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Anna Arons

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# *THOMPSON V. CLARK* AND THE "REASONABLE" POLICING OF MARGINALIZED FAMILIES

ANNA ARONS∞

ABSTRACT

*This Article uses the experience of Larry Thompson, the plaintiff in* Thompson v. Clark*, 142 S. Ct. 1332 (2022), to examine the absence of privacy for poor families, particularly poor Black, Latinx, and Native families, in the United States. Mr. Thompson may end up remembered in legal history as a victor, as the Supreme Court lowered the barriers to bringing malicious prosecution claims and reinstated Mr. Thompson's own previously dismissed malicious prosecution claim. Yet before securing this victory, Mr. Thompson lost a slew of other Fourth Amendment claims against the police. Mr. Thompson's claims arose from state agents' warrantless and violent entry into his home late at night to investigate a baseless claim that he was sexually abusing his newborn daughter.*

*With Mr. Thompson's story at its center, this Article argues that the deep-seated logic pathologizing poor parents—particularly poor Black, Latinx, and Native parents—intersects with an insidious carceral logic that relies on surveillance, coercive control, and punishment to maintain public safety and power hierarchies. These logics have fundamentally distorted society's view of what is reasonable for marginalized parents to do and what is "reasonable" for state actors to do when marginalized parents refuse to conform to their demands. They underpin the functional and formal entanglement of policing and social services. At the same time, as Fourth Amendment doctrine has shifted away from a warrant requirement and toward more nebulous assessments of police "reasonableness," a wide range of actors, from police and EMTs to judges and juries, can now fall back on these pathologizing and carceral logics to justify "reasonable" invasions into marginalized families' homes.*

∞ Acting Assistant Professor of Lawyering, New York University School of Law; Assistant Professor of Law, St. John's University School of Law (Fall 2023). I thank Josh Gupta-Kagan, Katherine Louras, Ann Shalleck, and Shanta Trivedi for their thoughtful comments and generative discussion during the Clinical Law Review Writers' Workshop 2022. I am grateful for helpful feedback from participants in the 2022 Family Law Scholars and Teachers Conference and the NYU Lawyering Scholarship Colloquium. Finally, thank you to the editors of the NYU Law *Review of Law and Social Change* for their careful attention.

## INTRODUCTION

One week after his daughter was born, four armed police officers and two medics forced their way into the home of Larry Thompson, a working-class Black father in Brooklyn.[1] Ignoring Mr. Thompson's demands for a warrant, the officers pushed past him and threw him to the ground to handcuff him. Then they arrested him and took him into custody for two days. Mr. Thompson's ordeal began because of an uncorroborated and unfounded report that he had sexually abused his infant daughter. But Mr. Thompson was never charged with child maltreatment. By the time police took him from his apartment, the medics had already confirmed that his daughter was unharmed. He was charged instead with resisting arrest and obstructing government administration—not complying with police. Two months later, the prosecutor dropped all charges against Mr. Thompson without explanation.

Perhaps improbably, Mr. Thompson may end up best remembered in legal history as a victor. After the charges were dropped, he sued the officers who had entered his apartment for a slew of violations of his Fourth Amendment rights. One claim, for malicious prosecution, was dismissed before trial after the district court found that under Second Circuit caselaw, Mr. Thompson could not show one of the required elements for a malicious prosecution charge: a "favorable termination" of the prosecution.[2] Under that caselaw, Mr. Thompson would have had to show that his criminal prosecution ended "not merely without a conviction, but also with some affirmative indication of innocence."[3] After the Second Circuit affirmed the dismissal of the malicious prosecution claim, the Supreme Court

1. Joint Appendix, Thompson v. Clark, 794 F. App'x 140 (2d Cir. 2019) (No. 19-580) (containing Transcript of Proceedings, Thompson v. Clark, 364 F. Supp. 3d 178 (E.D.N.Y. 2019) (No. 14-CV-7349-JBW)) [hereinafter Tr. Trans.].

2. Thompson v. Clark, 142 S. Ct. 1332, 1336 (2022).

3. *Id*. (citing Lanning v. Glens Falls, 908 F.3d 19, 22 (2d Cir. 2018)).

granted certiorari to resolve a circuit split over the meaning of "favorable termination," and in *Thompson v. Clark*, the Court overturned the Second Circuit, finding that a plaintiff need only show that their prosecution ended without a conviction.[4] Thus, Mr. Thompson's malicious prosecution claim was revived.[5]

In the majority opinion, Justice Kavanaugh devoted just 300 or so words to the facts of Mr. Thompson's case.[6] That brief recitation reflects a degree of incredulity on the part of the Court regarding the police officers' and Emergency Medical Technicians' treatment of Mr. Thompson. For instance, the opinion notes, "When [police] arrived Thompson told them that they could not come in without a warrant. The police officers *nonetheless* entered and, after a brief scuffle, handcuffed Thompson."[7] Yet any discomfort members of the Court may have felt about the officers' discounting of Mr. Thompson's Fourth Amendment rights was not shared by the jury that heard the remainder of his civil rights claims. By the time the Supreme Court heard his malicious prosecution argument, Mr. Thompson had already lost the remainder of his civil-suit Fourth Amendment claims in a jury trial.

Taking Mr. Thompson's Supreme Court victory as a starting point, this Article zooms out to consider the social and legal landscape that allowed, first, for state actors to assume that they had *carte blanche* to enter Mr. Thompson's home on the barest of allegations and to take his assertion of his rights as a sign of danger, and second, for judges and a jury to see these state actors' actions and interpretations as "reasonable." This is a landscape indelibly shaped by a deep-seated narrative pathologizing poor parents, particularly poor Black, Latinx, and Native parents, casting them as inherently suspicious and deviant and blaming them as individuals for societal failings. That narrative feeds into a carceral logic that relies on surveillance, coercive control, and punishment to maintain public safety and power hierarchies.

This carceral logic and the pathologization of marginalized parents underpin the functional and formal entanglement of policing and social services. Meanwhile, over the last several decades, Fourth Amendment doctrine has shifted away from the warrant requirement and toward an assessment of state actors' "reasonableness." That doctrinal move allows for a wide range of players—police, Emergency Medical Technicians ("EMTs"), judges, and juries—to fall back on pathology and carceral logics to justify "reasonable" invasions into marginalized families' privacy. These logics have fundamentally distorted society's view of what is "reasonable" for marginalized parents to do and what is "reasonable" for state actors to do when marginalized parents refuse to conform to their demands.

This Article bridges several bodies of scholarship. First, scholars including Peggy Cooper Davis, Dorothy Roberts, and Lisa Washington have traced this

4. 142 S. Ct. at 1335–36.
5. *Id.* at 1335.
6. *Id.* at 1335–36.
7. *Id.* (emphasis added).

country's long history of pathologizing Black, Native, and immigrant families.[8] Rather than addressing structural conditions of poverty and racism, the state casts individuals as deviant. This "pathology logic" lies at the heart of the state's continued regulation of families.[9] Second, scholars, activists, and practitioners have argued that the state's regulation of families through the civil family regulation system (commonly known as the child welfare system) must be understood as a project of the carceral state and an effort to control marginalized families and parents.[10] More broadly, a growing body of scholarship argues that carceral logic is not limited to systems of policing or incarceration and instead is reflected in almost every aspect of American life.[11] Third, a chorus of voices have critiqued the "reasonableness" standard in Fourth Amendment doctrine, arguing that it leaves Black people vulnerable to police violence and surveillance because centuries of racist stereotyping render them seemingly "reasonable" targets for policing and allow police to justify their intrusions and violence against them as "reasonable" reactions.[12]

Here, I consider how pathologizing narratives about marginalized *parents*, in particular, allow for state actors to justify intrusions and violence against them as "reasonable." I say "state actors" rather than police to highlight an important point: because of the shared carceral logic among state institutions, marginalized families are vulnerable not only to police but also to family regulation caseworkers and even emergency medical services. Thus, I build too on the work of scholars who demonstrate that there is no clean line between police and social services and who complicate calls to "defund the police" and fund social services.[13] Finally,

8. *See, e.g.*, DOROTHY ROBERTS, TORN APART 85–124 (2022); Peggy Cooper Davis, *"So Tall Within"*, 18 CARDOZO L. REV. 451, 458–65 (1996); S. Lisa Washington, *Pathology Logics*, 117 NW. L. REV. 1523 (2023); Amy Mulzer & Tara Urs, *However Kindly Intentioned*, 20 CUNY L. REV. 23, 55–57 (2016).

9. *See* sources cited *supra* note 8.

10. *See* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 129 (2017); Miriam Mack, *The White Supremacy Hydra*, 11 COLUM. J. RACE & L. 767, 771–72 (2021); *Ending Family Punishment*, MOVEMENT FOR FAMILY POWER, https://www.movementforfamilypower.org/ending-family-punishment [https://perma.cc/9RVF-HAQP] (last visited Nov. 18, 2022).

11. *See* MARIAME KABA, WE DO THIS 'TIL WE FREE US 77 (2021) (arguing that carceral logic has "crept into nearly every government function, including those seemingly removed from prisons").

12. *See, e.g.*, DEVON CARBADO, UNREASONABLE (2022); Kristin Henning, *The Reasonable Black Child*, 67 AM. U. L. REV. 1513 (2018); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018); Daniel Harawa, *The False Promise of* Peña-Rodriguez, 109 CAL. L. REV. 2121, 2167–68 (2021).

13. *See, e.g.*, Christy Lopez, *Abolish Carceral Logic*, 17 STAN. J. C.R. & C.L. 379, 396–97 (2022); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State*, 17 STAN. J. C.R. & C.L. 255 (2021); Dorothy Roberts, *Abolishing Police Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), https://imprint-news.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/TFR3-GAGN].

this piece draws on my own scholarship, examining how parents' Fourth Amendment rights, recognized in the abstract, go missing on the ground.[14]

Part I recounts in greater detail Mr. Thompson and his family's ordeal with the state. Part II briefly traces this country's long history of pathologizing poor parents and Black, Native, and immigrant parents, and describes how that pathologization intersects with carceral logic. Part III uses Mr. Thompson's case to illustrate the functional and formal entanglement of policing and social services and the shift toward "reasonableness" analysis in place of a warrant in Fourth Amendment jurisprudence. Ultimately, the Article argues that the increased emphasis on "reasonableness" allows state agents, courts, and juries to draw on pathologizing narratives and thus transform far-fetched allegations into "reasonable" beliefs of impending danger to children and cast parents' responses to state intrusion as unreasonable and as signs of possible danger. This, in turn, strips marginalized parents of their privacy. Part III concludes with a few reflections on how we might shift Fourth Amendment doctrine and institutional design to grant all families more meaningful privacy and security in their homes.

## I.
## MR. THOMPSON'S ORDEAL

Larry Thompson and his fiancée, Talleta Watson, welcomed their daughter Nala into the world on January 8, 2014.[15] Three days later, they brought her home to their apartment in Brooklyn.[16] Mr. Thompson had lived in the apartment most of his life, growing up there and moving back after he was honorably discharged from the Navy and as he began a career at the post office.[17] He was well-known around the building as a peacemaker; neighbors called him "Pumpkin."[18] His fiancée, Ms. Watson, had a nursing degree and worked at a school for autistic children.[19] The two had also opened their home to Ms. Watson's sister Camille after she had been evicted from her apartment.[20] (Per her sister, Camille had "learning and cognitive delays," and she later moved to a residence for adults with mental disabilities).[21]

On January 14, 2014, Mr. Thompson and Ms. Watson took Nala to her first check-up.[22] The doctor proclaimed Nala healthy and told her parents that she was

14. Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH U. L. REV. 1057 (2023).

15. This account is drawn from the transcript of Mr. Thompson's civil trial against the four officers. Discrepancies in testimony are noted in the text and in footnotes. Tr. Trans., *supra* note 1, at 79.

16. *Id.* at 79–80.

17. *Id.* at 168–72.

18. *Id.* at 31, 35.

19. *Id.* at 79.

20. Tr. Trans., *supra* note 1, at 171.

21. *Id.* at 79.

22. *Id.* at 80, 170.

off to a great start.[23] By 10:00 p.m., the young family was winding down at home. Mr. Thompson and Ms. Watson were wearing house clothes—underwear and t-shirts—and watching television as they got ready for bed. Nala was in her mother's arms, relaxed and comfortable.[24]

But around that same time, Camille Watson called 911.[25] She reported that she suspected her brother-in-law was sexually abusing her newborn niece.[26] Camille Watson supported this inflammatory allegation with scant detail: she said Nala cried during diaper changes and that she saw a red rash on Nala's bottom.[27] With no other information available, dispatch coded the call as possible child abuse and sent two EMTs to respond.[28] The EMTs met Camille Watson in the lobby of the apartment building.[29] Even then, she did not provide any more detail. Instead, when the EMTs asked her why she had called, she said nothing and took them to the apartment.[30] The interaction struck one of the EMTs as "weird" and "strange," and he felt, "on first impression," that Camille was "not all there upstairs."[31]

When the EMTs entered the apartment with Camille,[32] they saw Talleta Watson sitting on a couch holding a baby. The baby was not crying or screaming, and the EMTs did not see anyone else in distress either.[33] Mr. Thompson entered the room and asked Camille what was going on; when she said she didn't know, Mr. Thompson redirected the question to the EMTs.[34] The EMTs told him that they had received a call to investigate child abuse but offered no other specifics.[35] At no point did the EMTs ask Mr. Thompson for permission to examine his baby.[36] And while the EMTs later testified that Mr. Thompson was angry that they were in his apartment and used an "aggressive tone," he did not threaten or touch them and as one EMT later testified, the EMT did not feel concerned for his

23. *Id.* at 170.

24. *Id.* at 80, 171.

25. *Id.* at 55.

26. Tr. Trans., *supra* note 1, at 55.

27. *Id.*

28. *Id.* at 108.

29. *Id.* at 49–50, 135.

30. *Id.* at 135.

31. *Id.* at 135. The other EMT did not note anything off about her "at that time" and did not recall having any conversations about her mental state. *Id*. at 50. Of course, the officers' perception of Camille Watson, pejorative description of her, and ultimate dismissal of her illustrates the ongoing and specific harms that policing practices exact on disabled people—particularly Black disabled people. For more on this topic, see generally Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L.J. 1401 (2021).

32. One EMT testified that he and his partner did not enter the apartment until after the police arrived. Tr. Trans., *supra* note 1, at 51. That testimony contradicts his partner's testimony and Mr. Thompson's testimony. *Id.* at 135, 171.

33. *Id.* at 136, 139–40.

34. *Id.* at 171.

35. *Id.* at 171–72.

36. *Id.* at 172.

safety.[37] The EMTs told Mr. Thompson that it was possible they had the wrong apartment and left.[38] But rather than leaving the building, they waited for police to arrive to it, per "protocol."[39]

As the police were dispatched, the call was re-coded from possible child abuse to an assault in progress, for unknown reasons and despite the EMTs' observation of the baby resting peaceably in her mother's arms.[40] When officers arrived at the building, the EMTs told them only that Mr. Thompson seemed aggressive and that the EMTs had to evaluate the baby; they did not pass along any additional details from the caller or about the baby.[41]

Four officers, armed with guns on their belts and wearing bulletproof vests, went to Mr. Thompson's apartment, with the EMTs following close behind.[42] Mr. Thompson, who stood around 5′5″, met them at the apartment door or on the stairs leading to it.[43] The lead officer told Mr. Thompson that they needed to enter his home, despite the absence of any new information indicating an exigency.[44] An increasingly frustrated Mr. Thompson said that they could not come in—then yelled it, as the officer persisted.[45] As Mr. Thompson later testified, he was still wearing only a tank top and underwear, and he knew that his fiancée was similarly undressed and recovering from her C-Section.[46] Mr. Thompson asked to speak to the officers' supervisor—and told them that they could not come in without a warrant.[47] This demand for a warrant seems to have meant little to the officers; indeed, the lead officer later testified he had never once in his career gotten a warrant.[48]

All of this happened, per the officers' and Mr. Thompson's estimates, within the span of a few minutes, perhaps as shortly as 30 seconds.[49] When Mr. Thompson still did not allow the officers entry, the lead officer put his hands on Mr. Thompson to "guide" him out of the way of the front door.[50] The officer shoved his foot in the door and another officer began to push his way into the

37. *Id.* at 51, 56, 139–40.

38. Tr. Trans., *supra* note 1, at 51, 136.

39. *Id.* at 140.

40. *Id.* at 92, 136.

41. *Id.* at 137.

42. *Id.* at 40, 149.

43. *Id.* at 91, 93. One officer testified that Mr. Thompson initially met the officers on the stairs leading up to the apartment, before returning to his apartment. Tr. Trans., *supra* note 1, at 149.

44. *Id.* at 42, 97, 106. Though one officer later testified that he saw a woman who looked "scared" peek around the corner inside the apartment and heard a baby crying loudly, the three other officers, two EMTs, Mr. Thompson, and two neighbors all testified that they did not hear a baby crying. *Id.* at 40, 5, 62, 11, 138, 157. Nor did any other officer mention seeing a woman, scared or otherwise.

45. *Id.* at 97, 106.

46. *Id.* at 171–74, 197–99.

47. Tr. Trans., *supra* note 1, at 111, 173, 198.

48. *Id.* at 97.

49. *Id.* at 40, 81, 106.

50. *Id.* at 96.

apartment.[51] Mr. Thompson pushed back, kicking off a "back and forth" scuffle as the four officers wrestled Mr. Thompson to the ground.[52] Overpowering Mr. Thompson, the officers held him face down on the floor and handcuffed him.[53] By the time he was handcuffed, Mr. Thompson was bleeding from the mouth and his clothes were torn.[54]

The EMTs, meanwhile, moved to the living room, where they found Ms. Watson and Nala.[55] The EMTs examined Nala and concluded that the red marks on her bottom looked like diaper rash.[56] From there, they reentered the front area, where one EMT noticed that Mr. Thompson was bleeding.[57] The EMTs told the police that Nala was fine, yet despite that assessment—and the paperwork Ms. Watson provided from the doctor's visit that day—the officers and EMTs told Ms. Watson that her infant needed to be "removed" to a hospital as a precaution.[58] Ms. Watson left with Nala and the EMTs.[59] When she and Nala got home hours later, Mr. Thompson was gone. Ms. Watson would not know where he was for two to three days.[60]

By the time Ms. Watson and Nala left, the officers were at ease, confident that Nala had diaper rash.[61] Yet despite knowing that Nala was safe—and concluding that the 911 caller had a "mental disability"—the officers still arrested Mr. Thompson and took him into custody.[62] Per the officers, they had probable cause to arrest him for obstructing government administration based solely on his refusal to consent to their middle-of-the-night warrantless entry into his home.[63]

Only because a neighbor intervened did the officers allow Mr. Thompson to put clothes on over his ripped underwear before they paraded him out of the building in handcuffs.[64] Mr. Thompson was held at the precinct overnight.[65] He told officers that he was in pain and needed medical treatment, but rather than taking him to a hospital, officers moved him to an isolated, cold cell.[66] Hours later, late the next morning, police transported him to a hospital.[67] He was treated with

51. *Id.* at 141.
52. *Id.*
53. Tr. Trans., *supra* note 1, at 33, 151–52, 163, 175.
54. *Id.* at 138.
55. *Id.*
56. *Id.* at 43, 101, 138.
57. *Id.* at 138.
58. *Id.* at 152.
59. Tr. Trans., *supra* note 1, at 85.
60. *Id.* at 84.
61. *Id.* at 101.
62. *Id.* at 102, 155.
63. *Id.* at 65, 68, 105, 162.
64. *Id.* at 33, 112, 177.
65. Tr. Trans., *supra* note 1, at 178.
66. *Id.*
67. *Id*. at 102, 179.

painkillers and a neck brace, handcuffed and shackled all the while.[68] Then, police brought him to Central Booking, where he was held in crowded and unsanitary conditions overnight.[69] Finally, two days after his arrest, he was assigned a public defender and arraigned on charges of resisting arrest and obstructing government administration, and released on his own recognizance.[70]

Mr. Thompson was offered a plea deal at arraignment that would have sealed the records of the case and left him without a criminal conviction.[71] But he rejected it, insisting on his innocence.[72] Two months later, the prosecutor moved to dismiss both charges, and the court granted the application.[73] While the prosecutor present in court that day offered no explanation of the dismissal in court, an earlier conversation with the assigned prosecutor led Mr. Thompson's public defender to believe that the decision was due to a "legal problem" with charges.[74]

Though Mr. Thompson avoided a conviction, he continued to feel the consequences of his ordeal. He missed work while in police custody and for weeks after due to pain.[75] Meanwhile, the arresting officer reported Mr. Thompson to the state's child protection services for sexual abuse of a child—a step he insisted he was required to take as a mandated reporter, even though he declined to charge Mr. Thompson with anything related to child abuse, because the EMTs had indicated "it was more or less just simple diaper rash."[76] By statute, the child maltreatment report kicked off an invasive 60-day investigation.[77] Under routine protocol, that investigation would have brought an unannounced home "visit," a search of the home, and an examination of Nala's nude body.[78] Beyond the state's

68. *Id.* at 102, 178–79.

69. *Id.* at 180.

70. Tr. Trans., *supra* note 1, at 180–81.

71. *Id.* at 181.

72. *Id.*

73. *Id.* at 73.

74. *See id.* at 72, 75. His public defender had earlier made an oral application to dismiss the charges for facial insufficiency, arguing, as she recalled, that the arrest underlying the resisting arrest charge was unlawful because it is not "a lawful arrest to arrest someone for not allowing the police into their home." *Id.* at 76. The judge denied the oral application and instructed her to put it in writing, which she had not done by the time the case was dismissed. *Id.*

75. *See* Tr. Trans., *supra* note 1, at 181.

76. *Id.* at 158–60, 166.

77. *See* N.Y. SOC. SERV. LAW § 424 (Consol. 2017).

78. The appellate record is silent as to the contours of the investigation here, but these elements are core to New York's typical investigative process. Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes.*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html [https://perma.cc/MC7U-6M2D] ("Caseworkers making unannounced visits strip-search children looking for bruises and peer into refrigerators and around homes looking for signs of bad parenting. One A.C.S. worker in the survey compared the experience to being stopped and frisked for 60 days."); *A Parent's Guide to a Child Abuse Investigation*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page [https://perma.cc/3ZTK-HZUR] (last visited Nov. 15, 2022); Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the* Floyd *Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 131 (2019).

suspicion, Mr. Thompson began to face suspicion in his own community, as his neighbors began whispering.[79]

After the resolution of his criminal case, Mr. Thompson attempted to gain some recompense by suing the four police officers under 42 U.S.C. § 1983.[80] He brought a malicious prosecution claim, which was dismissed as a matter of law under the existing Second Circuit caselaw.[81] Five other claims survived and went before a jury: unlawful entry; false arrest; excessive force; denial of a right to a fair trial; and failure to intervene.[82] In their closing, lawyers for the police officers drew on themes of safety, aggression, and non-compliance that they had relied on throughout the trial:

> *All they wanted to do was check to see if the baby's safe*. On January 15, 2014, Camille Watson called 911 and said that plaintiff was sexually abusing a baby. When [the officers] responded, Plaintiff *angrily refused* to let them into his apartment to check that the baby was okay. All they wanted to do is see if the baby was safe and plaintiff didn't let them. Plaintiff *aggressively obstructed* these officers from doing their duty and he *violently resisted their reasonable attempts* to get in the house.[83]

The lawyers for the police argued that the officers' entry into the home was made lawful by exigent circumstances and that their use of force was reasonable.[84] Then, the judge instructed the jury. He emphasized that "[r]easonableness is central to the act of a police officer faced with a decision to enter in exigent circumstances,"[85] that probable cause to arrest is "analyzed from the perspective of a reasonable police officer, standing in the officer's shoes."[86] The judge instructed the jury to ignore Mr. Thompson's subjective experience, stating, "The reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on a defendant's own state of mind."[87]

The judge specifically drew the jurors' attention to the nature of the allegations, stating that "[i]n the context of possible child abuse, the state has a strong interest in the welfare of the child, particularly in his or her being sheltered

79. Tr. Trans., *supra* note 1, at 35, 184.

80. Third Amended Complaint at 1–3, Thompson v. Clark, 364 F. Supp. 3d 178 (E.D.N.Y. 2019) (No. 14-CV-7349-JBW), ECF No. 34.

81. Tr. Trans., *supra* note 1, at 201. The Second Circuit required at that time that plaintiffs bringing malicious prosecution claims show that a prosecution ended with some affirmative indication of innocence. *Lanning v. Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018).

82. *See* Tr. Trans., *supra* note 1, at 250–51.

83. *Id.* at 224 (emphasis added).

84. *Id.* at 239.

85. *Id.*

86. *Id.* at 240.

87. *Id.* at 241.

from abuse."[88] Then, he told them that police may rely on an anonymous or uncorroborated 911 call plus "what they saw and heard when they arrived at the scene and that they arrived at the right place as a result of the 911 call" to justify a warrantless home entry.[89] The judge further admonished the jury to be mindful that police must engage in "prompt assessment of sometimes ambiguous information."[90]

Operating under these instructions—and apparently accepting contradictory testimony between the four officers, between the two EMTs, and between the officers and EMTs, while setting aside the testimony of Mr. Thompson, Ms. Watson, and two neighbors who witnessed the fracas—the jury found in the officers' favor on all claims.[91] It found, in essence, that the officers had acted reasonably.

## II.
## PATHOLOGIZING MARGINALIZED PARENTS AND FEEDING CARCERAL LOGIC

Mr. Thompson's ordeal, from his initial interactions with EMTs through the verdict in his civil trial, reveals how decisions about institutional design and Fourth Amendment doctrine strip poor families, particularly poor Black, Native, and Latinx families, of their privacy—and how pathology logic and carceral logic undergird and exacerbate the harms wrought by design and doctrine. This Part describes those logics.

For centuries, the government has led or supported efforts to control and separate poor families, immigrant families, and Black, Latinx, and Native families. Historical examples abound. To name just a few, we can look to the destruction of enslaved families through sales; the forced assimilation of Native children; and movements aimed at "rescuing" urban immigrant children from their families.[92]

Today, the state continues its project of surveilling and regulating impoverished and racialized families at a breathtaking rate: a recent study concluded that 37% of all children in the United States will be subjects of family

88. Tr. Trans., *supra* note 1, at 239.

89. *Id.*

90. *Id.*

91. *Id.* at 250–51.

92. *See, e.g.*, Mack, *supra* note 10, at 781–82 (contextualizing the family regulation system within state efforts to pathologize and exert control over Black families, dating back to separation of enslaved families); Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 538 (2021) (tying contemporary problems of Native child removal to a long-standing history of colonialism and forced assimilation); Mulzer & Urs, *supra* note 8, at 53, 55–56 (describing white women's movements to "rescue" poor and/or immigrant children).

regulation investigations[93] before their 18th birthday.[94] "Virtually every child" who ends up in foster care "is from a family with low- or no income."[95] Native and Black children are overrepresented in the family regulation system nationwide, and in certain states, Latinx children are also overrepresented.[96] White children are underrepresented nationwide.[97]

A common theme emerges from this survey of the modern family regulation system and historical examples of family control and separation. Individual parents are blamed for their failure to adhere to norms of white, middle-class parenthood.[98] They—and their children—are then punished for their deviance.[99] In the aggregate, this approach feeds a narrative that poor parents, and particularly

93. I use "family regulation" to describe the system that surveils, regulates, and separates poor families, and particularly poor Black, Native, and Latinx families, around the country. While this system is often referred to as the "child welfare" or "child protective" system, these names ignore the centuries of trauma that the government has inflicted on marginalized communities in the name of protecting children and perpetuates the narrative that children in these communities need protection from their own families. *See* Emma Payton Williams, Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition 14 (Apr. 27, 2020) (B.A. thesis, Oberlin College), https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1711&context=honors [https://perma.cc/FF2M-AEA9] (coining and explaining the term "family regulation system"); *see also* Roberts, *supra* note 13 (using the same term).

94. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017).

95. Matthew Fraidin, *Decision-Making in Dependency Court*, 60 CLEV. ST. L. REV. 913, 940 (2013); *see also* Kelley Fong, *Child Welfare Involvement and Contexts of Poverty, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 6 (2017).

96. Charles Puzzanchera, Marly Zeigler, Moriah Taylor, Wei Kang & Jason Smith, *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010-2021)*, NAT'L CTR. FOR JUV. JUST., https://ncjj.org/AFCARS/Disproportionality_Dashboard.asp?selDisplay=2 [https://perma.cc/YGD3-S4T5] (last visited Nov. 10, 2023); CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND RACIAL DISPARITY 2–3 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [https://perma.cc/CLN3-P9CS].

97. Puzzanchera & Taylor, *supra* note 96; *see* CHILD.'S BUREAU, *supra* note 96.

98. *See generally* Mulzer & Urs, *supra* note 8, at 46–56 (surveying historical efforts by white middle-class reformers to "protect" Native and immigrant children by removing them from their families and describing these efforts' reliance on the image of white middle-class "moral motherhood"); *id.* at 56 (quoting notes from "reformers" describing Black mothers as, variously, "'primitive,' 'limited,' 'not nearly as talkative as many of her race, but apparently truthful,' 'fairly good for a colored woman'"); Shani King, *The Family Law Canon in A (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 623 (2011) (contrasting the images of the "worthy white widow" on welfare to the "immoral Black welfare queen"); Washington, *supra* note 8, at 1542–43 (tracing white supremacist narratives of Black parenthood from historical settings to the modern-day family regulation system).

99. *See* sources cited *supra* note 98.

poor parents of color, are not to be trusted.[100] At the same time, it shifts the focus from structural problems that endanger children's safety to individual parents' failings.[101] This is what I mean by pathologization: "a focus on individual responsibility that renders invisible the structural conditions of poverty and racism that underlie family safety."[102]

Intertwined with the pathologization of marginalized parents is the moral construction of poverty—the idea that people are poor not because of macro forces or institutions, but because of individual moral and ethical deficiencies.[103] This project, too, relies on racist tropes and imagery. As Khiara Bridges observes, this country has long distinguished between the "deserving" and "undeserving" poor, and almost invariably placed Black people and some immigrant groups on the "undeserving" side of the equation.[104] As the "welfare queen" trope took off, the link between poverty, moral failings, and Black families became more salient still.[105] At the same time, Black men are stereotyped as aggressive, angry, and violent,[106] and Black fathers, particularly Black non-married fathers, are cast as uninvolved,[107] despite ample evidence to the contrary.[108] Writ large, this project

100. Scholars and activists alike have argued that the government's regulation of families today is premised on and powered by a deep distrust of marginalized parents. *See, e.g.*, Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1486 (2012); Fraidin, *supra* note 95, at 939; Shalonda Curtis-Hackett, *Stop Weaponizing Protective Services*, N.Y. DAILY NEWS (Nov. 8, 2021), https://www.nydailynews.com/opinion/ny-oped-stop-weaponizing-child-protective-services-20211108-lkjhewmtlzbwljj2fmfneokswu-story.html [https://perma.cc/6G74-CUJF]; *Ending Family Punishment*, *supra* note 10.

101. Washington, *supra* note 8, at 1535.

102. *Id.*

103. *Id.* at 1538–39.

104. BRIDGES, *supra* note 10, at 48–55; *see generally* MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (tracing the origins of the "illegal alien" in American society and the stratification of immigrant groups and arguing that race was central to the creation of the figure of the "illegal alien").

105. *See* Washington, *supra* note 8, at 1539–40.

106. *See* Quaylan Allen & Henry Santos Metcalf, *"Up to No Good"*, in HISTORICIZING FEAR 19 (Travis D. Boyce & Winsome M. Chinnu eds., 2019); Adam Harris, *The Burden of Being 'On Point'*, ATLANTIC (Apr. 26, 2021), https://www.theatlantic.com/politics/archive/2021/04/black-boys-trauma-misunderstood-behavior/618684/ [https://perma.cc/Q8AC-W75L].

107. *See generally* Tonya L. Brito, *Nonmarital Fathers in Family Court: Judges' and Lawyers' Perspectives*, 99 WASH. U. L. REV. 1869 (2022) (presenting results of five-year study capturing dismissive and suspicious attitudes of family court actors toward non-marital fathers, drawn from a sample where most fathers were Black).

108. *See, e.g.*, Kenrya Rankin Naasel, *It's a Myth that Black Fathers Are Absent*, N.Y. TIMES (Mar. 12, 2014), http://www.nytimes.com/roomfordebate/2014/03/12/the-assumptions-behind-obamas-initiative/its-a-myth-that-black-fathers-are-absent [https://perma.cc/23JS-NX58] ("Yes, more than half of [B]lack households are headed by women, but the Centers for Disease Control and Prevention reports that whether or not they live under the same roof, [B]lack dads are actually more involved with their children than their white and Latino counterparts, spending more time feeding, dressing, playing with and reading to their children."); Laurie S. Kohn, *Engaging Men As Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 519 n.36 (2013) (collecting studies showing that by most accounts, "African American men are less likely than Caucasian or Hispanic men to be absent fathers").

of pathologization encourages society to view marginalized parents as worthy of suspicion and unworthy of unfettered assistance.

Because they are deemed suspect, marginalized parents are exposed to the violent force of carceral logic—the punishment-oriented mindset that centers retribution and control as public safety strategies.[109] Though the word "carceral" evokes policing and incarceration, the tentacles of carceral logic snake into everything from schools to welfare to housing to immigration to healthcare.[110] Across these fields, this logic demands that people accept increased surveillance, increased compliance, and decreased autonomy as conditions for receiving support, services, or basic rights like education.[111] Carceral logic and pathologization operate together: the pathologization of Black parents, poor parents, and immigrant parents has, throughout United States history, served to justify coercive control over those parents in the name of "welfare."[112] Together, these forces power a vast network of surveillance and regulation that endeavors to control marginalized families and punish those parents who fail to adhere to expected visions of parenting.[113]

## III.
## THE STATE'S "REASONABLE" REGULATION OF MARGINALIZED FAMILIES

Using Mr. Thompson's ordeal to illustrate, this Part examines the entanglement of "social services" with police forces and describes Fourth Amendment jurisprudence's move away from a strict warrant requirement in favor of warrant exceptions that turn on police "reasonableness." It argues that these design and doctrinal trends stem from carceral and pathology logics that demand suspicion, surveillance, and control of marginalized families by state actors housed within a wide swath of agencies, including police, emergency medical services ("EMS"), and family regulation agencies. At the same time that pathologizing narratives justify the creation and maintenance of the web of systems that makes up the carceral state, they infect the decision-making of individual actors, such as police officers, EMTs, and caseworkers, within those

109. *See* Lopez, *supra* note 13, at 386.

110. *See* Jonathan Simon, GOVERNING THROUGH CRIME 207–09 (Oxford Univ. Press 2007) (schools); Ashley Southall & Nikita Stewart, *They Grabbed Her Baby and Arrested Her. Now Jazmine Headley Is Speaking Out.*, N.Y. TIMES (Dec. 16, 2018), https://www.nytimes.com/2018/12/16/nyregion/jazmine-headley-arrest.html [https://perma.cc/E3QM-MQW9] (welfare); Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808 (healthcare); Erica Rodarte Costa, *Reframing the "Deserving" Tenant*, 170 U. PA. L. REV. 811 (2022) (housing); KABA, *supra* note 11, at 77 (immigration).

111. *See* sources cited *supra* note 110.

112. *See* Washington, *supra* note 8, at 1538–41 (describing how the "history of welfare in the United States provides context for pathology logics in the family regulation system today"); *id.* at 1541 ("The history of separating parents from their children to intervene in the intergenerational 'culture of poverty' can be traced back to the destruction of indigenous families and the 'Orphan Trains.'" (footnote omitted)).

113. *See generally* Washington, *supra* note 8.

systems. And because these actors have broad discretion, there is ample room for them to justify their actions. Indeed, their actions may ultimately be judged by judges and juries who themselves are steeped in these same pathologizing narratives. Through these layered filters, invasions on the privacy of marginalized parents can be recast as "reasonable."

The Part concludes by suggesting some ways by which we might begin to disentangle the various agencies regulating families and broaden the view of "reasonable" actions for families to take in response to the state's efforts to regulate them.

### *A. The Entanglement of Emergency Services, Social Services, and Policing*

Camille Watson made a single call to 911. As a result, her family dealt with three sets of state agents: EMS, police, and family regulation caseworkers. The overlapping responses of these three agencies are not accidental. Instead, they are deliberately and thoroughly linked. In New York City, police personnel answer all 911 calls, allowing police to decide whether to dispatch only police or to route the call to the fire dispatcher or EMS dispatcher.[114] The integration continues on the scene, as EMTs are encouraged to call for police backup.[115]

Mandated reporting laws deepen the entanglement of emergency services, social services, and policing. These laws require a long list of professionals, including EMTs and police officers, to report suspicions of child neglect or maltreatment.[116] Reports are then routed to family regulation agencies,[117] which must conduct invasive investigations of even specious reports.[118] Often lost in the discussion of mandated reporting laws is a key limit: the law is only triggered when the reporter has "reasonable cause to suspect" that child abuse or maltreatment has occurred.[119] This still leaves reporters with discretion over what constitutes reasonable cause. Studies show that mandated reporters import their own biases and preconceptions into these important sorting decisions.[120] For instance, doctors are more likely to suspect (and report) abuse of non-white and poor children than of white children and wealthier children for the same types of

114. *Anatomy of a 911 Call*, N.Y.C. 911 REPORTING, https://www.nyc.gov/site/911reporting/reports/reports.page [https://perma.cc/5MX7-ED2C] (last visited Nov. 17, 2022).

115. N.Y. DEP'T OF HEALTH, STATEWIDE BASIC LIFE SUPPORT ADULT AND PEDIATRIC TREATMENT PROTOCOLS 29, 34, 36, 39, 59, 65, 110 (2023), https://www.health.ny.gov/professionals/ems/docs/bls_protocols.pdf [https://perma.cc/N5NJ-GFZK] (describing types of medical emergencies, ranging from altered mental state to hyperglycemia to seizures to refusal of medical attention, where EMS should consider calling law enforcement).

116. Thomas Hafemeister, *Castles Made of Sand?*, 36 OHIO N.U. L. REV. 819, 851–52 (2010); N.Y. SOC. SERV. LAW § 413 (Consol. 2017).

117. SOC. SERV. § 422(2)(a).

118. *Id.* § 422(2)(b); *see* Tr. Trans., *supra* note 1, and accompanying text.

119. SOC. SERV. § 413(1)(a).

120. Jessica Dixon Weaver, *The African-American Child Welfare Acts*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 117 (2008) (summarizing studies indicating bias in reporting).

injuries.[121] Similarly, Black women are more likely to be screened for drug use than white women during pregnancy and more likely to be reported than white women if they do give birth to a baby who tests positive for a substance.[122]

Mandatory reporter laws create a steady flow of reports *from* other government agencies like the police *to* family regulation agencies. Making the integration more complete, family regulation agencies themselves must share certain types of information with police agencies. New York, for instance, requires its family regulation agency to inform law enforcement of certain types of reports and allows the agency to disclose otherwise-confidential records to law enforcement.[123] In a particularly vivid illustration of the integration of policing and family regulation, in New York, new caseworkers attend trainings at the Police Academy and participate in a simulated "fun-house" training based on police training methods.[124]

The EMTs who responded to Mr. Thompson's home testified that they had to call for police per "protocol" that required them to call for police in unsafe situations.[125] Indeed, state guidance does instruct EMTs to call for police backup before entering unsafe scenes.[126] Yet that same EMT also testified that although Mr. Thompson appeared "upset," he never threatened or touched the EMT.[127] That "upset" became "unsafe" may owe to the EMT's biases; that "unsafe" so quickly led to a police response owes to an integration system set up to expedite exactly such an escalation. At the same time, the second EMT seems to have felt another carceral protocol was triggered due to his status as a mandated reporter: he testified that it was his job to report "any and all abuse whether it be adult [or] child. So if someone makes that allegation, I have to check on the welfare and make sure that it's reported."[128] Whatever investigatory protocol this EMT had in mind apparently went beyond seeing the baby in the apartment and seeing that she

121. *See* Kent Hymel, Ming Wang, Veronica Armijo-Garcia & Kelly S. Tieves, *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. PEDIATRICS 137, 138 (2018); Wendy G. Lane, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AM. MED. ASS'N 1603 (2002); ROBERT B. HILL, CASEY-CSSP ALL. FOR RACIAL EQUITY, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 18 (2006), https://www.aecf.org/resources/synthesis-of-research-on-disproportionality-in-child-welfare-an-update [https://perma.cc/JDP4-SWAR].

122. Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. REV. 77, 90 (2016) (summarizing research on rates of screening).

123. SOC. SERV. § 422.

124. Thomas Tracy, *EXCLUSIVE: Childrens Services Case Managers to Get Real-Life Home Visit Experience in Simulated Settings*, N.Y. DAILY NEWS (Nov. 25, 2018, 6:00 AM), https://www.nydailynews.com/new-york/ny-metro-acs-fun-house-training-20181124-story.html [https://perma.cc/B9TB-DAEY].

125. Tr. Trans., *supra* note 1, at 140.

126. N.Y. BUREAU OF EMERGENCY MED. SERVS., STATEWIDE PRE-HOSPITAL TREATMENT PROTOCOLS M-2 at 1, M-4 at 1 (2016).

127. Tr. Trans., *supra* note 1, at 139.

128. *Id.* at 56.

was not in distress, or asking Mr. Thompson to bring the baby to the apartment door for a closer examination (a step the EMTs did not take).[129]

Once these protocols were triggered, police arrived, and police and EMTs together breached Mr. Thompson's apartment. The EMTs examined Nala and determined that she had only diaper rash. And yet, a police officer still reported Mr. Thompson to the family regulation agency, despite his lack of "reasonable cause" at that point to suspect child abuse had occurred.[130]

The individual state agents' responses, discussed at greater length below, likely owe at least in part to their individual biases; the EMTs' and officers' shared view of Mr. Thompson as "aggressive" hints as much.[131] But the individual actors' responses were shaped just as much by the shared carceral logic seeping through the institutions for which they worked—and formally linking those same institutions to each other. Through each agency's involvement, the state attempted to exert control over Mr. Thompson and punish him for his deviance. This logic might be most apparent in the actions of the police themselves: in exercising control over Mr. Thompson by forcefully entering into his apartment, committing physical violence, punishing his deviance by arresting him for disobeying orders, and calling in a child abuse report on a disproven claim. Carceral logic is apparent, too, in the actions of the EMTs, who seemed less concerned with ensuring Nala's health than with assuring Mr. Thompson's compliance. Indeed, in the EMT's testimony that he had a duty to *investigate* child maltreatment, we see a replication of a policing mentality by a healthcare provider.[132] That policing and surveillance logic carries over to the family regulation system, where state law *required* an invasive investigation of an already-disproven report.

Though Mr. Thompson's civil suit focused on the police response, that response forms but one strand of a broader carceral net. Through this wider lens, we see the comprehensive and systemic efforts to control marginalized families and to invade their most private spaces.[133]

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129. *See* Tr. Trans., *supra* note 1, at 51, 53–54.

130. By the time the officer lodged the report, he already had been told that Nala had diaper rash, concluded Camille Watson had a "mental disability," and declined to arrest Mr. Thompson on any child maltreatment charges. *See supra* notes 61–62, 76 and accompanying text.

131. Tr. Trans., *supra* note 1, at 57, 140, 162.

132. *See id.* at 56.

133. The nature of occupancy of and privacy within those spaces is also a product of systemic inequality: Mr. Thompson's sister-in-law lived with Mr. Thompson because she "didn't have anywhere else to go." *Id.* at 171. Mr. Thompson's neighborhood was as of 2014 one of the fastest-gentrifying neighborhoods in New York City. NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015 6 (2016), https://furmancenter.org/research/sonychan/2015-report [https://perma.cc/YL77-SRLB]. As inaccessibility of housing forces more people to live in closer quarters, their privacy diminishes interpersonally. "[T]he Fourth Amendment only protects from the state that which is protected from private citizens." BRIDGES, *supra* note 10, at 92. Thus, to the extent that individuals lack privacy from people with whom they come into daily contact, they lack privacy from the state. *Id.* If Mr. Thompson had not lived with his sister-in-law, she would not have been present to make the limited observations that led to her specious 911 call and state intrusion of Mr. Thompson's home.

### *B. Sweeping Police "Reasonableness" Under Fourth Amendment Doctrine*

In Fourth Amendment doctrine, the home is the most sacred space.[134] Searches and seizures inside a home are presumptively unreasonable in the absence of a warrant and probable cause.[135] Police are not the only state agents constrained by the warrant requirement: federal courts have increasingly recognized the same requirements apply to caseworkers carrying out family regulation investigations.[136] Yet the Supreme Court has also recognized a growing list of exceptions to this warrant requirement[137] and has described "reasonableness" rather than warrants as the "ultimate touchstone of the Fourth Amendment."[138] Whereas the Warrant Clause sets forth specific requirements for the issuance of a warrant, "reasonable" remains a slippery touchstone—one that gives state actors wide latitude to justify searches, codes reasonable responses of marginalized people as reasons for further state invasion, and ultimately leaves police actions unchecked and marginalized people exposed to state intrusion.

With reasonableness as a touchstone, the "exigencies of the situation" may render "the needs of law enforcement so compelling that a warrantless search is objectively reasonable."[139] Thus, as long as probable cause of a crime exists, a police officer may enter a home without a warrant if a reasonable officer would believe entry was necessary to render emergency assistance.[140]

To decide where an exigency exists, courts consider the "totality of the circumstances confront[ing] law enforcement agents,"[141] and may look to lengthy, inexhaustive lists of factors.[142] Among these factors is "the gravity or violent nature of the offense with which the suspect is to be charged."[143] This means that

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134. *See, e.g.*, Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) ("The 'very core' of this guarantee is 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013))); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("It is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" (quoting Groh v. Ramirez, 445 U.S. 573, 586 (1980))).

135. *Brigham City*, 547 U.S. at 403.

136. Arons, *supra* note 14, at 1060.

137. *See* Craig Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985) (listing more than 20 exceptions to the probable cause or warrant requirement or both); *see also* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable.").

138. Kentucky v. King, 563 U.S. 452, 459 (2011) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

139. *Id.* at 460 (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

140. *Id.* at 459; Craig Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1013 (2003) (explaining probable cause requirement still applies for warrantless searches carried out under exigent circumstances).

141. Chamberlain v. City of White Plains, 960 F.3d 100, 106 (2d Cir. 2020) (quoting United States v. Klump, 536 F.3d 113, 117 (2d Cir. 2018)).

142. *See, e.g.*, Harris v. O'Hare, 770 F.3d 224, 234 (2d Cir. 2014) (listing six "guideposts").

143. *Id.*

"the intensity of the social interest in a police search" is "weighed in the balance,"[144] a consideration that Fourth Amendment doctrine traditionally has rejected.[145] Yet for exigencies, the more serious the alleged offense, the lower the barrier to police entry.

Decades ago, the Supreme Court admonished that "the seriousness of the offense under investigation" does not alone "creat[e] exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search."[146] This means that it should not be per se reasonable for an officer to believe it necessary to enter a home and render emergency assistance solely because the crime alleged is particularly heinous—for instance, sexual abuse of an infant. Probable cause that such a crime was committed would satisfy only one requirement for exigent circumstances; officers also need to *separately* have a reasonable belief that emergency assistance was necessary.[147] But in cases involving child abuse, courts seem prepared to find that the very nature of the allegation gives rise to a reasonable suspicion that emergency aid is necessary, even where there is little support for the underlying allegation.[148] As we consider what judges evaluate to assess whether probable cause and reasonable suspicion exist, we should not overlook society's baseline suspicion of poor parents and Black, Latinx, and Native parents.[149] With that suspicion already weighing against parents, even a dubious allegation of the serious offense of child abuse can support a "reasonable" belief that a child is at risk. Thus, a fact pattern that appears insufficient to support exigent circumstances when the allegation is something like a drug crime might suddenly appear sufficient when the allegation is child abuse.[150]

At the same time, by focusing on the objective reasonableness of police officers' actions, Fourth Amendment doctrine refracts individuals' reactions to police actions through the lens of police officers' perception. Courts considering whether police had an objectively reasonable basis to believe an exigency existed consider *what information the police had* and *how a reasonable police officer would react to that information*. That information may include how an individual reacted to a demand from a police officer. Instead of considering why the *individual* might have reacted the way that he did—fear, actions police have already taken, desire to protect a vulnerable family member from state invasions late at night, feelings of frustration or indignity—courts look to how a reasonable

144. Lerner, *supra* note 140, at 1013.

145. *Cf. id.* at 1015.

146. Mincey v. Arizona, 437 U.S. 385, 394 (1978).

147. Lerner, *supra* note 140, at 1013.

148. *Cf. id.*

149. Washington, *supra* note 8, at 1543–44; Davis, *supra* note 8, at 458–65.

150. Lerner, *supra* note 140, at 1013 (describing a state court decision finding exigent circumstances where police had nothing more than an anonymous tip that a child was abused at a certain location by a certain person, corroborated solely by that person answering the door, and comparing this to a drug enterprise case).

officer would *respond to* that reaction.[151] Further, the Supreme Court has repeatedly pointed to the purportedly "split-second" nature of policing as weighing heavily in favor of the reasonableness of their actions, noting that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[152]

In the carceral state, police expect compliance with their directives; indeed, that expectation runs so deep that a failure to comply with a police directive can itself be coded as a lawful basis to detain a person.[153] The pressure to comply is just as high in family regulation cases, where a parent's failure to comply may be deemed a sign of danger to their child—a possible reason to separate a family.[154] If an individual does not comply with a state agent's directive, the agent may take that to be a sign of an exigency or danger—and a court may later agree with that analysis, without considering *why* the individual may not have complied in the first place.[155]

In Mr. Thompson's case, each of these elements came to bear: the abandonment of the warrant requirement for a nebulous "reasonableness" analysis; the invocation of the heightened social interest in protecting children to lower the barrier to a search; and the coding of an individual's lawful—reasonable, even—response to police invasion as a cause for suspicion on the part of a reasonable police officer.

When police arrived at the scene, they knew only that someone had called 911 alleging that a child was being abused, with quite limited support for that allegation. Neither the EMTs nor the officers gathered any additional information on the scene to corroborate the allegations. Indeed, their observations might have assuaged any concerns. The EMTs saw Mr. Thompson's baby at rest in her mother's arms, and both EMTs and three police officers testified that they did not hear a baby (or anyone else) crying or see anyone looking upset. Yet multiple officers opined that the mere fact that Mr. Thompson did not allow them into his home without a warrant not only heightened their suspicion but itself constituted a criminal offense.[156]

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151. Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 170–71 (2017).

152. Kentucky v. King, 563 U.S. 452, 466 (2011) (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)); *see also* Kingsley v. Hendrickson, 576 U.S. 389, 399 (2015); Plumhoff v. Rickard, 572 U.S. 765, 775 (2014); United States v. Robinson, 414 U.S. 218, 235 (1973) ("A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.").

153. CARBADO, *supra* note 12, at 117; *see also* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).

154. *See* Amy Sinden, *"Why Won't Mom Cooperate?"*, 11 YALE J.L. & FEMINISM 339, 354–55 (1999); Fraidin, *supra* note 95, at 937.

155. *See, e.g.*, Rios v. State, No. 04-08-00003-CR, 2009 WL 1406249, at *7 (Tex. App. May 20, 2009).

156. Tr. Trans., *supra* note 1, at 65, 68, 105, 162.

What the police did next was of dubious legality; indeed, the prosecutor ultimately dropped the charges against Mr. Thompson because of concerns over the soundness of arresting a person for telling police they could not enter his home without a warrant.[157] Of note, police did have several patently legal routes into Mr. Thompson's home if they feared he was abusing his child but lacked any indicia of exigent circumstances. They could have applied for a criminal search warrant upon a showing of probable cause.[158] They could have also referred the case to the family regulation agency *before* seeking to enter the home; then, if Mr. Thompson refused to allow a caseworker into his home, the agency could have applied for an order directing Mr. Thompson to produce his child for a caseworker to examine, upon a showing of only reasonable suspicion of child abuse.[159] When such orders to produce are sought, they are almost always granted.[160] And New York's family regulation agency, like others, maintains after-hours and rapid response teams precisely for circumstances like this.[161] (It bears noting that fewer than 20% of all reports of child maltreatment are substantiated by an investigation and that reports lodged by non-mandated reporters, like Camille Watson, are much less likely to be substantiated than reports by mandated reporters.)[162]

Rather than following those routes, the officers gambled that their thin evidence of exigent circumstances would suffice. They could bolster their evidence by falling back on the nature of the allegations and Mr. Thompson's "irate" demeanor[163]—factors that fit with carceral logic and the pathologization of Black men and Black parents.

The judge instructed the jury in Mr. Thompson's civil case to keep in mind the state's "strong interest" in the welfare of a child in a child abuse investigation[164] and that police may rely on an uncorroborated 911 call plus whatever else they saw and heard at the scene to justify a warrantless entry into a home.[165] He also reminded the jury of the time pressure under which police must operate as they assess ambiguous information.[166] (The police, of course, did not actually gather any additional information on the scene, save for information from

157. *See supra* Part I.

158. N.Y. CRIM. PROC. LAW § 690.35 (McKinney 2019).

159. N.Y. FAM. CT. ACT § 1034(2)(a) (McKinney 2019).

160. Response from N.Y. Off. of Ct. Admin. to author's Freedom of Information Law Request (Sept. 24, 2020) (on file with author) (92% of orders to produce granted in 2019).

161. *See* CASEY FAM. PROGRAMS, ARE THERE GOOD EXAMPLES OF HOW CHILD WELFARE AGENCIES ARE COLLABORATING WITH LAW ENFORCEMENT? 5 (2018), https://www.casey.org/media/SComm_Models_Law_Enforcement_fnl.pdf [https://perma.cc/4GHG-DSRC].

162. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 30–31 (2021), https://www.childwelfare.gov/pubpdfs/canstats.pdf [https://perma.cc/3RWE-MKN4]; Maria Gandarilla Ocampo, Brett Drake & Melissa Jonson-Reid, Child Maltreatment Report Outcomes: Do Reports from Mandated and Permissive Reporters Differ?, Presentation at the Society for Social Work and Research 24th Annual Conference (Jan. 17, 2020).

163. Tr. Trans., *supra* note 1, at 105.

164. *Id.* at 239.

165. *Id.*

166. *Id.*

the EMTs, their observations that there was not a child in distress, and their knowledge that Mr. Thompson asked for a warrant.) Nowhere did the judge instruct the jury to consider why Mr. Thompson might not have wanted armed police and EMTs to enter his home: that it was late at night; that he and his fiancée were only half-dressed and their newborn was resting; that his fiancée had just come home from the hospital; that he knew the allegations were specious and he mistrusted his sister-in-law; or perhaps most simply, because he believed that under the Constitution, he had the right to keep state agents out of his home without a warrant.

Officers can explain away their actions in individual cases as reasonable. Their "reasonableness" rests on narratives that assume suspicion of marginalized parents, such that even a minimal allegation is sufficient to support a reasonable belief that they are abusing their children and such that parents' rational reactions can be cast as defiant, deviant, and worthy of further suspicion. This officer impunity in individual cases feeds into an institutional culture—and expectation—of impunity.[167] In this environment, it is little surprise that police officers treat warrants as unnecessary inconveniences, rather than requirements. We need look no further than Mr. Thompson's case, where an officer testified that he had *never in his career sought a warrant*, to see evidence of that.[168]

Mr. Thompson's experience does offer a glimmer of hope, in that prosecutors eventually dropped the charges against him—but even so, that came only after Mr. Thompson's life was upended for months.[169] And still, Mr. Thompson never received any sort of vindication in his civil trial, because the jurors subscribed to the same view of "reasonableness" as the officers.

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167. Qualified immunity, with its own "reasonableness" analysis, only deepens this problem of officer impunity. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1818 (2018) (describing how recent Supreme Court decisions dismissing cases on qualified immunity grounds "suggest to officers that they can act with impunity"); Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 417–18 (2016) (quoting Anderson v. Creighton, 483 U.S. 635, 659–60 (1987) (Stevens, J., dissenting) (describing how qualified immunity reasonableness standard layered atop Fourth Amendment reasonableness standard allows police to ignore the limitations of the probable cause and warrant requirements)). In addition to these issues relating to officers' individual impunity, studies have cast doubt on the efficacy of the exclusionary rule at deterring police misconduct, leading to arguments that police pay little heed to the legality of their searches. *See, e.g.*, Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 588, 591 (2011); Harry M. Caldwell, L. Timothy Perrin, Carol A. Chase & Roland Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 755 (1998). Others have argued that the exclusionary rule does lead to general deterrence, if not specific deterrence for individual officers. *See* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372 (2008). Of course, the growing number of exceptions to the exclusionary rule complicates further the project of measuring its efficacy.

168. Tr. Trans., *supra* note 1, at 97.

169. Indeed, Issa Kohler-Hausmann has argued that securing a conviction is not the purpose of misdemeanor prosecutions in New York; rather, the purpose is to regulate and control defendants and sort them based upon their compliance with these efforts. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 4–5 (2019).

### *C. Jurors' Approval of Police Officers' "Reasonableness"*

As a general matter, federal civil rights litigation is rarely an adequate means to achieve justice: poor litigants, and particularly poor Black litigants, struggle to find lawyers, and if they make it to court, they must overcome the high bar of qualified immunity for the claims to survive.[170] Even where a Fourth Amendment claim makes it to a jury, plaintiffs must win in front of jurors who are themselves steeped in the same culture of carceral logic as police officers. That culture encourages jurors to see police officers' actions as reasonable.

A jury, in theory, stands in for the community.[171] In reality, "people of color are underrepresented in jury pools because they are often underrepresented in the source lists—typically voter registration databases—used to create the pools."[172] Poor people across races are likewise less likely to be included in the jury pool, and less likely to be seated on juries.[173] Thus, jurors who are seated tend to be whiter and higher-income than the communities they are drawn from. They bring with them a lifetime of biases and preconceptions. For instance, studies show that in criminal cases, jurors are more likely to associate Blackness with guilt and whiteness with innocence.[174]

Jurors also bring carceral logic to bear on deliberations. Carceral logic "has embedded itself into our psyches."[175] It is not merely the logic of police; it is also the logic of social services, emergency services, schools, and the like. Indeed, "the retributive impulses of the state are inscribed in our very individual emotional responses."[176] The pervasiveness of this logic heightens focus on crime and increases fear of it—and increases the likelihood of authoritarian or invasive government tactics, as politicians play off those fears and "govern through crime."[177] This makes it easier to normalize coercive tactics and police violence and intrusion.[178] Indeed, research shows that most jurors believe police testimony in criminal trials and that this is particularly true for white jurors.[179]

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170. Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117–19 (2009).

171. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 725–26 (2019).

172. EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION 26 (2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [https://perma.cc/8LTR-AS2B]; *see also* Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 615 (2021).

173. *See* sources cited *supra* note 172.

174. *See* Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV 307, 338–39, 343–45 (2010); Justin Levinson, Huajian Cai & Danielle Young, *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010).

175. Lopez, *supra* note 13, at 390.

176. *Id.* (quoting Angela Davis, Address at the University of Chicago: Feminism and Abolition: Theories and Practices for the 21st Century (May 3, 2013)).

177. Simon, *supra* note 110, at 207–09.

178. Lopez, *supra* note 13, at 397.

179. Vida Johnson, *Bias in Blue*, 44 PEPP. L. REV. 245, 295 (2017).

When jurors hear cases, they do not do so as mechanical and neutral arbiters.[180] Rather, they bring their own societally informed latent beliefs: for instance, that Black families, and particularly lower-income Black families, are inherently suspect; that Black men are violent and aggressive; that it is normal and necessary for the state to intervene in poor families' lives; that poor people must comply with police; and that police themselves act heroically and quickly in time-sensitive situations.

These themes were reinforced through Mr. Thompson's trial, in the police officers', EMTs', and defense counsel's references to Mr. Thompson's anger and aggression, his "resistance" to the police's "reasonable" requests, and the overarching need to "save" a child.[181] The jury instructions emphasized similar themes.[182] And the jury instructions also reminded the jurors over and over that they were to consider Mr. Thompson's claims from the perspective of a "reasonable officer," putting before the jury the same nebulous, wide-ranging, and police-focused standard as the police themselves operated under.[183]

It is impossible to say what went through the minds of each individual juror or what animated their decision-making. But faced with the testimony of Mr. Thompson, his fiancée, his doctor, and two neighbors, and with four police officers and two EMTs—whose testimony conflicted at times internally and at times with each other's—the jurors found in favor of the officers on every count, finding the actions of the police officers as they burst into Mr. Thompson's home, arrested him, and bloodied him to be reasonable.

### *D. Disentangling Agencies and Widening Our Conceptions of "Reasonableness"*

Mr. Thompson's experience shows the insidious nature of the pathologization of marginalized parents. That pathologization is foundational to the construction and maintenance of the carceral state. It encourages the maintenance of a sprawling and integrated system of surveillance and control—a system that extends beyond formal mechanisms of policing and incarceration to include emergency services and social services. At the same time, it excuses the violence and intrusions of state actors, allowing state agents, judges, and juries to cast state agents' actions as "reasonable" responses to inherently suspect and fundamentally unreasonable parents.

Reforms tinkering with institutional design or Fourth Amendment doctrine cannot be expected to guarantee meaningful privacy or security to poor families; such reforms will prove insufficient if they do not also challenge the underlying pathology and carceral logics. In this sense, recent calls to defund or divest police

180. *See* Margaret Covington, *Jury Selection*, 16 ST. MARY'S L.J. 575, 576 (1985).

181. A search of "aggressive" in the trial transcript returns 34 results; "comply" or "compliance" returns 6; "danger" or "dangerousness" returns 25; and "escalate" or "escalation" returns 19. Tr. Trans., *supra* note 1.

182. *Id.* at 239.

183. *Id.*

that come paired with calls to "reinvest" in social services[184] represent a beguiling but ultimately insufficient effort: if those social services remain tied to policing formally or maintain their same carceral logic, then "reinvestment" will amount to nothing more than a change in uniform.[185] By the same token, doctrinal changes that expand the rights of marginalized parents in criminal or civil cases will have little impact if judges and jurors do not question both the underlying narratives that cast marginalized parents as suspect or dangerous, as well as the carceral logic demanding parents' compliance with massive systems of surveillance and punishment. This Section very briefly describes two ways we might disrupt these carceral and pathology logics and begins to address the design and doctrinal problems described above.

As a starting point, we might consider how to delink social services from policing—and how to "de-police" the roles of helping professions such as social workers and medical professionals. One obvious target is mandated reporting laws. These laws deputize millions of citizens to police parents and strengthen the integration of family regulation into policing, medical care, and education. Collectively, mandated reporters were responsible for about two-thirds of reports of child maltreatment made in 2019.[186] These same laws, as discussed above, not only directly entangle social services and policing, but also entrench carceral logic (and suspicion of individual parents) in social service agencies.

Efforts to abolish—or at least severely curtail—mandated reporting requirements have been growing in the academy and in public discourse.[187] Of note, some mandated reporters—like social workers—have joined these efforts,[188] pointing not only to the racist effect of mandated reporting laws but also to the destruction of trust between individuals and providers who are mandated reporters.[189] As Lisa Kelly has argued, the abolition of mandated reporting laws

184. *See, e.g.*, Sam Levin, *These US Cities Defunded Police: 'We're Transferring Money to the Community'*, GUARDIAN (Mar. 11, 2021), https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community [https://perma.cc/94Y5-W5TT].

185. *See* Roberts, *supra* note 13 ("Rather than divesting one oppressive system to invest in another, we should work toward abolishing all carceral institutions and creating radically different ways of meeting families' needs.").

186. CHILD.'S BUREAU, *supra* note 162, at 30–31.

187. *See, e.g.*, Kelly, *supra* note 13, at 313; Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 668 (2021); Annery Miranda, *Making Interdisciplinary Collaboration Between Social Workers and Lawyers Possible*, 14 NE. U. L. REV. 715, 775 (2022); Erin Miles Cloud, Jasmine Wali, Shannon Perez-Darby & Dean Spade, Panel at Barnard Center for Research on Women: Abolish Mandatory Reporting and Policing (Nov. 10, 2022), https://bcrw.barnard.edu/event/abolish-mandatory-reporting-and-family-policing [https://perma.cc/5L75-UNNT].

188. *See, e.g.*, Miranda, *supra* note 187, at 739; NAT'L ASS'N OF SOC. WORKERS, N.Y.C. CHAPTER, ANTI-RACIST ALTERNATIVES TO MANDATED REPORTING & REIMAGINING SAFETY (2021), www.naswnyc.org/resource/resmgr/ce_conference/2021/workshops/anti-racist_alternatives_pro.pdf [https://perma.cc/H8ZN-UNUP].

189. Miranda, *supra* note 186, at 725 n.25.

would set parents "free from the fears that accompany asking for help" and set social service providers "free to strategize with families and support systems about child safety without having to bring the threat of child welfare involvement into the conversation."[190] Perhaps counterintuitively, the abolition of mandated reporting might also appease those who believe that the current family regulation system does have the capacity to keep children safe[191]: studies suggest that the fewer reports family regulation agencies receive, the more accurate their investigations become.[192]

As we work to disentangle social services and policing, we must also consider how to shift perceptions of what constitutes "reasonable" behavior for police. One approach might be to change *whose* reasonableness we focus on, moving from a focus exclusively on police reasonableness to a greater focus on the reasonableness of parents' actions *in response* to police. This approach does not necessitate a wholesale rethinking of Fourth Amendment doctrine; rather, it would necessitate that judges and juries take into account the social, political, and personal history that might drive a person's response to a state agent's action. In Mr. Thompson's case, the judge instructed the jury to consider the police's reasonableness only from the perspective of the police. From the verdict, it seems clear that the jury accepted that perspective and found the officers' decision to escalate to be reasonable. But whether the police acted reasonably depends on how they understood Mr. Thompson's own actions; if a "reasonable" police officer had viewed Mr. Thompson's responses as "reasonable," then any escalation would have been unreasonable. We might expect that a "reasonable" police officer should consider that individuals' responses will be shaped by their identity along any number of dimensions; an officer's failure to take this into account may render escalations unreasonable.

Thus, we might expect that a judge, when considering the reasonableness of police actions or when instructing a jury on such questions, should similarly take those dimensions into account. The judge in Mr. Thompson's case told the jurors again and again to put themselves in the shoes of the police officer and noted the purported pressures that bear on police officers making reasonable determinations, including limited information and the absence of hindsight.[193] Judges would also do well to instruct a jury to consider factors that bear on whether Mr. Thompson's own actions—which the police took to be unreasonable at best and threatening at worst—were in fact reasonable and unworthy of any police response. For example, a judge might instruct the jury to consider that police disproportionately

190. Kelly, *supra* note 13, at 315.

191. There are countless reasons to doubt the premise that the current system can keep children safe. *See generally* DOROTHY ROBERTS, SHATTERED BONDS (2022).

192. Jane M. Spinak, *Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change*, *in* LAW IN THE TIME OF COVID-19 71, 74 (Katharina Pistor ed., 2020), https://scholarship.law.columbia.edu/faculty_scholarship/2685/ [https://perma.cc/6XTZ-L2HM].

193. *See supra* notes 83–86.

injure Black people[194] and that family regulation agencies disproportionately separate Black families.[195] These factors might render Mr. Thompson's unwillingness to allow two EMTs and four armed police officers into his home late at night eminently reasonable—and thus not a reaction that should have caused a reasonable police officer to escalate. This approach is not unprecedented: courts around the country have taken race—and particularly the relationship between Black men and police—into account when deciding the reasonableness of police suspicion of Black men based upon their flight from police.[196] Bringing a similarly identity-conscious lens to other areas of Fourth Amendment reasonableness analysis could begin to challenge the insidiousness of a carceral logic that assumes any degree of "noncompliance" constitutes danger.

These are just two small examples. The broader task is to continue the project of interrogating—and disrupting—the carceral logic driving the state's actions and the public's reaction to those actions. Only then can we begin to build toward a society that protects vulnerable children without pathologizing their parents.

## CONCLUSION

Perhaps improbably, Larry Thompson emerged victorious from the Supreme Court. In a legal sense, his victory stands for a narrow proposition: the loosening of one requirement for malicious prosecution claims. That narrow victory alone is meaningful for those litigants now able to bring malicious prosecution claims that previously would have been barred. Indeed, Mr. Thompson may now have access to a legal remedy for the harm he (and his family) suffered. To transform this individual—and still uncertain, in terms of Mr. Thompson's own relief[197]—victory into meaningful privacy protections for marginalized families, we must

194. Timothy Williams, *Study Supports Suspicion that Police Are More Likely to Use Force on Blacks*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html [https://perma.cc/T8CU-RFPK].

195. *See* Kim, Wildeman, Jonson-Reid & Drake, *supra* note 94, at 277.

196. *See, e.g.*, Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (noting data showing extreme racial disparities in stop-and-frisk rates and finding that a Black person's flight from police does not itself give rise to reasonable suspicion); People v. Horton, 2019 IL App (1st) 142019-B, ¶¶ 71, 74–76, 142 N.E.3d 854, 867, *as modified on denial of reh'g* (2019) (citing C.R. DIV., U.S. DEP'T OF JUST. & U.S. ATT'Y'S OFF. N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017), https://www.justice.gov/usao-ndil/press-release/file/925976/download [https://perma.cc/428H-NUUX]) (re-affirming that flight from police, without more, does not give rise to probable cause to arrest, after citing a Department of Justice report finding that "some negative interactions between the police and members of some communities have led to a measurable amount of fear and distrust of police," and noting "one can readily understand why a young [B]lack man having a conversation with friends in a front yard would quickly move inside when seeing a police car back up"); Miles v. United States, 181 A.3d 633, 641–42 (D.C. 2018) (finding that Black defendant's flight from police was not necessarily driven by consciousness of guilt, after discussing several studies showing Black men are disproportionately likely to be subjected to police brutality).

197. I say this mindful that Mr. Thompson may now have the right to pursue a malicious prosecution claim—but if that claim survives to trial, it will be heard by a jury steeped in the same carceral logic and exposed to the same narratives as the jury that rejected his Fourth Amendment claims.

demand more than a narrow doctrinal change. Indeed, even changes like reducing police budgets, increasing formal separation between police and social service providers, and pushing for a return to a Fourth Amendment doctrine that adheres more strictly to the warrant requirement will prove insufficient on their own. Rather, we must confront the pathologizing narratives and carceral logic that drive the regulation and policing of families across a multitude of government systems.