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## Radical Early Defense Against Family Policing

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**ABSTRACT.** What possibilities arise when law-school clinics experiment in challenging a well-oiled system at its untouched margins, within a collective, community-based movement whose lodestar is abolition? This Essay examines this question in the family-policing context and articulates a radical vision of family defense in subjudicial venues.

### INTRODUCTION

On national and local scales, impacted people and allies are increasingly mobilizing and making the case for abolition of the family-policing system (FPS).<sup>1</sup> Responding to invasive and damaging investigations by family-policing agents, communities have begun organizing to support parents as they push back during these first moments of contact between a family and the FPS. Yet lawyers who work to counter family policing have dedicated less attention to investigations. Instead, they have tended to focus on the FPS's judicial venue, rightly seeking to keep families intact or reunite those the state has separated. They have not

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1. For purposes of this Article, we define the family-policing system (FPS) as the interlocking administrative, social-services, and judicial structures deployed to surveil, control, and sometimes separate families. The movement to abolish the FPS includes organizations and coalitions from across the country such as Movement for Family Power, upEND, Parent Legislative Action Network, Reimagine Child Safety Coalition, and Operation Stop CPS, among others. See MOVEMENT FOR FAM. POWER, <https://www.movementforfamilypower.org> [<https://perma.cc/QT4M-2U5F>]; *About Us*, UPEND MOVEMENT, <https://upendmovement.org/about> [<https://perma.cc/PMC5-GFG4>]; *Legislative Advocacy: Parent Legislative Action Network*, JUST MAKING A CHANGE FOR FAMS., <https://jmacforfamilies.org/plancoalition> [<https://perma.cc/5MRP-DFYJ>]; REIMAGINE CHILD SAFETY COAL., <https://www.reimaginechildsafety.org> [<https://perma.cc/CHV9-BS7V>]; OPERATION STOP CPS, <https://www.operationstopcps.com> [<https://perma.cc/N4W9-C4KV>].

concertedly sought to disrupt the mechanisms through which families are caught in the web of the expansive FPS apparatus in the first place and the far-reaching devastation such contact can levy. Consequently, the process by which families become locked in judicial proceedings has largely operated unfettered and remains underexamined.

In this Essay, we explore the potential for lawyers and law-school clinics to experiment in challenging a well-oiled system at its untouched margins, within the context of a collective, community-based movement whose lodestar is abolition. Our focus, in this Essay and in our clinical law practice, are two subjudicial venues that are sites of significant vulnerability for families subject to family policing: first, investigations; and second, proceedings challenging a parent's inclusion in registers of child maltreatment. We call our approach *radical early defense*: the representation of families at the earliest moment possible, with the intention of restricting or eliminating the state's coercive encroachment into a family's life while directly challenging presumptions core to the FPS regime. Radical early defense stands in contrast with the predominant – though still nascent – systems-navigation model of pre-petition representation, where in the initial stages of an FPS case, advocates help parents navigate the FPS with the singular goal of avoiding a court filing against the family.

A family's encounter with the FPS usually begins with an investigation, triggered by a report to a Statewide Central Registry of Child Abuse and Maltreatment (SCR).<sup>2</sup> Often referred to as a “front door” to the FPS, SCRs are more obscure structures than the judicial venues of the FPS. Yet, in service of SCRs, state agents are empowered to conduct wide-ranging investigations without meaningful oversight.<sup>3</sup> By law, SCR investigations are invasive, involving

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2. See Child's Bureau, *Establishment and Maintenance of Central Registries for Child Abuse or Neglect Reports*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1-2 (2018), <https://www.childwelfare.gov/pubPDFs/centreg.pdf> [<https://perma.cc/TU2L-N2NN>] (explaining that many states use a statewide “central registry” to collect and maintain investigation records).
  3. See Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1 (2001) (discussing general statutory frameworks of central registries, including problems of overinclusion and underinclusion); Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063 (1995) (providing an overview of jurisprudence on due process, child abuse, and neglect registries); Shaudee Navid, Comment, *They're Making a List, but Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process*, 44 U.C. DAVIS L. REV. 1641 (2011) (arguing that erroneous placement of individuals on child-abuser databases violates a liberty interest and requires procedural due process); Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 168-72 (1993) (arguing that placement on registries impinges upon protected property and liberty interests in employment under the Due Process Clause); Alisha M. Santana, *A Pointer System that Points to the Nonexistent: Problems*

thorough searches of a family's home, interviews of each family member, and more.<sup>4</sup> The vast majority of investigations are carried out without a warrant, by virtue of a parent's often-coerced "consent."<sup>5</sup> At the conclusion of an investigation, agents determine whether the parent or caregiver has abused or neglected the child and accordingly, whether to list their name in the SCR.<sup>6</sup> Like other extrajudicial registries,<sup>7</sup> SCRs are easy to become listed in and difficult to escape.<sup>8</sup> An individual listed in an SCR may face restricted employment and licensing opportunities, and may not be able to serve as a foster resource for family or friends. SCR listing is therefore a mechanism for ongoing punishment, surveillance, and control, even if no court action is ever initiated against a family.<sup>9</sup> For those families who must also defend themselves in court, the SCR is further punishment, but one that takes back seat to the immediate crisis of a neglect or abuse case in court. By and large, SCRs nearly guarantee that once a family collides with the system, that family will long feel its mark.

Despite the harms of subjudicial investigations and SCR listings, the judicial venue is currently the only site where the FPS encounters any kind of systematic resistance by lawyers. In large part, this is because lawyers are appointed to represent a parent only once a petition has been filed in family court.<sup>10</sup> Yet by that

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*with the Child Abuse Central Index (CACI)*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 115 (2004) (focusing on California's Child Abuse Central Index); Molly Greer, *Suggestions to Solve the Injustices of the New York State Central Register for Abuse and Maltreatment*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 729 (2011) (focusing on New York State's Central Register for Abuse and Maltreatment (SCR) statutory scheme and its constitutionality).

4. 42 U.S.C. § 5106(a)(1) (2018); see Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 14-15), <https://ssrn.com/abstract=4219985> [<https://perma.cc/SA7A-GSVS>].
5. See *infra* notes 35, 37-45 and accompanying text; Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One.*, PROPUBLICA (Oct. 13, 2022, 8:00 AM EDT), <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants> [<https://perma.cc/7MUH-RD3X>].
6. See, e.g., N.Y. SOC. SERV. LAW § 412(7) (McKinney 2022) (defining an "indicated report," which formally documents all evidence of alleged abuse and maltreatment).
7. 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, 859 (2020) (comparing child-neglect and abuse registries to other government-maintained databases, including lists of people convicted of certain crimes, no-fly lists, and work-authorization databases).
8. Hollenbeck, *supra* note 3, at 13 ("[O]nce a report has been received and determined to fall within the state's guidelines, most states mandate that investigation of the allegations begin almost immediately—the maximum response time is usually twenty-four hours.").
9. See Sen et al., *supra* note 7, at 868-69 (describing collateral consequences under various SCR state statutory schemes).
10. See, e.g., N.Y. FAM. CT. ACT § 262(a) (McKinney 2012) (detailing an individual's right to counsel once they appear before the court).

point, significant damage has already been done. If Child Protective Services (CPS) files a petition, agents generally have already investigated and gathered information from family members, who are not advised of their rights to refuse an investigation<sup>11</sup> and who are usually not represented by legal counsel.<sup>12</sup> By similar measure, parents whose cases have never been filed in family court must nonetheless deal with the trauma of an SCR investigation and the impact of a “substantiated” case.<sup>13</sup> To them, early legal representation, at the first stirrings of state involvement, could have meant more than keeping their cases out of court—it could have meant keeping CPS out of their lives entirely.

To close the “front door” to the FPS, we call for abolitionist lawyers to experiment with radical early defense. In expanding representation of families beyond the judicial sphere, we aim to meaningfully disincentivize invasive searches. We hope to build impacted communities’ capacity to refuse investigations, while preventing harmful SCR administrative judgements made at the whim of a single agent. Our efforts in this regard are experimental. Our intention is to begin a conversation about systematically building out subjudicial representation as an aspect of family-defense practice.

We come to this project humbly, cognizant of its implications and deeply influenced by our lived and professional experience. As defense attorneys in family court, we represented hundreds of families hauled before judges on allegations of neglect or abuse, and navigating the FPS was a core element of our practice.<sup>14</sup> We worked closely with clients whom we met at arraignments. We cobbled together the evidence at our disposal to craft compelling legal arguments; we filed motions and tried cases appealing to the fact finder’s reason; and we sought settlement as a harm-reduction technique and a tool to achieve our client’s goals. We honed these skills in partnership with our colleagues and

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11. See cases cited *infra* note 37 (indicating that New York courts have held that Child Protective Services (CPS) investigations do not entail *Miranda*-style warnings); see, e.g., *State v. Jackson*, 116 N.E.3d 1240, 1241, 1247-48 (Ohio 2018) (holding that a social worker was not law enforcement and, thus, a defendant accused of child sexual abuse was not entitled to *Miranda*-style warnings); Hager, *supra* note 5 (relaying accounts of nine former Administration for Children’s Services (ACS) caseworkers stating they were never told to advise parents that they can refuse an investigation).

12. See *infra* note 38.

13. The evidentiary standard for the determination that a case is “substantiated” varies by jurisdiction: thirty-seven jurisdictions require a preponderance of the evidence that maltreatment has been committed before a report can be substantiated; fourteen allow merely “credible” or “reasonable” evidence to substantiate a report. See Child’s Bureau, *Child Maltreatment 2020*, U.S. DEP’T OF HEALTH & HUM. SERVS. 132 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2020.pdf> [<https://perma.cc/8NRL-JZXA>].

14. The authors were both staff attorneys in the Brooklyn Defender Services Family Defense Practice.

supervisors, some of whom helped develop the very systems we sought to traverse.<sup>15</sup> As family defenders in court, our ambition was often to be the most adept systems navigators in the room. Achieving results for our clients and their families required as much.

However, our outlook has been inflected by study and practice in the rebellious-lawyering tradition.<sup>16</sup> And work across City University of New York (CUNY) legal clinics showed us that early, systems-disrupting intervention was possible.<sup>17</sup> Through a partner clinic, we represented individuals and communities targeted for national-security investigations.<sup>18</sup> On our advice, most of our clients refused to open the door when law enforcement knocked and politely refused to speak without an attorney present. Agents were flummoxed. The rules required them to fully assess and close each lead that came in – this was the protocol upon which they trained. Over time, though, it became clear to us (and probably to the law-enforcement officers) that the rules and the system were premised on consent, and that with enough resistance, the system would bend. Agents would often simply abandon the investigation, having failed to obtain the consent they would have otherwise needed.

This work is not without challenges for families, practitioners, and students. Many parents rationally fear that if they assert their rights to refuse an investigation in whole or in part, the state will retaliate.<sup>19</sup> Families have differing appetites for taking confrontational positions with state agents, and there is no one-size-fits-all approach to responding to child-maltreatment allegations. These complexities can make attorney-client counselling intensive, continuous, and emotionally charged. And because representing families at this stage is

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15. See Chris Gottlieb, Martin Guggenheim & Madeleine Kurtz, *Discovering Family Defense: A History of the Family Defense Clinic at New York University School of Law*, 41 N.Y.U. REV. L. & SOC. CHANGE 539, 543 (2017) (describing the development of the family-defense bar in New York City).
  16. See, e.g., Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 27 CLINICAL L. REV. 671, 681-83 (2017) (describing the work of the Creating Law Enforcement, Accountability, & Responsibility (CLEAR) Project at the City University of New York (CUNY) School of Law).
  17. *Id.* (describing the approach of the CLEAR Project to Federal Bureau of Investigation questioning).
  18. Professor Hernandez was a student in the CLEAR Project from 2011 to 2012 and later taught in the clinic in 2020. Professor Ismail was Senior Staff Attorney in the CLEAR Project from 2016 to 2019.
  19. See *infra* Section III.C.2; see also Amy Sinden, *Why Won't Mom Cooperate: A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354-55 (1999) (explaining how the substantial power differential between child-welfare agency workers and parents “create[s] pressure to cooperate rather than to assert rights, and to resolve cases through a process of compromise and agreement rather than through litigation”).

uncommon, there are currently few receptors in the FPS toward which we can direct our representation, raising the specter of future co-optation.<sup>20</sup>

Part I defines and describes the subjudicial structures of the FPS and current efforts to counter its harms. Part II describes systems navigation, the predominant legal approach to family defense, and explores its limitations. Part II then articulates a vision of radical early defense: a deliberate effort to contract the front end of the FPS and to shield families from FPS surveillance and SCR punishments. Part III explores law-school clinics' potential role in radical early defense within the context of larger abolitionist efforts to shrink the FPS. Finally, Part IV describes some of the challenges of and insights from lawyering and clinical teaching in an emerging area of practice.

## I. FAMILY POLICING AND COUNTERMOVEMENT

### A. *The Scope of the Problem*

In New York City and other locales, families become ensnared in the FPS through a call to a child-abuse and maltreatment hotline – the Statewide Central Register for Child Abuse and Maltreatment (SCR).<sup>21</sup> These calls mobilize vast government resources, launching administrative and judicial processes that investigate, surveil, and separate families. In some cases, these processes eventually legally sever parent-child bonds. Because our experience has taught us that focusing on judicial spaces alone is not enough to shrink the FPS, our practice and this Section focus on aspects of the system that occur at a purely administrative level, without any judicial oversight. Those administrative, subjudicial family policing mechanisms occur at the very outset of a family's interactions with the FPS.

By federal law, state CPS agencies are required to investigate every report they receive in which the allegations meet the state's statutory definitions of neglect or abuse, no matter the provenance or reliability of the report.<sup>22</sup> While millions of reported allegations are weeded out for not meeting the statutory

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20. See *infra* Section III.C.3; see also Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 855-862 (2014) (discussing how liberal criminal procedural reforms, such as institutionalization of search warrants, led to even more aggressive policing tactics on the streets, including the rise of stop and frisk).

21. Although anyone can call in a report of suspected child abuse or maltreatment, certain people are required, under threat of criminal prosecution, to call in a report. See, e.g., N.Y. SOC. SERV. LAW § 413(1)(a) (McKinney 2022) (listing professions that are required to report suspicions of abuse or neglect of a child); N.Y. SOC. SERV. LAW § 420 (McKinney 2022) (listing criminal and civil penalties for failing to report suspicions of child abuse or neglect).

22. 42 U.S.C. § 5106(a)(1) (2018); see Ismail, *supra* note 4.

standard, millions more allegations are sent out for investigation nationwide each year.<sup>23</sup> Investigated families are disproportionately of color; a vast majority of them are poor.<sup>24</sup> Even after sorting out reports that fall below the maltreatment threshold, most CPS investigations do not uncover maltreatment.<sup>25</sup> In 2020, for example, CPS investigated reports into nearly four million children; nearly eighty-three percent of these investigations failed to substantiate allegations of maltreatment.<sup>26</sup>

During an investigation,<sup>27</sup> agencies use a variety of tools to obtain information. Agents question nearly anyone involved with a family: parents, children, relatives, neighbors, teachers, and more,<sup>28</sup> without informing them that such conversations are entirely voluntary.<sup>29</sup> Questioning takes place during unannounced visits to the family home, the children's schools, caretakers' jobs, and sometimes on the street.<sup>30</sup> When questioning children, agents often direct the parents to leave the room<sup>31</sup> or question a child without a parent's knowledge or consent at the child's school.<sup>32</sup> Agents search the family's home, inspecting their refrigerators, pantries, and sleeping arrangements.<sup>33</sup> As a matter of course,

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23. Child's Bureau, *supra* note 13, at 8.

24. See Chris Gottlieb, *Major Reform of New York's Child Abuse and Maltreatment Register*, N.Y.L.J. (May 26, 2020, 10:30 AM), <https://www.law.com/newyorklawjournal/2020/05/26/major-reform-of-new-yorks-child-abuse-and-maltreatment-register> [https://perma.cc/N2PS-KM8J] (“The overwhelming majority are there as a result of allegations of neglect, most of which are poverty related. Less than 14% percent [sic] of cases involve any allegations of abuse. There is extreme racial disproportionality in who is affected by the SCR, with black parents 2.6 times more likely to have an indicated report than white parents.”).

25. Child's Bureau, *supra* note 13, at 20.

26. *Id.*

27. Investigations are generally governed by statutes, regulations, and policy directives issued by state or local agencies. See, e.g., N.Y. SOC. SERV. LAW § 424 (McKinney 2022); N.Y. COMP. CODES R. & REGS. tit. 18 § 432.2(b)(3) (2021); *New York State Child Protective Services Manual*, OFF. CHILD. & FAM. SERVS. ch. 6., at F-1 to -10 (June 2022) [hereinafter *OCFS Manual*], <https://ocfs.ny.gov/programs/cps/manual/2022/2022-CPS-Manual-Cho6-2022Jun.pdf> [https://perma.cc/3AS5-JXXQ].

28. See *OCFS Manual*, *supra* note 27, ch. 6., at F-1 to -10.

29. See *infra* note 37 and accompanying text.

30. See *OCFS Manual*, *supra* note 27, ch. 6, at F-6 to -9 (explaining that interviews can potentially occur at any location).

31. See, e.g., *id.* ch. 6, at F-6 (“During the interview with the parent(s), the worker should inform the parent of the need to speak privately with the child.”).

32. See, e.g., *id.* ch. 6, at F-8 (“Children who are alleged to have been abused or maltreated can be interviewed at school without parental permission in appropriate circumstances.”).

33. See, e.g., Melissa Russo, *An Inside Look at ACS's New Child Abuse Detection Training Program*, NBC N.Y. (Sept. 20, 2021, 8:15 PM), <https://www.nbcnewyork.com/news/an-inside-look-at-acss-new-child-abuse-detection-training-program/3282657> [https://perma.cc/V6YG-

agents pressure parents to sign Health Insurance Portability and Accountability (HIPAA) release forms to obtain private medical information from a child or parent's doctor, therapist, or other medical provider.<sup>34</sup>

When agents approach a parent, they might only vaguely disclose the nature of their investigation, leaving a parent confused about the scope of the agent's interest in their family and, consequently, about how to assess their rights.<sup>35</sup> Agents are intentionally vague about the nature of investigations because once an investigation begins, it is not limited to the initial concerns articulated by the caller. Take, for example, a family our clinic recently represented. An anonymous caller to the SCR alleged that a fifteen-year-old was not attending school and was instead helping bring his ailing grandfather to medical appointments. Even after our client informed the agent that the supposed fifteen-year-old was eighteen—an adult over whom CPS has no protective jurisdiction<sup>36</sup>—the investigation continued, refocusing on his nine-year-old sibling. The agents questioned the child and directed him to lift his shirt and pull down his pants to allow them to look for suspicious marks or bruises. Agents pressured the parents to sign releases allowing them to speak with his school and doctor, even though no concerns about the child had ever been raised.

Because agents are not required to inform parents of their rights,<sup>37</sup> most parents are unaware that participating in the investigation is voluntary. Parents are

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CVHG] (describing New York City CPS investigative practice); Ismail, *supra* note 4 (manuscript at 18) (describing CPS investigation practice).

34. See, e.g., OFCS Manual, *supra* note 27, ch. 6, at F-10 (“In general, CPS workers should attempt to obtain *signed* consent forms (i.e., release of information) from parents before securing information from collateral contacts who will be contacted because of their professional positions, such as medical providers.”).
35. See, e.g., Parent Legis. Action Network Coal., *Family Court Justice: Miranda Rights for Families*, BRONX DEFS. 5 (Oct. 2021), [https://wagner.nyu.edu/files/nyc2025/Bronx%20Defenders\\_NYU%20Policy%20Project%20-%20Family%20Miranda%20-%20DRAFT.pdf](https://wagner.nyu.edu/files/nyc2025/Bronx%20Defenders_NYU%20Policy%20Project%20-%20Family%20Miranda%20-%20DRAFT.pdf) [https://perma.cc/V2SD-7HAG] (describing the harms of misinformation during a CPS investigation).
36. N.Y. SOC. SERV. LAW § 412(2) (McKinney 2022) (restricting the definition of a “maltreated child” to a child under eighteen years of age); N.Y. FAM. CT. ACT § 1012(e)-(f) (McKinney 2022) (restricting the definition of “abused” and “neglected” children to children under the age of eighteen).
37. Generally, New York state courts have held that CPS caseworkers are not obligated to provide *Miranda* warnings. See, e.g., *People v. Brooks*, 585 N.Y.S.2d 30, 31 (N.Y. App. Div. 1992) (“The caseworker was not required to advise the defendant of his *Miranda* rights before speaking with him, since the filing of a child abuse petition did not trigger the defendant’s right to counsel and, in any event, the caseworker was not engaged in law enforcement activity.”); *People v. Hussain*, 638 N.Y.S.2d 285, 286 (N.Y. Sup. Ct. 1996) (“*Miranda*, however, only applies to custodial interrogation by a law enforcement officer.”); *People v. Gwaltney*, 530 N.Y.S.2d 437, 439 (N.Y. Sup. Ct. 1988) (“Although the court notes that this caseworker had a duty to report suspected cases of child abuse or maltreatment, however, this does not make



not entitled to a lawyer during an investigation, and neither is the child who may face, now or later, a painful separation from their family.<sup>38</sup> What's more, agents – who generally refuse to communicate with legal representatives – employ coercive and threatening tactics to obtain information, access homes and children, and force families to modify their behavior or living arrangements.<sup>39</sup> CPS agents admit to pressuring parents to submit to an investigation using lines like “Well, I’m not going to stop coming”<sup>40</sup> and “Why not, if you don’t have anything to hide?”<sup>41</sup> Others admit to misleading parents into thinking they will have a warrant put out for their arrest if they refuse an agent entry.<sup>42</sup>

Seeking to appear cooperative, parents often overshare rather than only answering questions relevant to the investigation<sup>43</sup> and agree to comply with “services” beyond the scope of the allegations against them.<sup>44</sup> They sometimes lack the institutional experience or power to insist on alternatives to court filing, like

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[the caseworker] an agent of the police, no more so than would we consider a physician who is required to report cases of child abuse or maltreatment acting as an agent of the police.”).

38. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31-32 (1981) (holding that the decision over whether due process calls for the appointment of counsel for indigent parents in termination proceedings is left to the trial court); *Jeter v. Poole*, 171 N.Y.S.3d 98 (N.Y. Sup. Ct. 2022) (holding that the parent has no due-process right to counsel during SCR administrative hearings). *See generally* N.Y. FAM. CT. ACT § 262(a) (McKinney 2022) (describing assignment of counsel only in certain judicial proceedings).
39. *See, e.g.*, Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 850 nn.29, 31, 34 & 35 (2020) (describing cases in which CPS caseworkers presented safety plans to parents and threatened parents with removal if they failed to agree); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1124 (2022) (outlining the multifaceted coercion tools used by CPS to discredit, silence, and exclude any speech that does not align with the agency); Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 440-41 (2021) (describing how social workers use children to leverage bargaining power over parents); Dinah Ortiz-Adames, *Uplifting Every Voice – Together We Can Change the Perception of Parents Created by the Child Welfare System*, RISE MAG. (Oct. 2, 2018), <https://www.risemagazine.org/2018/10/uplifting-every-voice> [<https://perma.cc/PY7B-RM8D>] (recounting a parent’s experience with difficulties and obstruction from CPS over any kind of disagreement).
40. Hager, *supra* note 5.
41. *Id.*
42. *Id.*
43. *What to Know About ACS*, CTR. FOR FAM. REPRESENTATION, <https://cfrny.org/community-advocacy-project/what-to-know-about-acs> [<https://perma.cc/2QQ2-MCVV>] (advising parents who are contacted by ACS to “[a]nswer only the questions ACS asks about an investigation,” to not “offer any information that isn’t about the allegations in your case,” and that “[i]f you do not talk to ACS, they will still investigate. It could make things worse if you refuse to talk to them”).
44. *Id.* (advising parents under investigation that “[y]ou have the right to preventive services. You can choose only the services you think will help your family”).

advocating for a coterie of services sufficient to quell CPS's concerns or making alternative financial, living, caretaking, or medical arrangements.

In the very early stages of an investigation, agents acting under dubious assertions of authority often coerce parents to make “family arrangements” or “safety plans” that involve relinquishing a child to a relative or friend.<sup>45</sup> In another case we handled with our students, agents were investigating an allegation that on one occasion, a parent hit a teenager on the back of her leg with a belt. Without court order, the agent directed the mother to bring both her teenager and eighteen-month-old to a family friend's home until the agency filed a neglect petition in court. In her notes, the agent wrote that the “[c]hildren . . . were placed in the home of a family friend pending court outcome” – that is, the agent unilaterally effected a removal of the children from the family home.<sup>46</sup> When the government intervenes, and families have no access to lawyers to assess CPS agents' authority and make considered decisions, families often believe they are required to abide by agents' demands or risk the immediate seizure of their children.

An agent's discretion at this stage is not limited to investigating and deciding whether to file a petition against the parents in family court. At the conclusion of the investigation, the agent may enter an administrative judgment that can impact a family for decades. If the agent decides that the investigation turned up enough proof of maltreatment,<sup>47</sup> the parent will be listed in the SCR and their status disclosed to employers and licensing agencies.<sup>48</sup> Based on this listing, a parent can be denied employment or economic opportunities.<sup>49</sup> CPS also has broad authority to deny approval of an individual with a substantiated report as

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45. See Gupta-Kagan, *supra* note 39, at 849 (describing CPS's use of safety plans to coerce parents by “threaten[ing] to remove children immediately if parents do not agree to a safety plan that calls for children's physical custody to change, typically shifting the child to the custody of a kinship caregiver”).

46. Investigation Progress Notes 19-20 (Mar. 21, 2022) (on file with authors).

47. In New York, CPS has a duty to investigate and determine within sixty days whether there is a fair preponderance of evidence that the alleged neglect or abuse contained within the SCR report to indicate the report in the database. N.Y. SOC. SERV. LAW § 424(7) (McKinney 2017) (establishing CPS's duty to determine whether to indicate an SCR report); *id.* § 422(5)(a) (McKinney 2022) (establishing that a fair preponderance of evidence that the alleged abuse or maltreatment occurred is required to indicate an SCR report). Licensing agencies and employers that have contact with children are required to check the SCR regarding any licensing applicant or potential employee. *Id.* § 424-a(1)(a)(ii)-(v) (McKinney 2022).

48. *Id.* § 424-a(1)(1)(ii)-(v) (McKinney 2022).

49. See generally *id.* §§ 422, 424-a (describing the potential consequences of an SCR listing).

a foster caregiver for relatives or friends.<sup>50</sup> In one case where CPS accused our immigrant client of using physical discipline, a bureaucrat determined that there was enough evidence to conclude, with no judicial review, that our client had neglected his daughter, resulting in his listing in the SCR. Our client works at a school where he interacts with children every day, and he stands to lose his job because of that determination.

Beyond the material harm of CPS investigations, both children's and parents' fundamental interests in privacy are threatened when an agent enters the home during a search.<sup>51</sup> Because allegations of neglect are so intimately tied to poverty and its moral construction,<sup>52</sup> a CPS investigation that may have been unsubstantiated based on the initial allegations could ultimately ensnare a family for months or years. Often, CPS could provide resources and achieve the same end without the cost of an incursion into the family.<sup>53</sup> With or without a court filing, the sorts of resources CPS tends to provide – parenting courses, therapy, child-care vouchers, or essential childcare items – do not require concomitant surveillance.

### B. Countermovement

Investigation and listing on the SCR take place at the administrative level, at the whim of government agents without any judicial oversight. Although

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50. See Class Action Complaint at 49-52, *B.B. v. Hochul*, No. 21-cv-06229 (E.D.N.Y. Nov. 10, 2021) (describing the impact of an indicated report on a family seeking certification as a resource).

51. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM & MARY L. REV. 413, 510-11 (explaining that “the child welfare exception to the Fourth Amendment is a throwback to the broad authority granted the British and colonial authorities under general warrants” in that it “give[s] the executive branch the unfettered right to enter and to search a person’s home and to seize and examine children on mere suspicion of maltreatment”).

52. See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 7, 9 (2017).

53. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 620 (2020) (finding that mandated reporters who invoked CPS services envisioned “CPS as a sort of all-purpose agency, compensating for what they could not provide”).

impacted parents,<sup>54</sup> organizers,<sup>55</sup> and a small but growing field of scholars<sup>56</sup> and practitioners<sup>57</sup> have highlighted the abuses of the FPS, efforts have largely been to triage. Those triage efforts have exposed and reduced the immediate harms wrought by state agents through the court system, including the forced separation of children from their parents; the mandated “services,” drug tests, and other hoops families must jump through for their children’s return; the trauma of both momentary and interminable foster care on young people; and the termination of parents’ fundamental right to raise their children.

Families have built power as they seek accountability from a system which has profoundly altered their lives.<sup>58</sup> Increasingly, organizers have gone on the offensive,<sup>59</sup> focusing attention on the less obvious but equally nefarious harms at the ends of the system’s tentacles. Through these efforts, advocates have sought to shrink the FPS’s sweeping reach by making it more difficult to surveil families during and after an SCR investigation, and by alleviating the impact of the SCR on impacted families after investigations.<sup>60</sup>

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54. See, e.g., Elize Manoukian, Ellen Moynihan & Dave Goldiner, *Black Parents March to Demand Racial Justice in NYC Child-Welfare System*, N.Y. DAILY NEWS (June 20, 2020, 6:52 PM), <https://www.nydailynews.com/news/politics/ny-protest-black-lives-matter-20200620-sqiy-n27g45fn7jyuywnrmyd7la-story.html> [<https://perma.cc/WRL6-RGWG>]; *Black Families Matter: Parents Rally on MLK Day to Abolish ACS*, RISE MAG. (Jan. 21, 2021), <https://www.risemagazine.org/2021/01/parents-rally-on-mlk-day-to-abolish-ac> [<https://perma.cc/832S-UZYU>].
55. See, e.g., JMAC FOR FAMILIES, <https://jmacforfamilies.org> [<https://perma.cc/F8ZY-X5EB>].
56. See, e.g., 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/U5KK-VLLS>].
57. See, e.g., Tehra Coles, Zainab Akbar, Emma Ketteringham & Lauren Shapiro, *The Sad Omission of Child Welfare from Mainstream Discussion on Race*, IMPRINT (Aug. 6, 2020, 5:58 PM), <https://imprintnews.org/opinion/sad-omission-child-welfare-mainstream-discussion-race/46315> [<https://perma.cc/MV5R-F3LY>].
58. Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, TIME (Mar. 17, 2021, 9:00 AM EDT), <https://time.com/5946929/child-welfare-black-families> [<https://perma.cc/ETA2-CDQM>].
59. For example, Operation Stop CPS, instead of waiting for legislative change, targets mandated reporters by offering a training to subvert their mindset and duties. See *Respond in Power Guide*, OPERATION STOP CPS, <https://www.operationstopcps.com/respond-in-power-guide-1> [<https://perma.cc/5TUZ-LVN4>].
60. For example, the Reimagine Child Safety Coalition has advocated for demands to shrink CPS reach by ending law-enforcement partnerships with social workers, eliminating in-hospital drug testing of pregnant persons and infants, establishing a committee overseeing community programs to help families avoid the CPS system, and guaranteeing basic income to combat conditions of neglect. *Our Demands*, REIMAGINE CHILD SAFETY (Nov. 15, 2021), <https://www.reimaginechildsafety.org/our-demands> [<https://perma.cc/N8V7-CCWQ>].

In New York, organizers with the Parent Legislative Action Network have taken concrete action to shrink the state’s SCR through legislative reform.<sup>61</sup> Neglect reports are now automatically sealed after eight, rather than twenty-eight, years, and SCR agents must meet a higher evidentiary burden to add a parent to the SCR.<sup>62</sup> The administrative hearing process now tracks what happens in family court: if a parent prevails in their neglect case in the administrative hearing, they will also prevail in removing their name from the registry, a result that was not required and often did not happen before the reform.<sup>63</sup> The coalition is currently advocating for a state bill that would establish rights similar to *Miranda* rights in CPS investigations: the right to remain silent, speak to a lawyer, and refuse entry into one’s home.<sup>64</sup> A second state bill addresses anonymous SCR reports and “requires reporters of suspected child abuse or maltreatment to provide their name and contact information” to deter malicious reporting.<sup>65</sup> A third would require that medical providers seek informed consent of pregnant people and new mothers before subjecting them to medically unnecessary drug testing in New York hospitals.<sup>66</sup> These efforts are not limited to New York. Organizers and their allies are engaged in similar work in cities across the United States and on the federal level.<sup>67</sup>

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61. See Keyna Franklin & Sara Werner, *New Law Reforming NY State Central Registry Will Provide Justice and Relief to Families*, RISE MAG. (Apr. 16, 2020), <https://www.risemagazine.org/2020/04/scr-reforms> [<https://perma.cc/C5T2-CX9G>].
62. *Id.* (explaining that the evidentiary burden was raised from “some credible evidence” to a “preponderance of evidence”).
63. *Id.*
64. *Active Campaigns*, JUST MAKING CHANGE FOR FAMS., <https://jmacforfamilies.org/active-campaigns> [<https://perma.cc/GK96-FKUD>] (“*Miranda* Rights in Child Welfare” section).
65. *Id.* (“Confidential Reporting” section).
66. *Id.* (“Informed Consent” section).
67. In Los Angeles, for example, the Reimagine Child Safety Coalition issued a set of eleven demands to the L.A. County Board of Supervisors, one of which was advanced when the Board approved a proposal to explore the possibility of providing parents with pre-petition legal counsel. See *Our Demands*, REIMAGINE CHILD SAFETY COAL., <https://www.reimaginechildsafety.org/our-demands> [<https://perma.cc/FX7J-3S33>] (“Providing counsel to parents at the beginning of any [Department of Children and Family Services] investigation.”); Jeremy Loudenbeck, *Amid Protest, L.A. County Looks to Early Legal Representation for Parents to Avoid Foster Care Removals*, IMPRINT (May 17, 2022 8:25 PM), <https://imprintnews.org/child-welfare-2/los-angeles-county-pre-petition-representation> [<https://perma.cc/25L7-5T9Z>]. In Philadelphia, Community Legal Services advocates for legislative reforms to the state’s Child Registry, recently bringing suit to terminate it. See *The Childline Registry: A Poverty Trap for Children and Families*, CMTY. LEGAL SERVS. PHILA. (Jan. 20, 2022), <https://clsphila.org/employment/childline-registry> [<https://perma.cc/JBS2-AA8P>]; *Reform the Child Abuse Registry System in Pennsylvania*, CMTY. LEGAL SERVS. PHILA. (Nov. 2020), <https://clsphila.org/wp-content/uploads/2020/11/Reform-the-Child-Abuse-Registry-update-3.pdf> [<https://perma.cc/7GAK-8UMK>]. In Washington, D.C., Mother’s Outreach

In addition to legislative reform, grassroots organizers have envisioned a peer network of collective care—a mutual-aid model to strengthen families and reduce or prevent contact with the family regulation system altogether.<sup>68</sup> This model would help families access resources and services without putting them at risk of state intervention.<sup>69</sup> Similarly, community groups have advocated budgetary investments of five billion dollars in universal childcare.<sup>70</sup>

While organizers have steadfastly targeted subjudicial structures, lawyers have not similarly focused on subjudicial venues. Recently, recognizing the importance of legal representation at the outset of an investigation, many legal-service providers have begun to engage in the nascent work of “early defense” or “pre-petition advocacy.”<sup>71</sup> These organizations’ early-defense teams can be called upon prior to or upon a parent’s initial contact with FPS agents. These teams, consisting of attorneys, social workers, and parent advocates, work to prevent the agency from filing a neglect or abuse petition in family court, and they provide information about parental rights and the investigatory process.<sup>72</sup> Most

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Network focuses on economic empowerment of Black women subject to the family regulation system, such as organizing for guaranteed income and conducting presentations regarding the D.C. Child Protection Register. See *Programs*, MOTHER’S OUTREACH NETWORK, <https://mothersoutreachnetwork.org/programs> [<https://perma.cc/4WC2-K37D>]. Other organizations like Movement for Family Power, Just Making a Change for Families, Bay Area Transformative Justice Collective, Law for Black Lives, and Operation Stop CPS are engaged in efforts to repeal the 1997 Adoption and Safe Families Act. See *Who Are We?*, REPEAL ASFA, <https://www.repealasma.org/who-we-are> [<https://perma.cc/6J7L-HSRE>].

68. See *Someone to Turn to: A Vision for Creating Networks of Peer Care*, RISE MAG. (May 21, 2021), <https://www.risemagazine.org/2021/05/someone-to-turn-to-insights3> [<https://perma.cc/K73K-D45E>].

69. See *id.*

70. See *Halimah Washington Speaks at AQE Press Conference Demanding \$5B for Universal Child Care*, RISE MAG. (Feb. 28, 2022), <https://www.risemagazine.org/2022/02/rise-at-aqe-press-conference> [<https://perma.cc/J8RT-FSKB>]; Keyna Franklin, *Child Care Is a Child Welfare Issue: Why Rise Identified Child Care as a Policy Priority*, RISE MAG. (Feb. 15, 2022) <https://www.risemagazine.org/2022/02/child-care-is-a-child-welfare-issue> [<https://perma.cc/QB9C-UPFX>].

71. For example, beginning in 2020, New York City allocated \$1.5 million to the Family Advocacy and Guardianship Support Initiative, which included \$1.3 million in funding for pre-petition advocacy. *Fiscal Year 2020 Adopted Expense Budget Adjustment Summary/Schedule C*, N.Y.C. CITY COUNCIL (June 19, 2019), <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/12/Fiscal-2020-Schedule-C-Final-Merge.pdf> [<https://perma.cc/2PPM-FVSL>] (showing \$1.5 million allocation); Press Release, Bronx Defs., Family Advocacy Initiative Funding (June 18, 2019), <https://www.bronxdefenders.org/press-release-family-advocacy-initiative-funding> [<https://perma.cc/2UJM-GPLC>] (discussing availability of \$1.3 million for pre-petition advocacy).

72. See generally Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036 (2014) (discussing the growing trend of legal services organizations providing “preventive legal and social work advocacy to families at risk

pre-petition legal advocacy consists of correcting perceptions and mistakes of fact, helping parents access services, resolving ancillary legal issues to mitigate the agency's concerns, and advocating for parents during meetings with the agency.<sup>73</sup> Yet many providers rely on the agency itself to refer parents, allowing the state to gatekeep legal services.<sup>74</sup> Some providers only provide pre-petition representation in cases with a specific legal issue that, if resolved, would obviate the need for the agency to file an abuse or neglect petition.<sup>75</sup> This may nevertheless result in the separation of a family, for example, where custody or guardianship is transferred to another relative without court order.

Similarly, the few law-school clinics that work to challenge the family-policing system<sup>76</sup> have historically focused their efforts on sites of juridical

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of losing children to foster care"). These organizations maintain twenty-four-hour hotlines a parent can call to speak to a lawyer, parent advocate, or social worker before an investigation begins. Once an investigation commences, early-defense teams advocate at conferences, limit releases of information, provide referrals for services to help address any underlying issues, and help develop safety plans to prevent cases from being filed in court or having children removed. These providers also engage in community outreach and "Know Your Rights" presentations, and they distribute written materials through hospitals, treatment programs, schools, and community organizations to educate healthcare and education professionals and to encourage referrals for at-risk families.

73. See, e.g., *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, AM. BAR ASS'N 10 (2006), [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba-parent-rep-stds.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf) [<https://perma.cc/HB5B-4WPT>] (describing the goal of representing a parent in the pre-petition phase of the case as "often to deter the agency from deciding to file a petition or to deter the agency from attempting to remove the client's child if a petition is filed," by using strategies such as "discuss[ing available services and help[ing]the client enroll"; "explor[ing] conference opportunities with the agency"; and discussing "the realistic pros and cons of cooperating with the child welfare agency").
74. See, e.g., *Prevention in Kansas*, KAN. DEP'T FOR CHILD. & FAM. SERVS. 3 (2021), [http://www.dcf.ks.gov/services/pps/documents/fy2022datareports/family%20first/aug\\_sept\\_oct2021\\_%20prevention%20in%20kansas.pdf](http://www.dcf.ks.gov/services/pps/documents/fy2022datareports/family%20first/aug_sept_oct2021_%20prevention%20in%20kansas.pdf) [<https://perma.cc/2P2N-Z7MU>] (explaining how families may only work with the Parent Advocate Program Pilot of the Kansas Legal Services once "a referral is made").
75. Ancillary legal issues may be related to housing, public benefits, a child's educational placement or needs, etc. See, e.g., Wayne County Juvenile Division, *Request for Ancillary Legal Services*, THIRD JUD. CIR. OF MICH. ("Describe how the ancillary legal service will help prevent removal from the home or attain permanency for the child(ren) . . .").
76. Law-school clinics have engaged in family-defense work for decades. This work was initially done within clinics dedicated to representing children, where clinical teams would represent both children and parents in child-welfare proceedings. See Gottlieb et al., *supra* note 15, at 543 (describing the Child Advocacy Law Clinic at the University of Michigan, founded in 1976, in which students were required to cycle between the roles of child-welfare prosecutor, parent's lawyer, and children's lawyer). The first clinic exclusively dedicated to representation of parents was inaugurated in 1990 at the New York University School of Law. *Id.* at 540. Since then, standalone family-defense clinics have started to emerge. See, for example, *The Bronx Defenders' Law School Clinics*, BRONX DEFS., <https://www.bronxdefenders.org/>

adjudication—fair hearings before administrative-law judges, emergency fact-finding and termination-of-parental-rights trials in family court, and appeals of judicial decisions emerging from these lower courts.<sup>77</sup> In these contexts, especially in jurisdictions where family-defense clinics are active, the role of a parent’s attorney is by now well trod, clearly defined, and well anticipated by the court, counsel, and local CPS agencies.<sup>78</sup> Family defenders in these contexts serve the important function of ensuring the protections of due process and zealous representation for their clients, largely after CPS agents have already gathered the information necessary to prosecute the parents.

It is not yet family defenders’ standard practice to represent parents formally during a CPS investigation. Family defenders generally do not intervene substantially in the investigation by reaching out to CPS prosecutors and placing themselves between the agency and the client. Consequently, attorneys do not assume the explicit goal of preventing an administrative judgment in the SCR. But from our practice experience, discussed in depth in Part II, we believe many cases warrant aggressive attorney involvement in the investigation. In Part II, we describe the limitations of the predominant approach to lawyering in the FPS and propose a new model that may stand to shrink the FPS in a meaningful way.

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programs/the-bronx-defenders-law-school-clinics [<https://perma.cc/4J5W-KCHQ>], which discusses the Gertrud Mainzer Family Defense Field Clinic at Cardozo School of Law, founded in 2013 in partnership with the Bronx Defenders; and the Family Defense Practicum at CUNY School of Law, founded in 2021. Others continue to represent various stakeholders in child welfare proceedings. See, e.g., *Child Advocacy Law Clinic*, MICH. L., <https://michigan.law.umich.edu/academics/experiential-learning/clinics/child-advocacy-law-clinic-o> [<https://perma.cc/CQ5A-6PBY>] (describing the various legal roles filled by students in the clinic); *Interdisciplinary Child Advocacy Clinic*, PENN CAREY L., <https://www.law.upenn.edu/clinic/child> [<https://perma.cc/6AGP-TH66>] (same).

77. See, e.g., *Family Defense Clinic*, N.Y.U. L., <https://www.law.nyu.edu/academics/clinics/familydefense> [<https://perma.cc/NYJ7-GHNX>] (“The heart of the clinic is the opportunity to represent individual clients in Family Court . . . . The cases include child neglect and abuse cases, termination of parental rights proceedings, and permanency planning hearings. We also represent parents in administrative proceedings to clear records of child abuse and maltreatment.”); MICH. L., *supra* note 76 (“Students taking this clinic represent children, parents, or the Department of Health and Human Services in trial court cases.”).
78. See, e.g., *Interim Report to Chief Judge DiFiore*, COMM’N ON PARENTAL LEGAL REPRESENTATION (Feb. 2019), [http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR\\_Commission-Report.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf) [<https://perma.cc/2BZJ-7JVZ>] (describing in detail the commission’s shared understanding of the role of a parent’s attorney in child-welfare court proceedings and making concrete recommendations for buttressing that role).



## II. THE LIMITATIONS OF SYSTEMS NAVIGATION AND THE NEW HORIZONS OF RADICAL EARLY DEFENSE

### A. *Systems Navigation and Its Limitations*

Family-defense lawyers have historically been frozen out of the investigation phase—usually because it happens before parents are entitled to counsel.<sup>79</sup> When lawyers begin working with families, they have often observed that significant harm was already done to the family and the family’s court case during the investigation phase.<sup>80</sup> Lawyers have rightly imagined that if they could just intervene earlier to provide advice on navigating an investigation—the same sort of advice that they might provide on navigating a court proceeding—they might help a family avoid a court filing in the first instance.<sup>81</sup> We call this approach *systems navigation*.

Systems navigation imagines the role of an advocate as responsive to, and largely predetermined by, the parameters of the system in which the advocate operates. Each system is governed by a set of rules. Under systems navigation, if a system has no rules, the options are either to operate under the rules of a closely analogous system or to erect a new set of rules by which to navigate the space. Systems-navigating lawyers largely imagine courts and legal processes as the lawyer’s realm. To a systems-navigating lawyer, subjudicial spaces are relevant and navigable to the extent that they relate to or impact the legal process.

Systems navigation in the context of early defense is therefore driven by priorities familiar to a lawyer who meets a family, already ensnared by the family-policing system, in court. Such an approach privileges cooperation and compliance to avoid some of the FPS’s most drastic harms: court involvement and family separation. Systems navigators sometimes do early-defense work at the behest of or in cooperation with the FPS agents conducting the investigation. FPS agents occasionally refer families they determine are worthy of pre-petition representation,<sup>82</sup> usually after an investigation has already been completed.

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79. See *supra* note 39 and accompanying text.

80. See, e.g., Ismail, *supra* note 4 (manuscript at 52) (describing the harms of family-policing investigations); AM. BAR ASS’N, *supra* note 73, at 10 (acknowledging the potential harms of a parent displaying anger during an investigation).

81. *Early Defense for Parents Facing ACS Investigations*, BROOKLYN DEF. SERVS., <https://bds.org/issues/early-defense-for-parents-facing-acs-investigations> [<https://perma.cc/YM4U-2USA>] (“Access to legal assistance at the beginning of an investigation can ensure that parents understand the process, have immediate access to important supportive services and can help avoid family court filings or the removal of children.”).

82. See *infra* Section IV.C.3.

The systems-navigation approach has merits in the subjudicial phase of a case, especially to the extent that its main goal is avoiding court involvement. A court filing can be devastating for a family. Once a case is under a judge's supervision, CPS's talons will have more or less dug in, making escape from family policing even more onerous. Escalation, including to family separation, is more likely. CPS court cases can drag on for years and, at their most extreme, can result in the termination of parental rights. Avoiding court often means avoiding this reality. For many families, this is a priority of the first order.

But the systems-navigation approach has its limits, too. An investigation, limited or mediated as it may be, can have serious, enduring impacts on a family. Research has shown that the very act of a government agent assessing a parent can cause significant trauma to the child, the parent, and the family unit.<sup>83</sup> More invasive investigations, which may involving strip searches, genital examinations, and intrusive questioning, compound these harms.<sup>84</sup> Investigations have also been shown to diminish trust within the family.<sup>85</sup> The threat of removal, even if unspoken, seeds a child with uncertainty about their parents' ability to provide for the child's protection and needs.<sup>86</sup> Driven by avoiding the harms of a case in court, the systems-navigation approach can overlook the harms a family suffers by virtue of the investigation itself. We turn our attention to addressing those harms now.

### *B. Radical Early Defense*

While a family-defense lawyer in court is restricted to predictable systems-navigation advocacy, attorneys representing parents in subjudicial contexts are rare and largely unanticipated by stakeholders, including by CPS agents and their legal representatives. We argue that lawyers should engage in adversarial representation at the earliest stage of an investigation, before family-defense attorneys traditionally intervene. A law-school clinic is especially well suited to provide this early representation along a consciously abolitionist horizon. We call this intervention *radical early defense*.

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83. Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse*, 3 INST. FOR PSYCH. THERAPIES 1, 2-5 (1991); see also Lauren Devine & Stephen Parker, *Rethinking Child Protection Strategy: Learning from Trends* 52 n.137 (Univ. of W. of Eng., Working Paper, 2015) (collecting studies evincing harm of investigations to families and children).

84. See Coleman, *supra* note 51, at 510-11, 519-21 (discussing the harms of invasive investigations).

85. See Ismail, *supra* note 4 (manuscript at 52-53) (discussing the psychological harms of investigations).

86. See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 531 (2019) (describing attachment-disorder impacts of family separation).

Radical early defense is the representation of families at the earliest moment possible, with the intention of restricting or eliminating the state's coercive encroachment into a family's life. By taking this approach, radical early defenders directly challenge presumptions core to the prevailing FPS regime. First, radical early defenders reject the inevitability of investigation and surveillance. By equipping families to refuse investigation safely and confidently, radical early defenders push back against the notion that families do not deserve legal representation until the state has taken drastic action to remove children or involve a court. Second, radical early defenders reject the presumption of the FPS's benevolence. By providing the kind of representation a wealthy family could procure at the first instance of state intrusion, radical early defenders help families set the terms of their interaction, rather than allowing CPS to do so.

Radical early defense spans the arc of the investigation phase. Radical early defenders invoke their client's Fourth and Fourteenth Amendment rights to be free from unreasonable search and seizure, counsel clients through FPS interrogations, and negotiate directly with CPS counsel to set the bounds of the client's consent to be investigated.<sup>87</sup> This involves counseling a client about their right to refuse entry to their home, as well as representing parents who have chosen to refuse entry.<sup>88</sup> Radical early defense also involves advocating for a warrant standard that is at least as protective as a criminal search warrant.<sup>89</sup>

Like systems navigation, radical early defense takes aim at the especially violent FPS harms of family separation and court filings. But radical early defense is crucial in the context of child-welfare investigations for three other reasons. First, radical early defense prevents the less visible harms of SCR investigations. Few cases where CPS investigates and continues to monitor families end up in court. This means that families are often sternly referred to "services" and subjected to ongoing surveillance without anyone informing them that they are not required to comply or protecting them from CPS agents who might imply otherwise. As described above, an SCR investigation can also cause serious dignitary and stigmatic harms, in addition to ongoing surveillance without oversight.<sup>90</sup> Even more, a family member's placement on an SCR can materially harm families for decades.<sup>91</sup>

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87. See Ismail, *supra* note 4 (manuscript at 63-67).

88. See *id* at 63-64 (describing the consequences of applying basic Fourth Amendment principles to CPS investigations); see also, e.g., N.Y. FAM. CT. ACT § 1034 (McKinney 2022).

89. See Ismail, *supra* note 4 (manuscript at 59-60, 63-64) (describing the impact of applying the *Gates* warrant standard to CPS investigations).

90. See *supra* notes 2-10, 48-51 and accompanying text.

91. See *supra* notes 48-51 and accompanying text.

Second, procedural protections sought by family defenders in court seldom effectively push back against investigative overreach. In a criminal case, effective defense representation at the judicial phase may challenge the corresponding criminal investigation. The same is not true in a child-welfare case. Criminal police are trained to project compliance with constitutional limitations: if an officer enters a home without consent or coerces a confession by threatening a witness, the officer knows that they risk the resulting evidence being suppressed in court.<sup>92</sup> Not so in family court, where even the most zealous family defender cannot exclude evidence obtained contrary to the Fourth Amendment.<sup>93</sup> Most child-welfare investigators are required to continue searching for evidence of maltreatment<sup>94</sup> beyond the underlying allegations which gave rise to the investigation. Such a searching and continuous investigation often yields evidence of what could be construed as neglect. Accordingly, many families end up under years of court and family-policing surveillance based on allegations of neglect arising from information obtained in home searches and interviews which they did not feel entitled to refuse.

### C. *Abolition as Our North Star*

By adopting a radical-lawyering approach to fight family policing, lawyers and law-school clinics can take an explicitly abolitionist tack. This approach can be driven by the mission of shrinking the carceral family-policing project as a whole, and it might be especially effective in subjudicial contexts that have not yet been tamed by systems navigation. A law-school clinic is especially well positioned to provide high-quality, ethical early-defense representation to clients in communities where the clinic has deep relationships, while simultaneously imagining new horizons.

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92. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained through unconstitutional searches and seizures cannot be admitted in a state criminal court).

93. *Id.*

94. For example, in New York, CPS investigators are required to carry out a complete and adequate investigation. N.Y. SOC. SERV. LAW § 424 (McKinney 2022); N.Y. COMP. CODES R & REGS. tit. 18, § 432.2 (2022). A complete child-protective investigation requires “a determination of the nature, extent and cause of any condition enumerated in such report *and any other condition that may constitute abuse or maltreatment.*” N.Y. COMP. CODES R & REGS. tit. 18, § 432.2. (2022) (emphasis added). A CPS agent must conduct a preliminary safety assessment within seven days of a report that identifies the presence of safety factors. *Id.* As defined in the New York state CPS manual, “A safety factor is a behavior, condition, or circumstance *that has the potential to place* a child in immediate or impending danger of serious harm.” *OCFS Manual*, *supra* note 27, ch. 6, at D-2. These safety factors can range from drug and alcohol use, to provision of food and clothing, to leaving the child home alone, to physical condition of the home, to acting negatively toward the child, to a child exhibiting fear or anxiety. *Id.* at D-3 to D-6.

Such a clinic can use Professor Ruth Wilson Gilmore’s description of nonreformist reforms<sup>95</sup> as a heuristic: does the clinic’s intervention, “at the end of the day, unravel rather than widen the net of social control?”<sup>96</sup> The clinic might inflect that question with a further provocation by Professor Amna A. Akbar: does the clinic’s intervention “unleash people power against the prevailing political, economic and social arrangements and toward new possibilities?”<sup>97</sup> The clinical work described below in Section III.A is designed with such guidance in mind.

Radical early defense offers possibilities for a different horizon: a new sort of protection and support for families, independent of carceral systems. By developing collaborative, family-by-family precedent for CPS pushback, radical family-defense clinics can bolster communities’ efforts to build power, resist family policing, and lay the groundwork for new models of support. One way to manifest that power is to puncture CPS’s reliance on parental cooperation as evidence of good judgment. With support from a radical early-defense clinic, families can demand that CPS get a warrant backed by probable cause if the agency wants to enter the home and speak to counsel if it wants a conversation. By repeatedly forcing CPS to follow the law, families can redefine what it means to protect themselves and break the false equivalency between resistance and bad parenting.

Radical early defense also has the potential to shrink the CPS footprint more broadly. Most CPS investigations are unfounded from the beginning.<sup>98</sup> When these investigations are disrupted by parents’ resistance, CPS must decide how to proceed. CPS agents have three options: two escalatory, one de-escalatory. First, as sometimes happens, CPS agents can further intimidate families by calling upon criminal police to compel consent. While this tactic is coercive, it does

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95. The term “nonreformist reforms” was coined in the 1960s by French economist-philosopher and sociologist André Gorz. He defined them as reforms that reject “capitalist needs, criteria and rationales” requiring “modification of the relations of power.” ANDRÉ GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 7-8 (Martin A. Nicolaus & Victoria Ortiz trans., 1967).

96. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION TO GLOBALIZING CALIFORNIA* 242 (2007); see also *So Is This Actually an Abolitionist Proposal or Strategy? A Collection of Resources to Aid in Evaluation and Reflection*, INTERRUPTING CRIMINALIZATION, PROJECT NIA & CRITICAL RESISTANCE 11-13 (2022), <https://www.interruptingcriminalization.com/binder> [<https://perma.cc/LKY3-FHVZ>] (listing questions to ask of each reform to determine if it is an abolitionist proposal or strategy).

97. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 102 (2020). Akbar lays out a three-part test for evaluating whether a particular effort is reformist or nonreformist: (1) Does that effort “advance a radical critique and radical imagination” by highlighting how the status quo regimes structure society for the benefit of the few, rather than the many?; (2) Does the effort “draw from and create pathways for building ever-growing organizing popular power?”; and (3) Does the effort facilitate “an exercise of power by people over the conditions of their own lives?” *Id.* at 103, 104, 106.

98. See *supra* notes 25-26 and accompanying text.

not change families' legal rights to refuse a search without a warrant; a well-organized community would know that the same rights apply regardless of who the law-enforcement agent is. Second, CPS agents can request that CPS prosecutors apply for search warrants. Again, this tactic is likely to fail, especially in the face of a parent represented by a law-school clinic. The allegations in an SCR complaint often do not rise to the level of probable cause needed to secure a warrant,<sup>99</sup> and neither does a parent's resistance. And finally, CPS could step back. It could decide to communicate its requests through an attorney and respect a parent's rights. The case described below demonstrates that possibility.

#### *D. The Case of Suzy Q*

A case study partially described earlier illustrates the harmful impact of a CPS investigation, as well as the difference between systems-navigation lawyering and radical early defense. In the spring of 2022, CUNY Law's Family Defense Practicum (FDP) received a referral from a community partner. A mother in the Bronx was under CPS investigation. A person had anonymously called the ubiquitously advertised SCR hotline,<sup>100</sup> alleging that Suzy Q's fifteen-year-old son was skipping school to take care of his elderly grandfather and that he was sometimes up late with his friends, hanging out near the front door of his home. The anonymous caller told the SCR that Suzy Q had a younger child, maybe eight or nine, but that they had no concerns about him. He was in school and doing well.

However, Suzy Q did not have a fifteen-year-old. Her older son was eighteen and in college, taking online courses owing to the pandemic. Her elderly father lived with their family, and the eighteen-year-old did help care for him between classes. But the son was an adult, and CPS did not have jurisdiction over his relationship with Suzy Q. Ms. Q told FDP lawyers that CPS had come to her home and insisted on coming in. The CPS agent questioned Ms. Q and her

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99. *Id.*

100. See Press Release, N.Y.C. Admin. for Child's Servs., Children's Services Launches Citywide Public Awareness Campaign Highlighting Child Safety and Child Well-Being (Oct. 27, 2014), <https://www1.nyc.gov/site/acs/about/press-releases-2014/public-awareness-campaign-ads.page> [<https://perma.cc/UK79-CVDN>] (announcing an ad campaign encouraging the public to call to make a report, featuring black-and-white images of children emblazoned with quotations, including "But what if I'm wrong' isn't a reason to stay silent"; "It's not my business' isn't a reason to stay silent"; and "I don't want to get involved' isn't a reason to stay silent"); see also Press Release, N.Y.C. Admin. for Child's Servs., During Holiday Season & With Kids Out of School, ACS Doubles Down on Child Safety by Launching Digital Campaign to Educate New Yorkers on How to Call in Suspected Cases of Abuse or Neglect (Nov. 28, 2018), <https://www1.nyc.gov/assets/acs/pdf/PressReleases/2018/ACSCChildSafetyMarketingCampaign.pdf> [<https://perma.cc/M7RR-EYAN>] (encouraging New Yorkers to call ACS during the holiday season since school personnel make twenty-five percent of abuse and neglect allegations).

husband and pulled her kids aside to question them. The agent also questioned Ms. Q's elderly father, including about his medical condition and which medicine he took. She went through their cabinets and refrigerator, and she examined the kids' bedrooms. She asked all the adults in the home to sign medical releases and Ms. Q to sign a release for her younger son.

Ms. Q had informed the CPS agent of her oldest son's age at the outset of the search. Nevertheless, the agent insisted on continuing the investigation because she believed there was an eight-year-old in the home.<sup>101</sup> After conducting the initial home search, the agent told Ms. Q that she would be in touch and that she would be back in two weeks—if not before. She planned to make both announced and unannounced visits as part of the investigation.

In the world of systems navigation, the advice to Ms. Q may have been to answer questions, but only those which pertained to the allegations being investigated.<sup>102</sup> A systems-navigation approach might involve informing Ms. Q of her rights but suggesting that limited cooperation would move things along, whereas refusing entry might make things worse.<sup>103</sup> Once Ms. Q signed HIPAA releases, the systems-navigation advice would likely be to allow the investigation to run its course: "If you do not talk to CPS, they will still investigate."<sup>104</sup>

But in a world of radical early defense—the world that we are suggesting law-school clinics can occupy—different outcomes are possible. After hearing Ms. Q's facts, we advised our client not to talk to CPS anymore. Upon her agreement, we directed CPS to communicate only through counsel. We informed CPS that Ms. Q would not be letting agents into the family home again and revoked all releases that Ms. Q had signed. The CPS agent doubled down and contacted Ms. Q, asking her for a drug test. Ms. Q heeded our advice and did not respond. We again advised CPS counsel that the agent was to refrain from contacting Ms. Q. A few weeks later, CPS counsel wrote asking for CPS to conduct a "home visit." When we asked the purpose of the home visit, CPS counsel wrote back in general terms: "They make home visits to ensure the continued safety of the children during the course of the investigation."<sup>105</sup> We asked if there were any specific concerns about safety in this case. The lawyer replied that there were not. After consulting with Ms. Q, we renewed our request: the agent was to refrain from communicating with our client outside of the presence of counsel.<sup>106</sup>

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<sup>101</sup>. This information was also inaccurate; Suzy Q's younger child was nine.

<sup>102</sup>. See *supra* notes 79-82 and accompanying text.

<sup>103</sup>. *Id.*

<sup>104</sup>. See *id.* (describing why parents would feel coerced to comply).

<sup>105</sup>. Email from N.Y. Fam. Ct. Legal Servs., Admin. for Child's Serv., to authors (Apr. 18, 2022, 3:43 PM) (on file with authors).

<sup>106</sup>. *Id.*

Two months later, Ms. Q received notice that her case was closed as unfounded.<sup>107</sup> Ultimately, the systems-navigation approach may have achieved the desired legal outcome, avoiding court involvement. It may have also achieved the ancillary benefit of arriving at a finding that the allegations were unsubstantiated. But systems navigation in Ms. Q's case could also have led to weeks, if not months, of home searches and persistent CPS involvement in her life, launched only by an anonymous tip. Such an approach risks entrenching this sort of invasive investigation, backed by the full force and credit of the state, and forcing Ms. Q to tick every box CPS demanded. That approach reifies the CPS investigation as a system worthy of navigation, thereby attracting more resources, more personnel, and more rules for navigating it. What's more, systems navigation gives credence and legitimacy to the outcome of a CPS investigation. It subjects the next family who faces similar scrutiny to the same problems that Ms. Q's family faced. Unlike Ms. Q, the next family may not have legal protection.

In this case, the radical early-defense approach achieved the desired legal outcomes. Ms. Q did not end up in court, and NYC's CPS deemed the allegations against her unsubstantiated, a result we achieved largely without cooperating with CPS. But our strategy brought additional, nontangible benefits. By adopting this approach, Ms. Q protected her family from the additional trauma of continued surveillance. She also took a step toward protecting the next family who confronts this sort of investigation, helping to shield them from trauma and make it costlier for CPS to apply bureaucratic rules at an entire family's expense.

### III. RADICAL EARLY DEFENSE IN PRACTICE

Law-school clinics can experiment with lawyering in the subjudicial spaces families usually navigate alone. In doing so, clinics can support communities as they challenge longstanding policing practices. We envision lawyering beyond the juridical space as multidimensional, deliberately constructed to contract the front end of the family-policing funnel, with the ultimate goal of contracting the entire family-policing apparatus. In this section, we attempt a blueprint for the potential design of radical early defense from the standpoint of a law-school clinic. We explore operationalizing this blueprint and identify preliminary insights and unanswered questions from our experience implementing radical early defense in its infancy.

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<sup>107</sup>. Letter from Lisa Gharthey Ogundimu, Deputy Comm'r, Child Welfare & Cmty. Servs., to [Client] (June 3, 2022) (on file with authors).



### A. *The Clinical Standpoint*

Law-school clinics are especially well situated to work with families in the FPS's quasi-judicial gaps.<sup>108</sup> First, law clinics do not experience the same case-load requirements as nonprofits or private law firms. The demands and metrics of a successful law-school clinic are different—in ways both liberating and restricting<sup>109</sup>—from those of a private law office or even that of a nonprofit. While even nonprofit law offices are expected to handle a certain (and sometimes crushing) number of cases per annum to satisfy their contracts, for example, a law-school clinic's capacity is far more circumscribed, as are the pressures around it.

Second, law-school clinics generally benefit from an unusual degree of freedom because they are not beholden to specific funding streams. This financial freedom, bolstered by the academic freedom that comes with operating within an institution of higher education, offers clinics a unique opportunity for experimentation. Clinics can be flexible in the kinds of cases they take, and the matters in which they represent clients, allowing them to meet the evolving needs and prerogatives of the communities they serve. These conditions can also make clinics more accountable to those communities, providing some measure of insurance against co-optation, as we discuss further in Section IV.C.

Third, operating out of a law school offers a unique dialectic relationship between theory and practice.<sup>110</sup> Clinicians and students in an academic environment are blessed with opportunities for deliberate reflection and conversation with peers and colleagues.<sup>111</sup> Fourth, and perhaps most importantly, operating

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108. Law-school clinics' ability to experiment and innovate in both theory and practice has been widely covered in academic literature. See, e.g., Wendy A. Bach & Sameer M. Ashar, *Critical Theory and Clinical Stance*, 26 *CLINICAL L. REV.* 81 (2019); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 *AKRON L. REV.* 463 (1995); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333 (2009); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 *S.M.U. L. REV.* 1461 (1998).

109. Although beyond the scope of this Essay, two such constraints on law-school clinics are capacity (a clinic's ability to serve even a fraction of the families that will seek representation in an early-defense model) and scalability (how such a model can be implemented outside of a clinical setting).

110. See, e.g., Wendy Bach & Sameer Ashar, *supra* note 108, at 92 (arguing that clinicians employ and revise theory in service of their clients).

111. There is a dearth of literature on methodologies in clinical pedagogy, including the key practice of reflection. For discussions of reflection in seminar design, case rounds, and supervision and as a learning goal, see, for example, SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* (2014).

as a law-school clinic means working with student attorneys who are excited about the work, blessed with time to dive into it headfirst, and sometimes directly impacted by the very issues that clinics are seeking to address.<sup>112</sup>

*B. A Model of Radical Early Defense*

Clinics can aim to disrupt compulsory consent and the surveillance mechanisms it serves through a robust, two-pronged approach, one that a small number of family-defense practitioners and clinics already engage in.<sup>113</sup> First, clinics can seek to build deep relationships with the parents and families most vulnerable to family policing, providing community education while gaining a clearer sense of the needs and pain points of targeted communities and families. Second, clinics should—to the extent possible—reinforce these relationships with full representation when families face an investigation, as well as during any resulting court case or challenge to their listing in the SCR.

*1. Building Community Relationships*

In our vision for a law-school clinic, the clinic can build relationships through hyperlocal, routinized rights-awareness presentations to affected families. These presentations should be tailored directly to the needs of the parents and families in community spaces where the clinic has established a presence. Such presentations can give families an accurate understanding of the legal authority for investigations, highlighting CPS's reliance on parental consent to searches, interrogations and information. Presentations can also provide a basic reminder of the Constitution's technical protections, although those protections are ill defined in the context of family policing.<sup>114</sup> More importantly, a radical-early-defense Know-Your-Rights presentation offers families and community members an opportunity to test out their real concerns about asserting those protections.<sup>115</sup> Because there are no mandated reporters hovering overhead, families may feel more comfortable asking questions that they might otherwise be afraid to raise—a phenomenon we hope will grow even deeper over time.

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112. Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 158-59 (2020) (describing opportunities for legal experimentation when acknowledging the lived experience of attorneys subject to the family-regulation system).

113. See Fong, *supra* note 53, at 623.

114. See Ismail, *supra* note 4 (manuscript at 43-62).

115. Questions like the following are not uncommon: “Won’t they use it against me if I say no?”; “What happens if I actually talk to them?”; “What happens if they come back with the police?”; and “Won’t they just take my baby?”

From these questions, lawyers can also glean important information and insight about trends in family policing.

In addition to connecting with impacted families, it bears emphasizing the importance of maintaining strong, deep relationships with local defender offices who are contracted to represent parents in family court. Over the past two decades, these offices have developed the infrastructure to navigate family-court cases. When there is a possibility that CPS might escalate by filing a petition against a family in court, these relationships with family-defender offices are invaluable from the earliest stage of the process.<sup>116</sup>

Ultimately, a clinic's success will turn on the reliability of its community relationships. We were only able to represent Ms. Q so closely because of the trusted relationships FDP had established with CUNY's community partners.<sup>117</sup> We were able to speak frankly with those partners about the novelty of our approach and the costs and benefits that it might bring. We approach the families with whom we work in the same spirit.

## 2. Representation

If the first prong of a radical early defense approach is relationship building and community education, the second is reinforcing that education as legal representatives when agents arrive at families' doors. In our design, legal representation takes two forms. First, in community engagement, lawyers should aim to be explicit about their early-defense legal role. Through roleplay and exchange with student attorneys, parents and community leaders will learn the specific ways that a lawyer can and will engage with CPS on their behalf during the investigation phase. We want people to know that if they choose to say, "Call my lawyer," that lawyer can be us.<sup>118</sup>

Second, beyond representation at the investigation phase, radical early defenders represent parents in administrative hearings when a CPS agent has

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<sup>116</sup>. For example, defenders' offices are made up of adept systems navigators. They have vast experience based on the volume of cases they handle and can offer important information and advice. They also staff "intake," the court proceedings where the agency first presents its petition against a family and a judge issues preliminary orders about children's living arrangements and interactions with parents. This staffing enables them to alert us to the pace and timing of a potential filing, including real-time information.

<sup>117</sup>. See *infra* Part IV.

<sup>118</sup>. See, e.g., CLEAR, *Flying While Muslim: Your Rights at U.S. Airports & Borders*, YOUTUBE (Sept. 2, 2018), <https://www.youtube.com/watch?v=Qv3C9V731Ns> [<https://perma.cc/ZG7U-3YCN>] (providing instruction on rights while traveling and encouraging viewers to call if they need representation).

placed a parent on an SCR registry.<sup>119</sup> Families who face such determinations but never end up in court are caught in limbo: no factfinder has resolved their case in either direction, and the families have no right to counsel in administrative proceedings to remove their names from the registry.<sup>120</sup> Continuing representation, from the investigation through the SCR administrative proceeding, has several benefits. First, lawyers can see the full arc of a family-policing case, yielding important insights from each stage of the representation that can be integrated into their practice. Second, continuing representation deepens relationships between families and the clinic, providing a measure of trust and solidarity that can only be built through sustained collaboration. Third, it is crucial that families feel confident that if they take an assertive stance at the beginning of the investigation, they will have legal backup. Radical early-defense lawyers can give families that assurance by continuing the representation that began with the call to the SCR all the way through to the conclusion of a family's interactions with the FPS.

### *C. Challenges, Insights and Questions for the Future*

Radical early defense will trigger new challenges, implicate new considerations, and open new opportunities—both for families targeted by the FPS and for the lawyers who work with them. This Part describes some of the insights that have emerged so far and themes we anticipate facing in our work representing families at the margins of the FPS. Some are not unique to the context of family policing. Yet because some of our work is experimental, we especially note new horizons that are specific to this emerging area of practice.

#### *1. Transcending the Radical-Regnant Lawyering Dichotomy*

In the subjudicial spaces where we work with our clients, we strive to remain faithful to the abolitionist principles described in Section II.C. In our relationships with our clients and the communities we engage with, we attempt to deliberately build client power, control, and autonomy. Yet our approach to representing and counseling each client is never the same. Each family approached by CPS is dealing with different facts and a different lived experience. We do not always advise our clients to take the most radical stance during an investigation. Some cases require steering toward a systems-navigation approach because the

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119. See *supra* note 13 (explaining the evidentiary standard for substantiating an allegation of maltreatment).

120. *Jeter v. Poole*, 171 N.Y.S.3d 98, 101 (App. Div. 2022) (holding that the parent has no due-process right to counsel during SCR administrative hearings).

case is more likely to go to court. In these scenarios, preventing the removal of children becomes paramount. Such cases usually require connecting our client with services and resources and negotiating with FPS representatives. When we take a systems-navigation approach, our representation can unsurprisingly appear regnant at first look.<sup>121</sup> But ironically, radical early defense often appears regnant as well.

In a radical early defense model, when we represent a family during an investigation, we may advise the client to remain silent and to direct the agent to us, their lawyers. This silence might appear to transfer their power to the legal team, disempowering the client. It is easier to identify empowerment or resistance when families assert their own rights and we provide legal backup. But in many scenarios, we intervene immediately by shielding the client from CPS agents: the client is behind a curtain, and attorneys speak on their behalf.

Yet *all* these practices are animated by radical intentions. As other lawyers who represent clients at the edges of untamed systems have observed, “engaging in problem-solving hand in hand with clients is a praxis guided by rebellious intuitions and a desire to work in solidarity and partnership with clients in a situation fraught with risk for all but the state.”<sup>122</sup> We take direction from our client in making decisions that determine the shape of the representation: to navigate the FPS on its own terms; to refuse to submit to an investigation, full stop; and every posture in between. The same goes for the discrete decisions that follow: whether the client should agree to *any* meeting and on what terms, whether they should sign even a limited release of information, and other questions.

Nonmarginalized and wealthy families would assume this same lawyer-forward posture when facing these circumstances; for them, this posture would not be radical. But for families targeted by the FPS, this kind of considered, protected response *is* radical because it stands to disrupt the prevailing norms of a powerful system and the coercive consent the FPS has capitalized on. Moreover, these shielding practices are often necessary because subjudicial defense is in its infancy, the state’s reactions are unpredictable, and the stakes are so high; parents stand to lose their children to the state, potentially forever. We take these shielding practices as opportunities to creatively envision law practice, experiment, and expand our understanding of how to achieve radical goals with the tools we can imagine or already have at our disposal.

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121. Cf. GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 23-25, 60, 70-71 (1992) (describing regnant lawyering as progressive lawyering practices that filter subordinated people’s struggles through the lens of professional ideologies and structures preferring litigation and court-based remedies which isolate and ultimately disempower clients).

122. Kassem & Shamas, *supra* note 16, at 700.

## 2. *Fear of Retaliation for Asserting Basic Rights*

Family-policing agents possess vast discretion in their involvement with a family. The trajectory of this relationship may be short, ending after a one-off investigation. Alternatively, it may last years or even decades.<sup>123</sup> Family-policing agents may take children from their families, surveil families, terminate parental rights, or any combination of these.<sup>124</sup> Even at the outset of an investigation, most parents are acutely aware of the power the system wields and that that power resides largely with the agent at their door, especially in this early stage. As family-defense lawyers, we may advise clients to take an adversarial position by refusing to speak to the agents, open the door for them or allow them access to their children; refusing to sign consent forms; or revoking previous consent. Many of our clients are rightfully hesitant about this approach; they have varying appetites for risk in this regard. Some are fed up with years of harassment by various arms of the FPS and, with the benefit of legal counsel, want to assert their rights, however unclear and relatively toothless those rights may be. Others feel they have “nothing to hide” and wish to communicate directly with agents and meet at least some, if not all, of their demands. Most parents are somewhere in the middle. They want to protect their family from the harmful effects of an investigation<sup>125</sup> and maintain their privacy, while providing just enough information to ensure the agent will end the investigation as quickly as possible. Yet nearly every family we have worked with has expressed some degree of fear that refusing even part of an investigation will make things worse for them.

The fear that asserting rights will prompt CPS to respond with punitive or drastic measures is not paranoid or misguided.<sup>126</sup> One parent described the following:

I don't feel [CPS agents] play fair. In the past when I've asserted my rights, they became more aggressive. Once I said I didn't want to answer certain questions. The worker showed up at my door the next day with more workers and made me go to their office and speak with their supervisor who chastised me. They told me we shouldn't have told my grandkids that their father was in jail; that I should have said he is “busy.” I

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123. See, e.g., ANDREA ELLIOTT, *INVISIBLE CHILD* (2022) (describing a family's decade-long interactions with New York City's Administration for Children's Services and family courts).

124. See *supra* notes 22-38 and accompanying text.

125. See Fong, *supra* note 53, at 618-20, 631.

126. See, e.g., Hager, *supra* note 5 (describing how CPS agents returned to a mother's home at 4:30 AM with police, bluffing that they had a court order to remove her sons, after she refused to allow them entry the previous afternoon).

disagreed. That should have been my choice, but I always felt intimidated.<sup>127</sup>

Similarly, another parent suspected that when she took a more aggressive approach with FPS agents, involving adversarial actions against the agency, the agency retaliated by slowing down her case and alleging that she was emotionally unstable.<sup>128</sup> When a parent pushes back against the FPS, they can face retaliation from the agents, even over seemingly small disagreements.<sup>129</sup> For example, one agent refused to provide transportation to a program that a parent chose over the one to which the agent had referred the parent. When the parent left her home after waiting for one hour for a scheduled home visit, the agency responded with unannounced visits.<sup>130</sup>

Family-defense attorneys, who see the impacts of a parent's approach during an investigation later in court proceedings, corroborate this reality. They explain that agents' wide discretion and lack of accountability enable FPS retaliation. One seasoned family-defense attorney lamented that when their clients invoked their rights to refuse an investigation, CPS would respond by seeking an order to enter the home, inspect the children, and legally remove the children from the home.<sup>131</sup>

The very real fear of such retaliation by a powerful, punitive system is at the top of our clients' – and our – minds. At the investigation stage, families typically bear the brunt of an agency's power on their own; legal counsel is neither guaranteed nor widely available.<sup>132</sup> To build communities' capacity to push back during an investigation, families facing potential retaliation must be supported by attorneys willing to aggressively represent them no matter what actions they agency takes, including retaliation. On an individual level, the threat of retaliation makes the quality of the attorney-client relationship especially important. Because an investigation is the initial contact between a parent and the FPS, even if a parent secures representation at this early stage, they likely have not yet developed a relationship with their legal team by the time they're forced to respond

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127. Telephone Conversation with Parent (June 2022).

128. Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services> [https://perma.cc/N35K-ZHYV].

129. Ortiz-Adames, *supra* note 39.

130. *Id.*

131. N.Y. FAM. CT. ACT §§ 1034, 1027; Telephone Conversation with New York City-Based Family-Defense Attorney (June 2, 2022).

132. *See supra* note 38 and accompanying text. *But c.f.* UNIF. R. FOR N.Y. STATE TRIAL CTS. § 205.19(a)(2). (providing for counsel prior to initiation of a proceeding which may result in removal of children).

to CPS's actions. Investing quickly and deeply in the attorney-client relationship is essential to creating an environment where a parent feels confident to take a more assertive stance if they so choose.

### 3. *Lawyering in New Spaces & Staying Faithful to Radical Visions*

Because attorneys generally become involved only once a petition is filed in court, the FPS has yet to anticipate that parents will resist an investigation with the backing of their attorney. This makes stepping in to help a client assert their rights or doing so on their behalf easier said than done. In New York City, our experience is that CPS workers generally refuse to speak to attorneys.<sup>133</sup> When we called one agent to assert representation, she refused to speak with us. If we wanted to assert representation, she said, we had to speak to a CPS lawyer. But at the subjudicial stage, there is no lawyer overseeing the case or investigation. A lawyer is not assigned until the agent engages the agency's legal division to file a petition in court. When we asked who we should contact in the legal department, the agent replied, "Pick your favorite FCLS [Family Court Legal Services] attorney."<sup>134</sup>

The difficulties we face when traversing this new landscape are expected and, in most regards, a reality we do not necessarily seek to change. We expect that as the FPS begins to absorb pressure from radical defense, it will counter with its own power and dampen the emancipatory potential that radical defense stands to foment. As Scott Cummings observes, "[W]hether reforms are hard or soft, the product of lawyer-led litigation campaigns or broad-based social movements, they are always as vulnerable to strategic reinterpretation, deliberate non-enforcement, and political backlash."<sup>135</sup>

One foreseeable deradicalizing force is funding from and relationships with state agencies. Many early-defense projects have recently been funded through Title IV-E of the Social Security Act.<sup>136</sup> But this funding appears to so far have

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133. This position appears to be contrary to the agency's own policy. See ADMINISTRATION FOR CHILDREN'S SERVICES, CITY OF NEW YORK, GUIDANCE #2012/01, GUIDELINES FOR WORKING WITH ATTORNEYS REPRESENTING PARENTS AND CHILDREN (2012) ("It is the policy of Children's Services to encourage communication regarding families' and children's needs, the provision of individualized services, and optimal family visiting plans. Attorneys for parents and children can work with caseworkers to facilitate the sharing of information that will allow us to meet families' needs.").

134. Telephone Conversation with Child Protective Specialist, N.Y.C. Admin. for Child's Servs. (on or about Mar. 24, 2022).

135. Scott Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62, 67 (2007).

136. See, e.g., *Title IV-E Reimbursement for Lawyers Representing Children, Parents, and Pre-Petition Prevention Opportunities*, NAT'L JUD. TASK FORCE TO EXAMINE STATE CTS.' RESPONSE TO MENTAL ILLNESS 1, 3-5 (July 2022), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0027/79524/](https://www.ncsc.org/__data/assets/pdf_file/0027/79524/)



been used to implement systems-navigation style advocacy, not radical early defense. Most pre-petition programs articulate their primary goal as preventing family separation through legal and social work advocacy—connecting parents with services and addressing collateral legal issues such as housing problems, denial of public benefits, and orders of protection.<sup>137</sup> What’s more, some early-defense programs rely on referrals from CPS itself, nearly ensuring that CPS will dictate the nature and scope of early-defense efforts. CPS control, in turn, will denature attempted interventions.

There is no doubt that connecting parents to services and addressing ancillary legal issues is lifesaving for many families facing a CPS investigation. Such efforts have helped many families avoid separation. But here, we distinguish these burgeoning systems-navigation early-defense efforts from the radical, adversarial early-defense approach articulated in this Essay.<sup>138</sup> Preventing separation is undoubtedly a pinnacle goal of every family defense advocate. But by focusing only on separation, to the exclusion of the other harms wrought by an investigation<sup>139</sup>, we forego the opportunity to transform the relationship between the state and families targeted by the FPS. Practicing radical early defense keeps us faithful to a metanarrative and corresponding practical approaches that are irreconcilable with the prevailing carceral logics of the FPS. By developing close relationships with impacted communities, early-defense practitioners can guard against these deradicalizing pressures, making it possible to achieve non-reformist reforms by working toward abolition of the FPS and providing resources directly to communities.

## CONCLUSION

We are deeply inspired by our clients, community activists, and the growing movement against family policing. They have taught us, in no small measure, how to see resistance, and they have pushed us to take risks in reenvisioning the role of lawyering in an overdetermined system. Through them, we have learned that the state is not a window that we can destroy by throwing a hammer through it. We have learned that our role as lawyers is to create space for families to redraw the terms on which they engage with the state, forming new

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Title-IV-E-Reimbursement.pdf [https://perma.cc/YL2J-VN3C] (describing bases for Title IV-E reimbursement opportunities).

137. See, e.g., *How is Pre-Petition Legal Representation Critical to the Continuum of Legal Advocacy?*, CASEY FAM. PROGRAMS (May 2021), <https://www.casey.org/pre-petition-legal-advocacy> [https://perma.cc/Y6QG-VBNY].

138. See *infra* Section III.B; *supra* Sections II.A, II.B.

139. See Ismail, *supra* note 4 (manuscript at 52); Trivedi, *supra* note 86.

relationships with state power that are life-affirming rather than soul-crushing. Clinics are in a unique position to test lawyering approaches and strategies to that end.

This layered perspective has real implications for how we lawyer against family policing. While practicing primarily before a judge, it was natural to view the court as the logical endpoint of the family-policing system. The harm of a CPS investigation was that it was a front door, a step toward a dangerous judicial endpoint. But radical early defense suggests a new and slightly different take on this approach to lawyering in the FPS. The CPS investigation is an endpoint in itself and brings its own harms: an SCR substantiated case, the mistrust sown into a family, the pain families experience. Radical early defense helps us confront those harms head-on and push toward abolishing family policing as we know it.

*Associate Professors of Law, City University of New York School of Law. We recognize first the clients whose stories are reflected here and the many others who have trusted us to represent them over the years. Thank you to Lynn Zhong for dedicated research support and CUNY School of Law's Family Defense Practicum alumni for developing and carrying out FDP's work. This Essay benefitted from discussion and collaboration with many colleagues, including Sarah Lorr, Chris Gottlieb, Joyce McMillan, Erin Miles Cloud, Nila Natarajan, Jessica Marcus and Emma Ketteringham, to name a few. Finally, thank you to the editors of the Yale Law Journal for their careful assistance.*