person X violated any laws.²⁴ If Person X refused police entry, then under state law, police could obtain a court order permitting them to enter and search the entire home for “cause shown.”²⁵ If Person X moved to suppress any evidence gathered during this search on statutory or Fourth Amendment grounds, they would find that remedy, and

17. See *infra* Section I.C.

18. See *infra* Section I.C.

19. See *infra* Sections I.C., III.A.3.

20. See *infra* Section III.A.1.

21. See *infra* Sections I.B., I.C., III.A.2.

22. See *infra* Sections I.C., III.A.3.

23. See, e.g., TENN. CODE ANN. § 37-1-406(a) (2022).

24. See, e.g., TENN. CODE ANN. § 37-1-406(e) (2022); TENN. DEP’T CHILDS.’ SERVS., WORK AID 3: CHILD PROTECTIVE SERVICES. INVESTIGATIVE TASKS AND ACTIVITIES, at 7.

25. See, e.g., TENN. CODE ANN. § 37-1-406(e) (2022).

any other, unavailable.²⁶ And they might discover that even asserting such a claim could result in harsh penalties.²⁷ Anyone vaguely familiar with the Fourth Amendment, drafted as a protection against general warrants,²⁸ might spot some issues with this scheme in the criminal legal system. Yet it is precisely what is in place in the family regulation system.

The Fourth Amendment limits the government's ability to invade on individuals' privacy and sense of security. For the government to invade these spheres lawfully, it must meet certain requirements and must do so in a limited manner. Key to effectuating Fourth Amendment protections is the separation of powers. Each branch plays a role in authorizing and checking government searches. The problem-solving family regulation model, however, starts from the premise that the government must have easy and unlimited access to the homes of poor Black, Latinx, and Native families in order to gather information on them.²⁹ Each branch is united in this project of surveillance, and, rather than serving as a check, each branch aids the others in facilitating home searches. Concurrently, the model's claimed focus on rehabilitation over punishment and its purposeful informality impede the efficacy of checks on government overreach outside the separation of powers. These emphases diminish parents' substantive individual rights and their ability to assert those rights, muddy the internal separation of functions, and limit public awareness and oversight of the family regulation system. Perhaps unsurprisingly, the family regulation system's greatest successes lie in promoting surveillance, rather than child safety: though neglect allegations are the grist of (and justification for) this massive system, there has not been a meaningful reduction in the incidence

26. See *infra* notes 237–240 and accompanying text (collecting state cases declining to apply exclusionary rule to dependency proceedings).

27. See *infra* notes 109–112 and accompanying text (describing negative consequences for parents asserting their rights in court). Parents' assertion of their rights out of court, too, can prove harmful to their family and to their personal liberty. See Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One.*, PRO PUBLICA (Oct. 13, 2022, 8:00 AM), <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants> [<https://perma.cc/P3RS-FK72>] (describing experience of mother who allowed caseworkers and police into her home because they were “threatening her with arrest” and noting that “[t]he agency didn’t justify its actions until afterward, claiming that her refusal to cooperate suggested that [her children] may have been in imminent danger”); CHILDS.’ BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING: CPS SAMPLE COMPONENT WAVE 1 DATA ANALYSIS REPORT at 4-15 (2005) (finding that “caregiver cooperation” is the “most critical” factor influencing caseworkers’ decisions); see also TENN. DEP’T CHILDS.’ SERVS., *supra* note 24, at 16 (requiring caseworker to note family’s “level of cooperation”).

28. See *infra* Section II.A.

29. See, e.g., S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. (forthcoming 2023) (describing elements of the family regulation system that contribute to the pathologizing of impoverished and racialized groups); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1486 (2012); see also *infra* Section I.B.

of neglect over the last two decades, even as rates of child abuse have dropped.³⁰

This Article argues it is the very design of the family regulation system that explains the sharp divergence between abstract Fourth Amendment protections against government home searches and the government's actual ability to invade marginalized families' homes. The Article proceeds in four parts.

Part I describes the centrality of home searches to family regulation investigations and situates these investigations within the family regulation system's historic and present function as a means to monitor marginalized families. It concludes by describing the family regulation system's problem-solving model. Part II brings the Fourth Amendment into this account, discussing the relationship between the Fourth Amendment and the separation of powers in the criminal setting. It then summarizes established Fourth Amendment limits on family regulation home searches—limits that may be surprising, given the absence of meaningful privacy protections for poor families, generally speaking.³¹

Part III asks how it is that the abstract protections of the Fourth Amendment have been so soundly abandoned on the ground. After reviewing the role that each branch of government plays in carrying out family regulation home searches, it reaches the Article's central argument: through its very problem-solving orientation, the family regulation system conflicts with the Fourth Amendment. By undercutting the checks and balances offered by the separation of powers and by other mechanisms such as individual rights protections, internal separation of functions, and public accountability, the problem-solving model leaves families with no refuge from government overreach—even when that overreach takes the government into families' most sacred spaces.

30. David Finkelhor, *Trends in Adverse Childhood Experience (ACEs) in the United States*, 108 CHILD ABUSE & NEGLECT 5 (2020), <https://www.sciencedirect.com/science/article/pii/S0145213420302969?via%3Dihub#bib0130> [<https://perma.cc/UT3C-CH6L>] (“Neglect substantiations by child protection authorities have fluctuated but remained relatively stable since the late 1990s at around 75 per 10 K.”); STEVE OLSON & CLARE STROUD, INST. OF MED. & NAT’L RSCH. COUNCIL, *Social Trends and Child Maltreatment Trends*, in CHILD MALTREATMENT RESEARCH, POLICY, AND PRACTICE FOR THE NEXT DECADE: WORKSHOP SUMMARY 25, 25 (2012) (“Many sources of data point to a substantial reduction in the incidence of child physical and sexual abuse, but not neglect, over the past two decades.”). At least one expert argues that federal data shows that the rate of substantiated child neglect actually increased by a small amount between 1990 and 2017. Richard Wexler, *Graphic Evidence that Child Welfare Surveillance Doesn’t Work*, IMPRINT (Aug. 30, 2021, 9:53 AM), <https://imprintnews.org/opinion/graphic-evidence-that-child-welfare-surveillance-doesnt-work/58258> [<https://perma.cc/S28L-DU3U>] (reviewing federal data and arguing that the rate of substantiated child neglect increased between 1990 and 2017).

31. See generally KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017).

If the problem-solving model is inevitably at odds with the Fourth Amendment *and* an inefficient, perhaps even ineffective, means of protecting children's safety or parents' autonomy, then Part IV suggests a path forward. Guided by the heuristic of "non-reformist reforms,"³² it sets forth a continuum of proposals that would unravel the family regulation system's wide net of surveillance and safeguard children's well-being. Short-term reforms—like tightening legal definitions of neglect and abandoning blanket requirements for home searches, and ensuring parents receive adequate counsel to foster a more adversarial atmosphere in court—would increase privacy for the thousands of families currently surveilled each year by the family regulation system with no negative impact on child safety. Yet standing alone, these reforms are not sufficient, for parents or for children; the present criminal legal system and family regulation system show as much. Even as we pursue these short-term reforms, we must also fundamentally re-envision how the government protects children, with abolition of today's surveillance-based model as the horizon. By providing families the resources, support, and services they need outside the strictures of any system of policing, the government might proactively avert the very sorts of problems it purports to solve currently through the family regulation system, leading to better outcomes for this generation of children and the generations that follow.

In advancing these arguments, this Article makes three contributions. First, it offers a comprehensive account of entry orders, the dependency court orders that empower the executive to enter families' homes absent their consent. Though these orders are often assumed to be analogous to search warrants, a close study of the legislative schemes authorizing these orders and the caselaw considering them shows that across the country, by statute and in practice, entry orders lack many of the basic protective features of search warrants.³³ Tarek Ismail has described the executive's reliance on family regulation home searches during investigations, while others, including Josh Gupta-Kagan and Doriane Lambelet Coleman, have

32. See *infra* Section IV.A. Non-reformist reforms are those changes that unravel, rather than widen, the net of carceral systems and that advance critiques of those systems in the process. See ANDRÉ GORZ, STRATEGY FOR LABOR 6–8 (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press 1967) (1964) (coining the term "non-reformist reforms"); see also Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98–106 (2020); *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE, https://static1.squarespace.com/static/59ead8f9692ebec25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [https://perma.cc/GR3E-D54H] (last visited Feb. 9, 2023).

33. See *infra* Section III.A.1.

focused on how the Fourth Amendment applies to these searches.³⁴ This Article fills a key gap, showing how the legislature, the judiciary, and the executive have together used entry orders as a mechanism to displace Fourth Amendment protections in the service of free access to families' homes during investigations. In doing so, it builds on the necessary foundation laid by Ismail and other family defense practitioners-*cum*-scholars who have carefully explicated the intricate statutory and regulatory schemes governing family regulation investigations and illuminated this corner of surveillance and policing.

Second, by describing the role of dependency courts in this scheme, this Article adds to the growing body of scholarship examining state courts, particularly low-level courts. State criminal and civil courts shape the lives of far more people in this country than do federal courts.³⁵ Yet as compared to federal courts, state courts remain understudied in legal academia and law schools.³⁶ Low-level courts have begun to garner more attention.³⁷ Still, dependency courts are often set to the side or lumped in with family courts more generally, despite the unique dynamics at play in dependency proceedings, where the government turns its considerable might to prosecuting individuals.³⁸ This Article also comes amid calls to deformalize civil and criminal state proceedings and to move toward problem-solving

34. See Tarek Z. Ismail, Remarks Offered at the Columbia Journal of Race and Law Symposium: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being (June 17, 2021), https://www.youtube.com/watch?v=CWbNti5JpIQ&list=PLqqQx5I6USK6B9RjE_QHkjZDW9sdz6ypb&index=6 [https://perma.cc/L32Y-YHS2]; Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353 (2012) [hereinafter Gupta-Kagan, *Beyond Law Enforcement*]; Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Irony Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (2005).

35. Compare CSP STAT Overview: Caseload Detail, CT. STAT. PROJECT, <https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-overview> [https://perma.cc/8JUT-FZKP] (last visited Feb. 9, 2023) (estimating 60 million new state court filings in 2020), with *Federal Judicial Caseload Statistics 2020*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> [https://perma.cc/ZJT9-WXY2] (last visited Feb. 9, 2023) (estimating 332,000 new federal district court filings in 2020). See also Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 900 (2013) (calling state and local trial court judges "the face of law and justice to citizens in our democracy.").

36. See, e.g., Natapoff, *supra* note 7; Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1035 (2020); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 251.

37. For a sampling of scholarship published in recent years focusing on low-level courts and state courts, and noting the previous dearth of scholarship in this area, see, for example, Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1711 (2022); Natapoff, *supra* note 7, at 1026; Weinstein-Tull, *supra* note 36, at 1035; Carpenter, Steinberg, Shanahan & Mark, *supra* note 36, at 268; ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 4 (2018).

38. See, e.g., Wilf-Townsend, *supra* note 37, at 1726 n.107 (explaining exclusion of all family cases from analysis given the difficulty of differentiating between types of "family" cases); Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106, 2114–20 (2013) (focusing exclusively on family court cases between private individuals).

models.³⁹ In that sense, it offers a cautionary tale to those who might hope to cast the adversarial system aside for a less formal, more cooperative model that grants judges more power.

Third, this Article brings to family regulation law a discussion that has been taking place in administrative law and criminal law for years regarding the purpose and importance of separation of powers principles.⁴⁰ Under the traditional accounting of the separation of powers, we expect each branch to play a carefully delineated role and to embody its own identity and its own ambitions.⁴¹ This separation of powers serves as an important check, limiting the power of each branch while motivating each branch to check and balance the others.⁴² Yet the separation of powers has proven an insufficient check already in the criminal legal system. There, as scholars including Rachel Barkow, Shima Baradaran Baughman, and Daniel Epps have pointed out, the promise of separation of powers falls apart in light of the shared interests of the three branches and the inflation of executive power.⁴³ The same can be said here.

Finally, a note on terminology: I use “family regulation system” to describe the system that surveils, regulates, and separates poor families, and particularly poor Black, Native, and Latinx families, around the country. While this system is often referred to as the “child welfare” or “child protective” system, these names ignore the centuries of trauma that the government has inflicted on marginalized communities in the name of protecting children and perpetuates the narrative that children in these

39. See, e.g., Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 518–21 (2022) (collecting scholarship calling for a more active judging role over the last twenty years); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1612–16 (2018); Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017); Aviel, *supra* note 38, at 2114–15; Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (arguing for more active judging rather than a right to counsel for civil court proceedings).

40. See, e.g., Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1 (2021) (discussing separation of powers as it relates to criminal law); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071 (2017) (discussing constitutional checks in criminal law); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1031 (2006) [hereinafter Barkow, *Separation*] (“[The separation of powers] makes it difficult for the state to act in criminal cases against individuals and members of groups disfavored by the majority.”). Though discussions of the separation of powers often focus on the federal government, forty state governments require three distinct branches of government. Baughman, *supra*, at 1078 n.24.

41. Epps, *supra* note 40, at 12–14.

42. *Id.* at 5.

43. See, e.g., *id.* at 78; Baughman, *supra* note 40, at 1084–85; Barkow, *Separation*, *supra* note 40, at 1033.

communities need of protection from their own families.⁴⁴ In the same vein, I use “home searches” to refer to entries by family regulation agents into families’ homes. Not only have these entries have been deemed searches in the Fourth Amendment sense, but to call them “visits,” “evaluations,” or “assessments” imbues them with a sense of gentle benevolence that, as this article shows, is unmerited.

I. HOME SEARCHES IN THE PROBLEM-SOLVING FAMILY REGULATION SYSTEM

Each year in the United States, more than three million children are subjects of family regulation investigations.⁴⁵ State and county caseworkers attempt to enter the homes of virtually every one of these children.⁴⁶ This Part describes home search practices during family regulation investigations and situates these practices within the family regulation system’s historical and present function of policing poor families and Black, Latinx, and Native families. It concludes by describing the problem-solving model common across the family regulation system.

A. *Surveilling Families and Searching Homes*

State family regulation agencies receive approximately 4.4 million reports of child neglect or abuse annually, concerning approximately 7.9 million children.⁴⁷ Most of these reports reflect concerns of “neglect,” rather than physical or sexual abuse.⁴⁸ Only one in five reports is ultimately

44. See Emma Payton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition* 14 (2020) (B.A. thesis, Oberlin College), <https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1711&context=honors> [<https://perma.cc/FF2M-AEA9>] (coining and explaining the term “family regulation system”); see also Dorothy Roberts, *Abolishing Police Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480#0> [<https://perma.cc/TFR3-GAGN>] (using the same term) [hereinafter Roberts, *Abolishing Family Regulation*].

45. CHILDS.’ BUREAU, *supra* note 11, at 18, 29.

46. See *infra* Section I.A.

47. CHILDS.’ BUREAU, *supra* note 11, at 6–7; Ismail, *supra* note 34.

48. While federal data does not track the nature of the maltreatment initially reported, in cases where concerns of maltreatment were substantiated, concerns of physical or sexual abuse accounted for only 27% of findings. CHILDS.’ BUREAU, *supra* note 11, at 47. This number may be lower than 27%, because that figure double counts children who have been found to be both physically and sexually abused. In 61% of cases where any concerns of maltreatment were substantiated, neglect was the only substantiated concern. *Id.* at 22. There is reason to believe that this same breakdown exists at the reporting stage: “[o]ne study that used small samples of hotline calls suggests that the majority of hotline reports are also of neglect.” Gupta-Kagan, *Beyond Law Enforcement*, *supra* note 34, at 362 n.33. Similar breakdowns appear in jurisdictions disaggregating the type of concerns in initial reports. See, e.g.,

substantiated by an investigation.⁴⁹ But a report sets in motion an investigation that may carry severe legal penalties. The state may seek to separate families or require that parents meet certain conditions (“case plans” or “service plans”) in order to keep their families intact.⁵⁰ Over time, it may seek to permanently sever a parent-child relationship, a consequence so severe that it has been called the civil death penalty.⁵¹ Reports may also lead to criminal investigations and criminal charges.⁵² Even absent formal dependency or criminal charges, reports can place pressure on families to accept services, ongoing surveillance, or family separations on a “voluntary” basis in lieu of formal court proceedings.⁵³

Most reports are made by mandated reporters—individuals legally required to report suspected abuse or neglect.⁵⁴ One in six reports is made by caller whose identity is unknown even to the family regulation agency

N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: NOVEMBER 2021 29 (2021), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/11.pdf> [<https://perma.cc/W3ZM-VBEE>] (reporting that 65% of reports received in fall 2021 pertained to “neglect” while 15% pertained to physical, sexual, or psychological abuse); *CPI Completed Investigations: Alleged & Confirmed Types of Abuse*, TEX. DEP’T FAM. & PROTECTIVE SERVS., https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Investigations/Investigations/Types_of_Abuse.asp [<https://perma.cc/5ZTG-DHNL>] (last visited Feb. 10, 2023) (reporting that 60% of reports received in 2020 pertained to neglectful supervision or physical neglect, while 35% pertained to physical, emotional, or sexual abuse).

49. CHILDS.’ BUREAU, *supra* note 11 at 29–30.

50. CHILDS.’ BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES 2 (2018), <https://www.childwelfare.gov/pubpdfs/caseplanning.pdf> [<https://perma.cc/6MQB-74SC>] (noting that federal law the development of case plans for any child in foster care and that “approximately 26 States and the District of Columbia, Guam, and the Virgin Islands also require a case plan when a child and his or her family are receiving any kind of in-home services to prevent placement or when the child has been placed in the legal custody of the State agency.”); *id.* at 5–48 (collecting statutes referencing “case plans” or “service plans”).

51. See, e.g., *In re L.B.*, 970 N.W.2d 311, 314 (Iowa 2022); *In re J.W.*, 645 S.W.3d 726, 751 (Tex. 2022); *In re C.M.*, 255 A.3d 343, 362 (Pa. 2021); *In re T.M.R.*, 487 P.3d 783, 785 (Nev. 2021); *In re D.A.*, 862 N.E.2d 829, 832 (Ohio 2007); *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004); Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. FOOTNOTE F. 68, 85 (2017).

52. Gupta-Kagan, *Beyond Law Enforcement*, *supra* note 34, at 367; Coleman, *supra* note 34, at 433–35 (highlighting collaboration between family regulation caseworkers and criminal law enforcement).

53. Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841 (2020) (describing practice of family regulation agencies inducing parents to transfer physical custody of their children to kinship caregivers by threatening to place the children in foster care and bring them to dependency court); Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 886 (2007) (citing Leroy H. Pelton, *Has Permanency Planning Been Successful? No*, in *CONTROVERSIAL ISSUES IN CHILD WELFARE* 268, 271 (Eileen Gambrill & Theodore J. Stein eds., 1994)) (highlighting the coercion inherent in caseworkers’ dual role as investigators and helpers). For a longer discussion of the pressures placed on parents to cooperate, see *infra* Sections I.A, I.C, III.A.2.

54. CHILDS.’ BUREAU, *supra* note 11, at 9. Mandatory reporter laws exist in all states; in most states, they require a wide swath of professionals to report suspicions of abuse or neglect and in eighteen states they require all people to make such reports. Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society’s Response*, 36 OHIO N.U. L. REV. 819, 853–54 (2010).

receiving the report.⁵⁵ Where a reporter does provide their name, every state permits the reporter's identity to be kept from the family being reported.⁵⁶ Most states also grant immunity to anyone who makes a report in good faith.⁵⁷ Meanwhile, a failure to report can result in criminal charges and the loss of professional licenses for mandated reporters.⁵⁸ This combination of protections and penalties incentivizes reporters to cast a wide net and report broadly.⁵⁹

State agencies "screen in" slightly more than half of the reports they receive, approximately 2.3 million in all.⁶⁰ Agencies typically do not screen for veracity or reliability, regardless the provenance of the report. Rather, they screen out only those reports that do not contain enough information to proceed or that would not constitute child neglect or abuse if true.⁶¹ Screened-in reports are then referred for investigations.⁶² This sprawling reporting system gives rise to an investigatory apparatus that affects a huge number of American children. Over the course of their childhoods, 37.5% of children in the United States will be the subject of a family regulation investigation.⁶³ Almost all children affected by investigations are poor, and a disproportionate number are Black, Latinx, or Native.⁶⁴

Once an investigation begins, a home search almost inevitably follows. Most states require, by statute, regulation, or policy, that caseworkers evaluate children's homes as part of their initial investigation into allegations of neglect or abuse.⁶⁵ Parents face immense pressure to

55. Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 54 (2014); *id.* at 58 ("Most notably, according to the federal government's official data, sixteen percent of calls are made by anonymous or 'unknown' sources"). Forty states permit anonymous reports, where even the family regulation agency does not know the identity of the reporter. *Id.* at 54.

56. *Id.* at 55.

57. Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 313 (2021).

58. *Id.*

59. For a discussion of the ways in which overreporting may make children less safe, see Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 933 (2014) [hereinafter Gupta-Kagan, *Public Health Legal Structure*]. See also Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, 139 PEDIATRICS PERSPS. 1, 1–2 (2017).

60. CHILDS.' BUREAU, *supra* note 11, at 6–7.

61. *Id.* (reviewing reasons reports are screened out).

62. Gupta-Kagan, *Public Health Legal Structure*, *supra* note 59, at 937.

63. Kim et al., *supra* note 12, at 277.

64. See *infra* Section I.B.

65. See, e.g., ARK. CODE ANN. § 12-18-606(6) (2022) ("[A]n investigation under this chapter shall seek to ascertain . . . The environment where the child resides."); CONN. GEN. STAT. ANN. § 17a-101g(b) (2021) ("All investigations of a report of child abuse or neglect pursuant to this section shall include a home visit at which the child and any siblings are observed . . ."); IOWA CODE ANN. § 232.71B(4)(a)(2) (2022) ("A child abuse assessment or family assessment shall include . . . [a]n evaluation of the home environment."); MD. CODE REGS. 07.02.07.08(1) (2017) (worker shall "initiate

“cooperate” and consent to workers’ entry into their homes, and where they do not consent, workers can obtain court orders permitting their entry even without meeting typical warrant requirements.⁶⁶

Home searches are often referred to in gentler terms, like “home visits” or “assessments” or “evaluations” of the “home environment.”⁶⁷ These terms fail to capture the invasiveness of the practice. Caseworkers enter homes and assess everything from the physical status of the home, to the quantity and quality of food, provisions and clothing on hand, to the presence of alcohol or drugs, to “traffic in and out of the home,” to the “climate of the neighborhood.”⁶⁸ They may enter every room, open medicine cabinets and refrigerators, and demand identifying information for every person associated with the home.⁶⁹ They may even perform “body checks” on children, stripping them of their clothing to examine their nude bodies.⁷⁰ The invasiveness of the search is not limited by the allegations at

an on-site investigation”); MASS. GEN. LAWS ANN. ch. 119, § 51B(b)(i) (2022) (“The investigation shall include . . . a home visit at which the child is viewed, if appropriate.”); Hager, *supra* note 27 (“With rare exceptions, all [family regulation] investigations include at least one home visit, and often multiple, according to a review of all 50 states’ child welfare statutes and agency investigative manuals.”); Ismail, *supra* note 34.

66. See *infra* Part III.

67. For state statutes referencing home visits, see, e.g., CONN. GEN. STAT. ANN. § 17a-101g (2021); MASS. GEN. LAWS ANN. ch. 119, § 51B(b)(i) (2022); TEX. FAM. CODE ANN. § 261.302(1) (West 2021); UTAH CODE ANN. § 80-2-702(2)(f) (LexisNexis 2022). For state statutes referencing an “evaluation of the home environment, see, for example, IOWA CODE ANN. § 232.71B(4)(a)(2) (2022); MD. CODE REGS. 07.02.07.08(1) (2017). These “visits” are searches for Fourth Amendment purposes, see *infra* Section II.B, and I refer to them as such.

68. See, e.g., OR. DEP’T OF HUM. SERVS., DHS CHILD WELFARE PROCEDURE MANUAL 195–97 (2022), http://www.dhs.state.or.us/caf/safety_model/procedure_manual/Oregon-DHS-Child-Welfare-Procedure-Manual.pdf [<https://perma.cc/N7WX-83KF>] (directing workers to observe home environment and listing areas that must be observed and assessed); S.C. DEP’T OF SOC. SERVS., HUMAN SERVICES POLICY AND PROCEDURE MANUAL § 758.01.03(II)(B) (2008), https://dss.sc.gov/media/1897/cpps_2019-01-15.pdf [<https://perma.cc/2M7Q-VGMY>] (directing workers to assess, inter alia, whether home is safe; there is adequate food; and parents have necessary materials to care for child); W. VA. DEP’T OF HEALTH & HUM. RES., CHILD PROTECTIVE SERVICES POLICY 84–85 (2019), https://dhhr.wv.gov/bcf/policy/Documents/CPS_Policy.pdf [<https://perma.cc/L9H4-VTHA>] (listing considerations for workers’ initial visits).

69. See Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 131 (2019) (describing New York’s initial home visit protocol); Hager, *supra* note 27 (describing the searches a parent was subjected to as part of investigation). Cf. *Family Involvement in the Child Welfare System: Hearing Before the Assemb. Standing Comm. on Child. & Fams.*, 2021 Assemb., 10-21-21 Sess. (N.Y. 2021) [hereinafter *Family Involvement*] (testimony of Dessera Wright, at 1:18:00), https://nystateassembly.granicus.com/MediaPlayer.php?view_id=8&clip_id=6408 [<https://perma.cc/9NAP-M8KT>] (describing her family’s experience during a family regulation investigation).

70. *Doe v. Woodard*, 912 F. 3d 1278 (10th Cir. 2019) (dismissing, on qualified immunity grounds, challenge to use of “body check” in family regulation investigation); see also COLO. REV. STAT. § 19-3-306(1) (“Any . . . social worker . . . who has before him a child he reasonably believes has

hand. In most states, a comprehensive home search is required for every report.⁷¹ Thus, a report that a child missed too much school leads to the same type of search as a report that a child injured themselves playing with exposed wiring.

Despite the scope of searches, fewer than one in five reports referred for investigation results in any substantiated finding of child neglect or abuse.⁷² But even where a search uncovers no evidence of child maltreatment and leads to no further state action, the investigation itself inflicts trauma on children. As Joseph Goldstein, Anna Freud, and Alfred Solnit observed, “[t]he younger the child and the greater her own helplessness and dependence, the stronger is her need to experience her parents as her law-givers—safe, reliable, all-powerful, and independent.”⁷³ Thus, “[a]ny invasion of family privacy alters the relationships between family members,” undermining the effectiveness of parental authority and causing children to “react with anxiety even to temporary infringements of parental autonomy.”⁷⁴ Overall, investigations increase children’s sense of uncertainty, confusion, powerlessness, and fear, while also increasing stressors for caretakers.⁷⁵ This is to say nothing of the trauma experienced

been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child.”); J. Khadijah Abdurahman, *Birthing Predictions of Premature Death*, LOGIC (Aug. 22, 2022), <https://logicmag.io/home/birthing-predictions-of-premature-death/> [https://perma.cc/T88S-4848] (describing “body check” of her child).

71. See, e.g., ARK. CODE ANN. § 12-18-606(6) (2022) (“If the alleged offender is a family member, fictive kin, or lives in the home . . . an investigation under this chapter shall seek to ascertain . . . [t]he environment where the child resides”); CONN. GEN. STAT. ANN. § 17a-101g(b) (2021) (“All investigations of a report of child abuse or neglect pursuant to this section shall include a home visit”); IND. CODE § 31-33-8-7(a)(5) (2022) (“The department’s assessment, to the extent that is reasonably possible, must include . . . [t]he home environment”). But see ILL. DEP’T OF CHILD. & FAM. SERVS., REPORTS OF CHILD ABUSE AND NEGLECT § 300.50 (2022), https://www2.illinois.gov/dcf/aboutus/notices/Documents/procedures_300.pdf [https://perma.cc/7ZBX-9PLQ] (requiring home searches only for reports of inadequate shelter or environmental neglect); TEX. DEP’T OF FAM. & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 2250 (2020), http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2200 [https://perma.cc/4687-W3KH] (requiring home search where child in the report is age five or younger; the allegations involve the conditions of the home; or “[o]ther circumstances in the case make a home visit necessary”).

72. Seventeen percent of screened-in reports result in a substantiated or founded determination of child abuse or neglect. CHILDS.’ BUREAU, *supra* note 11, at 19.

73. JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 97 (1996).

74. *Id.*

75. See CTR. FOR IMPROVEMENT OF CHILD & FAM. SERVS., PORTLAND STATE UNIV., SCH OF SOC. WORK, *REDUCING THE TRAUMA OF INVESTIGATION, REMOVAL, & INITIAL OUT-OF-HOME PLACEMENT IN CHILD ABUSE CASES* (2008) (acknowledging trauma caused by uncertainty introduced by investigation); Charles Wilson, *Trauma-Informed Investigation and Engagement*, in *CREATING TRAUMA-INFORMED CHILD WELFARE SYSTEM: A GUIDE FOR ADMINISTRATORS* 59, 60–61 (2012),

by children subjected to strip searches or ultimately removed from their parents' care.⁷⁶ Parents "lucky" enough to keep their children at home still recount how their young children continue to react with fear to a knock on the door months after investigations have closed.⁷⁷

B. Pathologizing Marginalized Families

The trauma of family regulation investigations is not evenly distributed. From the reporting stage onward, the family regulation system focuses almost exclusively on poor families and disproportionately on Black, Latinx, and Native families. While 37.5% of all children in the United States experience an investigation during childhood, that rate is 53% for Black children; put differently, more Black children are subjected to investigations during their childhoods than are not.⁷⁸ Other studies show that by the point children are placed in foster care, the highest rates of disproportionality (i.e. overrepresentation in foster care as compared to their proportion of the total population) are observed for Native children, with Black children the second highest.⁷⁹ Depending on the state, Latinx children, too, are overrepresented, while white children are slightly underrepresented nationwide.⁸⁰ Across the country, "[v]irtually every child in foster care is from a family with low- or no income."⁸¹

https://www.ncwwi.org/files/Evidence_Based_and_Trauma-Informed_Practice/Trauma_Informed_CW_Systems_Guide.pdf [<https://perma.cc/VGZ4-GBNK>] (advising caseworkers on minimizing trauma during investigations); Brittany Bartkowiak, *The Fine Line Between Saving Kids from Trauma and Making Things Worse*, MICH. RADIO (Feb. 27, 2015, 5:30 PM), <https://stateofopportunity.michiganradio.org/families-community/2015-02-27/the-fine-line-between-saving-kids-from-trauma-and-making-things-worse> [<https://perma.cc/P3AQ-ZQVE>].

76. See Coleman, *supra* note 34, at 515–16, 520–21 (summarizing scientific research regarding children's sense of privacy and bodily integrity); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

77. E.g., *Family Involvement*, *supra* note 69 (testimony of Dessera Wright, at 1:16:43) (describing her five-year-old son's reaction when a caseworker knocks on her family's door).

78. Kim et al., *supra* note 12, at 277.

79. Charles Puzzanchera, Moriah Taylor, Wei Kang & Jason Smith, *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010–2020)*, NAT'L CTR. FOR JUV. JUST. (2022), https://www.ncjj.org/AFCARS/Disproportionality_Dashboard.asp?selYear=2020&selRace=Hispanic&selDisplay=3 [<https://perma.cc/K2CR-9G2U>].

80. *Id.*; see also CHILDS.' BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2–3 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [<https://perma.cc/G3LW-53LZ>] (finding Black and Native children overrepresented nationwide and Hispanic children overrepresented in 20 states).

81. Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEVELAND ST. L. REV. 913, 940 (2013); see also GEEN et al., *supra* note 12; Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERV. REV. 5, 5–6 (2017) (reviewing past

This disproportionality is not a modern phenomenon: for centuries, the government has led or supported efforts to control and separate marginalized families, from the destruction of enslaved families through sales,⁸² to the forced assimilation of Native children,⁸³ to movements aimed at “rescuing” urban immigrant children from their families by reifying notions of “pure, good, white motherhood.”⁸⁴ These efforts are not distant historical relics: As Professor Dorothy Roberts has written, the modern family regulation system only emerged in the 1960s, when more Black children began receiving welfare benefits and family regulation agencies “pivoted sharply from providing services to children in their homes to taking children from their parents.”⁸⁵

This dark historical legacy is compounded today by the conflation of child poverty with child maltreatment, broader forces of structural racism and classism, and the biases of individual actors. First, sweeping definitions of “neglect” allow for conditions of poverty—a lack of material resources and a lack of access to childcare, healthcare, mental health services, and substance use treatment—to be conflated with child maltreatment.⁸⁶ Second, high levels of residential segregation along race and class lines, together with poorer families’ increased reliance on social services and government benefits, place marginalized families under heavier surveillance by mandated reporters.⁸⁷ Finally, mandated and non-mandated reporters are themselves biased. They are more likely to report poor families

studies finding children from poor families and communities to be highly overrepresented in the child welfare system).

82. 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, 781–82 (2021) (citing Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER J. 9 (1987)).

83. Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 538 (2021).

84. Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 47, 55, 57 (2016).

85. Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 463 (2021).

86. See generally MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 192–93 (2005) (describing poverty as the number one predictor of reports of neglect); TINA LEE, CATCHING A CASE 3–5 (2016). For further discussion of overbroad definitions of neglect, see *infra* Section III.A.1.

87. See Fong, *supra* note 81, at 6 (suggesting that “[p]oor parents’ overrepresentation in the child welfare system may result from biased reporting systems or increased visibility to authorities,” rather than a higher incidence of child maltreatment among poorer parents); see also Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125 (2008) [hereinafter Roberts, *Racial Geography*] (presenting research in a Chicago neighborhood as a case study to examine the community-level impact of concentrated family regulation agency involvement in Black neighborhoods and finding that residents were aware of concentrated agency attention on their neighborhood and effects of that concentration).

and Black, Latinx, and Native families than white and wealthier families, even when the underlying concerns are identical.⁸⁸

Surveying this landscape, scholars, parents, and activists have concluded that the family regulation system is premised on and powered by a distrust of poor parents, and particularly poor Black, Latinx, and Native parents.⁸⁹ With that premise in mind, it is unsurprising that the initiation of a family regulation investigation immediately and dramatically impinges on the privacy of reported families. These impingements on privacy are built into the system's problem-solving model.

C. The Problem-Solving Model of the Family Regulation System

Though “[t]he juvenile court was the original problem-solving court,”⁹⁰ in the century-plus since the first juvenile courts were established, the phrase “problem-solving court” has come to refer to a wide array of models.⁹¹ Here, I describe the “problem-solving model” of the family

88. Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM L. & POL'Y 109, 117 (2008); JINA LEE, ZENOBIA BELL & MAE ACKERMAN-BRIMBERG, NAT'L CTR. FOR YOUTH L., IMPLICIT BIAS IN THE CHILD WELFARE, EDUCATION, AND MENTAL HEALTH SYSTEMS 3 (Michael Harris & Hannan Benton eds., 2015), https://ncwwi.org/files/Cultural_Responsiveness_Disproportionality/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf [<https://perma.cc/2JRK-VQB6>].

89. See, e.g., Washington, *supra* note 29; Roberts, *supra* note 29, at 1486 (attributing the growth of foster care to stereotypes of black maternal unfitness and recounting a study of Michigan's family regulation system which found, “[t]he belief that African American children are better off away from their families and communities was seen in explicit statements by key policymakers and service providers. It was also reflected in choices made by DHS”); Fraidin, *supra* note 81, at 939 (“[T]he commonly-held understanding of parents involved in the child welfare system is of deviant, pathological animals who inflict savage brutality on their children.”); Shalonda Curtis-Hackett, *Stop Weaponizing Protective Services*, N.Y. DAILY NEWS (Nov. 8, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-stop-weaponizing-child-protective-services-20211108-lkjhewmntzblwj2fmfneokswu-story.html> [<https://perma.cc/LH8R-BYRN>]; *The Problem, MOVEMENT FOR FAM. POWER*, <https://www.movementforfamilypower.org/ending-family-punishment> [<https://perma.cc/WE2U-2BVR>] (last visited Feb. 10, 2023).

90. Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 171 (2016) [hereinafter Spinak, *Family Defense*].

91. See Collins, *supra* note 39, at 1483 n.1 (“[P]roblem-solving courts are not a monolithic entity but rather a diverse and varied group. Many commentators have rightly noted that the term ‘problem-solving’ is overly ambitious and have suggested the ‘slightly less hubristic’ descriptor ‘problem-oriented.’”); *id.* (collecting sources critiquing the term “problem-solving”); see also Steinberg, *supra* note 39, at 1585 (holding drug courts out as the paradigmatic problem-solving courts); *Problem-Solving Courts*, N.Y. ST. UNIFIED CT. SYS., http://ww2.nycourts.gov/courts/problem_solving/index.shtml [<https://perma.cc/A8CH-VC2Y>] (last visited Feb 10, 2023) (“Problem-solving courts take different forms depending on the problems they are designed to address. Drug and mental health courts focus on treatment and rehabilitation. Community courts combine treatment, community responsibility, accountability, and support to both litigants and victims. Sex offense courts employ judicial monitoring and the use of mandated programs and probation to ensure compliance and facilitate access to services. Human trafficking courts center around victims and many cases are resolved without criminal charges.”).

regulation system, as I use that term in this article. This model is not confined to the courthouse. It inflects the operations and culture of the executive, the legislature, and the judiciary. The problem-solving model of family regulation grants judges sweeping responsibilities and powers, deliberately emphasizes informality and forgoes procedural protections for litigants, and emphasizes collaboration and cooperation among parties and among government branches. It supports a culture both inside and outside court under which judges and agencies have little incentive to adhere strictly to legal standards, and parents who assert their rights risk punishment. And it upsets basic expectations regarding adversarial litigation and the roles that each branch should play in investigating facts and enforcing and applying laws.

To understand the current problem-solving model, we must look to its roots. Starting in the Progressive Era, legislatures began establishing special courts to “rehabilitate” or “help” immigrant families.⁹² By the mid-1900s, family courts had come to oversee a wide array of proceedings, from disputes between two individuals over child custody or visitation, to paternity and child support suits, to juvenile delinquency matters.⁹³ The reach of this model was trimmed in 1967, when the Supreme Court granted children in juvenile delinquency proceedings an array of due process rights.⁹⁴ Yet even in the wake of that decision, as Professor Jane Spinak writes, “the role of the court as a place to solve problems remains a central tenet of [the family court] system.”⁹⁵ Today, scholars like Spinak continue to observe that the dependency court bears the traits of a problem-solving or rehabilitative court.⁹⁶

Several core features of the problem-solving model, as it applies in the family regulation context, bear emphasizing. First, it concentrates a vast amount of power in judges. Rather than acting as the “impartial, restrained

92. Cf. Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008); Fraidin, *supra* note 81, at 936. For a fuller accounting of the establishment of “rehabilitative” courts in the Progressive Era, see MICHAEL WILLRICH, CITY OF COURTS pt. II (2003).

93. See Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 486–90, 527 (1998); Spinak, *Family Defense*, *supra* note 90, at 171.

94. *In re Gault*, 387 U.S. 1, 4, 58 (1967).

95. Spinak, *Family Defense*, *supra* note 90, at 171.

96. See, e.g., *id.* at 171–73 (describing “Family Court as Problem-Solving Court” while arguing that the creation of institutional defense offices for parents in New York forced a shrinking of problem-solving courts); Fraidin, *supra* note 81, at 936; Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, 41 LAW & SOC. INQUIRY 701 (2015); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. ON POVERTY L. & POL’Y 473, 502 (2015); see also Spinak, *Family Defense*, *supra* note 90, at 174–75 (noting similarities between descriptions of criminal problem-solving courts and family courts).

and objective judge in the common law tradition,”⁹⁷ a family court judge functions as “confessor, task master, cheerleader, and mentor.”⁹⁸ Accordingly, judges may investigate facts and at times even initiate investigations,⁹⁹ tasks often conceived as core executive functions.¹⁰⁰ In this sense, the judicial role more closely resembles what we might expect to see in an inquisitorial civil law system or in an administrative law proceeding.¹⁰¹ Further, as unified family courts have become increasingly common, so too has the “one family, one judge” approach, under which the same judge oversees all cases related to the same family.¹⁰² This approach means that a judge’s initial negative assessment of a parent might haunt a family for years to come, as judges tend to continue rendering decisions that support their

97. Jane M. Spinak, *Judicial Leadership in Family Court: A Cautionary Tale*, 10 TENN. J.L. & POL’Y 47, 49 (2014).

98. Fraidin, *supra* note 81, at 936; *see also* N.Y. FAM. CT. ACT § 141 (McKinney 2021) (“[Family courts are] given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it.”)

99. While a survey of the investigatory power of dependency judges is beyond the scope of this article, some jurisdictions do afford judges the power to order investigations. *See, e.g.*, MINN. STAT. § 260C.157 (2022); N.Y. FAM. CT. ACT § 1034(1)(b) (McKinney 2021). Elsewhere, after a case is filed, judges may order agencies to undertake certain investigative steps—for instance, going to a parent’s home, conducting background checks, or referring a parent for drug screening—for the agency to secure a finding that it has made “reasonable efforts.” *See, e.g.*, N.Y. FAM. CT. ACT § 1089 (McKinney 2021); 42 U.S.C. § 671(a)(15).

100. *See Morrison v. Olsen*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (“Governmental investigation and prosecution of crimes is a quintessentially executive function.”); Epps, *supra* note 40, at 16 (“Courts routinely invoke the separation of powers as a justification for refusing to order prosecutors to bring criminal charges those prosecutors have declined to prosecute.”).

101. *See, e.g.*, Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899, 908–12 (“Adversary procedure is often contrasted with inquisitorial procedure—common in Europe—where the judge investigates facts, determines which evidence and witnesses will play a role in the proceedings, and is charged with ferreting out the truth through active examination of the parties.”); *id.* at 911 (quoting Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 557 (1973) (describing “mistrust” of inquisitorial system in United States)); *see also* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1301 (1997) (describing prevalence of inquisitorial model by federal benefactor agencies). *But see* Steinberg, *supra*, at 912 (surveying “departures” from adversarial model in United States); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–79 (1982) (describing rise of “managerial” judicial role in discovery and settlement).

102. Babb, *supra* note 93, at 487–88, 527 (citation omitted); Fraidin, *supra* note 81, at 936 (quotation marks omitted) (citations omitted) (“As of 2002, thirty-four states had unified family courts, with authority over all family law matters involving a family, and expressly adherent to precepts of the therapeutic justice movement, which evaluates the legal system by applying mental health criteria.”).

initial assessment of a case.¹⁰³ As a result, as one judge put it, the most important person in dependency court is the dependency court judge.¹⁰⁴

Second, the model prizes informality and forgoes procedural protections for litigants. A dim view of procedural protections has been baked into family courts since their creation. As Elizabeth Katz has documented, when legislatures around the country considered how to deal with child-support enforcement proceedings a century ago, they opted to place these proceedings under the jurisdiction of newly-created civil family courts.¹⁰⁵ This choice permitted states to enter support orders following civil proceedings, without the usual criminal procedure protections, even as support proceedings could lead to incarceration or probation for respondents.¹⁰⁶ The architect of New York's family court system forthrightly noted, "[w]e want to do our best to keep out the penal law atmosphere . . . with all the formal trappings of jury trials and the rest."¹⁰⁷ The very point was the "elasticity of procedure and punishment."¹⁰⁸

Third, the informality of the problem-solving model increases pressure on parties to "collaborat[e]" and "cooperate" to resolve cases.¹⁰⁹ Inevitably, when parties disagree, as they often will given the fundamental conflict between a parent who thinks their child is safe at home and a caseworker who thinks the precise opposite, it is the parent who bears the blame.¹¹⁰ This is in part because the parent is often the only outsider in the room. Everyone else—judge, caseworker, state's attorneys, and often parents' attorneys—is a repeat player. There is a pervasive atmosphere of "groupthink," creating pressure to achieve consensus and coalesce around a leader: the judge.¹¹¹ When parents assert their rights or invoke procedural protections, they are cast as obstructionist or deviant.¹¹²

103. Fraidin, *supra* note 81, at 963–64 (describing the tendency of dependency court judges to bolster their prior decisions when making subsequent decisions).

104. This assessment was provided by a member of the Board of Trustees of the National Council of Juvenile and Family Court Judges. Leonard P. Edwards, *The Juvenile Court and the Rule of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J., no. 2, 1992, at 25.

105. Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1280 (2019).

106. *Id.* at 1281.

107. *Id.* at 1293 (quoting Letter from Walter Gellhorn to J. Howard Rossbach (April 23, 1953) (on file with the Walter Gellhorn Papers, Box 19, Rare Book and Manuscript Lib., Colum. Univ.)).

108. *Id.* at 1281 (quoting Clarence M. Lewis, *New Domestic Relations Court of New York City*, 5 N.Y. STATE BAR ASS'N. BULL. 484, 484 (1933)).

109. See Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354–55 (1999); see also Fraidin, *supra* note 81, at 937.

110. Sinden, *supra* note 109, at 354.

111. Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCH. REV. 55, 57, 82 (2010); see also Fraidin, *supra* note 81, at 952; Edwards, *supra* note 104, at 25.

112. See Sinden, *supra* note 109, at 355; cf. Spinak, *Family Defense*, *supra* note 90, at 177–78.

The emphasis on collaboration extends beyond individual cases. Since 2006, Congress has required courts and child welfare agencies to demonstrate “meaningful and ongoing collaboration” to qualify for certain funds.¹¹³ This requirement came about at the urging of think tanks and has been embraced by the primary dependency court judicial interest group.¹¹⁴ “[M]eaningful, ongoing collaboration” requires that courts and agencies “identify and work toward shared goals and activities to increase the safety, permanency, and well-being of children in the child welfare system,” with the expectation that the collaboration will spur “institutional and infrastructure changes that lead to measurably improved outcomes for the children and families that the state is serving.”¹¹⁵ Judges are thus cast as “stakeholders,” alongside representatives from executive agencies, attorneys and advocates, and parents.¹¹⁶ This framing, as Spinak notes, “obscures the inequalities that exist among various participants and blurs professional roles, especially of advocates and judges.”¹¹⁷ At the same time, it muddies the judicial role and entangles individual case outcomes with judges’ pursuit of broad systemic goals. That is, “[c]ourts are being mandated by the federal government to collaborate on systemic reform to achieve the exact outcomes that judges are being asked to evaluate in individual cases.”¹¹⁸ Certain decisions—for instance, the adoption of a child—are systemic goals under federal legislation, and thus stakeholders must work together to achieve them on a systemic level.¹¹⁹ Inevitably, these systemic goals infect judges’ decisions for individual cases as well.¹²⁰

Fourth, dependency court judges’ expansive and important responsibilities do not lead to increased resources or prestige. Family courts occupy the “lowest rung” of the judicial system, “where judges are paid less, support facilities are nonexistent, and new judges are sent for a kind of

113. 42 U.S.C. § 629h(b)(1)(C).

114. Melissa Carter, Christopher Church & Vivek Sankaran, *A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed*, 12 COLUM. J. RACE & L. 497, 500–01 (2022).

115. *Id.* at 5 (quoting ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., ACYF-CB-PI-16-05, INSTRUCTIONS FOR STATE COURTS APPLYING FOR COURT IMPROVEMENT PROGRAM (CIP) FUNDS FOR FISCAL YEARS (FYS) 2017–2021, at 4, 6 (Oct. 27, 2016)).

116. Jane Spinak, *The Federal Family Court*, in *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* (forthcoming 2023) (cited with permission of author) [hereinafter SPINAK, *THE END OF FAMILY COURT*].

117. *Id.* Cf. Carter, Church & Sankaran, *supra* note 114, at 4–5.

118. SPINAK, *THE END OF FAMILY COURT*, *supra* note 116.

119. *Id.* (describing New York Permanent Judicial Commission on Justice for Children’s embrace of “Adoption Celebration Days,” where judges would volunteer to work overtime to complete and celebrate adoptions, alongside the absence of any “parallel efforts or celebration” to celebrate reunification, and observing that these efforts “affect a judge’s thinking about the meaning of permanency.”); see also Carter et. al, *supra* note 114, at 5–6.

120. SPINAK, *THE END OF FAMILY COURT*, *supra* note 116.

mandatory service obligation before finding their way into presiding over more prestigious contract disputes or auto accident cases.”¹²¹ Judges often operate under immense time pressure,¹²² with little time to reread case files, listen to evidence, or thoroughly consider the issues.¹²³ Instead, they may fall back on cognitive shortcuts, relying too heavily on agency-provided information and on reflexive, racist, sexist, and classist impressions of litigants.¹²⁴ This atmosphere does little to encourage thoughtful or thorough adherence to legal standards.

Finally, this model has implications beyond the walls of the courthouse, as it increases executive power by increasing pressure on parents to “comply” with executive actions. Not only do judges rely heavily on executive agents as they make decisions in court, but they also pressure parents to comply with those same agents out of court.¹²⁵ Even for cases that never result in court filings, caseworkers operate from the presumption that parents should cooperate and that a failure to do so represents a risk to child safety, presumptions discussed at greater length below in Section III.B.2. In the background, legislatures maintain dependency courts as problem-solving courts and enact legislative schemes requiring sweeping surveillance with no mind to the Fourth Amendment.

II. FOURTH AMENDMENT CONSTRAINTS ON HOME SEARCHES

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹²⁶ Central to this protection is the notion of privacy: more than protecting property from government invasion, the Fourth Amendment protects people from unreasonable invasions of their privacy.¹²⁷ That expectation of privacy is at its highest in

121. Andrew Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 460 (2002).

122. See Fraidin, *supra* note 81, at 938 (reviewing dependency court caseloads and noting that dependency judges in some parts of the country rule on as many as 135 cases in a single day).

123. *Id.* at 938–39.

124. *Id.* at 947. Neither of these tendencies is new: when white middle-class reformers sought to separate immigrant children from their families a century ago, reformers not only portrayed immigrant mothers as “degraded, immoral, and sexually promiscuous” but also served as “virtually a judge’s private advisor” and “judges usually accepted the agency’s advice.” See Mulzer & Urs, *supra* note 84, at 55, 57 (citations omitted).

125. Sinden, *supra* note 109, at 354–55.

126. U.S. CONST. amend. IV.

127. See *Katz v. United States*, 389 U.S. 347, 353 (1967) (“[T]he Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures”); *id.* (finding that the government’s actions “violated the privacy upon which [the defendant] justifiably relied”); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 89 (2017).

the home. Time and again, the Supreme Court has reiterated that “[a]t the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”¹²⁸ This core protection is effectuated through the Warrant Clause, which holds that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹²⁹

This provision, in turn, gives each branch—the legislature, the executive, and the judiciary—a role in authorizing, conducting, and limiting home searches: a separation of powers as a means to check and balance government overreach. This Part begins by describing, at a high level, the relationship between the Fourth Amendment and the separation of powers and distinguishing between the oft-conflated concepts of separation of powers and checks and balances. That discussion, like much Fourth Amendment jurisprudence, focuses on the criminal system, but the Part concludes by returning to the family regulation system to survey federal court decisions regarding the applicability of the Fourth Amendment to family regulation home searches.

A. The Fourth Amendment as a Check on Government Powers

In theory, as this section describes, the separation of powers serves to check and balance the government’s awesome power to punish individuals in the criminal legal system, and to conduct the searches that might lead to such punishment.

1. Separation of Powers and Checks and Balances in Criminal Law

In the traditional accounting, the separation of powers between the legislature, the executive, and the judiciary protects individual liberty by constraining state power.¹³⁰ In the criminal legal system, this means that an individual may only be punished if actors across distinct political institutions acquiesce. The legislature must criminalize conduct, the executive must investigate and bring charges, and the judiciary must agree that the conduct charged is in fact criminal and that the law criminalizing

128. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *see also* *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021).

129. U.S. CONST. amend. IV.

130. *See* Carissa Byrne Hessick, Response, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159, 159 (2021).

the conduct is itself legal.¹³¹ Underlying this Madisonian vision is the assumption that the separation of powers between institutions will lead to distinct identities, interests, and ambitions for each institution.¹³² As James Madison saw it, “[a]mbition must be made to counteract ambition,” and so the key “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹³³

The separation of powers was to serve as a “bulwark against tyranny,”¹³⁴ but it is not the only such bulwark. The phrase “separation of powers” is often used as shorthand for two ideas. The first is that the Constitution allocates different powers to formally and functionally different branches; the second is that the different branches constrain government power by checking and balancing each other.¹³⁵ While closely related, these ideas are not identical. Rather, the separation of powers between the branches is but one mechanism of checking government power. Checks outside the separation of powers (“outside checks”) take many forms. Though the separation of powers might be the checking mechanism most prominent in the architecture of the Constitution, the Constitution itself includes other mechanisms of constraining government action, most notably its protection of individual rights through the Bill of Rights.¹³⁶ More broadly, “the diffusion of government power between different interests or institutions that check the others,” may check branches by creating overlapping authority over the same decision.¹³⁷ Power may also be diffused within a single branch by internally separating functions,¹³⁸ or it may be diffused outside the government entirely, for instance to the public via elections or the press via transparency and access.¹³⁹

131. See, e.g., Epps, *supra* note 40, at 3 & n.2 (collecting scholarship reporting this accounting).

132. See *id.* at 30.

133. THE FEDERALIST NO. 51 (James Madison).

134. *United States v. Brown*, 381 U.S. 437, 443 (1965).

135. Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 1006–07 (2019); see also Epps, *supra* note 40, at 9.

136. As this discussion of the relationship between the Fourth Amendment and the separation of powers demonstrates, these individual rights protections may be effectuated through the separation of powers between branches, making it difficult to differentiate cleanly between the checks provided by separation of powers principles and the checks provided by these explicitly set out individual rights provisions. Compare Barkow, *Separation*, *supra* note 40, at 1031 (“The separation of powers is not the only means by which the Constitution protects the interests of criminal defendants. The Bill of Rights . . . provides additional protections to prevent the political process from targeting individuals.”), with Baughman, *supra* note 40, at 1084–85 (discussing watering down of individual rights protections in context of judiciary’s granting of power to executive).

137. Epps, *supra* note 40, at 9.

138. *Id.* at 31.

139. *Id.* at 75–78.

The Fourth Amendment represents a check in both of these senses. It operates as an outside constraint by placing specific limits on government action while relying on the separation of powers as the mechanism to enforce those protections.

2. *Separation of Powers and the Fourth Amendment*

The Fourth Amendment and the separation of powers “pursue a common end,” in that “both are concerned with constraining, not empowering, the state.”¹⁴⁰ Both, too, “converge on a quite distinct problem of liberal state building: the avoidance of what Montesquieu called ‘despotism’ and James Madison labeled ‘tyranny.’”¹⁴¹ Their solution to this problem was to splinter government power and to give each branch the means to stop actions by the others.

The Fourth Amendment controls the operations of each branch in two senses. It restricts the actions each branch may take while simultaneously tasking each branch with restricting the actions of the others. The executive enforces laws and carries out investigations and searches, rendering its actions perhaps the most obvious object of the Fourth Amendment’s constraints.¹⁴² It may only search when a search is reasonable; may only obtain a warrant upon a showing of probable cause and particularity, supported by oath or affirmation; and may not itself decide the adequacy of its warrant application.¹⁴³ Yet the executive, vested with the discretion to decide enforcement priorities and tactics, may also serve as a check on the legislature by declining to investigate violations of certain laws.¹⁴⁴

The judiciary, meanwhile, must determine whether the executive has presented adequate bases to support the search.¹⁴⁵ This determination must be rendered by a “neutral and detached magistrate” who operates independently of the officers “engaged in the often competitive enterprise of ferreting out crime.”¹⁴⁶ The judiciary exercises its power to review searches at multiple points: first, when it considers *ex parte* warrant

140. Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 144 (2016).

141. *Id.* (citations omitted).

142. See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN L. REV. 1005, 1035–36 (2011); Huq, *supra* note 140, at 148; see also Baughman, *supra* note 40, at 1072–73.

143. U.S. CONST. amend. IV.

144. See generally Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 671 (2014).

145. See Huq, *supra* note 140, at 151–52.

146. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

applications, at times with limited information and in haste;¹⁴⁷ second, when it considers defendants' post-execution motions to suppress;¹⁴⁸ and third, when appellate courts review suppression decisions.¹⁴⁹ But the Fourth Amendment does not leave the judiciary free to issue warrants whenever it sees fit and for whatever purpose. Instead, it must hold the executive to specific substantive and procedural requirements.¹⁵⁰ The judiciary also cannot order the executive to search a particular home *sua sponte*, and it may only react to applications brought before it by the executive.¹⁵¹

Finally, the legislature "enters the Fourth Amendment equation as a source of rules that calibrate search authority under warrants."¹⁵² The Fourth Amendment demands that the executive possess probable cause that evidence of a *particular crime* will be found in the place to be searched, and the task of defining what constitutes that particular crime falls to the legislature.¹⁵³ The legislature may broaden the executive's search power by defining criminal liability more broadly or rein it in by defining criminal liability more narrowly.¹⁵⁴ But the legislature may not authorize the use of general warrants, that is, ones that "specif[y] only an offense" and leave "to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched."¹⁵⁵

In this abstract conception, the government's power to conduct searches is deliberately fractured. The legislature may create an offense, but the executive must decide that the offense is worth investigating and then must convince a judge that there is probable cause that an offense was committed

147. *Franks v. Delaware*, 438 U.S. 154, 169 (1978) (noting that magistrate's initial determination of probable cause is "necessarily *ex parte*," "frequently . . . marked by haste," and "likely to be less vigorous" because "[t]he magistrate has no acquaintance with the information that may contradict the . . . affiant's allegations.>").

148. See Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 443, 465 (2014) (describing post-execution trial court review of search warrants and noting that such review tends to favor the state).

149. *Id.* (describing post-execution appellate review of search warrants and noting that it, too, tends to favor the state).

150. See U.S. CONST. amend. IV.

151. Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 726 (2000).

152. Huq, *supra* note 140, at 149; see also Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002).

153. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1025 (1998) (holding out the legislature's role of "defin[ing] the crimes" as part of the paradigm of criminal law enforcement). Put differently, for probable cause to serve as a limit, it must be tied to substantive criminal law. Cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 766 (1994) ("There is always probable cause to believe the government will find *something* in a house – walls, for example – yet surely that kind of probable cause cannot suffice to support an *ex parte* warrant").

154. See Huq, *supra* note 140, at 149.

155. *Steagald v. United States*, 451 U.S. 204, 220 (1981).

and that there is probable cause that a search of a particular location will reveal evidence of that offense. In the Madisonian vision, this formal and functional separation gives rise to distinct institutional identities and interests, resulting in each branch's ambition, competitiveness, and self-interest checking the others'.¹⁵⁶

This discussion of the Fourth Amendment, like the discussion of separation of powers and other checks, is abstract. It relays how the separation of powers, and other checks, might function in theory but says little of how effectively these checks function to constrain government overreach in practice, especially in light of centuries of jurisprudence reducing the strength of the warrant requirement and the on-the-ground reality of modern state criminal court proceedings.¹⁵⁷ Indeed, a growing body of scholarship argues that the separation of powers has failed to effectively curb government abuses in the criminal legal system and that other checks lack vitality or have not been implemented.¹⁵⁸ Those critiques are addressed in Parts III and IV.¹⁵⁹ But, at least in the abstract, one principle remains at the "very core" of the Fourth Amendment's guarantee against unreasonable searches: "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."¹⁶⁰

B. Fourth Amendment Constraints on Family Regulation Searches

Given the exalted nature of the home in Fourth Amendment jurisprudence,¹⁶¹ warrantless home searches are presumptively unreasonable in the absence of consent or a recognized exception to the warrant requirement.¹⁶² These exceptions include exigent circumstances

156. See THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

157. See Bradley, *supra* note 16, at 1473–74 (listing more than twenty exceptions to the probable cause or warrant requirement); Stuntz, *supra* note 16, at 2183 ("Water down the warrant process to make it affordable, and the process becomes pointless . . . [this] seems to characterize most search warrants."); *infra* notes 276–278 and accompanying text (collecting contemporary examples of the toothlessness of the Fourth Amendment in the criminal legal system).

158. See, e.g., Epps, *supra* note 40 (describing the absence of effective checks in the criminal legal system and discussing the separation of powers as an ineffective check); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281 (2021) (same); Baughman, *supra* note 40, at 1072–73 (same); Barkow, *Separation*, *supra* note 40 (same).

159. See *infra* Parts III–IV.

160. Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)) (describing the "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" as the core of the Fourth Amendment).

161. See *id.*

162. See *id.* Cf. U.S. CONST. amend. IV.

and “special needs . . . beyond the normal need for law enforcement” that render the “warrant and probable-cause requirement impracticable”¹⁶³

For poor people, particularly poor Black women, this heady promise of privacy in the home often rings empty. As Khiara Bridges has shown, in spheres ranging from reproductive health to informational privacy, poor mothers have “no *effective* privacy rights.”¹⁶⁴ *Wyman v. James*,¹⁶⁵ a Supreme Court case considering the legality of warrantless searches of the homes of welfare recipients, offers striking support for that proposition. There, the Court found that welfare visits did not constitute searches under the Fourth Amendment because they were consensual: the State could permissibly condition individuals’ receipt of benefits on their waiver of their Fourth Amendment rights.¹⁶⁶ In the alternative, the Court found that even if the home visits were searches, they need not be supported by probable cause or a warrant and instead need only be reasonable.¹⁶⁷ Applying that standard, the Court found the searches reasonable in light of the state and public’s interest in protecting children of welfare recipients, the state and public’s interest in deterring welfare fraud and monitoring the use of funds, the advance notice provided of these visits, and the “rehabilitative”—rather than punitive—purpose of the searches.¹⁶⁸

Undergirding these rationales, Bridges and others have pointed out, is the moral construction of poverty. The Court and the state administering the welfare program assume that “poverty evidences some sort of moral degradation,”¹⁶⁹ justifying heightened suspicion and surveillance of those relying on state funds. Bridges points out, too, the fallacy of describing these searches as consensual. A poor mother may, on one hand, choose to receive welfare benefits and waive her privacy rights in the home; she may, on the other hand, choose *not* to receive welfare benefits and risk a family regulation investigation as a result for her failure “to provide her children

163. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (citations omitted).

164. BRIDGES, *supra* note 31, at 11. This is, per Bridges, the “moderate” formulation of her argument; the “strong” formulation is that poor mothers do not enjoy any privacy rights whatsoever. *Id.* at 11, 28–29.

165. 400 U.S. 309 (1971).

166. *Id.* at 317–18.

167. *See id.* at 318.

168. *Id.* at 318–24. Despite the *Wyman* court’s reliance on the fact that “[t]he visit is not one by police or uniformed authority,” and was not part of any criminal investigation or prosecution, *id.* at 322–23, the Ninth Circuit later upheld a California search scheme in which welfare officials worked directly with law enforcement. *Sanchez v. County of San Diego*, 464 F.3d 916, 918 (9th Cir. 2006), *cert. denied*, 552 U.S. 1038 (2007). For a discussion of *Sanchez*, see Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1390–93 (2012).

169. BRIDGES, *supra* note 31, at 47.

with consistent food, clothing, shelter, and healthcare.”¹⁷⁰ Facing those two “choices,” she has no actual path to privacy.

Against that backdrop, it may come as a surprise—to scholars, practitioners, state courts, and agencies alike—that virtually every federal circuit court has found that the Fourth Amendment applies to caseworkers conducting family regulation investigations.¹⁷¹ More significantly, most circuits have found that home entries by caseworkers constitute searches and that traditional warrant and probable cause requirements apply to these searches. Seven circuits have held, in effect, that caseworkers’ home searches are presumptively unreasonable unless caseworkers obtain a court order or consent or the search is justified by exigent circumstances.¹⁷² In the process, these courts have rejected a family regulation special-needs exception. Such an exception would relax the typical warrant and probable cause requirement where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”¹⁷³ Some circuits have rejected that exception implicitly, holding that the traditional warrant requirement applies while not addressing a special-needs argument directly.¹⁷⁴ Others have pointed to the entanglement of the family regulation system with law enforcement

170. *Id.* at 85–86; *see also* Gilman, *supra* note 168, at 1412–13.

171. *See* *J.C. v. District of Columbia*, 199 A.3d 192, 200 (D.C. 2018); *Andrews v. Hickman County*, 700 F.3d 845, 859 (6th Cir. 2012); *Gates v. Tex. Dep’t of Protective & Regul. Servs.*, 537 F.3d 404, 419–20 (5th Cir. 2008); *Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir. 2008); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240 (10th Cir. 2003); *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003), *as amended on denial of reh’g* (May 15, 2003); *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999); *Tenenbaum v. Williams*, 193 F.3d 581, 602 n.14 (2d Cir. 1999); *Lenz v. Winburn*, 51 F.3d 1540, 1547 n.7 (11th Cir. 1995); *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993); *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989). The First Circuit, in an unpublished decision, noted that “the standards under the Fourth Amendment and the Due Process Clause are essentially the same” in family regulation investigations and assumed without deciding that the warrant requirement applied. *Doe v. Moffat*, 116 F.3d 464, 1, 1 n.1 (1st Cir. 1997) (*per curiam*) (unpublished).

172. Six circuits require a court order, consent, or exigent circumstances. *See J.C.*, 199 A.3d at 200–01; *Andrews*, 700 F.3d at 859; *Gates*, 537 F.3d at 419–20; *Roska*, 328 F.3d at 1240; *Calabretta*, 189 F.3d at 813; *Good*, 891 F.2d at 1092. The Seventh Circuit has a slightly looser standard, requiring a court order, consent, exigent circumstances, or probable cause that the child’s physical or mental condition will be seriously impaired or endangered if the child is not taken into immediate custody. *See Heck*, 327 F.3d at 514; *see also* *Siliven v. Ind. Dep’t of Child Servs.*, 635 F.3d 921, 926–27 (7th Cir. 2011). Several state courts have also held that the warrant requirement and probable cause standard apply to family regulation searches, *see, e.g.*, *J.B. ex rel Y.W.-B.*, 265 A.3d 602, 628 (Pa. 2021), though the on-the-ground impact of those decisions is limited. *See infra* Section III.A.3.

173. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

174. *See, e.g.*, *Good*, 891 F.2d at 1092 (“The decided case law made it clear that the state may not . . . conduct a search of a home or strip search of a person’s body in the absence of consent, a valid search warrant, or exigent circumstances.”); *J.C.*, 199 A.3d at 200; *Andrews*, 700 F.3d at 859–60.

purposes,¹⁷⁵ or noted that the normal warrant and probable cause requirement is practicable, in light of the already-extant exigent circumstances exception allowing family regulation caseworkers “to take immediate action to ensure the physical safety of a child . . . on private property.”¹⁷⁶

Only the Fourth Circuit has unambiguously endorsed a less strict standard for searches in the family regulation context, finding that “investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context” and that courts must “balance the government’s need to search with the invasion endured by the [parent].”¹⁷⁷ But the Fourth Circuit has not articulated what that lower standard entails, and it has not consistently relied on the balancing approach described in *Wildauer* in the decades since.¹⁷⁸ The remaining circuits have left the question open.¹⁷⁹ The Fourth Circuit, then, is anomalous: federal

175. See, e.g., *Gates*, 537 F.3d at 423–24; *Greene v. Camreta*, 588 F.3d 1011, 1027 (9th Cir. 2009), *vacated in part*, 563 U.S. 692 (2011), and *vacated in part*, 661 F.3d 1201 (9th Cir. 2011).

176. *Michael C. v. Gresbach*, 526 F.3d 1008, 1016 n.3 (7th Cir. 2008) (quoting *Heck*, 327 F.3d at 517 n.20); see also *Roska*, 328 F.3d at 1242; *Calabretta*, 189 F.3d at 817.

177. *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993).

178. See *Ross ex rel K.R. v. Klesius*, 715 F. App’x 224, 226 (4th Cir. 2017) (unpublished) (affirming dismissal, on qualified immunity grounds, of plaintiff’s Fourth Amendment claim against caseworkers who “entered [her] home without a warrant or any recognized exception to the warrant requirement,” with no discussion of the balancing test); see also *Words of Faith Fellowship, Inc. v. Rutherford Cnty. Dep’t of Soc. Servs.*, 329 F. Supp. 2d 675, 687 (W.D.N.C. 2004) (“The Fourth Circuit has acknowledged the Fourth Amendment applies to social workers involved in child abuse investigations but that investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context. The Circuit, however, has never articulated a clear standard by which social workers’ investigations should be judged.” (quotation marks omitted) (citations omitted)).

179. The First Circuit reserved the question in an unpublished decision. See *Doe v. Moffat*, 116 F.3d 464, 1 n.1 (1st Cir. 1997) (per curiam) (unpublished). The Second Circuit has allowed that, in some circumstances, the *seizure* of a child may need to only satisfy the relaxed special needs standard but it has never found a seizure lawful under a special needs rationale. See, e.g., *Southerland v. City of New York*, 680 F.3d 127, 158 (2d Cir. 2012); *Kia P. v. McIntyre*, 235 F.3d 749, 762 (2d Cir. 2000); *Tenenbaum v. Williams*, 193 F.3d 581, 603–05 (2d Cir. 1999). These cases consider the applicability of the special needs doctrine to seizures, but in the earliest of these cases, the Second Circuit quoted *Terry v. Ohio*, 392 U.S. 1, 20 (1968), and referenced “*searches and seizures*.” *Tenenbaum*, 193 F.3d at 593 (emphasis added) (“[I]f . . . caseworkers have ‘special needs,’ we do not think that freedom from ever having to obtain a predeprivation court order is among them. Caseworkers can effectively protect children without being excused from ‘*whenever practicable*, obtain[ing] advance judicial approval of searches and seizures.’”). The Eighth Circuit has been silent, though it has found that the *seizure* of a child must occur pursuant to court order, probable cause, or exigent circumstances. *Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir. 2008). The Eleventh Circuit referenced a balancing test and found a search reasonable under that test in a peculiar situation where a child consented to a search over her guardians’ objections. *Lenz v. Winburn*, 51 F.3d 1540, 1548, 1551 (11th Cir. 1995). With more typical fact patterns, the Eleventh Circuit has analyzed the constitutionality of searches under traditional Fourth Amendment warrant doctrine, *Doe v. Kearney*, 329 F.3d 1286, 1299 (11th Cir. 2003) (analyzing caseworker’s warrantless home search only under consent and exigent circumstance exceptions), or punted on the question, *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205, 1207 (11th Cir. 2012) (dismissing on qualified immunity grounds).

circuit courts overwhelmingly recognize that caseworkers seeking to enter families' homes in the absence of consent or exigent circumstances must have a warrant.

Yet the abstract protection afforded by the Fourth Amendment fails to translate to privacy for poor families on the ground. Instead, as in other arenas of their lives, most poor parents find that their privacy rights are "weak" and "meaningless."¹⁸⁰ As a result, few parents under investigation are able to "retreat into [their] own home and there be free from unreasonable governmental intrusion."¹⁸¹

III. THE ABSENCE OF CHECKS IN A PROBLEM-SOLVING SYSTEM

New York State investigated more than two-hundred thousand reports of child maltreatment in 2019.¹⁸² In the state's largest jurisdiction, 90% of children in these investigations were Black or Latinx.¹⁸³ By statute, for each investigation, the local family regulation agency had to conduct an "evaluation of the environment of the child named in the report"¹⁸⁴ and by regulation, for each investigation, caseworkers had to complete "one home visit . . . so as to evaluate the environment."¹⁸⁵ For investigations where a parent did not consent and exigent circumstances did not exist, caseworkers could turn to a statute setting forth a procedure for obtaining a court order for this home search.¹⁸⁶ But statewide in 2019, agencies applied for just six hundred court orders, representing a minuscule 0.3% of

180. BRIDGES, *supra* note 31, at 16.

181. Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)).

182. CHILDS.' BUREAU, *supra* note 11, at 28.

183. While statewide data on the racial demographics of investigations is not available, about a quarter of the state's investigations are in New York City. See CHILDS.' BUREAU, *supra* note 11, at 28 (200,000 investigations statewide in 2019); N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: NOVEMBER 2021 4 (2021), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/11.pdf> [<https://perma.cc/W3ZM-VBEE>] (54,828 investigations in New York City in 2019). In New York City, ninety percent of investigations relate to Black or Latinx children. *Testimony to the N.Y.C. Council Comm. on Gen. Welfare*, N.Y.C. Council 9 (Oct. 31, 2019) (testimony of David Hansell, Commissioner of the Administration for Children's Services).

184. N.Y. SOC. SERV. LAW § 424(6)(a) (McKinney 2021).

185. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iii)(a) (2021).

186. Cf. N.Y. FAM. CT. ACT § 1034(2)(b) (McKinney 2021) (allowing agency to seek a court order under the procedure provided for in New York's criminal procedure law if the agency has been denied access to the home and has told the parent or caretaker that they may seek a court order); *id.* § 1024 (allowing caseworkers and police, *inter alia*, to take emergency custody of a child absent a court order if they have reasonable cause to believe that the child is in imminent danger).

investigations.¹⁸⁷ Of those few applications, 92% were granted.¹⁸⁸ This example illustrates several themes: first, the sheer number of family regulation investigations and the disproportionate focus on Black and Latinx families; second, the state's remarkable expectation of access to families' homes despite Fourth Amendment protections; third, the immense pressure parents face to consent to searches and the high rate of parents who do accede; and finally, the near-automatic issuance of entry orders in those rare instances where they are sought. Animating each of these themes is the informal problem-solving model of the family regulation system.

This Part describes the role of each branch in authorizing, conducting, and approving family regulation home searches and provides an account of the legislative schemes that permit courts to issue orders for home searches—what I call entry orders—based on applications that fail to meet basic warrant requirements. Building from this, it argues that the problem-solving orientation has solidified among the three branches a shared interest in maximizing information gathering and minimizing parents' ability to assert their rights. These shared interests then leave each branch unmotivated to hold the others to constitutional requirements. The Part concludes by considering how the problem-solving orientation has undercut other possible checks and balances of government power, such as individual rights protections, internal separations of functions, and public oversight.

A. The Shared Project of Searching Families' Homes

Searches in family regulation investigations exemplify a striking contradiction: courts removed from the daily operations of the family regulation system recognize that parents are protected by the Fourth Amendment's Warrant Clause in the abstract, while those actors closer to the ground—judges, executive agents, and legislatures alike—evinced a concrete expectation that the executive should have ready access to the homes of families under investigation. This section describes the role of each branch in this project.

187. Response from N.Y. Office of Court Administration to Author's Freedom of Information Law Request (Sept. 24, 2020) (on file with author). This is an overcount of applications for entry orders. This figure includes *all* applications for orders applied for under Section 1034 of the Family Court Act, meaning that it includes both applications for entry orders and applications for orders to produce children. *Id.*

188. *Id.*

1. *The Legislature*

Legislatures across the country have enacted legislative schemes that not only authorize but require home searches for even spurious accusations.¹⁸⁹ They likewise lower the barriers of entry to families' homes by passing entry order statutes—statutes that allow for the executive to apply for court orders to enter families' homes absent consent—that weaken fundamental requirements of the Warrant Clause, including the probable cause requirement and the particularity requirement.¹⁹⁰ Read together with broad statutory definitions of child maltreatment, these investigative mandates and entry order statutes empower the executive to investigate more families and enter more families' homes.¹⁹¹

a. *Entry Order Statutes*

The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized.”¹⁹² Thus, to issue a criminal search warrant, a court must find both probable cause that a crime was committed and that evidence of the crime will be found in the location to be searched.¹⁹³

In the family regulation setting, few jurisdictions require probable cause for the issuance of entry orders. The phrase “probable cause” appears in just five statutes.¹⁹⁴ The remaining states reduce the standard of proof to standards ranging from “reasonable suspicion” to “if necessary.”¹⁹⁵ Taking

189. *See supra* Section I.A.

190. *See infra* Section III.A.1.

191. Legislatures are also the progenitors of the “problem-solving” model. *See supra* Section I.C.

192. U.S. CONST. amend. IV.

193. *E.g.*, *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

194. IOWA CODE ANN. § 232.71B (2022); KY. REV. STAT. ANN. § 620.040 (West 2022); N.H. REV. STAT. ANN. § 169-C:34 (2021); N.Y. FAM. CT. ACT § 1034 (McKinney 2021); S.C. CODE ANN. § 63-7-920 (2022). Two other states' statutory or regulatory codes reference legal standards higher than probable cause in the context of evidence of the parent's noncompliance with an investigation, rather than evidence of abuse or neglect. *See* DEL. CODE ANN. tit. 16, § 910 (2022); N.C. GEN. STAT. § 7B-303 (2022). Courts in three other states have read a probable cause requirement into an entry order statute. *J.B. ex rel Y.W.-B.*, 265 A.3d 602, 628 (Pa. 2021); *Germaine v. State*, 718 N.E.2d 1125, 1130–31 (Ind. Ct. App. 1999); *H.R. v. State Dep't of Hum. Res.*, 612 So. 2d 477, 479 (Ala. Civ. App. 1992). These decisions are described at greater length below. *See infra* notes 259, 261–262 and accompanying text.

195. Eleven states instruct courts to issue entry orders for “reasonable suspicion,” “cause shown,” “if necessary,” or if the order would be in the “best interests of the child.” *See* ALA. CODE § 26-14-7 (2021); COLO. REV. STAT. ANN. § 19-3-308 (2022); FLA. STAT. § 39.301 (2021); 325 ILL. COMP. STAT. ANN. 5 / 7.5 (2020); IND. CODE ANN. § 31-33-8-7 (2022); MONT. CODE ANN. § 41-3-433 (2021); N.J. STAT. ANN. § 30:4C-12 (West 2006); 40 R.I. GEN. LAWS ANN. § 40-11-7 (2022); TENN. CODE ANN. § 37-1-406(e) (2022); TEX. FAM. CODE ANN. § 261.303 (West 2021); WYO. STAT. ANN. § 14-3-204 (2022).

this tendency toward vagueness to its natural conclusion, other statutes reference no standard at all.¹⁹⁶ Through these standards (or lack of standards), legislatures grant the judiciary broad discretion to rely on its own values and pay little mind to legal standards,¹⁹⁷ excusing dependency court judges from rendering the very probable cause determination that is at the core of the warrant requirement.

Even those legislatures that do incorporate a probable cause requirement reduce that requirement by half, as they abandon the particularity requirement. A reaction against general warrants,¹⁹⁸ the particularity requirement places limits on the scope of government searches by requiring that a search warrant application establish that evidence of the crime in question will be found in the location to be searched and that the search warrant particularly describe the place to be searched and the things to be seized.¹⁹⁹ But just one state imposes any particularity requirement in its entry order statute.²⁰⁰ The rest empower judges to issue non-specific entry

196. See ARK. CODE ANN. § 12-18-609 (2022); 55 PA. CONS. STAT. § 3490.73 (1999) (“The county agency shall petition the court if one of the following applies: . . . A subject of the report of suspected child abuse refuses to cooperate with the county agency in an investigation, and the county agency is unable to determine whether the child is at risk.”); WIS. STAT. ANN. § 48.981(3)(c)(b) (2022); see also ALASKA STAT. ANN. § 47.10.020 (2021) (allowing courts to issue any orders necessary to aid an agency in conducting a preliminary investigation so that the court can determine whether the best interests of the child demand further action be taken).

197. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (“[T]he ‘best interests of the child’ standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.”); *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977) (“Moreover, judges too may find it difficult, in utilizing vague standards like ‘the best interests of the child,’ to avoid decisions resting on subjective values.”) (citations omitted); *N.J. Div. of Youth & Fam. Servs. v. Wunnenburg*, 408 A.2d 1345, 1347 (N.J. Super. Ct. App. Div. 1979) (noting approvingly that a “best interests” standard for searches allows judges to engage in a more capacious analysis than a probable cause standard); Erik W. Aamot-Snapp, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the “Good Cause” Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1169–70 (1995) (reviewing states’ inconsistent application of “good cause” standard in the context of the Indian Child Welfare Act and concluding that the good cause standard serves as a channel for judicial bias); Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 73–74 (2007) (surveying the multiple meanings of “good cause” contained solely within the Federal Rules of Civil Procedure and noting that “courts have interpreted the phrase to mean different things in different contexts and have applied the standard with varying levels of vigor”).

198. See *supra* note 155 and accompanying text.

199. *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (“The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.”).

200. Only New York’s entry order statute includes a particularity requirement paralleling the criminal search warrant requirement. N.Y. FAM. CT. ACT. § 1034(2)(c) (McKinney 2021) (incorporating New York’s rules of criminal procedure, codified at N.Y. CRIM. PROC. § 690, vis-à-vis warrants). Two other states’ courts have imposed particularity requirements. See *J.B. ex rel. Y.W.-B.*, 265 A.3d 602, 631 (Pa. 2021) (finding that entry order was illegally issued where lower court failed to “explain what

orders, allowing workers to search all areas of families' homes. Indeed, as evidenced by states' legislative and regulatory mandates for home searches, state legislatures and agencies do not just *allow* courts to authorize wide-ranging searches, they *expect* such searches to take place in every investigation, regardless of the allegations and regardless of the paucity of evidence.²⁰¹

Short of particularly describing the evidence to be seized, only a few states require even a nexus between the allegations at hand and the conditions of the home to justify a home search.²⁰² Entry order statutes refer to "access"²⁰³ to the home or even more broadly, to any place the child may be,²⁰⁴ with no regard to what particular evidence may be found in the home or whether the alleged perpetrator of the neglect or abuse even has access to the home.²⁰⁵ This encourages the wide-ranging surveillance of families, even when the parents being surveilled are not accused of any wrongdoing.²⁰⁶

that link was between the home inspection and the allegation" and noting that "[t]o establish probable cause, there must be a specific nexus between the items to be searched and the suspected crime committed"; *see also* *Germaine v. State*, 718 N.E.2d 1125, 1130 (Ind. Ct. App. 1999). *See infra* Section III.A.3 (describing courts' interpretations of entry order statutes).

201. *See supra* Section I.A (summarizing statutory and regulatory requirements mandating home searches).

202. *See, e.g.*, ARK. CODE ANN. § 12-18-609 (a), (c)(1) (2022) ("A person conducting an investigation . . . shall have the right to enter into or upon a home, school, or any other place for the purpose of conducting the investigation," and providing that if "necessary access" is denied, the agency may petition for an order requiring the parent to "allow entrance for the interviews, examinations, and investigations."); COLO. REV. STAT. § 19-3-308(3)(b) (2022) ("If admission to the child's place of residence cannot be obtained, the juvenile court or the district court with juvenile jurisdiction, upon good cause shown, shall order the responsible person or persons to allow the interview, examination, and investigation."); *But see* LA. CHILD. CODE ANN. art. 613 (2022) ("[T]he investigator shall apply to the juvenile court for an order authorizing an entry . . . for an inspection of the home to the extent such an inspection is essential to the investigation of specific allegations."); ILL. ADMIN. CODE tit. 89, § 300.50 (2020).

203. *See, e.g.*, ARK. CODE ANN. § 12-18-609 (2022); DEL. CODE ANN. tit. 16, § 910(a)(1) (2021); 40 R.I. GEN. LAWS § 40-11-7(a) (2021); WYO. STAT. ANN. § 14-3-204(a)(3) (2022).

204. For statutes referencing the "home," *see, for example*, IOWA CODE § 232.71B(6) (2022); LA. CHILD. CODE ANN. art. 613 (2022). For statutes allowing for searches in any place the child may be, *see, for example*, ALA. CODE § 26-14-7(c) (1975); ARK. CODE ANN. § 12-18-609(c)(1) (2015); N.Y. FAM. CT. ACT § 1034 (McKinney 2021); TENN. CODE ANN. § 37-1-406(e) (2022); TEX. FAM. CODE ANN. § 261.303(b) (West 2021).

205. *See supra* Section I.A. (describing broad investigative mandates); *see, e.g.*, ARK. CODE § 12-18-609(3)(b) (2022); COLO. REV. STAT. § 19-3-308 (2022) ("If admission to the child's place of residence cannot be obtained, the juvenile court or the district court with juvenile jurisdiction, upon good cause shown, shall order the responsible person or persons to allow the interview, examination, and investigation.");

206. Statutes typically refer to the "home" of the child, with no regard to where the perpetrator lives, so if a child lives with only one parent, but their other parent is accused of wrongdoing, the parent not named in the report will still be subjected to a home search. *See, e.g.*, TENN. CODE ANN. § 37-1-406(e) (2021).

b. Substantive Definitions of Child Maltreatment

Legislatures' embrace of diminished requirements for entry orders must be understood together with the broader project of crafting expansive definitions of child maltreatment that then enable greater intrusion by the executive. Around the country, legislatures have enacted wide-reaching and ambiguous definitions of child neglect. Statutes do not set forth specific elements for neglect, nor do they require any actual harm to have befallen a child.²⁰⁷ A typical statute might define a neglected child as one "whose health or welfare is harmed or threatened with harm" when their parent "[c]ontinuously or repeatedly fails or refuses to provide essential parental care and protection."²⁰⁸ Such vague and conclusory definitions allow caseworkers and judges to render subjective judgments about the adequacy of a parent's care.²⁰⁹ And while some state courts have narrowed these definitions, that narrowing most often serves to protect a parent against a *finding* of maltreatment, rather than protecting a parent from an investigation.²¹⁰

Broad definitions give rise to more investigations and, specifically, to more intrusive investigations. Whereas in criminal investigations, "the particularity requirement limits the discretion of officers who may otherwise use the warrant as an excuse to engage in a fishing expedition for

207. See Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 24 (2021) (surveying all 50 states' statutory definitions of neglect and summarizing definitions as describing "omissions, rather than acts," and "involv[ing] risk of, rather than actual, harm").

208. See, e.g., KY. REV. STAT. ANN. § 600.020(1) (West 2022).

209. See, e.g., Rebecca Rebbe, *What Is Neglect? State Legal Definitions in the United States*, 23 CHILD MALTREATMENT 303, 310–11 (2018) (arguing that states' definitions of neglect allow caseworkers and judges to exercise wide discretion when making enforcement decisions); Henry & Lens, *supra* note 207, at 24–25 ("In sum, the use of low evidentiary standards coupled with an expansive and subjective definition of neglect can greatly expand" the number of founded cases of neglect); Douglas J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL'Y 539, 569–70 (1985) (describing courts as taking a "know it when they see it" approach to defining child maltreatment and arguing that vague standards "set no limits on intervention and provide no guidelines for decision-making"); see also Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217 (2022) [hereinafter Gupta-Kagan, *Confronting Indeterminacy*] (describing how the substantive indeterminacy of child protective law builds on itself throughout the life of a case and encourages bias).

210. For example, New York's Court of Appeals held that risk to a child must be "near or impending," and that a parent must have actually failed to exercise a "'minimum degree of care,' . . . not ideal," to sustain a neglect finding. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 369–70 (2004). Yet the state requires an investigation to be initiated "[w]hen any allegations contained in [a report] could reasonably constitute a report of child abuse or maltreatment . . ." N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 2021). This broad mandate requires investigations for countless allegations that ultimately fail to meet the Court of Appeals' more exacting definition of "neglect."

evidence of criminal activity,”²¹¹ the expansive definition of child neglect instead encourages exactly such expeditions. Virtually any part of a child’s home might contain evidence relevant to a determination that their parent “fails or refuses to provide essential parent care,”²¹² and thus any part of the home might contain evidence of maltreatment. Were a legislature to require some degree of particularity—i.e., a showing that evidence of maltreatment will be found in the place to be searched and particularly describing the places to be searched—an agency could still credibly argue that a family’s entire home falls within the ambit of that requirement.

This ill-defined concept of neglect is layered atop an already-hazy standard of proof. Even probable cause, the most exacting standard at issue here, has been described as a “nontechnical” and flexible standard, “incapable of precise definition or quantification in percentages”²¹³ And of course, most states rely on even vaguer, or non-existent, standards. Together, statutory definitions of neglect and standards of proof in states’ statutory schemes grant judges wide latitude to find neglect supported by probable cause (or a lowered standard), based upon their own biases and subjective judgments,²¹⁴ and authorize a search accordingly.

Through enacting broad definitions of maltreatment, mandating searches for nearly every investigation, and lowering requirements for searches, legislatures set the stage for the executive to enter families’ homes, with little apparent interest in the Fourth Amendment protections of those families.

2. *The Executive*

Carrying forth the mission set for them by legislatures, executive agencies conduct millions of investigations annually and demand entry to families’ homes as a rote step in nearly every investigation. Parents accede to those demands to a remarkable degree. By some estimates, more than 90% of families under investigation consent to searches.²¹⁵ This means, then, that more than 90% of searches are conducted without judicial

211. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 861 n.354 (2004) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 196 (1927)).

212. See, e.g., KY. REV. STAT. ANN. § 600.020(1) (West 2022).

213. *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

214. See Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72 (2019) (providing an ethnographic study of how racial, gender, and class can affect judges’ decision-making in abuse and neglect proceedings); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (examining judicial bias in non-family court context).

215. Coleman, *supra* note 34, at 430.

approval. The institutional culture of the family regulation system writ large normalizes informality (and surveillance) to such an extent that state agents rarely even try to obtain court orders or warrants prior to conducting searches.²¹⁶

Across the family regulation system, government actors emphasize collaboration and discourage adversarial proceedings. The emphasis on “cooperation” in dependency court proceedings seeps beyond the courthouse²¹⁷ and is apparent from parents’ first interactions with executive agents. Despite the awesome powers with which family regulation agencies are invested—including the powers to separate parents from their children against the parent’s wishes and to move to permanently sever parent-child bonds—these agencies cast the family regulation system as collaborative and helpful, rather than adversarial and punitive, and encourage parents to cooperate with investigations.²¹⁸ They rarely inform parents of statutory or constitutional rights.²¹⁹ Instead, the expectation of compliance is so central to institutional culture that agency policies code parents’ assertion of their rights as an indicator of risk to their children and a reason to seek to separate their families.²²⁰ At least one state goes so far as to contemplate criminal

216. See, e.g., CONN. DEP’T OF CHILD. & FAMS., CARELINE AND INTAKE 22-2-2, at 9 (2021), <https://portal.ct.gov/-/media/DCF/Policy/Chapters/22-2-2-rev-2-1-2021.pdf> [<https://perma.cc/QYT9-EG6V>] (instructing agency caseworkers that a legal consultation may be sought *after* parents refuse entry); ALA. CODE § 26-14-7(c) (2021) (contemplating the issuance of an entry order only where an investigator has already been denied access to a family’s home); COLO. REV. STAT. § 19-3-308(3)(b) (2022) (same); N.Y. FAM. CT. ACT § 1034(2)(a)(i)(B) (McKinney 2021) (same).

217. See *supra* Section I.C.

218. See, e.g., MICH. DEP’T OF HUM. SERVS., A PARENT’S GUIDE TO WORKING WITH CHILDREN’S PROTECTIVE SERVICES 4 (2006), https://www.michigan.gov/documents/mdhhs/A_Parents_Guide_to_working_with_Childrens_Protective_Services_507536_7.pdf [<https://perma.cc/XRF9-WUUV>] (“No one knows your family better than you, so together you and the CPS worker will figure out the strengths of your family, what causes problems, and what services will make your home safe for your child.”); *id.* at 9 (“[T]he better you and your CPS worker can work together, the sooner your case will be resolved.”); MASS. DEP’T OF CHILD. AND FAMS., A FAMILY’S GUIDE TO PROTECTIVE SERVICES FOR CHILDREN, <https://www.mass.gov/doc/a-familys-guide-to-protective-services-for-children-english-1/download> [<https://perma.cc/NQ74-P7R8>] (last visited Feb. 11, 2023) (“DCF encourages parents to participate and cooperate with the investigation, as it provides an opportunity for parents to tell their side of the story.”); see also Kelley Fong, *Getting Eyes in the Home: Child Protective Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 611 (2020) (“[T]hese dual capacities—the possibility of therapeutic support alongside the threat of coercive intervention—generate expansive investigations of domestic life . . .”).

219. See Burrell, *supra* note 69, at 144–45 (describing absence of *Miranda*-type warnings). Even parents who know their rights may, under the immediate pressure of an investigation, feel unable to assert them. *Family Involvement*, *supra* note 69 (testimony of Dessera Wright, at 1:17:00) (testifying that even as a trained parent advocate, she “forgot [her] rights” when a family regulation caseworker knocked on her door).

220. See W. VA. DEP’T OF HEALTH & HUM. RES., CHILD PROTECTIVE SERVS. POL’Y 76–77, 79 (2019), https://dhhr.wv.gov/bcf/policy/Documents/CPS_Policy.pdf [<https://perma.cc/VM7M-Q3VM>] (classifying situations where parent “refuses access to the home” as a sign of “present danger”); see also

charges for parents who “obstruct[], delay[], interfere with[] or deny[] access” to caseworkers or officers conducting investigations.²²¹

Parents under investigation are vulnerable: not only is their very family integrity at risk, but they are overwhelmingly poor and disproportionately Black, Latinx, and Native, already ill-positioned to push back against government might.²²² On top of that, they may be grappling with generational and historical trauma, stemming from “[g]enerations of family separation and the ongoing fear of government intrusion into parenting.”²²³ In this intensely stressful moment, parents have a choice. They may assert their rights, risking the ire of the agency investigating them and the separation of their family, or they may agree to allow a state agent to search their home in hopes of assuaging the worker’s concerns and ending a painful investigation as quickly as possible and with their family intact.

One Black mother recounted: “[T]he caseworker issued an ultimatum: I could comply with her investigation and ongoing surveillance or she would involve police or Family Court. I didn’t really know my rights and the last thing I needed was more threats to my children’s safety, so I complied.”²²⁴ As this mother’s experience shows, the executive benefits too from an absence of attention to the family regulation system from the public eye, which leaves parents unaware of their rights and more susceptible to

Lofus v. Clark-Moore, 690 F.3d 1200, 1203 (11th Cir. 2012) (recounting caseworker’s threats to father to remove his children after he expressed reservations about investigation); Doe v. Heck, 327 F.3d 492, 524 (7th Cir. 2003) (recounting caseworker’s threat, left via voicemail, to physically remove three children from their parents’ custody if parents’ attorney did not contact him to schedule an interview within twenty-four hours); Clark v. Stone, 998 F.3d 287, 302 n.6 (6th Cir. 2021) (“While he did not immediately consent to the search when defendants arrived for the first home visit, it is not illegal for the defendants to have warned him that refusal to cooperate could result in [the judge] finding him in contempt of court to secure his consent.”).

221. N.M. STAT. ANN. § 30-6-4 (2022). A federal court construed this statute as constitutional, noting “law enforcement officers still have to comply with the federal and state Constitutions and must conduct a search pursuant to a warrant unless the search falls within one of the narrow exceptions for a warrantless search.” *Payne v. Wilder*, No. CIV 16-0312 JB/GJF, 2017 WL 2257390, at *41 (D.N.M. Jan. 3, 2017). However, this construction may not stop caseworkers or law enforcement officers from using the statute as a cudgel in extracting cooperation from parents. *See Lowther v. Child. Youth & Fams. Dep’t*, No. 1:18-cv-00868 KWR/JFR, 2020 WL 5802039, at *13 (D.N.M. Sept. 29, 2020) (noting, in case where plaintiff alleged “[s]he was immediately and repeatedly informed that she could be arrested or detained for denying access to the children,” that “a reasonable officer would know that repeatedly threatening an individual with arrest or detention to gain access to a home without a warrant is inherently unconstitutional,” but granting officer qualified immunity on other grounds). Likewise, if a judge issues an unlawful order but a statute seems to authorize the judge’s decision, families may be pressured more easily into accepting unlawful searches. *See In re Anouck C.*, No. M2019-01588-COA-R3-JV, 2020 WL 7493078, at *2, *6 (Tenn. Ct. App. Dec. 21, 2020) (dismissing parent’s appeal of entry order as moot because parent complied with order).

222. *See supra* notes 78–81 and accompanying text; *infra* notes 279–281 and accompanying text.

223. Miriam Itzkowitz & Katie Olson, *Closing the Front Door of Child Protection: Rethinking Mandated Reporting*, 100 CHILD WELFARE 77, 86, 91 (2022).

224. Curtis-Hackett, *supra* note 89; *see also* Burrell, *supra* note 69, at 144–45.

demands from the executive.²²⁵ This makes it easier for the executive to extract consent from parents and to remove searches from the oversight of the judiciary.²²⁶ Yet even where the judiciary does review searches, it does little to constrain the executive.

3. *The Judiciary*

While the criminal legal system takes the theoretical premise that judges must operate as neutral arbiters removed from the pressures of the proceedings at hand,²²⁷ that premise is abandoned in dependency court, where judges are tasked with “rehabilitating” litigants by gathering information and emphasizing cooperation.²²⁸ This problem-solving orientation discourages parents from asserting their rights in trial court or seeking appellate review and has excused courts from developing a meaningful post-search remedy. For those parents who do successfully seek appellate review, appellate courts stay the course, issuing narrow rulings that allow for states’ information-gathering surveillance apparatuses to stay intact.

a. *Lack of Access to Trial-Level Review*

Trial-level judges fulfill their obligation to check executive overreach at two points in the criminal context: initially, in *ex parte* proceedings where they determine whether the executive has made the requisite showings for a warrant; and again when they consider any challenges that defendants may bring to the legality of a search after it is conducted.

In the family regulation context, few statutes detail any specific process for the issuance of entry orders at the initial review stage. Only a handful of states require pre-issuance notice or opportunity to be heard.²²⁹ Two others explicitly allow *ex parte* orders and do not mention *ex post* review.²³⁰ The

225. See *infra* Section III.C.3.

226. Parents who consent to a search—even under false pretenses—are unlikely to ever receive judicial review of that search that would give rise to a remedy. See *infra* Sections III.A.2–A.3.

227. Epps, *supra* note 40, at 49 (describing myth that judges are insulated from political pressures).

228. See *infra* Section I.C.

229. Delaware requires notice, DEL. CODE ANN. tit. 16, § 910 (2022), while North Carolina requires notice and an opportunity to be heard. N.C. GEN. STAT. § 7B-303(c) (2022). Utah previously required notice and an opportunity to be heard. UTAH CODE ANN. § 78A-6-106 (LexisNexis 2021) (repealed 2021). Arkansas allows for the *ex parte* issuance of entry orders but does permit parents to petition a court for a stay of the order upon a showing of good cause. ARK. CODE ANN. § 12-18-609 (2022).

230. See LA. CHILD. CODE ANN. art. 613 (2022); WYO. STAT. ANN. § 14-3-204 (2022) (both providing for *ex parte* issuance of entry orders).

remaining statutes are silent. Where statutes are silent, dependency courts routinely hear applications *ex parte*, mirroring the typical process for a criminal search warrant.²³¹

Even if parents receive notice, they are likely to be ill-positioned to fight the issuance of an entry order. Petitions for entry orders can be filed before the right to appointed counsel attaches.²³² Parents who are hauled into dependency court for any reason are overwhelmingly poor and unlikely to be in a position to hire private counsel, assuming that they are aware of their right to counsel.²³³ This leaves parents to contest entry orders *pro se* if they are given the opportunity to contest them *ex ante* at all.²³⁴

After an order is issued, the opportunities for review in dependency court diverge from those in criminal court, as dependency courts fail to offer litigants an opportunity for thorough *ex post* review with a meaningful remedy. The first hurdle is practical and owes in part to the informality of family court and in part to legislatures' watering down of warrant requirements. Few entry order statutes require that applications for entry orders be supported by oath or affirmation.²³⁵ Dependency courts may issue entry orders on unsworn evidence or evidence outside the record and a trial

231. See, e.g., *Germaine v. State*, 718 N.E.2d 1125, 1127 (Ind. Ct. App. 1999); *In re L.R.*, 97 N.Y.S.3d 394, 400 (N.Y. Fam. Ct. 2019); see *In re Anouck C.*, No. M2019-01588-COA-R3-JV, 2020 WL 7493078, at *21 (Tenn. Ct. App. Dec. 21, 2020); *In re Berryman*, 629 S.W.3d 453, 456 (Tex. App. 2020) (all reviewing orders issued *ex parte* in states whose statutes are silent as to the parent's right to notice and an opportunity to be heard).

232. There is no constitutional right to counsel in neglect and abuse cases, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 34 (1981), but thirty-nine states provide a categorical right to counsel for parent respondents. Lucas A. Gerber, et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 42 (2019). That right typically attaches only after a petition alleging neglect or abuse is filed, as opposed to a preliminary petition. See, e.g., COLO. REV. STAT. § 19-3-202(1) (2022) (requiring judge to advise parent of right to counsel at his first appearance following the filing of a petition alleging abuse or neglect); LA. CHILD. CODE ANN. art. 608(A) (2022) ("The parents of a child who is the subject of a child in need of care proceeding shall be entitled to qualified, independent counsel at the continued custody hearing and at all stages of the proceedings thereafter."); N.J. STAT. ANN. § 9:6-8.43 (West 2004) ("[At first proceeding t]he court shall advise the parent or guardian of his right to have an adjournment to retain counsel and consult with him. The court shall advise the respondent that if he is indigent, he may apply for an attorney through the Office of the Public Defender.").

233. See *infra* Section III.A.2 (describing lack of notice to parents regarding their rights in family regulation investigations and proceedings).

234. As just one example, the father in *Clark v. Stone*, 998 F.3d 287, 292 (6th Cir. 2021), discussed in the introduction, appeared *pro se*.

235. Many statutes are entirely silent. See, e.g., N.J. STAT. ANN. § 30:4C-12 (West 2006); 40 R.I. GEN. LAWS § 40-11-7 (2021); TEX. FAM. CODE ANN. § 261.303 (West 2021). Others reference "petitions" but are silent as to whether the petition must be verified. See, e.g., DEL. CODE ANN. tit. 16, § 910 (2021); MONT. CODE ANN. § 41-3-433 (2021). But see LA. CHILD. CODE ANN. art. 613 (2022) (requiring affidavit); N.Y. FAM. CT. ACT § 1034(2)(c) (McKinney 2022) (requiring procedures dictated by rules of criminal procedure); S.C. CODE ANN. § 63-7-920(B) (2022) (requiring affidavit).

court—or appellate court—reviewing an order *ex post* may have little on which to base its review.²³⁶

The second hurdle relates to incentives. Parents must decide that seeking review of an order is in their best interest with an understanding that asserting their rights may earn them a label of obstructionist.

On top of that overarching concern, parents must opt for review knowing that even if the court were to find the search unlawful, they would receive no remedy in dependency court. Appellate courts across the country have rejected the use of the exclusionary rule in family regulation cases.²³⁷ These decisions classify dependency courts as civil, rather than quasi-criminal, and weigh “the urgent plight of those who most need the protective hand of the State” and the risk of “condemn[ing] an innocent child to a life of pain and fear or even death”²³⁸ against the likely deterrent effect on worker misconduct of employing the exclusionary rule.²³⁹ It is difficult to imagine any court finding that the deterrent effect of the exclusionary rule on caseworkers could outweigh the specter of the death of an innocent child. Further dimming the prospects of the exclusionary rule, courts also fail to see caseworker misconduct as such a widespread problem that it would

236. 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 4.3(b) (6th ed. 2022) (“[O]ne important function of the warrant requirement ‘is to facilitate review of probable cause and avoid justification for a search . . . by facts or evidence turned up in the course of execution.’”); *see also* J.B. *ex rel.* Y.W.-B., 241 A.3d 375, 385 (Pa. Super. Ct. 2020) (“[N]either the issuing authority nor a reviewing court may consider any evidence outside the affidavits of probable cause in support of a search warrant.”), *overturned on other grounds*, 265 A.3d 602, 628 (Pa. 2021); *id.* at 386 n.11 (noting that it is “imperative that the agency reduce all allegations to writing” if the application for the entry order is decided *ex parte*). Pennsylvania is remarkable in terms of setting specific evidentiary requirements and specific procedural requirements for entry orders; most other states’ statutes and courts are silent on both matters.

237. *See* Idaho Dep’t of Health & Welfare v. Doe, 244 P.3d 247 (Idaho Ct. App. 2010); *State ex rel.* Dep’t of Hum. Servs. v. W.L.P., 202 P.3d 167, 173 (Or. 2009) (en banc); *People ex rel.* A.E.L., 181 P.3d 1186 (Colo. App. 2008); *State ex rel.* Child., Youth & Fams. Dep’t v. Michael T., 172 P.3d 1287 (N.M. Ct. App. 2007); *In re* Nicholas R., 884 A.2d 1059 (Conn. App. Ct. 2005); *In re* Corey P., 697 N.W.2d 647 (Neb. 2005); *State ex rel.* A.R. v. C.R., 982 P.2d 73 (Utah 1999); *In re* Diane P., 110 A.D.2d 354 (N.Y. App. Div. 1985); *In re* Christopher B., 147 Cal. Rptr. 390 (Cal. Ct. App. 1978); *In re* Robert P., 132 Cal. Rptr. 5 (Cal. Ct. App. 1976) (all holding the exclusionary rule to be inapplicable to family regulation proceedings); *see also* Abid v. Abid, 406 P.3d 476, 481 (Nev. 2017) (rejecting a *per se* rule that illegally obtained evidence is inadmissible in a child custody proceeding). One New York court found “evidence alleged to have been acquired illegally in violation of a person’s constitutional rights may properly be the subject of a suppression motion in a civil child abuse or neglect proceeding in Family Court.” *In re* Melinda I., 110 A.D.2d 991, 992 (N.Y. App. Div. 1985). However, there are no reported cases granting suppression in family court. Evidence may be suppressed in related criminal proceedings, *see* Germaine v. State, 718 N.E.2d 1125, 1130 (Ind. Ct. App. 1999), but most family regulation cases do not have a related criminal case. Gupta-Kagan, *Beyond Law Enforcement*, *supra* note 34, at 358.

238. *In re* Diane P., 110 A.D.2d at 357.

239. *Id.* at 355, *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) (describing balancing test to determine applicability of exclusionary rule to civil proceedings).

justify the drastic remedy of the exclusionary rule.²⁴⁰ As one court wrote, “the very paucity of exclusionary rule cases in the context of child welfare proceedings indicates that allegations of improperly obtained evidence in such proceedings are rare.”²⁴¹ This reasoning overlooks the incentive structure that the lack of an exclusionary rule itself creates. If parents object to the introduction of evidence obtained through an unlawful search, the court can find that the evidence was illegally obtained yet still admit the evidence.

Thus, parents’ lawyers—who in many jurisdictions are paid little, receive inadequate training, and carry high caseloads²⁴²—may see little reason to raise or vigorously contest objections to evidence obtained through deficient entry orders, and courts may pass over these issues cursorily if they are raised at all. It is worth noting, too, that parents’ lawyers may themselves be complicit in the problem-solving culture of family regulation proceedings. Even where the law affords their clients clear rights, parents’ lawyers may be reluctant to break with cultural norms of the courthouse out of fear of worse outcomes for other clients or merely out of discomfort with disrupting “the way things are done.”²⁴³ Regardless of lawyers’ ethical obligations to their clients, these systemic and cultural forces can limit the zealotry of representation.

Defense lawyers’ failure to vigorously represent their clients—whether due to confused allegiances, lack of incentives, lack of resources, or ignorance of their clients’ rights—further undercuts judges’ ability to assess applications for entry orders, as they must weigh them in the absence of a sharp presentation of facts and law. Indeed, Martin Guggenheim has described the absence of a strong defense bar as a separation of powers problem in and of itself. He points out that “judges *depend* on defense counsel to investigate cases and to present any critical issue to the court’s

240. See *State ex rel. A.R.*, 982 P.2d at 79; *In re Christopher B.*, 147 Cal. Rptr. at 394 (“[W]e see no necessity to extend the rule to the relatively few violations in child custody actions which are not criminal in nature.”).

241. *State ex rel. A.R.*, 982 P.2d at 79.

242. See Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 8–9 (2017) (summarizing studies of quality of parents’ counsel).

243. Breger, *supra* note 111, at 66, 82 (2010) (describing parents’ lawyers as “repeat players” who act to promote group interests and maintain social cohesion); Fraidin, *supra* note 81, at 933 n.108 (describing parents’ lawyers’ fears that their zealous representation on one case may jeopardize their appointment to future cases); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 56–58 (2000) (describing pressure on defense attorneys to “cooperate” with prosecutors and judges in criminal drug courts).

attention. When that does not happen, judges are unable to provide adequate oversight of executive action.”²⁴⁴

b. Lack of Access to Appellate Review

Parents may be tempted to seek the assistance of an appellate court to hold not just the executive but the dependency court itself to its legal obligation. But parents seeking appellate review face a tangle of questions of strategy, justiciability, and jurisdiction.

Just as parents asserting their rights in dependency court risk raising the ire of the judge and other parties, parents considering appealing an entry order must consider the reputational risk because, regardless of the outcome of their appeal, they may remain in front of the same dependency court judge for years to come.²⁴⁵ This calculation becomes more complicated still as parents must also navigate the high-stakes dilemma of whether to comply with an entry order while appellate review is pending. If parents allow a search, and then seek review, their appeal may be dismissed as moot.²⁴⁶ Yet if parents refuse to comply with an entry order, they may face civil or criminal contempt charges carrying the threat of fines or incarceration,²⁴⁷ and their refusal may constitute grounds to remove their children from their care.²⁴⁸ Some courts have recognized the dilemma that parents face if they must choose between complying and mooting the issue and not complying to keep the issue live at risk of losing their children.²⁴⁹ But within the same

244. Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 399 (2012) [hereinafter Guggenheim, *The People's Right*].

245. See *supra* notes 102–104 and accompanying text.

246. See, e.g., *In re J.S.1.*, 167 N.E.3d 698 (Ind. Ct. App. 2021) (unpublished) (dismissing appeal of motion to compel cooperation as moot because allegations were already found to be unsubstantiated and the granting of the motion did not have any collateral consequences); see *In re Anouck C.*, No. M2019-01588-COA-R3-JV, 2020 WL 7493078, at *4 (Tenn. Ct. App. Dec. 21, 2020) (dismissing challenge to investigatory order as moot because “the parties were able to cooperate in order for DCS to complete its investigation”).

247. See, e.g., COLO. REV. STAT. § 19-3-308 (2022); N.C. GEN. STAT. § 7B-303 (2022).

248. See *supra* notes 109–112, 220–221 and accompanying text.

249. *In re* Petition to Compel Cooperation with Child Abuse Investigation, 875 A.2d 365, 370–71 (Pa. Super. Ct. 2005) (“[T]he issues before us are clearly capable of repetition, yet evading appellate review,” where mother had permitted home search); *In re F.S.*, 53 N.E.3d 582, 591 (Ind. Ct. App. 2016) (“declin[ing] the State’s invitation to dismiss the case as moot and agree[ing] with Mother that this case involves a matter of constitutional proportions and is of great public interest,” where it was unclear if parent had complied with order while appeal was pending); see also *In re Stumbo*, 582 S.E.2d 255, 263 (N.C. 2003) (Martin, J., concurring) (“[O]nce such an order has been issued, a caregiver is faced with two options: (1) she can consent to the requests of the director, or (2) she can assert her constitutional right to freedom from impermissible searches and seizures as a ‘lawful excuse’ for noncompliance and risk contempt of court.”).

jurisdictions, courts apply exceptions to the mootness doctrine unevenly,²⁵⁰ leaving parents to guess at when or if they might be able to seek review of an entry order.

Further confounding *ex ante* appellate review, an entry order may be unappealable as a temporary or interim order.²⁵¹ Though some states allow for interlocutory review of preliminary orders affecting the physical placement of children in family regulation cases,²⁵² the availability of immediate review for entry orders is less certain.²⁵³ Appellate courts in at least two states have concluded that entry orders are temporary orders not subject to interlocutory appeal.²⁵⁴ These decisions decline to treat entry orders as final orders, instead treating them as orders issued to aid in the determination of issues raised in the family regulation agencies' petitions²⁵⁵—even though entry orders may be granted as standalone orders, absent any dependency proceeding.²⁵⁶ Pointing to the unpredictability of appellate review, parents elsewhere in the same states have successfully obtained review.²⁵⁷

If parents do not immediately appeal the issuance of an entry order and instead wait until the conclusion of any proceeding against them—akin to a criminal defendant who must wait to appeal the denial of a motion to suppress evidence until a judgment is entered—parents again must confront

250. Compare *In re J.S.1.*, 167 N.E.3d 698 (Ind. Ct. App. 2021) (unpublished) (dismissing as moot an appeal of a motion to compel cooperation with an investigation, in part because it had already considered such motions in past cases) with *In re A.H.*, 992 N.E.2d 960 (Ind. Ct. App. 2013) (reaching the merits of the same issue); see also *J.B. ex rel. Y.W.-B.*, 241 A.3d 375, 381 (Pa. Super. Ct. 2020), *overturned on other grounds*, 265 A.3d 602, 628 (Pa. 2021) (overturning trial court decision finding challenge to entry order moot where search had already taken place).

251. See generally MATTHEW P. BARACH, THE FAMILY LAW GUIDE TO APPELLATE PRACTICE 29 (2019) (surveying availability of interlocutory appeal of family court orders).

252. 3 SETH F. GORMAN, DONNA FURTH & MATTHEW BARACH, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 23:15 (2021) (collecting cases in which state courts found preliminary placement orders to be appealable).

253. Fraidin, *supra* note 81, at 962 (“[A]mong the dozens or hundreds of court decisions judges make while they are responsible for a child, virtually none is appealable.”).

254. *Tate v. Sharpe*, 777 S.W.2d 215, 217 (Ark. 1989) (finding that entry order was not a mandatory injunction and dismissing appeal for want of jurisdiction); *B.H. v. Tex. Dep’t of Fam. & Protective Servs.*, No. 03-18-00101-CV, 2018 WL 1220897, at *1 (Tex. App. Mar. 9, 2018) (finding that entry order was temporary order that was not subject to interlocutory appeal and dismissing appeal for want of jurisdiction); *In re S.D.*, No. 09-11-00192-CV, 2011 WL 2581914, at *1 (Tex. App. June 30, 2011).

255. *Tate*, 777 S.W.2d at 217 (“[This] order was obviously intended to aid in the determination of the issues raised in the complaint, nothing more. This order is not appealable. . . .”); *B.H.*, 2018 WL 1220897, at *1 (describing entry order as temporary order in aid of investigation).

256. Both Texas and Arkansas permit family regulation agencies to petition the family court for orders of investigation, without filing a petition alleging abuse or neglect. ARK. CODE ANN. § 12-18-609 (2022); TEX. FAM. CODE § 261.303 (West 2021).

257. *In re Berryman*, 629 S.W.3d 453, 457 (Tex. App. 2020) (“Mandamus is an appropriate remedy because the trial court’s issuance of a temporary order is not subject to interlocutory appeal.”).

the lack of a meaningful remedy. The lack of exclusionary rule allows appellate courts, like trial courts, to cursorily pass over Fourth Amendment issues.²⁵⁸ Indeed, there appear to be no reported appellate decisions finding that a completed search violated the Fourth Amendment and excluding evidence or devising any other remedy for the affected parents.²⁵⁹ Within the confines of the family regulation proceeding itself, parents can find no remedy for unlawful searches.²⁶⁰

c. Avoidance of Constitutional Issues

In those rare instances where parents do obtain review of family regulation searches, they must still confront a judiciary that consistently aligns itself with the legislature and the executive in a project of surveilling marginalized families. Even as legislatures have passed a litany of entry order statutes that sidestep central tenets of the Fourth Amendment and even as the executive justifies sprawling searches of families' homes on the

258. A Utah appellate court held that a search violated the Fourth Amendment but the exclusionary rule did not apply. *C.R. v. State ex rel. A.R.*, 937 P.2d 1037, 1042–43 (Utah Ct. App. 1997). On appeal, the Supreme Court of Utah found the exclusionary rule inapplicable and thus concluded it was “unnecessary to consider in this case whether the searches . . . were unreasonable under the Fourth Amendment.” *State ex rel A.R. v. C.R.*, 982 P.2d 73, 79 (Utah 1999).

259. Where courts have found completed searches unlawful, they have not crafted any remedy for the past harm to the litigants and have instead spoken in terms of guidance for future cases. *See In re F.S.*, 53 N.E.3d 582, 591 (Ind. Ct. App. 2016) (“Although a reversal might not afford Mother any relief given subsequent events, a decision on the merits will offer direction to courts in future cases where DCS seeks an order”); *In re* Petition to Compel Cooperation, 875 A.2d 365, 380 (Pa. Super. Ct. 2005) (Beck, J., concurring) (writing separately to provide additional direction to “future parties and courts”). One judge suggested that alternate means to deter agency misconduct might include civil litigation or the appointment of private prosecutors in cases where there was agency misconduct. Michael D. Bustamante, *Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children a Voice Through* Mathews v. Eldridge, 32 N.M. L. REV. 143, 172–73 (2002). The appointment of private prosecutors does not seem to have gained any traction. *See In re Adoption of Natasha*, 759 N.E.2d 1210, 1217 (Mass. App. Ct. 2001) (declining to follow *In re Dep’t of Soc. Servs. to Dispense with Consent to Adoption*, 429 N.E.2d 685, 688 (Mass. 1981), the case cited by Judge Bustamante in which state agency was replaced by private foster agency as prosecutor).

260. Indeed, the leading cases on Fourth Amendment issues in family regulation investigations are civil rights cases. But civil rights litigation is far from a sure shot. Setting aside access to justice, *see* Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child’s Unconstitutional Catch-22*, 71 FLA. L. REV. 831, 856–57 (2019) (describing difficulties poor litigants face in securing civil representation), qualified immunity allows courts to avoid reaching the merits on constitutional issues. As the Eleventh Circuit put it, “[s]tate officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of ‘clearly established law.’” *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012) (quoting *Foy v. Holston*, 94 F.3d 1528, 1537 (11th Cir. 1996)). Other circuits have similarly dismissed claims on qualified immunity grounds, even where they found that caseworkers violated the Fourth Amendment. *See, e.g.*, *Clark v. Stone*, 998 F.3d 287 (6th Cir. 2021); *Andrews v. Hickman County*, 700 F.3d 845, 859–63 (6th Cir. 2012); *Gates v. Tex. Dep’t of Protective & Regul. Servs.*, 537 F.3d 404 (5th Cir. 2008); *Tenenbaum v. Williams*, 193 F.3d 581, 601–05 (2d Cir. 1999).

slimmest of suspicions, state courts reviewing entry orders have rarely checked either the legislature or the executive.

Just three states' courts have read more stringent requirements into entry order statutes and held that in order to comply with the Fourth Amendment, family courts must find reasonable or probable cause and adhere to certain evidentiary requirements.²⁶¹ One other state reached the same result, but did so by avoiding the Fourth Amendment issue, instead construing a requirement for "good cause" in the statute to mean "reasonable or probable cause shown to believe that there is or has been an abuse of a child."²⁶² Of course, even these heightened standards of proof may in actuality provide little protection to parents, given the capacious definition of child neglect.²⁶³

Other courts, however, have declined to take even that minimal step to check the other branches, instead issuing narrow, fact-specific decisions that avoid not just constitutional issues but also any prospective gloss on statutes' standards.²⁶⁴ In this vein, courts may find that allegations underlying an investigation would not constitute child neglect if true, thereby leaving no legal grounds for an entry order.²⁶⁵ While beneficial to the parents in those cases, these decisions do not create any additional protections for future parents under investigation or provide prospective

261. See *Germaine v. State*, 718 N.E.2d 1125, 1130–31 (Ind. Ct. App. 1999) (holding that in a family regulation investigation, "the search of a private residence may be conducted only pursuant to a criminal search warrant issued by a neutral magistrate and supported by the traditional standard of probable cause applicable to criminal investigations," despite statute allowing agency to petition for an order upon good cause shown); *In re Petition to Compel Cooperation*, 875 A.2d at 377 (requiring agency to "file a verified petition alleging facts amounting to probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home," despite statute that was silent as to both standard of proof and form of evidence); *State v. Boggess*, 340 N.W.2d 516, 520–21 (Wis. 1983) (holding that caseworker's entry into home was visit under the Fourth Amendment and thus, "[a] warrant was therefore required for this intrusion unless it was justified under an exception to the warrant requirement," despite statute that was silent as to standard of proof and form of evidence).

262. *H.R. v. State Dep't of Hum. Res.*, 612 So. 2d 477, 479 (Ala. Civ. App. 1992).

263. See *supra* Section III.A.1. Heightened standards may also encourage courts to expand warrant exceptions beyond recognition. See, e.g., *Boggess*, 340 N.W.2d at 524–25 (finding exigency existed to justify home entry); *id.* at 530–31 (Abrahamson, J., dissenting) (recounting evidence available to worker at time of home entry and arguing that this information was insufficient to support a reasonable belief that immediate aid was needed in the home); see also Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1013–14 (2003) (arguing that "probable cause," as applied in *Boggess*, "means a lesser evidentiary predicate in cases of exigency, because the social costs of not searching are potentially so high").

264. E.g., *In re Stumbo*, 582 S.E.2d 255, 261 (N.C. 2003) (finding that anonymous report of a naked toddler unattended in a home's driveway should not have triggered a neglect investigation and thus the petition charging the parents with interfering or obstructing an investigation and the subsequent entry order were invalid); *In re Berryman*, 629 S.W.3d 453, 459 (Tex. App. 2020) (finding entry order invalid because supporting affidavit failed to allege facts constituting neglect, where affidavit alleged that child was heard "crying inside a closet with door shut in the residence," but mother explained to investigator that the "closet" was a walk-in closet off master bedroom that had been converted to nursery).

265. E.g., *Stumbo*, 582 S.E.2d at 261; *Berryman*, 629 S.W.3d at 459–60.

guidance to parents, caseworkers, or lower courts regarding the circumstances under which the state may lawfully enter a home when there *is* a sufficient allegation of neglect.²⁶⁶ Rather, they highlight the high degree of subjectivity written into the definition of neglect²⁶⁷ and leave intact legislative schemes that permit the executive to invade the homes of thousands of other parents annually, based on similarly thin allegations.

Indeed, courts seem intent on smoothing over possible constitutional issues without disturbing the other branches' surveillance schemes. Even where courts have acknowledged that the Fourth Amendment applied to caseworkers' home entries, they have fallen back on general tenets of "reasonableness,"²⁶⁸ rather than holding the state to the warrant requirement or a recognized exception to it.²⁶⁹ Underlying these decisions is the assumption that if a family is under investigation, there is a reason for it: that is, that surveillance is a necessary and "reasonable" aspect of the state's schemes to keep children safe, even absent a particularized showing of probable cause.²⁷⁰ While judges may disallow searches at the extremes, they appear loathe to disrupt the family regulatory scheme more broadly.

266. *Stumbo*, 582 S.E.2d at 262 (Martin, J., concurring).

267. For instance, in *In re Stumbo*, the Supreme Court of North Carolina found that a report of a naked toddler unattended in a home's driveway should not have triggered a neglect investigation and invalidated an entry order petition, 582 S.E.2d at 261, but the North Carolina Court of Appeals later upheld not just an investigation but a *finding* of neglect based on a report that a 16-month-old child had been left unattended for 30 minutes. *In re D.C.*, 644 S.E.2d 640, 645 (N.C. Ct. App. 2007); *see also In re D.A.D.*, No. COA12-1091, 2013 N.C. App. LEXIS 299, at *4 (N.C. Ct. App. April 2, 2013) (upholding neglect finding based on several occasions where a 7-year-old did not have a key to enter his home upon arriving home on the school bus).

268. *Wildberger v. State*, 536 A.2d 718, 723 (Md. Ct. Spec. App. 1988) (finding that home search was "reasonable" and supported by state's statutory obligation to investigate the condition of any child in the same household as a child named in a report); *C.R. v. State ex rel. A.R.*, 937 P.2d 1037, 1041 (Utah Ct. App. 1997) (finding search "unreasonable").

269. In *C.R. v. State ex rel. A.R.*, the court recognized that a warrantless search of a home was presumptively unreasonable but analyzed whether the search was reasonable pursuant to the considerations laid out in *Terry v. Ohio*, 392 U.S. 1 (1968). 937 P.2d at 1039–42. In *Wildberger*, the court did not explain why a warrant was not required. 536 A.2d at 723; *see also City of Laramie v. Hysong*, 808 P.2d 199, 204 (Wyo. 1991), *overruled in part by Georgia v. Randolph*, 547 U.S. 103 (2006). A New Jersey court held that family regulation home searches fulfilled a "special need" and thus are subjected to a relaxed standard. *N.J. Div. of Youth & Fam. Servs. v. Wunnenberg*, 408 A.2d 1345 (N.J. Super. Ct. App. Div. 1979). This "special needs" justification was later rejected by the Third Circuit in *Good v. Dauphin County. Social Services. for Childen & Youth*, 891 F.2d 1087, 1096 (3d Cir. 1989). However, New Jersey courts have continued to rely on *Wunnenberg*. *See, e.g., State v. Johnson*, 799 A.2d 608, 611 (N.J. Super. Ct. App. Div. 2002) *overruled in part by State v. Dispoto*, 913 A.2d 791 (N.J. 2007).

270. *Wunnenberg*, 408 A.2d at 1348 (permitting "reasonable" home searches in the "best interests" of the child, and finding standard met by mere existence of prior neglect finding against mother).

B. The Failure of Separation of Powers to Check Home Searches

The Fourth Amendment situates government invasions of the home as an exception; the family regulation system situates them as a rule. This basic conflict arises from the problem-solving model, through which the legislature has tasked the judiciary and the executive with gathering as much information as possible regarding families under investigation and doing so under a “cooperative” model. By unifying the interests of the three branches, the problem-solving model undercuts not only the values of the Fourth Amendment but also the mechanism by which those values are enforced, the separation of powers.

The theory of separation of powers assumes that each branch will be motivated to check the others due to its distinct interests and ambitions.²⁷¹ But there is no guarantee that separating the government into distinct branches will render the interests of the branches distinct.²⁷² This is perhaps most obvious in periods of unified government, where one party holds power in all three branches.²⁷³ But in certain contexts, that problem is more universal. For instance, in the criminal context, the pressure to appear “tough on crime” cuts across political parties and across branches of government.²⁷⁴ There is rarely a powerful countervailing interest against that pressure. Criminal laws disproportionately target poor people and Black, Latinx, and Native people, groups that lack political capital and whose voting power has been systematically diluted.²⁷⁵ Legislatures pass expansive laws criminalizing broad swaths of behavior,²⁷⁶ and these laws

271. THE FEDERALIST NO. 51 (James Madison).

272. See Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 100 (2016); Epps, *supra* note 40, at 41.

273. Epps, *supra* note 40, at 41–42.

274. See Baughman, *supra* note 40, at 1106–07 (describing legislative incentives to “expand offenses and enact more severe punishments”); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 733 (2005) (“Sentencing commissions are even more vulnerable to political controls because the executive and legislature, regardless of their respective political party, are more likely to agree than in other contexts.”); see also William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 803 (2006) (describing legislators and prosecutors as “natural allies” and noting that the “trend these days is to blame democracy for that state of affairs,” but arguing that that explanation is insufficient).

275. See Richard L. Hasen, *Civil Right No. 1: Dr. King’s Unfinished Voting Rights Revolution*, 49 U. MEMPHIS L. REV. 137, 165 (2018); Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1092–93 (2021); Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994).

276. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001) (“Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas. Appellate courts lack the doctrinal tools to combat those tendencies.”).

then give police and prosecutors more grounds on which to initiate investigations and to allege probable cause exists to support a search warrant. The judiciary, for its part, approves these tactics by and large.²⁷⁷ Indeed, judges may have personal reasons to defer to government interests: not only are they themselves members of the government, but they often worked in the same prosecutors' offices whose applications for warrants they are now deciding.²⁷⁸

These same dynamics are apparent in the family regulation system. The desire to appear "tough on child abuse" might be even less partisan than the desire to appear tough on crime.²⁷⁹ Underpinning this desire is a centuries-old narrative pathologizing poor and marginalized parents and assuming that they are in need of surveillance.²⁸⁰ The parents targeted by the family regulation system are ill-positioned to combat this as they too have little political capital and often find themselves facing off against foster and adoptive parents who have deeper pockets and powerful connections.²⁸¹

277. Jessica Miller & Aubrey Wieber, *Warrants Approved in Just Minutes: Are Utah Judges Really Reading Them Before Signing Off?*, SALT LAKE TRIB., (Jan. 16, 2018, 9:13 AM), <https://www.sltrib.com/news/2018/01/14/warrants-approved-in-just-minutes-are-utah-judges-really-reading-them-before-signing-off/> [<https://perma.cc/F8YJ-Q944>] (finding that judges in Utah granted 98% of warrant applications and approved more than half of them in ten minutes or less); Stuntz, *supra* note 16, at 2183, 2183 n.142 (referring to the "rubber-stamping" of warrants and reviewing study showing that 8%, at most, of warrants are denied); Renée McDonald Hutchins, *Policing the Prosecutor: Race, the Fourth Amendment, and the Prosecution of Criminal Cases*, CRIM. JUST., Fall 2018, at 14, 18 (summarizing decades of studies on the success of suppression motions and describing success rate as "abysmal" and as low as 1%).

278. See, e.g., Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/T42H-XZ8U>] (finding that former courtroom advocates for the government outnumber former advocates for individuals against the government by nearly seven to one on the federal bench); Amanda Powers & Alicia Bannon, *State Supreme Court Diversity*, BRENNAN CTR. FOR JUST. (May 25, 2022), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update> [<https://perma.cc/D7D7-8AEG>] (finding 39% of sitting state supreme court justices were former prosecutors, as compared to just 7% who were former public defenders).

279. See, e.g., Andy Newman, Ashley Southall & Chelsia Rose Marcius, *These Children Were Beaten to Death. Could They Have Been Saved?*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/nyregion/child-abuse-reports-deaths-nyc.html> [<https://perma.cc/7J6W-RRGH>] (quoting caseworkers' union head describing family regulation agency as "the only agency that is expected to have 100 percent success stories.").

280. See *supra* Section I.B.

281. This dynamic is apparent around the country. The Supreme Court heard a case in the October 2022 Term alleging that the Indian Child Welfare Act's preference for placing Indian children within tribes is an unconstitutional race-based preference. *Brackeen v. Haaland*, 142 S. Ct. 1205 (2022) (No. 21-380). The plaintiffs, a white anesthesiologist and engineer who adopted a Navajo child, are represented *pro bono* by Gibson, Dunn & Crutcher LLP, a firm whose other clients have a deep interest in curtailing Native sovereignty. See *Brackeen v. Haaland*, SCOTUSBLOG <https://www.scotusblog.com/case-files/cases/brackeen-v-haaland/> [<https://perma.cc/4TDQ-BNY9>] (last visited Feb. 12, 2023); Joe Patrice, *Most Firms Don't Advocate Cultural Genocide Pro Bono But This*

The design and culture of the family regulation system amplify the shared-interest problems already on display in the criminal legal system. First, the problem-solving orientation runs up against the basic premise of the Fourth Amendment. Whereas the Fourth Amendment assumes the government should not have easy or expansive access to the home, the problem-solving model requires that the government collect *more* information, instead of cabining investigations.²⁸² Each branch appears to share that desire. Through their broad reporting requirements, definitions of neglect, and investigative and search mandates, legislatures authorize a huge number of invasive and expansive investigations.²⁸³ Executive agents who conduct searches expect access to all areas of families' homes and threaten severe penalties for failures to comply.²⁸⁴ And the judiciary approves such investigatory tactics and itself may order them.²⁸⁵ These sprawling, speculative investigations—where allegations of any type of neglect serve as license to investigate all aspects of a family's life—call to mind the very sorts of general warrants that the Fourth Amendment rejects.

To see these dynamics at play, consider a report Tennessee might receive about a child who lives with only his mother. The report might allege that, while the child was on a visit with his father, his father did not bring him to school. Such a report could constitute neglect under Tennessee's broad statutory definition.²⁸⁶ This report would trigger a requirement that the investigating caseworker must visit the child's home²⁸⁷—here, their home with their mother—despite the absence of any tie between the report and the condition of the mother's home, or indeed the condition of any home,²⁸⁸ and despite the presumptive unreasonableness of a warrantless home search in

Biglaw Firm Will!, ABOVE THE LAW (Nov. 8, 2022, 1:20 PM), <https://abovethelaw.com/2022/11/supreme-court-indian-child-welfare-act-gibson-dunn> [https://perma.cc/5VPQ-Y9A2]. In New York, in two legislative cycles, the legislature has passed a bill that would permit judges to enter orders allowing contact between children and their biological families after their parents' rights are terminated; in both years, the state's governor vetoed the bill after intensive lobbying by the Adoptive and Foster Family Coalition. *Vetoed by Governor Hochul: New York State Bill S6357 | A6700*, ADOPTIVE & FOSTER FAM. COAL. N.Y. <https://affny.org/nys-bill-s6357/> [https://perma.cc/9R7N-EGNY] (last visited Feb. 12, 2023).

282. See *supra* Section I.C.

283. See *supra* Sections I.A., III.A.1.

284. See *supra* Section III.A.2.

285. See *supra* Section III.A.3.

286. See TENN. CODE ANN. § 37-1-102(b)(13)(f), (g) (2022) (setting forth ten separate grounds to find a child "dependent and neglected," including that a child is "in such condition of want or suffering or is under such improper guardianship . . . as to injure or endanger the morals or health such child of others" and "who is suffering from abuse or neglect.").

287. TENN. CODE ANN. § 37-1-406(e) (2022).

288. See *id.* (requiring a search of "the child's home" for all investigations and making no mention of any nexus between the report and the condition of the home to be searched).

a family regulation investigation.²⁸⁹ If the mother admits the worker into her home, the caseworker will likely look in every room, interview the child, open cabinet and refrigerator doors, and perhaps conduct a body check on her child, in no way tailoring the search of the home to the allegations. If she refuses to admit the caseworker, the agency may threaten her with the dissolution of her family or police involvement.²⁹⁰ It may also petition for an entry order, and “upon cause shown,” a court may order the mother “to allow entrance for the interview, examination, and investigation.”²⁹¹ The order need not specify the locations in the home to be searched or particular items to be seized. A judge will not only likely sign off on the entry order,²⁹² but may also hold the mother’s initial noncompliance against her—even though she was never the subject of the initial report of child maltreatment. The mere invocation of child neglect sets in motion an invasive investigation into all areas of her life.

Second, the problem-solving orientation of dependency courts blurs the formal and functional separation of powers. Legislatures have placed judges in quasi-executive roles by authorizing them to order investigations and order the executive to undertake particular investigatory steps.²⁹³ This heightens the judiciary’s shared interest with the executive and the legislature in gathering as much information as possible about families. It may also draw on judges’ pre-existing allegiances to the government or family regulation agencies.²⁹⁴ Moving a step beyond criminal court where the executive and the judiciary may share political interests, in dependency court, the judiciary and the executive may be fully united in their more immediate and concrete goals.

Finally, the criminal legal system demonstrates ably how the branches’ shared interests increase executive power and decrease oversight. There, plea-bargaining places a huge swath of criminal prosecutions outside the oversight of the judiciary.²⁹⁵ Specific to the search context, plea-bargaining incentivizes cooperation with investigations and insulates searches from

289. *Andrews v. Hickman County*, 700 F.3d 845, 859 (6th Cir. 2012) (holding that case workers are bound by Fourth Amendment reasonableness and warrant requirements for searches).

290. *See Clark v. Stone*, 998 F.3d 287, 302 n.6 (6th Cir. 2021) (approving of agent’s statement to parent threatening possible removal of children for lack of compliance).

291. TENN. CODE ANN. § 37-1-406(e) (2022).

292. *See supra* Sections I.C, III.A.3.

293. *See supra* note 99 and accompanying text.

294. Anecdotally, while I was in practice, I regularly appeared in front of four judges. None had backgrounds representing parents and all four employed court attorneys who had represented the agency now prosecuting cases in front of them.

295. Barkow, *Separation*, *supra* note 40, at 996–97; *see also* William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 557 (2016); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 257 (2006).

review.²⁹⁶ This trend is not a naked power grab by the executive. Instead, legislatures have passed broad laws that enable overcharging, and courts have declined to closely monitor plea bargaining while at the same time approving of a growing list of exceptions to the warrant requirement, leaving police more avenues into individuals' homes without seeking judicial approval beforehand, or risking suppression after the fact.²⁹⁷ These decisions give the executive greater authority to conduct sprawling investigations, which turn up more evidence, and thus create more leverage for the executive and increase pressure on defendants to plea.²⁹⁸

The problem-solving bent of the family regulation system magnifies this tendency to hand unchecked power over to the executive. Whereas the criminal legal system retains, at least formally, an adversarial orientation,²⁹⁹ dependency courts have rejected such a "penal law atmosphere" and prized "cooperation." Starting during investigations and continuing during subsequent court proceedings, parents are pressured to consent to executive actions. Their failure to do so may lead to the separation of their families—a powerful threat to hold out over anyone. If parents do consent, executive actions then take place without any oversight from the other branches. Of course, if they do not consent, the oversight provided by the other branches offers little protection.

296. See Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1628 (2017) (describing pressure to share information in exchange for leniency); Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 79–80 (2015) (describing risks of litigating suppression to receiving a favorable plea offer); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding two-thirds of federal cases settled by plea incorporated an appeal waiver). But see Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 133 (1995) ("[T]here are specific issues that can be raised on appeal after a plea in those states which have created statutory exceptions For example, in California and New York, a defendant may raise suppression issues on appeal, notwithstanding the fact that the judgment is predicated upon a plea of guilty.").

297. Bradley, *supra* note 16, at 1473–74 (listing more than twenty exceptions to the probable cause or warrant requirement); see also Tokson, *supra* note 16, at 742 (summarizing critiques of Fourth Amendment jurisprudence); California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable.").

298. See Matthew C. Ford, *The Fourth Amendment Hearing: Prompt Judicial Review of All Fourth Amendment Warrantless Conduct for an Imprisoned Defendant*, 55 CATH. U. L. REV. 473, 501–03 (2006).

299. See William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 471–72 (2021) (describing purpose of Confrontation Clause as "ensuring an adversarial criminal process"). But see Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 164 (2012) ("Plea bargaining today is fundamentally not adversarial but collaborative (some would say collusive)."); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121 (1998).

Consider a situation where a school official calls in a report for a child missing too much school. Under New York's statutory scheme, that would trigger an investigation and a home search.³⁰⁰ The state agent who seeks to conduct the home search may extract consent from the parent by warning of dire consequences of refusing to cooperate, including a family separation, no matter how improbable that might actually be. Once in the home, the caseworker may observe a "spot of dirt" on a child's arm, "inadequate sleeping arrangements," "the odor of marijuana," or "a bottle of psych meds."³⁰¹ These concerns would likely never have attracted the attention of the state if the state were not already in the home. Yet with this information, the executive agency may pressure the parent to consent to ongoing "voluntary" services—including ongoing surveillance—in the absence of a court case.³⁰² Or the agency may file a petition in court alleging that the parent neglected their child based on these new grounds, rather than the original allegation. If a parent refuses to consent to the search, nine times out of ten, the court, itself an agent of surveillance and a proponent of cooperation in the problem-solving system, will order it anyway.³⁰³

The problem-solving orientation ruptures the fundamental premise of separation of powers: that each branch's distinct ambition and self-interest will check the others. Instead, the goal of surveilling and policing poor Black, Latinx, and Native families cuts across branches (and across political parties).³⁰⁴ If the government's pursuit of that goal is to be checked, those checks must come from a source other than the separation of powers.

300. See *supra* note 184 and accompanying text.

301. Each of these examples are taken from casenotes or petitions I reviewed in my time in practice representing parents accused of neglect or abuse. See also Suzanne Hirt, *How to Protect Parental Rights in a Child Welfare Investigation by Child Protection Agency*, USA TODAY (April 6, 2022, 5:03 AM), <https://www.usatoday.com/story/news/investigations/2022/04/06/parental-rights-child-protection-agency-probe/7250541001/> [<https://perma.cc/YQ93-B83Z>] (quoting a former attorney for the Florida Department of Children and Families explaining that in an investigation, "It's not just illegal things they're looking for . . . It's anything and everything they can possibly use against you . . .").

302. For example, in spring 2019, prior to the disruption of COVID, more than 80% of "voluntary" preventive cases in New York began as neglect or abuse investigations, while just 4% began as self-referrals. N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: JULY 2020 33 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/07.pdf> [<https://perma.cc/625Y-URR6>].

303. See *supra* notes 98–99, 109–111, 188 and accompanying text.

304. The Adoption and Safe Families Act, which has been described as "the most family destructive law ever enacted since slavery was abolished," was passed with bipartisan support during the Clinton Administration. Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of The Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 715 (2021).

C. *The Absence of Outside Checks*

With the separation of powers failing to check government searches in the family regulation system, we might hope that checks outside the separation of powers would fill that role. Instead, even those checks that provide some protection in the adversarial criminal legal system fail to provide any meaningful protection in the problem-solving family regulation system.³⁰⁵

1. *Individual Rights Protections*

The protections extended in the Bill of Rights check government power and safeguard individuals' rights on both an individual and a systemic level by providing concrete rights to individuals hauled before courts by the government and giving rise to prophylactic measures that serve as systemic checks on each branch.³⁰⁶ The problem-solving model of dependency court impedes protections on both of these levels.

First, individual parents under investigation enjoy fewer concrete rights. In the criminal legal system, the Bill of Rights extends a promise of outside constraints on state power, even if that promise now looks threadbare.³⁰⁷ As compared to defendants in the criminal legal system, parents in the family regulation system are afforded fewer constitutional protections. There is no right against self-incrimination (meaning too that judges may draw negative inferences from a failure to testify), no right to jury trials, no prohibition on double jeopardy, and no guaranteed right to counsel.³⁰⁸ (Of course, the right to privacy at the core of the Fourth Amendment is itself thin in this setting.) In fact, courts rely on the classification of family regulation proceedings as

305. The outside checks discussed here are a representative, rather than an exhaustive, list. For a more extensive discussion of outside checks and balances in the criminal context, see Baughman, *supra* note 40, and Epps, *supra* note 40.

306. For example, *Mapp v. Ohio*, 367 U.S. 643 (1961), limited judicial discretion by requiring the exclusionary rule as a remedy and aimed explicitly to re-shape and re-incentivize executive behavior; *Miranda v. Arizona*, 384 U.S. 436 (1966), imposed new obligations on police officers while *Brady v. Maryland*, 373 U.S. 83 (1963), did the same for prosecutors; and *Gideon v. Wainwright*, 372 U.S. 335 (1963), implicitly tasked legislatures with creating systems for indigent defense.

307. See, e.g., Baughman, *supra* note 40, at 1080–81; Barkow, *Separation*, *supra* note 40, at 1032; William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 977–78 (2001) (arguing that the institution of prophylactic *Miranda* rights left police tactics unregulated but also occupied the field so a more effective regulatory scheme was not developed).

308. *Sinden*, *supra* note 109, at 349; *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981) (finding no blanket right to counsel in termination of parental rights proceedings).

civil and rehabilitative rather than criminal and punitive to justify the absence of these rights.³⁰⁹

Second, this absence of substantive rights has stunted the development of prophylactic systemic checks on government action. This allows the government to search homes more easily, for reasons both obvious and subtle. Most obviously, courts' failure to impose the exclusionary rule or any other remedy for unlawful searches, even as they recognize that the Fourth Amendment applies to family regulation searches, leaves parents a right without a remedy, and relieves agencies of internalizing the cost of the exclusionary rule.³¹⁰ More subtly, the absence of prophylactic procedural protections—like *Miranda* warnings³¹¹ and a guaranteed right to counsel³¹²—leaves parents less capable of asserting the rights that they do have.

That parents do not know their rights³¹³ marks a sharp departure from the criminal context, where constitutional rights may have a greater hold on the public imagination than they do in court.³¹⁴ Without that knowledge, parents are left more vulnerable to executive and judicial actors who might misrepresent their rights and obligations to them. Judges may tell parents that they have limited or no Fourth Amendment protections, as in *Clark v. Stone*.³¹⁵ Caseworkers may tell parents that they “need” to complete a home search as a final step before closing out an investigation, then use information gained during that home search to file a case in court, that their lack of consent will lead to police involvement, or that it “won’t look good” to a judge and will be taken as a sign that they are “playing games,” hiding

309. See, e.g., *Lassiter*, 452 U.S. at 26; see also *supra* notes 237–241 and accompanying text (collecting cases declining to apply exclusionary rule to dependency proceedings).

310. See *supra* notes 237–241 and accompanying text.

311. Sinden, *supra* note 109, at 349.

312. *Lassiter*, 452 U.S. at 31. Even when parents are assigned counsel, few states have created robust family defense systems; instead, defense is often provided by individual panel attorneys who may themselves share the “problem-solving” outlook and encourage their clients to cooperate rather than asserting their rights, or who may be overworked and under-resourced and unable to mount a vigorous defense, Sankaran, *supra* note 242, at 8–9, or who may see little reason to raise issues for which there is no remedy.

313. See, e.g., Burrell, *supra* note 69, at 145.

314. Consumers, for instance, may choose between no fewer than thirty doormats on Amazon bearing the phrase, “Come Back With a Warrant.” Search Results for “Come Back With a Warrant Doormat,” AMAZON, <https://www.amazon.com/> [<https://perma.cc/RNP7-W5BA>] (Follow Amazon hyperlink; then type “come back with a warrant” in the search bar and click “search”). Popular music also demonstrates a solid public knowledge of constitutional rights in the criminal context. See, e.g., JAY-Z, 99 *Problems*, on THE BLACK ALBUM (Roc-A-Fella/Def Jam 2004) (“Well, do you mind if I look ‘round the car a little bit?’ . . . And I know my rights so you gon’ need a warrant for that. . . . Well, I ain’t pass the bar, but I know a little bit. Enough that you won’t illegally search my shit.”).

315. 998 F.3d 287, 301–02 (6th Cir. 2021).

something, or are a danger to their children.³¹⁶ Parents, in the dark as to the contours of their rights, have little ground to push back. But even parents who know their rights and who might have counsel may be all too aware of the real-world consequences of asserting their rights, given the problem-solving orientation.³¹⁷

2. *Internal Separation of Functions*

Administrative law provides another model of checking government power: power might be diffused within the confines of a single political institution.³¹⁸ The internal separation of functions and internal review are norms in the administrative state, and in non-administrative law contexts, as power accumulates in the executive, we might expect to see similar norms take hold there as well.³¹⁹

But scholars have decried their absence in the criminal legal system.³²⁰ Particularly in a system that has come to concentrate so much power in the hands of the executive, the lack of structural separation of adjudicative and executive power within prosecutors' offices may, as Rachel Barkow argues, constitute the "most significant design flaw in the federal criminal system."³²¹ Per this argument, a design that charges the same prosecutor with investigating, advocating, and enforcing the law, as well as with making a final decision on the merits, inevitably gives rise to biased decision making because the actor commits themselves "intellectually and

316. Each of these examples is drawn from my practice in New York City. I would meet parents in court who had allowed caseworkers to search their homes during investigations, based on caseworkers' representations—then had cases filed against them. Threats and misrepresentations in other jurisdictions can be just as severe. *See* *Lowther v. Child. Youth & Fams. Dep't*, No. 1:18-cv-00868 KWR/JFR, 2020 WL 5802039, at *13 (D.N.M. Sept. 29, 2020) (describing plaintiff's allegation that "[s]he was immediately and repeatedly informed that she could be arrested or detained for denying access to the children," under a New Mexico statute, N.M. STAT. ANN. § 30-6-4 (2014), that criminalizes parents' failure to cooperate with investigations despite a federal court's previous holding that the statute "does not allow any search at all, and certainly does not authorize a warrantless search, or one that does not fall within the narrow exceptions for a warrantless search." *Payne v. Wilder*, No. CIV 16-0312 JB/GJF, 2017 WL 2257390, at *41 (D.N.M. Jan. 3, 2017)).

317. *See supra* Sections III.A.2–A.3.

318. Epps, *supra* note 40, at 26–27.

319. *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 437–40 (2009) (describing the heightened benefits of internal separation of functions in light of the legislature's and the judiciary's limited power to check executive power).

320. Barkow, *Separation*, *supra* note 40, at 1025; Epps, *supra* note 40, at 55; Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009).

321. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) [hereinafter Barkow, *Institutional Design*].

psychologically” to the prosecution.³²² This, in turn, raises the likelihood that they reach a “biased and erroneous conclusion.”³²³

A full accounting of the internal structures of family regulation agencies and the offices that prosecute dependency matters is beyond the scope of this article.³²⁴ But it is worth noting that in many jurisdictions, the functions of executive offices are even more muddled in the family regulation system than in the criminal system. In the criminal system, police typically hand off cases to prosecutors’ offices, which then exercise discretion over charging decisions.³²⁵ In the family regulation system, only eleven states and the District of Columbia use that model.³²⁶ The remaining jurisdictions place charging decisions in the hands of the agencies,³²⁷ the equivalent of placing charging decisions in the hands of police. Thus, rather than making charging decisions themselves, dependency prosecutors in most jurisdictions carry forward the prosecutions that agencies elect to pursue.³²⁸ Whatever concerns we might have about a prosecutor’s office that does not wall off investigative decisions from charging decisions, those concerns only grow where we place prosecutors under the same roof as—or beholden to—agencies’ case-working staff.

The family regulation system adds another wrinkle with the uncabined role of the dependency court judge. Counter to any sort of structural separation of adjudicative and executive functions, dependency court judges concurrently play the role of investigator and adjudicator under the problem-solving model.³²⁹ The same judge who authorized an agency to initiate an investigation into a family may continue to render decisions for years to come regarding the integrity of that same family, increasing the

322. *Id.* at 895–96.

323. *Id.* at 896.

324. For an accounting of the various structures states employ for family court prosecutions, see Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743 (2018) [hereinafter Gupta-Kagan, *Rethinking Family-Court Prosecutors*].

325. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 21 (1998) (outlining prosecutors’ power to bring charges “more or less serious than that recommended by the police officer, as long as there is probable cause”); Barkow, *Institutional Design*, *supra* note 321, at 876; *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”). *Cf.* Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1393 (2021) (describing prosecutors’ discretion in sentencing). *But see* Jonathan Abel, *Cops and Pleas: Police Officers’ Influence on Plea Bargaining*, 126 YALE L.J. 1730 (2017) (describing role that police play in plea bargaining).

326. Gupta-Kagan, *Rethinking Family-Court Prosecutors*, *supra* note 323, at 746–47.

327. *Id.*

328. *Id.*

329. *See* Fraidin, *supra* note 81, at 936.

likelihood that the judge will continue to issue decisions that support their initial assessment of a case.³³⁰ A judge in New York, for example, may order the executive agency to conduct an investigation “in order to determine whether a proceeding . . . should be initiated.”³³¹ At the point that the investigation is initiated, a baseline distrust has likely already entered the judge’s mind. If the parent does not cooperate with the investigation, the agency may seek an entry order.³³² The judge, who themselves ordered the investigation in order to obtain information on a family, will be inclined to issue that order. Later, the same judge may decide whether to leave a child at home or place a child in foster care—a decision that turns, in part, on the likelihood that court orders short of removal will mitigate risk to the child and that the parent will comply with those orders.³³³ If the judge, already skeptical of the parent’s likelihood to “comply,” removes the child, then that same judge will continue for months or years more to decide the family’s separation or reunification. Those decisions, too, will be infected both by the judge’s initial distrust of the parent and by the judge’s desire to retroactively re-affirm the correctness of their initial decisions by continuing to find risk to a child.³³⁴

Thus, this lack of internal separation of functions in the family regulation system fails to check government searches, and may even encourage further searches, as actors within each branch attempt to buttress their initial decisions in the case.³³⁵

3. *Public Oversight*

If the government will not check itself, the public might instead play that role, through public pressure and electoral accountability.³³⁶ For the public to serve as a check on the family regulation system, the family regulation system must first pierce the public consciousness. Yet the family regulation system often operates in darkness. States strictly guard the confidentiality of family court files and records compiled for family regulation

330. *Id.* at 963–64.

331. N.Y. FAM. CT. ACT § 1034(1)(b) (McKinney 2022).

332. *See id.* § 1034(2)(b) (allowing agency to seek entry order only after parent has denied entry to caseworker).

333. *Nicholson v. Scopetta*, 820 N.E.2d. 840, 852 (N.Y. 2004).

334. *See* Fraidin, *supra* note 81, at 964 (recounting research showing that “after just *one* iteration of a determination . . . a decision-maker’s primary goal is to defend the wisdom and insight of the decision.”). *Cf. id.* at 966 (collecting cases where judges’ tendency to bolster their initial decisions in dependency cases led to them taking punitive measures against the subject children themselves).

335. *Id.* at 943, 964.

336. Epps, *supra* note 40, at 78.

investigations, in the name of protecting parents' and children's rights.³³⁷ This is a somewhat ironic stance given states' own invasiveness and use of family regulation records against families.³³⁸ Family court proceedings also routinely take place behind closed doors. More than half of states presumptively close dependency proceedings to the general public,³³⁹ and even among the "open" states, access is limited by law or in practice.³⁴⁰ Not only may the public be barred from the courtroom but states publish limited data on family court operations, even as compared to criminal court operations.³⁴¹ Agencies themselves may not even track key data.³⁴² The combination of confidential records and closed courtrooms leaves the public with a limited sense of the operations and scale of the family regulation

337. The federal Child Abuse Prevention and Treatment Act requires states receiving federal grants to certify that they have "methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians." 42 U.S.C. § 5106a(b)(2)(B)(viii).

338. See generally Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1 (2021) (summarizing the history, scope, and use of states' child maltreatment registries and questioning the sufficiency of due process protections for people listed on registers).

339. As of 2012, twenty-seven states and the District of Columbia had presumptively closed proceedings. JAMIE KAPALCO, CHRON. SOC. CHANGE, A WATCHED SYSTEM: SHOULD JOURNALISTS BE GRANTED ACCESS TO JUVENILE DEPENDENCY COURT PROCEEDINGS? 10 (2012), https://imprintnews.org/wp-content/uploads/2019/03/A-Watched-System-Nov-2012_rev_03.07.19_web.pdf [<https://perma.cc/68UX-DCNC>].

340. Twenty-four states had presumptively open proceedings. *Id.* But see William Wesley Patton, *Bringing Facts into Fiction: The First "Data-Based" Accountability Analysis of the Differences Between Presumptively Open, Discretionarily Open, and Closed Child-Dependency-Court Systems*, 44 U. MEMPHIS L. REV. 831, 841–42 (2014) (noting that Florida, Kansas, and Georgia are generally labeled as "presumptively open," despite barring the public and the press from certain hearings); William Glaberson, *New York Family Courts Say Keep Out, Despite Order*, N.Y. TIMES (Nov. 17, 2011), <https://www.nytimes.com/2011/11/18/nyregion/at-new-york-family-courts-rule-for-public-access-isnt-heeded.html> [<https://perma.cc/6B5F-J5VN>] (reporting that of the forty courtrooms across the city a reporter tried to enter in a one-week period, he gained access to five). In the decade since, little has changed; in my practice in New York County Family Court, court officers regularly asked the identity of non-lawyers seeking to enter courtrooms and prevented members of the public from entering proceedings about families other than their own.

341. For instance, the National Center for State Courts collected complete data from thirty-two states regarding their incoming criminal caseload and just twelve states regarding their juvenile dependency caseload. CT. STAT. PROJECT, CONF. OF ST. CT. ADM'RS & NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST 2018 DATA 20–21 (2020), http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf [<https://perma.cc/WM6X-PPLH>]. Likewise, New York's Office of Court Administration maintains a public "dashboard" providing up-to-date data on criminal court arraignments across the state, including the charges, the demographics of the person arraigned, and the disposition of the case, yet publishes no reports at all concerning family courts. See *Other Data Resources*, NYCOURTS.GOV, <http://ww2.nycourts.gov/other-data-links-33126> [<https://perma.cc/MPM7-56MD>] (last visited Feb. 12, 2023).

342. See Hager, *supra* note 27 (reporting on results of survey of forty state child welfare agencies in which "[n]one said they keep any data on how often they get an entry order")

system as a general matter,³⁴³ to say nothing of granular practices like entry orders.

The secrecy of dependency proceedings must be considered together with the heavy geographic concentration of family regulation investigations in poor neighborhoods.³⁴⁴ That concentration means the family regulation system operates outside the sight of those members of the public with political power—and when it does come into view, it is with stories that support the narrative that poor Black, Latinx, and Native parents endanger their children and need more policing, not less.³⁴⁵ And while critiques of the criminal legal system have become increasingly mainstream, the family regulation system continues to be ignored or treated as a gentler alternative to the criminal legal system into which more resources should be poured.³⁴⁶ The casting of family regulation proceedings as rehabilitative underscores that narrative.

In light of this popular conception of the family regulation system, it is difficult to imagine the public holding the judiciary, the executive, or the legislature accountable for its family regulation actions at the ballot box.³⁴⁷ Indeed, anecdotal evidence shows that the public writ large supports

343. For arguments in favor of presumptively open family court proceedings, see generally Jay D. Blitzman & Steven F. Kreager, *Transparency and Fairness: Open the Doors*, 102 MASS. L. REV. 38, 39 (2021); Kelly Crecco, *Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings*, 11 FIRST AMEND. L. REV. 490, 526–32 (2013); Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 192 (1999). The National Council of Juvenile and Family Court Judges has also endorsed increased openness. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, NCJFCJ 68TH ANNUAL CONFERENCE, RESOLUTION NO. 9 (July 30, 2005).

344. See, e.g., Angela Butel, *Data Brief: Child Welfare Investigations and New York City Neighborhoods*, CTR. FOR N.Y.C. AFFS. (June 2019), <http://www.centrernyc.org/data-brief-child-welfare-investigations> [<https://perma.cc/Y739-QM3D>] (mapping family regulation investigations in New York City by neighborhood, income, and race, and noting that two of the city's neighborhoods with the fewest Black and Latinx residents and the lowest child poverty rates had less than one-seventh the rate of investigations of three neighborhoods with the highest concentrations of Black and Latinx residents and the highest child poverty rates); Roberts, *Racial Geography*, *supra* note 87, at 127–28 (describing the clustering of family regulation investigations in poor Black neighborhoods and the comparative lack of investigations in whiter neighborhoods) 145–46.

345. The New York Times, for instance, ran a story under the sensationalist headline, *These Children Were Beaten to Death. Could They Have Been Saved?*. Newman et al., *supra* note 279. Almost 2,000 words into the article, the authors acknowledged that there had not been any increase in child fatalities or abuse since the previous year. *Id.* Rachel Barkow notes that “[t]hose who have not been caught committing a crime are rarely going to self-identify in order to lobby for lesser punishments or more narrow crime definitions.” Barkow, *Separation*, *supra* note 40, at 1029. It is no great leap to conclude that those who have not been accused of child maltreatment are just as unlikely to self-identify as child abusers or neglecters.

346. See Roberts, *Abolishing Family Regulation*, *supra* note 44.

347. Gupta-Kagan, *Rethinking Family-Court Prosecutors*, *supra* note 323, at 819 (describing lack of electoral accountability for family court prosecutors and judges under current models).

punitive and aggressive actors in the family regulation system.³⁴⁸ In this environment, even small measures of accountability, like the election of more progressive prosecutors in the criminal legal system,³⁴⁹ seem distant in the family regulation system.

* * *

If the problem-solving orientation of the family regulation system is fundamentally incompatible with the Fourth Amendment, as this Part suggests, we must consider how to alter the family regulation system to remedy that incompatibility to offer parents meaningful privacy protections while at the same time safeguarding the welfare of their children. More fundamentally, we must consider whether “alteration” of this system can ever achieve those goals, knowing what we know about the very history and purpose of the family regulation system as a means to surveil marginalized families. The next Part turns to that puzzle.

IV. FORTIFYING CHECKS AND FORTIFYING CHILD SAFETY

This Part considers how we might move closer to achieving the twin goals of protecting families’ privacy and autonomy from government overreach and providing safety and security to children. It suggests implementing a series of reforms, guided by the heuristic of “non-reformist reforms,” to shore up checks on government overreach while unraveling the family regulation system’s wide net of surveillance.

These proposals exist along a continuum: some would provide immediate relief to parents and children alike, while others would play out over the course of generations. The more immediate changes—ranging from tightening legal definitions of neglect, to abandoning blanket requirements

348. For instance, a Tennessee family court judge who was overturned repeatedly for wrongfully terminating parents’ rights and who jailed children at a rate nearly ten times the state’s average has remained on the bench for more than two decades and remains a popular figure with her county’s commissioners. Meribah Knight & Ken Armstrong, *Black Children Were Jailed for a Crime That Doesn’t Exist. Almost Nothing Happened to the Adults in Charge*, PRO PUBLICA (Oct. 8, 2021, 5:00 AM), <https://www.propublica.org/article/black-children-were-jailed-for-a-crime-that-doesnt-exist> [https://perma.cc/6RM7-J62X]. The Kentucky judge who wrongly told a father that the Fourth Amendment did not apply in the dependency court proceedings underlying *Clark v. Stone*, 998 F.3d 287, 301 (6th Cir. 2021), ran for re-election unopposed after he made that statement. *Kentucky Judicial Elections, 2014*, BALLOTEDIA, https://ballotpedia.org/Kentucky_judicial_elections_2014 [https://perma.cc/B76V-38HU] (last visited Feb. 12, 2023) (results for 46th District Court, Kenneth Harold Goff II).

349. Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 128, 144 (2021) (finding that more “progressive prosecutors” have been elected, although incumbent prosecutors won re-election in 87% of races and that there appears to be a “growing popular interest in and control over local criminal justice policy”).

for home searches, to ensuring parents receive adequate counsel to foster a more adversarial atmosphere in court—would increase privacy protections for the hundreds of thousands of families currently surveilled annually. Concretely, they reduce the number of state entries into homes and increase parents' ability to assert their rights, while ensuring children's safety. Abstractly, these proposals represent a radical critique of the basic premises of the family regulation system: that marginalized parents inherently merit suspicion, that the government must surveil them, and that the system primarily serves to help families.

Yet these proposals alone would not interrupt another of the core premises of the family regulation system: that safeguarding child welfare requires a reactive and individualistic approach, where individual parents are held responsible for larger-scale societal failings. To disrupt that premise, we must embrace a more transformative and expansive project that implicates our approach to poverty governance more broadly. With the abolition of the family regulation system as the horizon, we can holistically reimagine our approach to child safety. Providing material support, better schools, and better access to healthcare and services to all families would serve, in the near-term, to reduce neglect of this generation of children. Over time, it would serve to reduce child neglect and abuse for future generations. Today's children become tomorrow's parents, and as today's children are raised in safer and healthier environments, they will be better able to meet their own children's needs. Over the course of generations, if the government meets families' needs before the point at which any "problem" arises and chips away at the intergenerational and historical trauma inflicted on marginalized communities by centuries of family regulation, we can obviate the need for the sprawling system of family regulation we currently rely on.

A. Non-Reformist Reforms

In describing this continuum of proposals, I start from the idea of "non-reformist reforms," a heuristic that prison abolitionists have long deployed to weigh the wisdom and utility of embracing incremental reforms as half-steps on their longer march toward carceral abolition.³⁵⁰ These are "changes

350. See GORZ, *supra* note 32, at 6–8 (1964) (coining the term "non-reformist reforms"); see also Akbar, *supra* note 32, at 98; CRITICAL RESISTANCE, *supra* note 32; Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/7sfs-dj35>]; LISA SANGOI, MOVEMENT FOR FAM. POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR." HOW THE FOSTER SYSTEM HAS

that, at the end of the day, unravel rather than widen the net of social control through criminalization,” in Ruth Wilson Gilmore’s words.³⁵¹ They serve to “reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”³⁵² Employing this heuristic in the prison-abolition context might mean decriminalizing certain behavior, thus reducing policing and police contact.³⁵³ But the heuristic has salience in other arenas, too. A non-reformist reform in the immigration context might mean ending agreements between police departments and Immigration and Customs Control;³⁵⁴ in environmental justice, it might mean divesting from fossil fuels.³⁵⁵

Surveying decades of organizing projects and scholarship, Amna Akbar identifies three “hallmarks” of non-reformist reforms.³⁵⁶ First, “non-reformist reforms advance a radical critique and radical imagination,” placing transformation rather than reform as the end goal.³⁵⁷ This is in contrast to reformist reforms, which may critique the system at issue, but which do not question the underlying premise of the system and instead preserve and legitimize the system.³⁵⁸ Second, they “draw from and create pathways for building ever-growing organized popular power” and aim to shift power away from elites and toward the masses of people.³⁵⁹ Non-reformist reforms not only aim to empower marginalized people but also are the products of “social movements, labor, and organized collectives of poor, working-class, and directly impacted people making demands for power over the conditions of their lives and the shape of their

BECOME GROUND ZERO FOR THE US DRUG WAR 103 (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> [<https://perma.cc/ZJK5-LR2C>] (contrasting reformist and abolitionist goals in the family regulation context).

351. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007).

352. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019).

353. CRITICAL RESISTANCE, *supra* note 32.

354. *Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf [<https://perma.cc/K9WM-N5WF>] (last visited Feb. 12, 2023).

355. Emilia Belliveau, James K. Rowe & Jessica Dempsey, *Fossil Fuel Divestment, Non-Reformist Reforms, and Anti-Capitalist Strategy*, in *REGIME OF OBSTRUCTION: HOW CORPORATE POWER BLOCKS ENERGY DEMOCRACY* 453 (William K. Carroll ed., 2021), <https://read.aupress.ca/read/277204af-f11e-46d8-a6c7-fdfe6ff58349/section/356ae30b-935e-4882-bbe4-ba41d7ba3bc0> [<https://perma.cc/M55X-QVD5>].

356. Akbar, *supra* note 32, at 103.

357. *Id.*

358. *Id.* at 104.

359. *Id.* at 104–05.

institutions.”³⁶⁰ Finally, and relatedly, non-reformist reforms “are about the dialectic between radical ideation and power building.”³⁶¹ They are not “in themselves about finding an answer to a policy problem,” and instead are “about an exercise of power by people over the conditions of their own lives.”³⁶² Thus, they can only be effective “when pursued in relation to a broader array of strategies and tactics for political, economic, social transformation.”³⁶³ These hallmarks guide the proposals below.

B. “Narrowing the Front Door”

To limit unnecessary government surveillance of poor families—surveillance that intrudes on families’ privacy without improving child safety—we can begin by limiting the grounds on which the government can enter families’ homes. I suggest two changes, guided by two powerful facts: most reports of child maltreatment refer to child neglect, not abuse, and 80% of investigations are closed without substantiating any allegations.³⁶⁴

First, legislatures can tighten statutory definitions of neglect by excluding certain categories of conduct and by specifically enumerating forms of neglect. We might think of this as akin to “decriminalization” efforts in the criminal legal system.³⁶⁵ The current broad definitions of neglect, as Josh Gupta-Kagan and others have observed, allow for the easy conflation of poverty and neglect and allow for reporters’ and investigators’ bias to more easily creep in.³⁶⁶ Narrower definitions of neglect would limit reporters’ and investigators’ discretion and cull out cases based on nothing more than generalized and near-inarticulable suspicion of marginalized parents and cases based on parental actions that are unlikely to pose risks to children.³⁶⁷

Legislatures can start with low-hanging fruit. In recent years, California, New York, and Texas have narrowed their definitions of neglect to limit

360. *Id.* at 105. I recognize—and do not resolve—the tension inherent in proposing “non-reformist reforms” as a legal academic (and a lawyer) in the pages of a law review, especially when the legal academy is a pillar of the legal and social hierarchies that non-reformist reforms aim to upset. Though the reforms I describe here are almost entirely drawn from proposals advanced by affected parents and organizers, that, of course, does not resolve this tension.

361. *Id.* at 106.

362. *Id.*

363. *Id.*

364. See CHILDS.’ BUREAU, *supra* note 11 at 29–30; *supra* notes 48–49 and accompanying text.

365. See Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1568 (2022) (discussing decriminalization as an abolitionist strategy).

366. Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 209; see also *supra* notes 207–210 and accompanying text.

367. *Id.* at 221.

cases based upon a parent's marijuana use;³⁶⁸ and Utah, Texas, and Oklahoma have narrowed their definitions of neglect to allow for "free-range parenting," the colloquialism for parents permitting their children to engage in "independent activity."³⁶⁹ These examples show how coalition-building can help marginalized parents push legislatures for change. Both the marijuana and the free-range parenting efforts were driven in part by conservative parents' groups and by wealthier parents that shared an interest with marginalized parents in reducing government surveillance.³⁷⁰ These legislative reform efforts not only narrowed the grounds for neglect investigations but also created pathways for building and organizing new streams of popular power.³⁷¹

Going beyond excluding certain parental conduct, Gupta-Kagan suggests that legislatures should "adopt civil child neglect and abuse codes comparable in their detail to state criminal codes and which create tiers of severity analogous to degrees of criminal offenses."³⁷² He suggests these codes should specifically encompass common fact patterns, such as parental drug use or excessive corporal punishment instead of listing only sweeping definitions regarding parents' failure to provide care.³⁷³ He points to states' existing criminal codes and states' tiered registries of child neglect and abuse as two starting points for a civil child neglect and abuse code.³⁷⁴

368. Jeremy Loudonback, *California Governor to Decide on Family Reunification Bills and More*, IMPRINT (Sept. 7, 2022, 11:56 AM), <https://imprintnews.org/top-stories/california-governor-to-decide-on-child-welfare-bills/173144> [<https://perma.cc/XL7D-6QHX>] (reporting California governor's signing of marijuana bill); S. 854A, 2021 Leg., Reg. Sess. § 58 (N.Y. 2021); H.B. 567, 87th Leg., Reg. Sess. § 6 (Tex. 2021).

369. See Donna De La Cruz, *Utah Passes "Free-Range" Parenting Law*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/well/family/utah-passes-free-range-parenting-law.html> [<https://perma.cc/QBJ6-ES3A>]; H.B. 567, 87th Leg., Reg. Sess. §§ 3, 5–6 (Tex. 2021); H.B. 2565, 58th Leg., 1st Sess. § 1 (Okla. 2021); see also S.B. 143, 2021 Leg., Reg. Sess. § 1 (Nev. 2021) (amending NEV. REV. STAT. § 432B.020(2)(c)(2) to allow for independent activity); H.B. 77, 66th Leg., 1st Reg. Sess. § 1 (Idaho 2021) (amending IDAHO CODE § 16-1602(31)(a) to allow for independent activity).

370. See, e.g., *Two States Pass "Childhood Independence" Laws That Ensure it Is Not Neglect for Kids to Play Outside*, LET GROW, <https://letgrow.org/two-states-pass-childhood-independence-laws-thatwill-make-it-legal-for-kids-to-play-outside/> [<https://perma.cc/6SVY-LMU7>] (last visited Feb. 12, 2023) (reporting that proposed Nevada legislation was co-sponsored by an assemblywoman whose grandchildren had been the subjects of a 911 call due to their unsupervised play and describing the testimony of the co-sponsor's son and the children's father, a doctor); see also *id.* (describing bipartisan support for Oklahoma and Nevada legislation); Robert T. Garrett, *House Advances Bill Making It Harder for CPS to Remove Texas Youth From Their Families*, DALL. MORNING NEWS (Mar. 31, 2021, 4:39 PM), <https://www.dallasnews.com/news/politics/2021/03/31/house-advances-bill-making-it-harder-for-cps-to-remove-texas-youth-from-their-families/> [<https://perma.cc/Q4AK-4GEY>] (noting bill's passage by a margin of 143–4 and the support of groups including the Texas Home School Coalition).

371. Akbar, *supra* note 32, at 104–05.

372. Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 209, at 273–74.

373. *Id.* at 274.

374. *Id.* 273–74.

These more specific definitions of neglect would then allow for a second reform: more precise tailoring of home search requirements, depending on the nature of the alleged maltreatment. If a civil code enumerated ten different forms of child neglect, including “educational neglect” and “inadequate or unsafe housing,” that code could also differentiate appropriate investigatory responses for each type of neglect. A report of inadequate or unsafe housing might trigger a requirement for a home search, whereas a report of educational neglect might trigger a requirement for an interview with a parent outside the home. Some states already take this approach, demonstrating its workability. Illinois, for instance, requires an “examination of the environment for inadequate shelter and environmental neglect reports only.”³⁷⁵

Together, these two proposals would narrow the front door into the family regulation system, while also disrupting the premise that the slightest suspicion of a marginalized family justifies intensive invasion into their lives. These changes could also improve the ability of the actors within the family regulation system to keep children safe: studies have shown that the fewer reports that family regulation agencies receive, the more accurate their investigations become.³⁷⁶

C. Empowering Parents in Court and Re-Inscribing the Judicial Role

For those parents who the state still investigates and hauls to court, the question is how to empower them to assert the rights that they already have. One answer might be the very adversarial, quasi-criminal atmosphere that family courts have rejected for so long. The problem-solving model common to dependency courts took shape as an explicit rejection of the adversarial and formal atmosphere of criminal courts.³⁷⁷ It is a model purposeful in its informality, its expansion of judicial power, its information-gathering, and its emphasis on collaboration and de-emphasis of individual rights.³⁷⁸ It should come as no surprise that the Fourth Amendment rests uneasily with this model. Indeed, similar critiques have been lodged at drug courts, the prototypical criminal problem-solving

375. 89 ILL. ADMIN. CODE tit. 89 § 300.90(a) (2020).

376. See, e.g., Raz, *supra* note 59, at 1; Jane M. Spinak, *Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change*, in *LAW IN THE TIME OF COVID-19* 71, 74 (Katharina Pistor ed., 2020).

377. Katz, *supra* note 105, at 1293 (quoting Letter from Walter Gellhorn to J. Howard Rossbach (Apr. 23, 1953) (on file with the Walter Gellhorn Papers, Box 19, Rare Book and Manuscript Library, Columbia University)).

378. See *supra* Section III.A.

courts.³⁷⁹ Re-casting dependency court proceedings as adversarial rather than problem-solving and recognizing that the family regulation system serves a punitive function instead of a purely rehabilitative function could help to shift Fourth Amendment protections in family regulation investigations from an abstract ideal to a concrete reality.³⁸⁰

The non-reformist reform heuristic demands that we ask *how* to achieve this shift without legitimizing dependency courts and building up additional infrastructure around them.³⁸¹ At the same time, non-reformist reforms aim to give people power over the conditions of their own lives.³⁸² One possible route to empowering parents in court without more deeply entrenching the current family regulation system may be through the parental defense bar.

Shifting funds from private appointed attorneys to institutional defense offices would empower parents along several dimensions.³⁸³ It could increase the quality of representation, increase the chances that parents' lawyers will be responsive to and beholden to them rather than to the court or family regulation agencies, and ultimately increase parents' ability to assert their rights in an adversarial manner.³⁸⁴ This change need not grow

379. See, e.g., Peggy Fulton Hora, William G. Schma & John T. A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 521 (1999) (describing pressures on defendants to waive their Fourth Amendment rights as condition of admission to drug court); Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 129 (2007) (describing pressure on defendants to disclose criminal conduct); Quinn, *supra* note 243, at 56–58 (describing pressure on defense attorneys to “cooperate” with prosecutors and judges); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1617 (2012) (describing “extraordinary power” of judges in problem-solving model).

380. While I focus here on re-framing dependency courts, Tarek Ismail similarly suggests that we should view caseworkers as law enforcement officers. Ismail, *supra* note 34.

381. Stahly-Butts & Akbar, *supra* note 365, at 1567 (considering how “progressive prosecutors” legitimize the carceral system).

382. Akbar, *supra* note 32, at 106.

383. While I focus here on representation in dependency court, outside of dependency court, civil rights litigation may be a fruitful—if limited—avenue for vindicating parents' existing rights and recognizing new rights. In the past, few strategic or affirmative litigation organizations specialized in family regulation cases, but that may be changing with the advent of organizations like the Family Justice Law Center, which “use[s] affirmative litigation to seek justice for families mistreated by the child welfare system.” FAM. JUST. L. CTR., <https://www.fjlc.org> [<https://perma.cc/NH2E-88G3>] (last visited Feb. 12, 2023).

384. See, e.g., Gerber et al., *supra* note 232, at 42 (finding that parents' representation by interdisciplinary institutional defense offices results in shorter stays in foster care for children); *How Does High-Quality Legal Representation for Parents Support Better Outcomes*, CASEY FAM. PROGRAMS (Aug. 1, 2019), <https://www.casey.org/quality-parent-representation> [<https://perma.cc/C6AN-TY3X>] (summarizing studies in multiple states finding that quality legal representation leads to “[b]etter judicial decision-making” and “[i]ncreased parental engagement and perceptions of fairness”); *Explore Holistic Defense*, BRONX DEFS., <https://www.bronxdefenders.org/who-we-are/how-we-work/> [<https://perma.cc/6QX7-CE3H>] (last visited Feb. 12, 2023) (describing the commitment of Bronx Defenders, which housed the nation's first interdisciplinary family defense practice, to “client-centered

the family regulation system; rather, funds could shift from the hands of private attorneys to the hands of institutional defenders. It could also serve to shrink more harmful elements of the family regulation apparatus writ large. Recent changes to federal policy allow for funds that previously could only be directed to family regulation agencies to instead go to institutional defense offices³⁸⁵—taking funds from agencies and redirecting them to parents’ representation.

The potential of this shift can already be seen in jurisdictions like New York City, where dependency proceedings have become increasingly adversarial as more parents have begun receiving representation from institutional public defense offices.³⁸⁶ There, “[v]igorous, sustained advocacy has challenged previous court practices that often failed to protect the procedural and substantive due process rights of parents and permitted often-unfettered judicial discretion.”³⁸⁷ At the same time, this shift has proved a boon for children. A longitudinal study showed that when parents are represented by institutional defense offices rooted in adversarial advocacy, children achieve permanency more quickly and stay as safe once they are returned home.³⁸⁸

A more adversarial form of representation would necessarily change the flow of information and power dynamics within a courtroom—and as a result, sharpen the separation of powers, under Professor Guggenheim’s theory.³⁸⁹ With a competent defense bar carefully investigating cases, demanding due process, and consenting less frequently, judges would no longer receive information about cases solely from the executive.³⁹⁰

While such a culture shift could be precipitated by the defense bar, it could be accelerated by legislatures and by judges. Dependency court judges currently serve as jacks-of-all-trades, tasked with adjudicating cases

representation, which defines a client not by his or her case but by the needs he or she identifies”). Of course, this client-centered model is an ideal; lawyers working with institutional defense offices are not immune to bias or structural constraints, see Jonah E. Bromwich, *Hundreds Have Left N.Y. Public Defender Offices Over Low Pay*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/nyregion/nyc-public-defenders-pay.html> [https://perma.cc/DV9R-WY3Z], and they may stray from the promises their offices make.

385. See CASEY FAM. PROGRAMS, *supra* note 384 (noting that the federal Children’s Bureau revised its policy manual to allow for family regulation agencies to claim administrative costs for attorneys to provide legal representation for children and their parents).

386. See generally Chris Gottlieb, Martin Guggenheim & Madeleine Kurtz, *Discovering Family Defense: A History of the Family Defense Clinic at New York University School of Law*, 41 N.Y.U. REV. L. & SOC. CHANGE 539 (2017) (describing genesis of institutional family defense offices in New York City).

387. Spinak, *Family Defense*, *supra* note 90, at 173.

388. Gerber et al., *supra* note 232, at 42.

389. Guggenheim, *The People’s Right*, *supra* note 244, at 399–400.

390. See *supra* notes 122–124 and accompanying text.

and deciding legal questions and with quasi-executive tasks like initiating and pursuing investigations.³⁹¹ Were legislatures to reinscribe the judicial role as that of a neutral, detached decisionmaker tasked with deciding narrowly drawn legal disputes, it would inch the family regulation system closer to the Madisonian vision in which each branch forms its own distinct identity and ambitions.³⁹² This, in turn, might raise the likelihood of the judiciary checking illegal actions by the executive—and the legislature.³⁹³ Alongside shoring up the formal external separation of powers, it would also increase *internal* separation of functions within the judiciary,³⁹⁴ by placing judges more squarely in an adjudicatory role and out of an investigative role.³⁹⁵

Judges themselves can also change court culture. This can be seen in the remarkable example of Judge Ernestine Gray, a judge on the Orleans Parish Juvenile Court, who has been credited with reducing the number of children in foster care in New Orleans by nearly 89% by “applying the law and forcing child welfare agencies to meet their legal burden.”³⁹⁶ Rejecting the sprawling role envisioned for dependency judges in the problem-solving model, Judge Gray “considered it to be her paramount—and perhaps only—obligation to enforce constitutional and statutory standards governing family separation.”³⁹⁷ Researchers reviewing her hearings found that she strictly enforced statutory burdens and evidentiary rules, and insisted that lawyers were prepared for thorough hearings.³⁹⁸ Under her approach, fewer children were placed in foster care and children who were placed left foster care sooner.³⁹⁹ And, as in New York, “a wealth of administrative data suggests that the reduction in family separation occurred without compromising safety for children.”⁴⁰⁰ Judge Gray models what it might look like if dependency court judges act “as [a] gatekeeper, rigorously and

391. See *supra* Section I.C.

392. See *supra* Section II.A.1.

393. See *supra* Section II.A.

394. See *supra* Sections I.C, III.A.3, III.C.2.

395. By the same token, it would invite a closer look at the internal separation of functions within executive agencies. Were we to recognize family regulation caseworkers as analogs to police and their lawyers as analogs to prosecutors, we might find, for example, that suggestions for greater separation of functions within U.S. Attorneys’ Offices are just as apt in this system. See generally Barkow, *Institutional Design*, *supra* note 321 (arguing that in the plea-bargaining era, where power is increasingly concentrated in the executive, a greater separation of functions within federal prosecutors’ offices is necessary to curb abuses of government power).

396. Vivek Sankaran, *Finally, A Judge Who Owns the Decision to Remove Kids*, IMPRINT (Dec. 5, 2019, 6:05 AM), <https://imprintnews.org/child-welfare-2/finally-a-judge-who-owns-the-decision-to-remove-kids/39478> [<https://perma.cc/JYN3-C9EP>].

397. Carter et al., *supra* note 114, at 507.

398. *Id.* at 507–09.

399. *Id.* at 510–11.

400. *Id.* at 512.

dispassionately enforcing the law to ensure that children enter and remain in foster care only when the state produces evidence that meets the high burden required to justify family separation.”⁴⁰¹

These examples show how a change in court culture can fundamentally change the nature of family regulation proceedings, even without a change in substantive law. Yet a shift away from nominally cooperative orientation could also give rise to additional constitutional protections for parents. The exclusionary rule, for example, has been rejected in family regulation proceedings in part because these proceedings are not recognized as quasi-criminal.⁴⁰² The recognition of family regulation proceedings as punitive and adversarial rather than rehabilitative and cooperative could force a re-examination of those decisions. Courts, too, would have to re-evaluate parents’ right to counsel at all stages of family regulation proceedings,⁴⁰³ their right against self-incrimination, and their right to prophylactic *Miranda*-like warnings.

Finally, there is expressive value in rejecting the problem-solving model for dependency proceedings.⁴⁰⁴ Such a move would more squarely acknowledge the family regulation system’s historic and current function as a means to police—and punish—marginalized communities.⁴⁰⁵ At the same time, it might increase public oversight of the system, by drawing public attention to the ways that the system itself causes harm instead of focusing that attention solely on the instances where the system responds (or fails to respond) to harm.⁴⁰⁶ Public awareness may already be changing. Calls to decrease funding for police and increase funding to social services including family regulation agencies have been met by resistance from those who

401. *Id.* at 498.

402. *See supra* notes 237241 and accompanying text.

403. *See, e.g.,* *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26 (1981); Sinden, *supra* note 109, at 349.

404. A re-orientation of dependency proceedings would not necessarily necessitate a re-orientation of family courts writ large. A problem-solving model—or more broadly, a model that encourages active judging, *see* Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 650 (2018), may be advantageous for the fair, efficient resolution of disputes in family court between two private individuals. Aviel, *supra* note 38, at 2114–20 (arguing that a problem-solving model allows judges to take a more active role in guiding under resourced litigants, create greater flexibility in terms of crafting solutions, and decrease animosity between parties). And active judging might help level the playing field between mismatched litigants by allowing judges to adjust procedures, explain law and process, and elicit information from unrepresented litigants. *See* Carpenter, *supra*, at 661–62. But a problem-solving model is a particularly poor fit for dependency proceedings because it adds to, rather than levels, the disparities between the two parties: the government and the poor parents it hauls to court against their will.

405. *See supra* Section I.B.

406. *See supra* Section III.C.3.

argue that the family regulation agencies *are* a form of police.⁴⁰⁷ The hope here would be to accelerate that shift in public perception.

A move to adversarial proceedings is not a panacea. Rather, it is an interim step that will allow the families *currently* embroiled in the family regulation system to better assert their rights and protect their privacy while still keeping their children safe. The criminal legal system demonstrates all too well the limited promise of an adversarial, punitive system. Even with an explicitly adversarial orientation and a more careful formal and functional separation of powers, the branches' shared interests in policing and punishing marginalized people serve to align them and erode their checking function.⁴⁰⁸ The criminal system shows, too, the limits of individual rights protections in a plea-based system. The pressure to take a plea (to "cooperate") weighs heavy, and people who assert their rights and take their cases to trial face real penalties.⁴⁰⁹ While buttressing the separation of powers and introducing additional checks into the family regulation system would serve to better protect parents' rights against unconstitutional home searches, better is a relative term: adversarial courts, too, function as effective means of social control.⁴¹⁰ Thus, we must take a broader and longer-term view of poverty governance and the social welfare system.

D. Supporting Today's Children and Today's Parents

Problem-solving courts in non-family law contexts have been criticized for engaging in "responsibilization": holding individuals accountable for addressing their own problems while failing to hold the government accountable for its role in creating the conditions that led to those problems.⁴¹¹ Drug courts, for instance, cast individual defendants' addictions as their own moral failings while overlooking the government's failure to provide access to healthcare, job training, housing, and

407. E.g., Michael Fitzgerald, *Rising Voices for 'Family Power' Seek to Abolish the Child Welfare System*, IMPRINT (July 8, 2020, 11:45 PM), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141> [<https://perma.cc/AJ65-KACC>]; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services> [<https://perma.cc/X8T3-ECR5>]; Dorothy Roberts, *Abolish Family Policing, Too*, DISSENT, Summer 2021, <https://www.dissentmagazine.org/article/abolish-family-policing-too> [<https://perma.cc/9DKW-U4Y7>].

408. See Barkow, *Separation*, *supra* note 40, at 1030; Epps, *supra* note 40, at 49.

409. Barkow, *Institutional Design*, *supra* note 321, at 878; Baughman, *supra* note 40, at 1075, 1120.

410. See generally KOHLER-HAUSMANN, *supra* note 37.

411. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425–27 (2009); Steinberg, *supra* note 39, at 1625.

education.⁴¹² This same dynamic plays out in the family regulation system, where individuals are pathologized as deficient mothers and fathers, even as the structural racism and economic inequality that give rise to reports of child maltreatment go unexamined and unaddressed.⁴¹³

If the goal of the family regulation system is to maintain the status quo on a societal level, this approach is a convenient one. It absolves society of its collective responsibility to protect children and safeguard their welfare by holding out individual parents as aberrant bad actors, worthy of reprobation and in need of rehabilitation.⁴¹⁴ But if the goal is to ensure that all children have the support and resources that they need, this approach is neither sufficient nor necessary. For all the hundreds of thousands of families subjected to investigations each year, more than 80% of reports are not substantiated.⁴¹⁵ And even accepting a certain degree of individual harm in exchange for societal gain, this approach has also failed to address child neglect on a societal level. There has not been a meaningful reduction in the incidence of neglect over the last two decades.⁴¹⁶ Indeed, there may have even been a slight increase.⁴¹⁷

Rather than surveilling individual parents and invading their homes in the name of child safety, the government might instead address, on a societal level, the conditions that give rise to reports of maltreatment: lack of access to material support, failing schools, inadequate mental and physical healthcare and substance use services, and residential segregation and lack of housing, to name just a few.⁴¹⁸ By providing all parents with adequate funds to support their families, and by providing families access to a robust social welfare net, the government could reduce the number of reports of neglect in an immediate sense. To take just a few examples, reports of medical neglect or educational neglect could be averted if families had access to doctors and schools that they trusted; reports of inadequate food, provisions, and housing could be averted if families had the funds to pay for

412. Miller, *supra* note 411, at 425–27.

413. See *supra* notes 84–89 and accompanying text.

414. See DOROTHY ROBERTS, *SHATTERED BONDS* 74–82 (2001); *supra* note 89 and accompanying text.

415. CHILDS.’ BUREAU, *supra* note 11, at 29–30.

416. Finkelhor, *supra* note 30; OLSON & STROUD, *supra* note 30, at 25.

417. Wexler, *supra* note 30.

418. I am by no means the first to suggest such a re-envisioning of child welfare. See, e.g., Roberts, *supra* note 85; THE UPEND MOVEMENT, <https://upendmovement.org> [<https://perma.cc/EE9N-7E5J>] (last visited Feb. 12, 2023); Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, TIME (Mar. 17, 2021, 9:00 AM), <https://time.com/5946929/child-welfare-black-families> [<https://perma.cc/9Z22-64ZH>]; JMACFORFAMILIES, <https://jmacforfamilies.org> [<https://perma.cc/G4QL-XSUV>] (last visited Feb. 12, 2023); MOVEMENT FOR FAMILY POWER, <https://www.movementforfamilypower.org> [<https://perma.cc/68GR-YWPY>] (last visited Feb. 12, 2023).

those needs; and reports of concerns relating to parents' substance use or mental health could be averted if parents could access adequate services before reaching a crisis point.⁴¹⁹

Such an approach has already shown promise at keeping children safe while keeping their families intact. A large-scale study found an association between increased tax credits to families and lower rates of child maltreatment reports; for each additional \$1,000 in tax credits, rates of reported maltreatment declined in the several weeks following by approximately 5%.⁴²⁰ Studies of small-scale pilot programs have similarly shown that the provision of material support to families results in fewer incidents of child maltreatment than ongoing services and surveillance of parents.⁴²¹ Meanwhile, the COVID-19 crisis created a real-world view into a world where family regulation operations shrunk drastically, more families received increased entitlements from the federal government absent onerous requirements or surveillance, and communities built up mutual aid and support networks.⁴²² In that world, children stayed just as safe.⁴²³

As the COVID example shows, increased government aid need not mean increased government control.⁴²⁴ Indeed, the last several years have shown

419. For a case study of how one state "criminalized" drug treatment for poor women, making it available almost exclusively through the criminal legal system, see WENDY BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022).

420. Nicole L. Kovski, Heather D. Hill, Stephen J. Mooney, Frederick P. Rivara & Ali Rowhani-Rahbar, *Short-Term Effects of Tax Credits on Rates of Child Maltreatment Reports in the United States*, *PEDIATRICS*, July 2022, at 1, 5.

421. E.g., Mark Chaffin, Barbara L. Bonner & Robert F. Hill, *Family Preservation and Family Support Programs: Child Maltreatment Outcomes Across Client Risk Levels and Program Types*, 25 *CHILD ABUSE & NEGL.* 1269, 1284–85 (2001); KRISTEN SHOOK & MARK TESTA, *COST-SAVINGS EVALUATION OF THE NORMAN PROGRAM: FINAL REPORT TO THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES 2* (1997).

422. Anna Arons, *An Unintended Abolition: Family Regulation During the Covid-19 Crisis*, 11 *COLUM. J. RACE & L.* 1 (2022); *The Child Welfare System During COVID-19: Oversight Hearing Before the Comm. on the Gen. Welfare*, N.Y.C. COUNCIL (June 14, 2021) (testimony of David Hansell, Commissioner of the Administration for Children's Services, at 51:00), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4970226&GUID=78C78A7E-7E75-4989-B0C7-526E8F1AD20F&Options=&Search=> [<https://perma.cc/B4LV-TLRY>] [hereinafter "*Oversight Hearing*, N.Y.C. COUNCIL"].

423. Robert Sege & Allison Stephens, *Child Physical Abuse Did Not Increase During the Pandemic*, 176 *JAMA PEDIATRICS* 339 (2021); see also *Oversight Hearing*, N.Y.C. COUNCIL, *supra* note 422.

424. It is crucial to distinguish these suggestions from "preventive services," the purportedly voluntary services that family regulation agencies offer to families. While these services are often touted as a way to keep families intact and meet families' ongoing needs, see, e.g., NAT'L IMPLEMENTATION RSCH. NETWORK & CASEY FAM. PROGRAMS, *IMPLEMENTING EVIDENCE-BASED CHILD WELFARE: THE NEW YORK CITY EXPERIENCE* 10 (2017), <https://www.casey.org/media/evidence-based-child-welfare-nyc.pdf> [<https://perma.cc/78FZ-RW6R>], preventive services are deeply enmeshed with family regulation system's policing arm. In New York, for instance, more than 80% of preventive cases begin with a report to the state central register. Arons, *supra* note 422, at 14–15. Thus, parents may accept

how parents can build power together—through mutual care networks and community-based services but also through parent activist groups pushing for legislative change, to empower parents, and to shift public perception of family regulation agencies.⁴²⁵ Together, measures to proactively support families and to support communities as they build power together represent a radical rebuke—and a radical re-imagining—of how we safeguard the welfare of today’s children.

None of these proposals are mutually exclusive. We can move forward with proposals to increase government support and community-based support even as the current family regulation system continues to operate. In the short-term, a reduction in child neglect through increased government support would shore up parents’ privacy rights and children’s safety within the current system. If fewer cases are called in and investigated for neglect or poverty-related concerns, family regulation agencies can devote more time and resources to more serious allegations of abuse.⁴²⁶ If these more serious allegations lead to filings in court, these are also the sorts of allegations where the benefits of a more adversarial, quasi-criminal proceeding are most obvious, given the high stakes for parents and children alike.

E. Supporting Tomorrow’s Parents

Efforts to better care for today’s children will redound to the benefit of future generations. While an increase in material support for families would

“voluntary” services under duress. Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEMPHIS L. REV. 629, 671 (2012). These services are also often contingent on ongoing surveillance by mandated reporters—surveillance that itself could initiate a new investigation. N.Y. OFFICE OF CHILD. AND FAM. SERVS., PREVENTIVE SERVICES PRACTICE GUIDANCE MANUAL 4-6, 4-7 (2015).

425. For instance, the Parent Legislative Action Network (PLAN) has mobilized parents to push for stricter restrictions on anonymous reports in New York and held know-your-rights trainings for parents. *Legislative Advocacy*, JMACFORFAMILIES, <https://jmacforfamilies.org/plancoalition> [<https://perma.cc/VCK7-GX7L>] (last visited Feb. 12, 2023); Parent Legislative Action Network (@plan.coalition), INSTAGRAM, https://www.instagram.com/p/CiOUuIaJ_Ka [<https://perma.cc/U26E-QLXU>] (last visited Feb. 12, 2023). PLAN’s founder, parent activist Joyce MacMillan, has also created training programs and support groups to empower family regulation-impacted parents, *Advocacy Programs*, JMACFORFAMILIES, <https://jmacforfamilies.org/overview> [<https://perma.cc/KN2P-2HKR>] (last visited Feb. 12, 2023), and arranged a campaign of ads on the sides of city buses urging parents to “Know Your Rights if ACS Knocks.” JMacforFamilies (@jmacforfamilies), INSTAGRAM, https://www.instagram.com/p/ChZ69_5u7ny [<https://perma.cc/CT4B-SHS4>] (last visited Feb. 12, 2023). Meanwhile, a group called Operation Stop CPS has garnered nearly 15,000 followers on Instagram and it regularly arranges mass actions by its followers one on behalf of particular families being affected by the family regulation system. Operation Stop CPS (@operationstopcps), INSTAGRAM, <https://www.instagram.com/operationstopcps> [<https://perma.cc/H5CW-7FR2>] (last visited Feb. 12, 2023).

426. See, e.g., Raz, *supra* note 59; Spinak, *supra* note 376, at 74.

drive an immediate decrease in child neglect, it also could reduce child neglect *and* child abuse over a longer time horizon. While intergenerational patterns of child neglect and abuse are complex, studies have shown that children who are victims of child neglect or abuse are more likely to neglect and abuse their own children.⁴²⁷ As today's parents gain better access to physical and mental healthcare, substance use treatment, and material provisions, their children will reap the benefits now—and their children's children and children's children's children will reap the benefits in generations to come.

The same is true for historical trauma. So long as the family regulation system continues to pathologize and punish marginalized families, it remains part of a tradition stretching back to slavery and Native boarding schools. Rejecting the narrative that these families merit suspicion represents a dramatic break from this tradition—a break that serves an expressive value but that also might, in a concrete sense, serve to mitigate the effects of historical trauma on parents and thus reduce future child neglect and abuse.⁴²⁸ Measures like reparations for those communities affected by the toll of historical trauma might further speed that reduction.⁴²⁹

427. Childs.' Bureau, U.S. Dep't of Health & Hum. Servs, *Intergenerational Cycle of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/can/impact/consequences-can/abuse> [<https://perma.cc/Q8D3-2Z7R>] (last visited Feb. 12, 2023) (collecting studies).

428. For discussions of the ongoing physical and mental health tolls of historical and intergenerational trauma, see DOTTIE LEBRON ET AL., MCSILVER INST. FOR POVERTY POL'Y & RSCH. & NYU SILVER SCH. OF SOC. WORK, *FACTS MATTER! BLACK LIVES MATTER! THE TRAUMA OF RACISM* (2015); Michelle M. Sotero, *A Conceptual Model of Historical Trauma: Implications for Public Health Practice and Research*, 1 J. HEALTH DISPARITIES RSCH. & PRAC. 93 (2006); see also Reakeeta Smallwood, Cindy Woods, Tamara Power & Kim Usher, *Understanding the Impact of Historical Trauma Due to Colonization on the Health and Well-Being of Indigenous Young People: A Systematic Scoping Review*, 32 J. TRANSCULTURAL NURSING 59 (2020) (describing the continued effect of historical trauma on Native children today).

429. See generally Ta-Nehesi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/GB4H-CQQ9>] (arguing for reparations for Black Americans). The Indian Child Welfare Act (ICWA), which for forty years has required the government to meet high standards in order to separate Native children from their families and from tribes, is an example of one model of reparations in the family regulation context. See Pamela D. Bridgewater, *Ain't I A Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 137 (2005) ("The Act exemplifies the government's responsiveness to the type of harm experienced by families when parental rights are forcibly severed in order to further some larger cultural subordination project. While there were no monetary damages paid in connection with the Indian Child Welfare Act, it established the possibility of remedy provided by formal recognition of the experiences, protection from future abuses, and a greater sensitivity to the vulnerability of a particular community with regard to child removal."); Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619, 624 (2001). At the time of this writing, ICWA appears to be under grave threat, see Adam Liptak, *Supreme Court Closely Divided in Case on Native American Adoptions*, N.Y. TIMES (Nov. 9, 2022), <https://www.nytimes.com/2022/11/09/us/politics/supreme-court-native-american-adoptions.html>

Over generations, we might create a country in which the vast, grinding machinery of the family regulation system is obsolete and a world in which those few cases of child maltreatment that do occur can be handled within families and within communities, with minimal government invasion—much like concerns of child maltreatment are currently handled in wealthier and whiter communities.⁴³⁰

Achieving this goal requires a fundamental shift in assumptions. Rather than presume that poor parents and Black, Latinx, and Native parents are deficient and thus require state supervision, the government could instead start from the premise that these parents, like almost all parents, want what is best for their children and know what is best for their children. In this vision, the government's role would not be to police but to provide and to ensure that all parents have the resources to create the lives they dream of for their children. The fundamental mismatch between the problem-solving family regulation system and the basic guarantees of the Fourth Amendment will not be resolved without a close examination of the assumptions underlying the family regulation system and the purposes this system is supposed to serve.

CONCLUSION

There exists an intractable conflict between the Fourth Amendment and the problem-solving family regulation system. The Fourth Amendment treats the home as a sanctuary and a retreat from government invasions. The problem-solving model of family regulation treats the home—or more precisely, the home of poor families and Black, Latinx, and Native families—as an open-access site of investigation. If the goal of the family regulation system is to effectuate unbounded government surveillance of marginalized families, then through the concerted efforts of each branch of government, it has doubtless succeeded. But if its goal is instead to secure the well-being of the nation's children, it has faltered, failing to curb child neglect despite the great costs to families' privacy and autonomy and to children's sense of security. To measure this system's success, and to

[<https://perma.cc/PTU6-H24K>] (reporting on oral arguments in *Brackeen v. Haaland*, 142 S. Ct. 1205 (2022) (No. 21-380), and noting apparent skepticism of five conservative justices toward the law), underlining all the more the necessity for a broad range of legal and non-legal strategies to change the family regulation system.

430. See, e.g., Jessica Horan-Block, *A Child Bumps Her Head. What Happens Next Depends on Race*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html> [<https://perma.cc/DQ6X-CVPT>] (comparing the treatment of two white celebrities whose child suffered a skull fracture with the treatment of poorer and non-white parents whose children suffer similar injuries).

consider its future, we must first ask what problem, exactly, the family regulation system is designed to solve.