

Surviving Family Regulation

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Introduction

The Restatement of Children and the Law embraces a strong parental rights framework for families ensnared in the family regulation system.¹ It does so by resolving several contentious legal questions in favor of family integrity.² This is especially true where family separation is at issue.³ The Restatement's commitment to parental rights is notable given the politically fraught nature of the current parents' rights movement.⁴

Since 2021, hundreds of [parents' rights bills](#) in several states have focused on parents' ability to direct their children's education in the classroom, particularly on topics of race and gender. While the family regulation system has been the subject of sustained critique in

* Assistant Professor at the University of Wisconsin Law School. I thank Elizabeth Scott, Richard Bonnie, Emily Buss, Clare Huntington, and Solangel Maldonado for their work on the Restatement and for creating a productive space for discussion of its implications. I thank Steph Pettit for research and discussion on Sojourner Truth. Finally, thank you to Christopher Lau for reading everything I write.

¹ This Essay uses the term "family regulation system" instead of "child welfare system."

² Many contentious issues in family regulation law are concentrated in the investigatory stage. Professor Josh Gupta-Kagan points out that these issues, however, remain underdiscussed by the Restatement. See Josh Gupta-Kagan, *Nudging Improvements to the Family Regulation System*, 91 U. CHI. L. REV. 469, 476-77 (2024) (observing that the Restatement is silent on topics relating to the reporting and investigation structures of the family regulation system.)

³ For example, the Restatement favors a balancing test that requires courts to consider the harm of removal before separating a child from their parents. The Restatement also disfavors removals absent a judicial hearing and recognizes a parent's right to effective assistance of counsel in all stages of a family regulation court proceeding. See, e.g., Gupta-Kagan, *Nudging Improvements to the Family Regulation System*, 91 U. CHI. L. REV. 469, 475-98 (2024).

⁴ Clare Huntington has pointed out that the Restatement can function as "an institutional counterbalance to the heated partisan rhetoric around parental rights." See Clare Huntington, *Parental Rights: Rhetoric vs. Doctrine*, 91 U. CHI. L. REV. 503, 504 (2024).

the past few years, this system, and the marginalized parents it most affects, are often side-lined within parental rights discourse.⁵

Professor [Clare Huntington](#) has long made the point that a rights-based lens alone does little to protect and support marginalized families impacted by the family regulation system. This Essay adds to the conversation by discussing that the parents' rights debate fails to capture the realities of state intervention in Black families' everyday lives. The narrow focus of a rights-based lens obscures that what is at risk for Black families goes far beyond the ability to make decisions for their children in a discrete context. What is at stake for the most marginalized families is their very existence. The vulnerability of Black familial relationships is perhaps best expressed in Ta-Nehisi Coates's words in [Between the World and Me](#): "Black people love their children with a kind of obsession. You are all we have, and you come to us endangered." The family regulation system is one site of state intervention that endangers Black families and their communities.

As the political debate focuses on parents' ability to dictate their children's education, a child—typically in a marginalized community—is removed from their home [every three minutes](#). After separation, their parents navigate intrusive and lengthy surveillance, lose the ability to make day-to-day decisions on behalf of their children, and ultimately face the threat of permanently losing their parental rights. These interventions have impacts beyond the individual family: they impact entire communities. Still, the family regulation system and the marginalized families it most impacts are generally not the focus of parental rights debates. In this way, the parental rights discussion is illustrative of how dominant experiences shape societal knowledge production and reinforce social stratification.

A better understanding of the depth and breadth of state intervention into marginalized families' lives warrants a shift in our epistemic resources. Luckily, directly impacted families have come

⁵ Cynthia Godsoe, *Racing and Erasing Parental Rights*, B.U. L. REV. (forthcoming 2024) (manuscript at 44) (discussing that legislative efforts around parent's rights bills fail to "mention the harms of the family policing system."); S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J. FORUM 163, 173 (2022) ("research and mainstream discourse rarely focus on Black LGBTQ+ parents targeted by the family regulation system"). Professor LaToya Baldwin Clark has discussed how parental rights have historically been and continue to be asserted to protect white parents. See LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2199 (2023).

forth to offer just that. This Essay draws on their experiences and the legacy of their movement.

This Essay proceeds as follows: Part I documents the limitations of the parental rights lens for Black families along two axes: the degree and the reach of harms caused by routine state intervention. Part II argues that the more appropriate lens for marginalized families focuses on the survival of both individual families and the larger community tied to these families. Beginning with Sojourner Truth's fight to regain custody of her son in 1828, Part II focuses on Black parents' resistance to family separation. Drawing on recently publicized archival materials, it discusses how Sojourner Truth employed and frustrated the court process to resist separation from her child. Today, a social movement led by directly impacted parents explicitly draws on the racialized history of the regulation and control of Black families since slavery. This Essay concludes by contemplating what the future of the Restatement might hold against the backdrop of a reconfigured framework.

I. Parental Rights: A Limiting Framework for Black Families

Since 2021, conservative legislatures have introduced [hundreds of bills](#) limiting discussion on topics of racial and gender injustice in schools. Parents' rights groups are at the forefront of this political effort. Professor LaToya Baldwin Clark has aptly characterized the movement against race-conscious demands for racial justice and the parents' rights movement as "[twin movements](#)."

Parental rights remain one of the most discussed topics in family law today. A number of scholars have embraced a strong parental rights framework, arguing that parents' ability to make decisions for their children ultimately [benefits the entire family](#). Professors [Clare Huntington and Elizabeth Scott](#), reporters on the American Law Institute's Restatement of the Law, have emphasized that "[p]arental rights are—and should remain—the backbone of family law." Other scholars are more critical of this framework. Some argue that, while parental rights sometimes further children's interests, they do so [unreliably](#), or, as [Professor Catherine Smith](#) pointed out, some parents simply lack the "political power to act in their [children's] best interests." In this vein, [Professors Anne Dailey and Laura Rosenbury](#) proposed a paradigm shift away from parental control over their children and towards a framework that centers children's interests.

Scholarship focusing on the relationship between parents and the state further complicates the debate between children's interests

and parental rights by emphasizing that a strong parental rights framework does not necessarily interfere with children’s rights, but instead [limits the state’s power over families](#). As [Professor Josh Gupta-Kagan](#) put it in his commentary on the Restatement, “[W]hatever problems may result from the law granting parents control over children, any limitations necessarily impose some form of state power over families.” Although marginalized families routinely experience profound rights losses, today’s parental rights movement is almost synonymous with [white parents](#). Some of the most common areas of normalized rights violations in the family regulation system are [warrantless searches of homes](#) and the [unnecessary removal](#) of children from their parents. Even where parental rights are not violated, parents face an uphill battle in a process with [limited procedural protections](#) and [low evidentiary standards](#).

Some scholars, however, are bringing family regulation law and the parental rights debate into conversation.⁶ Professor Cynthia Godsoe, for example, built on [Derrick Bell’s interest convergence theory](#) to make the case that political alliances between family defenders and libertarian groups have been a significant tool to advance parental rights for marginalized families. Godsoe observed that in several states, these alliances have successfully advocated for [narrower substantive neglect laws](#) as well as [increased procedural protections](#) for parents. But as Godsoe acknowledged, a parental rights lens has limited practical impact for marginalized families.⁷ Even with improved procedural protections, the family regulation system continues to perpetuate harm to the most marginalized families. And changes in the substantive neglect law are unlikely to “[significantly alter deeply entrenched mechanisms of control](#).”

By centering white families, the parental rights debate fails to fully account for the practical impacts of state intervention in marginalized families’ lives and obscures the true stakes for Black families along two axes: the *degree* and the *reach* of harm. When the family regulation system intervenes, parental rights are inevitably at issue. But discrete rights losses only capture a part of the picture. The

⁶ While the parental rights debate has often ignored the impact of the family regulation system on marginalized families, Professor Martin Guggenheim has long raised these issues. *See generally, e.g.*, MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005).

⁷ Cynthia Godsoe, *Racing and Erasing Parental Rights*, B.U. L. REV. (forthcoming 2024).

family regulation system not only has temporary removal power over families, it also has the power to initiate termination of parental rights proceedings that can bring about the ultimate rights loss: the [civil death](#) of the family.

The threat of family regulation intervention informs relationships with institutions of care and learning. Take, for example, public education—the site of much contestation in the current parental rights debate. For marginalized families, schools, as entry points of state intervention, play a central role. Several parents have recounted school staff reporting them to the state after disagreements or complaints. [One parent](#) discussed her experience of being reported to the family regulation system after she complained about a teacher to an elected official. Another recounted how her son’s school used system intervention to make her take her son to a psychiatric evaluation, then again for failing to notify the school of her son’s new medication, and finally for sending him to school with a bad haircut. In 2016, several parents filed a [complaint](#) against New York City’s largest charter school network with the federal Department of Education, alleging, amongst other things, that one New York City school weaponized the family regulation system to [elicit parental compliance](#). The complaint discussed that one mother was threatened with the family regulation system when she informed the school that she could not do early pickups for one child because she needed to first pick up her other children. Parents who fear that their child’s school might use the family regulation system in retaliatory ways may decide to acquiesce and refrain from advocacy on their family’s behalf.

Family regulation intervention impacts entire communities. Children who were removed from their parents by the state and placed in the foster care system are more likely to become parents under investigation once they have children of their own. This transition from being a child in state care to a parent under state investigation sometimes occurs while the child is still in foster care. Professor Kelly Fong has characterized this intergenerational surveillance and supervision as “[a rite of passage](#)” for marginalized families. Past family regulation involvement can [impact kinship networks](#) for decades; for example, a parent might be unable to temporarily place their child with a family member because of that family member’s past involvement with the family regulation system. Over-policing, both by law enforcement and family regulation agents, puts Black families under the constant gaze of the state. Over time, the presence of state agents in marginalized communities has not only fostered legal estrangement but also created [distrust amongst community members](#). At the same time, the [shame](#) many parents feel at their involvement

with the family regulation system can isolate them from their community, cutting them off from their support network.⁸

Both the individual and community-wide harms disproportionately disadvantage marginalized families. This is especially true for Black families. It is well documented that Black parents are more likely to be reported, investigated, and separated from their children both temporarily and permanently. In fact, more than [half](#) of all Black children in the United States will experience a family regulation intervention before the age of eighteen. It is unsurprising, then, that families living in Black communities have described the family regulation system as a constant, [unavoidable presence](#) in their lives. One mother [observed](#), “If you’re a person of color, you live in a certain zip code, you’re not exempt from the system.” For Black and other marginalized families, the parental rights framework does not capture the depth and breadth of normalized state intervention in their lives; it not only fails to capture their experience but also distracts from the existential nature of what Black families and their communities face.

Today’s parental rights debate is illustrative of how dominant experiences shape popular discourse. The exclusion of marginalized knowledge from societal meaning-making is a distinct form of oppression that harms not just individual knowers, but knowledge production on a broader scale. Excluding marginalized families’ experiences from informing our understanding of state intervention in families further perpetuates already existing subjugation.⁹

The issue is not merely that white families are the center of the parents’ rights debate but the limitations of the debate itself. Simply shifting the debate to include Black and other marginalized families is an unsatisfying solution. Shifting our epistemic resources, however,

⁸ Shanta Trivedi, “*Am I Still a Parent?*” *The Devastating Effects of Family Policing on Parents* (forthcoming) (manuscript at 28) (citing lawyer and advocate Angela Burton who describes how family regulation intervention “ruptur[es] the village of the child’s ecological system, which has ripple effects....as it tears the fabric of a child’s life and community.”).

⁹ Professor Miranda Fricker has called the exclusion of socially marginalized knowers from societal knowledge production “hermeneutical injustice.” MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007). While Fricker discussed this form of injustice in the context of gender discrimination, others have discussed the relationship between race and knowledge production. See, e.g., Kristie Dotson, *A Cautionary Tale: On Limiting Epistemic Oppression*, 33 *FRONTIERS* 24 (2012).

may be a start. A closer look at past and present Black resistance to family surveillance and separation offers insights into the limitations of a parents' rights lens for marginalized families.

II. Black Resistance to Family Regulation from Sojourner Truth to the Current Movement

Sojourner Truth & Black Motherhood

From slavery until today, Black women have fought against racist and gendered intervention into their families. Under slavery, the relationship between an enslaved parent and their child(ren) was understood entirely based on its economic value. [Professor Gwendoline Alphonso](#) discussed how, as white familiar bonds and child-rearing were viewed as inherently valuable, Black familial bonds were regularly and violently broken in the name of economic utility. Enslaved Black parents did not have custodial rights over their children. Instead, their children were considered the property of those enslaving them. Courts in the antebellum South [endorsed the separation of Black children from their parents](#), with some [comparing enslaved children to animals](#). At the same time, the image of the [bad Black mother](#) became firmly ingrained in the public imagination. The [“association between enslavement and losing \[...\] one’s children was \[...\] so firmly welded together”](#) that abolitionists drew heavily on the injustice of family separation to further their advocacy. Even then, [Black mothers resisted reproductive control and separation](#) from their children.

For Black parents, the fight against family separation continued after emancipation. The dehumanization of Black people by white American society perpetuated the notion that separation from their children did not cause Black mothers [the same pain](#) that it did white mothers. Sojourner Truth's journey to regain custody of her son Peter is emblematic of the barriers Black mothers faced. When Sojourner Truth escaped her enslaver, John Dumont, four of her five children were left behind. Peter, one of those four children, was five years old when he was illegally sold to another family. Peter was passed to several other people until he ultimately remained with a man named Fowler. Sojourner Truth spent two years fighting for his return. [On March 15, 1828](#), she filed papers in New York State court demanding Peter's return pursuant to New York state law. Truth pushed the boundaries of the legal system by insistently advocating for better legal assistance and refusing to accept anything less than the immediate return of her child. Her consistent advocacy resulted in a New York State judge ordering Peter's return.

Recently, Truth's 1828 court documents were on display in the [Schomburg Center in Harlem](#), New York City. They showcase the use of the legal system by a woman who—living in a society dominated by white men—had little reason to believe that she would be successful. They are a reminder that for Black women, demanding recognition as mothers constituted a radical act. For Black women in the United States, motherhood has always been [contested](#). Indeed, many other formerly enslaved parents faced similar battles. They risked their lives, health, and freedom when they attempted to regain custody of their children after emancipation. Take, for example, one mother who returned to a plantation to demand the return of her daughter, who was still enslaved, and was violently [beaten](#). Or a Black soldier who attempted to reunite with his wife and children and was physically [assaulted](#). During that time, purported [parental incompetence](#) became the legal vehicle for Black family separation.

The Current Black Movement Against Family Regulation

The fight against unjust family separation is ongoing. Against the backdrop of one of the largest uprisings against the police in U.S. history, another movement gained considerable traction in 2020. Directly impacted parents demanded the abolition of the family regulation system. In Harlem, New York, parents called for an end to family separation and surveillance. In October 2021, parents mobilized outside the Assembly Standing Committee on Children and Families in New York City. The movement carried on past the momentum of 2020 and beyond New York City. For example, in May 2022, the [Black Mothers March on the White House](#), a [coalition](#) of Black-led organizations, condemned the “terror” of child protective services. To date, directly impacted parents are advocating against the family regulation system in public spaces and testifying in public hearings.

Advocacy by directly impacted people, from Sojourner Truth to the social movement today, reflects what is at stake: the existence of Black families and their communities. [Professor Dorothy Roberts](#) and others speak of the destruction of the Black family through the family regulation system. The movement against the family regulation system has adopted similar language to describe the stakes faced by marginalized families. For example, Joyce McMillan, a directly impacted mother and movement leader, [observed](#) that the family regulation system is “decimating the Black community.”

The movement against family regulation explicitly [connects](#) the current moment to the long history of family separation during slavery. While society at large might not be, marginalized people are often acutely aware of the through line from long-standing oppression to current dominant narratives that exclude their experiences. In one

study, a Black woman [noted](#) about her experience with the family regulation system: “[A]s a woman of color who is an African American woman, I’m always thinking of our culture, our history, being enslaved. And how this system has continued to perpetuate that.”

Given that several legal and practical barriers discourage parents from voicing critique of the family regulation system, advocacy by directly impacted parents and their supporters is remarkable. Take, for example, [Amanda Wallace](#), who worked for Child Protective Services (CPS) in North Carolina for ten years, and then left and founded “Operation Stop CPS.” In the spring of 2022, Wallace and a few other supporters started protesting outside of family court in Hanover County, North Carolina. They had gathered to protest the termination of a mother’s legal relationship with her three-year-old daughter. “Operation Stop CPS” held protests throughout the termination trial. The judge presiding over the case eventually barred them from protesting outside the courthouse and terminated the mother’s parental rights. Wallace continued to protest outside the courthouse. In July 2022, she was charged with violating the judicial order barring protest. This led to public outcry and [advocacy](#) on her behalf.

Organizations led by directly impacted parents have focused on concrete system change. Some of their most common demands include changes to mandated reporting laws that emphasize support for parents; Miranda Rights for parents under family regulation investigation; and informed consent bills in the context of drug testing practices. These advocacy priorities serve a dual purpose. On an immediate level, the above efforts are pre-judicial, early interventions with the potential to avoid a cascade of future interventions. But they also have the potential to counter [dominant narratives](#) about the system by showcasing the normalized nature of privacy invasions into marginalized families’ lives. To the greater public, these intrusions tend to remain invisible. Advocacy efforts have made public what previously remained hidden [in closed courtrooms](#) and behind [confidentiality laws](#).

The social movement against the family regulation system has translated into an important epistemic intervention in legal scholarship. Some scholars have long criticized dominant narratives about the family regulation system. For example, [Professor Matthew Fraidin](#) observed that the public has an obscured view of the family regulation system and the families it impacts. More recently, several scholars have built on these critiques and drawn on social movements and direct experience to illuminate the implications of surveillance and separation. In a recent piece, [Professor Nancy Polikoff](#) suggested that

academics should use their “scholarship to highlight the work of the organizations that are actually seeking” meaningful change for impacted families. In the past few years, several academic panels have included and emphasized directly impacted parents’ experience. In 2021, the Columbia Journal of Race and Law’s annual [symposium](#) centered direct experience by publishing the works of parents impacted by the system. This approach is on par with recent debates around [expertise in the legal academy](#).

III. Conclusion: The Future Includes Black Families

Amid a robust scholarly debate around parental rights, the Restatement has taken a clear stance. By resolving a number of contentious legal issues in favor of procedural protections for parents impacted by the family regulation system, the Restatement of Children and the Law builds on a strong parental rights framework. This provides some protection to families facing separation by the state. But, for many families, the parental rights lens is both limiting and obscuring. Amid normalized surveillance and separation of marginalized families, the stakes are incredibly high for Black families and their communities. The focus on privileged families and the sidelining of marginalized experiences in mainstream debates not only distract from this fact but also provides an inaccurate understanding of why, how, and in which families the state predominantly intervenes. Simply bolstering parental rights for parents in the family regulation context is an important but insufficient remedy given the legacy, degree, and reach of harm inflicted upon Black families. A better understanding of the depth and breadth of state intervention warrants a shift in our epistemic resources. The Black movement against the family regulation system offers a starting point; and its lessons are starting to translate into legal scholarship.¹⁰

What might the future of the Restatement look like against the background of this epistemic intervention? Given the nature of the Restatement, it cannot adopt a normative view of what the law should be. However, when the movement for and by Black families successfully advocates for change, it might push the Restatement into a direction more protective of marginalized families in the long-term. Arguably, glimpses of this are already reflected in its current version.

¹⁰ Many of the scholars who write in the field of family regulation today, including me, Professors Sarah Lorr, Shanta Trivedi, Anna Arons, Tarek Ismail, and others are familiar with the system through their experience of representing parents against allegations of abuse and neglect. This certainly informs their critiques of the system.

But the movement gives rise to more fundamental questions: How do we think about legal systems that are under immediate contestation? Can we imagine a process that gives voice directly to those most impacted by the law? The Restatement might, as a starting point, explicitly interrogate where social movements have shaped the legal landscape and where such expertise is missing. Commentary and other written responses might be part of the answer as well. Marginalized groups might add important critiques to the status quo of the law and offer thoughts on the promise and limitations of the Restatement in specific areas. Such insights might also expand the discussion by uncovering areas of practical importance that are missing.¹¹ Shifting our epistemic resources to include contributions by those with lived experiences challenges assumptions that go uninterrogated, clarifies the limitations of existing frameworks, and may help discover pathways that affirm the existence and well-being of all families.

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¹¹ In his response to the Restatement, Josh Gupta-Kagan pointed out that the Restatement is silent on several important topics in family regulation practice. As both a scholar and practitioner, his comments illuminate where the Restatement might benefit from expanding the discussion. Those directly impacted by the family regulation system might offer similar contributions based on their lived experiences.