

# WEAPONIZING FEAR

S. Lisa Washington

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## ABSTRACT

*In a letter dated February 22, 2022, Texas Governor Greg Abbott directed the commissioner of the Texas Department of Family and Protective Services “to conduct a prompt and thorough investigation of any reported instances” of what he called “abusive sex change procedures.” Many condemned the weaponizing of the child welfare system against parents supporting their children. Some highlighted that the directive misuses the vague definitions of child abuse to target LGBTQ+ youth and their families. While I agree with both critiques, I suggest that this framing insufficiently captures the ways the family regulation system—often called the “child welfare system”—fits squarely into the broader project of controlling marginalized families. The issue is not primarily the Texas directive’s misuse of the system but the system itself.*

*This Essay argues that the directive invokes preexisting, deep-seated fears of violence committed or perpetuated by the carceral state against the most marginalized families. Whatever the long-term viability of the directive, it has already exacerbated those fears. The family regulation system has the power to separate families and intrude on the most intimate parts of family life. Fear of state supervision and family separation takes a tremendous toll on impacted families. State actors weaponize this fear by leveraging, whether intentionally or unintentionally, a structural environment that induces, benefits from, and relies on fear, making it easier to control families. This weaponizing of fear to control families, in turn, produces further marginalization.*

*This Essay outlines the conditions of fear in the family regulation system and examines the ways that fear is and is not discussed in family regulation court decisions. It explores how fear is regularly weaponized against families with intersectional marginalized identities, and it identifies the targeting of LGBTQ+ youth and parents as a racialized movement. Popular conversations and legal scholarship rarely adopt an intersectional lens and bigger-picture*

*framing that includes both Black LGBTQ+ children and Black LGBTQ+ parents. By conducting an intersectional analysis, this Essay reveals that the Texas directive draws on the inequality, anti-Blackness, and heteronormativity of the family regulation system to target and discipline the most vulnerable families. This Essay calls for scholars to foreground intersectional perspectives in the fight against anti-LGBTQ+ policies and the family regulation system more broadly.*

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## INTRODUCTION

In a letter dated February 22, 2022, Texas Governor Greg Abbott directed the Commissioner of the Texas Department of Family and Protective Services (DFPS) “to conduct a prompt and thorough investigation of any reported instances” of what he defines as “abusive gender-transitioning procedures.”<sup>1</sup> The letter emphasized that mandatory reporting laws required doctors, nurses, teachers, and other mandated reporters to report child abuse or else face criminal penalties.<sup>2</sup> DFPS responded that it would comply with the Texas law.<sup>3</sup> Following the Governor’s directive, DFPS initiated several investigations against parents with transgender children.<sup>4</sup> A few hospitals halted hormone treatment for LGBTQ+ youth in the state.<sup>5</sup>

On March 1, 2022, the ACLU filed a lawsuit to challenge the state-sanctioned prosecution of parents who support their transgender children in obtaining medical care.<sup>6</sup> On March 2, 2022, the District Court of Travis County issued a temporary restraining order in the ACLU suit, blocking DFPS from further investigating the plaintiffs.<sup>7</sup> Shortly thereafter, on March 11, 2022, the district court issued a temporary statewide injunction, preventing enforcement of the Governor’s directive.<sup>8</sup> In May, however, the Supreme Court of Texas struck down the statewide injunction and ruled that while Abbott’s directive did not bind DFPS to conduct these investigations, child welfare investigations into gender-affirming care could resume.<sup>9</sup> DFPS then resumed investigations that had been temporarily halted by the statewide injunction, continuing to put families of transgender children at risk.<sup>10</sup>

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1. Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Comm’r, Tex. Dep’t of Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/KRQ4-ZP9L>].

2. *Id.*

3. Jeff Bell & Drew Knight, *DFPS Says It Will Comply with Abbott, Paxton Push to Investigate Transition Procedures as Child Abuse*, KVUE (Feb. 23, 2022, 10:50 PM CST), <https://www.kvue.com/article/news/politics/ken-paxton-child-modification-abuse-opinion/269-7115bb89-be34-4a9d-a79e-fb09ec87e52b> [<https://perma.cc/VJW5-ARD4>].

4. J. David Goodman & Amanda Morris, *Texas Investigates Parents over Care for Transgender Youth, Suit Says*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html> [<https://perma.cc/JPP9-3WKZ>].

5. J. David Goodman, *Texas Court Allows Abuse Inquiries of Parents of Transgender Children*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/13/us/texas-supreme-court-abuse-transgender-children.html> [<https://perma.cc/ZNJ4-BXCP>].

6. See Plaintiffs’ Original Petition & Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction & Req[ue]st for Declaratory Relief, Doe v. Abbott, No. D-1-GN-22-000977 (Tex. Dist. Ct. Mar. 1, 2022).

7. Doe v. Abbott, No. D-1-GN-22-000977, 2022 WL 628912, at \*1–2 (Tex. Dist. Ct. Mar. 2, 2022) (granting plaintiffs’ application for a temporary restraining order).

8. Doe v. Abbott, No. D-1-GN-22-000977, 2022 WL 831383, at \*2 (Tex. Dist. Ct. Mar. 11, 2022) (granting plaintiffs’ application for a temporary injunction).

9. *In re Abbott*, 645 S.W.3d 276, 281–83 (Tex. 2022).

10. See Eleanor Klibanoff, *Texas Resumes Investigations into Parents of Trans Children, Families’ Lawyers Confirm*, TEX. TRIB. (May 20, 2022, 1:00 PM CT), <https://www.texastribune.org/2022/05/20/trans-texas-child-abuse-investigations> [<https://perma>].

Texas is not the only state to take aim at transgender children and adults. The conservative right has made a national project of targeting LGBTQ+ youth and their parents. In 2021, state legislators introduced an unprecedented number of anti-LGBTQ+ bills.<sup>11</sup> Twenty-one states introduced bills prohibiting gender-affirming medical care for transgender youth.<sup>12</sup> Some of these bills penalize parents who support gender-affirming care for their transgender children.<sup>13</sup> In 2022, this project remains in full effect. To date, states have introduced at least 162 anti-transgender and anti-LGBTQ+ bills.<sup>14</sup> Some efforts have succeeded: recently, for example, the Florida Senate passed a bill that would prevent teachers from discussing LGBTQ+ issues in their classrooms.<sup>15</sup>

It is unclear whether DFPS in Texas will continue investigating parents with transgender children. We do not yet know how many states might follow suit, or whether family court judges will find parents neglectful for complying with medically sound recommendations.<sup>16</sup> While these are all important questions, this Essay focuses on a more fundamental aspect of family regulation in the carceral state: the way the family regulation system<sup>17</sup> weaponizes fear to control marginalized families.

I employ the term “weaponizing” to describe how state actors—whether intentionally or unintentionally—use a structural environment that induces, benefits from, or relies on fear, ultimately producing further marginalization.<sup>18</sup>

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cc/WY52–8UYX]. On September 16, 2022, a Texas District Court again enjoined DFPS, this time from investigating any family members of transgender children belonging to the national LGBTQ+ advocacy organization PFLAG. *See* PFLAG, Inc. v. Abbott, No. D-1-GN-22–002569 (Tex. Dist. Ct. Sept. 16, 2022). Litigation over the DFPS investigations is ongoing as of publication of this Essay.

11. Wyatt Ronan, *2021 Slated to Become Worst Year for LGBTQ State Legislative Attacks as Unprecedented Number of States Poised to Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (Apr. 22, 2021), <https://www.hrc.org/press-releases/2021-slanted-to-become-worst-year-for-lgbtq-state-legislative-attacks> [<https://perma.cc/FX79-PY53>].

12. Kerith J. Conron, Kathryn O’Neill & Luis A. Vasquez, *Prohibiting Gender-Affirming Medical Care for Youth*, WILLIAMS INST. 1 (Apr. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Apr-2021.pdf> [<https://perma.cc/L4V8-MM2Z>].

13. *Id.* at 1.

14. Priya Krishnakumar & Devan Cole, *2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights, ACLU Data Shows*, CNN (July 17, 2022, 5:57 PM), <https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/index.html> [<https://perma.cc/NRL5-MYNV>]; *Legislation Affecting LGBTQ Rights Across the Country*, ACLU (Sept. 9, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> [<https://perma.cc/7AQ6-6QHP>].

15. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (enacted).

16. *See* Plaintiffs’ Original Petition & Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction & Req[ue]st for Declaratory Relief, *supra* note 6, at 11.

17. This Essay employs the term “family regulation system” when referring to what is commonly described as the “child welfare system.”

18. The Essay focuses on structures and impact, not individual intent. However, there are certainly instances in which individuals intentionally weaponize fear of state-sanctioned

With some exceptions,<sup>19</sup> popular reactions miss how the Texas policy draws on a system that already uses its profound power and ability to inspire fear in marginalized communities.

Building on my forthcoming scholarship<sup>20</sup> and recent opinion pieces by Professor Dorothy Roberts<sup>21</sup> and Professor Mical Raz,<sup>22</sup> this Essay argues that the Texas directive's weaponizing of the family regulation system fits into a much larger project of producing fear to maintain white, heteronormative order through family regulation. White, middle-class, heteronormative norms dictate the standard of child neglect.<sup>23</sup> Those who deviate from the social norm are punished.<sup>24</sup> Here, the weaponizing of fear plays a central role in maintaining hegemonic structures.

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violence. For example, some scholars have described this phenomenon in the criminal legal and immigration context. *See, e.g.,* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1932–33 (2019) (arguing that private entities and citizens—empowered by federal and subfederal policy—create an environment so hostile to undocumented people that they self-deport and concluding that the “government’s use of spectacle and expressive statements directed to private citizens suggests that at least some policymakers understand these motivations and their own power to draw on this force”); Shawn E. Fields, *Weaponized Racial Fears*, 93 TUL. L. REV. 931, 968–73 (2019) (discussing how racially motivated 911 calls play on existing stereotypes and create the “opportunity for unwarranted police violence against a person of color”).

19. In a recent *Washington Post* opinion piece, Professor Dorothy Roberts poignantly argues that the “child welfare system already hurts trans kids.” Dorothy Roberts, Opinion, *The Child Welfare System Already Hurts Trans Kids. Texas Made It a Nightmare*, WASH. POST (Mar. 3, 2022, 12:23 PM EST), <https://www.washingtonpost.com/outlook/2022/03/03/texas-trans-youth-welfare> [<https://perma.cc/P4N7-RZRP>]; *see also* Mical Raz, Opinion, *Anti-Trans Law Weaponizes Child Protection Systems That Have Long Harmed Kids*, WASH. POST (Mar. 10, 2022, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2022/03/10/anti-trans-laws-weaponize-child-protection-systems-that-have-long-harmed-kids> [<https://perma.cc/L6K3-BCCM>] (describing the historic misuse of “child protective” services to punish parents and harm children).

20. S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. (forthcoming 2023) (manuscript at 44–48) (discussing how CPS’s subjective assessments of parental behavior pathologize Black parents), <https://ssrn.com/abstract=4068859> [<https://perma.cc/G5A8-2J3N>].

21. Roberts, *supra* note 19.

22. Raz, *supra* note 19.

23. *See* MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 9–30 (2020) (providing a history of how the movement against child abuse in the 1970s and 1980s centered middle-class white parents and concluding that colorblind approaches “ironically set the stage for current-day child welfare inequities”); 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, 716–28 (2021) (discussing the embedded relationship between race, class, and the foundations of the family regulation system in the period from the Johnson administration to the end of the 1970s).

24. *Cf.* Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1317–18 (2015) (arguing that the criminal legal system targets girls who “violate feminine and victim roles and related norms of chastity and obedience”); Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1109 (2014) (arguing that status offenses punish girls “who violate gender norms of obedience and sexual

While this Essay focuses on the weaponizing of fear against *parents* entangled in the family regulation system, it is important to note that the system harms children by targeting their parents. The interests of children cannot be viewed solely in isolation from the interests of their parents. Indeed, Professor Roberts points out that interference with the child-parent relationship is “an awful injury to the child.”<sup>25</sup> Professor Doriane Lambelet Coleman has long argued that the invasive nature of the family regulation system relies on the suspension of the “legal presumption that the children’s interests are aligned with those of their parents.”<sup>26</sup> State intervention into familial relationships is particularly common for Black and LGBTQ+ parents.<sup>27</sup> These families are the focus of this Essay.

As scholars have discussed at length, the government has long used criminalization as a tool of social control.<sup>28</sup> Against this background, a growing body of scholarship discusses how the family regulation system expands the carceral state’s control of marginalized families and parenthood.<sup>29</sup>

By examining the way that fear structures parents’ experience of the family regulation system, this Essay also complicates the argument that ambiguous legal definitions are to blame for the system’s harms. Some scholars identify the vague definitions of child neglect as a central issue in family regulation law.<sup>30</sup> Similarly, in its pending lawsuit, the ACLU argues that Governor

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purity”).

25. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 118 (2002).

26. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 539 (2005).

27. See *infra* Part I.

28. See, e.g., Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1681–82 (2021) (“[D]isorderly conduct provides yet another mechanism not just for preserving or controlling the racial composition of spaces but also for regulating negatively racialized groups’ access to and movement in ‘the white space.’” (citations omitted)); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 4–5 (2018) (arguing that misdemeanor criminal courts “seek social control” by “gradually ratcheting up the punitive response with each successive encounter or failure to live up to the court’s demands”); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1426–27 (2012) (analyzing how systems of mass incarceration create “structural-dynamic discrimination” that harm women of color).

29. See, e.g., Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1700 (2019) (reviewing VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018)) (“Systems that ostensibly exist to serve people’s needs—health care, education, and public housing, as well as public assistance and child welfare—have become behavior modification programs that regulate the people who rely on them.”); J. Khadijah Abdurahman, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children’s Services*, 11 COLUM. J. RACE & L.F. 75, 91, 99 (2021) (discussing the digital reach of the family regulation system and its reliance on carceral data).

30. See, e.g., Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 562 (2019); Raz, *supra* note 19 (arguing that the wide definitions of child abuse have been “weaponized and politicized”).

Greg Abbott, Attorney General Ken Paxton, and the DFPS Commissioner used the directive to “create a new definition of ‘child abuse’” under state law.”<sup>31</sup> Ambiguous definitions certainly permit Child Protective Services (CPS) to fall back on harmful stereotypes during their subjective assessments of parents.<sup>32</sup> However, there is little reason to believe that a clearer definition of child neglect would significantly alter deeply entrenched mechanisms of control.

We cannot define our way out of deeply held beliefs about the autonomy of marginalized parents, children, and their communities. Family regulation actors have stereotyped Black and LGBTQ+ parents as unfit, neglectful, and even dangerous.<sup>33</sup> Similarly, they have depicted Black survivors of domestic violence as weak and incapable of protecting their children.<sup>34</sup> And to date, popular discourse marks marginalized communities as pathological spaces.<sup>35</sup> We will not define our way out of anti-trans violence, anti-Blackness, and their intersections. Regardless of how we define the family regulation system’s key terms, fear fits comfortably within the family regulation system’s core features of control and punishment.<sup>36</sup> Indeed, as the Essay will discuss, fear is a driving feature of the system.

This Essay proceeds in three parts. Part I summarizes the ways in which the family regulation system disproportionately harms parents and children with marginalized identities. Current research and mainstream discourse rarely focus on Black LGBTQ+ parents targeted by the family regulation system.<sup>37</sup> This Essay begins to fill that gap. Part II identifies fear as an integral part of the family regulation apparatus. It traces the way that fear of structural state violence meets specific fear of the family regulation system. Together, compounded fears exacerbate harms against Black LGBTQ+ parents and other marginalized families. Part II briefly examines the conditions of fear produced by the family regulation system and the narrow ways in which fear is discussed

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31. Plaintiffs’ Original Petition & Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction & Req[ue]st for Declaratory Relief, *supra* note 6, at 2.

32. See Washington, *supra* note 20 (manuscript at 44–48) (discussing how CPS’s subjective assessments of parental behavior pathologize Black parents).

33. See *infra* Section I.B.

34. See S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1121–24 (2022).

35. See, e.g., Breanna Edwards, *Why Does Violence in Chicago Attract So Much Attention, Even Though It’s Not the Murder Capital of the U.S.?*, ROOT (Aug. 21, 2018, 12:00 PM), <https://www.theroot.com/why-does-violence-in-chicago-attract-so-much-attention-1828327783> [<https://perma.cc/CT7V-TURP>] (discussing how the pathologizing of Black communities in Chicago allows for continued divestment from the community).

36. See Miriam Mack, *The White Supremacy Hydra: How the Family Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 781 (2021) (arguing that coercion through family separation “enables family regulation agents to exercise expansive control”).

37. But see Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 FAM. L.Q. 87, 91–96 (2018) (discussing Black lesbian and bisexual mothers affected by the family regulation system).

in family regulation court decisions. Finally, Part II locates the Texas directive within the context of fear. It argues that the narrative that the family regulation system keeps children safe from “unfit” parents obscures how fear shapes families’ experience with the system. Part III argues that ongoing state targeting of LGBTQ+ families must be understood in the larger context of family regulation. The anti-trans Texas directive marks the latest iteration of a system that subordinates and traumatizes marginalized families instead of keeping them safe.

## I. INTERSECTIONALITY AND FAMILY REGULATION

It is well established that the family regulation system disproportionately impacts Black children and parents.<sup>38</sup> This Part highlights how the system produces specific harms for children and parents with intersectional marginalized identities, in particular Black LGBTQ+ children and parents. Against this background, this Part begins to identify the target of the family regulation system.

### A. *Intersectional Harms in the Foster System*

While this Essay focuses on the weaponizing of fear against parents, the system also instills deep fear in children with intersecting marginalized identities. To understand the weaponizing of fear against parents, it is important to discuss children’s experiences in the family regulation system. Family separation is traumatizing for children,<sup>39</sup> and children with marginalized identities bear the brunt of that trauma. Indeed, Black families are separated at higher rates than white families.<sup>40</sup> Among the approximately 400,000 children in the foster system, Black and LGBTQ+ children are overrepresented.<sup>41</sup> Many Black

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38. See “*Whatever They Do, I’m Her Comfort, I’m Her Protector.*” *How the Foster System Has Become Ground Zero for the U.S. Drug War*, MOVEMENT FOR FAM. POWER 26–28 (2020), <https://www.movementforfamilypower.org/s/MFP-Drug-War-Foster-System-Report.pdf> [<https://perma.cc/DA7F-CQ6S>]; *Black Children Continue to Be Disproportionately Represented in Foster Care*, KIDS COUNT DATA CTR. (Apr. 13, 2020), <https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity> [<https://perma.cc/SF22-928P>]; Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. 253, 253–54 (2020); ROBERTS, *supra* note 25, at 7–25.

39. Professor Shanta Trivedi discusses the severe impacts of family separation on a child’s mental health. See Trivedi, *supra* note 30, at 527–41 (discussing the emotional and psychological harms of child removals).

40. See Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, CHILD.’S BUREAU 3 (Nov. 2016), <https://ncwwi.dms.org/index.php/resourcemenu/resource-library/inclusivity-racial-equity/disproportionality-disparities/144-racial-disproportionality-and-disparity-in-child-welfare/file> [<https://perma.cc/9V6Y-5E4W>].

41. See KIDS COUNT DATA CTR., *supra* note 38; *LGBTQ Youth in the Foster Care System*, HUM. RTS. CAMPAIGN 1, <https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf> [<https://perma.cc/S5KB-SR2H>] (“[T]he percentage of youth in foster care who are LGBTQ-identified is larger than the percentage of LGBTQ youth in the general youth population.”).



and LGBTQ+ children hold other intersectional identities and experience multiple forms of discrimination.<sup>42</sup>

### 1. LGBTQ+ Youth

Some studies suggest that approximately 30% of youth in the foster system identify as LGBTQ, compared to 11% in the general population.<sup>43</sup> Once in the foster system, LGBTQ+ youth face distinct vulnerabilities. They tend to remain in the system longer, are more likely to be moved from one foster home to the next, and frequently end up in hostile group-home settings.<sup>44</sup> A survey of LGBTQ youth in the New York foster system found that 100% of LGBTQ youth in group homes reported verbal harassment; 70% reported physical violence.<sup>45</sup> Studies suggest that up to 40% of homeless youth are LGBTQ,<sup>46</sup> with even higher numbers of youth experiencing periods of instable housing.<sup>47</sup> LGBTQ+ youth in the foster system experience negative mental, emotional, and physical health outcomes.<sup>48</sup> In 2019, a lawsuit against the state of Oregon challenged widespread discrimination against LGBTQ+ youth in

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42. HUM. RTS. CAMPAIGN, *supra* note 41, at 2 (stating that many LGBTQ youth in the foster system “live at the intersection of multiple identities and thus experience multiple forms of discrimination including on the basis of race, class, disability, sexual orientation and gender identity.”); Bianca D.M. Wilson & Angeliki A. Kastanis, *Sexual and Gender Minority Disproportionality and Disparities in Child Welfare: A Population-Based Study*, 58 CHILD. & YOUTH SERVS. REV. 11, 15 (2015) (finding that the majority of surveyed LGBTQ youth in Los Angeles County are youth of color).

43. Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS, Mar. 2019, at 4; Theo G.M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities*, N.Y.C. ADMIN. CHILD.’S SERVS. 6 (2019), <https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf> [<https://perma.cc/FHP8-AK7V>]; Dana M. Prince, Meagan Ray-Novak, Braveheart Gillani & Emily Peterson, *Sexual and Gender Minority Youth in Foster Care: An Evidence-Based Theoretical Conceptual Model of Disproportionality and Psychological Comorbidities*, TRAUMA, VIOLENCE, & ABUSE, May 2021, at 1; Alan J. Dettlaff, Micki Washburn, Lynley “Christian” Carr & Alicia “Nikki” Vogel, *Lesbian, Gay, and Bisexual (LGB) Youth Within in Welfare: Prevalence, Risk and Outcomes*, 80 CHILD ABUSE & NEGLECT 183, 191 (2018) (finding that at least 15.5% of youth in the family regulation system identify as lesbian, bisexual, or gay).

44. See Jill Jacobs & Madelyn Freundlich, *Achieving Permanency for LGBTQ Youth*, 85 CHILD WELFARE 299, 303–05 (2006); Sandfort, *supra* note 43, at 8.

45. Randi Feinstein, Andrea Greenblatt, Lauren Hass, Sally Kohn & Julianne Rana, *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System*, URB. JUST. CTR. 16 (2001), <https://www.hivlawandpolicy.org/sites/default/files/justiceforallreport.pdf> [<https://perma.cc/DF77-27S4>].

46. *Id.* at 1, 6.

47. Ryan Berg, *A Hidden Crisis: The Pipeline from Foster Care to Homeless for LGBTQ Youth*, IMPRINT (Oct. 14, 2016, 7:25 AM), <https://imprintnews.org/child-welfare-2/hidden-crisis-pipeline-foster-care-homelessness-lgbtq-youth/21950> [<https://perma.cc/D4A5-MRWJ>] (“Nearly half of the youth experiencing homelessness today have had at least one placement in a foster home, or group home.”).

48. Julia Alberth, *LGBTQ Youth Homelessness and Discrimination in the Foster Care System*, UNIV. WIS. MADISON 1 (Spring 2020), <https://patientpartnerships.wisc.edu/wp-content/uploads/sites/1237/2021/02/AlberthFinal.pdf> [<https://perma.cc/9PZY-5UES>].

the foster system.<sup>49</sup> The lawsuit argued that the state's foster system harmed those it purports to protect.<sup>50</sup> The plaintiffs alleged that LGBTQ+ children "are often deprived of safe and stable placement" and are not provided with the support and resources necessary to survive after they leave the foster system.<sup>51</sup> When they eventually exit the foster system, these children frequently end up homeless.<sup>52</sup>

## 2. LGBTQ+ Youth of Color

The trauma of the foster system is intensified for LGBTQ+ children of color, who are especially overrepresented.<sup>53</sup> This disparity is particularly pronounced for Black LGBTQ+ girls.<sup>54</sup> When children's marginalized identities intersect, they are more likely to experience mental and physical harms, discrimination, and violence in and after the foster system. LGBTQ+ youth of color are particularly at risk for poor outcomes in the foster system due to a "range of intersecting vulnerabilities," including racism, sexism, gender identity, sexual orientation, socioeconomic class, and psychiatric vulnerabilities during and following foster care.<sup>55</sup> A study by the Annie E. Casey Foundation found that LGBTQ youth of color are more likely than their heterosexual, cis-gender peers to cycle through at least ten different placements while in the system.<sup>56</sup>

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49. Wyatt B. *ex rel.* McAllister v. Brown, No. 19-cv-00556, 2021 WL 4434011, at \*7 (D. Or. Sept. 27, 2021) (summarizing plaintiffs' allegations that the Oregon child welfare system violated LGBTQ+ foster youth's rights "(1) to freedom from bias-related violence, abuse, and harassment while in state custody; (2) to freedom from systemic discrimination based on sexual orientation, gender identity, and gender expression; (3) to privacy regarding the same; (4) to medically necessary gender-affirming medical and psychological care; (5) to culturally competent reproductive health care and sexual health services; and (6) to be clothed and groomed consistent with their sexual orientations, gender expressions, and gender identities").

50. *See id.*

51. *Id.* at \*2.

52. *Id.* at \*2.

53. *See* Wilson & Kastanis, *supra* note 42, at 15 (finding that the majority of LGBTQ+ youth in the LA foster system were youth of color and suggesting that many of them likely faced both racial and anti-LGBTQ discrimination).

54. Bianca D.M. Wilson & Laura J.A. Bouton, *System Involvement Among LBQ Girls and Women*, WILLIAMS INST. 3–4 (Apr. 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LBQ-System-Involvement-Apr-2022.pdf> [<https://perma.cc/BF7V-MFFK>] (finding, based on data from the 2014 Los Angeles Foster Youth Survey, that lesbian, bisexual, and queer girls were overrepresented in the Los Angeles County foster system, and that of these girls, approximately 33% were Black).

55. Harold E. Briggs & Kimberly Hoyt, *LGBTQ Youth of Color in Systems: Child Welfare*, in Kerith J. Conron & Bianca D.M. Wilson, *LGBTQ Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems: A Research Agenda*, WILLIAMS INST. 45, 45–46 (June 2019) (citation omitted), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-YOC-Social-Services-Jul-2019.pdf> [<https://perma.cc/QUC8-H7P2>].

56. Jeffrey M. Poirier, Sandra Wilkie, Kristin Sepulveda & Tania Uruchima, *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ*, 96 CHILD WELFARE 1, 13–17 (2018).

For some Black LGBTQ+ youth in the foster system, fear is a constant. Black LGBTQ+ children have described the regular harassment and violence they have suffered—abuse that actors in the foster system have ignored or even participated in.<sup>57</sup> One Black gay youth explained that when he was in the foster system, his white foster family told him that they would kill him if he were gay; he felt so unsafe that when he was moved to a group home, he began sleeping with a knife under his pillow.<sup>58</sup> Once out of the foster system, LGBTQ+ youth of color experience worse physical and mental health outcomes, instable housing, and financial insecurity at higher rates than their white, heterosexual, cisgender peers.<sup>59</sup>

### B. *The Targeting of Black LGBTQ+ Parents*

Caregivers who hold multiple marginalized identities face their own—often overlooked—uphill battles. For example, although family regulation authorities have long removed children from lesbian mothers,<sup>60</sup> lesbian mothers’ narratives do not “occupy most legal scholarship, public policy advocacy, test case litigation, or media portrayals.”<sup>61</sup> Indeed, there is little empirical data on LGBTQ+ parents who are impacted by the family regulation system. Current discourse and data collection are, for the most part, limited to LGBTQ+ individuals as foster or adoptive parents.<sup>62</sup> In these discussions, the intersectional identities of Black LGBTQ+ parents entangled in the family regulation system are frequently rendered invisible. As a growing body of scholarship points out, the family regulation system mirrors and intersects with the criminal legal system.<sup>63</sup> And much like the criminal legal system, the family regulation system must be examined intersectionally.<sup>64</sup>

57. See DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 231–33 (2022); Rosalyn Erney & Kristen Weber, *Not All Children Are Straight and White: Strategies for Serving Youth of Color in Out-of-Home Care Who Identify as LGBTQ*, 96 *CHILD WELFARE* 151, 159 (2018).

58. Erney & Weber, *supra* note 57.

59. Poirier et al., *supra* note 56, at 14–19.

60. See Polikoff, *supra* note 37, at 90.

61. *Id.*

62. See, e.g., A. Chris Downs & Steven E. James, *Gay, Lesbian, and Bisexual Foster Parents: Strengths and Challenges for the Child Welfare System*, 85 *CHILD WELFARE* 281, 281 (2006) (examining the “challenges and successes” of lesbian, gay, and bisexual foster parents); Sean Cahill, Juan Battle & Doug Meyer, *Partnering, Parenting, and Policy: Family Issues Affecting Black Lesbian, Gay, Bisexual, and Transgender (LGBT) People*, 6 *RACE & Soc’y* 85, 88, 94–95 (2003) (surveying barriers faced by Black LGBT people who wish to foster or adopt and proposing policy solutions to dismantle those barriers).

63. See, e.g., Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 *CUNY L. REV. F.* 68, 72 (2017); Venezia Michalsen, *Abolitionist Feminism as Prisons Close: Fighting the Racist and Misogynist Surveillance “Child Welfare” System*, 99 *PRISON J.* 504, 506 (2019); ROBERTS, *supra* note 57, at 161.

64. See Crenshaw, *supra* note 28, at 1429–34 (problematizing the marginality of intersectional criminal justice discourse); Kimberlé W. Crenshaw, *Why Intersectionality Can’t Wait*, *WASH. POST* (Sept. 24, 2015, 3:00 PM EDT), <https://www.washingtonpost.com/>

Both children *and* parents entangled in the system experience intersectional harms. Existing data and examples highlighted by scholars, popular media outlets, and my own practice experience suggest the pervasiveness of intersectional bias by the family regulation system. The disparate treatment of parents and children with intersectional marginalized identities is multifaceted and complex. In this Section, I will discuss only a few central aspects and corresponding examples.

The family regulation system may characterize LGBTQ+ parents as “unfit” to care for their children. Professor Nancy D. Polikoff discusses one such case, the story of a lesbian mother named Hilda.<sup>65</sup> When Hilda’s children entered the foster system, a faith-based agency was assigned to provide mandated reunification services.<sup>66</sup> A family regulation caseworker working for the agency informed Hilda that her sexual orientation needed to be “fixed” to avoid intergenerational effects of sexual “preference.”<sup>67</sup> A family court judge later terminated Hilda’s parental rights.<sup>68</sup>

The family regulation system enables caseworkers to punish lesbian mothers like Hilda. Once parents are under investigation, agency caseworkers hold significant power over families. Caseworkers monitor and document the child-parent relationship while a child is in the foster system.<sup>69</sup> At permanency hearings, caseworkers recommend either continued family separation or reunification. Their recommendations are based on their own perception of parental behavior and progress. Caseworkers regularly remain in the lives of families for long periods of time, producing a uniquely coercive power dynamic.<sup>70</sup> In Hilda’s case, this power dynamic allowed her caseworker to dictate heteronormativity as a standard for child safety.

The family regulation system also disciplines transgender parents for their gender identities. In *M.B. v. D.W.*, the Kentucky Court of Appeals affirmed the trial court’s decision to terminate a legal parent-child relationship based on the child’s emotional distress caused largely by a parent’s gender-affirming surgery.<sup>71</sup> Strikingly, the court chose to remedy the emotional distress of the child

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news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait [https://perma.cc/8BFB-CMB4] (“Intersectional erasures are not exclusive to black women. People of color within LGBTQ movements; girls of color in the fight against the school-to-prison pipeline; women within immigration movements; trans women within feminist movements; and people with disabilities fighting police abuse—all face vulnerabilities that reflect the intersections of racism, sexism, class oppression, transphobia, able-ism and more.”).

65. Polikoff, *supra* note 37, at 87–88 (citing *In re R.M.*, Nos. 115,945, 115,946, 2017 Kan. App. Unpub. LEXIS 365, at \*1 (May 12, 2017)).

66. *Id.* at 87.

67. *Id.* at 87.

68. *Id.* at 88.

69. Washington, *supra* note 20 (manuscript at 27–28) (discussing how CPS caseworkers, as “perpetual witnesses,” document, monitor, and report their perceptions of the family functioning).

70. For more on the power dynamics driving the relationship between parents and caseworkers, see *id.* (manuscript at 26–29).

71. 236 S.W.3d 31, 33–36 (Ky. Ct. App. 2007).

by severely and permanently intervening in the parent-child relationship.<sup>72</sup> The opinion makes clear that the parent wished to remain in her child's life.<sup>73</sup> The parent requested a less drastic intervention, which could have included family therapy, a custody arrangement, or even a temporary break from visitation.<sup>74</sup> Instead, the court terminated the family relationship.<sup>75</sup> The trial court's decision characterized the gender-affirming surgery as "self-centered."<sup>76</sup> The court of appeals found no error in the lower court's conclusion that the transgender parent was "primarily responsible" for the emotional distress of the child, and it affirmed the trial court's neglect finding.<sup>77</sup>

LGBTQ+ parents are keenly aware that their identities may make them targets for family regulation intervention. In one participatory-research study of parents directly impacted by the family regulation system in New York City, an LGBTQ+ parent shared concerns about their disparate treatment by case-workers: "I've learned the hard way that they don't respect us. Their favorite question is 'Which one of you actually had the child?' . . . I just don't think that that matters. It just doesn't matter."<sup>78</sup>

A 2016 study found that if a Black mother was lesbian or bisexual, her child was more likely to be removed than if she were heterosexual.<sup>79</sup> As a public defender, I witnessed similar discrimination against Black LGBTQ+ parents and their partners. In one case,<sup>80</sup> CPS removed all four children from their mother. Instead of placing the children with her partner, a transgender man whom the children knew as their father, CPS placed the children in the foster system with a stranger. One child's health quickly deteriorated, and they were ultimately hospitalized. The agency did not even consider the mother's transgender partner and de facto father of the children as a resource. Only

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72. *Id.* at 35, 38 (holding that "substantial evidence" supported the involuntary termination of a transgender parent).

73. *Id.* at 34.

74. *Id.*

75. *Id.* at 37 ("The appellant has also argued that there were other measures, less drastic than termination, which might have been effective in protecting the best interests of M.B. This court has held that a trial court should consider any such less drastic measures. However, it does not appear from the record that the appellant ever raised this issue in the trial court." (citation omitted)).

76. *Id.* at 37.

77. *Id.* at 36–37. The label that attaches to parents who are adjudicated neglectful is pervasive, even when the legal parent-child relationship remains intact. See Washington, *supra* note 20 (manuscript at 47–48).

78. *An Unavoidable System: The Harms of Family Policing and Parent's Vision for Investing in Community Care*, RISE & TAKERROOT JUST. 20 (Fall 2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf> [<https://perma.cc/3E9Z-AMJS>].

79. Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 Soc. Sci. RSCH. 283, 288–89, 293 (2016).

80. For confidentiality purposes, I do not include the name or any further identifying details.

through family regulation intervention did the children eventually learn that their mother's partner was not their biological father.

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The family regulation system is fertile ground for the targeting of parents and children with intersectional marginalized identities.<sup>81</sup> Unequal power dynamics and anti-Black, heteronormative norms are a feature of the system, not a bug. Adopting an intersectional analysis reveals that the Texas directive weaponizes the inequality, anti-Blackness, and heteronormativity of the family regulation system to target and discipline the most marginalized families. The framework of intersectionality helps identify “where power comes and collides, where it interlocks and intersects.”<sup>82</sup> The family regulation system is one such site of concentrated power and fear. The discussion around law and policy in Texas is missing some of these deep connections. By adopting an intersectional lens, however, we can identify fear as a structural logic within the family regulation system. The following Part argues that the family regulation system not only produces fear but relies on fear in its operation.

## II. INSPIRING FEAR

For many marginalized families, the fears of individually inflicted violence and state-sanctioned violence—violence promoted, produced, or sustained by the state—collide. In other words, individual violence does not occur in a vacuum; it exists against the backdrop of social structures, including underprotection by the state and violence inflicted by the state.<sup>83</sup> In this way, fear is sustained by families' awareness that they may be individually targeted

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81. The disparate treatment of LGBTQ+ parents in the family regulation system tracks how a parent's nonheterosexual identity is used against them in parental-fitness determinations in custody cases. See Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEM. 1, 4 (2012) (arguing that parents outside of “traditional marriage and its presumed heterosexuality” are seen as “threateningly ‘sexually salient’” in custody determinations); Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 998–1001 (examining courts' apparent “fascination” and concern about the sexual activity of gay fathers in custody cases); Doron Dorfman, *Penalizing Prevention: The Paradoxical Legal Treatment of Preventative Medicine*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 20–22), <https://ssrn.com/abstract=4045148> [<https://perma.cc/7QVF-ZCPV>] (arguing that for gay men in particular, the use of the preventative medication PrEP may be used against them in child-custody cases); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 648 (1996) (arguing that in custody cases, courts punish gay and lesbian parents for not being “discreet” in their displays of affection with partners); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285, 315 (2002) (identifying courts' attempts to “control and inhibit alternative sexualities” in custody cases).

82. Kimberlé W. Crenshaw, *Featured Quote*, COLUM. L. SCH., <https://www.law.columbia.edu/faculty/kimberle-w-crenshaw> [<https://perma.cc/PEF3-N4VX>].

83. For example, Professor India Thusi discusses how Black and Indigenous girls, many of them LGBTQ+, are “subjected to state-sanctioned sexual violence” in the juvenile system through sexual abuse, strip searches, and body cavity searches. See I. India Thusi, *Girls, Assaulted*, 116 NW. U. L. REV. 911, 957 (2022).

and that their targeting may be structurally reified as legitimate. This Part will show that the growing movement to criminalize LGBTQ+ parents and their children, including in Texas, must be understood in the context of *both* pervasive state-sanctioned violence against trans people *and* the fear of the family regulation system in marginalized communities.

A. *A. State-Sanctioned Violence Against Black LGBTQ+ Individuals and LGBTQ+ Individuals of Color*

Just a few days after Texas issued its directive targeting trans youth and their parents, a trans woman of color was found shot dead in her Houston apartment.<sup>84</sup> Texas is amongst the states with the highest incidence of fatal violence against trans women of color.<sup>85</sup> Naomi Green, a fellow with the Human Rights Campaign (HRC), stated in October 2021:

Since I moved to Dallas 3 years ago to the date tomorrow, this is the eighth transgender woman of color who has been shot. The seven who were killed were all Black and the Latina survived. I didn't know that when I moved here I was moving to a place where being trans means being more deserving to die.<sup>86</sup>

Violence<sup>87</sup> against Black trans individuals is pervasive. HRC reports that 2021 marked an all-time high of violence against trans and gender-nonconforming

84. Julian Gill, *Transgender Woman Fatally Shot Inside Southwest Houston Apartment, Police Report*, Hous. Chron. (Feb. 27, 2022, 9:31 AM) [<https://perma.cc/LC4Z-RBKZ>]; Muri Assunção, *Trans Woman Fatally Shot in Houston Apartment After Fleeing Anti-Trans Violence in Honduras, Friends Say*, N.Y. Daily News (Mar. 4, 2022, 4:00 PM), <https://www.nydailynews.com/news/crime/ny-trans-woman-fatally-shot-honduras-houston-apartment-friends-killed-20220304-kxml377fcnb7fkyhbvlvintena-story.html> [<https://perma.cc/74EE-XLF8>].

85. *An Epidemic of Violence 2021: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, Hum. Rts. Campaign (2021), <https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2021> [<https://perma.cc/H2E5-2N97>] (“Most deaths in 2021 have been in Texas and Pennsylvania (five total), followed by four in Florida and Illinois.”).

86. Violet Lhant, *HRC Mourns Kiér Lapri Kartier, Black Transgender Woman Killed in Arlington, Texas*, Hum. Rts. Campaign (Oct. 4, 2021), <https://www.hrc.org/news/hrc-mourns-kiér-lapri-kartier-black-transgender-woman-killed-in-arlington-texas> [<https://perma.cc/QS9K-PJ8C>].

87. This Essay adopts a broad definition of violence, including psychological, emotional, epistemic, and structural state violence. See generally Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 237–42 (2011) (tracking and categorizing the silencing of marginalized groups as epistemic violence); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 280–87 (Cary Nelson & Lawrence Grossberg eds., 1988) (discussing the subordination of marginalized groups through epistemic violence); ANKE BARTELS, LARS ECKSTEIN, NICOLE WALLER & DIRK WIEMANN, *POSTCOLONIAL LITERATURES IN ENGLISH: AN INTRODUCTION* 153–54 (2019); M. Gabriela Torres, *State Violence*, in 2 *THE CAMBRIDGE HANDBOOK OF SOCIAL PROBLEMS* 381(A. Javier Treviño ed., 2018) (defining state violence as one form of violence).

people since 2013, when HRC began tracking these attacks.<sup>88</sup> In 2021, most victims were Black transgender women.<sup>89</sup> 84% of victims of fatal violence against transgender people are people of color.<sup>90</sup> 85% are transgender women, and 77% are transgender women of color.<sup>91</sup> These numbers are conservative, given the underreporting and misreporting of violence against transgender people.<sup>92</sup>

Individually inflicted violence against Black trans women occurs against the backdrop of state-sanctioned violence, including violence carried out by state actors like the police. According to one national survey, 22% of transgender people who have interacted with the police report that the police harassed them; 6% report that the police assaulted them.<sup>93</sup> Black transgender individuals report much higher rates: 38% report harassment in police interactions and 15% report assault.<sup>94</sup> Notably, states leading efforts to criminalize transgender people are amongst the states where the most trans people have been killed. This includes Texas and Florida.<sup>95</sup>

This is the hostile environment in which the criminalizing of parents of transgender youth is swiftly advancing. But there is more. The family regulation system exploits this landscape of fear, weaponizing it against marginalized communities. The following Section discusses the conditions of fear in the family regulation system and how they impact Black LGBTQ+ parents.

## B. *Fear of the Family Regulation System*

Many white middle-class families will never encounter the family regulation system. They are less likely to be reported to the system or investigated by it.<sup>96</sup> Their children are less likely to be removed from their homes, and their parental rights are less likely to be threatened, much less terminated,

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88. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> [<https://perma.cc/6W9M-L93Y>].

89. *Id.* (listing fifty-six victims and explicitly stating that thirty-two of them are Black transgender women).

90. HUM. RTS. CAMPAIGN, *supra* note 85.

91. *Id.* (considering fatal violence against transgender and gender nonconforming individuals since 2013).

92. *See id.* (“Fatal violence against transgender and gender nonconforming people is often reported inaccurately and insufficiently. Victims are consistently misgendered, and crimes against them are consistently underreported.”).

93. Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE 160 (2011).

94. *Id.*

95. *See supra* notes 11-12 and accompanying text (identifying the states leading efforts to criminalize trans and LGBTQ+ people); HUM. RTS. CAMPAIGN, *supra* note 85 (identifying Texas and Florida as among the states with the highest incidence of fatal violence against transgender and gender nonconforming individuals).

96. *Child Welfare Practice to Address Racial Disproportionality and Disparity*, CHILD WELFARE INFO. GATEWAY & CHILD.’S BUREAU 6, 15 (Apr. 2021), [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf) [<https://perma.cc/97VS-W3QZ>].



compared with Black families.<sup>97</sup> For Black parents in impoverished communities, by contrast, family regulation is an “unavoidable system” and a source of near-constant fear.<sup>98</sup>

This Section will highlight only a few areas in which fear is concentrated. This is in no way a comprehensive account of fear in and of the system. Instead, this Section provides examples of the pervasiveness of fear in the system and the way the system weaponizes fear to punish families that depart from white, middle-class, heterosexual, and cisgender norms.

## 1. The Conditions of Fear

### *i. Tools of Coercion*

The family regulation system has numerous tools of coercion at its disposal.<sup>99</sup> The separation of families—temporary and permanent—is the most punitive tool.<sup>100</sup> Even when children are not actually removed, the mere threat of removal can feel constant for parents.<sup>101</sup> Surveillance,<sup>102</sup> mandatory and often inappropriate services,<sup>103</sup> unannounced home visits, and intrusive searches of private spaces are other powerful tools.<sup>104</sup>

Furthermore, interaction with the family regulation system brings other, enmeshed adverse consequences. For example, a neglect or abuse investigation can impact current and future employment and shelter placements for homeless families.<sup>105</sup> Family regulation involvement can also provoke immigration consequences, including increased risk of detention and deportation.<sup>106</sup> This bundle of coercive mechanisms inspires fear in families, requiring parents to conform to the demands of CPS or risk continued supervision, enmeshed

97. *Id.* at 3 (“African-American and American Indian or Alaska Native children are more likely than other children to be removed from their homes and to experience a termination of parental rights.” (citation omitted)).

98. RISE & TAKEROOT JUST., *supra* note 78, at 12 (“[A]bove all, research participants described [CPS] as an unavoidable system.”).

99. Washington, *supra* note 34, at 1124 (discussing “tools of silencing and knowledge coercion” central to family regulation).

100. Cloud et al., *supra* note 63, at 74–84.

101. See, e.g., Abigail Kramer, *Backfire: When Reporting Domestic Violence Means You Get Investigated for Child Abuse*, CHILD WELFARE WATCH & THE CTR. FOR N.Y.C. AFFS. AT THE NEW SCH. 1–2 (Mar. 2020) (describing how one mother, a survivor of domestic violence, constantly feared that her child might be removed by CPS), [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer\\_Mar312020\\_v1.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer_Mar312020_v1.pdf) [<https://perma.cc/XK6A-BXEV>].

102. Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 509–30 (2021).

103. Mack, *supra* note 36, at 781.

104. 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, 147 (2019).

105. *Id.* at 132. For an in-depth discussion of enmeshed consequences of family regulation involvement see Washington, *supra* note 34, at 1128–31.

106. Washington, *supra* note 34, at 1129.

consequences, and even the “death”<sup>107</sup> of their family through the termination of parental rights.

ii. *Constant Presence*

The fear of the family regulation system in marginalized communities is exacerbated by the unavoidability<sup>108</sup> and constant presence<sup>109</sup> of CPS caseworkers and the institutional support caseworkers receive from law enforcement.<sup>110</sup> As a public defender in New York City, I encountered many parents who were acutely aware that CPS targeted their neighborhoods. This experience is corroborated by a participatory research study published by Rise in 2021.<sup>111</sup> The researchers surveyed fifty-eight impacted parents, conducted ten focus groups, and reviewed relevant literature.<sup>112</sup> The study found that families ensnared in the family regulation system live in fear.<sup>113</sup> One parent said about their experience with CPS: “They’re all over the place. In school, in daycare. They’re just all over the place, but for the wrong reasons.”<sup>114</sup> Another participant stated, “It is hard, hard—I’m going to say ‘hard’ again, to avoid [CPS].”<sup>115</sup> Parents are not only impacted by the family regulation system’s constant presence in their community, but also by the psychological impact of any potential family regulation intervention: “It’s terrifying. It’s like a stamp. And then knowing that you do have a stamp. . . . You know, it’s like a mark.”<sup>116</sup> Another par-

107. The permanent termination of parental rights by the state is also called the “civil death penalty.” Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 866–67 (2021); Cloud et al., *supra* note 63, at 84–85.

108. See RISE & TAKEROOT JUST., *supra* note 78.

109. See, e.g., Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 615 (2020) (“[S]ystem contact is commonplace in marginalize communities.”); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 673 (2021) (“[B]ut foster care agencies’ larger-than-life presence in marginalized communities is government surveillance in poor communities.”).

110. Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 50, 52 (2019) (“Child welfare agencies routinely conduct joint investigations with police, many police departments have created special units directed at child abuse and neglect, and police themselves handle noncriminal maltreatment investigations in some jurisdictions.”); Theodore P. Cross, Emmeline Chuang, Jesse J. Helton & Emily A. Lux, *Criminal Investigations in Child Protective Services Cases: An Empirical Analysis*, 20 CHILD MALTREATMENT 104, 105–06 (2015).

111. RISE & TAKEROOT JUST., *supra* note 78.

112. *Id.* at 9.

113. *Id.* at 7 (“[R]esearch shows, fear of family policing prevents families from accessing needed support and resources. Because the family policing system is so present in low-income communities of color, this fear can affect parents who have never had a case or report.” (footnotes omitted)); *id.* at 15.

114. *Id.* at 12.

115. *Id.* at 12.

116. *Id.* at 15.

ticipant stated, “[It has] a lasting impact—PTSD. When [my child] falls down, gets a bump or a scratch, his doctor’s visits—it’s just so stressful now. Like, I can’t even enjoy him doing kid things . . . . I can’t even let him be him.”<sup>117</sup> For these parents and others like them, the family regulation system is deeply traumatizing.<sup>118</sup>

Given the reports of abuse, discrimination, and long-term adverse outcomes for children in the foster system,<sup>119</sup> the fear of what might happen to a child while in state custody is understandably widespread. Foster children experience sexual abuse, physical abuse, and neglect. Professor Shanta Trivedi argues that despite the system’s claim of keeping children safe, “there is substantial evidence that children are more likely to be abused in foster care than in the general population.”<sup>120</sup> The numerous media stories of children killed or abused in the foster system exacerbate parents’ fears that if they lose custody, their children will face harm.<sup>121</sup> As discussed above, LGBTQ+ youth of color are placed into more dangerous foster placements and remain there for longer periods of time. Parents, including parents of LGBTQ+ youth of color, are rightfully afraid of what may happen to their children in the foster system.

### iii. *The Network of Fear*

The family regulation system’s coercive tools and its constant presence in marginalized communities create omnipresent fear. The fear is not limited to direct contact with the family regulation system. It extends to any institution that could potentially report a family to the system.<sup>122</sup> For example, some survivors of domestic violence avoid the police because they fear that

117. *Id.* at 15.

118. *See, e.g.*, ROBERTS, *supra* note 57, at 51 (discussing the experience of one mother after her child was removed: “I went insane. I broke down, nearly died.”).

119. *See, e.g.*, Class Action Complaint at 45, Wyatt B. v. Brown, 19-cv-00556 (D. Or. Apr. 16, 2019) (alleging, in a class action lawsuit against Oregon’s foster system on behalf of foster children, that “Oregon’s foster care system is so dysfunctional that Oregon cannot accurately track how bad its services are”); Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007) (finding that children “on the margin of placement” have better long-term outcomes when they remain at home, instead of entering the foster system).

120. Trivedi, *supra* note 30, at 542.

121. *See, e.g.*, Josh Salman, Daphne Chen & Pat Beall, *Foster Kids Lived with Molesters. No One Told Their Parents*, USA TODAY NEWS (Oct. 16, 2020, 2:42 PM EDT), <https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002> [<https://perma.cc/5LLR-JYJS>]; Richard Wexler, *Abuse in Foster Care: Research vs. the Child Welfare System’s Alternative Facts*, YOUTH TODAY (Sept. 20, 2017), <https://youthtoday.org/2017/09/abuse-in-foster-care-research-vs-the-child-welfare-systems-alternative-facts> [<https://perma.cc/DD3U-MJAQ>]; Vaidya Gullapalli, *The Damage Done by Foster Care Systems*, APPEAL (Dec. 18, 2019), <https://theappeal.org/the-damage-done-by-foster-care-systems> [<https://perma.cc/LY3P-68FM>].

122. Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 SOC. FORCES 1785, 1786 (2019).

contacting law enforcement may lead to a CPS investigation against them.<sup>123</sup> Undocumented survivors of domestic violence may fear deportation and avoid state assistance.<sup>124</sup> Parents may even avoid medical providers because they are afraid to lose their children.

These fears are not irrational. While some parents are met with compassion and care when they bring their child into a hospital to treat an injury, marginalized parents are met with suspicion.<sup>125</sup> Family defense attorneys juxtapose stories of middle-class white parents and low-income Black and brown parents seeking emergency care in New York City hospitals.<sup>126</sup> Low-income Black and brown parents are interrogated and discredited, and their children may be removed from their home by the family regulation system. Nonwhite children are more likely to be reported to CPS by hospital staff.<sup>127</sup> Hospitals are also more likely to conduct a skeletal survey of an infant—a key component of the evaluation for suspected child abuse<sup>128</sup>—if the child is Black.<sup>129</sup> Nonwhite families' justified fear of service providers indicate how deeply embedded the potential impacts of the family regulation system are in marginalized families' consciousness.

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123. See, e.g., Washington, *supra* note 34 (discussing the story of a mother who reached out to CPS for help and was instead investigated); *In re* Int. of D.C., No. 06–18–00114-CV, 2019 WL 2455622, at \*4 (Tex. App. June 13, 2019) (finding that the mother in the case established “that her prior CPS history resulted from her own requests for assistance from CPS in dealing with [her child’s] mental health”).

124. Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 *FORDHAM L. REV.* 837, 842 (2012).

125. Kent P. Hymel, Antoinette L. Laskey, Kathryn R. Crowell, Ming Wang, Veronica Armijo-Garcia, Terra N. Frazier, Kelly S. Tieves, Robin Foster & Kerri Weeks, *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 *J. PEDIATRICS* 137, 137–43 (2018); Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 *AM. J. PUB. HEALTH* 56, 57 (1985) (finding that hospital staff was more likely to report Black and Latinx parents for child abuse).

126. Jessica Horan-Block, Opinion, *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/V6BZ-PM2R>] (juxtaposing the story of Jenny Mollen, who had dropped her five-year-old child, causing a skull fracture, and was met with “compassion and sympathy” in a private hospital in Manhattan and a Latina mother in the Bronx who was investigated and separated from her child after an accident).

127. Wendy G. Lane, David M. Rubin, Ragin Monteith & Cindy W. Christian, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 *J. AM. MED. ASS’N* 1603, 1603, 1605–07 (2002).

128. Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 *COLUM. J. RACE & L.* 733, 751 (2021).

129. Studies show that Black and other marginalized infants are more likely to receive a skeletal survey. See Christine W. Paine & Joanne N. Wood, *Skeletal Surveys in Young, Injured Children: A Systematic Review*, 76 *CHILD ABUSE & NEGLECT* 237, 242 (2018); Lane et al., *supra* note 127, at 1603 (concluding that nonwhite children were “significantly more likely to have a skeletal survey performed compared with their white counterparts, even after controlling for insurance status, independent expert determination of likelihood of abuse, and appropriateness of performing a skeletal survey”).

The fear of the family regulation system is so reliable that abusive partners and hostile neighbors can weaponize it as retaliation.<sup>130</sup> Reports also indicate that some public institutions have utilized the family regulation system to enforce their own policies. For example, public schools have weaponized the family regulation system to resolve conflicts with parents or enforce school policy.<sup>131</sup> Similarly, homeless parents seeking shelter placements in Washington, D.C., have been turned away and then told that if they were unable to find a placement elsewhere, they would be reported to CPS.<sup>132</sup> In these ways, fear of the family regulation system informs marginalized parents' interactions with other state institutions and providers, creating a network of fear.

## 2. Black LGBTQ+ Parents & Fear

The threat of family regulation intervention is racialized, much like the weaponizing of the police against people of color.<sup>133</sup> Indeed, examples from directly impacted families, scholarly research, and practitioner experience emphasize Dorothy Roberts's observation that Black communities "live in fear of state agents entering their homes, interrogating them, and taking their children as much as they fear police harassing them in the streets."<sup>134</sup> Although little empirical data on Black LGBTQ+ parents ensnared in the family regulation system exists, there are reasons to believe that the family regulation system uniquely impacts Black LGBTQ+ parents. All too often, however, discussions

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130. Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 887 (2007) (observing that CPS surveillance creates distrust among neighbors who believed that "residents often falsely accused others of child abuse to seek retribution"); Kramer, *supra* note 101, at 3 ("It's not uncommon for abusers to use ACS as a weapon against their victims, who stay silent for fear of bringing more scrutiny into their homes.")

131. Ray Watson, Shakira Paige, Sarah Harris & Keyna Franklin, *What Parents Should Know: School Reports to CPS, School Reports to CPS, Communicating with the School, and Advocating for Your Child*, RISE MAG. (Dec. 3, 2019), <https://www.risemagazine.org/2019/12/school-reports-to-cps> [<https://perma.cc/C83F-585S>] ("The school told the parent that she had to leave work and pick up her child or they would call the police. My client couldn't leave work without losing her job . . ."); Rebecca Klein & Caroline Preston, *When Schools Use Child Protective Services as a Weapon Against Parents*, HETCHINGER REP. (Nov. 17, 2018), <https://hechingerreport.org/when-schools-use-child-protective-services-as-a-weapon-against-parents> [<https://perma.cc/XLR7-8DPX>].

132. Annie Gowen, *Homeless Families Who Turn to D.C. for Help Find No Room, Risk Child Welfare Inquiry*, WASH. POST (June 23, 2012), [https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bJyV\\_story.html](https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bJyV_story.html) [<https://perma.cc/NVT7-4HAN>].

133. See Fields, *supra* note 18, at 957–67.

134. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/CNS4-HXGE>]; see also Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 336 (2016) (explaining how Black women commonly fear losing custody of children and develop strategies for interacting with the police to avoid this outcome).

of LGBTQ+ identity, race, and family regulation have focused on foster and adoptive parents instead of those targeted by the family regulation system.<sup>135</sup>

The family regulation system presents a context in which the overlapping of race, gender, and sexuality is particularly salient. A study by the Williams Institute estimates that 1.2 million adults identify as both Black and LGBTQ.<sup>136</sup> Black same-sex couples are more likely to raise children than white LGBTQ couples.<sup>137</sup> Fifty-six percent of Black LGBTQ households are low-income.<sup>138</sup> Notably, poverty is a strong indicator of family regulation involvement.<sup>139</sup> A 2016 study suggests that Black mothers who identify as lesbian or bisexual are more likely to lose custody of their children to the state.<sup>140</sup> There is other anecdotal evidence of disparate outcomes for queer Black mothers entangled in the family regulation system.<sup>141</sup> Still, Black LGBTQ+ parents entangled in the family regulation system remain largely invisible.<sup>142</sup> This Essay does not purport to identify all the ways that fear of the family regulation system uniquely impacts parents who are both Black and LGBTQ+. Rather, it offers a few perspectives to help frame the issues for future scholarship.

First, fear of state intervention leads some parents to avoid health care providers. This is particularly true within Black, immigrant, and low-income

135. *Michigan Task Force to Propose New Plan for LGBTQ Families to Adopt or Foster*, IMPRINT (Mar. 2, 2022, 1:55 PM), <https://imprintnews.org/news-briefs/michigan-task-force-lgbtq-foster-families/63122> [<https://perma.cc/UDP2-S7PL>]; OFFICE OF PLAN., RSCH. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., OPRE REPORT #2014–79, HUMAN SERVICES FOR LOW-INCOME AND AT-RISK LGBT POPULATIONS: AN ASSESSMENT OF THE KNOWLEDGE BASE AND RESEARCH NEEDS (2014), [https://www.acf.hhs.gov/sites/default/files/documents/opre/lgbt\\_hsneeds\\_assessment\\_reportfinal1\\_12\\_15.pdf](https://www.acf.hhs.gov/sites/default/files/documents/opre/lgbt_hsneeds_assessment_reportfinal1_12_15.pdf) [<https://perma.cc/6FS6-RK44>].

136. Soon Kyu Choi, Bianca D.M. Wilson & Christy Mallory, *Black LGBT Adults in the US: LGBT Well-Being at the Intersection of Race*, WILLIAMS INST. 11 (Jan. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf> [<https://perma.cc/8BT5-TQZV>].

137. *LGBT Families of Color: Facts at a Glance*, MOVEMENT ADVANCEMENT PROJECT, FAM. EQUAL. COUNCIL & CTR. FOR AM. PROGRESS 2 (Jan. 2012), <https://www.lgbtmap.org/file/lgbt-families-of-color-facts-at-a-glance.pdf> [<https://perma.cc/VD6E-MUC5>].

138. *Id.* at 4.

139. ROBERTS, *supra* note 57, at 66–70 (discussing how the family regulation system conflates neglect and poverty).

140. Harp & Oser, *supra* note 79, at 289; *see also* Sarah J. Reed, Robin Lin Miller & Tina Timm, *Identity and Agency: The Meaning and Value of Pregnancy for Young Black Lesbians*, 35 PSYCH. WOMEN Q. 571, 574 (2011) (interviewing fourteen young Black lesbian women and finding that while most of those who had given birth were actively parenting, one mother's child had been removed by child protective services).

141. *See supra* Part I.

142. Professor Nancy D. Polikoff suggests that one cause may be rooted in litigation strategies applied by LGBT advocates who “turn a blind eye towards the systemic injustices of the child welfare system,” creating what Polikoff describes as “exacerbated invisibility.” *See* Polikoff, *supra* note 37, at 101–02 (“Now that the assault on LGBT parenting has moved to the arena of legislation and litigation to allow anti-gay discrimination based on religious and moral beliefs, LGBT advocates counter with uncritical assertions of the numbers of children in foster care and the tragedy of denying those children capable foster and adoptive parents.”).

communities, where awareness of the breadth and depth of the carceral state proliferates.<sup>143</sup> Mental health and other health issues disproportionately affect Black LGBT individuals.<sup>144</sup> According to a study conducted by the Williams Institute, Black LGBT adults were almost twice as likely to report having been diagnosed with depression by a medical provider compared to Black non-LGBT adults.<sup>145</sup> Already existing health disparities may widen when Black LGBTQ+ individuals avoid treatment because they fear their families will be disrupted by the state. In a vicious cycle, the government may use a parent's fear-driven avoidance of mental health treatment and other health care as evidence of the parent's noncompliance with the family regulation system and argue that this constitutes a child-safety issue.<sup>146</sup> In this way, state actors may penalize fear of the system.

Second, parents with intersectional identities and parents who support children with intersectional identities risk that their identities or support will be conflated with notions of parental "unfitness." Once parents are on the radar of the family regulation system, they may remain in the system for months or years.<sup>147</sup> What the system identifies as a parental deficit is not only subjective but also enmeshed with racialized and gendered parenting ideals.<sup>148</sup> One way to characterize this intersectional dynamic is that anti-Blackness and poverty funnel families into the system. Once there, Black LGBTQ+ families experience another layer of bias as their parenting is measured against a white, middle-class, heterosexual "norm." The intersectional dynamic is perhaps even clearer the other way around: when families are "drawn into [the family regulation] system based on illegitimate pretenses"<sup>149</sup> and then remain under investigation for lengthy periods of time. In this way, investigations that begin with the questioning of gender-affirming care for children can quickly expand into other areas of parenting. Given the attacks on LGBTQ+ parenting more generally,<sup>150</sup> parents with multiple marginalized identities who are ensnared in

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143. *E.g.*, Park, *supra* note 18, at 1932–33 (describing the breadth of people who implement national policies designed to encourage certain minority populations to self-deport); Fong, *supra* note 122, at 1786; Nikki Jones, "The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men, in *PATHWAYS TO ADULTHOOD FOR DISCONNECTED YOUNG MEN IN LOW-INCOME COMMUNITIES: NEW DIRECTIONS IN CHILD AND ADOLESCENT DEVELOPMENT* 33, 39 (Kevin Roy & Nikki Jones eds., 2014) (discussing young Black men's awareness that "the gaze of the police is most frequently targeted at them" in a marginalized community); Bell, *supra* note 134, at 336 (2016) (discussing how the most present fear of marginalized mothers was the loss of their children to the state, and explaining that "[s]tories and proverbs of about avoiding child removal abound, with some respondents worried that . . . their children may 'go into the system and never come out'").

144. Choi et al., *supra* note 136, at 18.

145. *Id.*

146. Washington, *supra* note 20 (manuscript at 10, 16–17).

147. Burrell, *supra* note 104, at 138.

148. Washington, *supra* note 20 (manuscript at 49–50).

149. ROBERTS, *supra* note 57, at 69.

150. *See generally* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 *FAM. L.Q.* 523 (1999) (detailing

the family regulation system are vulnerable to racialized and heteronormative assessments of their parenting.

Finally, once LGBTQ+ parents are trapped in the system, their family structures risk being devalued. For example, caseworkers may place children in the foster system with a stranger, instead of with a family member, due to the family member's nonheteronormative identity.<sup>151</sup> This devaluing of non-heteronormative family structures, combined with the system's enormous power to supervise and separate families, can trigger a rational fear in parents with multiple marginalized identities.

The compounded impacts of multiple marginalized identities funnel people into the web of family regulation. Poor and Black families are particularly vulnerable. Once in the system, white heteronormative standards inform the assessment of parental fitness and devalue nonheteronormative family ties, further exacerbating the subordination of already marginalized families. The unique challenges faced by Black LGBTQ+ parents in the family regulation system can intensify these fears.

Directly impacted parents, practitioners, and advocates have highlighted the fear endemic to the family regulation system. In 2020, *Mother Jones* wrote about Sarah,<sup>152</sup> a former caseworker, in the context of demands to abolish the family regulation system.<sup>153</sup> Sarah described how Black families lived in fear of the system while white families had never encountered it: "There's one group of people walking around not knowing that [the Administration for Children's Services (ACS) in New York City] exists, and there's another group of people walking around living in fear of ACS."<sup>154</sup>

In 2021, families' fear of the family regulation system was a central point of testimony for a bill proposing a child-welfare-specific Miranda Right in the State of New York.<sup>155</sup> Emma Ketteringham, managing director of the Family Defense Practice at the Bronx Defenders, testified that the "family regulation system invokes fear and trauma for Black and Latinx families."<sup>156</sup> Zainab

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the history of same-sex couples and family law from the 1960s through the 1990s); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (arguing that same-sex parenting has negative effects on children, and that these negative effects should be taken into consideration in child welfare cases); Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (defending same-sex parenting and rebutting Wardle's article).

151. *E.g.*, Polikoff, *supra* note 37, at 89–90 (describing two cases in which the family regulation system failed to recognize one person in a same-sex relationship as a parent, consequently stripping one parent of their parental rights); *see also supra* text accompanying note 80 (discussing one such example from my time as a public defender).

152. Sarah is the pseudonym used in the article.

153. 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/H6CH-EK2Z>].

154. *Id.*

155. S.B. S5484-B, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

156. *Defenders, Advocates and Impacted Parents Urge Passage of Legislation Requiring ACS and Other Family Regulation Agencies to Inform Parents of Their Miranda*



Akbar, Managing Attorney of the Family Defense Practice of Neighborhood Defender Service of Harlem, testified that “Black and brown parents live in fear of the government using its vast resources and unchecked power to separate them from their children here in New York State.”<sup>157</sup> In the end, however, the bill that would have informed parents of their right to legal counsel in “child welfare” investigations failed to pass in the 2021 legislative period.<sup>158</sup> Thus far, the New York State legislature has failed to recognize the pervasiveness of fear in the system and protect families accordingly.

### 3. The Erasure of Fear in Court Decisions

Despite the pervasiveness of fear in marginalized families’ experiences of the family regulation system, courts rarely consider fear as a factor driving interactions, perceptions, and outcomes.<sup>159</sup> To be sure, some parents have shared how fear shapes their interactions with the system in court proceedings. Take, for example, the petitioner’s brief before the Supreme Court of Pennsylvania in a case about whether CPS caseworkers can conduct searches of a family’s home without a warrant. While the court decision does not discuss parents’ fear of family regulation intervention, the petitioner’s brief does:

That fear, that government employees can force their way into your home, and interpret something differently than you do, can also make one seem defensive. . . . What is clear is that Mother had an aversion to the government intruding into her home.<sup>160</sup>

In a handful of instances, courts have explicitly referenced parents’ fear of family regulation. In *Pratt v. Pitt County Department of Social Services*,<sup>161</sup> the court noted Constance Pratt’s claim of emotional suffering due to the removal of her children: she had been “emotionally traumatized by CPS workers continuously removing” her children.<sup>162</sup> Or consider *In the Interest of E.L.C.*<sup>163</sup> The decision summarized the mother’s fear of the family regulation system:

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*Rights*, BRONX DEFS. (Oct. 22, 2021), <https://www.bronxdefenders.org/defenders-advocates-and-impacted-parents-urge-passage-of-legislation-requiring-acs-and-other-family-regulation-agencies-to-inform-parents-of-their-miranda-rights> [https://perma.cc/4APF-TFLZ].

157. *Id.*

158. Madison Hunt, ‘*Miranda Warning*’-Style Bill for Parents Fails in New York City Council, IMPRINT (Dec. 16, 2021, 11:39 AM), <https://imprintnews.org/top-stories/miranda-warning-style-bill-for-parents-fails-in-new-york-city-council/61243> [https://perma.cc/LEZ7-4584]; Madison Hunt, *New York Lawmakers Reject Parents’ Rights Bills*, IMPRINT (June 6, 2022, 5:39 PM), <https://imprintnews.org/child-welfare-2/new-york-lawmakers-reject-parents-rights-bills/65587> [https://perma.cc/GAF5-SX6A].

159. *But see* Good v. Dauphin Cnty. Soc. Serv. for Child. & Youth, 891 F.2d 1087, 1090 (3d Cir. 1989) (“Both Jochebed Good and her mother were left shocked and shaken, deeply upset and worried.”).

160. Brief on Behalf of Petitioner, J.B., Mother of Y.W.-B. & N.W.-B. at 19, *In re Y.W.-B.*, 265 A.3d 602 (Pa. 2021) (Nos. 1 EAP 2021 & 2 EAP 2021), <https://clsphila.org/wp-content/uploads/2022/01/Brief-for-Mother.pdf> [https://perma.cc/37LC-S3EK].

161. No. 16-CV-00198, 2016 WL 7057473 (E.D.N.C. Oct. 24, 2016).

162. *Id.* at \*6–7.

163. No. 05–20–00373-CV, 2020 WL 5494415 (Tex. App. Sept. 11, 2020).

“Mother ‘had previously been in a CPS case,’ and she feared she could lose her children. At ‘the thought of CPS entering [her] life again and losing [her] children,’ Mother ‘got nervous and scared, and so [she] left.’”<sup>164</sup> The court noted a father’s similar fear in *In the Interest of A.B.*:

Father said that he did not have anything to hide but was scared that CPS was not going to believe anything that he said about where the injury came from. He said that he had finally gotten his children back and felt like his life was where it needed to be, so he was afraid of losing his children again.<sup>165</sup>

However, these explicit discussions of fear in court cases are the exception.

The absence of a critical analysis of how fear shapes parental interactions with the system is partly due to the compliance-driven nature of family regulation.<sup>166</sup> For example, although caseworkers regularly testify against parents in court and make decisions to separate families, parents are expected to cooperate with them over months and sometimes years.<sup>167</sup> Despite this inherently adversarial relationship, noncooperation is held against parents. As Professor Amy Sinden observes, parents targeted by the family regulation system are pressured to “cooperate rather than assert [their] rights.”<sup>168</sup> When the family regulation system punishes parents for refusing to cooperate with CPS and for invoking their parental rights, it disregards their rational fear of caseworkers and the system they work for.

Given the pervasive fear of the system and its devastating effects on families with marginalized identities, we should expect courts to grapple with these dynamics in decisions—especially when allegations center around a parent’s reluctance to cooperate with CPS. Instead, cases often focus on parental “non-compliance” or “lack of insight,”<sup>169</sup> instead of the context and environment of fear. In other words, the problematic expectation that “good parents” cooperate with CPS further renders fear invisible.

When I was a public defender, numerous parents asked me whether they had to continue working with a caseworker who traumatized them by physically removing their child or threatening the same. Bringing these concerns up with the court could harm parents by feeding into a narrative that would characterize them as “difficult.”<sup>170</sup> Here again, Black parents are particularly vulnerable

164. *Id.* at \*2.

165. *In re A.B.*, No. 02–00215-CV, 2010 WL 2977709, at \*17 (Tex. App. July 29, 2010), reprinted in *In re A.B.*, 412 S.W.3d 588, 631 (Tex. App. 2013).

166. See Washington, *supra* note 34, at 1124–25 (discussing how family separation is used as a tool to achieve parental compliance).

167. See Washington, *supra* note 20 (manuscript at 26–29).

168. Amy Sinden, *Why Won’t Mom Cooperate?’: A Critique of Informality in Child Welfare Proceedings*, 11 *YALE J.L. & FEMINISM* 339, 354 (1999).

169. See Washington, *supra* note 34, at 1123–26, 1132, 1149–60 (discussing the vague concept of insight in family regulation doctrine).

170. See, e.g., Sinden, *supra* note 168, at 353–55 (discussing the informalized nature of child welfare proceedings and the pressures on parents to cooperate and resolve their case).

to biased misperceptions. A Michigan study showed that CPS investigators routinely characterized Black parents as “hostile,” “aggressive,” or “angry” in CPS notes and court reports, without identifying a factual basis for these descriptions.<sup>171</sup> These documents fail to interrogate how fear informs marginalized parents’ perception of punitive family regulation intervention. Taken out of context, these racialized and often gendered statements harm families.<sup>172</sup>

### C. *Against the Backdrop of Fear: The Texas Directive*

The Texas directive promotes broader, racialized “child welfare” trends. On the one hand, white, upper-middle-class families likely have easier access to gender-affirming care. If the Texas directive targets families that seek out gender-affirming care, then families with more access to such care may bear the brunt of the law. At first glance, the Texas directive thus may not present an example of the racialized, classist harms of the family regulation system.

There is reason to believe, however, that the Texas policy targeting LGBTQ+ parents and their children will disproportionately impact the most marginalized families, including those with multiple marginalized identities. The family regulation system has a lengthy history of targeting nonwhite, nonheteronormative families. An investigation triggered by the directive will impact those who are already vulnerable. In fact, as is true nationwide, Black families are overrepresented in Texas’s family regulation system.<sup>173</sup> Any policy that encourages investigations based on vague concerns will likely have a more severe impact on Black families than white families.

As Professor Kelley Fong describes, the initiation of a family regulation case “opens a can of worms.”<sup>174</sup> What begins as an investigation into gender-affirming care, for example, can quickly turn into an intrusive investigation into other aspects of family life. As I discuss elsewhere, a CPS

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nonadversarially).

171. *Race Equity Review: Findings from a Qualitative Analysis of Racial Disproportionality and Disparity for African American Children and Families in Michigan’s Child Welfare System*, CTR. FOR STUDY SOC. POL’Y 31 (2009), <https://ocfs.ny.gov/main/recc/presentations/Race-Equity-Review-Michigan-2009.pdf> [<https://perma.cc/2SCR-D4SG>].

172. See Washington, *supra* note 20 (manuscript at 44–50) (describing how CPS utilizes gendered and racialized behavioral descriptors to police parents’ emotions).

173. See KIDS COUNT DATA CTR., *supra* note 38 (“In 2018, black children represented 14% of the total [national] child population but 23% of all kids in foster care.”); MOVEMENT FOR FAM. POWER, *supra* note 38, at 26–28 (examining the historical context of racial disproportionality in the family regulation system); *Fiscal Year 2021 Disproportionality and Disparity Analysis*, TEX. DEP’T OF FAM. & PROTECTIVE SERVS., (Oct. 1, 2021), [https://www.dfps.state.tx.us/About\\_DFPS/Reports\\_and\\_Presentations/Rider\\_Reports/documents/2021/2021-10-01\\_Rider\\_33\\_Report.pdf](https://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/Rider_Reports/documents/2021/2021-10-01_Rider_33_Report.pdf) [<https://perma.cc/6NS4-K5ZE>] (finding that in Texas, “there was a higher proportion of African American children at all the different stages of DFPS involvement than the proportion of African American children in the statewide population”).

174. Roxanna Asgarian, *The Biggest Threat to Trans Kids in Texas Is Child Protective Services*, SLATE (Mar. 2, 2022, 9:00 AM), <https://slate.com/news-and-politics/2022/03/child-protective-services-is-already-investigating-families-over-texas-anti-trans-directive.html> [<https://perma.cc/UM7T-WGJN>].

investigation may shift in focus as new potential allegations emerge.<sup>175</sup> These allegations often circle around issues of poverty.<sup>176</sup> For example, when a family loses its housing, CPS may open an investigation against the parents rather than make meaningful efforts to bring economic stability to the family.<sup>177</sup> At the very least, the Texas directive and any similar strategies broaden state surveillance generally, with disproportionate impacts for those who are most vulnerable to surveillance. In other words, the Texas directive provides the state with yet another reason to initiate intrusive investigations into the lives of those it already targets. Further, white middle-class parents, when targeted, are more likely to have the financial resources to invoke their rights and successfully navigate legal challenges.<sup>178</sup> Low-income Black parents, on the other hand, will often lack the resources to defend themselves against family regulation investigations effectively.<sup>179</sup>

LGBTQ+ parents targeted by the family regulation system, including those with other marginalized identities, have not been the primary focus of LGBTQ+ advocacy.<sup>180</sup> The Texas directive has brought up family regulation as an LGBTQ+ issue, but it has not changed the centering of white, upper-middle-

175. Washington, *supra* note 34, at 1142–43.

176. See ROBERTS, *supra* note 57, at 69 (“[M]any of the indicators child welfare agencies use to assess whether a child is at risk for maltreatment are actually conditions of poverty.”).

177. See Vivek Sankaran, *The Looming Housing Crisis and Child Protection Agencies*, IMPRINT (Sept. 16, 2020, 10:45 PM) <https://imprintnews.org/opinion/looming-housing-crisis-child-protection-agencies/47437> [<https://perma.cc/3N8M-CXCR>] (explaining that when a family is referred to CPS because of a lack of stable housing, CPS may launch a “broad inquiry on the family’s entire life” instead of providing financial support or helping the family access housing). Professor Patricia Williams has also pointed out that child protective services can intervene in the lives of homeless parents but are not obligated to provide them with housing. See Patricia Williams, *THE ALCHEMY OF RACE AND RIGHTS* 25 (1991).

178. Tey Meadow, ‘Deep Down Where the Music Plays’: How Parents Account for Childhood Gender Variance, 14 *SEXUALITIES* 725, 734–37 (2011). This portion of the article describes the story of Sean, a white gay man, who adopted two children. When Michael, one of his adoptive children, “adamantly refused to wear anything feminine” and vocalized wanting to be referred to as a boy, Sean began raising this in therapy sessions. *Id.* at 735. Supported by Michael’s therapist and a local LGBT clinic, Sean began exploring gender-affirming care for Michael. Shortly thereafter, the family regulation system began investigating Sean and questioning Michael. *Id.* at 736. Ultimately, though, Sean had the resources and supportive relationships to successfully challenge the intrusion into their lives.

179. See, e.g., Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 *COLUM. J. RACE & L.* 1, 16–17 (2022) (discussing the tattered access to legal representation for low-income parents); Jonah E. Bromwich, *Family Court Lawyers Flee Low-Paying Jobs. Parents and Children Suffer*, N.Y. TIMES (Apr. 29, 2022), <https://www.nytimes.com/2022/04/29/nyregion/family-court-attorneys-fees.html> [<https://perma.cc/F64U-3RBW>] (citing Professor Cynthia Godsoe’s assessment that the state of family defense in New York City deprives the most vulnerable poor parents of their fundamental rights as parents); ROBERTS, *supra* note 57, at 297 (discussing the lack of quality legal representation for Black parents and the need for multidisciplinary family defense services).

180. See Polikoff, *supra* note 37, at 90 (concluding that the “distinctive needs” of LGBTQ+ parents impacted by the family regulation system have been “largely ignored”).

class families in the conversation. The potential reach of the Texas directive and similar policies could mark an opportunity for interest convergence of white middle-class parents—traditionally unaffected by the system—and Black and brown parents—disproportionately impacted by the family regulation system. However, it could also further perpetuate the idea that the family regulation system generally targets “bad parents”<sup>181</sup> while Texas policy targets “good parents.” This will depend on whether the policy is viewed as *part* of the family regulation system or a *misuse* of the system. To prevent the latter view from taking root, the movement must actively make space for and center the long history and current experiences of Black LGBTQ+ parents and their children with the family regulation system. The following Section elaborates on this history and its narrative reinforcement.

#### D. *Narrative Reinforcement*

The family regulation system, in order to legitimize the infliction of pervasive concentrated violence on marginalized families, has always depended on the narrative that the state keeps children safe from “unfit” parents. In the postemancipation period, purported concerns for children’s welfare were used to keep Black children from their liberated mothers.<sup>182</sup> Indigenous children were removed from their parents to “civilize them” for their own good. The Children’s Aid Society removed poor immigrant children in New York City from their parents and sent them to work in the Midwest to “protect” them from their parents until the 1920s.<sup>183</sup> Today, the narrative of abusive parents endangering their children persists<sup>184</sup> without a critical interrogation of structural issues underlying poverty and racialized inequality.<sup>185</sup> For example, the National Social Work Association (NASW) condemned Texas’s efforts to target LGBTQ+ children and their families through the “child protective” system. NASW emphasized correctly that the Texas directive from February fits into a much “larger anti-LGBTQ+ movement taking place across the nation.”<sup>186</sup> The

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181. Coleman, *supra* note 26, at 539 (discussing the inaccurate notion that child welfare actors are primarily tasked with “saving” children from abusive parents).

182. Peggy Cooper Davis, “*So Tall Within*”—*The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 458–65 (1996); Cynthia Godsoe, *The Family Policing System as a Contemporary ‘Black Code,’* 121 MICH. L. REV. (forthcoming 2023) (manuscript at 3–4) (manuscript on file with author).

183. NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* 197–98 (2002).

184. See Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL’Y 97, 98–100 (2012).

185. Washington, *supra* note 20 (manuscript at 12) (discussing how the family regulation system pathologizes parents and families, deploying language and instruments that “distract from the structures that render marginalized families hyper visible to the states, conceal the interconnectedness of carceral systems, [and] obscure the destabilizing effects of poverty and racism”).

186. *NASW Condemns Efforts to Redefine Child Abuse to Include Gender-Affirming Care*, NAT’L ASS’N OF SOC. WORKERS (Feb. 25, 2022), <https://www.socialworkers.org/News/News-Releases/ID/2406/>

letter, however, did not address the broader targeting of marginalized families by a system that ostensibly should protect children and support families.

Those with lived experiences of the family regulation system offer knowledge of the harms that the system produces and perpetuates.<sup>187</sup> Their real-world fear of the system is part of that knowledge. To accurately understand the family regulation system, advocates and scholars must incorporate impacted families' experiences into the larger discourse.<sup>188</sup> In the context of the Texas order, for example, including the experiences of Black LGBTQ+ parents may help disrupt the notion that the targeting of LGBTQ+ children and parents is primarily a white issue. It can also bring to light that discrimination against LGBTQ+ parents goes far beyond barriers for LGBTQ+ adoptive and foster parents. Therefore, we must change the narrative to include the stories of those who have actually experienced the family regulation system. Doing so will provide us with a more robust understanding of the family regulation system's impact on families, including Black LGBTQ+ families. It may also open up ways to promote family safety outside of coercive systems.

### CONCLUSION

This Essay has shown that Governor Abbott's weaponization of the family regulation system against the most vulnerable families in Texas is not an anomaly. Anti-LGBTQ+ policy in Texas both relies on and feeds into a landscape of fear. That fear is exacerbated for parents with marginalized identities. Because we cannot discuss the Texas directive without also understanding the context that surrounds it, opponents of the directive and policies like it must abandon too-narrow focuses. Instead, advocates must interrogate the anti-Black, heteronormative logics and broader structures that drive the family regulation system.

Interrogating those logics and structures will require both advocates and academics to recognize the experiences of Black LGBTQ+ parents. To date, little research has examined Black LGBTQ+ parents entangled in the family regulation system. This research gap alone is problematic and indicates a larger disregard for the impacts of intersectional marginalization.<sup>189</sup> But the underrepresentation of intersectional perspectives in research also favors dominant groups and hinders scholars from producing frameworks that

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NASW-Condemsns-Efforts-to-Redefine-Child-Abuse-to-Include-Gender-Affirming-Care [<https://perma.cc/PSSK-STMX>].

187. For example, JMacForFamilies, led by Joyce McMillan, is dedicated to supporting communities traumatized by structural violence. See *Our Team*, JMacForFamilies, <https://jmacforfamilies.org/our-team> [<https://perma.cc/6Q4S-8JT4>].

188. See generally Washington, *supra* note 34 (discussing knowledge exclusion through silencing and discrediting in the family regulation system through the framework of epistemic injustice).

189. As Professor Robyn M. Powell points out, this intersectional lens must also include parents and children with disabilities. See Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 *YALE J.L. & FEM.* 37, 45 (2022).

conceptualize marginalized experiences.<sup>190</sup> Anti-Blackness and the targeting of LGBTQ+ individuals are both wrapped up in the project of white heteronormative supremacy. The struggles to dismantle anti-Blackness, homophobia, and transphobia are intrinsically linked. Having identified Black LGBTQ+ parents as a particularly vulnerable group, this Essay recommends that future research focus more deeply on the specific experiences of Black LGBTQ+ parents impacted by the family regulation system and how the reality of fear should shape advocacy strategies.

Popular discussion around Texas policy and legislation is missing two critical perspectives: first, an intersectional lens that includes LGBTQ+ parents of color; and second, a broader discussion of the family regulation system's positionality within the carceral state. Those who want to protect the most vulnerable families must interrogate how fear of the family regulation system is weaponized against marginalized parents generally. Even if Texas policy does not lead to large-scale investigations and separation of families, the damage is done: the directive has fed the coercion that marginalized families face every day. Marginalized families' deep-seated fears are historically grounded in the punitive continuum that colors the family regulation system. By using the family regulation system to criminalize families that deviate from white, cis-gender, heterosexual norms, policies like the Texas order advance a broader project of inflicting and weaponizing fear to maintain the status quo.

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190. See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND ETHICS OF KNOWING* 155 (2007).

