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ARTICLE

FAMILY REGULATION'S CONSENT PROBLEM

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The home is the most protected space in constitutional law. But family regulation investigators conduct millions of home searches a year. Under pressure, parents nearly always consent to these state agents' entry into the most private areas of their lives.

This Article identifies the coercive forces—not least the threat of family separation—that drive parents to consent to home searches. Drawing on primary sources and case law examining consent in criminal cases, it shows that common family regulation investigation tactics render consent involuntary and the ensuing searches unconstitutional. And yet, it argues, the Constitution is not enough. Though constitutional litigation could lead to tangible improvements in privacy for families, the Constitution offers thin protection from government surveillance for race–class subjugated communities. Instead, reformers ought to reject the consent paradigm and focus on state legislation cabining searches in family regulation investigations.

This Article makes three central contributions. First, it describes the underexamined role that consent searches play in the family regulation apparatus. Second, it establishes the unconstitutionality of routine family regulation investigative practices, building out the Fourth Amendment framework for family regulation investigations. Finally, this Article distinguishes between reforms aimed at limiting consent *as a legal justification for searches and reforms aimed at limiting* searches*, no matter their justification. Consent-focused reforms legitimize and leave intact the search apparatus. Thus, reform must contend squarely with*

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searches and not merely consent, within the family regulation system and across the carceral state.

"*At the back of everyone's mind as they're going through an investigation is, 'I have a caseworker in my house, asking me questions about my parenting of my children. And it can go either way. I know this could end up with my kids being removed, not even for anything I've done. This person has the legal power to separate my children from me.' No matter how flowery we talk, that is in the back of everyone's mind.*"

— Official, Connecticut Department of Children and Family Services [1]

INTRODUCTION

Family regulation investigators subject more than three million American children to home searches each year.[2] Though home searches have proven ineffectual for rooting out child maltreatment,[3] states require these searches for almost every family regulation investigation, regardless of the underlying allegations.[4] As a result, investigations routinely bring state agents into the home, the most protected space in Fourth Amendment jurisprudence.[5] Under the Fourth Amendment, home searches are presumptively unreasonable unless state agents have a

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1. Telephone Interview with Michael C. Williams, Deputy Comm'r, Conn. Dep't of Child. & Fams. (May 31, 2024) (notes on file with the *Columbia Law Review*) [hereinafter Conn. D.C.F. Interview].

2. Child.'s Bureau, HHS, Child Maltreatment 2022, at xv (2024) [hereinafter Child.'s Bureau, Child Maltreatment 2022], https://acf.gov/sites/default/files/documents/cb/cm2022.pdf [https://perma.cc/CT8L-YHWS] (noting that 3,096,101 children "received [e]ither an investigation or alternative response"). This Article uses "family regulation" to describe the system commonly called the "child welfare" system. See Emma Ruth, Opinion, 'Family Regulation,' Not 'Child Welfare': Abolition Starts With Changing Our Language, The Imprint (July 28, 2020), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/5FLT-5WEN]. See generally Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World (2022) [hereinafter Roberts, Torn Apart] (describing the terror and violence accompanying the family regulation system and advocating for its abolition). This Article describes a unified "family regulation system" as an oversimplified stand-in for the many local, state, and federal institutions that comprise it. Cf. Emma Kaufman, The Prisoner Trade, 133 Harv. L. Rev. 1815, 1826 n.50 (2020) (noting of the criminal legal system that "[s]ome resist calling it a 'system' at all").

3. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 20 (reporting that more than 80% of investigations close without substantiating allegations); David Finkelhor, Trends in Adverse Childhood Experiences (ACEs) in the United States, Child Abuse & Neglect, Oct. 2020, at 1, 4–5 (noting that the rate of child neglect has remained steady for more than two decades, a time period in which surveillance has been near-constant); Robert Sege & Allison Stephens, Child Physical Abuse Did Not Increase During the Pandemic, 176 JAMA Pediatrics 339, 339 (2022) (finding no increase in child abuse during a period that saw a dramatic decrease in family surveillance). On the use of "child maltreatment," see infra note 82 and accompanying text.

4. Tarek Z. Ismail, Family Policing and the Fourth Amendment, 111 Calif. L. Rev. 1485, 1497 (2023) [hereinafter Ismail, Family Policing] ("In all screened-in cases, CPS conducts a home search."); Eli Hager, Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One., ProPublica (Oct. 13, 2022), https://www.propublica.org/article/child-welfare-search-seizure-without-warrants [https://perma.cc/XF2U-MY3L] [hereinafter Hager, Police Need Warrants] ("With rare exceptions, all of these investigations include at least one home visit, and often multiple, according to a review of all 50 states' child welfare statutes and agency investigative manuals.").

5. See Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

warrant, avail themselves of a recognized exception to the warrant requirement like exigency, or gain the consent of the home's residents.[6]

Consent is, in practice, the default response to this constitutional hurdle. Though data is sparse, one scholar estimated that more than 90% of home searches are conducted with the nominal consent of parents.[7] The number of searches authorized by warrants or court orders is vanishingly small. In both New York City and Los Angeles, for example, searches authorized by warrant occur in fewer than 1% of investigations.[8] Perhaps more surprisingly, the number of searches justified by exigency is also low.[9] Exigency allows state agents to enter a home without a warrant if they believe a person inside is hurt or about to be hurt.[10] But most family regulation investigations focus on allegations of neglect, rather than physical or sexual abuse,[11] reducing the likelihood of exigency in most cases. Further, only 5% of children whose families are investigated are ultimately taken from their parents' care.[12] Since the state must make a showing similar to exigency to justify many of these separations,[13] the

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6. See Anna Arons, The Empty Promise of the Fourth Amendment in the Family Regulation System, 100 Wash. U. L. Rev. 1057, 1088 (2023) [hereinafter Arons, Empty Promise] (collecting circuit decisions holding that the Fourth Amendment's warrant requirement applies to family regulation home searches); Ismail, Family Policing, supra note 4, at 1529 ("The majority of circuits affirmatively ruling on the question—five—have in fact held that CPS agents must obtain a warrant to enter a home during a CPS investigation in the absence of exigency or consent.").

7. 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, 430–31 (2005). Throughout, this Article uses "parents" as shorthand for the persons named as the subjects of family regulation investigations.

8. Compare Dep't of Child. and Fam. Servs., Cnty. of L.A., Child Welfare Services Data Fact Sheet: Calendar Year 2022 (2022), https://dcfs.lacounty.gov/wp-content/uploads/2023/02/Factsheet-CY-2022.pdf [https://perma.cc/KEH5-97UD] (reporting that 47,309 cases received an "in-person response"), with N.Y.C. Admin. for Child.'s Servs., Child Welfare Indicators Annual Report CY 2024, at 9, 16 (2025), https://www.nyc.gov/assets/acs/pdf/data-analysis/2024/CityCouncilReportCY2024.pdf [https://perma.cc/4KE2-6PPZ] (reporting 219 entry orders, compared to 36,988 investigations), and Email from Aldo Marin, Bd. Liason, DCFS Bd. & Comm'n, L.A. Cnty., to author (June 26, 2024) (on file with the *Columbia Law Review*) (reporting that a total of 287 investigations included warrants of any kind and 240 included investigative search warrants).

9. See infra section I.C.

10. Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 6.6(a) (6th ed. 2021).

11. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 23 (categorizing allegations).

12. Id. at xv (comparing the number of children who received foster care with the number who received investigations or alternative responses).

13. See Josh Gupta-Kagan, America's Hidden Foster Care System, 72 Stan. L. Rev. 841, 860 (2020) [hereinafter Gupta-Kagan, Hidden Foster Care] (describing the standard for emergency removal before parents are adjudicated as unfit as requiring a "substantial and imminent" risk to the child). Not all children placed in foster care are placed there under this emergency removal standard, as some are not placed until after their parents are adjudicated responsible. See Paul Chill, Burden of Proof Begone: The Pernicious Effect of

removal rate is a rough proxy showing the relative rarity of exigencies in family regulation investigations.[14]

That leaves consent. Yet the consent extracted from families is rarely the product of free choice. The vast majority of family regulation investigations target poor families, and a disproportionate number target Black, Native, and Latine families.[15] Investigators arrive on families' doorsteps unannounced.[16] They say they need to come in—that a home evaluation is required.[17] They tell parents that they are there to help.[18] They neither inform parents of their rights[19] nor warn parents that the information they gather can be used against parents to support the government's case against parents in court, including attempts to sever

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Emergency Removal in Child Protective Proceedings, 41 Fam. Ct. Rev. 457, 466 n.15 (2003) (acknowledging the difficulty of estimating the rate at which children are removed on this basis but estimating it to be "a very large percentage").

14. See infra section I.C.

15. See, e.g., Child.'s Bureau, HHS, Child Welfare Practice to Address Racial Disproportionality and Disparity 2–3 (2021), https://cwlibrary.childwelfare.gov/discovery/delivery/01CWIG_INST:01CWIG/1218693270007651 [https://perma.cc/RF5U-ZDKY] [hereinafter Child.'s Bureau, HHS, Child Welfare Practice] (documenting racial disparities); Kelley Fong, Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services, 72 Child. & Youth Servs. Rev. 5, 5–6 (2017) [hereinafter Fong, Contexts of Poverty] (offering a meta-analysis and concluding that children from poor families and communities are highly overrepresented in the child welfare system).

16. See, e.g., Fla. Dep't of Child. & Fams., Child Protection: Your Rights and Responsibilities 2, https://www.myflfamilies.com/sites/default/files/2023-05/CPI_RightsResponsibilitiesMar2015.pdf [https://perma.cc/L2WG-PF32] ("Florida law specifically directs visits and interviews with the child and family to be unannounced whenever possible . . . ." (emphasis omitted)); Hum. Rts. Watch, "If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System 1–2 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf [https://perma.cc/KJN4-C7JA] (recounting one Los Angeles parent's experience with unannounced searches); Cynthia Godsoe, Just Intervention: Differential Response in Child Protection, 21 J.L. & Pol'y 73, 87–88 (2012) (contrasting the "[t]raditional CPS practice [which] entails a worker making an unannounced visit to the home to 'catch the parent off guard'" with noninvestigative responses in which initial visits are announced); A Parent's Guide to a Child Abuse or Maltreatment Investigation, N.Y.C. Admin. for Child.'s Servs., https://www.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page [https://perma.cc/4NHC-SNWQ] (last visited Mar. 3, 2025) ("During the [i]nvestigation . . . CPS will make an unannounced visit to your home within 24–48 hours of the report.").

17. See, e.g., Class Action Complaint and Jury Demand at 1–2, Gould v. City of New York, No. 1:24-cv-01263-CLP (E.D.N.Y. filed Feb. 20, 2024), 2024 WL 693712 [hereinafter *Gould* Complaint] ("You have to let us in. We need to look in your home. We don't need a warrant. We're going to get the police here if you refuse. We're not leaving until we come inside. If you don't let us in, we're going to take your children." (emphasis omitted)); Ismail, Family Policing, supra note 4, at 1539.

18. See Arons, Empty Promise, supra note 6, at 1097 (describing how family regulation agencies cast the family regulation system as "collaborative and helpful" and encourage cooperation by parents).

19. See id. ("They rarely inform parents of statutory or constitutional rights."); infra section III.A.

parents' rights to their children permanently.[20] If parents question or resist investigators' entry, they threaten to call law enforcement.[21] An even larger threat looms over this entire interaction, sometimes explicit, sometimes implicit: If the parents do not cooperate, investigators can take their children.[22] It is no wonder that so many parents acquiesce to searches, despite the harms that searches inflict on parents, children, and communities.[23]

In the criminal law context, it is hardly a novel observation that consent is often—perhaps always—a legal fiction. Under the Supreme Court's Fourth Amendment jurisprudence, consent must be voluntary to be valid.[24] But generations of criminal law scholars have argued that the Court's standard for voluntary consent does not sufficiently account for the coercion inherent in any request from an official to an individual.[25]

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20. See Anna Arons, Prosecuting Families, 173 U. Pa. L. Rev. 1029, 1049–50 (2025) (describing trajectories of family regulation cases). This total absence of warnings presents an obvious contrast to criminal investigations. See Miranda v. Arizona, 384 U.S. 436, 479 (1966) (requiring police to give prophylactic warnings to people in custody in criminal cases that their words can be used against them in a court of law).

21. See, e.g., Lowther v. Child. Youth & Fams. Dep't, No. 1:18-cv-00868 KWR/JFR, 2020 WL 5802039, at *13 (D.N.M. Sept. 29, 2020) (describing plaintiff's allegation that "[s]he was immediately and repeatedly informed that she could be arrested or detained for denying access to the children" (quoting Lowther v. Child. Youth & Fams. Dep't, No. 1:18-cv-00686KWR-JRF, 2020 WL 4192591, at *10 (D.N.M. July 21, 2020))); Cayla Bamberger, ACS Routinely Violates NYC Families' Rights During Child Welfare Investigations: Lawsuit, N.Y. Daily News (Feb. 20, 2024), https://www.nydailynews.com/2024/02/20/acs-routinely-violates-nyc-families-rights-during-child-welfare-investigations-lawsuit/ [https://perma.cc/L24N-WAV5] (recounting an agency's threat to call the police upon a mother's refusal to allow entry).

22. See, e.g., Clark v. Stone, 998 F.3d 287, 302 n.6 (6th Cir. 2021) (describing an investigator's explicit threat of removal); Kelley Fong, Investigating Families: Motherhood in the Shadow of Child Protective Services 81, 87 (2023) [hereinafter Fong, Investigating Families] (describing parents' experiences with the implicit threat of family separation); Conn. D.C.F. Interview, supra note 1 (acknowledging that there is an implicit fear of family separation throughout investigations).

23. See Hum. Rts. Watch, supra note 16, at 63–65 (describing the harms of investigations on families and communities); see also infra section I.B.

24. See Schneckloth v. Bustamonte, 412 U.S. 218, 227–30 (1973) ("[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

25. See, e.g., Roseanna Sommers & Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L.J. 1962, 2009–10 (2019) ("Some commentators have taken high compliance rates as an indication that consent is all but impossible. '[P]eople consent so often that it undermines . . . the meaningfulness of the consent.'" (alterations in original) (quoting Oren Bar-Gill & Barry Friedman, Taking Warrants Seriously, 106 Nw. U. L. Rev. 1609, 1662 (2012))); see also I. Bennett Capers, Criminal Procedure and the Good Citizen, 118 Colum. L. Rev. 653, 655 (2018) [hereinafter Capers, The Good Citizen] (describing the categorically compliant "good citizen" who aids police, waives his rights, and consents to searches); Ric Simmons, Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine, 80 Ind. L.J. 773, 774 (2005) (rejecting a binary conception of voluntariness in favor of an analysis of the degree of compulsion applied); Marcy Strauss,

Nor, they argue, does it account for imbalances in information and power or for the dimensions of identity—including race, class, gender, disability, immigration status, and language—that necessarily shape interactions between the state and individuals.[26] Others critique consent for expanding surveillance and insulating searches from review: Consent, they say, allows the state to conduct searches even when it has no particularized suspicion, shields searches from judicial scrutiny, and offers courts an alternative basis on which to approve of searches that might otherwise be constitutionally infirm.[27]

Though these critiques of consent searches are common in criminal law scholarship, they have received limited attention in family regulation scholarship.[28] In this field, explorations of consent and voluntariness tend to focus on the voluntariness of parents' decisions to separate from their children or to accept ongoing restrictions on their parental rights.[29] Those

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Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 221 (2001) (criticizing the voluntariness test for being vague, failing to acknowledge the reality of coercion, and fostering distrust of the police and judicial system).

26. See, e.g., Raquel Aldana, Of *Katz* and "Aliens": Privacy Expectations and the Immigration Raids, 41 U.C. Davis L. Rev. 1081, 1085 (2008) ("[T]he application of the consent doctrine in immigration enforcement under the most coercive circumstances increasingly defies the fictional premise that reasonable people feel free to walk away from law enforcement encounters."); Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 1013–14 (2002) [hereinafter Carbado, (E)racing the Fourth Amendment] (arguing that "racial vulnerability" to coerced consent derives from "the relationship between race and knowledge about constitutional rights" and from "the nexus between race and social behavior in the context of police encounters"); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 271–72 (1991) (positing that "for most black men, the typical police confrontation is not a consensual encounter"); Jamelia Morgan, Disability's Fourth Amendment, 122 Colum. L. Rev. 489, 515–20 (2022) (arguing that the consent standard's normative construction fails to acknowledge race and disability as factors in the test for coercion); Strauss, supra note 25, at 213 (arguing that "members of certain racial and cultural groups" experience heightened "feelings of compulsion" in police encounters).

27. See, e.g., Carbado, (E)racing the Fourth Amendment, supra note 26, at 970 (describing how consent "doctrinally masks" race's role in searches); Kate Weisburd, Criminal Procedure Without Consent, 113 Calif. L. Rev. (forthcoming 2025) (manuscript at 31–32) [hereinafter Weisburd, Criminal Procedure Without Consent] (on file with the *Columbia Law Review*).

28. Scholars studying Fourth Amendment constraints on family regulation home searches have noted that consent is a popular pathway around the warrant requirement, but consent has not been their central concern. See Coleman, supra note 7, at 461–63 (describing the consent and exigent circumstances exceptions); Ismail, Family Policing, supra note 4, at 1541 (exploring voluntary consent in the family regulation context).

29. See, e.g., Gupta-Kagan, Hidden Foster Care, supra note 13, at 849–50 (examining the pressures on parents in family regulation investigations to agree to changes in custody); Soledad A. McGrath, Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness, 42 U. Mem. L. Rev. 629, 635 (2012) ("A family's decision to participate in assessment and services in lieu of a [traditional] child protection investigation may seem to be a relatively simple, proactive choice, but it is a choice that can lead to severe consequences for a family and is, in fact, no choice at all."); Katherine C. Pearson, Cooperate

explorations are vital but leave untouched the millions of cases every year where state agents investigate a report of child maltreatment, extract consent to search a home, and close the case after the search finds no evidence to support further state intervention.[30] This is by far the most common kind of contact families have with the family regulation system.[31] Even when searches do not lead to further state intervention, they still disrupt the privacy, dignity, and security of individual families and race–class subjugated communities[32]—thus feeding families' legal estrangement from the state and the body politic.[33]

This Article contends squarely with the central role of consent searches in the family regulation system. In doing so, it makes three central contributions.

First, it offers an initial descriptive account of how consent powers the family regulation home search apparatus, surveying the sorts of pressures that the state exerts on families to extract consent for searches. Statistical

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or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change, 65 Tenn. L. Rev. 835, 837–38 (1998) ("Careful examination of the pressures the state imposes upon parents to enter into a separation agreement reveals the often fictional nature of the voluntary label and the consequent need for concern."); Clare Ryan, Children as Bargaining Chips, 68 UCLA L. Rev. 410, 426-45 (2021) (examining how state actors use threats of family separation to extract consent to deportation in immigration proceedings, to extract statements during criminal interrogations, and to extract consent to safety plans during family regulation investigations).

30. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that around 80% of investigations are closed without substantiating the allegations and around 70% of investigations are closed without post-investigation involvement for the family). For an explanation of why investigations sometimes result in referrals for services even though they do not reveal evidence to substantiate the underlying allegations, see Arons, Prosecuting Families, supra note 20, at 1045.

31. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv.

32. See Khiara M. Bridges, The Poverty of Privacy Rights 112–17 (2017) (arguing that poor parents "feel themselves to be in an antagonistic relationship with the government" because of omnipresent state surveillance); Fong, Investigating Families, supra note 22, at 12–14 (2023) (noting that "lower-level investigative contacts are increasingly the face of CPS" and arguing that the ubiquity of these contacts increases "precarity" for mothers); Hum. Rts. Watch, supra note 16, at 9–11 ("[T]he [family regulation] system's interventions too often undercut its goals—failing to adequately address the needs of the family, and in some cases exacerbating the problems it intended to remedy."); Daniella Rohr & Melissa Friedman, Overreporting and Investigation in the New York City Child Welfare System: A Child's Perspective (forthcoming 2025) (manuscript at 13–14, 20) (on file with the *Columbia Law Review*) ("[F]ear of CPS oversight leads parents to limit their children's access to mandatory reporters, resulting in decreased access to medical, welfare, legal, labor market, or educational institutions."); Joe Soss & Vesla Weaver, Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities, 20 Ann. Rev. Pol. Sci. 565, 567 (2017) (explaining choice of the term "race–class subjugated").

33. Cf. Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2057, 2067 (2017) (describing how police practices "leave[] large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection" and defining "legal estrangement" as the banishing, "at . . . an interactional and structural level," of "whole communities from the body politic").

data on the frequency of home searches and what legal authority the state asserts to justify home searches is hard to come by—a problem that itself hints at the casualness of agencies' home intrusions.[34] Thus, this Article draws on primary sources including interviews, agency materials, legal filings, and court decisions to sketch out the role of consent searches and identify some of the tactics and pressures that agencies around the country rely on to gain consent.[35] Given the fractured nature of the family regulation system[36] and limits on data, this Article does not purport to provide a definitive or unified national account. But it does reveal consent to be the default justification for family regulation home searches[37] and yield a taxonomy of three recurring tactics agencies rely on to gain consent. All three tactics play out against a backdrop of parental fear and family regulation norms of compliance: (1) misrepresentations of investigators' legal authority to conduct searches; (2) threats to arrest parents if parents refuse to consent; and (3) threats to remove children if parents refuse to consent.[38]

Second, following from this descriptive account, this Article advances a constitutional claim.[39] Under current consent doctrine, consent is involuntary if a reasonable person would not feel free to refuse a state actor's request for consent.[40] This Article reviews state and federal case law considering the voluntariness of consent searches in criminal investigations where criminal investigators extracted consent through tactics akin to routine family regulation tactics. That review shows that courts have found such tactics to be so coercive as to render consent involuntary under the existing standard.[41] Under current law, searches

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34. See infra Part I (recounting public records request responses from ten jurisdictions reflecting agencies' failures to track the rate of or justifications for home searches and arguing that the lack of data reflects agencies' inattention to constitutional constraints on searches); see also Email from Virginia Pickel, Tex. Dep't of Fam. & Protective Servs., to author (June 17, 2024) (on file with the *Columbia Law Review*) [hereinafter Pickel June 17 Email] (estimating a cost of $485,559 to report two years of data on the number of home searches and the justifications for them).

35. For a more complete description of sources, see infra Part I.

36. See Emilie Stoltzfus, Cong. Rsch. Serv., IF10590, Child Welfare: Purposes, Federal Programs, and Funding 1 (2025) (describing the allocation of responsibility for family regulation operations between local, state, and federal agencies).

37. See infra Part I.

38. See infra section II.A.

39. This Article analyzes the constitutionality of search tactics under the Fourth Amendment. It is plausible that certain agency policies and practices—such as policies classifying parents' assertions of their Fourth Amendment rights as "safety risks" to their children, see infra section I.A—also violate the Unconstitutional Conditions Doctrine. See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, The Unconstitutional Conditions Vacuum in Criminal Procedure, 133 Yale L.J. 1401, 1430–37 (2024) (arguing that waivers of Fourth Amendment rights should be subject to the Unconstitutional Conditions Doctrine). Analyzing those constraints is for another day.

40. United States v. Drayton, 536 U.S. 194, 202 (2002).

41. See infra section II.B.

authorized by such coerced consent are as unconstitutional in the family regulation system as in the criminal legal system.[42]

This Article explains how systemic challenges to the constitutionality of agencies' coercive tactics could knock down a central pillar of the family regulation system's constitutional evasion and spur changes in agency practices through the legal process and public pressure.[43] But, it acknowledges, constitutional litigation is not a cure-all. Even when a constitutional violation can be established, remedies may be ineffective or nonexistent.[44] More fundamentally, the constitutional argument itself is limited. As criminal law scholars point out, the voluntariness standard does little to protect against implicit, rather than explicit, coercion.[45] Consent works no better in the family regulation domain than in other domains where it has failed.

Third, this Article takes up reforms that could fill the gaps left by constitutional consent doctrine and demonstrates the necessity of distinguishing between reforms seeking to limit or abolish consent ("consent reforms") and reforms seeking to limit or abolish searches ("search reforms").[46] Jurisdictions across the country have begun enacting consent reforms in the family regulation and criminal legal systems.[47] This Article surfaces a fundamental limit of consent reforms: They leave intact a vast search apparatus fueled by an altered consent doctrine or by warrants.[48] Thus, this Article reframes the consent search problem. Are we opposed to consent in its current form serving as a justification for searches? Or are we opposed to the searches themselves, regardless their justification? This Article points to a clear answer: Mitigating the harms of family regulation consent searches—and consent searches across the carceral state—requires recognizing surveillance itself as the problem.[49]

Through these contributions, this Article brings the rich criminal law literature critiquing consent searches into conversation with the growing body of family law scholarship positioning the family regulation system as one strand of a larger carceral net.[50] Family law scholars continue to puzzle

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42. See infra section II.B.

43. See infra section II.C.

44. See infra section II.D.

45. See infra section II.D.

46. See infra Part III.

47. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 8) (identifying reforms in the criminal legal system); see also infra section III.A (describing reforms in the family regulation system).

48. See infra section III.B.

49. See infra section III.B.

50. See, e.g., Cynthia Godsoe, Disrupting Carceral Logic in Family Policing, 121 Mich. L. Rev. 939, 942 (2023) [hereinafter Godsoe, Disrupting Carceral Logic] (explaining how the family regulation system is driven by and perpetuates carceral logic); Lisa Kelly, Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State, 17 Stan. J. C.R. & C.L. 255, 262 (2021) (highlighting parallels between policing and family regulation); Sarah H. Lorr, Disabling Families, 76 Stan. L. Rev. 1255,

through how the family regulation system comports with, or fails to comport with, the Fourth Amendment.[51] As recent scholarship highlights, the warrant requirement applies to home searches.[52] This Article builds out the next dimension of Fourth Amendment analysis, explaining how consent intersects with coercion and absolves the state of justifying searches. At the same time, it situates family regulation searches as a source of harm distinct from family separations.[53] Through focused description of the harms of home searches, it complements the work of scholars who describe more broadly the harms of family regulation to parents, children, and communities.[54] Though this Article's descriptions and critiques focus most sharply on searches and their harms in the child *neglect* investigations that form the majority of family regulation investigations, this narrower focus does not mean searches are warranted or harmless in *abuse* investigations; rather, this focus is a capitulation to limited data and space.

This Article's examination of reforms to consent searches in the family regulation system also provides new insights into the utility of such reforms in the criminal legal system. In this sense, it is a practical

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1285 (2024) (arguing that the family regulation system produces parental disability); Nancy D. Polikoff & Jane M. Spinak, Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being, 11 Colum. J. Race & L. 427, 430 (2021) (introducing a symposium considering how to provide for child well-being without the family regulation system); S. Lisa Washington, Pathology Logics, 117 Nw. U. L. Rev. 1523, 1533–34 (2023) [hereinafter Washington, Pathology Logics] (describing systemic processes and structures pathologizing parents); see also Clare Huntington, The Institutions of Family Law, 102 B.U. L. Rev. 393, 401 (2022) (calling for closer study of the institutions of family law). See generally Roberts, Torn Apart, supra note 2 (documenting the family regulation system's racialized harms and arguing for its abolition).

51. See, e.g., Coleman, supra note 7, at 415–19 (describing the absence of judicial scrutiny of Fourth Amendment issues in family regulation investigations); Josh Gupta-Kagan, Beyond Law Enforcement: *Camreta v. Greene*, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine, 87 Tul. L. Rev. 353, 377–79 (2012) [hereinafter Gupta-Kagan, Beyond Law Enforcement] (arguing that the Fourth Amendment's special needs doctrine doesn't neatly explain family regulation search and seizure cases); Ismail, Family Policing, supra note 4, at 1490–91 (proposing a new analytical framework that would treat family regulation investigations as equivalent to any other targeted investigation conducted by government agents).

52. See Arons, Empty Promise, supra note 6, at 1060; Ismail, Family Policing, supra note 4, at 1539; see also infra note 122 (collecting circuit court cases finding that family regulation home searches must be justified by warrants, a warrant exception, or consent).

53. See infra section I.B.

54. See generally Friedman & Rohr, supra note 32, at 2 (arguing that high rates of overreporting in family regulation cases divert resources from cases that warrant intervention); Shanta Trivedi, The Harm of Child Removal, 43 N.Y.U. Rev. L. & Soc. Change 523 (2019) [hereinafter Trivedi, The Harm of Child Removal] (describing removal's harms to children and arguing that such harms should be taken into account when ordering removal); Shanta Trivedi, The Hidden Pain of Family Policing, N.Y.U. Rev. L. & Soc. Change (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4715550 [https://perma.cc/Z2DY-N2PA] [hereinafter Trivedi, Hidden Pain of Family Policing] (cataloging the social, emotional, and physical harms parents endure in the course of family regulation proceedings).

companion to recent criminal law scholarship advocating for limiting or abolishing consent.[55] It also stands for a larger theoretical point. Family law scholars point out that the family regulation system is one strand of a larger carceral web, not collateral to the criminal legal system but interwoven with it and other systems of control.[56] Yet too often, family and criminal law scholars default to the criminal legal system as a descriptive and normative baseline.[57] This Article shows how taking a wider view of the carceral state—one that de-centers the criminal legal system—can reveal dynamics and paradigms that a narrower focus on criminal law obscures.

This Article proceeds in three parts. Part I describes the role of searches in family regulation investigations. It then situates those searches within a constitutional framework, explaining how the Fourth Amendment incentivizes reliance on consent searches and reviewing common critiques of consent.

Part II contends that routine family regulation investigative practices violate even the lax standard for voluntariness that governs in consent search jurisprudence. After describing some of those practices, it draws on case law stretching back more than sixty years—and reaching up to the Supreme Court—to show how these practices vitiate consent. Turning to practical implications, this Part describes the promise and limits of constitutional principles as a mechanism for increasing the privacy, dignity, and security of race–class subjugated families.

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55. See, e.g., Alafair S. Burke, Consent Searches and Fourth Amendment Reasonableness, 67 Fla. L. Rev. 509, 516 (2015) (arguing that courts should consider the reasonableness of requests for consent in determining the voluntariness of compliance); Stephen E. Henderson & Guha Krishnamurthi, A Wolf in Sheep's Attire: How Consent Enfeebles Our Fourth Amendment, 85 Ohio St. L.J. 33, 65–66 (2024) (arguing for narrowing the circumstances in which consent can serve as legal authorization for a search); Christopher Slobogin & Kate Weisburd, Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver In Criminal Cases, 101 Wash. U. L. Rev. 1913, 1916 (2024) (arguing that consent should be irrelevant as a legal justification for searches in certain circumstances); Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 8) (documenting efforts in thirty-eight jurisdictions to limit consent as a justification for searches and arguing for limits on consent as a legal justification across criminal procedure).

56. See, e.g., Roberts, Torn Apart, supra note 2, at 162 (describing the "giant carceral web"); Godsoe, Disrupting Carceral Logic, supra note 50, at 941 ("Like the criminal system, the family-policing system is driven by, and in turn perpetuates, carceral logic . . . ."); Kelly, supra note 50, at 263 ("'[C]hild welfare' and policing are not just parallel, mirrored realities. The two systems are connected and feed one another."); S. Lisa Washington, Fammigration Web, 103 B.U. L. Rev. 117, 123 (2023) [hereinafter Washington, Fammigration Web] ("The interplay between the family regulation and immigration systems produces intersystemic harms through the marking and subordination of noncitizen and mixed-status families.").

57. I thank Lisa Washington for generative conversations on this point. For another scholar who makes a similar point, see Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1387 (2022) ("The move to see punitive logics embedded in a host of U.S. institutions, from housing policy to employment law, strikes me as important in and of itself.").

Part III shifts focus to state-law reforms aimed at remedying constitutional consent search deficiencies. It does not offer a conclusive set of policy recommendations. Instead, it outlines the stakes of how "the consent search problem" is framed. Different reforms flow from framing consent doctrine as the problem versus framing the searches themselves as the problem. This distinction raises a more fundamental point: Protecting race–class subjugated families from state overreach requires grappling with surveillance itself, not just legal justifications for it.

I. CONSENT SEARCHES IN THE FAMILY SURVEILLANCE APPARATUS

This Part begins by describing the use of home searches in family regulation investigations and positioning searches as one manifestation of the carceral logics driving the family regulation system. It then surveys the damage this search scheme inflicts on families and communities. The Part closes by explaining why the Fourth Amendment's constraints on home searches make consent an appealing avenue to agencies and reviewing critiques of consent search doctrine.

At the outset, it is necessary to note the limits of available information and thus the limits of the account offered here. Part I and section II.A describe the family surveillance apparatus. To gain a rough picture of the frequency and legal justification for family regulation home searches, I sought information from the entities responsible for investigations in the ten largest cities in the country.[58] I requested agency data on the number of investigations in which the agency entered families' homes as part of its initial investigations for a two-year period and the number of those home entries justified by consent. Every jurisdiction reported that its family regulation agency does not, as a matter of course, collect that data.[59] Only one agency, Texas's Department of Children and Family Services, responded that it could generate that information—though it estimated a cost of nearly half a million dollars to do so on a statewide basis.[60]

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58. See Email from Carl W. Gilmore, FOIA Officer, Ill. Dep't of Child. & Fam. Servs., to author (June 21, 2024) (on file with the *Columbia Law Review*) (responding to a records request involving investigations in Chicago); Katherine N. Hodge, Dep't of Child & Fam. Well-Being, Cnty. of San Diego, Response to Records Request (June 3, 2024) (on file with the *Columbia Law Review*) (San Diego); Email from Aldo Marin, Bd. Liaison, DCFS Bd. & Comm'n, L.A. Cnty., to author, supra note 8 (Los Angeles); Email from Off. of Correspondence, Ariz. Dep't Child Safety, to author (May 30, 2024) (on file with the *Columbia Law Review*) (Phoenix); Email from Off. of Gen. Counsel, Fla. Dep't of Child. & Fams., to author (July 12, 2024) (on file with the *Columbia Law Review*) (Jacksonville); Pickel June 17 Email, supra note 34 (Dallas, Houston, and San Antonio); Email from Shea Skinner, Deputy City Solic., Right-to-Know, Law Dep't, City of Phila., to author (July 11, 2024) (on file with the *Columbia Law Review*) (Philadelphia). Data for New York City comes from the Administration for Children's Services's response to a reporter's request for this same information. See Hager, Police Need Warrants, supra note 4.

59. See supra note 58 for agency responses discussed.

60. Pickel June 17 Email, supra note 34. Rather than proceed with that request, I requested data from a more limited sample of 400 cases in Harris County, Texas, and

The absence of data quantifying searches does not mean searches do not happen. Instead, it suggests that agencies do not anticipate having to defend their search practices or their justifications for searches in particular cases.[61] And it hints, too, that agencies take surveillance and consent as defaults, rather than as remarkable. More fundamentally, this lacuna reflects the power differential between those who search and those who are searched.[62] Thus, in this Part and in section II.A, in addition to agency data, this Article relies on a review of agencies' public-facing materials (including policies and regulations); state statutes; legal filings and decisions; interviews with practitioners, agency personnel, and parents impacted by the family regulation system; prior accounts by reporters, legal scholars, and researchers in other disciplines; and my own experience representing parents in family regulation proceedings and participating in civil litigation against family regulation agencies.

A. *"Eyes in the Home"*

"Getting eyes in the home" could be taken as the motto of the family regulation system.[63] The phrase exemplifies the carceral logics organizing

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received the lower price estimate of $600. Email from Virginia Pickel, Tex. Dep't of Fam. & Protective Servs., to author (July 26, 2024) (on file with the *Columbia Law Review*). I describe the information received via this records request below, infra notes 95, 134, and 373.

61. See infra section II.D (describing barriers to obtaining review of searches).

62. Cf. Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2413 (1989) ("Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.").

63. See Child.'s Bureau, HHS, Massachusetts Statewide Assessment 230 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/ma-cfsr-r4-swa.pdf [https://perma.cc/7QD4-EF8J] (acknowledging that "eyes in the home" has a negative connotation but instructing service providers that "'another set of eyes in the home' is part of a strengths-based framework" (internal quotation marks omitted)); Fla. Dep't of Child. & Fams., Module 3: Commencement of the Investigation: Initial Contact and Present Danger 56 (2015), https://www.myflfamilies.com/sites/default/files/2023-10/Module%203%20Commencement%20of%20the%20Investigation%20Initial%20Contact%20and%20Present%20Danger_TG_03202015.pdf [https://perma.cc/ZHG7-T95U] (instructing investigators, "You are the first eyes in the home . . . ."); Naomi Schaefer Riley, Portland's Encampment Kids, City J. (Jan. 21, 2024), https://www.city-journal.org/article/portlands-encampment-kids [https://perma.cc/4PP4-DGWZ] ("[H]aving eyes in the home is much more effective in identifying risk." (internal quotation marks omitted) (quoting Amber Kinney, former attorney, Multnomah Cnty. Dist. Att'y's Off.)); Zach Crenshaw, 'A Failure of the System': Kids Told DCS and Police About Prior 'Youtube Mom' Abuse, ABC15 Ariz. (May 14, 2021), https://www.abc15.com/news/region-central-southern-az/maricopa/a-failure-of-the-system-kids-told-dcs-and-police-about-prior-youtube-mom-abuse [https://perma.cc/3Z62-GWVH] (last updated May 15, 2021) ("If there was more money in the system, we could provide more actual eyes in the home . . . ." (internal quotation marks omitted) (quoting Kent Volkmer, Pinal Cnty. Att'y)). See generally Kelley Fong, Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life, 85 Am. Socio. Rev. 610, 618 (2020) (finding expansive and unequal surveillance of marginalized families).

the system. As scholars and activists have observed,[64] these carceral logics demand the maintenance of social order through the subjugation of marginalized groups.[65] Thus, within the family regulation system, the state uses "surveillance, coercion, and punishment, instead of support, to achieve the purported goal of child safety."[66] By focusing on moral deficiencies of individual parents, the system obscures the societal policy choices that create the conditions under which subjugated families live.[67]

These carceral logics drive surveillance of already-marginalized parents—including poor parents, racialized parents, disabled parents, and immigrant parents.[68] As Professor Dorothy Roberts explains, the family regulation system draws on and perpetuates stereotypes of these parents as dangerous to their children.[69] Thus, the thinking goes, they must be surveilled under the "benevolent veneer" of family regulation.[70] As explained at greater length below, surveillance, even if well-intended, neither aids families nor makes children safer.[71]

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64. See, e.g., Roberts, Torn Apart, supra note 2, at 23 (describing the family regulation system as a "powerful mechanism for reinforcing racial capitalism—the US system of wealth accumulation grounded in racist hierarchy and ideology"); Emma Peyton Williams, UpEnd, The Carceral Logic of the Family Policing System 4 (2022), https://upendmovement.org/wp-content/uploads/2022/06/upEND-Carceral-Logic.pdf [https://perma.cc/M4FV-LXVF] ("[B]y framing child maltreatment as a series of isolated incidents as opposed to a public health issue, the family policing system obscures the reality that child maltreatment cannot be meaningfully ameliorated without overarching system and societal-level change."); Godsoe, Disrupting Carceral Logic, supra note 50, at 941 ("[T]he family-policing system is driven by, and in turn perpetuates, carceral logic—an array of legal practices that operate to police, discipline, and most importantly, subordinate a given population in the name of safety or protection."); Roberto Sirvent, Abolishing the Family Policing System: An Interview With Joyce McMillian, Black Agenda Rep. (July 6, 2022), https://blackagendareport.com/abolishing-family-policing-system-interview-joyce-mcmillan [https://perma.cc/2HDN-GH9K] ("What is so important to understand about family policing is its position as a system in which *all* the forms of policing and oppression come together . . . ." (quoting Joyce McMillan)).

65. See Washington, Fammigration Web, supra note 56, at 131 ("'[C]arceral logics' refers to the ways the family regulation system not only intersects with the criminal legal system but mirrors the ways it subordinates marginalized groups to maintain social order.").

66. Id.

67. Id.; see also Bridges, supra note 32, at 122–23, 128–29.

68. See, e.g., Child.'s Bureau, HHS, Child Welfare Practice 2–3 (documenting racial disproportionality in family regulation investigations); Fong, Contexts of Poverty, supra note 15, at 5–6 (summarizing research documenting the family regulation system's disproportionate focus on poor families); Lorr, supra note 50, at 1275–78 (summarizing the family regulation system's disproportionate focus on disabled parents).

69. Roberts, Torn Apart, supra note 2, at 211 (describing the family regulation system's reinforcement of and reliance on the "mythology" that Black mothers are prone to "neglect[ing] their children" and on "[s]tereotypes of maternal irresponsibility").

70. Id. at 27; see also Trivedi, Hidden Pain of Family Policing, supra note 54, at 33–46 (explaining how narratives that some people are undeserving of parenthood and that certain children need to be saved from their parents drive family regulation interventions).

71. Roberts, Torn Apart, supra note 2, at 167 (describing how surveillance with "benign" intentions does not translate to "beneficial" results).

Home searches are just one instance of the near-constant surveillance under which race–class marginalized parents live.[72] Most relevant here, an array of mandated reporters—individuals required by law to report suspected child neglect or abuse to the state—watch poor families in their schools, doctors' offices, shelters, and neighborhoods.[73] Once a reporter (mandated or otherwise) lodges an allegation of child maltreatment with a state's central register, the state conducts a cursory screening of the report.[74] After this initial screening, about half of reports are referred for investigation.[75] Those investigations almost always involve a home search.[76]

Following an investigation, investigators must decide whether to "substantiate[]" the allegations against the parent.[77] While standards of proof for this determination vary by jurisdictions, most jurisdictions maintain *lower* standards of proof for these administrative determinations

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72. See, e.g., Bridges, supra note 32, at 86 (describing the state's invasion of mothers' privacy rights in providing welfare); John Gilliom, Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy 17–20 (2001) (offering three examples of welfare surveillance); Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 226 (1997) ("Public relief for single mothers is structured to permit bureaucratic supervision of clients in order to determine their eligibility . . . ."); see also Wyman v. James, 400 U.S. 309, 324 (1971) (holding that a requirement that welfare recipients submit to "home visitation" to receive aid is constitutional).

73. See Fong, Contexts of Poverty, supra note 15, at 6 ("Poor parents' overrepresentation in the child welfare system may result from biased reporting systems or increased visibility to authorities." (citations omitted)); Katie Louras, The Runaway Train of Mandated Reporting, 61 San Diego L. Rev. 137, 143–50 (2024) (describing the history and growth of mandated reporting laws); see also 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, 142 (2018) (finding statistically significant racial disparities in abusive head trauma evaluation and reporting and suggesting that they exemplify "ascertainment bias"); Marian Jarlenski, Jay Shroff, Mishka Terplan, Sarah C. M. Roberts, Brittany Brown-Podgorski & Elizabeth E. Krans, Association of Race With Urine Toxicology Testing Among Pregnant Patients During Labor and Delivery, JAMA Health F., Apr. 14, 2023, at 1, 3 (noting that Black patients "had a greater probability of receiving a [urine test] at delivery compared with White patients and other racial groups" but "did not have a higher probability of a positive test result than other racial groups").

74. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 6–7 (reporting the national average rates of rejecting and accepting reports). States vary in the rate at which they reject ("screen out") reports based on this cursory review. Id. at 7 ("For those 47 states [that reported data], . . . the percentages of screened-out referrals ranged from 1.3 to 83.1.") Explanations for that wide variation are beyond the scope of this Article, but for one exploration, see N.Y.C. Fam. Pol'y Project, No Filter (Mar. 5, 2024), https://familypolicynyc.org/report/scr/ [https://perma.cc/9LJR-N3WE] (considering why New York refers more cases for investigation than other jurisdictions).

75. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 6–7 ("For 2022, 47 states . . . screened-in 49.5 percent . . . of referrals.").

76. Ismail, Family Policing, supra note 4, at 1497 ("In all screened-in cases, CPS conducts a home search.").

77. Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries, 77 Wash. & Lee L. Rev. 857, 864 (2020).

than for in-court determinations of liability against parents.[78] This is so even though administrative determinations carry weighty consequences, ranging from "marking" the parent as particularly risky in any future investigations to serving as bars to employment and acting as a caretaker to other children.[79] Whether the agency elects to substantiate the allegation or not, at the close of an investigation, they may refer families to "voluntary" ongoing programming and surveillance or seek "voluntary" family separations.[80] Alternately, the agency may initiate a case against the family in court, seeking court orders to separate the family or to require that the family comply with programming or surveillance—or ultimately, to permanently sever the family's legal relationship.[81] Agencies use the information collected through home searches against parents in and outside of court.[82]

Before describing family regulation home searches, two points bear emphasizing. First, parents may be investigated for neglecting or abusing their children[83]—two legal categories referred to collectively in this Article as "child maltreatment." The vast majority of parents investigated are alleged to have neglected their children, not to have abused them.[84] States define "neglect" vaguely and capaciously—it can capture anything from

78. Nicholas Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, The Standard of Proof in the Substantiation of Child Abuse and Neglect, 14 J. Empirical Legal Stud. 333, 334 (2017).

79. Sen et al., supra note 77, at 867–69; How to Remedy Harm Caused by State Child Abuse Registries, The Annie E. Casey Found. (Nov. 10, 2023), https://www.aecf.org/blog/how-to-remedy-harm-caused-by-state-child-abuse-registries [https://perma.cc/C343-JB3Y].

80. It is beyond the scope of this Article to trace the full legal process for a family regulation case. For a longer description of this process, see Arons, Prosecuting Families, supra note 20, at 1056–58.

81. Id.

82. Id.; see also infra notes 282–283 (discussing how the absence of the exclusionary rule in family regulation cases allows for even illegally obtained evidence to be used against parents in court proceedings).

83. While definitions of "abuse" and "neglect" vary by state, "abuse" generally refers to sexual abuse or "any nonaccidental physical injury to the child," in addition to "acts or circumstances that threaten the child with harm or create a substantial risk of harm." Child.'s Bureau, HHS, Definitions of Child Abuse and Neglect 2 (2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/define.pdf?VersionId=P2GBlQKK7w_ohrCN3oV2TiD6QIkkEjIP [https://perma.cc/JY6X-XTVM] (internal quotation marks omitted). Corporal punishment may be classified as neglect or abuse and is classified as abuse more often when it causes serious injury to a child. See Doriane Lambelet Coleman, Kenneth A. Dodge & Sarah Keeton Campbell, Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse, 73 Law & Contemp. Probs. 107, 114–19 (2010) (surveying states' definitions of abuse and statutory allowances for "reasonable corporal punishment").

84. Among children who are determined to be maltreated, 74% were deemed neglected, 17% physically abused, and 11% sexually abused. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 23. Because children may be counted in more than one category, this does not mean that 27% of children experienced some sort of abuse, as one child may have experienced more than one type of abuse. Id. at 22. In jurisdictions that track categories of allegations rather than categories of *substantiated reports*, it appears that allegations of neglect outpace allegations of abuse at a similar rate. Arons, Empty Promise, supra note 6, at 1069 n.48.

substandard housing conditions to school tardiness to lack of access to physical or mental healthcare to use of corporal punishment not resulting in serious injury to children.[85] Unsurprisingly, neglect is difficult to distinguish from poverty.[86] Second, searches are an ineffectual means of securing child safety. In individual cases, searches rarely turn up evidence supporting maltreatment allegations: States close more than 80% of investigations without substantiating any allegations of maltreatment.[87] In cases where states do substantiate allegations, states even more rarely pursue court action against parents, a necessary step to separate children from their parents.[88]

In the aggregate, the growth of the family regulation surveillance apparatus has not brought about an increase in child well-being. Studies show that rates of child neglect have remained static for decades,[89] and rates of child abuse and child neglect do not climb when surveillance recedes.[90] Even accepting carceral logics linking surveillance and safety,[91]

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85. See Josh Gupta-Kagan, Confronting Indeterminacy and Bias in Child Protection Law, 33 Stan. L. & Pol'y Rev. 217, 273 (2022) (describing calls to define "neglect more narrowly" and to limit neglect to situations causing significant harm); Colleen Henry & Vicki Lens, Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment, 24 CUNY L. Rev. 1, 24 & n.138 (2021) (surveying states' statutory definitions of neglect).

86. See Josh Gupta-Kagan, Distinguishing Family Poverty From Child Neglect, 109 Iowa L. Rev. 1541, 1546 (2024) (tackling the "enormously difficult challenge" of "disentangling poverty from neglect").

87. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 32–33.

88. See Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that the government must establish that a parent is unfit before it can impinge on parental rights). As a proxy for court filings, approximately 187,000 children entered foster care in 2022. Child.'s Bureau, HHS, The AFCARS Report 1 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/3T66-Y2RN] [hereinafter Child.'s Bureau, AFCARS Report]; see also Child.'s Bureau, HHS, Child Maltreatment 2019, at 18, 91 (2021), https://acf.gov/sites/default/files/documents/cb/cm2019.pdf [https://perma.cc/Q2FS-35U8] (reporting that, per 41 states' reports from 2019, out of more than 3.4 million children who received either an investigation or alternative response, 133,582 victims of child maltreatment had "court action"). Some jurisdictions also provide for filing in court when the state does not seek to separate a family but instead seeks to require the parents to comply with requirements like ongoing surveillance or participation in services as conditions for their children staying home. See N.Y.C. Admin. Child. Servs., What Should You Know About Court-Ordered Supervision?, https://www.nyc.gov/assets/acs/pdf/immigrant_services/translations/dps/COS.pdf [https://perma.cc/43KP6U7Z] (last visited Jan. 19, 2025).

89. See, e.g., Finkelhor, supra note 3, at 4–5 ("Neglect substantiations by child protection authorities have fluctuated but remained relatively stable since the late 1990s at around 75 per 10 K . . . .").

90. Sege & Stephens, supra note 3, at 338 (describing the absence of evidence of an increase in child maltreatment during the pullback of family regulation agencies early in the COVID-19 pandemic); see also Anna Arons, An Unintended Abolition: Family Regulation During the COVID-19 Crisis, 12 Colum. J. Race & L. 1, 3 (2022) [hereinafter Arons, Unintended Abolition] (same).

91. For examples of arguments that more surveillance increases safety for children, see supra note 63.

the scale of family surveillance can reduce child safety: When agencies must investigate more reports, they are spread thinner, leaving them spending unnecessary time investigating more families where children are already safe and less time protecting vulnerable children.[92]

Despite those caveats, family regulation investigators are required by statute or regulation to conduct at least one home search for virtually every investigation.[93] A handful of states have more targeted requirements that mandate home searches only for certain sorts of cases or certain ages of children, or they leave home searches to investigators' discretion.[94] However, even in jurisdictions with these narrower requirements, the commitment to getting "eyes in the home" can remain strong. In Harris County (Houston), Texas, for example, though investigators operate under a narrower mandate, in a small sample of cases, investigators still reported entering homes in 75% of investigations.[95]

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92. A study of large counties around the country that expanded reporting requirements (i.e., making more individuals mandated reporters of child maltreatment) showed that these changes were associated with an increase in the total number of reports but no increase in the rate at which reports were substantiated. See Vincent J. Palusci, Frank E. Vandervort & Jessica M. Lewis, Does Changing Mandated Reporting Laws Improve Child Maltreatment Reporting in Large U.S. Counties?, 66 Child. & Youth Servs. Rev. 170, 176 (2016). Elsewhere, after Pennsylvania expanded its mandated reporting laws, the rate of child fatalities and near fatalities almost doubled. Mical Raz, Abusive Policies: How the American Child Welfare System Lost Its Way 69–72 (2020). Mical Raz, a public health scholar, posits that "increased reporting depletes resources that are already spread thin and diverts attention away from children who need it the most." Mical Raz, Unintended Consequences of Expanded Mandatory Reporting Laws, Pediatrics Persps., Apr. 2017, at 1, 1–2 [hereinafter Raz, Unintended Consequences].

93. Ismail, Family Policing, supra note 4, at 1497 ("In all screened-in cases, CPS conducts a home search."); Hager, Police Need Warrants, supra note 4 ("With rare exceptions, all of these investigations include at least one home visit, and often multiple, according to a review of all 50 states' child welfare statutes and agency investigative manuals.").

94. See, e.g., Tex. Fam. Code Ann. § 261.302(a)(1) (West 2023) ("The investigation may include . . . a visit to the child's home, unless the alleged abuse or neglect can be confirmed or clearly ruled out without a home visit . . . ."); Ill. Dep't of Child. & Fam. Servs., Reports of Child Abuse and Neglect § 300.50 (2022), https://dcfs.illinois.gov/content/dam/soi/en/web/dcfs/documents/about-us/policy-rules-and-forms/documents/procedures/procedures-300.pdf [https://perma.cc/HM3H-MLWV] [hereinafter Ill. Dep't of Child & Fam. Servs., Reports of Child Abuse and Neglect] (requiring home searches only for reports of inadequate shelter or environmental neglect); Tex. Dep't of Fam. & Protective Servs., Child Protective Services Handbook § 2250 (2024), https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2200 [https://perma.cc/2SA2-R82R] (requiring home searches when the child is age five or younger, "[t]he allegations involve the condition of the home," or "[o]ther circumstances in the case make a home visit necessary to ensure child safety").

95. See Tex. Dep't of Fam. & Protective Servs., List of First 400 CPI INV Cases/Stages in Harris County that Started in FY 2024 YTD: September 1, 2023 to July 31, 2024 (2024) (on file with the *Columbia Law Review*) [hereinafter Tex. Dep't of Fam. & Protective Servs., Fiscal Year 2024 Data].

Once investigators enter families' homes, the scope of their searches is rarely bound by the nature of the allegations.[96] Whether a report alleges neglect or abuse and whether it relates to activities inside or outside the home, the same sort of unconstrained home search follows. Investigators seek out information on the physical condition of the home, the quantity and quality of provisions in the home, and the "climate" of the neighborhood in which the home is located.[97] To gather this information, investigators often enter every room of the home, opening refrigerators, drawers, cupboards, and medicine cabinets.[98] Investigators may use the evidence they gather to substantiate a case against a parent administratively, or, if they elect to file a case against a parent, to prove the allegations in court.[99]

The number of American families searched in this manner is staggering. By one estimate, 37% of all American children—and 53% of Black American children—experience a family regulation investigation (and a concomitant home search by state agents) during their childhood.[100] Before returning to why consent is so often used to justify these searches, the next section reviews the harms that these searches can wreak.

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96. Arons, Empty Promise, supra note 6, at 1094 (surveying state policies and statutes regarding blanket search requirements).

97. Id. at 1072 (surveying state policies and statutes regarding search directives to investigators).

98. Id. at 1088 (describing typical home searches nationally); Coleman, supra note 7, at 431, 436 (same); Ismail, Family Policing, supra note 4, at 1486 (same); see also Jennifer A. Reich, Fixing Families: Parents, Power, and the Child Welfare System 87, 100 (2005) (describing California's approach to home searches); Michelle Burrell, What Can the Child Welfare System Learn in the Wake of the *Floyd* Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations, 22 CUNY L. Rev. 124, 131 (2019) ("It is a common practice for an investigator to visit the home of the family under investigation unannounced, even late at night."); Dorothy E. Roberts, I Have Studied Child Protective Services for Decades. It Needs to Be Abolished., Mother Jones (Apr. 5, 2022), https://www.motherjones.com/criminal-justice/2022/04/abolish-child-protective-servicestorn-apart-dorothy-roberts-book-excerpt/ [https://perma.cc/N7CS-372D] (describing Colorado's procedures for home searches); Eli Hager, Agnel Philip & Hannah Rappleye, For Black Families in Phoenix, Child Welfare Investigations Are a Constant Threat, NBC News (Dec. 8, 2022), https://www.nbcnews.com/news/us-news/phoenix-arizona-child-welfare-black-parents-rcna60446 [https://perma.cc/9SDF-VH54] (describing Arizona's home search policy); What Does CPS Look for in a Home Visit in California?, Quora, https://www.quora.com/What-does-CPSlook-for-in-a-home-visit-in-California [https://perma.cc/Q5NF-FTX4] (last visited Jan. 19, 2025) (collecting parents' experiences with California home searches).

99. See supra notes 75–80 and accompanying text.

100. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, Lifetime Prevalence of Investigating Child Maltreatment Among US Children, 107 Am. J. Pub. Health 274, 278 (2017).

B. *The Harms of Family Regulation Home Searches*

The harms of family separation to children and to parents are extensive and well-documented. Children suffer from anxiety and attachment disorders, from grief and confusion surrounding removal itself, from high rates of abuse in the foster care system, and from the loss of connection with their community and with others who share their identity.[101] Parents whose children are taken experience a constellation of psychological symptoms akin to those brought about by the death of a child—only state-instigated family separation adds on additional uncertainty and stigma.[102]

Less discussed are the harms that in-home surveillance exacts on parents, children, and whole communities even when it *does not* lead to further state intervention—the lion's share of cases, or the more than 90% of family regulation investigations that close with families intact.[103] This section briefly highlights those harms.

First, there are the immediate harms to parents and children whose homes are searched. Parents describe searches as "nerve-wracking," "invasive," and "humiliating."[104] As Professor Shanta Trivedi explains, many parents feel that investigators treat them as "guilty until proven innocent," stereotyping them and presuming them "bad," "sick," or abnormal.[105] Throughout investigations, parents may feel utterly

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101. See Trivedi, The Harm of Child Removal, supra note 54, at 546 ("[T]he likelihood of abuse has been shown to increase every time a child is moved to a new home."); see also Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families, 102 Marq. L. Rev. 1161, 1163 (2019) (examining how the removal process itself inflicts trauma on children).

102. Trivedi, Hidden Pain of Family Policing, supra note 54, at 15–16 ("It's as if the three of them died." (quoting Kendra L. Nixon, H. L. Radtke & Leslie M. Tutty, "Every Day It Takes a Piece of You Away": Experiences of Grief and Loss Among Abused Mothers Involved With Child Protective Services, 7 J. Pub. Child Welfare 172, 180–31 (2013))).

103. Id. at 3–4 ("To date, most of the scholarly focus, including my own, has been on the harms that children experience when they are involved in the system and ultimately removed from their parents."); see also Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that of the 3,096,101 children who were subjects of investigations or alternative responses in 2022, 145,449 received foster care). It is likely that a roughly equivalent number entered "hidden foster care" without court involvement. Gupta-Kagan, Hidden Foster Care, supra note 13, at 844–47 (describing how "state agencies effectuate a change of custody for thousands of children with little, if any, meaningful due process" through an unreported, hidden foster care system).

104. Hum. Rts. Watch, supra note 16, at 4 (internal quotation marks omitted); see also In re Autumn A., No. NN-XXXXX-XX/24, 2024 WL 5265294, at *6 (N.Y. Fam. Ct. Dec. 23, 2024) ("This is the same agency that entered the sanctity of a family home for the purpose of investigating allegations of inadequate parenting. No parent welcomes this type of intrusion and examination nor the anxiety for the entire family . . . that it brings.").

105. Trivedi, Hidden Pain of Family Policing, supra note 54, at 12–13 (internal quotation marks omitted) (quoting Sabrina Luza & Enrique Ortiz, The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse, 3 IPT (1991), http://www.ipt-forensics.com/journal/volume3/j3_2_5.htm [https://perma.cc/6MXR-7ZXS]).

powerless: "[I]f they cooperate with the investigation, they risk having their children removed from their home; if they do not cooperate, the same thing might happen."[106]

The harms persist after investigations end. In an ethnographic study of poor mothers' experiences with family regulation, sociologist Kelley Fong documented how family regulation surveillance increased mothers' "precarity"—their sense that "[s]tate agents can take their children, and there isn't much they can do to stop it."[107] Fong found that precarity fuels parental stress, anxiety, and fear.[108] Precarity also spurs parents to withdraw socially and to be wary of government supports and services due to fear of future surveillance.[109]

Parental stress increases the risk of adverse child outcomes, so children are affected by harms inflicted on their parents.[110] But children also suffer their own distinct harms from home searches. Searches undermine children's sense of security and trust in their parents' protective capacity.[111] Younger children in particular "react with anxiety even to temporary infringements of parental autonomy."[112] Parents I have represented report that for months or even years after investigations end their children respond to knocks on the front door—by delivery drivers, neighbors,

106. Ndjuoh MehChu, Neither Cops nor Caseworkers: Transforming Family Policing Through Participatory Budgeting, 104 B.U. L. Rev. 73, 104–05 (2024).

107. Fong, Investigating Families, supra note 22, at 13–14.

108. Id. at 188 ("By repeatedly silencing and dismissing mothers, CPS and related authorities conveyed the system's power over them—a tactic effective in chilling mothers' potential mobilization and maintaining the status quo.").

109. Id. at 37–45 ("Ultimately, mothers' risk-averse approach—a rational response to CPS vulnerability—perpetuates marginality by reinforcing a sense of constraint and distancing families from assistance."). For a more extensive discussion of the harms of investigations to parents, see Trivedi, Hidden Pain of Family Policing, supra note 54, at 10–13.

110. Parental stress is a "well-established risk factor for adverse child outcomes, including the development of aggression and disruptive behavior, internalizing problems/anxiety, compromised emotional coping, and impaired social cognition and competence." Kathleen I. Crum & Angela D. Moreland, Parental Stress and Children's Social and Behavioral Outcomes: The Role of Abuse Potential Over Time, 26 J. Child & Fam. Stud. 3067, 3067 (2017) (citations omitted).

111. Joseph Goldstein, Albert J. Solnit, Sonja Goldstein & Anna Freud, The Best Interests of the Child: The Least Detrimental Alternative 97 (paperback ed. 1998) ("Children, on their part, react with anxiety even to temporary infringements of parental autonomy."); see also Casey Fam. Programs, How Can Investigation, Removal, and Placement Processes Be More Trauma-Informed? 1 (2018), https://www.casey.org/media/SC_Trauma-informed-investigation-removal-placement_fnl.pdf [https://perma.cc/KY9D-HGY4] ("The processes of investigation, removal, and placement into out-of-home care . . . are in and of themselves traumatic events for children and families."); Fong, Investigating Families, supra note 22, at 146 ("Investigations can be stressful for children . . . .").

112. Goldstein et al., supra note 111, at 97.

anyone—with a flurry of anxious questions.[113] Others report that their children developed new behavioral struggles at home and at school in the wake of the uncertainty and loss of security brought on by investigations.[114] Summing up their clients' experiences, one group of attorneys for children wrote, "Ironically, the very home visits designed to ensure children's safety at the hands of their caregivers can cause them great harm."[115]

The harms of searches extend beyond individuals and families into whole communities. Subjugated families' loss of privacy in their individual homes can rupture communities' sense of cohesion and security in the aggregate. Privacy and dignity are closely linked.[116] When the state encroaches on one family's privacy, even briefly, it interferes with that family's ability to embrace and act out their chosen values.[117] When the state encroaches on the homes of a substantial proportion—perhaps more than half—of families in a particular neighborhood or demographic group,[118] it conveys a clear message about what sorts of values are acceptable and what sorts of families deserve privacy.[119] It conveys a

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113. For an account in this vein, see the testimony of New York parent Desseray Wright regarding her five-year-old's anxiety about investigators' knocks on the front door after an investigation. Family Involvement in the Child Welfare System: Hearing Before the Assemb. Standing Comm. on Child. & Fams., 2021 Assemb., 10-21-21 Sess. (N.Y. 2021) [hereinafter N.Y. Assembly Hearing on Family Involvement in the Child Welfare System] (statement of Desseray Wright), https://nystateassembly.granicus.com/MediaPlayer.php?view_id=8&clip_id=6408 (on file with the *Columbia Law Review*).

114. For an account in this vein, see Jonah E. Bromwich & Andy Newman, Child Abuse Investigators Traumatize Families, Lawsuit Charges, N.Y. Times (Feb. 20, 2024), https://www.nytimes.com/2024/02/20/nyregion/acs-nyc-family-trauma-lawsuit.html (on file with the *Columbia Law Review*) ("Their daughter, once outgoing and cheerful, has been in therapy, her parents said, and blames herself for the investigations.").

115. Brief for the Child at 25, In re Sapphire W. v. Kenneth L., 227 N.Y.S.3d 624 (N.Y. App. Div. 2025) (No. NN-17879/23); see also *In re Sapphire W.*, 227 N.Y.S.3d at 633 ("[A] child protective agency's involvement with a family may itself have a negative impact on the parent or the child, even if it may be necessary in some circumstances to prevent or repair the effects of abuse or neglect.").

116. Bridges, supra note 32, at 107 (describing the view that privacy ought to be protected "because, insofar as it protects dignity, it is good in and of itself").

117. Peggy Cooper Davis, Contested Images of Family Values: The Role of the State, 107 Harv. L. Rev. 1348, 1371 (1994).

118. See, e.g., Frank Edwards, Sara Wakefield, Kieran Healy & Christopher Wildeman, Contact With Child Protective Services Is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties, PNAS, July 19, 2021, at 1, 1 (documenting rates of investigation by race in twenty of the largest United States counties and finding that, in eleven of twenty counties, Black children have risks of investigation exceeding 50%); Angela Butel, Data Brief: Child Welfare Investigations and New York City Neighborhoods, Ctr. for N.Y.C. Affs. (June 2019), http://www.centernyc.org/data-brief-child-welfare-investigations [https://perma.cc/NQ9H-9LEW] (mapping the disparate rate of family regulation investigations in New York City by neighborhood, income, and race).

119. See Bridges, supra note 32, at 107–10 ("By depriving poor mothers of . . . family privacy rights, law and society contend that we ought not to assume that poor mothers should be trusted to raise their children expertly."); Dorothy E. Roberts, The Racial Geography of Child Welfare: Toward a New Research Paradigm, 87 Child Welfare 125, 131–

message, too, that race–class subjugated parents must be careful in how they parent from the time of their children's birth, lest they invite intrusion.[120] The regularity of state intrusion can lead to community-wide legal estrangement, as the family regulation system perpetuates the idea that race–class subjugated families do not share in the same rights and freedoms as other Americans.[121]

C. *Consent as a Fourth Amendment Solution*

The carceral logics of family regulation prioritize getting eyes in the home. The Fourth Amendment presents a potential obstacle to that project. Consent allows the state to overcome that obstacle.

In Fourth Amendment jurisprudence, "the home is first among equals."[122] Home searches by state agents are presumptively unreasonable[123] and are only lawful if justified by a warrant supported by probable cause and particularity, consent, or a recognized exception to the warrant requirement.[124] Circuit courts around the country have held that these same constraints apply to home searches conducted by family regulation investigators.[125] In doing so, they have rejected the notion that

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47 (2008) ("The study found that all but one of the respondents were aware of intense DCFS involvement with families in their neighborhood.").

120. See Fong, Investigating Families, supra note 22, at 37–39 ("Even for mothers never reported to CPS, the *possibility* of reports creates trade-offs that foster a sense of constraint and make it risky to disclose difficulties to people who might help.").

121. Bell, supra note 33, at 2066–67 (defining legal estrangement).

122. Florida v. Jardines, 569 U.S. 1, 6 (2013).

123. See Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) ("To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions 'on private property,'—only 'unreasonable' ones." (quoting *Jardines*, 569 U.S. at 6)).

124. U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched . . . ."); *Caniglia*, 141 S. Ct. at 1599 ("We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps most familiar, for example, are searches and seizures pursuant to a valid warrant.").

125. See, e.g., Andrews v. Hickman County, 700 F.3d 845, 859 (6th Cir. 2012) ("Given the presumption that state actors are governed by the Fourth Amendment and the sanctity of the home under the Fourth Amendment, we agree that a social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement."); Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 419–20 (5th Cir. 2008) ("We begin by noting that it is well established in this circuit that the Fourth Amendment regulates social workers' civil investigations." (citing Roe v. Tex. Dep't of Protective & Regul. Servs., 299 F.3d 395, 401 (5th Cir. 2002))); Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1240 (10th Cir. 2003) ("It is well-established that a warrantless search is presumptively unreasonable under the Fourth Amendment and therefore invalid unless it falls within a specific exception to the warrant requirement." (citing United States v. Zubia-Melendez, 263 F.3d 1155, 1162 (10th Cir. 2001))); Calabretta v. Floyd, 189 F.3d 808, 813 (9th Cir. 1999) ("Any government official can be held to know that their office does not give them an unrestricted right to enter peoples' homes at will."); J.C. v. District of Columbia, 199 A.3d 192, 200, 200–01 (D.C. 2018) ("Accordingly, under the Fourth Amendment, a lawful seizure of children from their parents' custody requires a court order, e.g., a warrant, probable cause, or exigent

these searches are administrative or special needs searches subject to relaxed requirements.[126] Thus, for home searches to be constitutional, agencies must have a warrant, assert a warrant exception, or claim consent.

At first blush, the long-recognized exigency exception to the warrant requirement[127] might seem to create a legal path into the home for family regulation investigators. This exception allows state actors to enter homes without a warrant to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[128] Though the popular imagination might envision family regulation investigators bursting through doors to save children from immediate danger,[129] such occurrences are rare. In reality, most investigations concern allegations of neglect, not abuse.[130] And only 5% of children in investigations are ultimately removed from their parents' care.[131] Even assuming there are some instances in which investigators initially and reasonably believe that a child needs emergency assistance but ultimately decline to remove the child from their home, it is unlikely that such instances account for most of the remaining 95% of investigations.[132]

Thus, in order to fulfill their statutory obligation to carry out their home searches without violating the Constitution, family regulation investigators must usually get a warrant or get consent. Less than 1% of the

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circumstances."). But see Wildauer v. Frederick County, 993 F.2d 369, 372 (4th Cir. 1993) (holding that "investigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context" (citing Wyman v. James, 400 U.S. 309, 318 (1971))). For more extensive explanations of circuit court decisions applying the warrant requirement to family regulation investigations, see Arons, Empty Promise, supra note 6, at 1086–90; Ismail, Family Policing, supra note 4, at 1529–30.

126. For a descriptive account of why courts have rejected the special needs exception for family regulation investigations, see Arons, Empty Promise, supra note 6, at 1088–89. For normative arguments for why courts should reject the special needs exception, see Coleman, supra note 7, at 508–31; Ismail, Family Policing, supra note 4, at 1530–38.

127. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) ("For this reason, warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))).

128. Kentucky v. King, 563 U.S. 452, 460, 470 (2011) (internal quotation marks omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

129. See Matthew I. Fraidin, Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare, 63 Me. L. Rev. 1, 8–21 (2010) ("[Child abuse stories] are episodic and dramatic, with easily-identifiable heroes and villains, and easy to investigate via willing, authoritative government sources." (footnote omitted)).

130. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at 23 ("The FFY 2022 data shows three-quarters (74.3%) of victims experience neglect, 17.0 percent are physically abused, 10.6 percent are sexually abused, and 0.2 percent are sex trafficked.").

131. Id. at xv.

132. Ismail, Family Policing, supra note 4, at 1540 (explaining why "the need for invoking exigent circumstances is relatively low" in investigations).

time, they get a warrant.[133] More than 90% of the time, investigators claim to get consent.[134] The tactics by which investigators gain consent are discussed in Part II.[135] For now, we turn to the legal standard for consent.

The Supreme Court has long recognized consent as a path around the warrant requirement. If a person consents to a search, the state need not obtain a warrant or avail itself of any exception.[136] Consent does not need to be knowing[137]—so, for instance, family regulation investigators are not constitutionally required to inform parents that they have the right to refuse a home search. But the consent must be voluntary, meaning it cannot be "coerced, by explicit or implicit means."[138]

The Court's initial description of the voluntariness standard was a subjective one focused on "all the surrounding circumstances" and individualized to the person's state of mind, intelligence, and education.[139] But over time, the Court has increasingly endorsed objective voluntariness standards, focused not on whether the searched person in fact felt free to refuse the search but instead on whether "a reasonable person would understand that he or she is free to refuse."[140] This objective standard, in

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133. This Article uses "warrant" to include court orders issued by family courts that comply with warrant requirements. See Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 420 n.10 (5th Cir. 2008) (describing a family court order to enter the home as "the equivalent of a warrant in this situation"); Hager, Police Need Warrants, supra note 4 (describing the phenomenon of social workers entering without a warrant or other legal equivalent of a court order).

134. Coleman, supra note 7, at 430–31; see also Conn. D.C.F. Interview, supra note 1. Information reported by the Texas Department of Family and Protective Services about investigations in Harris County, Texas, also reflects a high rate of claimed consent. See Tex. Dep't of Fam. & Protective Servs., Fiscal Year 2024 Data, supra note 95 (reporting that, of 376 investigations about which information was available, 275 included home entries by investigators, 273 of which parents consented to; out of all 376 investigations, only 14 parents did not consent to a home entry; in 89 investigations, there was no data on parents' consent). Note that the reported data is from investigations that began in September 2023, immediately prior to Texas's implementation of a requirement that investigators tell parents of their right to refuse consent to home searches. See Annie Sciacca, You Have the Right to Refuse CPS Entry: Texas Launches *Miranda*-Style Warnings to Parents Under Investigation for Child Maltreatment, The Imprint (Oct. 11, 2023), https://imprintnews.org/top-stories/you-have-the-right-to-refuse-cps-entry-texas-launches-miranda-style-warnings-to-parents-under-investigation-for-child-maltreatment/245334 [https://perma.cc/SVY2NYYS] (noting that the requirements took effect in October 2023).

135. See infra section II.A.

136. See Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) ("In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.").

137. See id. at 227 ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.").

138. Id. at 228.

139. Id. at 229, 248.

140. United States v. Drayton, 536 U.S. 194, 197 (2002) (citing Florida v. Bostick, 501 U.S. 429 (1991)).

turn, focuses courts on the apparent reasonableness of the state actor's conduct in seeking consent.[141]

A thorough review of critiques of consent doctrine would fill several volumes. Instead, these are synopses of some recurring critiques:

First, consent searches are inevitably coercive, as even the most gently phrased request from a state actor is bound to intimidate most people into compliance.[142] This is all the more true in a carceral state that tends to view noncompliance as a grounds for suspicion or even punishment.[143] Second, consent searches have an especially pernicious effect on subjugated groups, for two reasons. Groups that are more policed are more likely to be asked to consent to state intrusion in the first place. Further, identity shapes how people experience and react to interactions with state actors.[144] The lack of a requirement that consent be "knowing" exacerbates those power imbalances.[145] Third, the "murky and ill-defined"

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141. See Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153, 214 ("The reasoning employed to effectuate the nominal standard, by now familiar, goes something like this: The police officer asked permission. The citizen granted it. A reasonable person in the situation would have felt free to not grant permission. Therefore encounter and subsequent search were consensual.").

142. See, e.g., Sommers & Bohns, supra note 25, at 1974 ("If we are right, then even if the voluntariness test is not a legal fiction—even if judges have only a desire to assess as accurately as possible the quality of the citizen's consent—the doctrine would still skew in favor of police and against citizens."); Strauss, supra note 25, at 268 ("Indeed, the arguments against the doctrine—the existence of inherent coercion—suggest that it is almost impossible to separate out those situations in which a person 'truly' wants to consent from those situations in which a person feels compelled to acquiesce.").

143. See Capers, The Good Citizen, supra note 25, at 665 ("The Court, in short, starts from a baseline that the good citizen has an interest in consenting because it reinforces the rule of law.").

144. See, e.g., Carbado, (E)racing the Fourth Amendment, supra note 26, at 1029 ("A black person trapped in this position is likely to experience an officer's request for permission to conduct a search as 'racial interrogation'—that is, as an inquiry that is reasonably likely to produce a privacy deprivation."); Maclin, supra note 26, at 271–72 (discussing how the Court promotes instability by ignoring the mistrust and hostility between the police and Black men); Strauss, supra note 25, at 213 ("[C]urrent caselaw fails to consider the reality that most people will feel compelled to allow the police to search, no matter how politely the request is phrased. Such feelings of compulsion are particularly experienced by members of certain racial and cultural groups who fear confrontation with the police."); see also Sommers & Bohns, supra note 25, at 2009 ("The problem . . . is not necessarily that racial minorities are more likely to comply with an officer's request to search but that they are more likely to be asked, and nearly everyone who is asked complies. This results in racial disparities in who is ultimately searched pursuant to consent." (footnote omitted)); Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 23–24) ("A shared critique of the various forms of consent, waiver and voluntariness throughout criminal procedure is that they directly facilitate and sanction racialized policing and prosecution. In particular, the pressure to comply is inherently shaped by race.").

145. See Sommers & Bohns, supra note 25, at 1967 (describing this as the most prominent critique of voluntariness doctrine and collecting scholarship making this argument).

voluntariness standard gives courts ample room to find consent voluntary, so long as state actors do not use overt, egregious tactics.[146] Relatedly, the shift from a quasi-subjective standard to an objective standard absolves courts of considering the particular (and at times implicit) pressures to consent felt by individuals and focuses courts exclusively on overt police conduct.[147] Fourth, the aggregate effect of a system of state surveillance powered by consent is to legitimize and sanitize state overreach, as the prevalence of consent allows judges to avoid tough constitutional questions and allows state actors to conduct searches absent any suspicion or justification.[148]

Part III returns to these critiques.[149] But focusing only on the thinness of consent doctrine risks obscuring that the tactics family regulation investigators deploy to gain consent commonly violate even this doctrine. The next Part demonstrates how.

II. THE UNCONSTITUTIONALITY OF FAMILY REGULATION CONSENT SEARCHES

"[T]he velvet glove over the steel fist": This is how one family regulation system investigator described the tactics he used to gain parents' consent to home searches.[150] This Part provides a descriptive account of the pressures, implicit and explicit, that agencies exert upon parents to extract consent for searches. Then, it demonstrates that common tactics that agencies use are explicitly coercive in ways that violate established constitutional constraints on consent. After explaining how strategic civil litigation advancing this constitutional argument could

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146. Id. at 1969; see also David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 32 (1999) (reviewing studies of courts' consent decisions); Gerard E. Lynch, Why Not a *Miranda* for Searches?, 5 Ohio St. J. Crim. L. 233, 235 (2007) ("Often these consents are given by people unquestionably in police custody, and even when they are not, they often occur under circumstances in which a claim of coercive conduct is quite plausible.").

147. See Sommers & Bohns, supra note 25, at 1968–69 (summarizing courts' shift to focusing almost exclusively on police conduct).

148. See Oren Bar-Gill & Barry Friedman, Taking Warrants Seriously, 106 Nw. U. L. Rev. 1609, 1666–67 (2012) ("If police officials must obtain warrants before searching and seizing, there is a likelihood that they will not search or seize in the first place."); Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 30–32) ("Not only does consent bestow legitimacy and unburden system actors of responsibility, it has the practical effect of allowing judges to sidestep thorny constitutional questions. Consent permits judicial avoidance.").

149. See infra Part III.

150. Unprotected: An Inside Look at NYC's Administration for Children's Services Searches, NBC News, at 3:06–3:13 (Oct. 13, 2022), https://www.nbcnews.com/nightly-news/video/unprotected-an-inside-look-at-nyc-s-administration-for-children-s-services-searches-150608453758 (on file with the *Columbia Law Review*) (statement of an anonymous ACS employee).

reduce coercion and reduce home searches, this Part concedes the practical limits of this constitutional argument as a mechanism for change.

A. *Tactics to Secure Parents' Consent*

When family regulation investigators arrive on families' doorsteps, they have at their disposal an arsenal of tools with which they can pressure parents to consent to home searches. These tools draw their power from the purported benevolence of the family regulation system, its close connections to other carceral systems, and many parents' greatest fear: that state agents will take their children away.

As Part I acknowledges, this Article does not quantify the frequency of the use of tools described here. Accounts from parents and system stakeholders around the country demonstrate that the tactics described are not anomalous. Even if such tactics are used in only five percent of investigations, that means they are used on tens of thousands of families annually.[151] Further, the list compiled from these sources is only a starting point. By drawing attention to these tactics, this Article seeks to spur more careful tracking of them and of other tactics not described here.[152]

1. *Family Regulation's Culture of Compliance.* — Though critics describe the family regulation system as carceral,[153] family regulation agencies represent themselves as social-working, collaborative institutions.[154] The problem-solving culture of the family regulation system writ large emphasizes collaboration and informality and casts adversarialism and the assertion of rights as deviant.[155]

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151. See Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that nationally, over three million children received either an investigation or alternative response in 2022).

152. For instance, a New York investigator reported that she would "up the pressure" by "us[ing] lines like 'I don't want to discuss your business out here in the hallway.'" Hager, Police Need Warrants, supra note 4.

153. See supra section I.A.

154. Cf. Child.'s Bureau, HHS, How the Child Welfare System Works 2 (2020), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cpswork.pdf?VersionId=1OJwA2lAGsRB.0WoXB_CW9a6Hw1MbGpy [https://perma.cc/KGK4-N6FR] ("The Children's Bureau works with State and local agencies to develop programs that focus on preventing child abuse and neglect by strengthening families, protecting children from further maltreatment, reuniting children safely with their families, and finding permanent families for children who cannot safely return home.").

155. See Jane M. Spinak, The End of Family Court: How Abolishing the Court Brings Justice to Children and Families 171–73 (2023) ("The federal government strengthened and consolidated more authority over dependent and maltreated children by state and local governments' child protection agencies through the provision of AFDC for foster care, mandated reporting requirements, and eventually CAPTA."); Arons, Empty Promise, supra note 6, at 1110–11 ("A judge will not only likely sign off on the entry order, but may also hold the mother's initial noncompliance against her—even though she was never the subject of the initial report of child maltreatment." (footnote omitted)); see also Eli Hager, NYC Child Welfare Agency Says It Supports "*Miranda* Warning" Bill for Parents. But It's

This orientation is apparent from investigators' first encounters with families. Around the country, public-facing agency materials instruct parents that they should "participate and cooperate" with investigations to "tell their side of the story,"[156] to "help the investigator" by "giving them the information they ask for,"[157] and to "work together" with the investigator to resolve the case "sooner."[158] Only a handful of states require investigators to inform parents that they have any rights during an investigation, let alone the right not to consent to a home search.[159] The idea of "rights" may hold no salience to investigators themselves.[160] What's more, investigators in some jurisdictions are instructed to code a parent's assertion of their rights—such as a refusal to allow a home search—as a safety risk to their children.[161] This culture of coerced compliance sets the stage for the more specific threats that investigators invoke.

2. *Presenting Searches as Mandatory.* — In addition to representing "cooperation" writ large as an expectation, investigators may represent a

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Quietly Lobbying to Weaken It., ProPublica (June 5, 2023), https://www.propublica.org/article/new-york-families-child-welfare-miranda-warning [https://perma.cc/9VTB-5DR3] [hereinafter Hager, Agency Quietly Lobbying] (reporting on efforts by New York's family regulation agency to remove the word "rights" from proposed legislation regarding parents' rights in investigations).

156. Mass. Dep't of Child. & Fams., A Family's Guide to Protective Services for Children 2, https://www.mass.gov/doc/a-familys-guide-to-protective-services-for-children-english-1/download (on file with the *Columbia Law Review*) ("DCF encourages parents to participate and cooperate with the investigation, as it provides an opportunity for parents to tell their side of the story.").

157. Fla. Dep't of Child. & Fams., Child Protection, supra note 16, at 2.

158. Child.'s Protective Servs. Program, Mich. Dep't of Hum. Servs., A Parent's Guide to Working With Children's Protective Services 9 (2006), https://www.michigan.gov/documents/mdhhs/A_Parents_Guide_to_working_with_Childrens_Protective_Services_507536_7.pdf [https://perma.cc/R7LS-RAGS].

159. Anna Belle Newport, Note, Civil *Miranda* Warnings: The Fight for Parents to Know Their Rights During a Child Protective Services Investigation, 54 Colum. Hum. Rts. L. Rev. 854, 891–900 (2023); Eli Hager, Texas, New York Diverge on Requiring *Miranda*-Style Warnings in Child Welfare Cases, ProPublica (July 5, 2023), https://www.propublica.org/article/texas-new-york-diverge-miranda-warning-bill [https://perma.cc/32TJ-GJ5D] [hereinafter Hager, Texas, New York Diverge].

160. See Hager, Police Need Warrants, supra note 4 ("Rights—no, we never did that. I didn't even know that was a thing." (internal quotation marks omitted) (quoting Natasha Walden, a former child protective specialist in Queens, New York)); Tarek Z. Ismail, Family Policing as Security Theatre 10 (Mar. 26, 2025) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Ismail, Security Theatre] (demonstrating how mutual unawareness of rights leads to their functional erasure).

161. See, e.g., Off. of Child. & Adult Servs., W. Va. Dep't of Health & Hum. Res., Child Protective Services Policy 76–77, 79 (2019), https://dhhr.wv.gov/bcf/policy/Documents/CPS_Policy.pdf [https://perma.cc/YL94-QV38] (classifying situations in which a parent "refuses access to the home" as a sign of "present danger"); see also Fong, Investigating Families, supra note 22, at 104 (noting that a mother's "case escalated" because she invoked her rights); Reich, supra note 98, at 89–91 ("Parents who do not act with deference . . . are perceived to be either in denial or beyond rehabilitation. They are seen as unable to protect or care for their children, which usually results in their children's placement in protective custody.").

home search itself as a mandatory component of an investigation. Parents report that when investigators first arrive at their homes, they say things like, "I need to come in," "I'm required to do this," "I have to look around," or "This is a part of the investigation."[162] Agency materials contain similar statements, presenting home searches as a compulsory component of investigations.[163] Few of these materials acknowledge that even if a state requires a home search for every investigation, the state does not require a *voluntary* home search for every investigation.[164]

3. *Invoking Law Enforcement.* — Family regulation investigators may threaten or actually involve law enforcement to increase the likelihood of parents consenting to home searches. In some investigations, law enforcement personnel are present at the initial point of contact.[165] In

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162. Similar representations abound. See, e.g., *Gould* Complaint, supra note 17, at 6, 32–33, 35–36 ("ACS used the Coercive Tactics to gain entry into the Taylor Family home and conduct the warrantless, non-exigent searches, including . . . deceptively stating that the searches were required by law[] [and claiming] that ACS 'needed to' check the apartment and that Ms. Taylor had no choice but to comply . . . ."); Fong, Investigating Families, supra note 22, at 103 ("Alison, looking apologetic, said that she needed to talk to everyone and see the children within twenty-four hours. (Per policy, she just had to *attempt* a visit within this time frame, which she was presently doing.)"); Interview with Family Member in Alabama Investigation (June 19, 2024) (on file with the Columbia Law Review) (noting that CPS presented the home search as mandatory); Interview with Parent Defense Attorney in North Carolina (June 17, 2024) (on file with the Columbia Law Review) (same).

163. See, e.g., Child Protective Servs., Va. Dep't of Soc. Servs., A Guide to Investigative Procedures 6 (2024), https://www.dss.virginia.gov/files/division/dfs/cps/intro_page/publications/investigation/B032-01-0974-14-eng-2-24.pdf [https://perma.cc/Q9KG-UMD4] ("[T]he CPS worker will . . . observe the home environment . . . ."); Child Welfare, Or. Dep't Hum. Servs., What You Need to Know About a Child Protective Services Assessment 2 (2021), https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/de1536.pdf (on file with the *Columbia Law Review*) ("The CPS worker will visit your home as part of the CPS assessment."); Div. of Child & Fam. Servs., Nev. Dep't of Health & Hum. Servs., Parents Guide to Child Protective Services (CPS) 2, https://dcfs.nv.gov/uploadedFiles/dcfsnvgov/content/Programs/CWS/CPS/Guide_to_CPS.pdf [https://perma.cc/AD8Z-SAEW] (last visited Jan. 18, 2025) (noting that "[t]he social worker's job is to . . . [o]bserve the family home"); Douglas Cnty. Dep't of Health & Hum. Servs., Parents' Guide to Child Protective Service Assessments 2, https://www.douglascountywi.gov/DocumentCenter/View/423/CPS-Assessments-brochure?bidId= [https://perma.cc/2HYV-C2ND] (last visited Apr. 3, 2025) (same).

164. See Fong, Investigating Families, supra note 22, at 103 (describing how an investigator responded to a parent refusing entry by claiming that she "needed" to talk to everyone within twenty-four hours of the investigation beginning when actually "[p]er policy, she just had to *attempt* a visit within this time frame"); Reich, supra note 98, at 94 (recounting an investigator's remark that "it helped that [a mother] wasn't 'system wise' about her rights and how the system works.").

165. See, e.g., Clark v. Stone, 998 F.3d 287, 302 (6th Cir. 2021) ("[A]t their first home visit [the investigators] were accompanied by a police officer."); Reich, supra note 98, at 95 (describing an investigation in which police accompanied the family regulation investigators for their initial trip to a family's home and noting that despite the mother's initial resistance to their entry into her home, "At the police officers' insistence, we entered"); Kerry Breen, Baby Taken From Texas Couple After Home Birth Will Be Returned by Dallas Court, CBS News, https://www.cbsnews.com/news/temecia-rodney-mila-jackson-returned-home-birth-jaundice-texas/ [https://perma.cc/N28Q-9UG3] (last updated Apr. 20, 2023) (describing

others, family regulation investigators invoke law enforcement after parents express hesitation about consenting to a home search. Investigators may threaten to call law enforcement to the home or threaten parents with arrest,[166] or may leave and return with law enforcement, then try again to demand consent to search the family's home.[167]

4. *Threatening Family Separation.* — Finally, investigators may make explicit the implicit threat at the core of family regulation investigations: the possibility of the state taking children. This threat is "at the back of everyone's mind" during investigations.[168] Particularly in communities that are heavily policed by family regulation agencies, separation is a threat that is in the air from the first knock at the door (if not before).[169] Agencies appear to be aware of the potency and immediacy of this threat. Many address it in brochures for parents with bolded questions, like, "Will My Child be Taken Away?",[170] "Will you take my children away from me?",[171] or "WILL MY CHILD BE REMOVED?"[172]

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how "[family regulation investigators] and police arrived" at a family's home at about 4:00 a.m. on their initial trip to a home, in response to concerns that a Black newborn was jaundiced).

166. See, e.g., N.Y. Off. of Child. & Fam. Servs., New York State Child Protective Services Manual F-12 (2023), https://ocfs.ny.gov/programs/cps/manual/2023/2023-CPS-Manual-2023Oct.pdf [https://perma.cc/R2HK-5ALF] ("When a CPS worker conducting an investigation is denied access to . . . the home of a child named in a report, . . . CPS should . . . [i]mmediately notify the adult who has denied access that law enforcement may be called to the site . . . ." (emphasis omitted)); see also N.M. Stat. Ann. § 30-6-4 (2025) (defining the criminal offense of "obstructing, delaying, interfering with or denying access to" investigators or officers conducting investigations).

167. See, e.g., Julia Hernandez & Tarek Z. Ismail, Radical Early Defense Against Family Policing, 132 Yale L.J. Forum 659, 679 (2022), https://www.yalelawjournal.org/pdf/F7.HernandezIsmailFinalDraftWEB_xddjejca.pdf [https://perma.cc/KUM4-PVKQ] ("CPS agents can further intimidate families by calling upon criminal police to compel consent."); Larissa MacFarquhar, When Should a Child Be Taken From His Parents?, New Yorker (July 31, 2017), https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents [https://perma.cc/BM7W-3RP8] (noting that refusal to open the door may lead to an investigator coming back with police).

168. Conn. D.C.F. Interview, supra note 1; see also Reich, supra note 98, at 94 (connecting a mother under investigation's "willingness to do anything" to "her fear of losing her children, who she sa[id] are 'the most important thing in the world'" (quoting Dana Brooks)); Bromwich & Newman, supra note 114 ("When investigators showed up . . . [a father] said he panicked. *They're going to take my daughter away*, he thought.").

169. Fong, Investigating Families, supra note 22, at 78–84 (describing parents' anxieties based on their prior observations of the family regulation system in their communities, regardless of their own experiences); Reich, supra note 98, at 104 ("Unsure of what to expect, [the mother] called her cousin, herself a CPS worker in another county, to ask for advice. She advised [the mother] that 'they're going to take your kids.'").

170. See, e.g., Child Protective Servs., Va. Dep't Soc. Servs., supra note 163, at 1; Douglas Cnty. Dep't of Health & Hum. Servs., supra note 163, at 1; N.J. Dep't of Child. & Fams., Parents' Handbook 2 (2017), https://www.nj.gov/dcf/families/dcpp/ParentsHandbook_English.pdf.

171. When Child Welfare Investigates Your Family, D.C. Child & Fam. Servs. Agency, https://cfsa.dc.gov/page/when-child-welfare-investigates-your-family#gsc.tab=0 [https://perma.cc/DC7J-NEEW] (last visited Jan. 18, 2025).

172. Div. of Child & Fam. Servs., Nev. Dep't of Health & Hum. Servs., supra note 163, at 1.

Investigators may make that threat more explicit and more immediate if parents refuse to consent to home searches. One parent, for instance, recalled investigators arriving at her home in the middle of the night to investigate a report that was duplicative of another that investigators had already investigated and found unsubstantiated.[173] When the parent declined to open the door for the investigators, they told her through the closed door that she "was at risk of having her children taken away."[174] Her experience is not isolated. Investigators reportedly make similar threats around the country.[175]

B. *The Unconstitutionality of Common Tactics*

Consent must be voluntary to satisfy the Fourth Amendment.[176] Voluntariness is judged by whether "a reasonable person would understand that he or she is free to refuse" the request to search.[177] Even under this state-friendly standard,[178] the types of threats that family regulation investigators make have been found to vitiate consent in

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173. See Bromwich & Newman, supra note 114.

174. Id.

175. See, e.g., Loftus v. Clark-Moore, 690 F.3d 1200, 1203 (11th Cir. 2012) (recounting a caseworker's threats to remove a father's children after he expressed reservations about an investigation); Hearing Before the N.Y.C. Council Comm. on Gen. Welfare 117–20 (N.Y.C. 2022) https://legistar.council.nyc.gov/View.ashx?M=F&ID=11077223&GUID=BD1C079D-6239-40F5-B0F0-014177ECC17A [https://perma.cc/E4SN-AKXK] (statement of Shalonda Curtis-Hackett) ("After several phone calls [from investigators] I consented [to a home inspection] because I was threatened with the police and possible removal if I refuse[d]. With both evils being presented, I consented to what I thought was the lesser."); *Gould* Complaint, supra note 17, at 32 (alleging that ACS threatened to return with police and a court order to remove children from the plaintiff's home if the plaintiff did not consent to a search); Conn. Dep't of Child. & Fams., Q & A for Parents About Protective Services 2 (2021), https://portal.ct.gov/-/media/dcf/brochures/prtkenglish-2019.pdf [https://perma.cc/CU7M-7S8P] (informing parents that they are not required to allow investigators into their home but noting "that choosing not to communicate with a DCF employee may have serious consequences, which may include DCF filing a petition to remove your child from your home"); see also Reich, supra note 98, at 95 (describing a home entry in which "[the investigator] calmly explained to [the mother] that one factor in whether her kids were removed was how cooperative she was" after the mother initially refused to allow entry); id. at 104 (describing a different investigation in which a mother refused to give a statement and a law enforcement officer accompanying a family regulation investigator "grew frustrated and demanded a statement from her, yelling, 'I'm going to take your kids'"); Darcey H. Merritt, Documenting Experiences and Interactions With Child Protective Services, Focus on Poverty, Sept. 2021, at 3, 3 ("Family participation is usually compulsory or, at best, strongly encouraged through the explicit or implicit threat of negative consequences, including a child's removal from the home.").

176. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) ("[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." (internal quotation marks omitted) (quoting Bumper v. North Carolina, 391 U.S. 543, 549 (1968))).

177. United States v. Drayton, 536 U.S. 194, 197 (2002) (citing Florida v. Bostick, 501 U.S. 429 (1991)).

178. See supra section I.C.

criminal cases, with courts casting a particularly wary eye on threats to the parent–child relationship. This section begins by describing the more studied area of threats to children in involuntary *confession* cases, then turns to the law surrounding the coerciveness of the specific tactics described above in consent search cases.[179]

1. *Threats to the Parent–Child Relationship in Confession Cases.* — Though the Supreme Court has never considered the voluntariness of consent to a search extracted through threats to the parent–child relationship, it has considered the voluntariness of a confession extracted through such tactics.[180] The voluntariness standard for confessions, like that for consent searches, focuses on the objective coerciveness of state actors' tactics.[181] Thus, this case law is an informative starting point.

In *Lynumn v. Illinois*, the Court considered the voluntariness of the confession of Beatrice Lynumn, a young widow and mother of a three-year-old and a four-year-old, who was accused of selling marijuana to a police informant.[182] Three police officers interrogated Lynumn in her home.[183] During the interrogation, an officer told her that she could receive a sentence of ten years, "and the children could be taken away, and after [she] got out they would be taken away and strangers would have them, and if [she] could cooperate he would see they weren't."[184] Officers also told her that if she was charged, she would likely lose her welfare benefits for her children.[185] The Court found that Lynumn's "will was overborne," writing that it was "abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'"[186]

As Professor Clare Ryan notes, the *Lynumn* decision was "hardly a model of clarity."[187] Since voluntariness turns on a totality of the

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179. Given the paucity of case law surrounding the voluntariness of consent in family regulation cases, most cases discussed address consent to search in criminal legal investigations. For a discussion of why consent is rarely litigated in family regulation cases, see infra section II.D.

180. See Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.").

181. See Colorado v. Connelly, 479 U.S. 157, 170–71 (1986) (holding that there must be *state* coercion sufficient to overcome the free will of an individual for a violation of the Fifth Amendment right against self-incrimination to accrue); Scott E. Sundby, The Court and the Suspect: Human Frailty, the Calculating Criminal, and the Penitent in the Interrogation Room, 98 Wash. U. L. Rev. 123, 126–31 (2020) (tracing the confusion of the voluntariness standard's application in confession cases).

182. 372 U.S. at 531.

183. Id. at 529, 531.

184. Id. at 531 (internal quotation marks omitted) (quoting trial testimony of Beatrice Lynumn).

185. Id. at 533.

186. Id. at 534.

187. Ryan, supra note 29, at 431.

circumstances, it is near-impossible to say which factors the court found decisive among the invocation of a long prison sentence, the presence of three officers and another man in her apartment late at night, her lack of experience with the criminal legal system, and the threats to her children.[188] But that the Court listed the threats to Lynumn's children first in its list of considerations gives some indication of the Court's serious concern with this category of police conduct.

Subsequent applications of *Lynumn* have been inconsistent.[189] A Ninth Circuit case, *United States v. Tingle*,[190] may represent a high-water mark of judicial recognition of the coercive effect of threats to the parent–child relationship.[191] That case, too, involved a young mother who confessed to police officers, this time after they told her she could be reunited more quickly with her child if she "cooperate[d]."[192] The Ninth Circuit found her confession involuntary, writing that the "relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert the 'improper influence.'"[193] Similarly, the Seventh Circuit held that "explicit threats to a suspect's custody of a young child are presumed to be coercive" when weighing the voluntariness of a confession.[194]

But even these cases do not establish a bright-line rule that any mention of individuals' children overbears their will in confession cases.[195] Courts have found confessions voluntary when state actors make vague statements like "think of your kids."[196] They are more troubled by statements that invoke the state's power to separate children from their parents—for instance, a threat to separate a parent from a child via arrest or call a local family regulation agency.[197] (That invocation is, of course, more direct when family regulation investigators are present and

188. Id. at 431–32.

189. Id. at 432.

190. 658 F.2d 1332 (9th Cir. 1981).

191. See Ryan, supra note 29, at 432 (describing *Tingle* as a "broader interpretation" of *Lynumn* and noting that *Tingle*'s interpretation has not been consistently adopted by other circuits).

192. *Tingle*, 658 F.2d at 1336.

193. Id.

194. Lentz v. Kennedy, 967 F.3d 675, 691 (7th Cir. 2020) (citing Janusiak v. Cooper, 937 F.3d 880, 891 (7th Cir. 2019)).

195. See Ryan, supra note 29, at 432 (collecting cases in which threats to children did not necessarily overcome a parent's will); see also Kate Levine, Police Suspects, 116 Colum. L. Rev. 1197, 1215–16 (2016) (collecting cases in support of the proposition that courts have "routinely held" that "threats to family members' welfare . . . do not render confessions involuntary").

196. Ryan, supra note 29, at 433–34 (internal quotation marks omitted).

197. Id.

conducting the investigation.[198]) Even then, courts may tolerate statements that they deem to accurately convey to the parent possible consequences related to child custody—for instance, a statement by police that a parent may lose custody of a child if the parent is found to have harmed the child,[199] or that the police may call the family regulation agency if no one else is available to take custody of the child upon the parent's arrest.[200] These principles regarding the voluntariness of *confessions* inform courts' analysis of the voluntariness of consent *searches*[201]—the subject of the remainder of this section.

2. *Submission to Claims of Lawful Authority.* — Perhaps the most straightforward examples of unlawful coercion in family regulation home searches are investigators' claims of lawful authority to carry out searches.

As the Supreme Court has explained, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[202] Such a situation, the Court has said, "is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."[203] These principles apply whenever a state actor claims lawful authority to carry out a search, not just when a state actor claims to have a warrant.[204] Accordingly, state and federal courts across the country have held state actions coercive when they "imply an individual has no right to refuse consent"[205] or explicitly convey as much.[206]

Assertions of lawful authority can take several forms. Police might claim that they have a search warrant when no warrant exists[207] or that they can and will get a warrant in the absence of consent.[208] Or police might

198. See infra section II.B.4.

199. See, e.g., *Janusiak*, 937 F.3d at 892 ("The questioners spoke the truth when they said that *if* [the subject of interrogation] had harmed [her child], then she might lose custody of her children, and that if she did no harm, she could remain with them.").

200. Id. at 890–91.

201. For instance, a district court in Illinois considering the voluntariness of a parent's consent to a *search* in a criminal investigation relied on a Seventh Circuit case holding that, in the context of involuntary *confessions*, "explicit threats to a suspect's custody of a young child are presumed to be coercive." United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6 (N.D. Ill. July 23, 2021) (internal quotation marks omitted) (quoting Lentz v. Kennedy, 967 F.3d 675, 691 (7th Cir. 2020)).

202. Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

203. Id.

204. See Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973) (noting that consent is involuntary if it is "granted only in submission to a claim of lawful authority").

205. See e.g., United States v. Harrison, 639 F.3d 1273, 1279 (10th Cir. 2011).

206. See e.g., State v. Valenzuela, 371 P.3d 627, 634 (Ariz. 2016) (holding that proof of consent is insufficient when given in response to an admonition that a search is "required").

207. See *Bumper*, 391 U.S. at 550.

208. See, e.g., Eidson v. Owens, 515 F.3d 1139, 1146 (10th Cir. 2008) ("An officer's threat to obtain a warrant may invalidate the suspect's eventual consent if the officers lack the probable cause necessary for a search warrant."); United States v. Kaplan, 895 F.2d 618, 622 (9th Cir. 1990) ("Courts have drawn distinctions where, on one hand, an officer merely

claim that they do not need a warrant to carry out the search lawfully.[209] Outside the language of warrants, police can point to other laws, like implied consent laws for chemical or blood tests for drivers, and present searches as "required."[210] Or, police can imply their lawful authority by beginning to undertake the search prior to receiving consent.[211] Consent extracted after claims like these is involuntary because any reasonable person from whom consent is sought would not believe they had an actual choice. Either they consent and the police carry out the search or they refuse to consent and the police carry out the search anyway under their asserted lawful authority.[212]

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says that he will attempt to obtain a search warrant or whether, on the other hand, he says he can obtain the search warrant, as if it were a foregone conclusion."); State v. Barker, 739 N.E.2d 192, 193 (Ind. Ct. App. 2000) (finding that consent was involuntary when officers told the subject that they would get a warrant if she refused their entry).

209. See, e.g., United States v. Molt, 589 F.2d 1247, 1251–52 (3d Cir. 1978) (holding that consent was involuntary when customs agents asserted the legal authority to conduct a warrantless search of a business's records); Lobania v. State, 959 S.W.2d 72, 73–74 (Ark. Ct. App. 1998) (holding that consent was involuntary when a police translator mistranslated an officer's request to search as the officer claiming authority to search); Lavigne v. Forshee, 861 N.W.2d 635, 639 (Mich. Ct. App. 2014) (per curiam) (holding that consent was involuntary when police officers told the subject that "they did not need a warrant to enter and search the home").

210. See, e.g., *Valenzuela*, 371 P.3d at 629 (holding that consent was involuntary when it was premised on misrepresenting implied consent law); People v. Mason, 214 Cal. Rptr. 3d 685, 703 (Cal. App. Dep't Super. Ct. 2016) (same); Cooper v. State, 587 S.E.2d 605, 612–13 (Ga. 2003) (same); see also United States v. Vázquez, 724 F.3d 15, 23 (1st Cir. 2013) (finding that consent was involuntary when federal agents told the subject that her state's probation and parole agency had the authority to search her and planned to do so); State v. McCants, 854 S.E.2d 415, 435 (N.C. Ct. App. 2020) ("This logic applies equally when law enforcement officers[,] [regardless of agency,] claim authority to search a home under a condition of [probation or parole] requiring the supervisee to submit to the search.").

211. See Watson v. State, 691 S.E.2d 378, 383 (Ga. Ct. App. 2010) (finding that consent was involuntary when it was in submission to an officer's display of legal authority, asserted by illegally entering the suspect's home); see also United States v. Tovar-Rico, 61 F.3d 1529, 1536 (11th Cir. 1995) (finding that consent was involuntary when it was obtained after officers had already entered every room of a home); State v. Marino, No. 2-01-474-CR, 2003 WL 851953, at *2 (Tex. App. Mar. 6, 2003) (finding that consent to a dog sniff was involuntary when it was obtained after an officer had directed the occupant on how to prepare his car for the dog sniff); Green v. State, 594 S.W.2d 72, 74 (Tex. Crim. App. 1980) (finding that an occupant's consent to a search of their hotel room was involuntary when consent was not obtained until after officers had used a hotel manager's key to unlock the hotel door and begun to open the door).

212. See State v. Lovato, 478 P.3d 927, 932–33 (N.M. 2020) (describing the two choices given by the officer as conveying that search was "inevitable" and explaining that "[w]hen an officer unequivocally asserts that he will be able to obtain a warrant, a defendant's belief that refusal to consent would be futile demonstrates involuntary consent" (alteration in original) (internal quotation marks omitted) (quoting State v. Davis, 304 P.3d 10, 15 (N.M. 2013))).

That mere acquiescence to an assertion of state authority is not valid consent may seem so obvious as to be unremarkable.[213] Yet parents and advocates in family regulation investigations report that such assertions are made every day.[214] To understand the implications of representations of lawful authority for searches in family regulation investigations, consider three cases:

In the first, the family regulation investigator seeks entry to a home by telling a parent, "This is not a criminal case, I don't need a warrant"—a representation that agency personnel once put in writing via text message to a parent I represented.[215] In the second, the investigator tells the parent, "I have to come in to complete the investigation. It's required."[216] In the third, the investigator works with shelter staff to gain access to a family's shelter unit, then once inside, tells the parent, "I'm going to look around, okay?"[217] In each, the parent ultimately acquiesces.

In all of these scenarios, under established case law, the parent's consent would be involuntary. In the first, the investigator has explicitly misstated the scope of their search authority, as in cases where police claim to have a warrant or claim that they do not need a warrant.[218] In the second, the investigator has presented the search as legally mandated, as in driving under the influence cases where police assert that a medical test is required by state law.[219] And in the third, the investigator has implied their authority by beginning the search prior to seeking consent, as where a police officer opens the door and steps inside a home before seeking

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213. See Simmons, supra note 25, at 806 (stating that it is beyond question that consent would be involuntary "if a police officer told a suspect, 'The law requires that you allow me to search'").

214. See supra section II.A.2.

215. Officials with the same agency made a similar, broader claim to a reporter. Hager, Police Need Warrants, supra note 4 ("[New York City family regulation] officials drew a distinction between their work and what police do, saying that the Fourth Amendment applies only to the criminal justice system . . . .").

216. This language draws from Phillips v. County of Orange, 894 F. Supp. 2d 345, 371 (S.D.N.Y. 2012) ("Plaintiffs also have alleged that [the investigator] told them that the home visit was 'required' as part of the investigation. This allegation cuts against a finding of voluntariness because Plaintiffs' recounting of events suggests that [they] were told that they had no choice but to allow the home inspection." (citation omitted) (citing Third Amended Complaint ¶¶ 256, 412)); see also Fong, Investigating Families, supra note 22, at 103 (recounting one social worker's framing of an optional home visit as compulsory).

217. This account reflects the increased likelihood that families with insecure housing will be reported for child maltreatment. Casey Fam. Programs, What Do We Know About the Impact of Homelessness and Housing Instability on Child Welfare-Involved Families? 1 (2019), https://www.casey.org/media/TS_Impact-homelessness-housing-instability_2021.pdf [https://perma.cc/GE3J-3BST]; see also Kelley Fong (@kelley_fong), X (Oct. 14, 2022), https://x.com/kelley_fong/status/1580949234425004032 [https://perma.cc/XS9F-4FNN] (recounting one mother's experience with an investigator who said, "I'm going to take a look" after having already entered her home (internal quotation marks omitted) (quoting a mother)).

218. See supra notes 205–208 and accompanying text.

219. See supra note 209 and accompanying text.

consent.[220] In these scenarios, the parent's eventual acquiescence is not consent. Rather, they have given in to a show of unlawful state authority by a family regulation investigator.

3. *Threats to Arrest or to Escalate Punitive Consequences.* — State actors' threats of arrest or other "punitive ramifications"[221] for refusal to consent may also render consent involuntary, particularly where the state actors do not have legal authority to carry out their threat.

As a baseline, a person's refusal to consent to a search does not, on its own, furnish a legal basis to detain or arrest that person.[222] But state actors seeking consent may still have reasonable suspicion or probable cause for some defined offense separate from refusal to cooperate.[223] Thus, courts distinguish between two scenarios.[224] On one hand, courts typically consider threats by state actors to detain or arrest a person who is refusing consent unduly coercive where the state actor does not have a legal basis to detain or arrest the person.[225] On the other hand, when the same threat

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220. See supra note 210 and accompanying text.

221. Other "punitive ramifications" might include, for example, a period of detention. See Eidson v. Owens, 515 F.3d 1139, 1146–47 (10th Cir. 2008) ("[A threat of detention] is coercive, as it indicates that there are punitive ramifications to the exercise of the constitutional right to refuse consent.").

222. See Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." (citation omitted)); see also United States v. Boyce, 351 F.3d 1102, 1111 (11th Cir. 2003) ("Because the tape shows that [the officer] did unlawfully base his decision on [the subject's] refusal to consent, the detention and search were unconstitutional."); United States v. Williams, 271 F.3d 1262, 1271 (10th Cir. 2001) (noting that a search subsequent to a seizure would "of course" be unconstitutional if the seizure were based "solely on [the subject's] refusal to consent to the officer's request to search the vehicle").

223. See William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 539 (2001) ("In both instances, the operative word is 'crime.' If that word includes enough behavior, if crime is defined broadly enough, police can stop or arrest whomever they wish.").

224. See, e.g., Feldman v. State, No. A-8605, 2005 WL 121866, at *2 (Alaska Ct. App. Jan. 19, 2005) ("[I]f police have the right to make that threat—in other words, if police are simply advising the defendant about what they have a legal right to do—that statement, standing alone, will not normally make the ensuing consent involuntary."); State v. Brunner, 507 P.2d 233, 239 (Kan. 1973) ("Where consent is obtained by threat of consequences without justification in law, such consent cannot be said to be voluntary.").

225. See, e.g., United States v. Tillman, 963 F.2d 137, 144 (6th Cir. 1992) (finding that consent was involuntary when police threatened to detain a subject for several hours without probable cause unless he consented to a search); United States v. Bohannan, No. 13-CR-229(JCH), 2017 WL 1536391, at *2–5, *9, *11 (D. Conn. Apr. 28, 2017) (finding that consent was involuntary when the government had no legal right to arrest the subject and noting that "the degree to which the officers' statements had a detrimental effect on the voluntariness of [her] consent depends, at least in part, on whether the statements were true" (internal quotation marks omitted) (quoting United States v. Bohannon, 67 F. Supp. 3d 536, 552 (D. Conn. 2014), rev'd, *Bohannon*, 2017 WL 1536391)); Anderson v. Moore, No. 5:15-CV-26-OC-30PRL, 2016 WL 4369543, at *6 (M.D. Fla. Aug. 16, 2016) ("[A] reasonable

is made by an actor *with* the legal basis to carry out that threat, courts are far less likely to find this sort of threat coercive.[226]

Recall that family regulation investigators carry out home searches for virtually every investigation, regardless the underlying allegation.[227] This means that any sort of allegation can give rise to an investigator threatening a parent with arrest explicitly ("Police will arrest you") or implicitly ("We will call law enforcement") if the parent declines to consent to a home search.[228] Whether such a threat vitiates consent turns on whether state actors have the necessary level of suspicion to carry out the threatened action lawfully.

In criminal investigations, this inquiry may resolve easily in the state's favor, given the wealth of possible criminal charges.[229] But in family regulation investigations, probable cause to arrest the parent for a *criminal* offense may be more difficult to assert. A parent's refusal to allow a search cannot alone furnish the requisite suspicion.[230] Further, child

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officer would know that a threat of unlawful detention would render consent involuntary."); State v. Childs, 64 P.3d 389, 394 (Kan. 2003) (suppressing the fruits of a search and agreeing with the search's subject that "consent was coerced . . . based . . . on the officer's threat to arrest him when arrest was not a possibility"); State v. Ortega, 202 P.3d 912, 912 (Or. Ct. App. 2009) (per curiam) (approving of the state's concession that consent was involuntary when an officer threatened to arrest the subject without probable cause).

226. See, e.g., *Eidson*, 515 F.3d at 1146–47 (finding that consent was voluntary when police threatened to detain the subject for three days but there was probable cause for her arrest); United States v. Green, No. 16 CR. 281 (PGG), 2018 WL 6413485, at *24 n.14 (S.D.N.Y. Dec. 6, 2018) (noting that "[w]here officers obtain consent to search through threats of arrest, courts' voluntariness analysis often turns on whether officers misrepresented the risk of arrest" and finding that consent was voluntary), aff'd sub nom. United States v. Johnson, Nos. 21-1896 (L), 21-1923 (con), 21-2244, 2024 WL 254118 (2d Cir. Jan. 24, 2024); People v. Walton, 990 N.E.2d 861, 866–67 (Ill. App. Ct. 2013) (finding that consent was voluntary when police threatened to arrest the subject but there was probable cause for her arrest); People v. Arriaga, 765 N.Y.S.2d 314, 315 (N.Y. App. Div. 2003) (finding that consent was voluntary when the subject was threatened with arrest but police "would have had a legitimate basis upon which to arrest her" (citing N.Y. Penal Law § 205.60 (McKinney 2003))); Jensen v. State, No. 08-15-00029-CR, 2016 WL 4379445, at *4 (Tex. App. Aug. 17, 2016) (noting that "an unfounded threat to arrest a person, or those close to him, raises the specter of coercion" but that the threat in the case was not unfounded). Courts may also find consent involuntary when arrest is threatened, even if probable cause to arrest exists, under a totality of the circumstances analysis. State v. Ormosen, No. 2022AP1962-CR, 2024 WL 1787134, at *6 (Wis. Ct. App. Apr. 25, 2024) (rejecting the state's argument that the court could not consider threats to arrest when there was probable cause and finding consent involuntary).

227. See supra section I.A.

228. See supra notes 167–169 and accompanying text.

229. Burke, supra note 55, at 526 (describing police officers' breadth of discretion over classifying transgressions).

230. See supra note 219 and accompanying text; see also Payne v. Wilder, No. CIV 16-0312 JB/GJF, 2017 WL 2257390, at *41 (D.N.M. Jan. 3, 2017) (construing a state statute criminalizing parents' failure to cooperate with family regulation investigations to be constitutional because "law enforcement officers still have to comply with the federal and

maltreatment investigations can concern allegations that do not constitute criminal conduct.[231] Because "neglect" is defined so broadly, it may be that even if a parent has engaged in conduct that constitutes child neglect under *civil* statutes, that same conduct does not furnish probable cause to *arrest* the parent for any *criminal* offense.[232] Finally, investigations may be based on anonymous tips or other evidence that would be too speculative to support probable cause to arrest.[233] Thus, adequate suspicion to arrest or detain a parent in a family regulation investigation may not exist.

Take the experience of Shalonda Curtis-Hackett, a Black mother in New York.[234] Curtis-Hackett became the subject of a family regulation investigation in 2021 after an anonymous caller alleged that her children looked undernourished.[235] She initially resisted an investigator's request for consent to a home search.[236] Curtis-Hackett relented, however, after the investigator threatened to call the police.[237] At the time of the threat, the investigator lacked probable cause to arrest Curtis-Hackett: Being a parent of an undernourished child is not, ipso facto, a crime.[238] Even if it were, an anonymous, uncorroborated tip cannot furnish probable cause to support arrest in a criminal matter under New York law.[239] (The investigation never turned up evidence that Curtis-Hackett's children were undernourished—indeed, her husband is a professional chef.[240] Curtis-

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state Constitutions and must conduct a search pursuant to a warrant unless [it] falls within [a] narrow exception[]").

231. Gupta-Kagan, Beyond Law Enforcement, supra note 51, at 358, 368.

232. See Tolulope Adetayo, Rafaela Rodrigues, Monica Bates & Leslye E. Orloff, Nat'l Immigrant Women's Advoc. Project, Appendix O: State Definitions of Child Endangerment as More Severe Than Neglect (2017), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-O-Endangerment-Chart.pdf [https://perma.cc/7S9UWF7M].

233. See Lafave, supra note 10, § 3.3(a) n. 26 (describing federal and state courts' approaches to weighing whether anonymous tips furnish probable cause); Dale Margolin Cecka, Abolish Anonymous Reporting to Child Abuse Hotlines, 64 Cath. U. L. Rev. 51, 54 (2014) (noting that one-sixth of reports in family regulation cases are anonymous).

234. N.Y. Assembly Hearing on Family Involvement in the Child Welfare System, supra note 113, at 72 (statement of Shalonda Curtis-Hackett).

235. Id. at 69.

236. Id. at 72–73.

237. Id. at 69.

238. New York criminalizes endangering the welfare of a child only if a person "*knowingly* acts in a manner likely to be injurious to the physical, mental or moral welfare of a child" or "fails . . . to exercise *reasonable diligence* . . . to prevent [their] child from becoming . . . a 'neglected child,'" and does so without "the intent that the child be safe from physical injury and cared for in an appropriate manner." N.Y. Penal Law § 260.10 (McKinney 2025) (emphasis added).

239. See People v. Johnson, 488 N.E.2d 439, 442 (N.Y. 1985) ("A police officer may arrest a person without a warrant when he has probable cause to believe that such person has committed a crime . . . before probable cause based on hearsay is found it must appear . . . that the informant has some basis of knowledge for the information he transmitted to the police and that the information is reliable." (citations omitted)).

240. N.Y. Assembly Hearing on Family Involvement in the Child Welfare System, supra note 113, at 74 (statement of Shalonda Curtis-Hackett). The Curtis-Hackett family

Hackett is now suing the City of New York as part of a lawsuit described in section II.C.) Thus, the investigators' implied threat of arrest as a consequence for Curtis-Hackett's initial refusal rendered her consent involuntary.[241]

4. *Threats to the Parent–Child Relationship.* — Finally, threats by family regulation investigators to remove children bear on a "primordial and fundamental value of our society."[242] If these threats do more than convey accurate information regarding possible consequences to parents, they are likely to render any consent involuntary.

Courts have considered threats to intervene in the parent–child relationship ranging from threats to lock children out of the family home until a warrant is obtained,[243] to threats to arrest all caretakers of children and necessitate the state taking the child into custody,[244] to threats to call the local family regulation agency if parents refuse consent.[245] These are powerful threats, as the Supreme Court long ago recognized.[246] In the

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subsequently sued the City of New York. See Gould v. City of New York, No. 1:24-cv-01263-CLP (E.D.N.Y. docketed Feb. 20, 2024).

241. See supra notes 224–226, 229–232 and accompanying text.

242. United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981).

243. See, e.g., United States v. Eggers, 21 F. Supp. 2d 261, 270 (S.D.N.Y. 1998) ("The agents made clear that the children would be allowed in promptly if the Miremadis consented to a search but otherwise would not be allowed back inside until after a search warrant was obtained and executed, which might take a day or two."); Flores v. State, 172 S.W.3d 742, 752 (Tex. App. 2005) ("[W]hile appellant was handcuffed in the back of the patrol car, the officers told him that if he did not consent, his mother and young son would be required to vacate the house while the officers secured the residence, despite the officers having no basis for doing so.").

244. See, e.g., United States v. Santiago, 428 F.3d 699, 705 (7th Cir. 2005) (holding that consent was voluntary in the absence of an explicit threat by police); United States v. Ivy, 165 F.3d 397, 404 (6th Cir. 1998) ("This Court now finds that such hostile police action against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent given by the suspect."); State v. Walmsley, 344 N.W.2d 450, 454 (Neb. 1984) (holding that consent was coerced when the sheriff threatened to arrest Walmsley's wife if he did not consent to a search).

245. See, e.g., United States v. Spates, 777 F. App'x 826, 829 (7th Cir. 2019) (finding that consent was voluntary when the officer merely admitted a mandate to report to DCFS); United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6–7 (N.D. Ill. July 23, 2021) (finding that consent was voluntary when officers merely mentioned DCFS in the defendant's presence); United States v. Almonte, 454 F. Supp. 3d 146, 154 (D.R.I. 2020) (finding that with "the Court's new understanding that Det. Fuoroli's statements to Pimentel were at odds with what DCYF actually told him, . . . Pimentel's will was overborne by Det. Fuoroli's coercive tactics and thus her consent to search was not voluntarily given"); McIlquham v. State, 10 N.E.3d 506, 513 (Ind. 2014) (finding that consent was voluntary when the police gave a balanced picture of potential child welfare outcomes); State v. Wyche, No. 40493-8-I, 1998 WL 346874, at *1 (Wash. Ct. App. June 29, 1998) (per curiam) ("The officers also told him that they would have to call Child Protective Services (CPS) for Wyche's five-year-old daughter because there was no other adult at home.").

246. See Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (finding that a confession was coerced when it was made after police threatened to cut off financial aid for and remove the petitioner's children); see also supra section II.B.1.

assessment of one court, when police told a mother "that her child would be taken away if she did not consent" to a search, police said "perhaps the one thing guaranteed to secure her consent."[247]

As with confessions,[248] not all invocations of children render a consent to search involuntary. And there are no bright-line rules to separate permissible from impermissible invocations of children.[249] But case law yields some general principles. Most notably, the more explicit and the more specious a threat, the more likely it is to render consent involuntary.[250] Thus, a police officer's statement that the state *will* take a child into custody even though other caretakers are available is more likely to vitiate consent than officers' statements that the state *may* take the child into custody if no other caretaker is available or that the family regulation agency will decide appropriate outcomes.[251] Less explicit threats may still make consent involuntary if coupled with other coercive factors—such as prolonged detention, middle-of-the-night encounters, language barriers, or threats of immigration consequences.[252] But implicit threats alone—

247. United States v. Tibbs, 49 F. Supp. 2d 47, 53 (D. Mass. 1999).

248. See supra section II.B.1.

249. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (favoring a "traditional contextual approach" and "eschew[ing] bright-line rules" for consent analysis (internal quotation marks omitted) (quoting Michigan v. Chesternut, 486 U.S. 567, 572–73 (1988))).

250. Compare, e.g., United States v. Hatley, 15 F.3d 856, 858 (9th Cir. 1994) (finding that consent was involuntary when it followed the sheriff's "inappropriate[]" threat to remove a child), and *Almonte*, 454 F. Supp. 3d at 154 (finding that consent was involuntary when it followed an officer's inaccurate claim that the family regulation agency would not permit a parent to return home with their child), with Hatfield v. Berube, 714 F. App'x 99, 104 (3d Cir. 2017) (finding that consent was voluntary when the "reference to the removal of the children was grounded in proper legal authority"), and Loudermilk v. Danner, 449 F. App'x 693, 695 (9th Cir. 2011), as amended on denial of reh'g and reh'g en banc (Oct. 21, 2011) ("[T]his is not a case in which officers use a *baseless* threat of the loss of one's children to obtain a result entirely unrelated to the children.").

251. See, e.g., United States v. Ivy, 165 F.3d 397, 403 (6th Cir. 1998) (finding that consent was involuntary when the officer threatened to take the child into custody but "there were supervision alternatives to state custody"); McIlquham v. State, 10 N.E.3d 506, 513 (Ind. 2014) (finding that consent was voluntary when the officers referenced the family regulation agency but made no representations about what decision those authorities might make); People v. Rodriguez, 935 N.W.2d 51, 59 (Mich. Ct. App. 2019) (finding that consent was voluntary when the officer told the parent that he would have to call the family regulation agency if no one else was available to look after the children); Hernandez v. State, 205 S.W.3d 555, 560 (Tex. App. 2006) (finding that consent was voluntary when officers truthfully told a parent that they were mandated reporters to the family regulation agency).

252. See, e.g., United States v. Marchi, No. 3:17-CR-00055-3 (VLB), 2018 WL 1409819, at *8 (D. Conn. Mar. 21, 2018) (finding that consent was involuntary based on the parent's "concern that she would be deported and her child taken into state custody," together with other factors including her lack of English proficiency and the overbearing law enforcement presence); United States v. Santos, 340 F. Supp. 2d 527, 537–38 (D.N.J. 2004) (finding that consent was involuntary when officers threatened to take the subject's child into custody in the middle of the night while her child slept in an adjoining room and threatened to bring drug charges against her if she did not cooperate).

cases where parents point to generalized fears of family separation—are unlikely to vitiate voluntariness.[253]

Applying these principles to family regulation investigations suggests that family regulation investigators unlawfully coerce consent regularly by explicitly raising the baseless specter of family separation. As an initial note, a reasonable person would likely experience a threat from family regulation investigators to take their children into state custody as a plausible and immediate threat. Courts already recognize that such threats uttered by *police* can overbear the will of a parent. When the threats are uttered by family regulation investigators, they are all the more direct, as they come from state actors with the ostensible power to remove children.[254]

Further, a statement like "If you don't cooperate, we can remove your children" more often than not conveys *in*accurate information about possible consequences.[255] Such a statement presents a family separation as lawful and inevitable—but to lawfully separate a family during the investigation phase, the state must establish that a parent's treatment of the child presents a risk "so substantial and imminent that emergency action is necessary."[256] Most family regulation investigations do not involve such risk: Of the more than three million children involved in investigations in 2022, approximately 145,500 were ultimately placed in foster care.[257] That number may not account for every case where the state had reasonable concerns that a child would be at imminent risk if they remained in their parent's care, as the state may resolve those concerns through means other than the formal foster system.[258] But even if we double the number of children placed in foster care to generously (albeit speculatively) account for cases where such concerns existed and were resolved via other means, that leaves ninety percent of investigations where investigators never had a lawful basis for family separation and thus never

253. See, e.g., United States v. Santiago, 428 F.3d 699, 705 (7th Cir. 2005) (finding that consent was voluntary and distinguishing from an earlier case "in several crucial respects, not the least of which is the absence of any explicit finding of a threat by the police"); United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6–7 (N.D. Ill. July 23, 2021) (finding that consent was voluntary when there was "no evidence that [any officer] made any explicit threat regarding [subject's] custody of her daughter").

254. See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 208 (1989) (Brennan, J., dissenting) ("[State] law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.").

255. For examples of such threats, see supra section II.A.4.

256. Gupta-Kagan, Hidden Foster Care, supra note 13, at 860; see also, e.g., N.J. Stat. Ann. § 9:6-8.32 (West 2025); N.Y. Fam. Ct. Act § 1027(b)(i)–(ii) (McKinney 2025); Va. Code § 16.1-251(A)(1) (2024).

257. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv.

258. For instance, the state may arrange for children to be placed in informal foster care, Gupta-Kagan, Hidden Foster Care, supra note 13, at 847, or further investigation may resolve the state's concerns.

had a lawful basis to threaten it.[259] Add in other factors, like family regulation investigators threatening to remove children during unannounced, middle-of-the-night visits[260] or speaking to parents in English when they lack fluency,[261] and the rate of unduly coercive threats ticks higher still.

Take an investigation into a teacher's report that a child does not have weather-appropriate clothing. This sort of report is common in the family regulation system.[262] It is likely to trigger an investigator to attempt a comprehensive home search,[263] but unlikely to provide a basis for removal on its own.[264] If an investigator raises removal as a realistic possibility to a parent who refuses a home search (for example, an investigator might say "Your child will be removed if we can't get access"), they are making that threat absent any lawful basis. That explicit and specious threat is unconstitutionally coercive.[265]

C. *The Promise of a Constitutional Argument*

The previous section outlined the unconstitutionality of three common tactics used by family regulation investigators to extract consent for home searches. More than abstract legal principles, that section offers a theory that could help pave a path to increased privacy protections for race–class subjugated families.

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259. See supra notes 249–250 and accompanying text.

260. See Complaint at 26, L.B. v. City of New York, No. 1:23-cv-08501-NRM-JRC (E.D.N.Y. filed Nov. 15, 2023) (describing how a family court judge admonished the family regulation agency that "showing up in the middle of the night is traumatic; taking off kids' clothes is traumatic" (internal quotation marks omitted) (quoting the family court judge in L.B.'s case)); Conn. D.C.F. Interview, supra note 1 (noting that parents' perception of the agency became less tense after investigators began announcing their visits).

261. In practice, I represented a parent whose first language was Mixteco, an indigenous Central American language. Her children's school had called the state's child maltreatment hotline over concerns that she was not addressing one of the children's mental health needs. The school's initial call included a note that she did not know any English and had only limited proficiency in Spanish, and school personnel speculated that she was either intellectually disabled or unable to understand the school's communications. Despite these many warnings, the family regulation investigators who went to her home attempted to speak with her only in English and Spanish, then sought an order to remove her children because of her failure to "cooperate" with their demands. I was assigned to represent the parent when the agency sought that order; the judge declined to grant it.

262. See N.Y.C. Admin. for Child.'s Servs., Flash Report: Monthly Indicators 32 (2024), https://www.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2024/05.pdf [https://perma.cc/VHT4-STTF] (noting that investigations may include allegations of "inadequate . . . clothing").

263. See supra section I.A.

264. See Nicholson v. Scoppetta, 820 N.E.2d 840, 849 (N.Y. 2004) (setting a high bar for removal and noting that "in many instances removal may do more harm to the child than good").

265. See supra notes 177–180 and accompanying text.

Scholars and advocates have long pointed out the gap between abstract constitutional protections and on-the-ground reality for families enmeshed in the family regulation system.[266] This gap can be daunting and difficult to close.[267] One difficulty has been consent, as agencies lean heavily on consent to evade Fourth Amendment constraints on home searches.[268] But consent is only valid if it is constitutionally obtained. A claim that consent is invalid may be difficult to advance in individual cases.[269] Strategic litigation systemically challenging the constitutionality of agencies' coercive tactics, however, could chip away at the family regulation system's constitutional evasion and spur changes in agency practices through the legal process and public pressure.

A recent class action in New York City exemplifies this approach.[270] The lawsuit alleges that the city's family regulation agency has a policy and practice of using unconstitutionally coercive tactics—including misrepresenting its authority, threatening to call law enforcement, and threatening family separation—to effectuate its search scheme in violation of the Fourth Amendment.[271] The suit primarily seeks injunctive relief and avoids the quagmire of qualified immunity by eschewing claims against individual employees of the family regulation agency.[272] It seeks to reshape the agency's search practices—by, for example, banning certain coercive tactics, training investigators on the constraints of the Fourth Amendment, and requiring tracking and documentation of consent.[273]

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266. See, e.g., Bridges, supra note 32, at 11 ("[P]oor mothers have no *effective* privacy rights."); Spinak, supra note 155, at 192 ("Even in states that provided a right to counsel . . . states and counties have consistently underfunded these mandates, leaving parents without counsel at all or with counsel so overwhelmed and underpaid that provision of counsel becomes a 'hollow right.'"); Washington, Pathology Logics, supra note 50, at 1578 ("The myopic focus on deficiency erases the knowledge that marginalized parents hold. Individuals are experts on their own lived experience, just as parents are intimately familiar with their own children's needs. From a constitutional perspective, this is in no way controversial."); Joyce McMillan (@JMacForFamilies), X (Oct. 26, 2021), https://x.com/JMacForFamilies/status/1453049049301532675 (on file with the *Columbia Law Review*) (sharing a video featuring several New Yorkers voicing their disapproval of ACS).

267. See infra section II.D and Part III.

268. Coleman, supra note 7, at 465; Hager, Agency Quietly Lobbying, supra note 152 (describing New York City ACS's attempts to undermine legislation that would require consent to be knowing).

269. See infra section II.D.

270. Gould v. City of New York, No. 1:24-cv-01263-CLP (E.D.N.Y. docketed Feb. 20, 2024). In the interest of transparency, this lawsuit was brought by the NYU School of Law Family Defense Clinic and the Family Justice Law Center—both firms with which this author is affiliated—in addition to two other law firms.

271. *Gould* Complaint, supra note 17, at 5.

272. Id. at 45, 48; see also Pearson v. Callahan, 555 U.S. 223, 242 (2009) (noting that qualified immunity is inapplicable in "§ 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages").

273. *Gould* Complaint, supra note 17, at 27, 30; see also Arya Sundaram, NYC Child Welfare Investigators Coerce, Traumatize Families, Class-Action Lawsuit Claims, Gothamist

Though still in discovery, the suit has received extensive coverage in local and national press.[274] Since the suit's filing, the agency has updated its public-facing materials to provide parents slightly more information regarding their right to refuse consent to home searches.[275] And there is renewed interest in state legislation that would require family regulation agencies across New York to inform parents of their rights.[276] It is too early to say whether the suit will secure sweeping changes in agency search practices through the legal process—though scattered decisions show that courts have some appetite for recognizing coercive consent searches in family regulation investigations.[277] But it is clear already that such a suit

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(Feb. 21, 2024), https://gothamist.com/news/nyc-child-welfare-investigators-coerce-traumatize-families-class-action-lawsuit-claims [https://perma.cc/J7ZV-SBQQ] (interviewing *Gould*'s lead litigator).

274. See, e.g., Bromwich & Newman, supra note 114 ("If successful, the lawsuit would require A.C.S. to fundamentally re-envision how it investigates reports of abuse and neglect."); Julia Lurie, Parents Are Suing New York City Over Coercive, Traumatizing Home Searches, Mother Jones (Feb. 21, 2024), https://www.motherjones.com/politics/2024/02/class-action-lawsuit-new-york-city-acs-home-searches-families-children/ [https://perma.cc/6RRE-CBW6] ("Over the next two years, the Goulds were subject to at least a dozen investigations . . . all of which proved to be baseless . . . ."); The Brian Lehrer Show, Lawsuit Over ACS Practices, WNYC (Feb. 22, 2024), https://www.wnyc.org/story/lawsuit-over-acs-practices/ [https://perma.cc/9PS8-P2YK] ("This case is all about making New York City a more just and more safe place for children, for parents, and for family units." (statement of David Shalleck-Klein, Exec. Dir. & Founder, Fam. J. L. Ctr.)).

275. Compare N.Y.C. Admin. for Child.'s Servs., Child Protection, https://www.nyc.gov/assets/acs/pdf/child_welfare/investigation/Important-Information-for-Families-Translations.pdf [https://perma.cc/S59T-GWU2] (last visited Jan. 18, 2024) (clarifying that families can refuse to allow ACS into their homes), with N.Y.C. Admin. for Child.'s Servs., A Parent's Guide to Child Protective Services in New York City 2 (2022), https://web.archive.org/web/20221108134053/https://www.nyc.gov/assets/acs/pdf/child_welfare/investigation/guide/ParentsGuide.pdf [https://perma.cc/9MUN-J9W7] ("CPS may make an unannounced visit to your home and will meet with you, your child, and other people in your household.").

276. See, e.g., Susan Arbetter, 'Family *Miranda*' Bills Regarding CPS Are Again in the Mix in Albany, Spectrum News 1 (Apr. 9, 2024), https://spectrumlocalnews.com/nys/central-ny/politics/2024/04/09/-family-miranda–bills-are-again-in-the-mix-in-albany [https://perma.cc/X9WQ-P27S] (discussing two proposed bills, one that would "require that parents be informed of their legal rights before the start of any CPS investigation" and another that would change anonymous reporting to confidential reporting); Dawne Mitchell, Melissa Friedman & Daniella Rohr, Opinion: The Harmful Impact of Invasive Child Welfare Investigations, City Limits (Mar. 18, 2024), https://citylimits.org/2024/03/18/opinion-the-harmful-impact-of-invasive-child-welfare-investigations/ [https://perma.cc/TJS5-YBXU] (advocating for ending anonymous reporting, eliminating mandated reporting, and requiring investigators to advise parents of their legal rights).

277. See, e.g., Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, 891 F.2d 1087, 1093 (3d Cir. 1989) ("[T]he consent required must be freely given. It is ineffective if extracted by the state under threat of force or under claim of government authority."); L.B. v. City of New York, No. 23-CV-8501 (RPK) (JRC), 2025 WL 788662, at *3 (E.D.N.Y. Mar. 12, 2025) (declining to dismiss a parent's Fourth Amendment search claim where the parent "nominally gave her consent" to investigators but alleged she did so "only because the investigators to her that she was 'required' to permit such access and threatened to initiate legal action if she did not comply" (citing Memorandum of Law in Support of Plaintiffs'

can be, at least, a magnet for public attention and a driver for institutional and political change.

Changes in search practices can increase family privacy and security by reducing how many parents consent to invasive searches. As the following sections explain, the reduction in parents' rate of consent may be modest.[278] It is possible, too, that if agencies cannot obtain consent, they will instead apply for more warrants to search homes and still gain access.[279] But resource constraints are likely to prevent agencies from seeking court orders in every case in which they currently obtain consent.[280] Given the huge volume of investigations each year, even a small decrease in the number of total searches would annually spare thousands of families the harms of home searches.[281]

D. *The Limits of a Constitutional Argument*

There are limits to the practical usefulness and reach of a constitutional argument. The careful framing of the previous section reveals as much: This Article does not suggest that many individual families could successfully deploy such an argument to protect themselves from imminent encroachments on their homes, to suppress evidence collected

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Opposition to Defendants' Partial Motion to Dismiss the Amended Complaint at 19–21, *L.B.*, 2025 WL 788662)); Phillips v. County of Orange, 894 F. Supp. 2d 345, 371–72 (S.D.N.Y. 2012) ("Where state officials have 'claimed official authority to conduct [a] search,' an individual 'should not be found to have consented' to the search, because he or she is merely acquiescing to a 'show of authority.'" (alteration in original) (quoting United States v. Milligan, No. 3:09-CR-246-RNC, 2011 WL 3930284, at *5 (D. Conn. May 4, 2011))).

278. See infra section IV.A.

279. See Child Welfare Indicators Report, supra note 8, at 16 (noting that 219 of 226 (95.6%) court orders to enter families' homes were granted). This also assumes marginal or no change in the rate at which agencies could credibly claim exigent circumstances. See Ismail, Family Policing, supra note 4, at 1540 ("[B]ecause there is no opportunity to address an unconstitutional search through the exclusionary rule, the likelihood of unredressed improper searches conducted via exigent circumstances is higher in CPS searches than in, say, the criminal context.").

280. See, e.g., N.Y. Senate Comm. on Judiciary & N.Y. Senate Comm. on Child. & Fams., The Crisis in New York's Family Courts 3 (2024), https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-02/2.12-family-court-hearing-report-w-graphics-1.pdf [https://perma.cc/TU5P-3W8N] ("Despite the supreme importance of these matters, New York's Family Courts are overburdened and under-resourced . . . ."); Ctr. for Fams., Child. & the Cts., Jud. Council of Cal., Unified Courts for Families: Improving Coordination of Cases Involving Families and Children 2 (2008), https://courts.ca.gov/sites/default/files/courts/default/2024-08/improvingcoordination.pdf [https://perma.cc/ZT4Z-PLKY] (describing family courts as under-resourced).

281. See, e.g., Lindsey Palmer, Sarah Font, Andrea Lane Eastman, Lillie Guo & Emily Putnam-Hornstein, What Does Child Protective Services Investigate as Neglect? A Population-Based Study, 29 Child Maltreatment 96, 98 (2024) (noting that there were 231,728 family regulation investigations in California in 2017); N.Y.C. Admin. for Child.'s Servs., About ACS, https://www.nyc.gov/site/acs/about/about.page [https://perma.cc/WWW2-AL3Q] (last visited Jan. 18, 2025) ("Each year, the agency's Division of Child Protection conducts more than 55,000 investigations of suspected child abuse or neglect.").

via unconstitutional home searches, or to win damages in civil suits. Nor does this Article suggest that an argument rooted in the limited understanding of voluntariness that controls in Fourth Amendment jurisprudence gets at all—or even most—state coercion in family regulation investigations.

First, though parents suffer a constitutional injury when investigators use unlawfully coercive tactics to extract consent, few parents find redress for that injury. Parallels to criminal law point toward an established remedy: an exclusionary rule to suppress the fruits of unconstitutional searches and deter unlawful agency search practices.[282] But state courts around the country have declined to adopt an exclusionary rule in family regulation proceedings, so even if a judge were to agree that an investigator obtained consent through unconstitutional concern, the state could still introduce the evidence collected during the search against the parent.[283] A parent might attempt to convince a judge to exclude the fruits of a search under other evidentiary rules,[284] but in doing so the parent would be fighting against the culture of compliance that pervades family court.[285] Judges, like investigators, emphasize cooperation and de-emphasize rights, discouraging parents from litigating Fourth Amendment violations.[286]

Further, few families subjected to searches end up in family court.[287] For most families, this leaves civil litigation as the only avenue for relief.

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282. See Mapp v. Ohio, 367 U.S. 643, 656–60 (1961) ("[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . .").

283. See, e.g., In re Christopher B., 147 Cal. Rptr. 390, 394 (Cal. Ct. App. 1978) (holding the exclusionary rule to be inapplicable to family regulation proceedings); In re Robert P., 132 Cal. Rptr. 5, 12 (Cal. Ct. App. 1976) (same); People ex rel. A.E.L., 181 P.3d 1186, 1192 (Colo. App. 2008) (same); In re Nicholas R., 884 A.2d 1059, 1062 (Conn. App. Ct. 2005) (same); Idaho Dep't of Health & Welfare v. Doe, 244 P.3d 247, 257 (Idaho Ct. App. 2010) (same); In re Corey P., 697 N.W.2d 647, 655 (Neb. 2005) (same); State ex rel. Child., Youth & Fams. Dep't v. Michael T., 172 P.3d 1287, 1290 (N.M. Ct. App. 2007) (same); In re Diane P., 494 N.Y.S.2d 881, 882 (N.Y. App. Div. 1985) (same); State ex rel. Dep't of Hum. Servs. v. W.P., 202 P.3d 167, 173 (Or. 2009) (en banc) (same); State ex rel. A.R. v. C.R., 982 P.2d 73, 78–79 (Utah 1999) (same). Texas recently enacted a statute that excludes evidence collected if the worker has not informed parents of their rights. Tex. Fam. Code Ann. § 261.307(e) (West 2023) (providing that evidence obtained without the subject receiving a "verbal notification and written summary" of their legal rights is inadmissible in civil proceedings).

284. See, e.g., Tex. R. Evid. 403 (allowing for exclusion of "relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice").

285. See Arons, Empty Promise, supra note 6, at 1076–80 (outlining the orientation of family court judges).

286. See, e.g., Clark v. Stone, 998 F.3d 287, 292 (6th Cir. 2021) (recounting a state circuit court judge's claim to a father that there was no Fourth Amendment right to stop home visits by the Kentucky Cabinet for Health and Family Services).

287. Child.'s Bureau, Child Maltreatment 2022, supra note 2, at xv (reporting that 2,537,202 of 3,096,101 investigations (82%) closed without substantiating allegations against parents and 145,449 investigations (5%) led to foster care placements, which necessitate court involvement).

While coordinated civil litigation holds promise,[288] civil litigation is inaccessible for many individual plaintiffs.[289] It is hardly probable that millions of parents will pursue it. Further, plaintiffs seeking money damages have to overcome qualified immunity to prevail, which can be difficult, since that requires parents to establish that they were subject to a coercive tactic that violated "clearly established" rights of which a reasonable investigator would have known.[290] Finally, challenges to search tactics in family court or in civil litigation often pit parents' accounts against state actors', and parents may struggle to win that credibility contest.[291]

Second, and more fundamentally, the voluntariness standard enunciated by the Supreme Court fails to reach the forms of coercion present in virtually every family regulation investigation—indeed, present in virtually every encounter between individuals and the state. As it has embraced an increasingly objective standard for consent, the Court has shifted its focus from the subjective experiences of individuals from whom consent is sought, to the overt actions of state actors.[292] This move protects

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288. See supra section II.C.

289. See Lisa V. Martin, No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22, 71 Fla. L. Rev. 831, 857 (2019) ("[L]egal aid organizations are only able to take on fewer than half of the legal problems that individuals who qualify for services ask them to resolve." (citing Legal Servs. Corp., The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 13 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/5VXH-MDKG])).

290. See White v. Pauly, 580 U. S. 73, 78–79 (2017) (per curiam) ("Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam))); see also *Clark*, 998 F.3d at 302 ("Because [of] the presence of the court order . . . a reasonable social worker in the position of the defendants would not have understood that he was violating the Clarks' Fourth Amendment rights."); Andrews v. Hickman County, 700 F.3d 845, 859–63 (6th Cir. 2012) (holding that social workers who relied on police instructions to enter a home without a warrant were immune); Loftus v. Clark-Moore, 690 F.3d 1200, 1205 (11th Cir. 2012) (holding that questioning a child at school without a warrant did not violate a well-established right and was therefore covered by qualified immunity); Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 424–27 (5th Cir. 2008) (finding that the defendants were entitled to qualified immunity due to the uncertain place of child abuse investigations in the special needs doctrine at the time of the search); Tenenbaum v. Williams, 193 F.3d 581, 601–06 (2d Cir. 1999) (finding that removing a child from school and conducting a medical examination without a warrant was shielded by qualified immunity because of the Fourth Amendment's ambiguous applicability to child abuse investigations).

291. See, e.g., United States v. Williams, Criminal Action No. 12-100, 2012 WL 3550467, at *4 (E.D. Pa. Aug. 17, 2012) ("To the extent that the testimony of the police officers conflict with that of Ms. Williams, we believe the police officers."); United States v. Groves, No. 3:04-CR-76, 2007 WL 171916, at *8 (N.D. Ind. Jan. 17, 2007) (accepting the police officers' claims that they did not threaten the parent's custody of their child over the parent's claim that such a threat was made), aff'd, 530 F.3d 506 (7th Cir. 2008); United States v. Gomez, No. S 92 CR. 584 (CSH), 1992 WL 315633, at *2 (S.D.N.Y. Oct. 21, 1992) (same).

292. Nadler, supra note 141, at 214.

and legitimizes implicit forms of coercion, like the inherent power imbalance between state actors and the subjugated individuals from whom they seek consent or parents' well-placed fears that state actors who *can* take their children *will* take their children.[293]

As a result, courts set aside parents' fears of family separation when those fears are not, in the courts' estimation, based on explicit threats by state actors.[294] While accounts by parents, advocates, and agencies reveal explicit threats and misrepresentations to be common features of family regulation home searches, investigators need not resort to such tactics in many—perhaps most—investigations. The mere presence of an investigator can make parents feel unable to refuse the investigator entry to their home.[295] A search conducted under consent extracted through implicit pressure still inflicts harm on families and communities.[296] But such a search is likely to fall within the bounds of constitutionally permissible consent.[297] Thus, even if the litigation outlined in section II.C succeeds, it will leave intact a family surveillance apparatus that puts eyes in the homes of hundreds of thousands of families annually.

As an illustration of the limits of constitutional litigation, consider the example of stop-and-frisk in New York City. After landmark litigation established that the New York City Police Department (NYPD) used a widespread practice of conducting unconstitutional suspicionless stop-and-frisks of Black and Latine New Yorkers, the rate of unconstitutional stops fell dramatically, as did the overall (reported) number of stops.[298] Yet

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293. See supra section II.A.

294. See United States v. Bailey, No. 18-CR-00336-2, 2021 WL 3129314, at *6–7 (N.D. Ill. July 23, 2021) (finding that consent was voluntary because there was no evidence that a state actor had made an explicit threat to child custody); Zimmer v. New Jersey Div. of Child Prot. & Permanency, Civ. Action No. 15-2524 (FLW) (DEA), 2017 WL 4838843, at *10 (D.N.J. Oct. 26, 2017) (concluding that a father's "unvoiced, subjective belief that [his child] would be removed from their house if they did not comply with the search, without more, is insufficient for this Court to find that [the state actors'] belief that Plaintiffs consented to the search was unreasonable"), aff'd, 741 F. App'x 875 (3d Cir. 2018); State v. Cromer, 186 S.W.3d 333, 348 (Mo. Ct. App. 2005) ("[The mother's] fear alone, without more, is not enough to render her consent involuntary to an objective observer.").

295. See supra section II.A.

296. See supra section I.B.

297. Cf. United States v. Drayton, 536 U.S. 194, 206 (2002) (emphasizing that an officer did not "command" the subject to consent and finding that consent was voluntary).

298. For the rate of legally valid stops, compare Sixteenth Report of the Independent Monitor at 5, Floyd v. City of New York, No. 1:08-cv-01034-AT (S.D.N.Y. filed May 6, 2022), ECF No. 885 (reporting the results of an audit showing that more than 50% of stops performed in 2016 were unconstitutional), with End of Year Monitor Update at 6–7, *Floyd* (S.D.N.Y. filed Feb. 22, 2024), ECF No. 923 (reporting the results of an audit showing that 11.3% of stops performed in 2022 were unconstitutional). For the overall number of stops, see A Closer Look at Stop-and-Frisk in NYC, NYCLU (Dec. 12, 2022), https://www.nyclu.org/data/closer-look-stop-and-frisk-nyc [https://perma.cc/593D-Y8F4] (showing trends in NYPD's stop-and-frisk practices from 2003 to 2023); see also End of Year Monitor Update at 7, supra (reporting the results of an audit showing that police did not document 31% of stops in 2022).

the NYPD still reports more than fifteen thousand stops a year, continuing to impact almost exclusively Black and Latine New Yorkers by exposing them to police violence and eroding their trust in police, though the practice rarely reveals evidence of illegal behavior.[299] The problem with stop-and-frisk now is less often that the police lack a constitutional basis for stops and more often that still-constitutional stops harm race–class subjugated communities.[300]

The next Part explores whether there are interventions outside constitutional law that can offer families, particularly families in race-subjugated communities, more fulsome protection from coercion, surveillance, or both.

III. DISENTANGLING CONSENT REFORMS AND SEARCH REFORMS

This Article has shown that family regulation home searches are pervasive and violent intrusions, that consent serves as justification for many of these searches, and that investigators extract parents' consent through implicit and explicit coercion, with few checks. This single (long) sentence points to at least three problems. First, even when parents are subjected to unconstitutionally coercive tactics, they rarely receive relief. Second, consent doctrine does not protect parents from implicit but still overbearing coercion. And third, regardless of their legality or justification, searches harm families. The third of these problems is the most fundamental: Consent fuels the family surveillance apparatus. No matter its fuel, the apparatus itself hurts families and communities,[301] even as it fails to increase child safety.[302]

In considering solutions to these problems, consent can function as a smokescreen. By focusing on consent doctrine, we lose sight of the surveillance for which consent provides cover. Across hundreds of pages in dozens of articles, scholars have carefully explicated the outlines of a concept of consent that they can live with.[303] But this approach centers

299. See A Closer Look at Stop-and-Frisk in NYC, supra note 298 (reporting that 91% of stops in 2023 were of Black or Latine New Yorkers, though these groups comprise only 52% of the city's population).

300. See Johanna Miller & Simon McCormack, NYCLU, Shattered: The Continuing, Damaging, and Disparate Legacy of Broken Windows Policing in New York City 4–6 (2018), https://www.nyclu.org/uploads/2018/10/nyclu_20180919_shattered_web.pdf [https://perma.cc/2TZM-D4MM] (describing the effects of disparate police presence and enforcement on race–class subjugated communities); Samantha Max, Stop and Frisk in NYC a Decade After Historic Court Ruling, Gothamist (Aug. 12, 2023), https://gothamist.com/news/stop-and-frisk-in-nyc-a-decade-after-historic-court-ruling [https://perma.cc/N8WJ-4RBT] (summarizing recent critiques of stop-and-frisk).

301. See supra section I.B.

302. See supra notes 85–90 and accompanying text.

303. This Article does not describe its own formulation of consent, for the reasons set forth in this paragraph. That said, this Article's views on the subject have been shaped by the work of scholars doing the creative work of describing visions of consent that reduce the state's ability to overbear individuals' will while still maintaining public safety and preserving

consent as the problem to be solved, as if, once we have found the right formula for consent and erected the right guardrails to ensure that formula is enforced, consent *searches* will no longer be a problem. These sorts of discussions risk legitimizing the searches that consent fuels by focusing on the procedure of searches rather than on their substance.[304] Further, reforms aimed at consent may do nothing to reduce the scale or scope of state surveillance.[305] That is, a solution to the problem of consent may not be a solution to the problem of searches.[306]

Thus, this Part demonstrates the importance of carefully considering how we frame "the problem of consent searches"—whether as a problem of remedies, of consent, or of searches. The framing fundamentally shapes the reforms that follow. Likewise, how we measure the success of those reforms turns on the problem to which they respond. To that end, this Part describes how distinct sets of reforms flow from conceptualizing *consent doctrine* as the problem versus *searches* as the problem. Rather than offering a definitive set of policy recommendations, this Part outlines the stakes of framing the problem. This examination makes one fact abundantly clear: Consent reforms alone cannot protect race–class subjugated communities from state surveillance. This insight is just as salient in the criminal legal

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individuals' ability to exercise free will and benefit from the efficiencies of consent. For just a few recent examples, see Burke, supra note 55, at 551–55 (arguing that courts must examine the reasonableness of the government's request for consent and the scope of the consent requested); Henderson & Krishnamurthi, supra note 55, at 41–42 (arguing that consent should only serve as a legal justification for state action in limited emergency situations); Slobogin & Weisburd, supra note 55, at 1915–16 (arguing that the voluntariness of an individual's choice should be legally irrelevant when the choice that the government has put to an individual is an "illegitimate" one under one of three theories).

304. See Shawn E. Fields, The Procedural Justice Industrial Complex, 99 Ind. L.J. 563, 608 (2024) ("Procedural justice does not merely stunt reform by presenting a false narrative of substantive change; it actively works in conflict with transformative police reform."); Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1315 (2012) (describing how an increased attention to process "embod[ies] basic legitimizing features of the criminal process"); Jocelyn Simonson, The Place of "The People" in Criminal Procedure, 119 Colum. L. Rev. 249, 255–56 (2019) (arguing that "the reigning assumptions structuring how we think about the criminal adjudicatory process legitimize inequitable practices and limit how we design procedures and approach reform"); Critical Perspectives on Rights, The Bridge, http://cyber.law.harvard.edu/bridge/CriticalTheory/rights.htm [https://perma.cc/3VC8-NDUW] (last visited Jan. 19, 2025) ("Rights discourse can actually impede progressive movement for genuine democracy and justice.").

305. See infra notes 310–324 and accompanying text (providing examples of such reforms).

306. Kate Weisburd makes a similar point regarding the difference between eliminating consent as a basis for electronic surveillance and eliminating electronic surveillance itself. See Kate Weisburd, Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring, 98 N.C. L. Rev. 717, 774 (2020) [hereinafter Weisburd, Sentenced to Surveillance] ("Requiring a warrant, or at least some level of suspicion, is a necessary but insufficient solution to the problems inherent with electronic surveillance. The other half of the solution involves . . . a shift away from relying on intensive surveillance as a necessary component of community supervision.").

system and across the carceral state as it is in the family regulation system.[307]

Two final notes: First, this Article does not discuss reforms that flow from conceptualizing *access to remedies* as the problem for a simple reason.[308] That framing starts from the position that current consent doctrine is adequate to reach all forms of coercion with which we should be concerned, and that position has already been heavily assailed in and outside of the academy.[309] Second, this Article focuses on reforms of state law, imposed by state legislatures or state courts, rather than federal constitutional reforms. This is because, though the Supreme Court has shown little interest in changing its course on consent,[310] states and local governments around the country have shown a greater appetite for solving the consent search problem.[311] Now more than ever, the question of framing is an urgent one.

A. *Framing Consent as the Problem*

This section describes two examples of state-level reforms that respond to the problem of consent searches by seeking to correct overly narrow consent doctrine. It then explains how this framing—that is, centering *consent* as the problem with consent searches—dictates the measure of success for these reforms and illustrates how the framing can give rise to reforms that leave the family surveillance apparatus intact.

1. *Examples of Consent Reforms.* — The first category of reforms requires that state actors inform individuals of their right to refuse consent. In a recent fifty-state survey, Professor Kate Weisburd found that such reforms are the most common type of consent search reforms in the

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307. Cf. Washington, Fammigration Web, supra note 56, at 129 (describing the family regulation and criminal legal systems as enmeshed strands of a carceral web rather than in a hierarchical relationship); Weisburd, Criminal Procedure Without Consent, supra note 27, at 8 (reviewing efforts to limit or ban consent in the criminal legal system).

308. One example of a reform that responds to this problem would be the adoption of an exclusionary rule in family court. For an argument for the adoption of the exclusionary rule in family regulation proceedings, see Nicole E. Imperatore, Note, Parents Under Pressure: Why CPS Needs to Tell Parents Their Rights Before Walking in the Door, 51 Hofstra L. Rev. 541, 568 (2023).

309. See supra notes 142–148 (collecting critiques of the consent doctrine).

310. The most recent Supreme Court case to contend with consent doctrine was decided more than twenty years ago. United States v. Drayton, 536 U.S. 194 (2002). That case marked the Court's most decisive embrace of an objective (more state-friendly) standard for deciding voluntariness. See id. at 206 (framing the inquiry of whether consent to a search was voluntary as whether it would be clear to a "reasonable person that he or she was free to refuse"). More generally, the Court has not taken up any Fourth Amendment questions in several terms. See Orin Kerr (@OrinKerr), X (June 20, 2024), https://x.com/OrinKerr/status/1803806297432678677 [https://perma.cc/4VY9-KV3V] ("[T]here have been no 4A cases at SCOTUS for a few Terms . . . .").

311. See infra section III.A.

criminal legal system.[312] Efforts in the family regulation system are nascent, but at least seven jurisdictions have considered or adopted measures requiring family regulation investigators to inform parents of their right to refuse consent to home searches.[313] For example, in Texas investigators must now provide written and verbal notification of the right to "refuse to allow the investigator to enter the home or interview the child without a court order,"[314] and in Connecticut investigators must provide a brochure that includes a notice that parents are "not required to permit [an agency employee] to enter [their] residence."[315]

These reforms respond to one of the most common critiques of constitutional consent doctrine: that the doctrine does not require consent to be knowing.[316] This intervention, the thinking goes, rebalances power between individuals and the state, giving individuals greater knowledge of their rights and reducing implicit coercion that might still fall within the bounds of constitutionality.[317]

Despite that thinking, early data from jurisdictions requiring knowing consent in criminal investigations shows that almost everyone consents to searches even after they are told they can refuse.[318] Anecdotal data shows the same for family regulation investigations.[319] These reports from the field reinforce academic accounts predicting that most individuals will consent to searches regardless of whether they are told of their right to

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312. See Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 9) ("In 29 jurisdictions, police are now required to tell people that they can refuse consent and (or) obtain written or recorded consent.").

313. See Ariz. Rev. Stat. Ann. § 8-809.01(A)(3) (2025) (requiring investigators to inform parents under investigation of their right to deny the investigator entry into the home absent a court order); Conn. Gen. Stat. Ann. § 17a-103d (West 2025) (requiring investigators to provide notice that parents are not required to permit an investigator to enter their residence); Mont. Code Ann. § 41-3-216(2)(b) (2024) (requiring investigators to give "a clear written description" during the initial investigation that, absent a court order, parents are not required to allow investigators to enter their residence); Tex. Fam. Code Ann. § 261.307(a) (West 2023) (requiring that investigators give oral and written notice of the right to refuse investigators entry absent a court order); H.B. 644, 446th Gen. Assemb., Reg. Sess. (Md. 2024) (proposing legislation requiring investigators to give oral and written notice that, except as otherwise provided by law, the parent or caretaker is not required to allow the investigator to enter their residence); Hager, Texas, New York Diverge, supra note 159 (discussing efforts in Texas and New York); see also Newport, supra note 159, at 891–900 (arguing for "civil *Miranda*" legislation that would require CPS to inform parents of their rights to refuse entry and seek counsel and comparing the effects of similar legislation in Connecticut, New York, and Texas).

314. Tex. Fam. Code § 261.307(a)(2)(E).

315. Conn. Gen. Stat. § 17a-103d(a)(1)(A).

316. Sommers & Bohns, supra note 25, at 1967.

317. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 11).

318. Id. at 13 (summarizing data from New York City).

319. Hager, Police Need Warrants, supra note 4 (describing how a Connecticut agency official reported that parents' cooperation with investigations increased after warnings were instituted).

refuse.[320] All of this echoes lessons from the land of *Miranda* warnings. There, decades of experience show that telling people their rights rarely means that people will exercise their rights.[321]

A second category of reforms forbids state actors from relying on consent as the (sole) justification for searches. In some jurisdictions, police must now have an "articulable reason," "reasonable suspicion," or "probable cause" before they seek consent.[322] A handful of jurisdictions impose categorical bans on consent as a justification for law enforcement searches of pedestrians or vehicles—rendering consent legally irrelevant.[323] As an important caveat, Fourth Amendment doctrine still allows law enforcement officers to search vehicles absent consent or court order so long as they have probable cause or reasonable suspicion.[324]

To date, there are no proposals for similar limits in family regulation investigations. But given the recent popularity of reforms requiring that

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320. See, e.g., Susan A. Bandes, Police Accountability and the Problem of Regulating Consent Searches, 2018 U. Ill. L. Rev. 1759, 1766–67 ("In short, warnings are not a panacea. They may not effectively transmit their legal message that acquiescence is voluntary, and even if they do, they may not convince civilians that they are in fact free to decline."); Burke, supra note 55, at 553 ("[E]mpirical evidence demonstrates that, just as most people waive their *Miranda* rights, consent-search warnings have very little effect, most likely because of the inherent social authority that comes with police interactions."); Nancy Leong & Kira Suyeishi, Consent Forms and Consent Formalism, 2013 Wis. L. Rev. 751 (arguing consent forms "do relatively little to improve a suspect's understanding of her rights"); Sommers & Bohns, supra note 25, at 1974 ("The voluntariness test is subject to a *systematic bias*, we hypothesize, whereby pressures to comply are underappreciated and consent is overstated.").

321. See Yale Kamisar, On the Fortieth Anniversary of the *Miranda* Case: Why We Needed It, How We Got It—And What Happened to It, 5 Ohio St. J. Crim. L. 163, 177 (2007) (noting that "there is wide agreement that *Miranda* has had a negligible impact on the confession rate"); Laura Smalarz, Kyle C. Scherr & Saul M. Kassin, *Miranda* at 50: A Psychological Analysis, Current Directions Psych. Sci., Dec. 2016, at 1, 1 ("[L]arge numbers of innocent individuals have been prosecuted and wrongfully convicted on the basis of false confessions given to police following Miranda waivers.").

322. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 46–50) (internal quotation marks omitted) (cataloguing reforms); see also, e.g., Brown v. State, 182 P.3d 624, 626 (Alaska Ct. App. 2008) (banning consent searches of cars absent reasonable articulable suspicion or probable cause); Austin Police Dep't, Gen. Ord. 306.5 (2023), https://www.austintexas.gov/sites/default/files/files/Police/General%20Orders/G.O.%2011.28.22/306.5%20Consent.pdf [https://perma.cc/5WZF-G9LB] (requiring officers to have "an articulable reason" before asking for consent to a search); Fayetteville Police Dep't, Fayetteville Police Department Policy Manual, sect. 3.5.2(B) (2023), http://www.fayettevillenc.gov/home/showpublisheddocument/24107/638309737923800000 (on file with the *Columbia Law Review*) (requiring officers to "articulate at least one reasonable factor").

323. Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 10); see also, e.g., Terms and Conditions of Settlement Agreement at 5–6, Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (banning consent searches on cars by California Highway Patrol).

324. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (per curiam); Michigan v. Long, 463 U.S. 1032, 1034–35 (1983).

police have some measure of suspicion before they seek consent for a search, such proposals may soon arise in the family regulation system. Following criminal consent reform templates, one example would be legislation forbidding family regulation investigators from seeking parents' consent to search their home unless they also have reasonable suspicion or probable cause to believe that evidence of maltreatment will be found in a family's home.[325] A more dramatic example would be legislation forbidding investigators from justifying searches with consent under any circumstance—a ban that would likely operate more completely in the home context than in the vehicular context, given the home's exalted status in Fourth Amendment jurisprudence.[326]

By limiting either the circumstances under which consent may be sought or the legal relevance of consent as a justification, these bans respond to concerns that consent provides cover for suspicionless searches and that consent doctrine may incentivize police to make racially motivated pretextual stops in order to seek consent for suspicionless searches.[327] More simply, these reforms may check states' abilities to coerce consent by reducing the number of opportunities for the state to seek consent. Indeed, in some jurisdictions, these limits have reduced the number of consent searches in criminal investigations.[328]

That same decrease may not by duplicated in family regulation investigations. Unlike police making pretextual stops, family regulation investigators almost always have *some* individualized suspicion when they seek parents' consent to a search. Their investigations stem from reports to states' central registers.[329] Though reports may not furnish probable cause,[330] they may furnish a lower quantum of individualized suspicion of child maltreatment. Add in narratives assuming the deficiency of race–class subjugated parents,[331] family regulation system norms labeling noncompliance as evidence of risk,[332] and broad, vague definitions of

325. See supra note 320 and accompanying text (collecting similar criminal investigation reforms).

326. See Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

327. See Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 11–12) (discussing how concerns about coercion and racial profiling have motivated reform efforts).

328. See id. (manuscript at 12–14) (summarizing data from California, New Jersey, New Orleans, North Carolina, and Rhode Island).

329. See supra section I.A (describing the trajectory of family regulation investigations).

330. See supra note 231 and accompanying text.

331. See Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1486 (2012) (arguing that the regulation of race–class subjugated parents is powered by the state's distrust of marginalized parents).

332. See supra section II.A.1 (describing pressures to comply with investigations).

"neglect,"[333] and it is plausible that family regulation investigators could almost always claim individualized suspicion to believe there is evidence of maltreatment in a family's home.[334] This would authorize investigators to seek consent, then search, in virtually all investigations.

2. *Measuring the Success of Consent Reforms.* — The question, then, is how we measure the success of these reforms—and here the framing of the problem matters. If we conceive of the problem with consent searches to be the failure of constitutional consent doctrine to reach all forms of coercion, then success should be measured by whether the reforms reduce the number of searches justified by consent extracted through coercion. Within this framing, the measure of success is not whether reforms reduce the total number of searches. Thus, a reform that maintains the current scale and scope of surveillance could still be considered a success.

To illustrate, consider a jurisdiction that requires a home search for every investigation, as most do.[335] Now, imagine that jurisdiction enacts a reform requiring investigators to inform all parents of their right to refuse consent. Experience teaches that upwards of 90% of parents under investigation will consent to a search, even after they are informed of that right to refuse.[336] In this scenario, 90% of families will still be subjected to home searches. But so long as warnings adequately correct for coercion, then the still-high number of home searches is no longer a problem. Granted, this is an unlikely premise, as there are plenty of reasons to believe that warnings do not effectively correct for coercion.[337] But the point is this: If the problem is that consent is too often coerced, then the solution is to make warnings more effective or to find other ways to shift the power dynamic between state actors and individuals, *not* to reduce the rate of searches. In a similar vein, in this framing, the success of reforms requiring individualized suspicion does not depend on whether they reduce the number of home searches but on whether they reduce the number of parents subjected to coercive requests for consent.

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333. See supra notes 86, 231 and accompanying text.

334. This is not the only formulation of *what* investigators would need to have individual suspicion of, see, e.g., N.Y. Fam. Ct. Act § 1034 (McKinney 2025) (requiring probable cause that a maltreated child is in the home for a court order authorizing home entry), but this is used as a stand-in for the general point that hotline reports may furnish individualized suspicion regardless of the precise formulation.

335. See supra note 93 (describing blanket search requirements).

336. See Weisburd, Criminal Procedure Without Consent, supra note 27 (manuscript at 13) (noting that in criminal investigations in New York City, "[d]espite being told that they had the right to refuse a consent search," 90% of Black people and 94% of white people complied with consent search requests).

337. See, e.g., Leong & Suyeishi, supra note 320, at 781 (collecting cases that found signed consent forms insufficient); Nila Bala, Fulfilling the Promise of Civil *Miranda* 3 (2024) (unpublished manuscript) (on file with the *Columbia Law Review*) (presenting "a taxonomy of three distinct categories of shortcomings associated with civil Miranda warnings: (1) inherent limitations of such warnings, (2) doctrinal deficiencies, and (3) shortcomings arising from the multiple interests implicated by a single warning").

To take one more example, imagine that a jurisdiction outright bans consent as a justification for family regulation searches. In this world, if investigators wanted to search homes, they would need to claim exigent circumstances or obtain a warrant.[338] In a world with limitless resources, investigators might seek a warrant for every investigation for which there is no exigency.[339] Judges would likely issue warrants in almost all cases.[340] The number of total searches would hardly change. But the number of *consent* searches—and more specifically, searches where consent was extracted through coercion outside the reach of constitutional consent doctrine—would be zero. Under a consent paradigm, such an outcome to this reform would constitute a success.

This outcome is plainly unsatisfying. Many critics of consent searches object to any regime that allows for mass state surveillance of race–class subjugated families, whether that surveillance is justified by consent or some other means.[341] And needless oversurveillance hurts children, regardless of its legality.[342] Framing solutions around consent, though,

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338. See Florida v. Jardines, 569 U.S. 1, 6 (2013); Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (per curiam) ("[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.").

339. But see supra note 279 and accompanying text (describing resource constraints that would likely serve to limit requests for warrants in family regulation investigations).

340. See William J. Stuntz, Local Policing After the Terror, 111 Yale L.J. 2137, 2183 n.142 (2002) (recounting the "rubber-stamp[ing]" of warrants in criminal cases).

341. See, e.g., Devon W. Carbado, Unreasonable: Black Lives, Police Power, and the Fourth Amendment 32 (2022) ("Black people experience the Fourth Amendment as a system of surveillance, social control, and violence."); Carbado, (E)racing the Fourth Amendment, supra note 26, at 969 ("[P]eople of color are more likely than whites to experience the Fourth Amendment as a technology of surveillance rather than as a constitutional guardian of property, liberty, and privacy."); Morgan, Disability's Fourth Amendment, supra note 26, at 495 ("Fourth Amendment doctrine both fails to adequately protect disabled people and reinforces a 'normative bodymind' by rendering vulnerable to police surveillance, suspicion, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm." (footnote omitted)); Jamelia Morgan, Responding to Abolition Anxieties: A Roadmap for Legal Analysis, 120 Mich. L. Rev. 1199, 1224 (2022) (book review) (describing a vision that is "radically committed to addressing the harms stemming from entrenched systems of surveillance, policing, and punishment"); Weisburd, Sentenced to Surveillance, supra note 306, at 774 (calling for limits to both consent as a legal basis for electronic surveillance and to the use of electronic surveillance as a standard condition of supervision). This position is, of course, not universal. See Capers, The Good Citizen, supra note 25, at 653 (explaining that the Supreme Court's criminal procedure jurisprudence has developed the concept of a "good citizen" as one who is willing to aid the police, waives their right to silence, and welcomes police surveillance); I. Bennett Capers, Crime, Surveillance, and Communities, 40 Fordham Urb. L.J. 959, 960 (2013) ("Although my argument is one for regulation, I am in fact in favor of more surveillance, not less.").

342. See supra section I.A (noting that the current scope of surveillance does not seem to increase child safety in the aggregate); supra section I.B (describing harms to children from searches).

risks focusing on reforms that shore up process—and legitimize carceral systems—without reducing surveillance.[343]

That does not mean that reforms aimed at consent are pointless. First, they might yet reduce the total number of home searches. Some parents advised of their right to refuse will exercise it;[344] investigators will not always have sufficient individualized suspicion to seek consent; and if a sweeping ban on consent as a legal justification were enacted, real-world resource constraints would prevent investigators from seeking a warrant for every investigation.[345]

Second, campaigns to implement such reforms can be powerful organizing tools for parent-advocates and can increase awareness of family regulation as a carceral system. That is, consent reforms may be non-reformist reforms that bridge short-term goals and long-term horizons for change.[346] In New York City, for example, the campaign for a "Family *Miranda*"—a law requiring family regulation agencies to advise parents of their rights at the outset of investigations—has galvanized parents' rights activists and energized a nascent movement that is also organizing for other legislative change.[347] Perhaps the practical impact of the Family *Miranda* movement is not immediately reducing family surveillance so much as it is building capacity for a sustained movement re-envisioning

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343. See supra note 302 (collecting critiques linking process-oriented reforms to legitimization).

344. See Sommers & Bohns, supra note 25, at 1994 (indicating that the provision of a prior notification explaining that one's failure to comply with a specific request will have no negative consequences resulted in slightly decreased compliance, but not to a statistically significant degree).

345. See supra note 279 and accompanying text.

346. See Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 Yale L.J. 2497, 2510 (2023) (arguing that using non-reformist reforms as a heuristic "requires engaging with systems as they are, allows one to hold in view bold and radical horizons, and facilitates the identification of strategic battles that might serve as a bridge through popular agitation").

347. See Press Release, Brooklyn Def. Servs., Parents, Advocates, and Elected Officials Call on New York Lawmakers to Enact Policies Rooted in Equity, Support, and Empowerment for Families (May 15, 2024), https://bds.org/assets/files/5_15-Family-Advocacy-Day-Press-Release.pdf [https://perma.cc/2XPF-LGU8] (discussing advocacy efforts for four pieces of legislation "that aim to shrink the pathways through which families are funneled into the family policing system . . . and ensure that families currently navigating this system are treated with dignity and respect"); see also Zach Williams, Outraged NY Parent Advocates Demand Albany Pass a '*Miranda* Rights' Bill for Child Protective Services Before Questioning, N.Y. Post (May 26, 2023), https://nypost.com/2023/05/26/parent-advocates-call-for-albany-to-pass-miranda-rights-bill-for-child-welfare-cases/ [https://perma.cc/TUX7-PZCU] ("Outraged parents are calling on state lawmakers to do something about New York City targeting their families without informing them of their rights during child welfare investigations."); Parent Legislative Action Network (@plan.coalition), Instagram, https://www.instagram.com/plan.coalition/ [https://perma.cc/JR2G-88D6] (last visited Jan. 19, 2025) (describing the Parent Legislative Action Network as "[a] coalition engaging in legislative, judicial, and media advocacy to end the harms of the family policing system").

how society provisions for child welfare without relying on carceral logics. It is not for me, as a legal academic, to direct this movement or to critique it. Instead, this Article aims to "describ[e] the stakes and co-constitute the terrain of the struggle" with "those who are transforming their own political and legal consciousness through participation in grassroots social movement organizations."[348]

That raises the third and perhaps most important point. Family regulation home searches are unlikely to disappear entirely in the near future, and efforts to reduce the frequency and potency of coerced consent to searches will redound to the immediate benefit of families affected by family regulation.[349] That may be particularly so if *consent* reforms are coupled with *search* reforms.[350]

These benefits aside, if we frame the problem with family regulation home searches not around the nature or validity of consent but around the searches themselves, then reforms making consent more knowing or making consent less powerful will not solve it.

B. *Framing Searches as the Problem*

Once we frame the problem around searches, the question becomes how to reduce surveillance in families' homes: how to get eyes out of the home. After briefly describing the political viability of reforms disrupting family surveillance, this section describes at a high level two categories of reforms that legislatures could enact to limit family surveillance. Such interventions are described in detail elsewhere.[351] Any effort to fully abolish family surveillance is a generations-long project, one that requires increasing family support alongside decreasing family surveillance, and one that requires confronting racial capitalism and the carceral logics it engenders.[352] Here, the intent is to show that reforms can reduce family surveillance on a shorter timeline and that reforms to reduce family surveillance are distinct from reforms to limit or ban consent.

1. *Disrupting the Surveillance–Safety Link.* — The project of limiting home searches implicates the carceral logics at the heart of family surveillance. These logics link surveillance and child safety, positioning the watchful eye of the state as a necessary tool to protect race–class subjugated children from their own untrustworthy parents, and obscuring the role of

348. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 843–46 (2021).

349. See supra section II.C (describing how, given the scale of the family regulation system, constitutional litigation that affects only some families will still benefit thousands of families).

350. See infra notes 371–373 and accompanying text.

351. See Arons, Empty Promise, supra note 6, at 1121–34.

352. See Arons, Unintended Abolition, supra note 90, at 3 ("Abolition, writ large, is a decentralized, collectivist project. This grounding gives abolitionist movements strength, vitality, and flexibility, but can also make the meaning of 'abolition' feel opaque or ephemeral.").

the state itself in creating the conditions that harm child well-being.[353] Crucially, though, searches are more likely to harm children and their families than they are to help them.[354] This is true whether searches are justified by consent or by court order.[355] As Professor Tarek Ismail puts it, most family regulation home searches are "security theatre": Most family regulation home searches are searches for searches' sake, not searches for safety's sake.[356]

Reckoning with the carceral logics at the center of family regulation is neither a small nor granular task. But it is already underway in the academy, in the media, and in courts and legislatures around the country.[357] This reckoning is not, however, a necessary precondition to limiting family surveillance. Reduced workloads for family regulation investigators improve their capacity to identify and address child maltreatment.[358] Thus, less surveillance can also be sold as better surveillance.

Lastly, an expansive coalition of interest groups may agree that in-home surveillance of families is a problem.[359] Conservative and libertarian groups have seized on parents' rights as a cause in recent years.[360] Many of their projects—for example, limiting schools' ability to recognize children's gender identities or barring schools from teaching critical race theory[361]—hurt subjugated communities. But conservative parents' rights activists also support efforts to limit the reach of the family regulation

353. See supra section I.A.

354. See supra section I.B.

355. In listing here legal pathways for agencies into homes, searches justified by exigency are purposefully excluded, as these may in fact remove children from immediately dangerous situations. However, such searches occur in only a small percentage of investigations. See supra notes 126–131 and accompanying text.

356. See Ismail, Security Theatre, supra note 160, at 8–9.

357. See supra notes 64–65 (collecting sources describing the family regulation system's carceral logics).

358. Raz, Unintended Consequences, supra note 92, at 2 ("Most saliently, mechanisms to increase reporting do not necessarily include increased funding or additional personnel dedicated to children's services. Accordingly, increased reporting depletes resources that are already spread thin and diverts attention away from children who need it the most.").

359. Cynthia Godsoe offers a longer exploration, using an interest-convergence lens, of the surprising alliances pushing to reform the family regulation system. See Cynthia Godsoe, Racing and Erasing Parental Rights, 104 B.U. L. Rev. 2061, 2109–27 (2024) [hereinafter Godsoe, Racing and Erasing Parental Rights].

360. See Mary Ziegler, Maxine Eichner & Naomi Cahn, The New Law and Politics of Parental Rights, 123 Mich. L. Rev. (forthcoming 2025) (manuscript at 20–25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4552363 (on file with the *Columbia Law Review*) (describing the contemporary use of parental rights rhetoric to oppose issues such as critical race theory and LGBTQ+ recognition in schools).

361. Id. (manuscript at 3–4).

system.[362] In that project, their interests may converge with those of race–class subjugated communities most often subjected to home searches.[363]

2. *Examples of Search Reforms.* — This section describes two categories of reforms to illustrate how reforms can take aim at surveillance, not consent. The first set reduces the total number of investigations. A growing number of stakeholders—including family regulation agency personnel—have called upon jurisdictions to narrow the front door to the family regulation system and reduce the number of reports referred for investigation.[364] The specific mechanisms proposed vary, from narrowing legal definitions of neglect,[365] to reforming or abolishing mandated

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362. One study found that most Republicans and independents believe that "when balancing the government's interest in the well-being of children and parental authority that parental authority should be favored" and that "more religious and libertarian respondents[] lean more toward parental rights because of a skepticism of government intervention, [as] do a number of progressive Democrats." Naomi Schaefer Riley, Political Affiliation Has Limited Impact on Public's Perceptions of Child Welfare, Bipartisan Pol'y Ctr. (Jan. 24, 2024), https://bipartisanpolicy.org/blog/political-affiliation-has-limited-impact-on-publics-perceptions-of-child-welfare/ [https://perma.cc/49Y3-JUFR]; see also Robert T. Garrett, House Advances Bill Making It Harder for CPS to Remove Texas Youth From Their Families, Dall. Morning News (Mar. 31, 2021), https://www.dallasnews.com/news/politics/2021/03/31/house-advances-bill-making-it-harder-for-cps-to-remove-texas-youth-from-their-families/ [https://perma.cc/2ZLS-9LBW] (reporting the passage of a bill narrowing the definition of neglect by a margin of 143–4 in the Republican-controlled Texas House).

363. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) (arguing that change is possible when elite interests converge with those of advocacy groups seeking change); Raymond H. Brescia, Aligning the Stars: Institutional Convergence as Social Change, 92 Fordham L. Rev. 1243, 1251 (2024) (urging a model focused on convergence of *institutions*, rather than convergence of *interests*). Reforms grounded in interest convergence can also present serious risks to race–class subjugated communities, including "the obscuration of racialized and other harms, internal and external cooptation, and 'reformist reforms' which can re-entrench and legitimate harmful systems." Godsoe, Racing and Erasing Parental Rights, supra note 359, at 2114–15. For a longer discussion of those risks in the family regulation context, see id.

364. See Casey Fam. Programs Ariz., Safe Strong Supportive 16, http://goyff.az.gov/sites/default/files/meeting-documents/materials/casey_family_programs.pdf [https://perma.cc/S838-8TNL] (last visited Jan. 18, 2025) (using the phrase "[n]arrowing the [f]ront [d]oor" to describe decreasing family separation and shrinking the family regulation system's footprint); Brenda Donald, Leading Under a Cloud, *in* 1 Collaboration, Innovation, & Best Practices: Lessons and Advice From Leaders in Child Welfare 47, 50 (Christine James-Brown & Julie Springwater eds., 2019) (same); Narrowing the Front Door to NYC's Child Welfare System, N.Y.C. Narrowing the Front Door Work Grp., https://www.narrowingthefrontdoor.org/ [https://perma.cc/S2RY-6CJM] (last visited Mar. 2, 2025) (same).

365. Child Prot. Ombudsman of Colo., Interim Report: Mandatory Reporting Task Force 11 (2024), https://coloradocpo.org/wp-content/uploads/2024/01/Mandatory-Reporting-Task-Force-Interim-Report-2024.pdf [https://perma.cc/WWQ2-DSYV] ("Colorado's current definition of abuse and neglect is too broad and conflates several circumstances—such as poverty—with child abuse."); Mandated Reporting to Cmty. Supporting Task Force, Mandated Reporting to Community Supporting Task Force Subcommittees, https://www.chhs.ca.gov/wp-content/uploads/2023/10/MRCS-Task-Force-

reporting laws,[366] to increasing screening requirements for reports so that more are screened out.[367]

The second set modifies states' requirements for home searches within cases that are referred for investigations. Though most jurisdictions require home searches for every investigation—no matter the sort of allegation—a few jurisdictions eschew such blanket requirements.[368] These jurisdictions require home searches for certain categories of allegation—for instance, those that concern the condition of the home—or certain ages of children[369] or grant discretion to investigators in individual investigations to decide if a home search is necessary.[370]

If the problem of consent searches is *searches*, then the measure for success of these reforms is quite simple: Do they reduce the number of families subjected to home searches?[371] By this measure, reforms in both

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Subcommittees.pdf [https://perma.cc/2RSS-4A9Y] (listing "[n]arrowing the [l]egal [d]efinition of [n]eglect" as a subcommittee); Annie Sciacca, In Texas, New Laws and Policies Have Resulted in Far Fewer Children Removed by CPS From Their Homes, The Imprint (Apr. 23, 2024), https://imprintnews.org/top-stories/texas-policies-fewer-foster-care-removals/248935 [https://perma.cc/B63K-7VBM] (summarizing the dramatic drop in the number of Texas children placed in foster care after Texas narrowed of its definition of child neglect).

366. See, e.g., Kristin Jones, States Find a Downside to Mandatory Reporting Laws Meant to Protect Children, NPR (Apr. 25, 2024), https://www.npr.org/sections/health-shots/2024/04/25/1247021109/states-find-a-downside-to-mandatory-reporting-laws-meant-to-protect-children [https://perma.cc/L3WC-4NVT]; Mandatory Reporting Is Not Neutral, https://www.mandatoryreportingisnotneutral.com/ [https://perma.cc/7QLP-R4DP] (last visited Mar. 2, 2025).

367. See Jeremy Loudenback, More States Seek to Curb Anonymous CPS Reports Against Parents, The Imprint (Nov. 7, 2023), https://imprintnews.org/top-stories/more-states-seek-to-curb-anonymous-cps-reports-against-parents/245884 [https://perma.cc/K5Y2-HJSR] (describing successful efforts to ban anonymous reports in California and Texas and nascent efforts to do the same in Colorado, Kentucky, Mississippi, Montana, New Hampshire, and New York).

368. See supra note 94 and accompanying text (summarizing state requirements for searches).

369. Ill. Dep't of Child & Fam. Servs., Reports of Child Abuse and Neglect, supra note 94 at 5–8 (outlining procedures for Ill. Admin Code. tit. 89, § 300.50 that require home searches only for reports of inadequate shelter or environmental neglect); Tex. Dep't of Fam. & Protective Servs., Child Protective Services Handbook, supra note 94 (requiring a home search under section 2250 when the child in the report is age five or younger or the allegations involve the home's conditions).

370. Tex. Dep't of Fam. & Protective Servs., Child Protective Services Handbook, supra note 94 (requiring a home search under section 2250 in any case in which "[o]ther circumstances in the case make a home visit necessary").

371. This Article's thinking about how to measure the success of reforms is shaped and inspired by the heuristic of nonreformist reforms—and particularly by grassroots organizers' deployment of this heuristic to take measure of reforms inside and outside the prison abolition context. For instance, Critical Resistance, a grassroots group working to abolish prisons, publishes a one-page handout that asks straightforward clarifying questions like, "Does this [reform] reduce the number of people imprisoned, under surveillance, or under other forms of state control?" Critical Resistance, Reformist Reforms vs. Abolitionist Steps to End Imprisonment (2021), https://criticalresistance.org/wp-content/uploads/

categories described above succeed. Reducing the number of investigations would limit the number of home searches, even if legislatures leave intact requirements that each investigation includes a home search and leave consent requirements unchanged. If there are fewer investigations, then investigators will knock on fewer front doors and seek to search fewer homes.[372] Removing blanket requirements for home searches within investigations could likewise reduce the number of times investigators seek to enter homes—though here, the devil is in the details, as the removal of a categorical requirement accompanied by an increase in investigator discretion could result in maintenance of the status quo.[373]

Search reforms need not be exclusive of consent reforms. Instead, the two can work in tandem to link short-term and long-term goals and to amplify one another.[374] If, for example, jurisdictions narrow definitions of neglect *and* require that investigators have reasonable suspicion that evidence of neglect will be found in the home before seeking consent, then fewer reports will give rise to that suspicion.[375] More subtly, these

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2021/08/CR_abolitionistsсteps_antiexpansion_2021_eng.pdf [https://perma.cc/YMW6-XXCJ]; see also Detention Watch Network, Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms P2 (2022), https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf [https://perma.cc/X7EB-H4YG] (asking, in the context of the movement to end immigration detention, whether reforms "[r]educe the scale of detention and surveillance").

372. See supra sections I.A, I.C (describing mandates for searches in every investigation and the prevalence of consent as a justification for searches).

373. For instance, Texas requires home searches for all investigations involving children ages five or under, when the allegations involve the condition of the home, or when "[o]ther circumstances" make a home search "necessary." Tex. Dep't of Fam. & Protective, Child Protective Services Handbook, supra note 95. In Harris County, Texas, more than 40% of investigations involved children aged five or under. See CPI Completed Investigations: Victims, Tex. Dep't of Fam. & Protective Servs., https://www.dfps.texas.gov/About_DFPS/Data_Book/Child_Protective_Investigations/Investigations/Victims.asp [https://perma.cc/N5L8-V2AW] (last visited Feb. 22, 2025) (showing a total of 14,779 confirmed and unconfirmed victims within Harris County with ages 5 or below, compared to a total of 33,419 victims within Harris County across all ages). It is harder to quantify the number of investigations with allegations involving the condition of the home, and harder still to quantify "other circumstances." But the number of investigations involving young children, standing alone, helps to explain why in a county *without* a blanket search requirement, 75% of investigations include a home entry. Tex. Dep't of Fam. & Protective Servs., Fiscal Year 2024 Data, supra note 95 (containing data for cases within Harris County initiated between September 1, 2023, and July 31, 2024, and including data on whether each case involved a home entry); see also Jack Glaser, Disrupting the Effects of Implicit Bias: The Case of Discretion & Policing, 153 Dædalus, 151, 160 (2024) (describing how actions allowing for higher discretion are more likely to be subject to bias-driven errors).

374. See Nick Pinto, Bailing Out, New Republic (Apr. 6, 2020), https://newrepublic.com/article/156823/limits-money-bail-fund-criminal-justice-reform [https://perma.cc/SSV9-UWCJ] (explaining Mariame Kaba's argument that short-term goals like ending cash bail must be coupled with the long-term goal of ending pretrial detention in order to avoid unintended consequences that increase incarceration in the aggregate).

375. See supra section III.A (describing reforms requiring suspicion in addition to consent).

reforms could also address the problem of consent itself. For instance, one of the tools that investigators use to coerce consent is the claim that searches are "required"—a claim that finds power in the fact that so many jurisdictions *do* require that investigators conduct a home search for every investigation.[376] What investigators do not share, of course, is that there is no requirement for parents to *consent* to a home search in every investigation.[377] By removing requirements for home searches, jurisdictions would reduce the frequency of these kinds of elisions. Reforms that roll back blanket requirements for searches could render those kinds of misrepresentations less likely and less powerful, thus reducing coercion.

Most fundamentally, reforms that limit or remove search requirements call on us to question the carceral logics of the family regulation system. They disrupt the presumption that we need "eyes in the home" to keep children safe.[378] And they disrupt the presumption that we need eyes on race–class subjugated parents to keep their children safe from them, thus maintaining these families' precarity and our society's current racial capitalist structures.[379]

This Part does not present an exhaustive set of solutions to reduce home searches or to rectify the coercive forces that lead to consent. Rather, it explicates the sorts of reforms that flow from two possible frames for the problem of family regulation consent searches—one focused on consent, one focused on searches. In doing so, it shows that consent reforms risk leaving the family surveillance apparatus intact and legitimizing it. In the family regulation system, the criminal legal system, and across the carceral web, to reduce surveillance of race–class subjugated communities, we should frame the consent search problem as one of searches, not one of consent.

CONCLUSION

Every minute of every day, state agents are searching a family's home somewhere in the United States. Often, parents consent to these searches. Often, their consent to the search is extracted through coercion. Sometimes, the coercion is so overt as to render the search unconstitutional. Other times, the coercion is of the sort that the Supreme Court has blessed. Rarely do these searches make children safer. But the state continues on in its project of searching—and controlling and

376. See Ismail, Security Theatre, supra note 160, at 5 (noting that investigators often believe the false representations they make to parents regarding their legal authority are true); supra section I.A (describing statutory requirements).

377. See supra note 164.

378. See supra section I.A (describing the "eyes in the home" mentality).

379. See supra section I.A (describing how carceral logics focus on the individual failings of race–class subjugated parents and obscure societal responsibility for the structures driving these parents' struggles).

subjugating—poor, Black, and brown families. Searches, not safety, are the point.

This Article has shown how searches harm families and communities, and it has shown that the unconstitutionality of these searches is ripe for litigation. Above all, it has shown that just as searches are the point, searches are the problem. Consent matters, inasmuch as it justifies searches. But substitute any other legal justification for consent—a stricter form of consent, consent plus suspicion, a warrant or warrant exception in place of consent—and the search problem persists. This Article reveals that across the carceral state this problem will not be solved by reforming or limiting consent; rather, it is necessary to reform and limit searches.