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Time and Punishment

ABSTRACT. Every three minutes, state agents remove a child from their home. Once a family is separated, impacted parents are up against a quickly approaching deadline—permanent legal separation looms at the end. In fact, impacted parents navigate three interrelated temporal dimensions: the race to permanent legal separation through the termination of parental rights, the time-consuming process of having to prove that they are fit parents, and the possibility that tomorrow, the state's concerns will drastically change. The family regulation system—the system that has the power to separate families in this way—has been the subject of sustained critique by both academics and directly impacted families. One major critique is that instead of helping children and their parents, the system further marginalizes them. This Feature introduces an under-explored layer of marginalization in the family regulation system: time.

This Feature argues that the construction of time in the system is not merely a benign force but instead profoundly shapes the family regulation process. Conceptions of time that are neutral fail to account for the ways temporal marginalization fixes parents in time, devalues time as a resource, reproduces social stratification, and privileges the state while disadvantaging families already at the margins. This Feature builds on an emerging literature that critically examines time in legal systems. Drawing on multidisciplinary frameworks that conceptualize the relationship between time and power, this Feature provides an aerial view of the abstract problem of regulating parent-child relationships through a temporal frame, as well as the concrete legal timelines, procedures, and court processes that combine to exacerbate an already-conflictual relationship between the state and marginalized families.

Time and Punishment is the first article to bring the rich conversation on time and power to the family regulation context. This Feature makes two central contributions. One, it identifies and discusses three temporal dimensions in the system—constriction, stretching, and indeterminacy—and addresses their combined impacts, as well as the legal frameworks that underlie them. Second, it brings two sets of literature into conversation: family regulation scholarship and multidisciplinary research on time, power, and marginalization. In this way, it offers an epistemic intervention that complicates managerial conceptions of time and offers insights that are fruitful beyond the family regulation context. Ultimately, this Feature concludes that taking account of time as experienced by impacted families is one step toward fully understanding and responding to temporal marginalization.

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FEATURE CONTENTS

INTRODUCTION	539
I. SITUATING TIME AND MARGINALIZATION IN THE FAMILY REGULATION SYSTEM	548
A. Beginning Family Regulation: Investigatory Stage	549
B. Continuing Family Regulation: Pretrial and Trial Stages	555
C. Permanency in Family Regulation: Posttrial Stage	558
II. CONCEPTUALIZING TEMPORAL MARGINALIZATION	559
A. A Critical Analysis of Time	560
B. Time and Managerial Justice: Performance and Procedural Hassle	563
III. SITUATING TEMPORAL MARGINALIZATION IN THE FAMILY REGULATION SYSTEM	566
A. Constriction	566
B. Stretching	576
1. Family Separation and Protracted Hearings	576
2. Barriers to Services and Treatment	585
3. Prolonging Safety Checks and Clearances	587
C. Indeterminacy	590
D. Interplay of Temporal Dimensions	594
IV. IMPLICATIONS: RECLAIMING TIME	599
A. Prefacing the Implications of Temporal Marginalization	600
B. The Managerial Level: The Perils of Family Regulation Reform	601
C. The Epistemic Level: Time as Experienced	605
CONCLUSION	611
CODA	612

INTRODUCTION

“Counsel, turn around. What do you see there?
Look at the clock! Where is your client?”¹

In 2019, advocate and parent Elizabeth Brico described the impact of being separated from her daughters by the State of Florida. As her trial for the permanent termination of her parental rights approached, she reflected on the changing role of time in her life²:

My clock is up in late August. At the beginning of last year, my life was a mess of sleepless nights, playdates, toilet training, and seemingly endless house chores. There never seemed to be enough time in the day

Now, my life is a series of endless, empty hours broken only by the routine of my court-mandated services. Instead of fixing breakfast and coaching my girls through brushing their teeth and dressing for school, I drink coffee alone before biking through the heat of Florida to three and a half hours of intensive outpatient therapy, five days a week. I am not greeted in the afternoon by my daughters, but with texts from a faceless social worker directing me to take random drug tests. My days are shaped by paperwork, mandates, and a persistent sense of longing Every time I see my daughters now, something has changed: a favorite color, a hair style, a shoe size. I am missing everything, and I have no idea when or if my real life will begin again.³

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1. This is what a judge said to me one morning in a New York City courtroom. At the time, I was a public defender representing parents in neglect and abuse proceedings. This case was the first scheduled appearance of the day. For my client, it was one of the final appearances on the case and was scheduled only for a status update. The parent had been under court and family regulation agency supervision for many months. The supervising agency had no concerns. The parent had completed the programs in which the agency asked him to participate and had maintained a close relationship with his children all throughout the proceedings. In the preceding months, he had appeared in court several times and had waited in court for hours. Being there meant missing work and losing wages. That morning, he was late to court for the first time.
 2. As this Feature will discuss in more detail, parents have a limited amount of time to regain custody of their children once they are removed by the state. See *infra* Section III.A.
 3. Elizabeth Brico, *How Child Protective Services Can Trap the Parents They’re Supposed to Help*, TALKPOVERTY (July 16, 2019), <https://talkpoverty.org/2019/07/16/child-protective-services-trap-parents/index.html> [<https://perma.cc/8KKZ-C29L>].

Brico goes on to describe the hurdles and setbacks she faced leading up to this profound sense of temporal distortion. She describes the lack of support and the pressures of having to act quickly to avoid permanently losing her children, all while waiting months for treatment referrals. With her mental health declining after the removal of her children, she eventually “began to believe that . . . [she] was fighting an unwinnable battle”⁴ against the family regulation system.⁵ Ticking clocks and time pressure alongside procedural languor, changing expectations placed on parents, and the permanent consequences of decisions made in a snap: the moment of family separation marks the compression of the past, present, and future.

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This Feature discusses multiple aspects of time and family regulation: the management of time through timelines and deadlines, time as a vehicle for social stratification or a medium of subordination, and time as experienced by those navigating the system.

Timelines and deadlines shape all aspects of the legal process. This is true across legal systems. Defense attorneys may use time strategically to navigate and mitigate punitive immigration sanctions.⁶ In criminal court, judges regularly issue bench warrants for people who fail to appear at hearings scheduled for their cases.⁷ In housing court, a tenant’s failure to appear for the scheduled court date can result in their eviction.⁸ Temporal inequities appear at all stages

4. *Id.*

5. This Feature uses the term “family regulation system” when referring to the child welfare system. For an explanation of this choice, see Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/T2PX-MQ4S>]. See also Emma Williams, ‘Family Regulation,’ Not ‘Child Welfare’: Abolition Starts with Changing Our Language, IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586> [<https://perma.cc/6BBG-37F6>] (advocating for the use of the term “family regulation system” to reflect the practical impacts of state intervention on the lives of marginalized families).

6. Christopher Levesque, Kimberly Horner & Linus Chan, *Process as Suffering: How U.S. Immigration Court Process and Culture Prevent Substantive Justice*, 86 ALB. L. REV. 471, 472 (2023).

7. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1454-63 (2009) (discussing the proliferation of punishment for failure to appear in court); Daniel Bernal, Note, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547, 552-53 (2017) (discussing the criminalization of nonappearance in criminal courts).

8. Rasheedah Phillips, *Race Against Time: Afrofuturism and Our Liberated Housing Futures*, 9 CRITICAL ANALYSIS L. 16, 18 (2022) (discussing that in Philadelphia, half of all legal evictions are based on a default judgment entered against a tenant and observing that “default

of the court process and are perhaps most prominent in low-level courts designed for the mass disposal of cases and the management and punishment of individuals.⁹ Legal scholarship has long criticized lower criminal courts as engaging in the “undignified offhand disposition” of cases against low-income people.¹⁰ Others have argued that state civil courts subordinate racially and economically marginalized litigants through “racialized extraction and dispossession . . . facilitated and justified through racialized devaluation.”¹¹ The devaluing of already-marginalized people’s time is one way that racial hierarchies are reproduced.¹² Traveling to court for appearances can take hours. Once in the courthouse, people are frequently expected to wait hours for appearances that merely last minutes. Regular trips to and from the courthouse are financially burdensome for those already living in poverty. The financial burden is exacerbated when attending court dates means losing a full day of work every few weeks, putting employment at risk, having to pull from scarce resources to organize childcare, or missing public-assistance appointments.

As Professor Renisa Mawani writes: “[L]aw’s time has too often been assumed rather than problematized.”¹³ Indeed, until recently, the construction of time in and through legal systems has received little sustained attention in legal

judgments are often a result of tenants showing up late to court due to conflicting demands on their time”).

9. Professor Issa Kohler-Hausmann examines how lower-level criminal courts engage in the project of managerial justice in processing large volumes of criminal cases with very limited resources. See generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018) (describing this practice of managerial justice). Professor Malcolm M. Feeley has described how the pretrial process itself becomes the punishment for those ensnared in the criminal process. See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (describing the punitive nature of the pretrial process).
10. ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA 190* (1930); see also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 586 & n.181 (1997) (discussing public-order laws and describing how scholars have viewed lower courts as focusing on (often uncounseled) defendants’ statuses as “vagrant[s], drunkard[s], or common prostitute[s],” rather than their alleged actions).
11. Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1249 (2022); see also Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 349-50 (2008) (discussing how racial inequality limits access to justice).
12. Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1636-37 (1989).
13. Renisa Mawani, *Law as Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65, 69 (2014).

scholarship.¹⁴ Today, the study of legal time and its impact on Black and brown people is receiving increased attention. A few recent articles focus on the relationship between race, time, and the law across subject areas.¹⁵ A body of literature draws on critical theories, postcolonial studies, and Afrofuturism¹⁶ to examine the relationship between power, law, and time. What characterizes this work is that it goes beyond the mere observation that time impacts the analysis and practice of the law.¹⁷ Instead, these scholars observe that time is “integral to the . . . epistemology of law” and examine the ways dominant temporalities perpetuate subordination.¹⁸

In adding to this conversation, this Feature identifies and conceptualizes time as a marginalizing force in the family regulation system. This Feature identifies three temporal dimensions in the family regulation system: *constriction*, *stretching*, and *indeterminacy*. Impacted parents navigate (1) constriction in the race against permanent legal separation; (2) stretching in the slow process of having to prove themselves to the state; and (3) indeterminacy in the ever-present possibility that the state’s concerns will no longer focus on a specific moment in time—the moment that gave rise to the underlying allegations—and instead, could change drastically during the course of the case. While these temporal dimensions may appear in tension with one another, they are mutually reinforcing, and families experience their effects concurrently. This Feature examines how their interplay exacerbates an already-conflictual

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14. However, Professor Carol J. Greenhouse has long problematized the privileging of linear conceptions of time and its reproduction by institutions that “affect people’s existential realities.” See CAROL J. GREENHOUSE, *A MOMENT’S NOTICE: TIME POLITICS ACROSS CULTURES* 175-210 (1996) (arguing that time is a “negotiable,” socially constructed concept); Greenhouse, *supra* note 12, at 1636-38; PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 84-90 (2001).
 15. See, e.g., Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1631-32 (2023); Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. 195, 237-51 (2021).
 16. See, e.g., Philip Butler, *Introduction* to *CRITICAL BLACK FUTURES: SPECULATIVE THEORIES AND EXPLORATION* 1, 5-7 (Philip Butler ed., 2021) (discussing multiple definitions of Afrofuturism); Mark Dery, *Black to the Future: Interviews with Samuel R. Delany, Greg Tate, and Tricia Rose*, in *FLAME WARS: THE DISCOURSE OF CYBERCULTURE* 179, 180 (Mark Dery ed., 1994) (“Speculative fiction that treats African-American themes and addresses African-American concerns in the context of twentieth-century technoculture . . . might, for want of a better term, be called ‘Afrofuturism.’”).
 17. This, of course, has received sustained attention by legal academics. See, e.g., Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663, 663-64 (2001) (“[Time] enters every part of how we practice, analyze, project, and balance legal arguments; it is integral to our daily schedule, our client appointments, our classroom teaching time, our court dates, our tickler files, our view of our careers.”).
 18. See, e.g., Mawani, *supra* note 13, at 71.

relationship between the state and marginalized parents. Once a family is separated, the parents are up against a quickly approaching deadline—permanent legal separation looms on the other end. The longer the separation, the more likely that the state will attempt to sever the legal child-parent relationship permanently. This Feature argues that neutral conceptions of time fail to account for how the construction of time in the system fixes parents in time,¹⁹ devalues time as a resource, reproduces social stratification, and privileges the state while disadvantaging families. This is not to say that temporal marginalization is the product of individual actors' conscious decision-making or intent. As Professor Kelley Fong puts it: “[T]hrough often well-meaning people trying to help, governments perpetuate marginality and reinforce existing inequalities.”²⁰

So far, most scholarship in the field focuses on how deadlines speed up the permanent separation of families.²¹ For example, several scholars and advocates have critiqued how federal legislation paved the way to fast-track severance of legal parent-child relationships.²² Indeed, after the enactment of the Adoption and Safe Families Act (ASFA) in 1997, permanent legal separation through the termination of parental rights increased.²³ And, as Professor Chris Gottlieb

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19. “Fixing parents in time” points to two phenomena: a parent’s experience of feeling fixed or stuck in a particular moment in time (for example, the moment of family separation), and the family regulation system’s reliance on the initial allegations as the lens through which the parent-child relationship is understood. Professor Peggy Cooper Davis and Gautam Barua have discussed the latter as the system’s “sequentiality effect.” See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 146 (1995) (observing that initial placement decisions in family regulation proceedings are “self-strengthening, so that the decision in the final stage of the case is more likely to go in the direction of the initial decision”).
 20. KELLEY FONG, *INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES* 4 (2023).
 21. *But see* Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL’Y & L. 546, 547 (2005).
 22. *See, e.g.*, Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins & Kelis Houston, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 877-78 (2021); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 715 (2021); Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 319-23 (2023).
 23. Christopher Wildeman, Frank R. Edwards & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016*, 25 CHILD MALTREATMENT 32, 35 (2020).

points out, so did the number of legal orphans²⁴—children who have lost their legal relationship with their parents and are not adopted.²⁵ ASFA specifically encourages states to file termination petitions after a child has spent fifteen out of twenty-two months in the foster care system. States that give parents more time for family reunification risk losing federal funding. After the implementation of ASFA, the number of children each year who had their legal relationship with their parents terminated increased significantly.²⁶ This Feature examines how this constriction of time interacts with the surveillance of parents during the stretching of slow-moving phases of separation and adjudication, and how this relationship is complicated by the fact that the focus of the state is in constant flux. For example, a case that begins with allegations that a mother exposed her children to acts of domestic violence inflicted against her²⁷ may later focus on her own alleged marijuana use. This Feature surfaces how the interplay of constriction, stretching, and indeterminacy facilitates ongoing monitoring of current and future behavior and ultimately leads to the “slow death” of impacted families.²⁸

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24. Chris Gottlieb, *A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights*, 19 HARV. L. & POL'Y REV. 43, 62 (2024).
 25. Sharon McCully & Elizabeth Whitney Barnes, *Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 4-5 (Apr. 2013), https://www.ncjfcj.org/wp-content/uploads/2013/04/LOTAB_3_25_13_newcover_0.pdf [<https://perma.cc/K5PY-VE23>].
 26. See Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, IMPRINT (Nov. 28, 2018, 6:00 AM), <https://imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582> [<https://perma.cc/R5H3-ENES>]; Laura Radel & Emily Madden, *Freeing Children for Adoption Within the Adoption and Safe Families Act Timeline: Part 1—The Numbers*, U.S. DEP'T OF HEALTH & HUM. SERVS. 2-3 (Feb. 2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-1.pdf> [<https://perma.cc/4UFB-X4V4>] (showing that the number of adoptions increased rapidly in the years following the enactment of the Adoption and Safe Families Act (ASFA) and stating that termination of parental rights is a requirement for adoption).
 27. Survivors of intimate-partner violence can become the target of a family regulation investigation and court proceeding for “exposing” their children to intimate-partner violence. See S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1101 (2022); Adriana Kohler, *The Battered Mother's Struggle in New York: The Laws and Policies that Led to the Removal of Children from Their Abused Mothers Based on the Child's Exposure to Domestic Violence*, 13 U. PA. J.L. & SOC. CHANGE 243, 248-55 (2009-2010); Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 270-76.
 28. Professor Stephen Lee provides an overview of the “slow death” framework, its origins, its uses in a variety of legal fields, and its meaning for the separation of families in and by the

The family regulation system holds the unique power to separate families for both short and extended periods of time. In many states, family regulation agents can separate families without a court order.²⁹ Family court judges can order the removal or reunification of the family once a case is filed in court. From 2017 to 2021, between 200,000 and 270,000 children entered the foster care system each year.³⁰ A recent report by Human Rights Watch and the American Civil Liberties Union (ACLU) has called state-induced family separation a national crisis.³¹ The family regulation system intervenes predominantly in the lives of Black, Indigenous, and low-income families. According to the Human Rights Watch and ACLU report, Black children are almost twice as likely to experience a family regulation investigation compared to white children.³² They are also more likely to be separated from their families by the state.³³ Once removed from their families, Black children remain in the system longer.³⁴ Indigenous parents are up to four times more likely to have their children taken from them than non-Indigenous parents.³⁵

During often-protracted periods of separation, parents navigate other temporal dynamics that can impact their reunification efforts. Parents must engage in months-long programs to prove their parenting abilities long before the state must prove the parents neglected their child. They attend hours of supervised visitation with their child, often having to navigate not only their own work schedules but also an agency worker's capacity. The tension between the inflexible deadline for the termination of parental rights and the flexibility demanded of parents during the extended period of separation is exacerbated by the fact that allegations brought against parents are not static.

immigration system. See Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2327-35 (2019).

29. See *infra* Section I.B.

30. Child's Bureau, *The AFCARS Report: Preliminary FY 2021 Estimates as of June 28, 2022 - No. 29*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (Nov. 1, 2022) [hereinafter *AFCARS Report No. 29*], <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [https://perma.cc/5WL2-TTRN].

31. "If I Wasn't Poor, I Wouldn't Be Unfit": *The Family Separation Crisis in the US Child Welfare System*, HUM. RTS. WATCH AND AM. C.L. UNION 171 (Nov. 2022) [hereinafter "If I Wasn't Poor, I Wouldn't Be Unfit"], https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf [https://perma.cc/9LU4-ZSYN].

32. *Id.* at 59.

33. *Id.* at 71.

34. Keva M. Miller, Katharine Cahn & E. Roberto Orellana, *Dynamics that Contribute to Racial Disproportionality and Disparity: Perspectives from Child Welfare Professionals, Community Partners, and Families*, 34 CHILD. & YOUTH SERVS. REV. 2201, 2201 (2012).

35. "If I Wasn't Poor, I Wouldn't Be Unfit," *supra* note 31, at 44.

The erosion of familial bonds in and by the family regulation system occurs over time, at different speeds, and with varying outcomes. In some cases, this “slow death” takes the form of the actual destruction of familial bonds through the termination of parental rights. In other cases, a family is put under enormous pressure to comply with family regulation intervention. In either scenario, parents lose the ability to make day-to-day decisions for their family free of constant scrutiny. Family regulation intervention commences suddenly and often unexpectedly. Then, the slow journey through the system begins.

A word on methodology: Critical temporal perspectives and the managerial justice framework provide analytical tools for understanding the unique ways that time shapes the family regulation process. Scholars from a variety of disciplines have offered critical temporal perspectives concerned with how specific conceptions of time facilitate subordination.³⁶ Under the managerial justice framework, developed by Professor Issa Kohler-Hausmann, low-level criminal courts exert social control by sorting and regulating people over time. This orientation is less concerned with the adjudication of guilt or innocence and instead allows for performance testing.³⁷ Together, these frameworks shed light on how monitoring and scrutinizing marginalized families occur under pressures of constriction, are prolonged through stretching, and evolve over time in indeterminate proceedings. In other words, by drawing on both frameworks, time is made visible as a managerial tool. In applying these frameworks, this Feature sheds light on less well-marked forms of marginalization in the legal system.³⁸ It zooms in on an ostensibly benign phenomenon that deeply impacts the realities of today’s ongoing family-separation crisis. This Feature is one of the first works to draw on the rich discourse on time and marginalization in legal scholarship and the first to do so specifically in the family regulation context. As I have done in past work, I blend directly impacted parents’ narratives and practical experience with doctrinal analysis.³⁹ This approach is consistent with an emerging epistemic intervention in other legal conversations that cen-

36. See *infra* Section II.A.

37. See *infra* Section II.B.

38. For a discussion of less obvious forms of marginalization in legal systems, see, for example, Javier Auyero, *Chuck and Pierre at the Welfare Office*, 25 SOCIO. F. 851, 859 (2010) (“[W]aiting as an experience of domination allow[s] us to see other, less obvious, forms of engagement of the state with subaltern groups—such as those routine, ordinary ones that are at work in the welfare office.”). See also Daina Cheyenne Harvey, *A Quiet Suffering: Some Notes on the Sociology of Suffering*, 27 SOCIO. F. 527, 527–28 (2012) (noting the general lack of engagement with suffering in sociology, but identifying several works that resist this trend).

39. See Washington, *supra* note 27, at 1099–1102.

ters direct experience.⁴⁰ It is particularly fruitful in the family regulation context, where case law provides only limited information about the actual functioning of the system and confidentiality laws limit knowledge production.⁴¹ The focus on *time as experienced* is reflected throughout this Feature and informs its implications.

This Feature makes two central contributions. First, it identifies and discusses three temporal dimensions in the system and the legal frameworks that underlie them. This Feature's examination of the interplay of these dimensions significantly expands existing critiques in family regulation scholarship. Second, it brings two literatures into conversation: a growing body of critical family regulation scholarship and multidisciplinary research on time, power, and marginalization. Grounding an analysis within critical approaches to time reveals that time is not merely a variable that can be managed. Rather, our understanding of time is both socially constructed and constructs our realities.⁴²

40. See *infra* Part IV.

41. See Sarah H. Lorr, *Disabling Families*, 76 STAN. L. REV. 1255, 1285 n.145 (2024) (citing William B. Reingold, Jr., *Finding Utility in Unpublished Family Law Opinions*, 19 U. ST. THOMAS L.J. 607, 608 (2023)). There is a growing movement to draw on direct experiences in examining the family regulation system. See, e.g., Jeanette Vega-Brown & Tricia N. Stephens, *Still, We Rise: Lessons Learned from Lived Experiences in the Family Policing System*, 61 FAM. CT. REV. 304, 307-10 (2023) (highlighting firsthand accounts of experiences in family policing). By including direct experiences of marginalized families in this way, this Feature draws on a long history of critical intervention into mainstream knowledge production. Critical legal theory has a lengthy tradition of producing and amplifying counternarratives through storytelling; for examples of this tradition, see generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989), which discusses how storytelling can “shatter complacency and challenge the status quo”; Derrick Bell, *The Power of Narrative*, 23 LEGAL STUD. F. 315 (1999), which uses a racial parable as an example to highlight the power of storytelling; and Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197 (1995), which outlines the “sociology” of storytelling. Neo-slave narratives are another example of the long tradition of the production of marginalized stories against the grain of historical modes of knowing. For prominent examples and discussion of the use of neo-slave narratives, see generally Madhu Dubey, *Speculative Fictions of Slavery*, 82 AM. LITERATURE 779 (2010), which argues that neo-slave narratives' antihistorical approaches are intentional; ASHRAF H.A. RUSHDY, *NEO-SLAVE NARRATIVES: STUDIES IN THE SOCIAL LOGIC OF A LITERARY FORM* (1999), which describes the sociological context of the emergence of these narratives in the 1960s; and BERNARD W. BELL, *THE AFRO-AMERICAN NOVEL AND ITS TRADITION* (1987), which describes the use of neo-slave narratives in the African American literary tradition.

42. Greenhouse discusses both the construction of linear time at the expense of other conceptions and the constructive nature of linear time in the West. “Construction of time” here indicates that our dominant way of making sense of time is not the only “kind of time that is culturally available.” Greenhouse, *supra* note 12, at 1637.

Once we understand time as constructed, our focus shifts from time management to time as experienced. This Feature illustrates that intervening at the level of time not only allows us to attend to people's lived experiences, but also requires a thick and rich account of those experiences. Ultimately, this Feature concludes that attentiveness to time makes plain why front-end interventions that shift power, reduce harm, and avoid making it even harder to effect broader-scale change are most promising.⁴³ These kinds of interventions prevent the clock from ever beginning to tick.

This Feature proceeds in four Parts. Part I summarizes modes of marginalization commonly discussed in family regulation scholarship and provides an overview of the central stages of family regulation proceedings and the legal standards relevant to each stage. Part II introduces the theoretical frameworks underlying this Feature's analysis of time, power, and marginalization. Part III maps and analyzes what I call the three temporal dimensions in the family regulation system: *constriction*, *stretching*, and *indeterminacy*. It discusses how these dimensions are both in tension with one another and mutually reinforcing. Drawing on the theoretical frameworks introduced in Part II, this Part provides an aerial view of both the abstract problem of regulating parent-child relationships through a temporal frame, and the concrete problem of legal timelines, procedures, and court processes that combine to exacerbate an already-conflictual relationship between the state and marginalized families. Part IV discusses the larger implications of the Feature on both a managerial and an epistemic level. It concludes that taking account of experience complicates managerial conceptions of time and constitutes one step towards fully understanding the impact of temporal marginalization. These lessons are relevant beyond the family regulation system and ought to inform our understanding of other legal systems and their impact on marginalized people more broadly.

I. SITUATING TIME AND MARGINALIZATION IN THE FAMILY REGULATION SYSTEM

To understand how time acts as a marginalizing force, it is necessary first to summarize the various stages of a family regulation case. For simplicity's sake,

43. These kinds of solutions are also discussed as ways to narrow the "front door" to the family regulation system. Changes to mandated-reporting laws and practices, a *Miranda* right for the family regulation system, and substantive changes to neglect laws are currently discussed changes that fall under the umbrella of front-end interventions. See, e.g., Cynthia Godsoe, *Racing and Erasing Parental Rights*, 104 B.U. L. REV. (forthcoming 2024) (manuscript at 29) (on file with author).

this Part outlines three stages: the investigatory, the pretrial, and the posttrial stages.⁴⁴

This Part situates these stages within the scholarly debate on marginality and the family regulation system more broadly.⁴⁵ Scholars have identified several modes of marginalization in the family regulation system. These modes can be characterized as falling into three overlapping categories: the targeting of already-disadvantaged families, the further disadvantaging of certain families once they are ensnared in the system, and the perpetual placing of some families at the margins through “concealment and constraint.”⁴⁶ Understanding these modes of marginalization clarifies that time does not operate in isolation from other forms of marginalization that are produced and reinforced by the family regulation system. The first mode provides context about *who* is most likely to be impacted by temporal marginalization. The other two modes help situate time as an additional layer of marginalization.

A. *Beginning Family Regulation: Investigatory Stage*

Every family regulation case begins with a call to the respective state maltreatment hotline. This call is then documented in the state’s central registry for child maltreatment,⁴⁷ resulting in millions of investigations every year.⁴⁸ As

44. While it is important to name and contextualize these stages of the process, this Feature will also challenge the dominance of linear conceptions of time.

45. Marginalization emerged as a sociological framework in the 1920s. See Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. SOCIO. 881, 892 (1928) (discussing the concept of “the marginal man,” a person at the margins of two societies). Prior to its discussion in sociology, the idea of marginalization was an important part of critical Black thinking about Reconstruction. W.E.B. Du Bois articulated the basic concept of marginalization as the “double-consciousness” associated with being Black in the United States. See W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* 3 (2d ed. 1903). Fundamentally, marginalization is based on the idea of being torn between two conflicting existences. See Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 492 (2019). To date, the framework has been significantly expanded in a variety of disciplines, including in the legal academy. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing marginalization of women of color); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759 (2005) (discussing the relationship between the rule of law, social control, and marginalization).

46. Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 SOC. FORCES 1785, 1805 (2019).

47. Child Welfare Info. Gateway, *Establishment and Maintenance of Central Registries for Child Abuse or Neglect Reports*, U.S. DEP’T OF HEALTH & HUM. SERVS. 1-2 (May 2018), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/centreg.pdf> [<https://perma.cc/5DSM-DYQE>] (“Every State has procedures for maintaining records re-

noted above, already-marginalized families are much more likely to be reported, investigated, and subjected to more intrusive state intervention. While family regulation contact is a pervasive part of American society at large, already-disadvantaged families are much more likely to be impacted.⁴⁹ The risk of family regulation involvement is highest for Black children. Black families are reported to family regulation authorities at higher rates than white families.⁵⁰ In fact, about fifty percent of Black children experience a family regulation investigation before the age of eighteen.⁵¹ A racial-equity audit conducted by child protective services in New York confirmed that many of the agency's own employees believe that the system is biased against Black families.⁵² Indigenous families are subjected to similarly high levels of family regulation contact.⁵³

lated to reports and investigations of child abuse and neglect. The term 'central registry' is used by many States to refer to a centralized database for the statewide collection and maintenance of child abuse and neglect investigation records.”).

48. Child's Bureau, *Child Maltreatment 2019*, U.S. DEP'T OF HEALTH & HUM. SERVS. 7 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/79FC-LD23>].
49. Professor Dorothy Roberts made this point over twenty years ago. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7-25 (2002).
50. Child Welfare Info. Gateway, *Child Welfare Practice to Address Racial Disproportionality and Disparity*, U.S. DEP'T OF HEALTH & HUM. SERVS. 3 (Apr. 2021), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/racial_disproportionality.pdf [<https://perma.cc/L9Z9-SWT3>].
51. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017) (“Black children had the highest lifetime prevalence of maltreatment investigations at 53.0% . . .”).
52. antwan wallace, Abigail Fradkin, Marshall Buxton & Sydney Henriques-Payne, *New York City Administration for Children's Services Racial Equity Participatory Action Research & System Audit: Findings and Opportunities*, NAT'L INNOVATION SERV. 14 (Dec. 2020), https://www.bronxdefenders.org/wp-content/uploads/2022/11/DRAFT_NIS_ACS_Final_Report_12.28.20.pdf [<https://perma.cc/P493-VTTF>] (“Participants described ACS as a predatory system that specifically targets Black and Brown parents and applies a different level of scrutiny to them throughout their engagement with ACS.”). This draft report was originally obtained from the City of New York by the Bronx Defenders via a Freedom of Information Act request and published online by the *New York Times*. See Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acr-racism-abuse-neglect.html> [<https://perma.cc/WU77-99QQ>].
53. See generally *Disproportionality in Child Welfare: Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N (Oct. 2021), https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf [<https://perma.cc/SQY4-VBK3>] (providing information and data about the overrepresentation of Indigenous children in state foster care systems).

Many of these families are also poor.⁵⁴ Several scholars have excavated the racialized and classist foundation of the system, with some arguing that the disproportionate involvement of racialized and economically disadvantaged families is no accident.⁵⁵ As a growing body of literature shows, parents with disabilities are also a major target of the family regulation system.⁵⁶ Against this background, scholars are beginning to map the intersectional dimensions of family regulation intervention.⁵⁷

An investigation commonly takes between thirty and sixty days, depending on the applicable state law.⁵⁸ At its conclusion, the investigating agents decide whether there is sufficient evidence to substantiate the allegations of maltreatment.⁵⁹ Should they find that there is sufficient evidence, they decide what fur-

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54. While white families are generally less likely to be involved with family regulation services, poor white families also experience high levels of involvement in some communities. See Wildeman et al., *supra* note 23, at 38.
55. Alan J. Dettlaff & Reiko Boyd, *The Intended Consequences*, in ALAN J. DETTLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 105, 119 (2023) (“By knowingly subjecting an already oppressed population to an intervention known to result in significant harm, the family policing system ensures this oppression is maintained [T]he family policing system was designed for this purpose.”).
56. Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1326 (2022) (detailing the disproportionate representation of parents with disabilities in the family regulation system); Sharyn DeZelar & Elizabeth Lightfoot, *Who Refers Parents with Intellectual Disabilities to the Child Welfare System? An Analysis of Referral Sources and Substantiation*, 119 CHILD. & YOUTH SERVS. REV. art no. 105639, at 1 (2020) (“In the United States, parents with disabilities have higher rates of child welfare involvement and worse outcomes than their non-disabled peers in initial referrals to child welfare, substantiation, removal of children from their home, and termination of parental rights.”); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 141 (2016) (“[C]hild welfare policies, practices, and adjudications are based—implicitly and at times, explicitly—on the postulation that parents with intellectual disabilities are inherently unfit because of their disability.”).
57. E.g., S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J.F. 163, 169–76 (2022) (discussing the harms of foster care for LGBTQ+ youth of color and the impact of family regulation on Black LGBTQ+ parents). See generally Lorr, *supra* note 41, at 1279 (exploring how race, ability, and class are coproduced).
58. Child Welfare Info. Gateway, *Making and Screening Reports of Child Abuse and Neglect*, U.S. DEP’T OF HEALTH & HUM. SERVS. 5 (Nov. 2021), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/repproc.pdf> [https://perma.cc/9MGN-LUE5].
59. Most family regulation investigations remain unsubstantiated. Still, they can have an impact when the family encounters the system again in the future. See Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1489 (2023).

ther intervention is necessary.⁶⁰ This is an administrative determination, separate from a court finding. The legal standard for this determination varies. Some states require a higher standard of “clear and convincing” evidence, while others require a “preponderance” of the evidence or merely “reasonable” evidence.⁶¹ The investigating agent’s decision is documented in the state’s central registry and may remain there for decades.

Once an investigation is in progress, state agents have an enormous amount of discretion over the way they conduct the investigation. An investigation typically includes a search of the family’s home and separate interviews with the parents and children.⁶²

During the investigation period, state agents make crucial decisions, including whether to remove children from the home or whether to file a case in court to pursue a finding of maltreatment against the parent. As discussed above, in some states, family regulation agents can remove a child from their parent prior to going to court and obtaining a court order.⁶³ Child removals without a court order typically require a heightened level of perceived risk to the child. In New York, for example, family regulation agents can remove children from their parents if there is reasonable cause to believe that failure to do so would create imminent risk to the child’s life or health and a court order cannot be obtained.⁶⁴ But state agents must file a petition in family court “forthwith,” which generally means between twenty-four hours and three business days.⁶⁵ Arkansas and Missouri have similar statutes.⁶⁶ Florida requires that

60. Child Welfare Info. Gateway, *How the Child Welfare System Works*, U.S. DEP’T OF HEALTH & HUM. SERVS. 5-7 (Oct. 2020), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cpswork.pdf> [<https://perma.cc/8ZCJ-WS26>].

61. Nicholas E. Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof in Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333, 336 (2017); Child Welfare Info. Gateway, *Decision-Making in Unsubstantiated Child Protective Services Cases: Synthesis of Recent Research*, U.S. DEP’T OF HEALTH & HUM. SERVS. 7-8 (June 2003), https://www.govinfo.gov/content/pkg/GOVPUB-HE23_1200-PURL-gp0116139/pdf/GOVPUB-HE23_1200-PURL-gp0116139.pdf [<https://perma.cc/XA8K-KZY2>].

62. Indeed, every year, family regulation agents conduct millions of home searches and interviews. See Ismail, *supra* note 59, at 1496-97.

63. The burden that the state must meet to remove a child from their parents and place them in state custody *with* a court order also varies. In some states, family regulation agents must show that there is imminent risk to the child’s health or life absent a removal. See Lauren Shapiro, *Challenging the Removal of Children*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 33, 38 (Martin Guggenheim & Vivek S. Sankaran eds., 2015). Others merely require probable cause to believe that the child is neglected. See *id.* at 37.

64. See N.Y. FAM. CT. ACT § 1024 (McKinney 2024).

65. See *id.* § 1026(c) & cmt.

state agents have probable cause to believe that the child has been abused, neglected, abandoned, or is at imminent risk of danger of illness or injury.⁶⁷ Several state appellate courts have emphasized that removal without prior judicial review is only justified if there is an urgent danger to the life or health of a child.⁶⁸

Federal courts disagree on whether the Constitution requires state agents to obtain a judicial order prior to removing children from their parents. Some circuits have held that state agents need to articulate “exigent circumstances” to justify such removals.⁶⁹ The First and Eleventh Circuits take a different approach. These circuits have allowed the removal of children from their parents without a court order, even when state agents could have obtained an order prior to the removal.⁷⁰ Some circuits have yet to make a definitive decision about the need for a court order prior to the removal of a child.⁷¹ Ultimately, while all states recognize emergency-removal authority, the kind of risk necessary and whether or not the state must attempt to first obtain a court order varies.

One mode of marginalization apparent in current family regulation discourse is the perpetual placing of families at the margins through what Professor Kelley Fong has called “constraint in families’ institutional interactions” that may trigger family regulation involvement.⁷² Most family regulation intervention begins with a call by a mandated reporter, with most reporters being school staff, law enforcement, or medical personnel.⁷³ At least some of these reports are intended to connect families to services; they are not motivated by a

66. ARK. CODE ANN. § 9-27-313(a)(1)(C) (2024); MO. REV. STAT. § 210.125(2) (2024).

67. FLA. STAT. § 39.401(1) (2024).

68. *E.g.*, *In re A.S.*, No. 14-0800, 2015 WL 249196, at *3 (W. Va. Jan. 12, 2015); *In re Jaelin P.*, No. U06CP06005881A, 2006 WL 3200348, at *6 (Conn. Super. Ct. Oct. 24, 2006); *Nicholson v. Scoppetta*, 820 N.E.2d 840, 853 (N.Y. 2004).

69. *Romero v. Brown*, 937 F.3d 514, 518 (5th Cir. 2019); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1246 (10th Cir. 2003); *Mabe v. San Bernardino Cnty. Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001); *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999).

70. *Doe v. Kearney*, 329 F.3d 1286, 1296 (11th Cir. 2003); *Tower v. Leslie-Brown*, 326 F.3d 290, 299 (1st Cir. 2003).

71. *See, e.g.*, *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, 397 (4th Cir. 1990).

72. Fong, *supra* note 46, at 1785.

73. Child’s Bureau, *Child Maltreatment 2020*, U.S. DEP’T OF HEALTH & HUM. SERVS., at xi (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/child-maltreatment-report-2020_o.pdf [<https://perma.cc/9H5J-F8QK>].

belief that the child is in danger.⁷⁴ Indeed, school staff and medical personnel are not always aware of the consequences of family regulation system involvement.⁷⁵ Already-marginalized parents are more likely to avoid engagement with service providers, including medical professionals, to prevent system involvement. For example, it is well documented that pregnant Black women are disproportionately subjected to nonconsensual drug testing by medical providers and then reported to the state.⁷⁶ One study shows that this leads some women to put off prenatal visits,⁷⁷ further exacerbating already-disparate health outcomes for Black birthing people. Some parents experience the family regulation system as an unavoidable byproduct of living in a Black or brown community, where asking for help might result in coercive state intervention.⁷⁸ The stories of survivors of interpersonal violence who found themselves under family regulation investigation after reporting abuse explain survivors' fear of asking for help. Social worker and advocate Jasmine Wali shared the words of a survivor, which poignantly describe the conflict for vulnerable parents: "I'd rather take a beating than catch a CPS case."⁷⁹ Concealment and constraint as a reaction to the risk of state intervention places already-marginalized families perpetually on the margins of society.

While the temporal dimensions discussed in this Feature focus on court proceedings after the investigatory stage, the decisions that are made prior to the initiation of a court proceeding by state agents and their intermediaries are crucial for all subsequent stages. The removal of a child from their family in the investigation stage is one such example. From the moment a child is removed and placed in state care, important timelines for family reunification are triggered.

74. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 620-21 (2020).

75. *Id.*

76. 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*, 4 JAMA HEALTH F. art. no. e230441, at 1-2 (2023).

77. Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERNAL & CHILD HEALTH J. 333, 333 (2011).

78. Naashia B., Shamara Kelly, Melissa Landrau, Yvonne Smith, Halimah Washington & Imani Worthy, *An Unavoidable System: The Harms of Family Policing and Parents' Vision for Investing in Community Care*, RISE AND TAKEROOT JUST. 12 (Fall 2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf> [<https://perma.cc/98JV-EC6Z>].

79. Jasmine Wali, "I'd Rather Take a Beating than Catch a CPS Case:" *Survivors Face an Impossible Choice*, NATION (Apr. 5, 2023), <https://www.thenation.com/article/society/child-welfare-domestic-violence> [<https://perma.cc/4T3J-XNJH>].

B. *Continuing Family Regulation: Pretrial and Trial Stages*

While most family regulation proceedings remain nonjudicial administrative proceedings that end in the investigation phase,⁸⁰ state agents file thousands of petitions⁸¹ against caregivers in court every year. Whether or not an investigation ends with a filing in court depends on a variety of factors. If the state removes a child from their home, a court filing is required either before or after the removal.⁸² A filing may also occur when the state has not yet removed the child but seeks to do so.⁸³ Other times, the state may file a petition to request court-mandated oversight over the family.⁸⁴ At this stage, the courts play a role in determining whether a child should be removed by the state and placed into the foster care system or returned to their home.⁸⁵ The court may order the parents to comply with a set of conditions to retain custody of their child or oversee family regulation agents' decisions about parent-child visitation and review what, if any, efforts should be made by state agents to reunite a separated family.⁸⁶

80. After the conclusion of the investigation, the allegations are deemed either substantiated or unsubstantiated. While the meaning of these terms varies from state to state, substantiated generally means that an investigating caseworker has determined that there is reasonable cause to believe that the child has been maltreated. See Child Welfare Info. Gateway, *supra* note 61, at 1. If the allegations are substantiated, the parent is listed in the state central registry. See S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1550-51 (2023); Julia Hernandez & Tarek Z. Ismail, *Radical Early Defense Against Family Policing*, 132 YALE L.J.F. 659, 668 (2022). This administrative decision can have long-term impacts. See Hernandez & Ismail, *supra*, at 668; Washington, *supra* note 27, at 1129-30. Even where the state does not file allegations in court, it might seek other remedial measures, such as placing the child with a family member, requiring the parents to engage in a host of services, or prescribing in-home services. See Hernandez & Ismail, *supra*, at 667-68; 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, 865 (2020). Parents might be asked to complete a service plan even where the allegations have not been substantiated. See “*If I Wasn’t Poor, I Wouldn’t Be Unfit*,” *supra* note 31, at 76.

81. A petition is a formal request to the respective state court to begin an adjudicatory child-protection proceeding. The petition is the state’s charging document against the caregiver. See Child Welfare Info. Gateway, *Understanding Child Welfare and the Courts*, U.S. DEP’T OF HEALTH & HUM. SERVS. 5 (Oct. 2022), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cwandcourts.pdf> [<https://perma.cc/9B8G-YFEV>].

82. See Shapiro, *supra* note 63, at 38.

83. See *id.*

84. See Child Welfare Info. Gateway, *supra* note 81, at 5.

85. *Id.*

86. *Id.*

The pretrial stage can last many months.⁸⁷ During this time, the family remains under court and agency supervision. Supervision includes regular announced and unannounced checks of the home at all hours of the day, continued interviewing of the children and parents, check-ins with the family's service providers, and observations of child-parent visits if the child was removed from the home.⁸⁸ At this stage, parents are frequently required to return to court several times for pretrial appearances, during which the court typically reviews the state's reports about the family and discusses the logistics of a future trial or potential settlement agreement.⁸⁹

When a child is removed in the investigatory or pretrial stage, pretrial court appearances may be more involved and frequent. Many states require courts to hold a hearing sometime between twenty-four hours and three days after removing a child.⁹⁰ Other jurisdictions do not measure the timeline for a hearing from the time of the removal and instead measure the timeline from the moment a parent requests a hearing. For example, in Montana, parents have the right to a contested hearing on the removal of their child ten days from when they ask for a hearing.⁹¹ In Connecticut, courts must conduct removal reviews within ten days of the removal and must hold a contested removal hearing within fourteen days if the parents request a hearing.⁹² In New York, courts must hold a contested hearing within three court days of the parent's application.⁹³ A few states allow for longer timelines.⁹⁴ Either way, this stage can last for weeks or even months, requiring parents to be in court for many hours and days.⁹⁵

87. Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1043-44 (2003).

88. Fong, *supra* note 74, at 622-23.

89. See Guggenheim & Gottlieb, *supra* note 21, at 572.

90. *E.g.*, FLA. STAT. § 39.401(3) (2024); ALA. CODE § 26-14-6 (2024) (requiring a hearing within seventy-two hours); ME. STAT. tit. 22, § 4023(5) (2023) (requiring judicial review within seventy-two hours); S.D. CODIFIED LAWS § 26-7A-14 (2024) (requiring judicial review within forty-eight hours but excluding weekends and holidays); WASH. REV. CODE § 13.34.060(1) (2024) (requiring judicial review within seventy-two hours but excluding weekends and holidays).

91. MONT. CODE ANN. § 41-3-427(1)(e) (2023).

92. CONN. GEN. STAT. § 46b-129(b) to (c) (2023).

93. N.Y. FAM. CT. ACT § 1028(a) (McKinney 2024).

94. See, *e.g.*, W. VA. CODE § 49-4-301(b) (2024) (requiring judicial review after a ninety-six-hour hold).

95. See *infra* Section I.C.

Another mode of marginalization relates to families' outcomes once they become ensnared in the system. Again, disparities here are pervasive. Black children are more likely to be removed from their parents both temporarily and permanently.⁹⁶ In fact, Black children spend more time in the foster care system, are less likely to reunify with their families, and are more likely to lose the legal relationship with their parents permanently than are white children.⁹⁷ Indigenous children are three times more likely to experience placement in foster care and the termination of the legal relationship with their parents than are their non-Indigenous, white peers.⁹⁸

To be sure, most family regulation intervention does not result in the permanent separation of a family. But even temporary intervention is not benign. It can have long-lasting impacts on a family's economic stability and upward mobility. In fact, even short-lived family regulation involvement can end with an entry into the respective state's central maltreatment registry, resulting in reduced employment opportunities.⁹⁹ As a recent report from Pennsylvania notes, the registry "acts as a wide barrier to employment with little regard for . . . the nature of the alleged misconduct."¹⁰⁰ The temporary removal of a child can also lead to the loss of housing for families living in a shelter.¹⁰¹ Many affected families are already living in poverty. For them, family regulation involvement may further exacerbate financial instability. For noncitizen parents, even temporary family regulation involvement that results in a temporary order of protection can have serious immigration consequences.¹⁰²

96. Youngmin Yi, Frank R. Edwards & Christopher Wildeman, *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011-2016*, 110 AM. J. PUB. HEALTH 704, 704-05 (2020). For an earlier analysis, see, for example, Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000-2011*, 9 PLOS ONE art. no. e92785, at 1 (2014).

97. Miller et al., *supra* note 34, at 2201; Wildeman et al., *supra* note 23, at 35.

98. Wildeman et al., *supra* note 23, at 35.

99. Washington, *supra* note 27, at 1128, 1129.

100. Brian Kennedy, Scott Werner, Jiayi (Coco) Xu, Laurenlee Dominguez, Joan Fernandez & Luke Myers, *Pathways to Poverty: How the ChildLine and Abuse Registry Disproportionately Harms Black Families*, GITTIS LEGAL CLINICS AT U. OF PA. CAREY L. SCH. AND STEPHEN & SANDRA SHELLER CTR. FOR SOC. JUST. AT TEMPLE U. BEASLEY SCH. OF L. 13 (2023), <https://www.law.upenn.edu/live/files/12705-pathways-to-poverty-how-the-childline-and-abuse> [<https://perma.cc/LJT5-EQB8>].

101. See, e.g., Washington, *supra* note 27, at 1128-29; Corey S. Shdaimah, "CPS Is Not a Housing Agency"; *Housing Is a CPS Problem: Towards a Definition and Typology of Housing Problems in Child Welfare Cases*, 31 CHILD. & YOUTH SERVS. REV. 211, 216 (2009).

102. See S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 139-59 (2023).

At the end of the pretrial stage, the court conducts either a factual hearing on the allegations brought against the parent or the parties come to a settlement agreement. At a trial, the state must prove the allegations against the parents by a preponderance of the evidence.¹⁰³ If the case is not dismissed at this stage, the posttrial stage commences after the fact finding or settlement.

C. *Permanency in Family Regulation: Posttrial Stage*

By the time a case has progressed to the posttrial stage, it has typically been pending before the court for several months. If the child was removed in an earlier part of the proceeding (in the investigatory or pretrial stage) and has not yet been returned home, the family has been separated for a sustained period of time. The longer a child has been in state care, the more likely it is that the state will ask the court to terminate parental rights permanently.¹⁰⁴ Accordingly, for separated families, the posttrial stage may become the most crucial stage.

If a child remains in state care, the court will continue to hold regularly scheduled appearances for permanency hearings. Federal law requires courts to conduct such hearings periodically.¹⁰⁵ In most states, permanency hearings mainly consist of an update from the foster care agency delivered via a written report.¹⁰⁶ Parents do not always have the right to challenge this report in an ad-

103. However, in practice, the burden is often on the parents to prove they are “fit.” See *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, AM. BAR ASS’N 9 (2006), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf [<https://perma.cc/5BBW-BX8U>] (“Although the burden of proof is on the child welfare agency, in practice the parent . . . generally must demonstrate that [they] can adequately care for the child.”). Additionally, evidentiary rules and procedural protections are more relaxed compared with criminal trials. See David J. Lansner, *Abolish the Family Court*, 40 COLUM. J.L. & SOC. PROBS. 637, 642 (2007) (observing that in family regulation proceedings in New York City, “hearsay, rumor, and suspicion, no matter how unreliable, are often admitted”); Jane Brennan, Note, *Emergency Removals Without a Court Order: Using the Language of Emergency to Duck Due Process*, 29 J.L. & POL’Y 121, 157 (2020) (“The unchecked discretion of child protective agencies, vaguely written laws, and a woeful lack of procedural protections in family proceedings have kept innocent families in and out of court and subject to monitoring by state agencies for years.”); Bullock, *supra* note 87, at 1030–36.

104. See *infra* Section III.A.

105. 42 U.S.C. § 675(5)(C)(i) (2018).

106. See Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 17 (2010).

versarial process.¹⁰⁷ At some point during this phase of the proceeding, the state might decide to change the permanency goal from return to adoption.¹⁰⁸

Most child removals do not end with permanent family separation. Many children return home to their parents within days or weeks.¹⁰⁹ Other parents regain custody of their child later in the family court process. Still, every year, several thousands of termination proceedings permanently sever the legal parent-child relationship.¹¹⁰ Even if many initial removals do not ultimately lead to the permanent dissolution of the legal parent-child relationship, every time a child is separated from their parents and placed in the foster system, the risk of termination of parental rights looms large.¹¹¹ After a child has been removed, every day they remain in the foster care system adds to the risk that parental rights might be terminated. Federal law sets up this dynamic through financial incentives. States are encouraged to file termination petitions after a child has spent fifteen out of twenty-two months in state court. If they do not, they risk losing federal funding.¹¹²

II. CONCEPTUALIZING TEMPORAL MARGINALIZATION

The framework of managerial justice alongside a critical analysis of time offers a more complete picture of the pernicious manifestations of temporal dynamics in the family regulation system. Although the managerial justice framework is concerned with lower-level criminal courts, it is instructive in the family regulation context. The family regulation system is known for its emphasis on monitoring and compliance, and the managerial justice framework focuses on legal proceedings that involve more than backward-looking factual

107. *Id.*

108. *Id.* at 14.

109. Child Welfare Info. Gateway, *Reunification: Bringing Your Children Home from Foster Care*, U.S. DEP'T OF HEALTH & HUM. SERVS. 2 (May 2016), https://stockton.edu/child-welfare-education-institute/bcwpw/documents/child-welfare-course/reunification_bringing_your_children_home_from_foster_care-may-2016.pdf [<https://perma.cc/4U9C-6KY7>] (discussing that three in five children in the foster care system return home to their parents or to a family member).

110. Child's Bureau, *Trends in Foster Care and Adoption: FY 2012-2021*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/trends-foster-care-adoption-2012-2021.pdf> [<https://perma.cc/F49G-P7MN>] (showing that from 2012 to 2021, about 60,000 children each year in the United States had parents who lost their parental rights).

111. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540, 544-45 (2004).

112. See *infra* Section III.A.

determinations. Together, these managerial and temporal frameworks shed light on the ways the monitoring and scrutinizing of marginalized families occur under the pressures of constriction, become prolonged through stretching, and evolve over time in indeterminate proceedings. In other words, by drawing on both frameworks, the construction of time becomes visible as a managerial tool.

A. A Critical Analysis of Time

Until recently, the relationship between time, power, and marginalization had received little sustained attention in legal academia.¹¹³ Today, a body of scholarship draws on strains of critical legal thought, postcolonial theory, and multidisciplinary scholarship to examine the relationship between power, law, and the construction of time.¹¹⁴ In this context, the construction of time refers to more than the mere observation that time impacts the practice and analysis of law.¹¹⁵ It understands the construction of time as “integral to the . . . epistemology of law.”¹¹⁶ In particular, within this discourse, time is understood as a vehicle for the reproduction of hierarchies.

Still, few legal scholars focus explicitly on how the management of time in legal systems disproportionately impacts marginalized people’s daily lives.¹¹⁷

113. There are, however, important exceptions. See, e.g., Greenhouse, *supra* note 12, at 1631; GREENHOUSE, *supra* note 14, at 175-210 (arguing that time is a “negotiable,” socially constructed concept); FITZPATRICK, *supra* note 14, at 84-90. Outside of legal academia, postcolonial theorists have challenged the conception of time as linear and neutral. See, e.g., DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 15-16 (2000) (“One cannot think of this plural history of power and provide accounts of the modern political subject in India without at the same time radically questioning the nature of historical time.”); MARK RIFKIN, *BEYOND SETTLER TIME: TEMPORAL SOVEREIGNTY AND INDIGENOUS SELF-DETERMINATION*, at viii (2017) (“[A] good deal of scholarship has insisted that Indigenous persons and peoples inhabit the same time as settlers However, an emphasis on coevalness tends to bracket the ways that the idea of a shared present is not a neutral designation but is, instead, defined by settler institutions, interests, and imperatives.”).

114. For example, Professor Yuvraj Joshi observes that American law inscribes “dominant experiences and expectations of time into law” and, as a result, fails to redress existing structural inequalities. Joshi, *supra* note 15, at 1625. See generally Mawani, *supra* note 13 (drawing on postcolonial theory as a lens through which to examine critically the law’s role in producing time).

115. See *supra* note 17.

116. Mawani, *supra* note 13, at 71.

117. Joshi, *supra* note 15, at 1631-32 (“[T]heories about the relationship between race, time, and injustice are virtually absent from mainstream U.S. legal scholarship.”).

There are, however, notable exceptions. In a recent article, Professor Yuvraj Joshi argues that Supreme Court jurisprudence in the civil-rights context has inscribed “universalized dominant perspectives on time” into the law.¹¹⁸ And Professor Kaaryn Gustafson has observed that strict time limits for benefits disproportionately impact Black and brown welfare recipients.¹¹⁹ Another example is Professor Rasheedah Phillips’s work on historic and current manifestations of “racialized temporal oppression” in eviction proceedings in Black communities.¹²⁰ Phillips’s work is part of a body of literature that draws on Afrofuturism¹²¹ to articulate visions of the future for marginalized people.¹²² Similarly, Professor I. Bennett Capers has drawn on Afrofuturism to imagine what the future of policing might look like for people of color.¹²³ These efforts to connect legal scholarship with speculative fiction that addresses Black American themes and concerns are primarily forward looking.¹²⁴

Scholars from a variety of other disciplines have explored how specific notions of time have been used to facilitate subordination.¹²⁵ Others have conceptualized temporal inequalities as a product of “power relations between racially

118. *Id.* at 1633 (arguing that these dominant perspectives on time are reflected in the ways the work of racial equality has been characterized as a “one-time process that has already been completed”).

119. See Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 306 (2013).

120. Phillips, *supra* note 8, at 22; see also David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions*, 120 PNAS art. no. e2210467120, at 2, app. at 10 (2023) (observing how longer trips to housing court impact eviction proceedings for low-income tenants).

121. Afrofuturism is commonly defined as “speculative fiction that treats African American themes and addresses African American concerns in the context of twentieth-century technoculture.” Dery, *supra* note 16, at 180; accord Butler, *supra* note 16, at 5.

122. Phillips, *supra* note 8, at 29–31.

123. See generally I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019) (drawing on Afrofuturism to visualize policing in a United States that is projected to become a majority-minority country). Similarly, Professor Ngozi Okidegbe draws on Afrofuturist perspectives to explore the subverting potential of algorithms in criminal courts. See Ngozi Okidegbe, *Of Afrofuturism, Of Algorithms*, 9 CRITICAL ANALYSIS L. 35, 36 (2022) (arguing that an Afrofuturistic vision of criminal legal algorithms could accomplish three things: situate Black people firmly in the future, disrupt current hierarchies, and reclaim technology for marginalized people).

124. *E.g.*, DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158–94 (1992).

125. *E.g.*, MARK M. SMITH, *MASTERED BY THE CLOCK: TIME, SLAVERY, AND FREEDOM IN THE AMERICAN SOUTH* 66–67, 94–104 (2000) (discussing how the establishment of clock-based time consciousness in the Antebellum South was used to discipline enslaved Black people and maximize economic benefits, a development that was influenced by colonial merchants’ “desire for the proper, predominantly secular, application of clock time”).

dominant and subordinate groups.”¹²⁶ The political-science framework of temporal injustice provides a lens through which to diagnose injustices related to the valuing of time.¹²⁷ According to this framework, temporal injustice develops from procedures that value certain people’s time over others’.¹²⁸ The sociological framework of temporal marginalization grows out of the observation that time is not merely a neutral dimension of everyday life, but a “socially constructed medium through which power relations are made.”¹²⁹ In *Law as Temporality*, sociologist Renisa Mawani discusses how the law facilitates notions of authority and legitimacy through temporality.¹³⁰ Mawani notes the tension between the linear conception of time in the law and the “multiple durations of lived time that it [seeks] to order.”¹³¹ Further elaborating on this tension, Mawani observes that the law’s focus on specific moments in time does not fully account for the experiences of those it impacts.¹³²

Critical perspectives on the construction of time offer several lessons relevant to legal systems. One, the ability to establish, control, and otherwise make meaning of timelines both reflects and perpetuates power relations.¹³³ For ex-

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126. Michael Hanchard, *Afro-Modernity: Temporality, Politics, and the African Diaspora*, 11 PUB. CULTURE 245, 253 (1999); see also Gilbert C. Gee, Anna Hing, Selina Mohammed, Derrick C. Tabor & David R. Williams, *Racism and the Life Course: Taking Time Seriously*, 109 AM. J. PUB. HEALTH S43, S43 (2019) (using the “perspective of intersectionality” to “examine how time may be related to racism, aging and the life course, and health inequities”); Charles W. Mills, *White Time: The Chronic Injustice of Ideal Theory*, 11 DU BOIS REV. 27, 27 (2014) (arguing for a conception of “[w]hite time”).
127. See generally ELIZABETH F. COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018) (describing how citizenship rights can be conferred or denied based on quantities of time).
128. *Id.* at 4.
129. Megan Reid, *Social Policy, “Deservingness,” and Sociotemporal Marginalization: Katrina Survivors and FEMA*, 28 SOCIO. F. 742, 754 (2013). One sociology scholar, for example, developed the concept of “queer time” to account for the passage of time that is not rooted in patriarchal ideas of reproduction and family. JUDITH HALBERSTAM, *IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 1-2* (2005) (discussing the concept of “queer temporalities” and how it develops “in opposition to the institutions of family, heterosexuality, and reproduction”). Others have studied how time exerts social control over workers in organizations. See Gary Alan Fine, *Organizational Time: Temporal Demands and the Experience of Work in Restaurant Kitchens*, 69 SOC. FORCES 95, 96 (1990).
130. Mawani, *supra* note 13, at 69 (discussing that the law produces temporal discontinuities to “fortify its own authority, sovereignty, and legitimacy”).
131. *Id.* at 74.
132. See *id.* at 79 (“Life and experience continually exceed legality . . .”).
133. See VINCENT DUBOIS, *THE BUREAUCRAT AND THE POOR: ENCOUNTERS IN FRENCH WELFARE OFFICES 157* (Jean-Yves Bart trans., Ashgate 2010) (1999); Mawani, *supra* note

ample, the ability to make someone wait can be a “mark of power,”¹³⁴ especially where it is used to exclude those in need of resources or to privilege middle-class norms.¹³⁵ Two, time is an unevenly distributed resource. Inequality in the ability to control time perpetuates social stratification.¹³⁶ Three, law – with its retrospective focus – “seeks to fix subjects in time”¹³⁷ and, as a result, underaccounts for the experience of duration.¹³⁸ This necessarily obscures the experience of time for those impacted by it.

B. Time and Managerial Justice: Performance and Procedural Hassle

Criminal procedure scholars have studied the pathologies of lower-level criminal prosecution and adjudication.¹³⁹ Professor Issa Kohler-Hausmann introduced the concept of managerial justice to describe the mass disposal of misdemeanors in lower-level courts.¹⁴⁰ Instead of individual adjudications of guilt and innocence, managerial justice is more concerned with the management and social control of groups of people not by convicting them, but by observing, sorting, and regulating them over time.¹⁴¹ The managerial justice framework offers two important observations that provide a lens for surveillance under temporal pressures in the family regulation context: one, that the procedural hassle associated with navigating misdemeanor-court proceedings is

13, at 93 (arguing that the relationship between law and time must be problematized to surface “racial-colonial distributions of power”).

134. DUBOIS, *supra* note 133, at 157.

135. *Id.*; see also Christine L. Williams & Catherine Connell, “Looking Good and Sounding Right”: *Aesthetic Labor and Social Inequality in the Retail Industry*, 37 *WORK & OCCUPATIONS* 349, 360-61 (2010) (describing how retail employers subject interviewees to long wait times to ensure an upper-class hiring pool); Reid, *supra* note 129, at 754-58 (calling the state’s ability to make welfare recipients in need wait “temporal domination”).

136. See generally PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (Richard Nice trans., Harvard Univ. Press 1984) (1979) (discussing how “leisure time” available to wealthy individuals perpetuates class distinctions).

137. Mawani, *supra* note 13, at 79.

138. *Id.*

139. See, e.g., Alexandra Natapoff, *Criminal Municipal Courts*, 134 *HARV. L. REV.* 964, 974-1005 (2021); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 *HARV. L. REV.* F. 200, 205-10 (2021); KOHLER-HAUSMANN, *supra* note 9, at 1-2; ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 5-6 (2018).

140. KOHLER-HAUSMANN, *supra* note 9, at 4-5.

141. *Id.*

a penal technique,¹⁴² and two, that the assessment of a parent's performance by state actors is a penal technique used inside and outside of court.¹⁴³ Both represent a form of punishment beyond conviction and incarceration and are embedded in a logic of social control.¹⁴⁴

Procedural hassle is the "collection of burdensome experiences and costs attendant to arrest and case processing" as an integral part of criminal procedure.¹⁴⁵ Kohler-Hausmann observes that procedural hassle includes the degradation associated with (often public) arrests, the loss of work and other opportunity costs, and the stress associated with frequent court appearances.¹⁴⁶ Kohler-Hausmann builds on Professor Malcolm M. Feeley's work in *The Process Is the Punishment*.¹⁴⁷ Feeley argues that for many people in lower-level criminal courts, the "real punishment" is the pretrial process itself, not adjudication and sentencing.¹⁴⁸ According to Feeley, in the aggregate, delays in the pretrial stage are central concerns for defendants in criminal court.¹⁴⁹ For many families, the length of family regulation proceedings and the frequency of court appearances are not merely an inconvenience. The hassle associated with family regulation reproduces disadvantage and probes every aspect of a parent's life.

Kohler-Hausmann defines performance as "some meaningful undertaking" by the defendant "that is evaluated by court officials."¹⁵⁰ This may include compliance with mandated programs, assigned tasks, or a behavioral accomplishment—anything that the court can "interpret as expressive of the defendant's character or worthiness."¹⁵¹ Michel Foucault long argued that performance provides the penal state with an opportunity to examine and evaluate a person's behavior as an expression of disciplinary power, even absent other

142. The term "penal technique" here suggests intentionally that procedural hassle and performance do not merely constitute more than a "set of inconvenient burdens" placed upon defendants or families. *Id.* at 183. They are instead "productive tools in the project of social control." *Id.*

143. *Id.* at 221.

144. *See id.* at 183.

145. *Id.*

146. *Id.* at 183-84.

147. *See id.* at 64-67 (discussing FEELEY, *supra* note 9).

148. *See* FEELEY, *supra* note 9, at 199-243.

149. *Id.* at 200 (arguing that pretrial costs explain why so few people take advantage of adversarial rights in the pretrial stage).

150. KOHLER-HAUSMANN, *supra* note 9, at 221.

151. *Id.*

forms of punishment.¹⁵² Coercing performance is one way that legal systems may further subordinate already-marginalized individuals. Indeed, feminist legal scholars have observed how women are penalized for failing to perform in ways that comport with stereotypical notions of victimhood. In the criminal legal context, Professor Leigh Goodmark has examined how survivors of color, poor survivors, and trans survivors of gender-based violence are harshly punished when they defend themselves.¹⁵³ In the immigration context, scholars have observed that women seeking asylum are pressured to perform stereotypical victimhood narratives.¹⁵⁴ Similarly, the family regulation system punishes survivors by removing or threatening to remove their children when they fail to comport with specific narratives about their own victimhood.¹⁵⁵

* * *

The legal system's ability to control and waste people's time is a form of dominion and punishment that exacerbates the innumerable structural disadvantages that poor, Black, and brown families already face. This is further illustrated by the managerial justice framework, which understands the legal procedures a litigant must follow and the duties they must perform as mechanisms of social control and discipline.

Understanding time in relation to power helps clarify and expand emerging assertions about power dynamics as they operate within legal systems. These frameworks are particularly fruitful in the family regulation context, where the state wields an enormous amount of power over families and where some parents "have been informally disenfranchised of their rights to family privacy."¹⁵⁶ The value of time is particularly salient in the family regulation system because of children's constant and rapid development. Missing out on developmental milestones and bonding opportunities not only constitutes an enormous loss for parents—it is also harmful to children.¹⁵⁷

152. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 189 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

153. LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* 2, 9-10 (2023).

154. See, e.g., Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 752-57 (2017).

155. Washington, *supra* note 27, at 1124-31.

156. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 114 (2017); see *id.* at 101 (observing that the right to separate children from their parents is "[p]erhaps the most spectacular demonstration of the fact that the right to family privacy is not absolute").

157. See *infra* Sections III.B.1, III.D.

III. SITUATING TEMPORAL MARGINALIZATION IN THE FAMILY REGULATION SYSTEM

Drawing on the theoretical framework introduced in Part II, this Part discusses two things: the abstract problem of regulating parent-child relationships through a temporal frame, and the concrete legal timelines, procedures, and court processes that, together, exacerbate an already-conflictual relationship between the state and marginalized families. It does so by first identifying what I call the three temporal dimensions within the family regulation system: *constriction*, *stretching*, and *indeterminacy*.¹⁵⁸ Constriction, stretching, and indeterminacy are both in tension with one another conceptually and mutually reinforcing in their effects on regulated families.

A. *Constriction*

When a child enters the foster care system, an invisible clock begins to tick.¹⁵⁹ Every day they remain in the system increases the threat of permanent family separation through the termination of parental rights. Termination proceedings sever, in most cases irrevocably, the legal relationship between parents and their children and all other attached familial bonds, such as the child's relationship with their siblings and grandparents.¹⁶⁰ Between 2013 and 2022, states

158. Constriction, stretching, and indeterminacy might not “sound” strictly temporal. This taxonomy reflects the tendency to speak about and think of time in relation to space. In other words, the epistemologies of time and space are inextricably linked. In the English language, we commonly articulate time in spatial ways (“time is hanging over me,” “time is running out,” “on the dot,” “the ship has sailed,” “around the clock,” “it’s high time”). The concept of “chronotope[s]” has been used to describe the “intrinsic connectedness of temporal and spatial relationships that are artistically expressed in literature.” M.M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 84 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) (1975). Emile Durkheim’s description of time is illustrative in its employment of spatial elements. Durkheim describes time as “like an endless chart, where all duration is spread out before the mind, and upon which all possible events can be located in relation to fixed and determined guide lines.” EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 10 (Joseph Ward Swain trans., George Allen & Unwin Ltd. 1915) (1912).

159. Constriction is most visible in the context of child removals that trigger the ASFA timeline. But even in cases in which the family is not separated, the possibility of separation looms large. Professor Kelley Fong demonstrates how even the threat of removal “hangs over marginalized mothers, who find themselves vulnerable to a system that jeopardizes their mothering” and, in so doing, structures their lives. FONG, *supra* note 20, at 37.

160. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (discussing that termination of parental rights “completely and irrevocably” severs the rights of parents to their child).

terminated the legal relationship between parents and children upwards of 70,000 times.¹⁶¹ One in one hundred children lose the legal relationship with their parents before they turn eighteen.¹⁶² Because of the enormously high stakes, every time a child is separated from their parents and placed in the foster care system, the risk of termination of parental rights looms large.¹⁶³ Given their severity and permanency, some have called terminations “the civil death penalty.”¹⁶⁴

Federal law incentivizes states to impose rigid timelines within which parents must either reunify with their child or else lose them permanently.¹⁶⁵ Indeed, to receive federal funding for the respective state’s family regulation system, states must initiate proceedings to terminate parental rights once a child has been in foster care for fifteen out of the previous twenty-two months.¹⁶⁶ The ASFA—the federal law that sets up these rigid timelines for termination—is ironically a response to what the political debate about child removals cast as a temporal problem in the foster care system in the 1970s and 1980s.¹⁶⁷ Political critiques in the 1970s focused not on why so many children were being placed in foster care to begin with, but on why it took so long to terminate the parental relationships and have children adopted out of the system.¹⁶⁸ The ASFA responded to this concern by shortening the time a child should be in foster care before the state could begin termination proceedings.¹⁶⁹ Indeed, Professor Mical Raz has observed that, as the number of children removed

161. Child’s Bureau, *Trends in Foster Care and Adoption: FY 2013 - 2022*, U.S. DEP’T HEALTH & HUM. SERVS. (Mar. 20, 2024) [hereinafter *Trends: FY 2013-2022*], <https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption> [<https://perma.cc/4ENE-YAKF>].

162. Wildeman, et al., *supra* note 23, at 32.

163. Chill, *supra* note 111, at 540.

164. Albert et al., *supra* note 22, at 866-67; N.R. Kleinfield, *The Girls Who Haven’t Come Home*, N.Y. TIMES (July 6, 2013), <https://www.nytimes.com/2013/07/07/nyregion/the-girls-who-havent-come-home.html> [<https://perma.cc/6ZEK-ULHP>].

165. Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Re-assessing the Concept of Termination of Parental Rights in Light of Its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. 1319, 1320-21 (2024).

166. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118-19 (codified as amended in scattered sections of 42 U.S.C.); Child’s Bureau, *Title IV-E Adoption Assistance*, U.S. DEP’T HEALTH & HUM. SERVS. (June 27, 2024), <https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-adoption-assistance> [<https://perma.cc/U86Z-WZE5>] (describing resources provided to states for assistance in placing children timely for adoption).

167. See MICAL RAZ, *ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY* 90 (2020).

168. See *id.* at 80-81.

169. See *id.* at 90.

from their homes increased in the 1970s and reached an all-time high in the 1990s,¹⁷⁰ the political debate focused not on why so many children—Black children in particular—were removed from their families, but instead on the length of time they spent in the system.¹⁷¹ Since the enactment of ASFA, states have terminated over 1.5 million parent-child relationships.¹⁷²

The rhetoric around the enactment of ASFA was steeped in racialized, gendered, and classist tropes.¹⁷³ ASFA was passed just a few years after the Violent Crime Control and Law Enforcement Act¹⁷⁴ and the Personal Responsibility and Work Opportunity Reconciliation Act.¹⁷⁵ These two laws fit squarely into already-established narratives of dysfunctional Black families.¹⁷⁶ The focus on “freeing” children from their “unfit” parents must be understood against the backdrop of the idea that permanent separation and adoption would save children from an epidemic of drug addiction, welfare reliance, and violence in marginalized communities.¹⁷⁷

170. Shannon DeRouselle, *Welfare Reform and the Administration for Children's Services: Subjecting Children and Families to Poverty and Then Punishing Them for It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 420 (1999) (noting an increase in the number of children in foster care in New York City); Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 135 (2001).

171. RAZ, *supra* note 167, at 73.

172. See, e.g., Guggenheim, *supra* note 22, at 722 n.48 (explaining the difficulty of obtaining data on the number of terminations ordered each year and conservatively estimating the number of terminations ordered in the past century to be two million); *Trends: FY 2013-2022*, *supra* note 161; Child's Bureau, *The AFCARS Report: Final Estimates for FY 1998 Through FY 2002 (12)*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (Oct. 2006), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport12.pdf> [<https://perma.cc/zx7v-rfbw>]; Child's Bureau, *The AFCARS Report: Preliminary FY 2018 Estimates as of August 22, 2019 – No. 26*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf> [<https://perma.cc/QLH3-TS6K>].

173. See Guggenheim, *supra* note 22, at 716-21.

174. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

175. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

176. See Washington, *supra* note 80, at 1538-41 (discussing the classist and racialized origins of 1990s welfare reform); Guggenheim, *supra* note 22, at 716-19.

177. See Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557, 579 (2022) (“ASFA was . . . meant to limit family preservation and reunification, facilitating the quick termination of parental rights on the assumption that the disproportionately Black and brown parents of the thousands of children in foster care at the time were inherently unfit and simply unable to care for them, no matter what services they were offered.”); ROBERTS, *supra* note 49, at 104-21, 167-68.

While all states have some mechanism to terminate parental rights,¹⁷⁸ some terminate at much higher rates than others. West Virginia, Oklahoma, Florida, and Arizona have some of the highest rates of terminations in the country, while Maryland, New York, and New Jersey have some of the lowest.¹⁷⁹ The chances of a parent successfully challenging the state's termination request in court vary widely among states.¹⁸⁰

Time is an important factor here. Whether or not parents and children are at risk of permanent separation depends, at least in part, on the length of time between the initiation of the proceedings and the filing of a termination petition in court. This in turn depends largely on where the case is heard. Some states have even shorter statutory timelines than prescribed by federal law.¹⁸¹ How quickly states rush to termination in practice varies.¹⁸² Florida, Texas, Utah, and Michigan are particularly quick to end the legal relationship between parents and their children.¹⁸³ Texas, West Virginia, and Utah complete over fifty percent of their total termination proceedings within one year of removal.¹⁸⁴ The government-relations director of the Texas chapter of the National Association of Social Workers remarked that “[w]e give up on parents very quickly in Texas.”¹⁸⁵

The time that a child has spent separated from their parent is one of the primary lenses through which terminations are regulated. Other factors—such as the deep connection the child might still have with their parents, the availability of less drastic interventions, and the discriminatory nature of the surveil-

178. Child Welfare Info. Gateway, *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (July 2021), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/groundtermin.pdf> [<https://perma.cc/U64Q-HMR4>].
179. Vivek S. Sankaran & Christopher E. Church, *The Ties that Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 252-53 (2023).
180. *See id.* (arguing that some of these differences might be explained by structural features of legal representation in family regulation cases).
181. In Texas, a parent's rights to their child may be terminated as soon as nine months after the child has been placed in care. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O) (West 2023); *In re* K.N.D., 424 S.W.3d 8, 9-10 (Tex. 2014) (per curiam); *In re* E.C.R., 402 S.W.3d 239, 248-49 (Tex. 2013).
182. Sankaran & Church, *supra* note 179, at 250.
183. *Id.* at 252-53.
184. *Id.* at 253.
185. David Crary, *Terminating Parental Rights: State Policies Vary Widely*, AP NEWS (Apr. 30, 2016, 2:40 PM EDT), <https://apnews.com/parenting-general-news-relationships-c9fec9ee24d64f4b9e56d1425179a50e> [<https://perma.cc/CD2N-NDYM>].

lance, reporting scheme, and subsequent investigation that brought the family into the system in the first place—become secondary.¹⁸⁶ Instead, the notion of fault or “fitness” is intrinsic to the simple fact of time passing. The managerial justice framework helps surface the function of parental performance under the pressure of constriction. Parents are required to prove their ability to conform to the state’s expectations in a swift manner. The process becomes about observing, sorting, and regulating families. Parents who are unable to perform as expected in the state’s predetermined timeline risk losing their parental rights. On the flip side, the trauma of state intervention itself on a parent’s ability to perform and a family to function is disregarded.¹⁸⁷ In family court’s specific version of managerial justice, the passage of time paired with a parent’s ability to perform within that time frame become crucial factors, while even strong parent-child bonds become secondary.¹⁸⁸

In other words, the legal system has answered in the affirmative the question whether the passage of time should be a central factor in justifying the termination of parental rights. The legislative history of ASFA sheds some light on how such a conception of time came to be. Originally, ASFA required parents to commence termination proceedings for children under ten years of age

186. See Guggenheim, *supra* note 22, at 725 (“Federal law encourages states to permanently sever the legal ties between children and their parents, without regard to the strength of their relationship for no better reason than that the children have been in foster care for fifteen months.”); Sankaran & Church, *supra* note 179, at 261. Over time, the thousands of terminations each year have produced a group of legal orphans—children who no longer have a legal relationship with their parents but also have not been adopted. See Brandon Gaille, *51 Useful Aging Out of Foster Care Statistics*, NAT’L FOSTER YOUTH INST. (May 25, 2017), <https://nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media> [<https://perma.cc/4ZPZ-GRXY>]. Between 2017 and 2021, approximately 60,000–70,000 children remained in the system after parental rights were terminated. See *AFCARS Report No. 29*, *supra* note 30, at 1. And during that time, around 20,000 children “aged out” of the foster care system, meaning that they were never adopted. See *id.* at 3 (stating that 19,130 children exited foster care in 2021 due to “emancipation”); Child’s Bureau, *The AFCARS Report: Preliminary FY 2020 Estimates as of October 04, 2021 - No. 28*, U.S. DEP’T OF HEALTH & HUM. SERVS. 3 (Nov. 19, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf> [<https://perma.cc/K55J-GSHB>] (stating that in 2020, over 20,000 children exited the foster care system due to “emancipation”); Child’s Bureau, *The AFCARS Report: Preliminary FY 2019 Estimates as of June 23, 2020 - No. 27*, U.S. DEP’T OF HEALTH & HUM. SERVS. 3 (Aug. 24, 2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [<https://perma.cc/VL8U-XMSU>] (stating that in 2019, nearly 20,500 children exited the foster care system due to “emancipation”).

187. See Washington, *supra* note 176, at 1537 (discussing the traumatizing impact of family separation on children and parents).

188. Gottlieb, *supra* note 165, at 1324 (“Courts now routinely sever parent-child relationships . . . when the emotional bonds are meaningful to both parents and children.”).

if they had been in the foster care system for eighteen of the past twenty-four months.¹⁸⁹ The time frame was then shortened to twelve of the past eighteen months.¹⁹⁰ Ultimately, Congress found that fifteen months out of the last twenty-two months was the appropriate time frame.¹⁹¹ One of the explicit goals of ASFA was to move children promptly into permanent homes.¹⁹² Policymakers leaned on emerging research about the negative psychological effects of long-term stays in the foster care system.¹⁹³ Many child advocates used these findings to advance the claim that earlier terminations would benefit children by getting them out of the system and into permanent homes.¹⁹⁴ Congressional testimony on the ASFA bill demonstrates that one of ASFA's main goals was to place foster children into permanent homes more quickly. Olivia A. Golden, representing the U.S. Department of Health and Human Services, testified that the Department aimed to “accelerate the path to permanency for all waiting children.”¹⁹⁵ Courts have shared similar sentiments about the harms to children due to extended stays in the foster care system.¹⁹⁶ In *In re N.J.*, the appellate court explicitly referenced the law's new focus on “time-limited reunification,” which no longer required long-term reunification efforts.¹⁹⁷

Notably, ASFA did not solve the temporal issues it set out to resolve. When parental rights are terminated, children may still wait months or years in the

189. See Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 *FORDHAM URB. L.J.* 1879, 1894 (2001).

190. *Id.*

191. *Id.*

192. JANE M. SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* 201 (2023) (discussing this goal as one of three central goals of ASFA and arguing that this goal has prevailed).

193. RAZ, *supra* note 167, at 75 (discussing how the work of psychologists and psychoanalysts impacted the debate); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 23-26 (1973).

194. RAZ, *supra* note 167, at 75; Guggenheim, *supra* note 22, at 724.

195. *The “Adoption Promotion Act of 1997”: Hearing on H.R. 867 Before the Subcomm. on Hum. Res. of the H. Comm. on Ways & Means*, 105th Cong. 19 (1997) (statement of Olivia A. Golden, Acting Assistant Secretary, Children and Families, U.S. Department of Health and Human Services).

196. See *In re J.L.Y.*, 361 S.E.2d 246, 249 (Ga. Ct. App. 1987) (“[T]here was expert evidence concerning the need for stability in the child's life and the documented adverse effects on children who remain in foster care for lengthy periods of time.”); *In re Abigail C.*, 772 A.2d 1277, 1286 (Md. Ct. Spec. App. 2001) (finding that the state general assembly revised its adoption laws shortly after ASFA “to speed up the guardianship and adoption process so that children no longer would be consigned to foster care limbo for years”).

197. No. 00-1827, 2001 WL 488067, at *2 (Iowa Ct. App. May 9, 2001).

foster care system. Many of them are never adopted.¹⁹⁸ According to a Human Rights Watch and ACLU report, on average, Black children wait longer than white children do to be adopted after parental rights are terminated.¹⁹⁹

Families that are already impacted by mass incarceration and immigration detention are especially vulnerable to the consequences of temporal constriction. For incarcerated parents, it may be impossible to regain custody of their children within fifteen out of twenty-two months—or, depending on the state, much shorter time frames. Some states explicitly make the long-term incarceration of a parent a cause of action for termination proceedings.²⁰⁰ But even where parental incarceration is not an explicit cause of action, ASFA timelines make it tremendously difficult for incarcerated parents to maintain their parental rights.²⁰¹ One study found that in one in eight family regulation cases, incarcerated parents lose their parental rights.²⁰²

In recent decades, the number of incarcerated women has grown significantly.²⁰³ Black women in particular are overrepresented in jails and prisons.²⁰⁴ Many of them are parents.²⁰⁵ One study found that as of 2010, about 1.3 million people living in the United States had been separated from their mother as a minor due to their mother's incarceration.²⁰⁶ When mothers are incarcerated,

198. “*If I Wasn’t Poor, I Wouldn’t Be Unfit*,” *supra* note 31, at 84.

199. *Id.*

200. Child Welfare Info. Gateway, *supra* note 178, at 3 n.9 (listing the following states as having this condition: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, and Wyoming).

201. See Eli Hager & Anna Flagg, *Parenthood Lost: How Incarcerated Parents Are Losing Their Children Forever*, WASH. POST (Dec. 3, 2018, 6:00 AM EST), https://www.washingtonpost.com/national/parenthood-lost-how-incarcerated-parents-are-losing-their-children-forever/2018/12/02/e97ebcfe-dc83-11e8-b3fo-62607289efee_story.html [https://perma.cc/N5NK-HFM9].

202. *Id.*

203. During the COVID-19 pandemic, the number of incarcerated women dropped. Before then, the number of women in prison had been growing at twice the pace of men. See Aleks Kajstura & Wendy Sawyer, *Women’s Mass Incarceration: The Whole Pie 2024*, PRISON POL’Y INITIATIVE (Mar. 5, 2024), <https://www.prisonpolicy.org/reports/pie2024women.html> [https://perma.cc/UP5P-CTS2].

204. *Id.*

205. See Wendy Sawyer & Wanda Bertram, *Prisons and Jails Will Separate Millions of Mothers from Their Children in 2022*, PRISON POL’Y INITIATIVE (May 4, 2022), https://www.prisonpolicy.org/blog/2022/05/04/mothers_day [https://perma.cc/25HG-TPVP] (finding that over half of incarcerated women in prisons, and eighty percent in jails, are mothers).

206. *Id.*

their children are much more likely to enter the foster care system.²⁰⁷ Then, the termination clock begins to tick. Most women, in 1997, served thirty-six or more months in prison – much longer than the ASFA deadline allows for.²⁰⁸ As Professor Dorothy E. Roberts has long observed, Black mothers experience the “combined effects of racism and sexism” through the criminal legal and family regulation systems.²⁰⁹ Some have called the intersection of these two systems and its impact on Black mothers “The New Jane Crow.”²¹⁰

Parents with disabilities – another overrepresented group in the family regulation system²¹¹ – are often labeled as “unfit” at the onset of a case.²¹² Professor Charisa Smith has observed that parents with disabilities are frequently stereotyped as inherently dangerous to their children.²¹³ Indeed, a parent’s disability can be grounds for the termination of parental rights.²¹⁴ Tailored services that would meaningfully support parents with disabilities are largely not provided.²¹⁵ A disabled parent is at risk of losing parental rights permanently once family regulation agents have decided that no amount of time would change the parent’s circumstances. In the termination context, Professor Robert L. Hayman, Jr. has observed how the logic of inevitability reduces “individual-

207. See BUREAU OF JUST. STAT., NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 4 (Aug. 2000), <https://bjs.ojp.gov/content/pub/pdf/iptc.pdf> [<https://perma.cc/F846-SXQ2>].

208. *Id.* at 6 tbl.8.

209. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1491 (2012).

210. See, e.g., Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. 517, 527-32 (2022). Pauli Murray and Mary O. Eastwood coined the term “Jane Crow” to describe how Black women experienced the intersection of racism and misogyny in the post-Reconstruction period. See Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233-35 (1965).

211. See Lorr, *supra* note 56, at 1326.

212. Lorr, *supra* note 41, at 1286.

213. See Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIPIAC HEALTH L.J. 191, 200 (2015).

214. See Robyn M. Powell, *Legal Ableism: A Systemic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423, 455-56 (2023) (finding that forty-two states and the District of Columbia include parental disability as legal grounds for the termination of parental rights).

215. See Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. U. L. REV. 783, 790-92 (2018) (discussing the “one size fits all” approach to services and treatment for parents with disabilities, based on a “categorical” understanding of disability).

ized adjudications to formalities and foregone conclusions” for disabled parents.²¹⁶ One case illustrates this particularly well. In *Tracy J. v. Superior Court*, state agents in San Diego removed a nine-day-old child from his parents, alleging that they could not care for him due to intellectual disabilities.²¹⁷ After the removal, the parents were granted only one supervised visit per week while their newborn remained in foster care.²¹⁸ Although visits went well—both parents supported one another in caring for their child, demonstrated care and love for him, and put his needs first²¹⁹—they were not given an opportunity to progress and parent their child away from the gaze of family regulation agents and the foster parent. The supervising agents apparently felt “uncomfortable” leaving the parents alone with their child.²²⁰ Without progress, the parents were at significant risk of losing their child permanently. No matter how many services they completed or how many supervised visits occurred without a safety concern, the state viewed their disability as an inevitable barrier to reunification.²²¹

For some parents, engaging fully in a service plan may be physically or financially challenging for a variety of other reasons. Take, for example, a recent Texas case.²²² In September 2018, the mother gave birth to J.W.²²³ When family regulation agents received a positive umbilical-cord blood test for THC, the state removed J.W. and filed for termination of parental rights only days after the birth.²²⁴ After a DNA test established the appellant-father’s paternity, family regulation agents assigned to the case gave him a service plan in February of 2020.²²⁵ The service plan required him to cooperate with a psychological and psychiatric evaluation, to undergo a drug- and alcohol-dependency assessment, to submit to random drug testing, to attend and engage in counseling sessions addressing what brought the child into the system, to participate in and com-

216. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1268-69 (1990).

217. 136 Cal. Rptr. 3d 505, 508 (Ct. App. 2012).

218. *Id.* at 509.

219. *Id.* at 509-11.

220. *Id.* at 510.

221. Ultimately, the court of appeals determined that the state had not provided the parents adequate reunification services, vacated the order terminating reunification services, and directed the lower court to continue monitoring the family for six months. *Id.* at 513-15.

222. *In re J.W.*, 615 S.W.3d 453 (Tex. Ct. App. 2020).

223. *Id.* at 457. The case does not identify the mother’s name or an acronym for it.

224. *Id.*

225. *Id.* at 457-59.

plete a parenting class, to obtain and maintain stable employment, to “develop a positive support system,” and to cooperate with any other provisions of an amended service plan.²²⁶ He was given twenty-nine days to complete his service plan.²²⁷ Notably, the father was not the one accused of neglecting or abusing his child.²²⁸ After hearing the long list of services he would have to engage in immediately to have a chance at avoiding the termination of his parental rights and subsequent adoption of his child, he became frustrated and expressed unwillingness to engage in the services listed by the agency.²²⁹ In March 2020, the trial court terminated his parental rights.²³⁰ While the appellate court ultimately reversed this decision,²³¹ the case illustrates one example of the expectations that are placed on parents with little time to complete them. Other parents have similarly raised the issue of not having sufficient time to complete their service plan.²³²

The temporal constrictions placed upon families by ASFA have led to fast-track terminations in some parts of the country. Already-marginalized children are particularly vulnerable to the permanent loss of the relationship with their parent, siblings, grandparents, and extended family. The above examples illustrate how the courts assess parental fitness within a specific time frame. Once determined, there is limited time for growth or change; parents find them-

226. *Id.* at 470.

227. *Id.* at 467 (“[T]he Department’s argument is essentially that, even though it did not provide the service plan to Appellant until fifteen days before trial, and even though the trial court did not issue its Additional Temporary Order until twenty-nine days before trial, the trial court and the Department told Appellant beginning in October 2019 – when he first appeared in court – that he would have to perform services before the final trial.”).

228. *Id.* at 460 (identifying the father as the “non-offending” parent).

229. *Id.* at 459.

230. *Id.* at 456–57.

231. *Id.* at 474.

232. See, e.g., *Jonah B. v. Dep’t of Fam. & Cmty. Servs.*, No. S-18646, 2023 WL 8452398, at *15 (Alaska Dec. 6, 2023) (holding it was error to terminate parental rights based on the parent’s failure to complete the service plan when the family regulation agency failed “to provide [the parent] with a case plan until less than three months before commencement of trial”); *In re L.P.*, No. 04-22-00015-CV, 2022 WL 2230926, at *10 (Tex. Ct. App. June 22, 2022); *In re A.B.*, Nos. L-12-1069 & L-12-1081, 2012 WL 4761914, at *5 (Ohio Ct. App. Oct. 5, 2012); *In re K.V.C.*, No. 04-22-00150-CV, 2022 WL 3639511, at *3 (Tex. Ct. App. Aug. 24, 2022) (“Father argues he has not received a reasonable opportunity to comply with his court-ordered services because he has not been given enough time to complete those services.”); *In re Banks*, No. 347482, 2019 WL 3987598, at *2 (Mich. Ct. App. Aug. 22, 2019) (per curiam) (explaining that the parent argued she was “not given enough time to complete her parent-agency agreement”).

selves racing against time to prove that they can safely care for their children. Parental performance under surveillance over and in time becomes crucial.

The experience of constriction is perhaps best summarized by a former foster child, who lost her legal relationship with her parents:

What is time? And because of . . . how ambiguous it is we have to realize that what works for one family . . . it may not work for another family So the standard of having a deadline . . . it's completely rooted in what I consider to be white dominant culture And in my personal case, [termination of parental rights] did happen and that timeline did not take things into consideration, like my father being incarcerated²³³

B. Stretching

The second central temporal dimension in the family regulation system is what I call the stretching of time. Both inside and outside the courtroom, delays prolong parents' ability to regain custody of their children once they are removed by the state. Even when the family remains together, delays mean extended surveillance under threat of separation. This Section identifies three moments of temporal stretching: protracted hearings, services and treatment barriers, and the prolonging of safety checks.

1. Family Separation and Protracted Hearings

Every three minutes, a child is removed from their home.²³⁴ Every year, between 200,000 and 270,000 children enter the foster care system.²³⁵ And these numbers arguably only reflect a subset of actual removals.²³⁶

233. Child's Rights, *Terminating Parental Rights Harms Children Too*, YOUTUBE, at 07:25 (Nov. 16, 2022), <https://www.youtube.com/watch?v=f3BnpuyupQg&t=445s> [<https://perma.cc/TET6-KMVM>].

234. "If I Wasn't Poor, I Wouldn't Be Unfit," *supra* note 31, at 2.

235. See AFCARS Report No. 29, *supra* note 30, at 1.

236. Professor Josh Gupta-Kagan argues that states obscure the large number of children who are removed from their parents by coercing parents into transferring custody of their children to kinship caregivers—a phenomenon that he calls the "hidden foster care system." See Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 847-60 (2020). Gupta-Kagan suggests that the number of children who are removed from their parents and placed into the "hidden foster care system" is comparable to the number of children who enter the formal foster system. See *id.* at 860.

Even short periods of separation from their home and family can have long-lasting, traumatizing effects on children.²³⁷ How quickly parents can challenge state removals in court varies across states. In some states, the court must hold an emergency hearing within seventy-two hours.²³⁸ Other states require that removal hearings take place within twenty-four hours of removal.²³⁹ In Connecticut, state agents can remove a child from their home through a ninety-six-hour hold.²⁴⁰ Once the hold is granted, they can seek an ex parte or emergency order of temporary custody without a formal hearing or the presence of the parents.²⁴¹ Only after the emergency order is granted can state agents seek a temporary custody order.²⁴² This order can be challenged by the parents.²⁴³ Pending a final decision about the child's placement, the child remains in the custody of the state.²⁴⁴ This period can last days, weeks, months, and even years.

Despite the existence of emergency court hearings in some states, there is some evidence that the statutory timelines are regularly violated or sidestepped, either when hearings are not started in a timely fashion or because they go on for many weeks and months. A report released by the Bronx Defenders in August 2017 identifies procedural-due-process concerns in Bronx family courts.²⁴⁵ The report focuses on protracted emergency hearings resulting in prolonged family separation. The hearings identified by Bronx Defenders stem from their own case docket.²⁴⁶ In New York, after the removal of a child, parents may re-

237. Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation Is Deep, Long-Lasting*, NOVA (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting> [<https://perma.cc/KR2P-5B6E>].

238. See *supra* Section I.B.

239. See *supra* Section I.B.

240. CONN. GEN. STAT. § 17a-101g(f) (2023).

241. *Id.* § 46b-129.

242. *Id.*

243. *Id.*

244. *Id.*

245. Impact Litig. Prac., *Protracted 1028 Hearings: Five Case Studies Raising Statutory and Constitutional Concerns About Non-Expedited Hearings Under Section 1028 of the Family Court Act*, BRONX DEFS. 1, <https://www.bronxdefenders.org/wp-content/uploads/2013/05/Bronx-Protracted-1028-Hearings.pdf> [<https://perma.cc/J3EK-ATYE>]; see also *Impact Litigation*, BRONX DEFS., <https://www.bronxdefenders.org/programs/impact-litigation> [<https://perma.cc/3VNZ-5SQW>] (explaining this report and noting that it was issued in August 2017).

246. According to their website, the Bronx Defenders are the primary institutional provider for family defense—representation of parents in abuse and neglect proceedings—in the Bronx: they “represent parents in 85% of the child welfare investigation cases in the Bronx Family

quest an emergency hearing (a “1028 hearing”) on the matter.²⁴⁷ The report includes a case study of five 1028 hearings that are “representative of a much larger body” of similar cases.²⁴⁸ All five cases went on for more than two months,²⁴⁹ with one lasting seven months.²⁵⁰ All of them included ten or more court appearances,²⁵¹ with one including twenty-three court appearances.²⁵² Hearing days were rarely scheduled on consecutive days, with some hearing dates being more than a week apart.²⁵³ Parents were typically afforded no more than thirty minutes during a scheduled hearing.²⁵⁴ Some of that time was used solely for scheduling purposes.²⁵⁵ Parents did not request waivers and instead objected to the length of time in between court dates.²⁵⁶ In all five cases, the court ultimately concluded that there was no imminent risk to the child, and the parents regained custody of their children.²⁵⁷ In one of them, an infant was separated from their mother from the age of four to eight months despite there being no imminent risk.²⁵⁸ The report identifies some of the factors that prolonged the process.²⁵⁹ Delays in New York family courts have long been the topic of discussion, despite an express commitment to giving priority to cases in which a child has been removed.²⁶⁰

While the report provides details of select cases from New York family courts, there is evidence of similar dynamics at play around the country. Take,

Court system.” *Family Defense Practice*, BRONX DEFS., <https://www.bronxdefenders.org/our-work/family-defense-practice> [<https://perma.cc/WY9A-GVVP>].

247. N.Y. FAM. CT. ACT § 1028 (McKinney 2024); see *In re Cory M.*, 763 N.Y.S.2d 771, 771 (App. Div. 2003); *In re Prince Mc.*, 931 N.Y.S.2d 261, 261 (App. Div. 2011).

248. Impact Litig. Prac., *supra* note 245, at 2.

249. *Id.* at 3-8.

250. *Id.* at 3.

251. *Id.* at 3-8.

252. *Id.* at 3.

253. See, e.g., *id.*

254. *Id.* at 1.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 4-5.

259. *Id.* at 1.

260. N.Y. FAM. CT. ACT § 1049 (McKinney 2024) (“In scheduling hearings and investigations, the court shall give priority to proceedings under this article involving abuse or in which a child has been removed from home before a final order of disposition. Any adjournment granted in the course of such a proceeding should be for as short a time as is practicable.”).

for example, findings from Massachusetts.²⁶¹ There, family courts are statutorily required to conduct an emergency hearing within seventy-two hours of the child's removal.²⁶² In 2003, a report found the seventy-two-hour requirement for emergency court hearings was not being met.²⁶³ And the issues have not disappeared. Out of 2,383 initial hearings that took place in 2021, only one-third of emergency hearings occurred within three business days, and one-fifth of them did not occur for more than a month.²⁶⁴

Practitioners have provided some further insights into the pervasiveness of protracted family court hearings. One attorney writes that although New York law

requires that hearings for the return of children “be held within three court days of the application and shall not be adjourned,” in our experience, hearings can be incredibly time-consuming Additionally, the family courts in New York City are only open weekdays from 9 AM to 4:30 PM, leaving hearings to be protracted and occurring in minutes-long increments over weeks or even months.²⁶⁵

Another practitioner describes a child removal during which a seven-year-old child remained separated from his parents after the child's physician had called in a case against the mother.²⁶⁶ This phase went on for two months and involved twenty court appearances, until finally, the child's physician testified in court.²⁶⁷ The physician testified that he never intended for the child to be removed from his mother and instead hoped that the state would help with “case

261. See Julia Lurie, *Inside Massachusetts' Family Separation Disaster*, MOTHER JONES (Sept. 26, 2022), <https://www.motherjones.com/criminal-justice/2022/09/child-protective-services-removal-families-massachusetts-hampden-county> [<https://perma.cc/W6RP-RXJC>] (“There is little data on just how common juvenile court delays are around the country, but legal experts say they are ubiquitous.”).

262. MASS. GEN. LAWS ch. 119, § 24 (2024).

263. Among other issues, the report noted delays in the assignment of court-appointed attorneys to represent parents and children in child-welfare cases and a shortage of qualified private practitioners willing to take these cases. See Lurie, *supra* note 261.

264. *Id.*

265. Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 418 n.92 (2019) (quoting N.Y. FAM. CT. ACT § 1028 (McKinney 2024)).

266. Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733, 757-58 (2021).

267. *Id.*

management.”²⁶⁸ Professors Martin Guggenheim and Christine Gottlieb similarly observe that “it is common to represent a parent in a child neglect case in which the child is taken from the parent by court order and not be able to obtain a trial for eight or more months.”²⁶⁹

Select court decisions provide some further texture to the phenomenon of protracted hearings. Take, for example, *In re F.W.*²⁷⁰ In that case, Monroe W.’s children were removed from his care in January 2018 and placed with strangers in the foster care system.²⁷¹ Monroe W. immediately requested an emergency hearing in family court asking the judge to return them.²⁷² The court noted that one attorney’s full calendar impacted the father’s ability to request an expedited hearing.²⁷³ The hearing eventually began in February 2018 but went on for six months.²⁷⁴ In the interim, the court was presented with evidence that the children were significantly impacted by the separation from their father and their placement in foster care.²⁷⁵ They became upset at the end of visits with him, and one child began wetting the bed.²⁷⁶ During these six months, Monroe W.’s attorney repeatedly requested earlier court dates to speed up the hearing.²⁷⁷ The trial judge rejected the applications. At the conclusion of the hearing, the judge determined that the allegations were not credible.²⁷⁸ The children were sent back to their father. Six months had passed. In the meantime, the children’s fifth and seventh birthdays had gone by.²⁷⁹

In *In re Wunika A.*, the court ordered the return of three children after a two-month-long emergency hearing requested by their parents.²⁸⁰ At the time of the removal, the children were ten, four, and one.²⁸¹ The court recognized the devastating consequences of the lengthy hearing from the perspectives of the children. The court wrote that the ten-year-old was emotional and with-

268. *Id.* at 758.

269. Guggenheim & Gottlieb, *supra* note 21, at 554.

270. 122 N.Y.S.3d 620 (App. Div. 2020).

271. *Id.* at 622–23.

272. *Id.* at 622.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 623.

279. *Id.*

280. 65 N.Y.S.3d 421, 428 (Fam. Ct. 2017).

281. *Id.* at 422.

drawn, said she missed her parents' hugs, and stopped eating regularly.²⁸² The court also emphasized that the one-year-old was at a critical stage for parent-child bonding.²⁸³ The four-year-old was negatively impacted not only by the separation from her parents but also by the sudden separation from her ten-year-old sibling, to whom she was deeply attached.²⁸⁴

A recent case exemplifies the arbitrariness of child removals, the delayed legal process that might follow, and the harms done to families throughout. On March 21, 2023, Temecia Jackson—a Black woman in Texas—gave birth to her third child, Mila Jackson.²⁸⁵ A Black midwife cared for her during pregnancy and delivery.²⁸⁶ Soon after her birth, Mila was diagnosed with jaundice, a very common condition in newborns.²⁸⁷ The Jacksons communicated to their pediatrician that they had decided to treat Mila at home with the support of their trusted midwife.²⁸⁸ But on March 25, at four in the morning, family regulation agents appeared at their home alongside a police officer.²⁸⁹ When the Jacksons refused to let them in, state agents returned five days later, warrant in hand—but the document contained the name of a different mother.²⁹⁰ This time, Texas police officers arrested the father, Rodney Jackson, on charges of preventing the execution of the civil process, while family regulation agents removed Mila.²⁹¹ Temecia Jackson expressed that she instantly felt as though her child had been stolen by strangers.²⁹² The Jacksons immediately demanded the return of their child in family court. But the court rescheduled the hearing from April 6 to April 20, prolonging Mila's separation from her parents.²⁹³ In the meantime, the Jacksons were allowed to see their daughter, a newborn, only a

282. *Id.* at 426, 427.

283. *Id.* at 427.

284. *Id.*

285. Nicquel Terry Ellis, *A Texas Family Fought for Weeks to Regain Custody of Their Newborn. Experts Say the Case Shows How Black Parents Are Criminalized*, CNN (Apr. 24, 2023, 11:14 PM EDT), <https://www.cnn.com/2023/04/24/us/texas-family-newborn-removed-reaaj/index.html> [<https://perma.cc/PTE9-Q5B9>].

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. Kerry Breen, *Baby Taken from Texas Couple After Home Birth Will Be Returned by Dallas Court*, CBS NEWS (Apr. 20, 2023, 11:16 AM EDT), <https://www.cbsnews.com/news/temecia-rodney-mila-jackson-returned-home-birth-jaundice-texas> [<https://perma.cc/9FYR-3VKD>].

few times while supervised by state agents.²⁹⁴ They were prevented from breastfeeding and early skin-to-skin contact, and they were otherwise deprived of the opportunity to bond meaningfully with their days-old child. After nearly a month in the foster care system, Mila was finally returned to her parents on April 20, 2023.²⁹⁵

The physical closure of family courts during COVID-19 exacerbated the protracted nature of family regulation proceedings in some states, but prolonged family separation is not a new phenomenon.²⁹⁶ Over two decades ago, the Eastern District of New York recognized the risk of unnecessary and protracted child removals brought on by family regulation agents and family courts in *Nicholson v. Williams*.²⁹⁷ In that case, survivors of gender-based violence who had been accused of neglecting their children by exposing them to domestic violence brought a class-action lawsuit against the Administration of Children's Services (ACS) in New York City.²⁹⁸ The lawsuit highlighted the direct experiences of several women who were separated from their children by the State of New York.²⁹⁹ In some cases, family regulation agents had separated the family long before a court held a hearing to consider whether the child was at risk in the home. In the case of Sharline Nicholson and her children, for example, it took the state twenty-one days to return the children to her care.³⁰⁰ In the interim, one of the children turned six years old and their mother, Ms. Nicholson, was not able to see or speak with him.³⁰¹ In the case of Ekaete Udoh, the court allowed family regulation agents to investigate the mother for approximately two weeks before sending her children back home, despite the

294. Char Adams, *Black Couple Reunited with Newborn Taken by Authorities over Medical Treatment*, NBC NEWS (Apr. 27, 2023, 2:49 PM EDT), <https://www.nbcnews.com/news/nbcblk/black-couple-reunited-newborn-taken-authorities-medical-treatment-rcna81833> [<https://perma.cc/HK6L-JTR4>].

295. *Id.*

296. N.Y.C. Fam. Ct. COVID Work Grp., *The Impact of COVID-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants*, N.Y.C. BAR ASS'N AND THE FUND FOR MOD. CTS. 13 (Jan. 2022), <https://moderncourts.org/wp-content/uploads/2022/02/NY-Family-Court-Report-1-22-2022.pdf> [<https://perma.cc/5QL7-7WP7>] (“[W]hile there have in recent years more frequently been delays in scheduling required hearings in child protective cases, including 1027 and 1028 hearings, these delays have grown exponentially worse with the advent of the pandemic restrictions.”).

297. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

298. *Id.* at 163–64.

299. *See id.* at 168–92.

300. *Id.* at 172.

301. *Id.*

children’s attorney noting that the delay was harmful to them.³⁰² While in the system, the children had missed school and had been locked out of the foster home repeatedly.³⁰³ In Sharline Tillett’s case, the children remained in the foster care system for almost two months.³⁰⁴ Michelle Norris’s child was removed from her care for over five months after the court adjourned her case without a hearing on the merits of the removal.³⁰⁵ Notably, in at least one case, the state agents themselves were, perhaps inadvertently, transparent about the use of separation, aggravated by the length of separation, as a weapon. The state agent testified that it was “common . . . to wait a few days before going to court after removing a child because, after a few days of the children being in foster care, the mother will usually agree to ACS’s conditions for their return.”³⁰⁶ The court in the case observed:

The child removal process is long, potentially taking many months before the Family Court will determine whether a child should be returned to her mother. A parent’s desire to have her children returned quickly often leads to the mother being forced to follow the instructions of ACS workers to avoid arduous court proceedings.³⁰⁷

These are just some examples of the ways that a state agent’s initial decision to remove a child may take a considerable amount of time to reverse. Little has changed since this lawsuit. Survivors of intimate-partner violence still experience coercive intervention by the family regulation system in New York and elsewhere.³⁰⁸ Time continues to play a major role.

For children, family separation has serious short- and long-term impacts. When children are removed by the state and placed with strangers, they are suddenly separated not only from what is likely their closest relationship, but in many cases also from their siblings, friends, extended family, and familiar community.³⁰⁹ For some children, this means being ripped from their culture,

302. *Id.* at 179-80.

303. *Id.*

304. *Id.* at 180-82.

305. *Id.* at 186-87.

306. *Id.* at 170.

307. *Id.* at 230.

308. Washington, *supra* note 27, at 1123-24.

309. Nell Clement, Note, *Do “Reasonable Efforts” Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 419 (2008).

which can later impact their sense of identity and belonging.³¹⁰ Young children in particular may carry a sense of loss and identity confusion into adulthood. Removals regularly occur without any explanation, leaving children to wonder about the reasons for being separated from their family and when they will be able to go home.³¹¹ One child compared her removal to being kidnapped.³¹² One parent described how her children lived in constant fear of being removed again long after they had returned home.³¹³ Failure to process the grief of this sudden loss can later result in posttraumatic stress disorder, anxiety, and low self-esteem.³¹⁴

The separation of a child from their parents and subsequent institutionalization can put children on a disadvantaged trajectory.³¹⁵ As research has shown, disadvantage in early childhood influences socioeconomic status in adulthood, often resulting in the “replication of poverty.”³¹⁶ These impacts are particularly salient for racially marginalized children, who are already disproportionately impacted by family regulation intervention.³¹⁷ While the state might remove a child in an instant, the impact might be felt long after—even when a child is eventually returned home.

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310. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 540 (2019); Clement, *supra* note 309, at 418-19 (“Removal of children from their families and cultural community has potentially devastating effects on the identity and psychological health of the removed children.”).
311. MONIQUE B. MITCHELL, *THE NEGLECTED TRANSITION: BUILDING A RELATIONAL HOME FOR CHILDREN ENTERING FOSTER CARE* 10-27, 38-62, 78-94 (2016).
312. *Id.* at 11.
313. Child Welfare Org. Project, *A Life Changing Visitor: When Children’s Services Knocks*, VIMEO (July 26, 2013, 5:29 PM), <https://vimeo.com/71127830> [<https://perma.cc/5JLE-TKAR>].
314. MITCHELL, *supra* note 311, at 4.
315. See Delilah Bruskas & Dale H. Tessin, *Adverse Childhood Experiences and Psychosocial Well-Being of Women Who Were in Foster Care as Children*, 17 PERMANENTE J., no. 3, 2013, at e131, e138; Lawson G. Lowrey, *Personality Distortion and Early Institutional Care*, 10 AM. J. ORTHOPSYCHIATRY 576, 585 (1940); Frank C.P. van der Horst & René van der Veer, *Loneliness in Infancy: Harry Harlow, John Bowlby and Issues of Separation*, 42 INTEGRATIVE PSYCH. & BEHAV. SCI. 325, 326-27 (2008).
316. See Clare Huntington, *Early Childhood Development and the Replication of Poverty*, in *HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY* 130, 130, 134-36 (Ezra Rosser ed., 2019).
317. For a discussion of how, beginning in childhood, racism can create cumulative disadvantage for people of color over the course of their lives, see Alexander A. Boni-Saenz, *The Age of Racism*, 100 WASH. U. L. REV. 1583, 1610-15 (2023).

2. *Barriers to Services and Treatment*

Once a family regulation proceeding commences, all time becomes time under surveillance. The monitoring of service-and-treatment plans is one important focus of such surveillance. Here, the framework of performance as penal technique is illuminating. Observing parental performance throughout the course of a case—in and outside court—provides the state with information about a parent’s willingness and ability to submit. The performance of submission is equated with parental fitness and worthiness.³¹⁸ Indeed, compliance with long lists of requirements informs the state’s perception of parental ability and child safety.³¹⁹

From the early to late stages, service-and-treatment plans are a central part of the family regulation process.³²⁰ Even before the state has proven the allegations against a parent, the parent is regularly asked to engage in services and treatment prescribed by family regulation agents.³²¹ Agents have a lot of leeway in determining the details of the service-and-treatment plan. Judges do not typically probe whether this plan is specifically tailored to the family’s individual needs.³²² In practice, service plans tend to include the same set of services for different families with different needs. For example, many parents are asked to complete a parenting class, regardless of the allegations or findings against them or whether they are new or experienced parents.³²³

Time adds an important dimension here. Altogether, finding and completing services may take many months or even years, especially when a parent is expected to engage in multiple services at once, is visiting with their child regu-

318. Cf. Washington, *supra* note 27, at 1134, 1150-51 (2022) (arguing that the family regulation system requires survivors to articulate their experiences in specific ways and perform agreement and compliance with state intervention).

319. See Washington, *supra* note 176, at 1570-71.

320. Frank Edwards, Kelley Fong, Victoria Copeland, Mical Raz & Alan Dettlaff, *Administrative Burdens in Child Welfare Systems*, 9 RSF 214, 216, 218 (2023).

321. 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, 139 (2019).

322. See Brennan, *supra* note 103, at 157 (discussing the “unchecked discretion of child protective agencies”); Hernandez & Ismail, *supra* note 80, at 688.

323. See Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 791-92 (2021); Suzanne M. Murphy & Doris Bryant, *The Effect of Cross-Cultural Dialogue on Child Welfare Parenting Classes: Anecdotal Evidence in Black and White*, 81 CHILD WELFARE 385, 385-86 (2002).

larly, and is working to support their family.³²⁴ Indeed, individualized treatment, recovery, and support do not necessarily fit neatly into the timeline dictated by the state.

Some courts have excused family regulation agencies from having to connect families with services effectively even as the same courts have held parents accountable for their lack of engagement in services.³²⁵ In areas with a dearth of service providers, it may take months or even years to identify and begin services. Take, for example, the case of Samantha and her daughter Sarah. At birth, Sarah was diagnosed with neonatal abstinence syndrome, separated from her mother, and placed in the foster care system.³²⁶ Samantha was willing to engage in an intensive drug-treatment program but was not able to access these services in her rural community in Maine.³²⁷ Family regulation agents did not help her connect with drug-treatment services.³²⁸ To help mitigate her dependence, she sought care at a local community clinic.³²⁹ With the help of her doctor, she made weekly calls to the only rehab center that would treat her without insurance.³³⁰ It took her two years to finally secure a rehab placement.³³¹ Although Samantha has remained drug free ever since, found housing, and is training to be a drug counselor, her daughter remained in the foster care system.³³²

324. Washington, *supra* note 176, at 1570-71 (discussing the challenges associated with the completion of service plans).

325. Cf. Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541, 1568-70 (2024) (“In theory, the reasonable efforts requirement could provide a mechanism to distinguish poverty from neglect. If reasonable efforts included anti-poverty supports, then courts in each case could evaluate whether those supports sufficed to mitigate any risk to the child’s safety. . . . Even more discrete reasonable efforts questions have not consistently led to requirements that CPS agencies provide services that families could not otherwise afford. Consider *In re N.M.W.*, the case involving unsanitary conditions in a home. Approving the removal in that case, the Iowa Court of Appeals noted that the parent ‘was given numerous opportunities to clean and sanitize her apartment’—not that the state provided assistance to do so—‘but failed to rectify the situation.’” (footnotes omitted) (quoting *In re N.M.W.*, 461 N.W.2d 478, 481 (Iowa Ct. App. 1990))).

326. *The State of America’s Children 2020*, CHILD’S DEF. FUND 26 (2020), <https://www.childrensdefense.org/wp-content/uploads/2023/08/The-State-Of-Americas-Children-2020.pdf> [<https://perma.cc/H7W5-GWF3>].

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

The story of Elizabeth Brico discussed in the Introduction similarly describes the serious consequences of treatment and service delays paired with a lack of support from family regulation agents.³³³ Brico was ordered to engage in a long list of services and other requirements, including a psychiatric evaluation, substance-abuse treatment, trauma-based therapy, parenting classes, random drug testing, family therapy, maintaining stable housing, employment, and paying child support.³³⁴ Although family regulation agents are meant to assist parents in completing their service plan, Brico writes that she received no help with employment or housing and did not receive a referral for mental-health services until six months after the case had started.³³⁵ The court found her to be noncompliant with her service plan because she failed to engage in all required services within a specific time frame.³³⁶

3. *Prolonging Safety Checks and Clearances*

Other sources of temporal stretching are prolonged safety checks and clearances. When a child is initially removed from their parents, family regulation agents are obligated at least to consider potential alternatives to stranger foster care.³³⁷ The basic idea behind the mandate to consider family is that remaining with relatives, especially if a prior relationship exists, is less disruptive to the child and to their relationship with their parents.³³⁸

Once a potential family resource has been identified, to be considered further, they must generally undergo a background check and clearance.³³⁹ This allows family regulation agents to identify whether the proposed resource has had any contact with the criminal legal or family regulation systems in the past. In other work, I have discussed the discriminatory impacts of these background checks.³⁴⁰ A closer look at temporal considerations adds another dimension.

333. See *supra* notes 2-4 and accompanying text.

334. See *supra* notes 2-4 and accompanying text.

335. See *supra* notes 2-4 and accompanying text.

336. See *supra* notes 2-4 and accompanying text.

337. 42 U.S.C. § 671(a)(19) (2018) (“[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child.”).

338. See Child Welfare Info. Gateway, *Kinship Care and the Child Welfare System*, U.S. DEP’T OF HEALTH & HUM. SERVS. 3 (May 2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/f_kinshi.pdf [<https://perma.cc/99CM-P923>].

339. Child Welfare Info. Gateway, *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers*, U.S. DEP’T OF HEALTH & HUM. SERVS. 1-2 (Sept. 2018), <https://www.childwelfare.gov/pubpdfs/background.pdf> [<https://perma.cc/4WLD-798M>].

340. See Washington, *supra* note 176, at 1558-61.

For one, the timing of clearances is crucial. The longer the state waits to clear a particular resource, the longer a child will be in the foster care system, even when relatives are willing to serve as a caregiving resource. Delays in identifying and clearing resources can significantly impact the trajectory of the case. *Haaland v. Brackeen*, a recent Supreme Court case, is one such example.³⁴¹ While the child was placed with nonrelative foster parents, her grandmother, Robyn Bradshaw, consistently and repeatedly made herself available as a permanent-placement resource.³⁴² Indeed, when Bradshaw learned that her grandchild, with whom she had a strong bond, had been removed from her daughter and placed in the foster care system, she acted immediately. Bradshaw called the county that had conducted the removal and asked if she could pick up her granddaughter.³⁴³ When she was not allowed to do so, Bradshaw proceeded to show up to every court hearing and repeatedly asked for her granddaughter to be placed with her.³⁴⁴ Bradshaw tried to get the agency to clear her as a kinship resource but was unable to receive the clearance due to a fifteen-year-old conviction for receipt of stolen property.³⁴⁵ She was not told that she could have had her record cleared.³⁴⁶ Consequently, her granddaughter remained in the foster care system for two years, where she was placed with six different families.³⁴⁷ In 2016, the child was eventually placed with the Cliffords, who were plaintiffs in the *Brackeen* case.³⁴⁸ Bradshaw eventually cleared her record, and her lawyer argued that the child “was forced into this system that she should have never been in because she had a family placement at the very beginning.”³⁴⁹ Bradshaw’s experience illustrates how criminal legal history paired with a lack of timely legal representation prolonged a child’s separation from her family and tribe.

341. 599 U.S. 255 (2023).

342. Nancy Marie Spears, *How an Ojibwe Grandmother’s Adoption Fight in Minnesota Ended up in the U.S. Supreme Court*, SAHAN J. (Oct. 20, 2022), <https://sahanjournal.com/policing-justice/brackeen-v-haaland-native-adoption-us-supreme-court-minnesota-bradshaw-icwa> [<https://perma.cc/8QVG-5U3M>].

343. *Id.*

344. *Id.*

345. Julia Lurie, *Forever Home*, MOTHER JONES (Mar./Apr. 2023), <https://www.motherjones.com/politics/2023/02/brackeen-haaland-scotus-indian-child-welfare-act-icwa> [<https://perma.cc/LHR3-2GEK>].

346. Spears, *supra* note 342.

347. Lurie, *supra* note 345.

348. *Haaland v. Brackeen*, 599 U.S. 255, 270-71 (2023).

349. Spears, *supra* note 342.

Another important temporal aspect relates to the ways background checks draw on the past and rely on racialized histories. The war on drugs in the 1980s and 1990s is one such example. During that time, allegations of child neglect based on drug use increased dramatically in family courts, whether the state could show actual harm to the child or not.³⁵⁰ At the same time, parental drug use became increasingly criminalized and prosecuted.³⁵¹ As the primary targets of the drug war, Black families were disproportionately impacted.³⁵² When family regulation agents refuse to clear a family resource for decades-old drug convictions, absent any other safety concerns, they rely on the product of this racialized history. In this way, past histories are catapulted into the present with disparate impacts on Black families.³⁵³

* * *

By making families wait, the state imposes “a mark of power.”³⁵⁴ The managing of marginalized families’ time through waiting creates a material and emotional burden. This burden reinforces existing social stratification. Parents find themselves having to deprioritize all else to juggle supervised visits with their child, wait in court, and engage in services pending a decision. For many families ensnared in the system, missing even a few days of work can seriously jeopardize financial stability. This issue is exacerbated when parents are required to come to court multiple times per week for a single hearing that extends over weeks or months. In some cases, this might not only lead to decreased earnings but ultimately to loss of employment or missed educational opportunities. A parent may find themselves navigating supervised visits, go-

350. See *Report: The War on Drugs Meets Child Welfare*, DRUG POL’Y ALL. 1-2 (2021), https://uprootingthedrugwar.org/wp-content/uploads/2021/02/uprooting_report_PDF_childwelfare_02.04.21.pdf [<https://perma.cc/L2JH-PT5S>]; “*Whatever They Do, I’m Her Comfort, I’m Her Protector.*” *How the Foster System Has Become Ground Zero for the U.S. Drug War*, MOVEMENT FOR FAM. POWER, N.Y.U. L. FAM. DEF. CLINIC, AND DRUG POL’Y ALL. 5-7, 15 (June 2020) [hereinafter *Ground Zero for the U.S. Drug War*], <https://static1.squarespace.com/static/65e79daddfbda143522ace5d/t/66ed89f8af7a4d5e1edbbfce/1726843386472/Ground-Zero-Report-Full.pdf> [<https://perma.cc/DAD8-LGZK>]. See generally Adam H. Johnson, *The Appeal Podcast: The War on Drugs Continues in Family Court*, APPEAL (Sept. 26, 2019), <https://theappeal.org/the-appeal-podcast-the-war-on-drugs-continues-in-family-court> [<https://perma.cc/TJ6Y-6GQW>] (discussing the interactions between criminalization of marijuana and the family court system).

351. See *Ground Zero for the U.S. Drug War*, *supra* note 350, at 15-18.

352. *Id.* at 15, 26-28.

353. See generally Washington, *supra* note 176 (describing the family regulation system’s pathologizing of racially marginalized parents).

354. DUBOIS, *supra* note 133, at 157; see also Reid, *supra* note 129, at 755 (terming state power “temporal domination”).

ing to programs recommended by the state, and attending court dates every day of the week. During the waiting period, parents are closely monitored inside of the courtroom, in their homes, and during supervised visits with their children. Their progress in services is documented and shared with state actors. They are expected to perform patience and compliance as they wait for the next court date, the next visit with their child, the next available appointment with a provider, or the clearance of a family member.

C. Indeterminacy

A third temporal dimension, and perhaps the dimension most unique to the family regulation system,³⁵⁵ is what I call indeterminacy. Here, indeterminacy refers to the ways in which a family regulation case does not necessarily focus on a specific moment in time in the life of a case and instead includes a prospective focus.³⁵⁶ This changing focus can render the subject of the proceedings indeterminate. In effect, indeterminacy shapes parents' experience of time and exacerbates constriction and stretching.

355. There are, however, some analogues in the criminal legal system. Probation and drug courts are examples of the criminal system shifting its focus from the allegations that gave rise to the charges to actions under supervision. In imposing probation or drug-treatment programs rather than a jail sentence, courts may require people to “accept’ that [probation] conditions can be enlarged in the future.” Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1726 n.125 (2019) (quoting *State v. Faraday*, 842 A.2d 567, 574 (Conn. 2004)). Professor Kate Weisburd similarly notes that “supervising agents become *de facto* shadow sentencers” by exercising their discretion to expand probation requirements in ways that may be only weakly connected to the original charges. Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 24 (2023); see also Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 221 (finding that the extended and invasive supervision that awaits many on probation “increases the likelihood that low-risk behaviors that would have otherwise gone unnoticed will be both seen and punished”).

356. Notably, Black feminist scholarship has focused on containment as a subordinating temporal dimension. See Logan Rae Gomez, *Temporal Containment and the Singularity of Anti-Blackness: Saying Her Name in and Across Time*, 51 RHETORIC SOC’Y Q. 182, 184 (2021) (“Blackness, for example, has been historically configured as always belated and the violences of a universal linear time are one site where race-making and maintaining the racial status quo come to light. Ore and Houdek seek to identify what is enabled or what could otherwise be outside the suffocating norms of white time. They introduce a countertemporality of a ‘spatio-temporal politics of breathing’ as a rearticulation of justice in times of persistent psychic, physical, and emotional violence against Black lives. A spatiotemporal politics of breathing highlights how the hegemony of white time is inseparable from white supremacy and anti-Blackness in the United States.” (citations omitted) (quoting Ersula Ore & Matthew Houdek, *Lynching in Times of Suffocation: Toward a Spatiotemporal Politics of Breathing*, 43 WOMEN’S STUD. COMM’N 443, 445-46 (2020))).

While a family regulation case may be triggered by a set of allegations against the parents, whether these allegations remain the focus of the court proceedings varies. Allegations in the charging document can be amended throughout the proceedings—meaning before, during, and after a factual hearing about the allegations.³⁵⁷ Parents can object to the amendment but must show that it causes significant prejudice.³⁵⁸

In most cases, however, the shift in focus is much more informal. What begins as a case about a particular incident, or a particular set of allegations, may quickly become about the parent's behavior *after* family regulation intervention. Take, for example, the case of Mercedes, a mother in New York.³⁵⁹ The initial allegations centered around Mercedes's failure to supervise her children when one of them burned her leg with a curling iron.³⁶⁰ Mercedes was charged with neglect in family court.³⁶¹ The state argued that all three children, including the ones who were unharmed, should be taken away and placed in foster care.³⁶² Later, they argued that "Mercedes's home had been observed to be unsanitary on . . . two occasions" and that "she had refused to participate in drug treatment" for marijuana use.³⁶³ Six months later, the agency again attempted to separate the family by presenting another set of allegations.³⁶⁴ They argued that one of the children had eczema and another was underweight.³⁶⁵ It would later turn out that the underweight child had a growth-hormone deficiency.³⁶⁶ Three months later, state agents attempted for a final time to separate the family.³⁶⁷ Although they were never successful, the case illustrates the state's ability to pivot to other allegations throughout the life of a case.

In some cases, the shift in focus is directly related to the intervention itself. The unexpected removal of a child and the constant surveillance by state agents

357. Washington, *supra* note 176, at 1548 (using the term "moving targets" to describe the changing focus of family regulation cases).

358. *Id.* at 1549.

359. 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/LV2F-W2YU>].

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

can have severe impacts on a parent's emotional state. For many of the parents I represented, state intervention marked the first time they had ever been separated from their child. Others feel deep shame and are unable to speak about and process their experience with the system.³⁶⁸ Indeed, some social scientists have described the family regulation system as a shame-based system.³⁶⁹ Some parents describe a sense of identity loss after the removal of their child.³⁷⁰ Many families continue to live in fear of state intervention long after their involvement with the system.³⁷¹ One parent articulates being unable to enjoy fun moments with her child out of fear that she might be blamed for bumps or scratches.³⁷² There is no shortage of examples of parents who detail how their sadness, anger, or desperation at the removal or threat of removal of their children was weaponized against them.³⁷³ Displays of strong emotions can cause the state to shift or expand the focus of the proceedings.³⁷⁴ Instead of recognizing the deep trauma associated with state intervention, the state uses anger, sadness, and desperation to pathologize parents and to justify further state intervention or legitimize existing intervention.³⁷⁵

Much of what enables this shifting focus is rooted in the interplay of vague understandings of neglect, low evidentiary standards to prove such neglect, risk-averse judges, and the compliance logic embedded in the system. As several scholars have argued, what constitutes neglect is incredibly vague and subjective.³⁷⁶ In fact, much of what falls into the category of neglect is related to poverty. If the state can construct allegations out of vague understandings of what a "fit" parent ought to do or not do, state actors can wield enormous

368. B. et al., *supra* note 78, at 15 (finding that most parents in the study felt ashamed by their involvement with the child welfare system, which can cause isolation).

369. Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse*, 3 ISSUES CHILD ABUSE ACCUSATIONS, no. 2, 1991, http://www.ipt-forensics.com/journal/volume3/j3_2_5.htm [<https://perma.cc/NF5B-86LV>].

370. B. et al., *supra* note 78, at 15 ("Parents lose their jobs – and identities – and live in fear.").

371. 'Fear of CPS Impacts Every Move I Make,' RISE (June 2, 2021), <https://www.risemagazine.org/2021/06/fear-of-cps-impacts-every-move-i-make> [<https://perma.cc/S5LG-KV77>].

372. B. et al., *supra* note 78, at 15.

373. *E.g.*, Washington, *supra* note 176, at 1526-30.

374. *Id.* at 1563-68 (discussing the ongoing policing of emotions by family regulation actors).

375. *Id.* at 1537.

376. See Mical Raz, *Anti-Trans Laws Weaponize Child Protection Systems that Have Long Harmed Kids*, WASH. POST (Mar. 10, 2022, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2022/03/10/anti-trans-laws-weaponize-child-protection-systems-that-have-long-harmed-kids> [<https://perma.cc/F8CU-UXMT>]; *cf.* Trivedi, *supra* note 310, at 562 (critiquing the vague, subjective standards by which judges determine what is "best" for a child).

power and exercise great discretion in deciding whether to investigate and charge a specific parent. The issue is not merely that the system conflates poverty and neglect. At least some aspect of neglectful behavior is arguably connected to time poverty. A parent who is working multiple jobs to sustain the family financially might be unable to attend to their child in ways that could be construed as failures in parental “fitness” without the appropriate context. This becomes yet another way that marginalized families are penalized.

Indeterminacy shapes parents’ experience of time by adding a disorienting element to an already-difficult-to-navigate system.³⁷⁷ One impacted parent recounts the feeling of “being stuck in a labyrinth” for five years.³⁷⁸ The shifting focus throughout the life of a case allows the state to engage in performance testing during both fast-moving and slow-moving moments. These changing focuses layer onto an experience of time that is far removed from the timelines that govern court processes.

Indeterminacy also exacerbates constriction and stretching. If the proceedings focus on new or different allegations throughout the life of a case, the need to race against looming deadlines is accelerated. On the other hand, a change in focus might lead to further delays in ongoing emergency hearings or complicate the completion of service plans.

* * *

A family’s ability to navigate constriction, stretching, and indeterminacy is informed by axes of social difference, such as race, class, and disability. For one, as discussed in Part I, the families impacted by family regulation intervention are overwhelmingly already at the margins of society. They are also more likely to have to navigate constriction while incarcerated and less likely to have the financial resources to afford loss of wages. They are also more vulnerable to the consequences of delayed treatment and services, while wealthy parents can “buy time” by gaining access to a variety of private providers. In other words, existing dimensions of marginalization compound to make some families particularly vulnerable to the interplay of constriction, stretching, and indeterminacy.

Navigating the family regulation system by racing, waiting, and readjusting in and over time is an integral part of the family regulation system’s specific managerial mode of observing, sorting, and regulating families.

377. “If I Wasn’t Poor, I Wouldn’t Be Unfit,” *supra* note 31, at 122.

378. Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 650-52 (2021).

D. Interplay of Temporal Dimensions

So far, this Feature has surfaced several dimensions of time in the family regulation system and their impact on already-marginalized parents and their children. The relationship between time and marginalization is multifaceted. In some instances, time takes on a distinctly marginalizing impact. The separation of infants from their parents is illustrative because this early phase in a child's life is so time sensitive. When families are separated days after the birth of the child, parents are stripped of the opportunity to nurse, practice early skin-to-skin contact, and build confidence in their parenting. Indeed, missed opportunities at this juncture can put both parents and children on a disadvantaged trajectory. New parents' confidence in their ability to care for their newborn is a crucial part of healthy adaptation to parenthood.³⁷⁹ Grieving lost time is a common experience for impacted parents.³⁸⁰ Professor Kelley Fong discusses a pertinent example: "Those moments can't be given back to me. . . . I can't relive her teething. I can't relive the things she used to do that would probably make my sister laugh, before she went to sleep."³⁸¹ For children, early bonding has well-documented developmental impacts.³⁸² For this reason, the timing and length of intervention take on a specific meaning. One former foster child, who became a legal orphan after his father's parental rights were terminated, recounts the long-term impacts of separation on their lives:

There was all this lost time when me and my dad had wanted to talk to each other but were being prevented by the state government There was a lot of damage and a lot of repair that needed to be done between us, and a lot that had been taken away.³⁸³

In other instances, time reinforces other forms of marginalization—for example, when time merely extends the state's ability to observe a parent's performance under surveillance. And finally, the devaluing of time as a parent's resource may be a product of their marginalized status. In those instances,

379. Tracy L. Jones & Ronald J. Prinz, *Potential Roles of Parental Self-Efficacy in Parent and Child Adjustment: A Review*, 25 *CLINICAL PSYCH. REV.* 341, 342 (2005).

380. FONG, *supra* note 20, at 166.

381. *Id.*

382. Miriam R. Spinner, *Maternal-Infant Bonding*, 24 *CANADIAN FAM. PHYSICIAN* 1151, 1151-52 (1978).

383. Agnel Philip, Eli Hager & Suzy Khimm, *The 'Death Penalty' of Child Welfare: In 6 Months Some Parents Lose Their Children Forever*, NBC NEWS (Dec. 20, 2022, 8:30 AM EST), <https://www.nbcnews.com/news/us-news/termination-parental-rights-neglect-children-rcna61439> [https://perma.cc/R8T7-NS69].

marginalization informs whose experience of time is valued. This Feature does not mean to suggest that time exists separate and apart from already-existing system issues. However, the interplay between constriction, stretching, and indeterminacy brings into focus the less obvious ways temporal factors are an aggravating force in a system already designed to control and punish disadvantaged families. Indeed, constriction, stretching, and indeterminacy must be understood through their combined impact. They are both in tension with one another and, in effect, mutually reinforcing. This Section focuses on two central aspects of their interplay: one, the asymmetry between the expectations put on parents and those put on the state, and two, the “slow death” that results from both fixing parents in time and continuously monitoring current and future behavior.

On the one hand, termination timelines are rigid and have dire consequences for families. For impacted families, fifteen out of twenty-two months becomes a guidepost.³⁸⁴ Simultaneously, however, other timelines seem malleable, dependent on court resources, attorney calendars, and within the control of other providers, creating tension between temporal constriction and temporal stretching. The slower the process of reunification, the more likely that the state will file for termination. Delayed access to services is a basis to challenge a parent’s progress and willingness to comply with the state’s expectation of progress. The use of decades-old findings and convictions to prevent a child’s placement with a relative might cut off alternatives to termination in later stages of the case, meaning the state will attempt to terminate parental rights rather than preserve the parent-child bond through legal guardianship. Indeterminacy adds an additional layer of disorientation here.

While termination timelines bind parents, the state is not necessarily required to adjudicate the underlying neglect or abuse allegations against the parents within a specific timeline.³⁸⁵ In some jurisdictions, it regularly takes

384. Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 701 (2021) (“Title IV-E funding requires the termination of parental rights if a child has been in foster care for fifteen out of the last twenty-two months.”).

385. See *In re Commitment of Raymond W.*, 693 N.Y.S.2d 27, 28-29 (1999) (“It was not improper for Family Court to entertain the instant permanent termination proceeding based on mental illness when a child protective proceeding based on neglect was pending by reason of a remand from this Court for a new fact-finding hearing.” (citations omitted)); *In re A.M.-F.*, 105 N.Y.S.3d 437, 439 (2019) (“The mother’s contention, in effect, that the Family Court lacked jurisdiction to make a finding of permanent neglect because the prior related Family Court Act article 10 child protective proceeding remained unresolved is without merit.”); *In re Walter D.H.*, 938 N.Y.S.2d 567, 568 (2012) (“The mother’s contention that this proceeding

one to two years for a case with underlying neglect or abuse allegations to reach the posttrial stage.³⁸⁶ The interplay of strict deadlines, lengthy monitoring, and separation disadvantages families and advantages the state. From a family's perspective, every moment of separation is an emergency, whether it is treated as one in court or not. The time lost during the process is invaluable. Parents may miss out on the ability to take their newborn home from the hospital for the first time, nurse their infant, celebrate birthdays and holidays together, and experience their child's first milestones.³⁸⁷

Further, the time pressures associated with the risk of termination can conflict with a parent's right to challenge violations of their rights. In other words, a parent may have to accept a flawed or even discriminatory process to speed up reunification with their child. Scholars have long recognized that the family regulation system favors a nonadversarial process and rewards submission.³⁸⁸ Challenging the allegations against them, making constitutional arguments, or

should not have been commenced prior to the resolution of a related Family Court Act article 10 child protective proceeding is without merit.”).

386. N.Y.C. Fam. Ct. COVID Work Grp., *supra* note 296, at 7.

387. *See supra* Introduction.

388. *See* Amy Sinden, “Why Won’t Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings,” 11 YALE J.L. & FEMINISM 339, 350-54 (1999); Washington, *supra* note 27, at 1106-07. In the criminal legal system, a similar dynamic has been referred to as the trial penalty. *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) (“The expected posttrial sentence is . . . like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”); Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 685 (2013) (“American defendants plead guilty in overwhelming numbers because the sentences imposed pursuant to plea agreements are substantially less severe than those imposed following convictions at trial.” (footnote omitted)); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2668 (2013) (“[The criminal justice system] punishes many individuals convicted after trial much more harshly than those convicted after a guilty plea, in what has been characterized as a ‘trial tax.’” (quoting Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1158 (2008))); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 246 (2006) (noting that threatening “unfair” trial sentences to encourage guilty pleas is a “common phenomenon in the American criminal justice system”); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 213 (1979) (noting that American plea bargaining has a “terrible attribute that . . . makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver of trial”); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 47 (“[O]ne can conclude that in most cases the prosecutor unilaterally determines what concessions the defendant will receive for his guilty plea because of the state’s ability to punish those defendants who do not plead.”).

complaining about their treatment in the system can result in prolonged separation from their children.³⁸⁹

Under federal law, before severing the legal parent-child relationship, the state must make “reasonable efforts” towards family reunification.³⁹⁰ However, Congress provides very little guidance on what constitutes reasonable efforts.³⁹¹ The interpretation of “reasonable” by state courts further illustrates the asymmetry between the state and impacted families. As Professor Josh Gupta-Kagan has observed, reasonable efforts findings constitute a “weak accountability tool.”³⁹² Indeed, available, although limited, research suggests that most judges very rarely find that the state has failed to make reasonable efforts.³⁹³ In other words, the reasonable efforts requirement does not mitigate the state/parent asymmetry and instead cements it.

Together, these temporal dimensions reinforce a dynamic in which parents are bound by strict timelines, while the state is not. The acceptance of this asymmetry is arguably rooted in entrenched narratives about marginalized families and their parenting capabilities.³⁹⁴ Black families have been pathologized for decades.³⁹⁵ While Black and Indigenous children are viewed as worth

389. See, e.g., Burton & Montauban, *supra* note 378, at 652-53.

390. This has been a federal requirement since 1980. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 500, 503 (codified as amended in scattered sections of 42 U.S.C.).

391. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL’Y REV. 217, 253-54 (2022) (observing that the concept of reasonable efforts has remained “amorphous”).

392. *Id.* at 254.

393. See Karen Monahan, Tammy Richards, Anita St. Onge, Mark Hardin, Judith Larsen, Samia Nursi & Sarah Caverly, *Michigan Court Improvement Program Reassessment*, MUSKIE SCH. OF PUB. SERV. AND AM. BAR ASS’N 105 (Aug. 2005), <https://www.courts.michigan.gov/4a7b69/siteassets/reports/cws/cipreassessmentreport090605.pdf> [<https://perma.cc/6TM3-G8Q8>]; Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 227 (2016); see also *Advisory Report on Front Line and Supervisory Practice*, ANNIE E. CASEY FOUND. 47 (Mar. 9, 2000), <https://files.eric.ed.gov/fulltext/ED439189.pdf> [<https://perma.cc/8JX3-3GR7>] (“Another critical example of lack of attention to the legal mandates governing this work is how rarely this court system addresses the question of whether the child welfare system has made ‘reasonable efforts’ to prevent the need for a child’s placement in foster care.”).

394. See Burton & Montauban, *supra* note 378, at 654 (explaining the fact that Black children spend more time in foster care than children of any other race as a result of “the lack of regard and respect for Black people in the United States”).

395. See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age>

saving from their parents, as adults they experience the same targeting that generations before them have faced.³⁹⁶

On the one hand, the state's allegations against the parent necessarily fix the family in time. The initial moment in time that led to family regulation intervention triggers a clock that requires parents either to prove that the allegations are false and that “they never were” the parent the state believes they are—an endeavor in which parents very rarely succeed—or to prove that they have “become a different person” since that moment in time.³⁹⁷ This retrospective focus is perhaps an inherent limitation of the law—one that often has, as Professor Renisa Mawani puts it, a “violent effect.”³⁹⁸ But in the family regulation context, the issue is compounded by the state's ability to monitor a family for years. The initial allegations color every aspect of this process. In this way, parents become simultaneously fixed in time while they are also expected to address ever-changing allegations against them.

This dynamic sets many families up for failure. An observation by Professor Juliet P. Stumpf about the “good moral character” requirements in the context of immigration naturalization is illuminating. Stumpf finds that the probationary period prior to naturalization “makes time for moral failure to occur In that way, time functions to manage the risk that an intending noncitizen may not measure up to the criteria that the naturalization laws establish for passage to citizenship.”³⁹⁹ The ASFA timelines have a similar impact. Parents' interactions with their children, their progress in services, their interaction with state agents, their appearance in court, the cleanliness and organization of their

-of-mass-incarceration/403246 [https://perma.cc/M4A2-474R]; Washington, *supra* note 176, at 1539. Black mothers have been stereotyped as unfit and Black fathers have been labeled uninvolved or violent. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1051 n.175 (discussing the stereotypical characterization of Black mothers as manipulative and neglectful); Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 50 (2010); Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 492 (2021); Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 428 (1999).

396. See Washington, *supra* note 176, at 1556–58.

397. I owe thanks to Professor I. Bennett Capers who pointed out this aspect of “fixing in time” to me in an email exchange. I partly rely on his articulation here. Email from I. Bennett Capers, Professor of L., Fordham L. Sch., to author (Dec. 18, 2023, 10:57 AM) (on file with author).

398. Mawani, *supra* note 13, at 79.

399. Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1713 (2011).

home, and their perceived attitudes towards state intervention are monitored for weeks and months. Every display of noncompliance, anger, sadness, or resistance not only provides confirmation that state intervention is necessary but also establishes a potential building block for the justification of the permanent legal separation at the end of the ASFA timeline. Taken together, the asymmetry between the expectations for parents and the ongoing monitoring of their current and future behavior often makes the “slow death” of the family inevitable.⁴⁰⁰

* * *

The erosion of familial bonds in and by the family regulation system occurs over time at different speeds and with varying outcomes. In some cases, this slow death takes the form of actual destruction of familial bonds through the termination of parental rights. In other cases, a family is put under an enormous amount of pressure to comply with family regulation intervention. In either scenario, parents lose the ability to make day-to-day decisions for their family free of constant scrutiny. Family regulation intervention commences suddenly and often unexpectedly. Then begins a slow journey through the system. Sometimes, the parent’s primary focus is to get their children out of foster care and back into their home. Other times, the family stays together, and their goal is to end state surveillance. This is not to say that all family regulation cases follow the same timeline or that all families experience constriction, stretching, and indeterminacy to the same degree. Similar dynamics, however, are usually at play. Constriction, stretching, and indeterminacy work to exacerbate an already-conflictual relationship between the state and marginalized families.

IV. IMPLICATIONS: RECLAIMING TIME

This Feature has identified three temporal dimensions central to the operation of the family regulation system and has argued that together, they exacer-

400. The slow-death or slow-violence framework emerged as a conversation in several disciplines, including environmental and health studies. See, e.g., Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1249-50 (2018); LAUREN BERLANT, *CRUEL OPTIMISM* 2 (2011). Strains of this framework have contributed to conversations in, among other fields, critical theory, queer theory, and literature. See, e.g., Eithne Luibhéid, *Queer/Migration: An Unruly Body of Scholarship*, 14 GLQ 169, 190 n.44 (2008); Susan Greenhalgh & Megan A. Carney, *Bad Biocitizens?: Latinos and the US “Obesity Epidemic,”* 73 HUM. ORG. 267, 274 (2014); Susan Koshy, *Neoliberal Family Matters*, 25 AM. LITERARY HIST. 344, 370 (2013); see also Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2327-35 (2019) (explaining and contextualizing the slow-death paradigm and recognizing its compatibility with critiques “designed to question the degree to which individual choice and personal worth should govern the ability to obtain relief under the law”).

bate an already-conflictual relationship between the state and marginalized parents. But what larger implications might we draw from these observations for the practice of law and legal scholarship? This Part addresses potential implications.

So far, this Feature has operated on two levels. I call them the “managerial” level and the “epistemic” level. Here, “managerial” refers to the ways the law and its application shape family regulation procedure. When we think about delays, deadlines, and other temporal features of legal systems and how they might be reformed, we typically think of this managerial level. In this context, “epistemic” refers to the implications of bringing two sets of literatures into conversation: a growing body of critical family regulation scholarship, and multidisciplinary research on time, power, and marginalization. This Part discusses how a time-and-power framework might make room for a discussion of the experience of time versus managerial aspects of time.

A. Prefacing the Implications of Temporal Marginalization

The legal system perpetuates difference along many axes in a variety of ways. What does a temporal lens add that is not subsumed by other forms of marginalization? For one, a temporal lens makes visible the dichotomy between legal timelines and the experience of time. Intervening at the level of time requires an account that is thick and rich in its engagement with lived experience. For that reason, this Feature is grounded in the accounts of people ensnared in the family regulation system.

Critical legal scholarship has long questioned the existence of a neutral, objective legal system that exists outside of power relations.⁴⁰¹ With this frame in mind, it is perhaps unsurprising that the construction of time within legal systems does not manifest in neutral ways. And yet, time remains difficult to see as anything but objective or neutral. The interplay of constriction, stretching, and indeterminacy illustrates that time is vulnerable to manipulation and weaponization. Indeed, while the lack of time in court systems is typically framed as a resource issue, the manipulation of time through constriction, stretching, and indeterminacy can also serve more pernicious functions such as performance testing. In the family regulation context, these pernicious functions of time remain understudied. Accounting for them does two things: one, it makes clear the limits of managerial interventions focused primarily on re-

401. See, e.g., Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2142-43 (1989); Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283, 290-91 (1993).

sources or incremental change, and two, it underscores the importance of understanding systems not through what they claim to do but their impacts and how they are experienced. Ultimately, the critical lens of this Feature goes beyond the observation that time is yet another arbitrary variable that can be managed and manipulated against already-marginalized people. Rather, time itself is socially constructed.

The following Sections illuminate why a managerial approach to time is limiting and then address the potential promise of focusing instead on time as experienced. Ultimately, this Section does not suggest a reform roadmap but instead contemplates lived experience as a guide to understanding less-understood manifestations of power and control in the family regulation context.

B. The Managerial Level: The Perils of Family Regulation Reform

On a managerial level, this Feature has illuminated how legal timelines, delays, and the state's prospective focus combine to penalize marginalized families. Family regulation scholars have suggested reforms to mitigate delays and harsh deadlines. For example, several scholars have advocated for either reforming ASFA or abolishing it outright.⁴⁰² While this would be a significant step, abolishing ASFA would make little difference in jurisdictions like Texas where even shorter timelines for termination-of-parental-rights proceedings exist. There is, however, some promising legal change in several states—often resulting from advocacy efforts led by parents who have been directly impacted by the system. For example, one initiative successfully advocated for a bill that “guides the courts’ discretion to delay the termination of parental rights if the parent’s incarceration or prior incarceration is a significant factor for the child’s continued stay in the foster care system.”⁴⁰³

402. See, e.g., Trivedi, *supra* note 22, at 317; Dorothy Roberts, *The Clinton-Era Adoption Law that Still Devastates Black Families Today*, SLATE (Nov. 21, 2022, 5:50 AM), <https://slate.com/news-and-politics/2022/11/racial-justice-bad-clinton-adoption-law.html> [<https://perma.cc/R8HJ-MKTQ>]; Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can't Be Repealed, Here's How to at Least Make It Better*, IMPRINT (Feb. 9, 2021, 7:00 PM), <https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490> [<https://perma.cc/86YE-CC95>].

403. Victoria Law, *New Law Gives Parents Behind Bars in Washington State a Way to Hold onto Their Children*, TRUTHOUT (May 11, 2013), <https://truthout.org/articles/new-law-gives-parents-behind-bars-in-washington-state-a-way-to-hold-onto-their-children> [<https://perma.cc/G4MD-TH9M>].

Some have called attention to persistent procedural delays in the family regulation system.⁴⁰⁴ Not only are parents unable to hold the state accountable for procedural delays, but worse, these delays are indirectly held against parents when the length of separation becomes grounds for permanent separation. A constitutional speedy-trial right akin to the one in the criminal legal system does not exist for civil cases, and a right to due process has provided little protection in practice. In fact, several state courts have declined to find that significant procedural delays violate a parent's due-process right,⁴⁰⁵ even where a timeline was statutorily prescribed.⁴⁰⁶ A statutory right to a speedy trial would certainly help hold the state and courts accountable for significant delays in emergency hearings and trials. Given the nature of what is at stake, however, these remedies will do little to undo harms to the parent-child relationship retroactively. And importantly, when a family is separated, they risk a court finding that "the time [had] run" despite the parents "moving in the right direction."⁴⁰⁷ Even in the criminal legal system, where a speedy-trial right does exist, the literature heavily criticizes its practical impact.⁴⁰⁸

404. See Guggenheim & Gottlieb, *supra* note 21, at 554; Lansner, *supra* note 103, at 641-42.

405. See, e.g., *In re E.H.*, 429 P.3d 1003, 1009-10 (Okla. Civ. App. 2018) (holding that the two-year delay for a jury trial that ended in terminating the mother's parental rights did not violate the procedural-due-process rights of the mother); *In re Melvin A.*, 98 Cal. Rptr. 2d 844, 847 (Ct. App. 2000) (stating that parents do not have a speedy-trial right in dependency proceedings); *In re C.M.*, 80 P.3d 1202, 2003 WL 22990213, at *3 (Kan. Ct. App. 2003) (unpublished table decision) (denying the mother's speedy-trial claim and stating there is "no legal authority which would grant the mother a right to a speedy trial in a civil action"); *In re C.P.*, 455 N.W.2d 138, 152 (Neb. 1990) (denying the parents' speedy-trial claim and stating that no speedy-trial right exists in civil proceedings). *But see In re D.S.*, 628 S.E.2d 31, 33 (N.C. Ct. App. 2006) (reversing and vacating the trial court's order terminating the respondent's parental rights because it "failed to reduce its order terminating respondent's parental rights to writing and enter it within the statutorily prescribed time limit" (citing *In re T.L.T.*, 612 S.E.2d 436, 438 (N.C. Ct. App. 2005))). In reversing and vacating the trial court's order in *In re D.S.*, the court cited *In re T.L.T.*, which explained that "the trial court's failure to enter its termination order in a timely manner affected not only respondent, but also [respondent's child], his foster parents, and his potential adoptive parents." *In re T.L.T.*, 612 S.E.2d at 438.

406. See *In re S.J.W.*, 535 P.3d 1235, 1247 (Okla. 2023) (holding that a three-month delay in an adjudication hearing did not violate the parents' due-process rights, even though the delay violated the statutory time limit).

407. *Tracy J. v. Superior Ct.*, 136 Cal. Rptr. 3d 505, 511 (Ct. App. 2012).

408. The literature reflects three central critiques. One, state courts have interpreted the speedy-trial right as requiring ever-stronger showings by defendants. See, e.g., Alfredo Garcia, *Speedy Trial Swift Justice: Full-Fledged Right or "Second-Class Citizen?"*, 21 SW. U. L. REV. 31, 57 (1992) ("[O]ne judge asserted . . . 'our court has figured out ways to deal with the [Speedy Trial] Act that don't cause us to change our practices at all. The Act has caused us to

One plausible solution to the issue of changing allegations is to raise the standard for formal amendments to charging documents. This would require statutory reform in the states, where such amendments exist. As discussed above, the burden is typically on the respondents in the case—here, the parent—to prove that they would be significantly prejudiced if the charging document were amended. A first step would be to require the state to file new allegations to allow the tracking and study of such filings. In the family regulation context, where the study of proceedings is complicated by informal decision-making, this collection of data would be valuable.⁴⁰⁹ This, of course, is not a fix for the informal changes in the focus of proceedings. It also does not address the ways in which constant surveillance itself can produce issues that refocus the family regulation system’s attention.

While this Feature focuses on the experience of people of color, people with disabilities, and poor people, it is important to remember that these groups are not a monolith. The interplay of temporal constriction, stretching, and indeterminacy impacts families differently, depending on, among other factors, the circumstances of their specific marginalization. This in turn informs implications. For example, for parents with disabilities, constriction and stretching take on a particular form. Parents with disabilities are at risk of being perceived as inherently unfit to parent their children. The notion of inevitability of termination or at least long-term surveillance undergirds their families’ experience of state intervention. For this group, extending the ASFA timelines would do very little to mitigate the consequences of these stereotypes and larger structural barriers. Or take, for example, incarcerated parents, who are disproportionately Black—and many of them mothers. Constriction and stretching likely have an outsized impact on this group of parents. While extending an incarcer-

be a little creative; that’s all.” (quoting MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 173 (1983))). Two, actors within the system do not adhere to the speedy-trial right in practice. See, e.g., Madison Carvello, *Right to a Speedy Trial for All, Unless You’re Incarcerated: How Sixth Amendment Jurisprudence Allows for Prolonged Isolation—United States v. Bailey-Snyder*, 923 F.3d 289, 291 (3rd Cir. 2019), 27 SUFFOLK J. TRIAL & APP. ADVOC. 111, 112 (2022) (“Courts have consistently denied the application of the right to speedy trial to inmates who are placed in administrative segregation for a new criminal charge.”). Three, a variety of exceptions undercut the speedy-trial right. See, e.g., Sara Hildebrand & Ashley Cordero, *The Burden of Time: Government Negligence in Pandemic Planning as a Catalyst for Reinventing the Sixth Amendment Speedy Trial Right*, 67 VILL. L. REV. 1, 31–32 (2022) (“As a result of the COVID-19 pandemic, many courts have suspended in-person jury trials in lieu of finding a pre-planned workaround to ensure speedy resolution of criminal cases. As a result, accused people are spending protracted periods incarcerated pretrial despite being cloaked with the presumption of innocence.”).

409. See Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1091 (2023); Sinden, *supra* note 388, at 354–55.

ated parent's ability to regain custody of their child holds some promise, this does not eliminate stretching as a major barrier for them. Indeterminacy, on the other hand, takes on a different meaning for parents who are already constantly monitored in prison. Poor families similarly face distinct challenges related to temporal marginalization. Giving poor families more time to complete services does not alleviate the underlying reasons they might struggle to engage in them. In fact, more time might only extend the system's ability to observe and scrutinize the family, their interactions, demeanor, and other behavior.

Family court reform has long been the subject of much discussion, with recent scholarship proposing the abolition of family courts altogether.⁴¹⁰ Professor Jane M. Spinak has discussed that while reforms of the family regulation system might reduce some harm to families, many of these efforts leave "in place the structures that have regulated marginalized families for more than a hundred years."⁴¹¹ Indeed, all of the above discussed solutions are back-end solutions and unlikely to address effectively the logics and structural issues that underlie family regulation involvement in which temporal marginalization takes place.

Understanding the temporal dimensions of state intervention further informs the limitations of discrete changes to the family regulation regime. If temporal marginalization were simply a problem of resources, a funding intervention could certainly mitigate the issue. But the marginalizing function of time in the family regulation system is much more complex. As this Feature has discussed, time can be manipulated to prolong, speed up, or redirect the proceedings, all while testing parental response and performance. Given these dynamics, some of the above interventions would at most mitigate discrete time issues; they would not, however, fundamentally alter the concrete ways time functions in the family regulation system.

The framework of nonreformist reforms is instructive here.⁴¹² Within abolitionist discourse, reformist reforms are commonly distinguished from nonreformist reforms.⁴¹³ Unlike reformist reforms, nonreformist reforms seek to un-

410. See, e.g., SPINAK, *supra* note 192, at 256.

411. *Id.* at 255.

412. See, e.g., Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1546 (2022); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103-06 (2020) (discussing the three hallmarks of nonreformist reforms and distinguishing them from reformist reforms); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 91-93 (Duke Univ. Press rev. & expanded ed. 2015) (2009).

413. Stahly-Butts & Akbar, *supra* note 412, at 1547-48.

settle power imbalances towards those who are racially and economically marginalized without bolstering conditions that create injustice.⁴¹⁴ Several scholars have applied the framework of nonreformist reforms to the family regulation system.⁴¹⁵

Nonreformist reforms are just as much about how change is made as about who is centered in the change-making process.⁴¹⁶ Front-end interventions that shift power, reduce harm, and avoid making it even harder to effect broader-scale change in the family regulation system are most promising.⁴¹⁷ These kinds of interventions prevent the clock from ever beginning to tick.

* * *

A closer look at the implications of time in the system presents a microcosm of larger tensions within reform efforts. If being made to perform under surveillance to determine parental fitness is a feature of the family regulation system, merely changing timelines and beefing up court resources might mitigate but are unlikely to solve the deeper issues. To be sure, discrete changes—reforms on the “managerial” level—might mitigate some of the unfair results of constriction, stretching, and indeterminacy for families. Intervening at the level of time helps us think beyond managerial solutions. Indeed, an attentiveness to time provides a vehicle for thinking more deeply about the way impacted families experience a purportedly benign force. In other words, focusing on time as experienced provides an opportunity to suspend our beliefs about the things that are difficult to see with fresh eyes.

C. The Epistemic Level: Time as Experienced

This Feature’s broader contribution lies on the epistemic level. Bringing a time-and-power lens to family regulation scholarship helps zoom in on an ostensibly neutral managerial tool and interrogates time as a force through which

414. Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L.J.* 2497, 2568–71 (2023).

415. E.g., Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 *MICH. L. REV.* 939, 961 (2023) (reviewing DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022)) (arguing that family regulation reforms must be measured against an abolitionist framework); DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 8–11, 284 (2022).

416. See ANDRÉ GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 8 n.3 (Martin A. Nicolaus & Victoria Ortiz trans., 1967) (1964).

417. See *supra* note 43.

power relations are produced and reinforced. In applying this lens, this Feature takes seriously the task of unearthing “less well-marked” forms of domination in the legal system.⁴¹⁸

A more complete understanding of the critical role of time in the family regulation system requires a shift in how we make meaning of time in legal systems. One way to make this shift is by focusing on the experience of time, or what Professor Renisa Mawani has called “lived time”⁴¹⁹—how affected families perceive and experience the passage of time and its consequences. Time as experienced focuses less on “lines of bounded or discernable units of time” and instead on an individual’s “emplacement along an emplotted continuum of past-present-future.”⁴²⁰ Taking seriously the experience of individuals seeks to counteract the threat of exercising “dominion reflexively over the usual suspect” and in doing so “fail[ing] to perceive the *genuine* individual with a *genuine* life interrupted.”⁴²¹

Several strands of critical legal scholarship recognize the importance of experience in understanding legal systems. Critical race scholarship has long drawn on personal narratives to illustrate structural oppression in legal systems. Feminist legal theory similarly embraces standpoint epistemology, a framework that recognizes marginalized experience as a “remedy for the inadequate . . . epistemologies . . . guiding mainstream research.”⁴²² Today, a burgeoning movement in legal scholarship focuses on lived experiences as an epistemic resource and contests the exclusive focus on traditional notions of expertise.⁴²³ For example, Professor Rachel López theorizes participatory law scholarship as a vehicle for “the collective construction of ‘truth’” in the legal academy.⁴²⁴ Felt theory—an analytical approach rooted within an Indigenous

418. See *supra* note 38.

419. Mawani, *supra* note 13, at 74.

420. Justin B. Richland & C. Jason Throop, *Storied Moments: On the Narrative Time of Experience and Interaction* 35 (May 26, 2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269744 [<https://perma.cc/UN73-GRQW>].

421. Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 210 (2017).

422. Sandra Harding, *Introduction: Standpoint Theory as a Site of Political, Philosophic, and Scientific Debate*, in *THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES* 1, 6 (Sandra Harding ed., 2004).

423. E.g., Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1818 (2023); Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2012 (2022) (contesting the emphasis on carceral knowledge sources); Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. 191, 208 (2022).

424. López, *supra* note 423, at 1818.

feminist tradition—recognizes that experience produces valuable knowledge.⁴²⁵ These frameworks ultimately teach us that lived experience can become an opportunity to turn a form of marginalization “into an epistemological, scientific, and political advantage.”⁴²⁶

Lived experience has also emerged as an important facet in recent family regulation scholarship. Several scholars have emphasized families’ direct experiences explicitly in their work.⁴²⁷ Others have produced scholarship in collaboration with a directly impacted parent.⁴²⁸ And some scholarship has addressed how the production of knowledge in the family regulation system obscures families’ direct experiences.⁴²⁹ Together, these contributions generate language within legal scholarship for an experience shared by thousands of marginalized families.⁴³⁰

Shifting attention away from managerial conceptions of time and towards the experience of time has the potential to intervene in reflexive subordination and to unsettle assumptions about inevitability in productive ways. As Professor Ronald Walcott observes, even if the marginalizing impact of time cannot be fully avoided, “one can still seek to minimize its effects.”⁴³¹ The concept of colored-people time is one such example of Black people’s “effort to evade, frustrate and ridicule the value-reinforcing strictures of punctuality.”⁴³² Take for example this small but tangible way of surfacing the disregard for marginalized

425. Dian Million, *Felt Theory: An Indigenous Feminist Approach to Affect and History*, 24 WICAZO SA REV., no. 2, 2009, at 53, 54.

426. Harding, *supra* note 422, at 7-8.

427. Washington, *supra* note 27, at 1099; Lorr, *supra* note 41, at 1258.

428. See generally, L. Frunel & Sarah H. Lorr, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 477 (2022) (exploring ableism’s influence in the public family regulation system, coauthored with an impacted parent); Albert & Mulzer, *supra* note 177 (forwarding a historical analysis and critique of the adoption system, coauthored with an impacted parent).

429. Washington, *supra* note 27, at 1098; Stephanie K. Glaberson, *The Epistemic Injustice of Algorithmic Family Policing*, 14 U.C. IRVINE L. REV. 404, 422-25 (2024) (describing types of epistemic injustices within the family policing system).

430. The power of naming and experience is well described in a quote by an advocate and directly impacted parent, Joyce McMillan: “‘It was a truth I didn’t have language for,’ she says. ‘It was a truth that I had lived in the shelter. I saw someone spoke about it. And someone put a name to it. And someone said, *I see it too.*’” Irin Carmon, *Dorothy Roberts Tried to Warn Us*, N.Y. MAG. (Sept. 6, 2022), <https://nymag.com/intelligencer/2022/09/dorothy-roberts-tried-to-warn-us.html> [https://perma.cc/986R-P6YK].

431. Ronald Walcott, *Ellison, Gordone, and Tolson: Some Notes on the Blues, Style, and Space*, 22 BLACK WORLD, no. 2, 1972, at 4, 9.

432. *Id.*

parents' time in family court: family court judges in urban jurisdictions see hundreds of cases every day.⁴³³ While much of a court appearance is spent picking dates and times for the next appearance by consulting calendars of judges and lawyers, a parent's availability is rarely even considered. In my time working on hundreds of cases as a public defender, I can recall a handful of court appearances where a parent's availability was considered. In proceedings that take no account of a parent's experience of time, speaking up to note the burdens on parents and demanding their consideration can be an effective intervention into the normalization of disregard. In this way, a new lens through which to view time forces practitioners to look at even the mundane parts of the system differently.

Interrogating time through the lens of experience surfaces the centrality of trauma and violence that accompanies family separation. Many of the accounts in this Feature touch on the lasting impact of state intervention on both children and parents. A sense of loss and disorientation permeates these accounts. Taking these experiences seriously contextualizes the conditions under which parents are expected to prove that they are fit caregivers. In other words, they are evaluated during what is likely one of the most difficult times in their lives. State actors should take seriously the way intervention itself shapes parents' ability to perform in several contexts, including supervised visitation, interactions with caseworkers, and court appearances.

Focusing on time as experienced also sheds new light on familiar problems on a macro level. For one, it reveals that "one-size-fits-all" timelines are not neutral in effect. They have a particularly devastating impact on families that do not comport with white, middle-class family ideals. The concrete impact of time is idiosyncratic and dependent on a number of factors, including financial resources, a family's support system, and the age of the child. Yet, the concrete burdens of difference are placed on families, instead of the state. In order for the experience of time to make a tangible impact in practice, it would have to include an adaptation of the process to the individual needs of the family, alongside material supports that level the playing field for marginalized families. Ultimately, a focus on the experience of time cautions that once the family regulation clock starts ticking, a cascade of interventions is triggered. Preventing involvement is perhaps the most important way to mitigate the effects of temporal marginalization.

To be sure, a focus on experience holds its unique challenges and risks. For one, experience is highly individualized; and while identity might inform one's

433. Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 434-35 (1996).

experience, no group is a monolith, and no two cases are identical.⁴³⁴ This Feature claims neither that parents' experiences of time are identical nor that solutions ought to be identical. To the contrary, an experience-based analysis favors a more nuanced discussion of ostensibly neutral forces, not a generalized one. For example, contemplating parents' experiences of time in the family regulation system might help disentangle some of the ways system actors fix a limited image of parents in time. An approach that takes seriously the experience of time would account for context and the specific circumstances of marginalized parents, rather than stereotypical or idealized understandings of parental fitness. Ultimately, taking account of experiences should include the welcoming of distinct insights about the relevant system.

This Feature has articulated several ways family regulation intervention alters an impacted parent's experience of time. For them, time, surveillance, and parental performance are deeply linked. One common feature is experiencing time as never-ending. As the introductory quote by Elizabeth Brico describes, after the state removed her daughters, her days felt "endless" and the hours within them "empty."⁴³⁵ Another parent expresses a similar futility: "Much of the time it feels like I'm not getting anywhere. Program to program, train to train, walking late in the cold."⁴³⁶

For parents like Elizabeth Brico, the feeling of endlessness ironically coexists with the feeling of never having quite enough time to meet the state's expectations of a fit parent. Another common experience parents describe is the pain and alienation of watching their children achieve milestones from afar, while they themselves are fixed in time: "Every time I see my daughters now, something has changed: a favorite color, a hair style, a shoe size. I am missing everything."⁴³⁷

The interplay of constriction, stretching, and indeterminacy is experienced as a source of great anxiety. In her ethnographic study of mothers who are investigated by the family regulation system, Professor Kelley Fong recounts about one mother: "She was anxious about her case, because it was coming up on a year, and she knew that the state could hold the timeline against her, even as court officials' summer vacations were delaying her next hearing. 'I'm scared because they keep playing with me,' she said."⁴³⁸

434. Harding, *supra* note 422, at 8 (discussing the risk of centering an ideal knower).

435. Brico, *supra* note 3.

436. Keyshana Mims, *I Didn't Feel Loved*, RISE [5], <https://www.risemagazine.org/wp-content/uploads/2019/05/Rise-TIPS-ServicePlan-ALL.pdf> [<https://perma.cc/22CK-NU6D>].

437. Brico, *supra* note 3.

438. FONG, *supra* note 20, at 172.

And finally, parents experience being trapped in the web of the family regulation intervention—they remain caught in the past. One parent describes a feeling of being trapped: “It’s not something a person can just get over. It’s something that’s going to be inside of them for years to come. And I’m just still trying to find a way to get out of it.”⁴³⁹ Organizer and directly impacted parent Shamara Kelly says, “I’m still growing in many ways, from being angry at the system, to turning my pain into medicine and using it against the system. Healing takes time and there’s no time limit on it.”⁴⁴⁰ Some parents experience the feeling of being thrust into the past in an endless cycle of state intervention. One parent discusses being removed from her mother at the age of five and then being threatened with the removal of her own child after surviving domestic violence: “I’m back in my past but this time I’m a mother with three children.”⁴⁴¹

When lived experience is taken seriously, one observation stands out: parents must demonstrate that they can perform under the pressures of state intervention and surveillance. The system’s focus on performance over time is not the result of flawed system design, but a key feature of the system. Indeed, the family regulation system is characterized by compliance logics, meaning that a parent’s compliance with the state’s expectations becomes a proxy for their ability to parent. Indeed, Professor Tina Lee observes that

[c]ompliance is taken to mean that parents have acknowledged their problems and are taking steps to remedy them. At the same time, compliance is also a matter of the differential power held by caseworkers and parents in these interactions. It can be the decisive factor in the decision to remove or not.⁴⁴²

This perpetuates the notion that what matters most in the child safety context is a prompt, patient, and flexible parent. Parental compliance becomes an indicator of parental fitness, while noncompliance renders parents undeserving.⁴⁴³

439. B. et al., *supra* note 78, at 13.

440. *PAR Team Profiles*, RISE (Sept. 21, 2021), <https://www.risemagazine.org/2021/09/par-team-profiles> [<https://perma.cc/EWS4-3HJM>].

441. *Ask Yourself: ‘Am I More Focused on Compliance than Safety?’—Parents Encourage Attorneys Who Represent the Child Welfare System to Focus on Justice and Humanity in the Courtroom*, RISE (Sept. 17, 2018), <https://www.risemagazine.org/2018/09/fcls-speech> [<https://perma.cc/EB9N-FWWG>].

442. TINA LEE, *CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM* 141 (2016).

443. What is legible as “compliant” behavior is informed by gender and race. Professor Devon W. Carbado’s observations in the policing context are illuminating here. *See* Devon W. Carbado,

Parents are often acutely aware that they are not only watched closely but that they are expected to fail. Speaking of spending time with her child while under supervision, one parent observes: “It’s hard to do this when two people are just staring at you, waiting for you to mess up. I was just very careful on everything and trying to control my emotions.”⁴⁴⁴

Time adds an important layer here. The duration of the proceedings alone allows for extended opportunities to watch, scrutinize, and document the family. Being able—formally and informally—to shift the focus throughout the case extends this opportunity. The object of present observation is constantly created anew and used as justification for future surveillance. The allegations simultaneously fix parents in time and legitimize the state’s reach beyond that moment.

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A critical view of time appreciates that the system does not merely impose temporal burdens as a byproduct of family regulation, but rather actively creates them and then fails to attempt to remedy them. In other words, the state builds the clock, sets it, and has the power to reset it. What links the three dimensions of time together are power and control. The state controls time, while parents experience it. Given this, there are no easy solutions. However, understanding time in the family regulation system as a source of power and control should lead scholars in the field to rethink their epistemic resources. Considering the *experience* of time is one way to do so. At the very least, it generates insights into the process of marginalization through ostensibly neutral forces.

CONCLUSION

The legal system’s ability to control, delay, and waste people’s time is a form of dominion and punishment that exacerbates the innumerable structural disadvantages that poor, Black, and brown families already face. In particular, the construction and management of time through constriction, stretching, and indeterminacy are important aspects of the family regulation system. This Feature has provided an aerial view of both the abstract problem of regulating parent-child relationships through a temporal frame, as well as the concrete legal timelines, procedures, and court processes that combine to exacerbate an al-

Strict Scrutiny & the Black Body, 69 UCLA L. REV. 2, 74-75 (2022) (“The legal regime of strict scrutiny treats racial remediation projects designed to address Black inequality as presumptively suspect; the social regime treats the Black body itself as presumptively suspect.”).

444. “*If I Wasn’t Poor, I Wouldn’t Be Unfit*,” *supra* note 31, at 80.

ready-conflictual relationship between the state and marginalized families. It has discussed how the interplay of constriction, stretching, and indeterminacy facilitate an asymmetry between the state and impacted families, constant surveillance of parental performance, and ultimately the slow death of the family. A critical view of time appreciates that the family regulation system does not merely have time issues but that it creates them. Power and control link these three dimensions of time together—the building, setting, and resetting of the clock.⁴⁴⁵ This Feature has implications on a managerial and epistemic level. Reforming the management of time might lead to important improvements for some impacted families but is not likely to address the deeper relationship between time and power. Considering the experience of time is one step towards fully understanding the impact of temporal marginalization. Importantly, these lessons are relevant beyond the family regulation system and ought to inform our understanding of other legal systems and their impact on marginalized people more broadly.

CODA

“There’s nothing new / under the sun, / but there are new suns.”

—Octavia E. Butler⁴⁴⁶

For many months, Gray had imagined holding her baby in her arms for the first time. She pictured a powerful surge followed by an elongated release. She imagined a moment of stillness followed by her daughter’s long-awaited first breath earthside. Her baby would cry briefly before settling at the touch of her mother’s warm skin against her own. Gray and her baby would spend their first precious hour together undisturbed. All that Gray had read about this first hour of a baby’s life seemed to suggest that this one hour would hold a lifetime of benefits.

Gray had heard that in the old days some mothers could be stripped of this moment because of a positive drug test or mental-health issue. It was Black mothers like her who would be tested without their consent during prenatal

445. Professor I. Bennett Capers offered these insightful thoughts as feedback to a draft of this Feature.

446. Gerry Canavan, “*There’s Nothing New / Under The Sun, / But There Are New Suns*”: Recovering Octavia E. Butler’s *Lost Parables*, L.A. REV. BOOKS (June 9, 2014), <https://lareviewofbooks.org/article/theres-nothing-new-sun-new-suns-recovering-octavia-e-butlers-lost-parables> [<https://perma.cc/M3U6-68QL>]. This well-known quote by Octavia E. Butler was the epigram for *Parable of the Trickster*, a work that was never published. See *id.*

appointments and in the delivery room. Parents with disabilities could be separated from their children because the state equated neglect and disability. Poor parents in public housing could be blamed for the city's failure to provide safe, rodent-free homes. Gray had been told that some of her own ancestors were hauled into family court days after the birth of their child, weak from many hours of labor. The halls of family court in major cities were filled with Black and brown parents waiting for their cases to be called, anxious for the future of their family. In those days, some parents avoided healthcare providers out of fear that their children would be taken away. In hindsight, it seemed so clear that the key to child safety was and always had been a well-supported caregiver.

Concerns over a plummeting birth rate around the world had led to a fundamental reconceptualization of the care landscape. Inspired by postpartum facilities in South Korea, the state now offered mothers stays in postpartum centers. There, they were treated to hotel-like accommodations, three nutritious meals a day, physical therapy, and childcare classes that emphasized a family's individual needs. A childcare credit, akin to the one in Germany, provided parents with a monthly stipend for each child. Health-policy researchers applauded the mitigation of the postpartum health issues and racial and socioeconomic disparities that had long provided the United States with the title of "outlier among industrialized nations, with a maternal mortality rate several times higher than other high-income countries."⁴⁴⁷ Parent advocates had used the momentum to make the case for a better future. Armed with social-science research and a track record of punitive interventions failing, they convinced the public that material supports were the answer to many of the problems punishment could not fix.

Although she didn't have the money or space to decorate a dedicated nursery, Gray knew she had all she needed. Her community had come together to provide diapers, baby clothes, toys, bottles, and swaddles. And with the stipend from the state, Gray would be able to purchase the bassinet and a safe changing table. With all the excitement for the baby, Gray hadn't been forgotten either. Her health insurance covered mental-health treatment and encouraged her to schedule a check-in appointment for after the delivery date. Pregnancy had been hard on Gray. The nausea had not dissipated after the first trimester, and lower-back pain kept her from sleeping restfully. Having supports in place now would surely help her recover faster—a stark contrast with

447. Jamila Taylor, Anna Bernstein, Thomas Waldrop & Vina Smith-Ramakrishnan, *The Worsening U.S. Maternal Health Crisis in Three Graphs*, CENTURY FOUND. (Mar. 2, 2022), <https://tcf.org/content/commentary/worsening-u-s-maternal-health-crisis-three-graphs> [<https://perma.cc/9M2S-EFT3>].

the days when childcare came at a premium and mothers who dared leave their children home alone risked family separation by the state.

In the end, Gray was not conscious for the birth of baby Mila. The moment she had idealized in her mind had been complicated by an emergency C-section. There was no magical first hour with her newborn, just numbness as the anesthesia wore off and she slowly felt herself coming back into her body. Mila had taken her first breath, lived the first few hours of her life, and Gray had not been there for any of it. Gray was thankful that the doctors had acted swiftly to keep both her and Mila safe, and yet it felt as though someone had ripped pages out of their story just as Gray had arrived at the crucial passages. The emergency intervention took an emotional, physical, and practical toll—but Gray took solace in her certainty that her support system would carry her through the challenging time. As much as everyone cared for the new baby, they also cared for the new mother. In the postpartum care facility, Gray's team, which consisted of a physical therapist, a lactation consultant, and a postpartum doula, immediately rallied around her. Being in community with other new parents assured Gray that she was not alone. She could ask questions about holding, feeding, and calming her baby without judgment. Unlike generations of mothers before her, Gray had nothing to fear in sharing how hard her initiation into motherhood was. She could talk about her mental-health issues without fearing that they would be reported to the state. And she felt no shame in asking for support.

Three months had passed since the birth of Mila. Time was a funny thing, Gray thought. The days still felt long, but somehow, everything seemed to be moving swiftly: Mila's first smile, the first time she slept for more than three hours in a row, the appearance and disappearance of a rash. For Gray, too, things were in constant flux. Old things had become new and revelatory, like leaving the home alone for the first time again; allowing herself to focus only on a conversation with a friend for an hour; moving her body free of pain.

The first few years with Mila would be both beautiful and demanding. Things that worried Gray in the initial weeks and months of motherhood became nonissues just as new questions presented themselves. They too would be replaced by new questions one day. Matrescence played with time, coming on quickly, slowing down and then speeding up, and covering even painful memories with the shimmer of nostalgia. Gray knew, though, that as long as she was given the support and space to struggle, there would be days she would get things just right and other times she would forgive herself for falling short. After all, mothers like her were finally allowed to do that.