

## “WE’RE NOT GIVING THIS CHILD BACK TO LESBIANS”: AN EXAMINATION OF LGBTQ+ PARENTS’ LOSS OF CHILDREN TO THE FAMILY REGULATION SYSTEM

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### INTRODUCTION

People often associate LGBTQ+<sup>1</sup> parents with adoptive and foster parents. In their minds, LGBTQ+ parents are affluent, white, and male, and any interactions LGBTQ+ parents have with the family regulation system<sup>2</sup> are one-sided: they are potential foster and adoptive parents for children who are already in state custody. But assumptions and facts sometimes do not align. In reality, a large constituency of LGBTQ+ parents are living below the poverty line, female, and persons of color. And, through the family regulation system, the state takes their children at a disproportional rate.

In 2016, professors Kathi L.H. Harp and Carrie B. Oser conducted the first study examining whether “being gay/lesbian or bisexual has an independent effect on the odds

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<sup>1</sup> LGBTQ+ is an acronym for “lesbian, gay, bisexual, transgender, and queer” with a “+” sign to signify all other gender identities and sexual orientations that are not specifically covered by the other initials. Different acronyms, such as LGBT or LGB, are used when applicable to accurately represent claims or findings of source material. Transgender people are particularly underrepresented in existing data and studies.

<sup>2</sup> See Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 431–32 (2021) (“The terminology we believe best captures the operation of this system is the family regulation system . . . Family regulation reflects the pervasive impact legally-constructed agencies and courts have on every aspect of the families they touch.”).

of losing custody of a child.”<sup>3</sup> By analyzing factors associated with custody loss among Black mothers, their study demonstrated with statistical significance that, among Black women, lesbian and bisexual women are more likely to lose their children to the state as compared to heterosexual women—and at an alarmingly higher rate.<sup>4</sup> Indeed, women identifying as lesbian or bisexual were more than four times as likely to lose official custody of their children to the state as compared to heterosexual women.<sup>5</sup> The implications of this under-studied disparity are deeply harmful, as even temporary removal from the home can cause deep psychological trauma for the child, and at an extreme can lead to parental rights termination.<sup>6</sup> This Note focuses on the particular risk to LGBTQ+ parents in their interactions with the family regulation system in the United States.

Today, LGBTQ+ parents in the United States have more legal rights and protections than in the past. Some state statutes now safeguard the relationships between non-biological LGBTQ+ parents and their children, at least in private custody cases.<sup>7</sup> With these added protections, discrimination against LGBTQ+ parents in the family regulation system today is usually not as brazen as it was in the past. However, both covert and overt discrimination in the family regulation system still exist. This matters because state intervention, even if temporary, can have a traumatic impact on both parents and children.<sup>8</sup>

Parents from historically marginalized communities, such as the LGBTQ+ community, often have their identities mistaken as signs of parental unfitness, or even conflated with

<sup>3</sup> Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 Soc. Sci. Rsch. 283, 285 (2016).

<sup>4</sup> *Id.* at 291 (“Women in our sample who reported being lesbian or bisexual were 4.19 times as likely to lose official custody rather than have no custody loss in comparison to their heterosexual counterparts (p < 0.001).”).

<sup>5</sup> *Id.* These findings merit further scholarly investigation and study. See discussion *infra* Part III.F.

<sup>6</sup> Courtney G. Joslin & Catherine Sakimura, *Fractured Families: LGBTQ People and the Family Regulation System*, 13 CALIF. L. REV. ONLINE 78, 94 (2022).

<sup>7</sup> See discussion *infra* Part II.

<sup>8</sup> See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 523 (2019) (“When the state proves or even merely alleges that a parent has abused or neglected a child, a court may remove the child from the parent’s care. However, research shows separating a child from her parent(s) has detrimental, long-term emotional and psychological consequences that may be worse than leaving the child at home. This is due to the trauma of removal itself, as well as the unstable nature of, and high rates of abuse in, foster care. Nevertheless, the child welfare system errs on the side of removal and almost uniformly fails to consider the harms associated with that removal.”).

abuse or neglect, both of which are grounds for removal of a child from their care.<sup>9</sup> LGBTQ+ parents may fear seeking care for their children, like taking their child to a physician or a therapist, because they worry a provider might contact family regulation officials on discriminatory grounds.<sup>10</sup> The family regulation system's culture of surveillance and fear has been well documented.<sup>11</sup> Taking children from their home causes significant harm—they are cut off from family members, often removed from their schools and other familiar environments, and face a statistically greater risk of abuse in foster care as compared to their parents' home.<sup>12</sup> Moreover, once a family becomes involved in the family regulation system, the ordeal can last from months to years.<sup>13</sup> At an extreme, the family regulation system can also terminate a parent's legal relationship to their child. Once a parent loses their legal parental rights, they no longer have the right to see their child, speak to their child, or make any decisions about their child's upbringing. After termination of parental rights, the state has the legal authority to place the child for adoption.<sup>14</sup> Even if a child is reunified with their parents, the trauma for both the child and their parents is “often irreversible.”<sup>15</sup> Additional and distinct problems LGBTQ+ parents face with the family regulation system include “discrimination in both the removal decision and the decision whether to reunite the family; [the] failure to treat a nonbiological parent as a legal parent;

9 S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J.F. 163, 168, 174–75 (2022).

10 Joslin & Sakimura, *supra* note 6, at 80.

11 E.g., Washington, *supra* note 9 *passim*.

12 Joslin & Sakimura, *supra* note 6, at 80.

13 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, 138 (2019) (“[W]hen a family encounters a child welfare agency official, it is never a brief intervention—in fact, it can often last months without court involvement.”). As of December 2023, the total average enrollment in preventative services in New York was 9.3 months. N.Y.C. ADMIN. FOR CHILD.'S SERVS., ACS QUARTERLY REPORT ON PREVENTION SERVICES UTILIZATION, OCTOBER–DECEMBER 2023 (2023), <https://www.nyc.gov/assets/acs/pdf/data-analysis/2023/PreventiveServicesUtilizationQ4.pdf> [<https://perma.cc/2S74-DLTZ>]. However, in looking at prevention program type, there is considerable variation in average enrollment. Special Medical programs had the longest average enrollment at 26 months. *Id.*

14 Unless the state places the child with another relative besides their parents. Some states have exceptions to general proceedings for termination of parental rights. About half of states also have provisions in place for reinstatement of parental rights. For a general overview of involuntary parental rights termination in the United States, see CHILD.'S WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2021), <https://www.childwelfare.gov/pubpdfs/groundtermin.pdf> [<https://perma.cc/P4Z4-5K6Q>].

15 Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 9 (2019).

and [the] failure to treat chosen family as relatives and kin, which carries special meaning in child welfare placement decisions.”<sup>16</sup>

While strong and growing scholarship exists on LGBTQ+ families concerning family and adoption law,<sup>17</sup> the overrepresentation of LGBTQ+ youth in the family regulation system,<sup>18</sup> and biases (particularly racial biases) in the family regulation system,<sup>19</sup> analyses of LGBTQ+ parents' specific interactions with the family regulation system are largely

16 Nancy Polikoff, *Fulton v. City of Philadelphia: The Challenge of Fighting BOTH Discrimination Against LGBT Foster/Adoptive Parents AND Excess State Removal of Children from Their Parents*, BEYOND (STRAIGHT & GAY) MARRIAGE (Aug. 12, 2020), <http://beyondstraightandgaymarriage.blogspot.com/2020/08/fulton-v-city-of-philadelphia-challenge.html> [<https://perma.cc/D3RH-7FAQ>] [hereinafter *Fulton: The Challenge*].

17 E.g., Joslin & Sakimura, *supra* note 6, at 83 n.28; Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483 (2018); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017); Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589 (2018); Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065 (2016); Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363 (2016); Courtney G. Joslin, *Protecting Children(?): Marriage, Biology, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

18 See Jessica N. Fish et al., *Are Sexual Minority Youth Overrepresented in Foster Care, Child Welfare, and Out-of-Home Placement? Findings from Nationally Representative Data*, 89 CHILD ABUSE & NEGLECT 203 (2019) (finding that, as compared to heterosexual youth, LGBTQ+ youth are 2.5 times as likely to experience foster care placement and are largely overrepresented in both child welfare services and out-of-home placement). These national findings have been corroborated by local studies. See, e.g., Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS 1 (2019) (finding LGBTQ youth are overrepresented in the California foster care system); THEO G. M. SANDFORT, N.Y.C. ADMIN. FOR CHILD.'S SERVS., EXPERIENCES AND WELL-BEING OF SEXUAL AND GENDER DIVERSE YOUTH IN FOSTER CARE IN NEW YORK CITY: DISPROPORTIONATELY AND DISPARITIES (2020) (finding overrepresentation of LGBTQAI+ youth in the New York City foster care system); MARLENE MATARESE ET AL., UNIV. MD. SCH. SOC. WORK, THE CUYAHOGA YOUTH COUNT: A REPORT ON LGBTQ+ YOUTH'S EXPERIENCE IN FOSTER CARE (2021) (finding overrepresentation of LGBTQ+ youth in a Midwest county's foster care system); see also *id.* at 7 (“This [study] provides further evidence about the overrepresentation of LGBTQ+ youth in foster care, supporting similar findings from youth in large coastal cities.”).

19 Joslin & Sakimura, *supra* note 6, at 83 n.29 (first citing DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) [hereinafter *TORN APART*]; then citing DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter *SHATTERED BONDS*]; then citing Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 71 (1999) [hereinafter *Poverty, Race, and New Directions*]; then citing Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1630–37 (2011); and then citing Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE 151, 153 (2008)).

absent from the literature.<sup>20</sup> Some scholarly articles have begun raising awareness about LGBTQ+ families and their interactions with the family regulation system,<sup>21</sup> as well as the intersectionality between marginalized identities and family regulation.<sup>22</sup> This Note seeks to add to this emerging scholarship by first making an empirical, descriptive argument, asserting that, as compared to cisgender, heterosexual parents, LGBTQ+ parents are disproportionately experiencing child removal by the state because of overt or covert discrimination on the basis of sexual orientation and gender identity (SOGI), and because of the over-policing of intersecting identities like SOGI, race, and socioeconomic class. This Note will then advance recommendations, examining what can be done to promote equity in the United States' family regulation system for LGBTQ+ parents and families.

This Note also calls for more data to be collected on LGBTQ+ parents and state intervention. The lack of national, concrete data on the number of LGBTQ+ parents who have lost their children to the state, coupled with the lack of scholarly research focused on LGBTQ+ parents and the family regulation system, present serious challenges for those trying to identify, explain, and remedy the issues LGBTQ+ parents and families face.<sup>23</sup> Bisexual, transgender, and nonbinary parents are particularly underrepresented in existing literature on LGBTQ+ parents generally.<sup>24</sup> Despite these gaps, the emerging scholarship

20 Joslin & Sakimura, *supra* note 6, at 78–107, 83–84.

21 See generally Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 FAM. L.Q. 87 (2018) [hereinafter *Neglected Lesbian Mothers*] (arguing that same-sex parental needs are invisible in the family regulation system); Joslin & Sakimura, *supra* note 6 (identifying problems for LGBTQIA families in the family regulation system and proposing potential solutions).

22 See Washington, *supra* note 9 *passim*.

23 In part, this lack of data is arguably fueled by the myth of LGBTQ+ affluence. See *infra* Sections I.D, I.E.

24 See, e.g., Susie Bower-Brown & Sophie Zadeh, *I Guess the Trans Identity Goes with Other Minority Identities': An Intersectional Exploration of the Experiences of Trans and Non-Binary Parents Living in the UK*, 22 INT'L J. TRANSGENDER HEALTH 101, 101 (2021) ("Little is known about either the experiences of trans and non-binary parents who have used diverse routes to parenthood or their experiences beyond the transition to parenthood. Research on the way in which gender intersects with other identity categories to shape the experiences of trans and non-binary parents is also lacking."); Susan Imrie et al., *Children with Trans Parents: Parent-Child Relationship Quality and Psychological Well-Being*, 21:3 PARENTING 185, 185 (2021) ("Of the adult trans population, between 25% and 49% of individuals are believed to be parents, yet little is known about family functioning in trans parent families.") (internal citation omitted); Melissa H. Manley & Lori E. Ross, *What Do We Now Know About Bisexual Parenting? A Continuing Call for Research*, in LGBTQ-PARENT FAMILIES 65, 65, 77 (Abbie E. Goldberg & Katherine R. Allen eds., 2020) (calling attention to the lack of research on "bisexual and other pluri-sexual parents [e.g., pansexual, omnisexual, two-spirit]," and pointing out that existing research on bisexual parents has focused primarily on "White women in Western countries")

on LGBTQ+ parents and state intervention—as well as adjacent scholarship on private custody disputes, biases in the family regulation system, and the treatment of LGBTQ+ adults in the foster care and adoption contexts—demonstrate clearly that LGBTQ+ parents are likely facing discrimination in the family regulation system and disproportionate rates of child removal.

More must be done to fully understand and address the disproportionate rates of child removal LGBTQ+ parents experience. Consistent with the recent rise in troublesome anti-LGBTQ+ legislation and sentiments, the weaponization of LGBTQ+ bias against LGBTQ+ parents that has been documented in the private custody context is likely continuing today in the family regulation system. This is not to say this phenomenon is happening to the same degree in all states; the degree of severity likely tracks with the degree of overall anti-LGBTQ+ legislation or administrative action in the state.

Studies show that children of LGBTQ+ parents have just as good of outcomes as children of cisgender, heterosexual parents, and LGBTQ+ status alone does not make someone an unfit parent.<sup>25</sup> So why did Harp and Oser's 2016 study find that, among Black women, those who identified as lesbian or bisexual were four times as likely to lose custody of their children to the state versus those who identified as heterosexual?<sup>26</sup> This Note argues that discrimination on the basis of parent LGBTQ+ status in the family regulation system is likely happening at an alarming rate, and yet this phenomenon is understudied and rendered hidden in larger conversations about the family regulation system and LGBTQ+ parentage in the United States. Part I, through presenting a brief overview of LGBTQ+ parents in United States history and debunking myths around LGBTQ+ demographics, argues that past state discrimination against LGBTQ+ parents has carried over into modern day family regulation practices. Part II asks why LGBTQ+ parents face disproportionately high intervention from the family regulation system, drawing from adjacent scholarship in the private custody and foster care contexts. Part III calls for transformational change in the family regulation system, working towards eventual abolition of the system, and discusses proposed changes aimed at reforming the system.

### I. LGBTQ+ Parents: History, Myths, and Demographics

Despite statutes that criminalized their existence, LGBTQ+ parents and families have

(internal citation omitted).

25 See discussion *infra* Part I.C.

26 Harp & Oser, *supra* note 3, at 291.



always existed,<sup>27</sup> just as LGBTQ+ people have always existed. This Part begins with a brief history of LGBTQ+ parentage in the United States. The legal rights and protections available to LGBTQ+ parents have always varied widely from state to state, as family law is primarily the domain of state and local lawmakers, with some exceptions.<sup>28</sup>

There is a lack of attention paid to, or a lack of awareness regarding, LGBTQ+ parents and their distinct struggles within the family regulation system. This is fueled by the myth of affluence, a mistaken belief that LGBTQ+ parents are white, male, and affluent.<sup>29</sup> On the contrary, the data shows that a disproportionate number of LGBTQ+ families are non-white and have low socioeconomic status.<sup>30</sup> The myth of LGBTQ+ affluence has obscured issues that LGBTQ+ parents face from the family regulation system and has prevented connections between existing research on the family regulation system's disproportionate surveillance of other communities, such as low-income communities of color. The lack of attention paid to LGBTQ+ parents' interactions with the family regulation system is further exacerbated because most contemporary legal battles and media attention on anti-LGBTQ+ discrimination are centered on religious or moral battlegrounds, often implicating LGBTQ+ adults fostering and adopting children, and LGBTQ+ youth, either in the system or outside of the family regulation context. This lack of attention or awareness has created a dearth of data concerning the rate at which LGBTQ+ parents lose custody of their children to the state. Therefore, the argument must be made that LGBTQ+ parents losing children to the state in a disproportionate and discriminatory manner is a real, demonstrable problem in the United States.

In recent years, scholars have begun calling attention to this topic, raising awareness about the particular risks the family regulation system poses to LGBTQ+ parents. However, the consensus is that more research and attention is needed to even “document the existence and circumstances of LGBT parents who experience child welfare proceedings.”<sup>31</sup> As law professor and LGBTQ+ activist Nancy Polikoff writes, “a group must be seen and

27 See ERIN MAYO-ADAM, *LGBTQ Family Law and Policy in the United States*, in OXFORD ENCYC. LGBT POLS. & POL'Y (Jan. 30, 2020), [https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1216;jsessionid=E510FDEACA41BC959C5F0564042DE8D8?fbclid=IwAR3UV A4VDILiZiAFsBx\\_VTG4-xhvA1ADXvw7\\_2uaML5kF6wasQZudHY\\_a0Y](https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1216;jsessionid=E510FDEACA41BC959C5F0564042DE8D8?fbclid=IwAR3UV A4VDILiZiAFsBx_VTG4-xhvA1ADXvw7_2uaML5kF6wasQZudHY_a0Y) [https://perma.cc/2JDL-ZTEA].

28 *Id.*

29 See *infra* Part I.D.

30 See *infra* Part I.E.

31 *Neglected Lesbian Mothers*, *supra* note 21, at 96.

acknowledged before it is likely to be the subject of research, and . . . this group [lesbian mothers] has remained invisible.”<sup>32</sup>

Because discriminatory treatment of LGBTQ+ parents by the family regulation system is an under-studied phenomenon, it is important to first make an empirical, descriptive argument about the disproportionate rate of child removal applied to LGBTQ+ parents. Understanding the history of LGBTQ+ parents in the United States and the discrimination LGBTQ+ parents faced in related contexts, like private custody disputes, is an important piece of this puzzle. History shows a pattern of state discrimination on the basis of LGBTQ+ parental status, which this Note argues has carried over into modern-day family regulation practices.

### A. LGBTQ+ Parents in American History

LGBTQ+ people and parents have always existed, but our collective societal memory has not recognized them or even acknowledged their legitimacy until relatively recently.<sup>33</sup> Historically, prejudiced beliefs about LGBTQ+ people stemmed from a “belief that any deviance from total heterosexuality is either an abomination to God, a manifestation of mental illness, an expression of criminality [sic], or all three.”<sup>34</sup> Thus, LGBTQ+ parents lived in secret, hidden by “a heritage of persecution,”<sup>35</sup> which included punishment and oppression by “employers, police, military, government, family, and friends.”<sup>36</sup> “[T]here was no sense of [LGBTQ+] community as exists today.”<sup>37</sup> Before the legalization of same-sex marriage and the decriminalization and de-stigmatization of living as an “out” LGBTQ+ person, most LGBTQ+ parents raised children in different-sex relationships.<sup>38</sup>

32 *Id.*

33 Marilyn Riley, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975) (discussing the new societal acknowledgement of the existence of lesbian mothers in the 1970s and presenting a comprehensive historical review of the existence and demonization of homosexuality throughout millennia and across many cultures and traditions).

34 *Id.* at 800.

35 *Id.*

36 Phyllis Lyon, *Lesbian Liberation Begins*, GAY & LESBIAN REV. (2012), <https://glreview.org/article/lesbian-liberation-begins/> [https://perma.cc/7QJH-CYSY].

37 *Id.*

38 Joslin & Sakimura, *supra* note 6, at 88.

Persecution of LGBTQ+ parents could include in criminal punishment, societal rejection, and “great personal loss,” such as losing the of custody of one’s children.<sup>39</sup>

The post-World War II period saw an explosion in the policing of homosexuality and family dynamics outside of the heterosexual nuclear family, exacerbated by social beliefs about “same-sex sexuality and desire as antithetical to parenting.”<sup>40</sup> Most LGBTQ+ parents remained “completely underground” during the 1950s and 1960s, living double lives in heterosexual relationships or living with their partner under the guise of being platonic roommates.<sup>41</sup> In addition to facing arrest, physical danger, and other forms of persecution on the basis of their LGBTQ+ status, LGBTQ+ parents who were outed often lost custody of their children.<sup>42</sup> If LGBTQ+ parents wished to keep custody of their children, they essentially had to stay closeted, hiding their sexual orientation or gender identity. Despite these risks, LGBTQ+ parents began forming social movements and organizing politically in the mid-20th century. The Daughters of Bilitis, founded in 1955 in San Francisco, is the first known lesbian social club, and included lesbian mothers among its first eight members.<sup>43</sup>

In the 1970s and 1980s, LGBTQ+ liberation movements—coinciding with feminist movements and civil rights activism—emboldened more LGBTQ+ parents to fight for custody of their children without hiding their LGBTQ+ identity.<sup>44</sup> Many married LGBTQ+ people came out publicly, divorced their spouses, and sought to maintain custody of children from heterosexual relationships.<sup>45</sup> This was not an easy path. Judges often assumed living with a LGBTQ+ parent was not in a child’s best interests.<sup>46</sup> To win custody, judges often

39 Riley, *supra* note 33, at 779–800, 823–24.

40 DANIEL WINUNWE RIVERS, *RADICAL RELATIONS*, 11–12 (Thadious M. Davis & Mary Kelley eds., 2013).

41 *Id.*

42 *Id.* at 21, 25.

43 Lyon, *supra* note 36.

44 See Daniel Winunwe Rivers, *In the Best Interests of the Child: Lesbian and Gay Parenting Custody Cases, 1967–1985*, in *RADICAL RELATIONS* (Thadious M. Davis & Mary Kelley eds., 2013) [hereinafter *Best Interests of the Child*].

45 Lauren Gutterman, *How the Fight for LGBTQ Parental Rights has Backfired in New Custody Battles*, *WASH. POST* (Nov. 7, 2019), <https://www.washingtonpost.com/outlook/2019/11/07/how-fight-lgbt-parental-rights-has-backfired-new-custody-battles/> [https://perma.cc/A6D4-DQBV].

46 See *Best Interests of the Child*, *supra* note 44, at 58–59 (“In state after state, family court judges hid their condemnation of gay and lesbian parents behind the logic of a ‘nexus ruling.’ Judges found reasons, remarkably

required LGBTQ+ parents to sign affidavits agreeing that they would not have a same-sex partner and their children in the home at the same time (in a flagrant judicial denial of their constitutional right of free association).<sup>47</sup> LGBTQ+ parents often felt compelled to enlist psychiatrists as expert witnesses in their custody cases, arguing that their children conformed to traditional heterosexual, cisgender stereotypes and thus were not negatively impacted by their parent’s “lifestyle.”<sup>48</sup> Defense funds, legal organizations, and forums for LGBTQ+ parents emerged around the country, providing legal aid and distributing information to LGBTQ+ parents about how they could protect themselves and their children from discriminatory parental rights termination.<sup>49</sup>

During the late 20th century, LGBTQ+ identity gradually became decriminalized. By 1986, half of the states had eliminated sodomy and other laws criminalizing same-sex relations, either by legislation or by legal challenges to these laws.<sup>50</sup> In 1982, Wisconsin became the first state to outlaw discrimination based on sexual orientation.<sup>51</sup> And in 1996, Hawaii became the first state to recognize the same privileges for LGBTQ+ couples as heterosexual married couples.<sup>52</sup>

Legal recognition of LGBTQ+ people and relationships continued to evolve in the 21st

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similar ones from state to state, to decide that there was a definitive connection, or ‘nexus,’ between a parent’s same-sex sexuality and possible harm to children and that a child’s best interest always lay with having a heterosexual family.”).

47 RIVERS, *supra* note 40, at 63.

48 Gutterman, *supra* note 45. Interestingly, Gutterman points out how these arguments have backfired in 21st century custody battles, wherein homophobic and transphobic parents are using this logic to argue that parents who support their child’s LGBTQ+ identity are not fit parents. Gutterman discusses the case of Anne Georgulas and Jeffrey Younger, whose transgender daughter Luna was at the center of a very public and contentious custody battle. Younger argued that Georgulas was not a fit parent because she recognized their daughter’s transgender identity. Younger even alleged that Georgulas had pressured Luna to “become transgender ‘because being the parent of a trans child is trendy.’” *Id.*

49 See Daniel Winunwe Rivers, *Lesbian Mother Activist Organizations and Gay Fathers Groups*, in *RADICAL RELATIONS* (Thadious M. Davis & Mary Kelley eds., 2013).

50 Jon W. Davidson, *A Brief History of the Path to Securing LGBTQ Rights*, A.B.A. (July 5, 2022) [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/) [https://perma.cc/4BCM-6NNY].

51 CNN Editorial Research, *LGBTQ Rights Milestones Fast Facts*, CNN (Oct. 23, 2022), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html> [https://perma.cc/XRF5-763N].

52 *Id.*

century. The Supreme Court first recognized constitutional protections for LGBTQ+ people in the 1996 case of *Romer v. Evans*. In *Romer*, the Court held that, under the Fourteenth Amendment's Equal Protection Clause, a state cannot amend its constitution to deprive LGB persons of the same fundamental legal protections enjoyed by heterosexual people.<sup>53</sup> In 2003, the Court decriminalized all same-sex sexual conduct in *Lawrence v. Texas*, finding that Texas' ban on same-sex sexual conduct violated the Fourteenth Amendment's Due Process Clause.<sup>54</sup> "Taken together, *Romer* and *Lawrence* made clear that neither the state nor its agents may demean, disadvantage, or stigmatize gay people simply because of their sexual orientation."<sup>55</sup>

In the 2015 case *Obergefell v. Hodges*, the Supreme Court recognized that the right to marry extends to same-sex couples, legalizing same-sex marriage nationwide and requiring all states to issue and recognize same-sex marriage licenses.<sup>56</sup> In *Obergefell*, the Court held that state constitutions that denied same-sex the right to marry violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>57</sup> In 2020, the Supreme Court held in *Bostock v. Clayton County* that discrimination on the basis of SOGI is discrimination on the basis of sex, affirming that Title VII prohibits

53 *Romer v. Evans*, 517 U.S. 620 (1996).

54 *Lawrence v. Texas*, 539 U.S. 558 (2003).

55 Mark Joseph Stern et al., *A Test to Identify and Remedy Anti-Gay Bias in Child Custody Decisions after Obergefell*, 23 UCLA WOMEN'S L.J. 79, 91 (2016).

56 *Obergefell v. Hodges*, 576 U.S. 644 (2015). On its own, *Obergefell* does not guarantee LGBTQ+ parents "legal protection over their children" as it does not answer whether the marriage presumption (wherein a non-birth parent is assumed to be the legal parent of their spouse's child) applies to same-sex couples. MAYO-ADAM, *supra* note 27. This is especially problematic for nonbiological and non-gestational parents. Today, the marriage presumption's applicability to LGBTQ+ couples and the importance of a legal marriage between parents is realized differently in different states. *Id.* But even if the marriage presumption did conclusively apply to LGBTQ+ couples, it does not solve the problem of recognizing LGBTQ+ parentage. As of 2014, the majority of children in "LGB-parent families" were conceived in different-sex relationships. GOLDBERG ET AL., WILLIAMS INST., RESEARCH REPORT ON LGB-PARENT FAMILIES (2014).

57 576 U.S. 644, 681 (2015) ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. . . . [T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.").

employers from discriminating against LGBTQ+ people in making hiring decisions.<sup>58</sup> In 2021, President Biden issued Executive Order 13988, stating that *Bostock's* reasoning applies to all "laws that prohibit sex discrimination . . . so long as the laws do not contain sufficient indications to the contrary," widening the potential application of *Bostock* across federal statutes.<sup>59</sup> Most recently, in December 2022, President Biden signed the Respect for Marriage Act into law.<sup>60</sup> This Act prevents states from refusing to recognize out-of-state marriages based on sex,<sup>61</sup> and acknowledges the validity of any marriage between two consenting individuals at the federal level.<sup>62</sup>

## B. LGBTQ+ Parenthood Today

Today, LGBTQ+ parents in the United States enjoy more de jure legal protections than ever, a marker of hard-won progress achieved over time. As a result, more LGBTQ+ people are openly raising children, living with their partners, and forming family units.

Data highlights the significance of LGBTQ+ families within the fabric of American society. According to the 2020 United States Census, "14.7% of the 1.1 million same-sex couples had at least one child under 18 in their household."<sup>63</sup> According to a 2019 study, 29% of LGBT people reported that they were raising children.<sup>64</sup> "Between 2 million and 3.7 million children under age 18 have an LGBTQ parent," and "approximately 191,000 children are being raised by two same-sex parents."<sup>65</sup>

58 *Bostock v. Clayton Cty.*, 140 U.S. 1731 (2020).

59 Exec. Order No. 13988, 86 C.F.R. § 7023 (2021).

60 But note that the Respect for Marriage Act does not require states to issue same-sex marriage licenses, if *Obergefell* were to be overturned. See James Esseks, *Here's What You Need to Know About the Respect for Marriage Act*, ACLU (July 21, 2022), <https://www.aclu.org/news/lgbtq-rights/what-you-need-to-know-about-the-respect-for-marriage-act> [<https://perma.cc/M7EY-EK2J>].

61 28 U.S.C. § 1738C (requiring full faith and credit be given to out-of-state same-sex marriages).

62 1 U.S.C. § 7 (defining "marriage" for Federal purposes).

63 Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html> [<https://perma.cc/RP95-M2WE>]. In comparison, 37.8% of opposite-sex couples have at least one child under 18 in their household. *Id.*

64 LGBT Demographic Data Interactive, WILLIAMS INST. (2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic> [<https://perma.cc/3FEL-YHP9>].

65 *LGBTQ+ Family Fact Sheet*, FAM. EQUAL. COUNCIL 1 (2020), <https://www.familyequality.org/wp-content/>

Data also highlights the number of LGBTQ+ families that do not fit the traditional nuclear family model, in which a heterosexual, cisgender couple is married and has biological children.<sup>66</sup> Beyond differences in SOGI, many LGBTQ+ parents do not have a presumed legal relationship or a biological tie to their child. This is because many LGBTQ+ parents are raising children in blended families, in nonmarital partnerships, or as single parents.<sup>67</sup> “Most children today who are being raised by a same-sex couple were conceived in a different-sex relationship.”<sup>68</sup> Census data also shows that “same-sex couples are four times more likely than opposite-sex couples to have adopted children or stepchildren.”<sup>69</sup> In 2019, 63% of LGBTQ+ couples reported that they expect to use assisted reproductive technology (ART), foster care (adopting from foster care), or other forms of adoption to become parents.<sup>70</sup> Moreover, as of 2021, 41% of all LGBTQ+ couples that live together are unmarried.<sup>71</sup> The number of unmarried LGBTQ+ couples—combined with the number of LGBTQ+ couples that plan to use ART, to foster, or to adopt in the future—suggest that LGBTQ+ parents will continue to have a complicated relationship with legal parenthood.

The prevalence of non-nuclear families among LGBTQ+ people is important, as the family regulation system often assumes a nuclear family and places a premium on marriage in assessments of parental rights. Parents in non-nuclear families, especially if they are

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uploads/2021/01/LGBTQ-Families-2020-Sheet-Final-clean-version.pdf [https://perma.cc/4KZV-XU2N]. The discrepancy between these two statistics is likely because (1) not all LGBTQ+ couples live together, (2) some LGBTQ+ parents are single parents, and (3) some LGBTQ+ parents are not in same-sex relationships, such as a bisexual man in a relationship with a straight woman, or a transgender woman in a relationship with a cisgender man, and thus do not fit this Census category.

66 See Shoshana K. Goldberg and Kerith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children?*, WILLIAMS INST. (Jul. 2018) (comparing marital status, child raising, and type of parent-child relationship—biological, adopted, foster, or step-parent/child—among same-sex and opposite-sex couples).

67 See *LGBTQ+ Family Fact Sheet*, *supra* note 65, at 1.

68 *Id.* at 1 (“The legal and social climate for LGBTQ+ people has a direct impact on how LGBTQ+ people form families and become parents. Historically, in the face of an anti-LGBTQ+ legal and social climate, LGBTQ+ people have tended to come out later in life, oftentimes after having a different-sex relationship.”).

69 Taylor, *supra* note 63.

70 *LGBTQ+ Family Fact Sheet*, *supra* note 65, at 1–2.

71 Zachary Scherer, *Key Demographic and Economic Characteristics of Same-Sex and Opposite-Sex Couples Differed*, U.S. CENSUS BUREAU (Nov. 22, 2022) <https://www.census.gov/library/stories/2022/11/same-sex-couple-households-exceeded-one-million.html> [https://perma.cc/84LN-JYV5] (reporting that, of the 1.2 million same-sex couple households in the United States, 710,000 couples were married and 500,000 were unmarried).

not biologically related to the child and/or are in a nonmarital partnership, can have their parental status effectively denied by the courts because they lack a legal relationship to the child.<sup>72</sup>

Despite important representations of LGBTQ+ parents in the United States as a whole, these statistics, of course, do not speak to the specific context of parents involved in the family regulation system.

### C. LGBTQ+ Parental Fitness

Extensive research has shown that LGBTQ+ parents are just as capable parents as heterosexual parents. Homophobic stereotypes about LGBTQ+ people have perpetuated myths that they are not good parents, including “concerns that lesbians and gay men are mentally ill, that lesbians are less maternal than heterosexual women, and that lesbians’ and gay men’s relationships with their sexual partners leave little time for their relationships with their children.”<sup>73</sup> However, these stereotypes have unequivocally been debunked. According to the American Psychological Association, “there is no scientific evidence that parenting ineffectiveness is related to parental sexual orientation or gender identity: sexual and gender minority parents are as likely as cisgender heterosexual parents to provide supportive and healthy environments for their children.”<sup>74</sup>

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72 Scholars have long called for the law to broaden the legal conception of families and parents, usually in the private custody context. *See, e.g.*, KATIE L. ACOSTA, *QUEER STEPFAMILIES: THE PATH TO SOCIAL AND LEGAL RECOGNITION* (2021) (presenting distinct obstacles LGBTQ+ parents face in divorce proceedings and custody cases, and underscoring the distrust that LGBTQ+ parents have towards the courts’ willingness to act in their child’s best interests); Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making*, 31:1 L. & SOC. INQUIRY 1 (2006) (promoting a children’s rights-based argument to expand legal recognition of non-traditional parents in custody disputes); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70:5 VA. L. REV. 879, 882 (1984) (“challeng[ing] the law’s adherence to the exclusive view of parenthood” and calling for the law to recognize parent-child relationships outside of the nuclear family model).

73 Official Resolution, *Resolution on Sexual Orientation, Parents, and Children*, OHIO PSYCH. ASS’N 1 (2004), [https://cdn.ymaws.com/ohpsych.org/resource/collection/42246448-2A49-4E73-8F83-4651867051C7/Sexual\\_Orientation\\_Parents\\_and\\_Children.pdf](https://cdn.ymaws.com/ohpsych.org/resource/collection/42246448-2A49-4E73-8F83-4651867051C7/Sexual_Orientation_Parents_and_Children.pdf) [https://perma.cc/Y8F3-ZNFY].

74 Official Resolution, *Resolution on Sexual Orientation, Gender Identity (SOGI), Parents and their Children*, AM. PSYCH. ASS’N 1, 4 (2020), <https://www.apa.org/about/policy/resolution-sexual-orientation-parents-children.pdf> [https://perma.cc/UH6H-Z6XR] [hereinafter APA SOGI Resolution]. *See also* Charlotte J. Patterson, *Lesbian and Gay Parents and Their Children: Summary of Research Findings*, in *LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS* 5–15 (2005); Jorge C. Armesto, *Developmental and Contextual Factors that Influence Gay Fathers’ Parental Competence: A Review of the Literature*, 3 PSYCH. MEN & MASCULINITY 67 (2002); Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE



In recent years, there has been a sharp uptick in anti-LGBTQ+ legislation and administrative action, accompanied by a rise in anti-LGBTQ+ protests and sentiment.<sup>75</sup> In June 2022, the Texas Republican Party declared in its platform that “homosexuality is an abnormal lifestyle choice,” stated “there should be no granting of special legal entitlements or creation of special status for homosexual behavior,” and opposed “all efforts to validate transgender identity.”<sup>76</sup> In 2023, a record 510 anti-LGBTQ+ bills were introduced in state legislatures.<sup>77</sup> This is nearly three times as many anti-LGBTQ+ bills as were introduced 2022.<sup>78</sup> These bills attack a wide range of LGBTQ+ rights in the United States, including proposed limitations on gender-affirming medical care, transgender individuals’ participation in sports teams, and criminalization of drag performances on public property or in front of minors.<sup>79</sup>

Many recent anti-LGBTQ+ bills and other anti-LGBTQ+ state actions implicate parents, children, and family life. In February 2022, Texas Governor Greg Abbott instructed the Department of Family and Protective Services to investigate parents and doctors who provide gender-affirming care to transgender youth, misconstruing such health care as child abuse.<sup>80</sup> Advocates worry that this attempt to label gender-affirming care as child

& FAM. 1052 (2000); FIONA L. TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY* (1997).

75 Jo Yurcaba, *With Over 100 Anti-LGBTQ Bills Before State Legislatures in 2023 So Far, Activists Say They’re ‘Fired Up,’* NBC NEWS (Jan. 14, 2023), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/100-anti-lgbtq-bills-state-legislatures-2023-far-activists-say-fired-rcna65349> [https://perma.cc/6PZN-EBCP].

76 TEX. REPUBLICAN PARTY, *REPORT OF THE PERMANENT 2022 PLATFORM & RESOLUTIONS COMMITTEE 21* (2022), <https://texasgop.org/wp-content/uploads/2022/06/6-Permanent-Platform-Committee-FINAL-REPORT-6-16-2022.pdf> [https://perma.cc/6W2E-DEE4].

77 Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN (Jan. 22, 2024), <https://www.cnn.com/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html> [https://perma.cc/T4T8-QQRM].

78 *Id.*

79 Yurcaba, *supra* note 75.

80 Tex. Dep’t Fam. & Protective Servs., *Opinion Letter* (Feb. 18, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [https://perma.cc/53AV-4L3P]. While the Texas Supreme Court ruled in May that Abbott and Texas Attorney General Ken Paxton can “air their views,” they also ruled that Texas DFPS is not legally required to follow them. Even so, this ruling “has cleared the way” for DFPS to investigate parents and doctors for providing gender-affirming care to transgender minors. *See also* Bill Chappell, *Texas Supreme Court Oks State Child Abuse Inquiries into the Families of Trans Kids*, NPR (May 13, 2022), <https://www.npr.org/2022/05/13/1098779201/texas-supreme-court-transgender-gender-affirming-child-abuse> [https://perma.cc/43RA-VF3E]. Texas DFPS had already investigated parents for using gender-affirming therapy prior to Abbott’s February 2022 directive; *see* Katelyn Burns, *What the Battle Over a*

abuse could be exploited in divorce and custody proceedings, further stigmatizing and criminalizing LGBTQ+ individuals and allies.<sup>81</sup> This increased policing of LGBTQ+-affirming families has concerning implications for LGBTQ+ parents who come into contact with the family regulation system.

#### D. The Myth of Affluence

The myth of LGBTQ+ affluence is another factor contributing to the lack of attention paid to and data collected on LGBTQ+ parents’ loss of children to the family regulation system. The myth of affluence is the misconception that most LGBTQ+ parents are affluent, male, and white, and that they create families solely through adoption or surrogacy.<sup>82</sup>

The myth of affluence was fueled in part by the litigation strategy surrounding the fight for marriage equality, in which advocates arguably overcorrected for concerns over LGBTQ+ parenting by “portraying same-sex couples raising children as practically perfect . . . . The desirability of same-sex couples raising children was most championed in the context of their willingness to adopt children in state care.”<sup>83</sup> Indeed, the plaintiffs involved in marriage equality litigation “were disproportionately white, male, and raising adoptive children.”<sup>84</sup> This set up a “direct juxtaposition” between the families involved in marriage equality litigation and “the families of children in the foster care system.”<sup>85</sup> This focus on LGBTQ+ parents’ interaction with the system post-removal omits LGBTQ+ parents who interact with the system on the other end—those whose children the family regulation

*7-year-old Trans Girl Could Mean for Families Nationwide*, VOX (Nov. 11, 2019), <https://www.vox.com/identities/2019/11/11/20955059/luna-younger-transgender-child-custody> [https://perma.cc/LPK3-7MGQ].

81 Sneha Dey & Karen Brooks Harper, *Transgender Texas Kids are Terrified After Governor Orders That Parents be Investigated for Child Abuse*, TEX. TRIBUNE (Feb. 28, 2022), <https://www.texastribune.org/2022/02/28/texas-transgender-child-abuse/> [https://perma.cc/UEW3-K458].

82 As an illustration, in *Romer v. Evans*, Justice Scalia wrote an infamous dissent with explicit statements fueling the myth of LGBTQ+ affluence, and even going as far as to say that gay people are part of a powerful political coalition, compelling everyone else to accept homosexuality. He wrote, “Those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . have high disposable income . . . they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.” *Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting).

83 *Neglected Lesbian Mothers*, *supra* note 21, at 99.

84 *Id.*

85 *Id.*



system takes away and those who are more likely to be marginalized in terms of race and class.

To be clear, scholars like Polikoff who criticize LGBTQ+ advocates who “turn a blind eye” to LGBTQ+ parents facing child removal do not believe that advocating for those LGBTQ+ parents and advocating for LGBTQ+ adults to seeking to foster or adopt are mutually exclusive.<sup>86</sup> To the contrary, Polikoff repeatedly states that these interests are not at odds but simply that the demographics of the two groups of parents are very different.<sup>87</sup> Moreover, one group is the face of the movement for LGBTQ+ parents’ rights while the other remains largely invisible.

While existing studies are limited,<sup>88</sup> data shows that LGBTQ+ people are more likely to live in poverty,<sup>89</sup> are more likely to be people of color,<sup>90</sup> and are more likely to experience other risk factors associated with state intervention, such as homelessness.<sup>91</sup> As such, dispelling the myth of LGBTQ+ affluence and adopting an intersectional approach

86 *Id.* at 102.

87 *Id.*

88 *See generally* Joslin & Sakimura, *supra* note 6, at 84–87 (presenting a comprehensive overview of available LGBTQ+ parent family demographics and explaining the limitations of existing data).

89 *See, e.g.*, BIANCA D.M. WILSON ET AL., WILLIAMS INST., PATHWAYS INTO POVERTY: LIVED EXPERIENCES AMONG LGBTQ PEOPLE 1 (2020) (“More than a decade of empirical research has shown that LGBT people in the United States experience poverty at higher rates compared to cisgender heterosexual people.”) [hereinafter, PATHWAYS INTO POVERTY]; NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 3 (2016) [hereinafter 2015 U.S. TRANSGENDER SURVEY] (“The findings show large economic disparities between transgender people in the survey and the U.S. population. Nearly one-third (29%) of respondents were living in poverty, compared to 12% in the U.S. population”). *See also* Catherine P. Sakimura, *Beyond the Myth of Affluence: The Intersection of LGBTQ Family Law and Poverty*, 33 J. AM. ACAD. MATRIM. L. 137 (presenting intersections of race and class among LGBTQ+ parents and analyzing the family law and child welfare issues faced by low-income LGBTQ+ parents).

90 *Compare LGBT Demographic Data Interactive*, WILLIAMS INST. (2019) (reporting that 52.3% of LGBT people identify as white, and thus 47.7% of LGBT people identify as non-white), with *United States Census QuickFacts*, U.S. CENSUS BUREAU (July 1, 2023) (reporting that 58.9% of the general population identifies as white, and thus 41.1% of the general population identifies as non-white). *See also* Joslin & Sakimura, *supra* note 6, at 86 (“LGBTQ people . . . are also more likely to be people of color, as compared to cisgender straight men and women”).

91 *See, e.g.*, ADAM P. ROMERO ET AL., WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 3 (2020) (“Compared to non-LGBT people, LGBT people appear more likely to face housing unaffordability, are less likely to own their homes and are more likely to be renters, and are more likely to be homeless.”).

can not only help demonstrate that LGBTQ+ parents are losing their children to the state at an alarming rate, but can also help explain why. The existing scholarship on the family regulation system’s over-policing of low-income communities of color can also speak to the circumstances of many LGBTQ+ parents facing state intervention.

### E. Debunking the Myth

While the dominant narrative around LGBTQ+ parents is of rich, white, male parents, this is an inaccurate picture of LGBTQ+ parenthood. These images are a double-edged sword; they “have helped combat discrimination against LGBTQ adoptive parents and achieve marriage equality, but they have also erased the real experiences of the majority of LGBTQ families.”<sup>92</sup>

The data is limited, but the evidence shows that LGBTQ+ people are significantly more likely to live in poverty than straight people.<sup>93</sup> Out of all LGBTQ+ people, transgender people and bisexual women have the highest likelihood of living in poverty.<sup>94</sup> Moreover, “there is research showing that LGBT individuals, many of them parents, disproportionately experience many risk factors that correlate with facing child welfare investigations, such as homelessness and housing instability, food insecurity, substance abuse, incarceration, a history of physical or sexual abuse, and having been a foster child oneself.”<sup>95</sup>

92 Sakimura, *supra* note 89, at 137.

93 *See* sources cited *supra* note 89.

94 M. V. LEE BADGETT ET AL., WILLIAMS INST. LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 10–11 (2019) (“[C]isgender bisexual women and transgender people have the highest rates of poverty in both rural and urban areas . . . Their rates are higher than those of cisgender straight women and men in both urban and rural areas”).

95 Polikoff, *Fulton v. City of Philadelphia*, *supra* note 16. *See* ROMERO ET AL., *supra* note 91 (presenting data on LGBT individuals and housing affordability, discrimination, and homelessness); KERITH J. CONRON ET AL., WILLIAMS INST., FOOD INSUFFICIENCY AMONG LGBT ADULTS DURING THE COVID-19 PANDEMIC 2 (2022) (“Food insufficiency was more common among transgender adults (19.9%), cisgender bisexual women (12.7%) and men (14.2%), and cisgender lesbian women (12.4%) relative to cisgender straight women (8.1%) and men (7.5%).”); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., LESBIAN, GAY, AND BISEXUAL BEHAVIORAL HEALTH: RESULTS FROM THE 2021 AND 2022 NATIONAL SURVEYS ON DRUG USE (2023) (signifying that lesbian, gay, and bisexual adults are more likely than straight adults to have a substance use disorder and experience mental health issues, including major depressive episodes and serious thoughts of suicide); Jane Hereth, *Overrepresentation of People Who Identify as LGBTQ+ in the Criminal Legal System*, SAFETY & JUSTICE CHALLENGE (presenting a comprehensive overview of the overrepresentation of LGBTQ+ people in criminal legal systems, as well as pathways and pipelines into the criminal legal system for LGBTQ+ people); Nathaniel M. Tran et al., *Adverse Childhood Experiences and Mental Distress Among US Adults by*

LGBTQ+ people are more likely to be people of color,<sup>96</sup> and LGBTQ+ people of color are more likely to live in poverty than LGBTQ+ white people.<sup>97</sup> 31.6% of same-sex couples are interracial, as compared to 18.4% of opposite-sex couples.<sup>98</sup> Systemic discrimination and structural racism have resulted in people of color having a higher likelihood to live in poverty. The intersection between race and poverty means that Black women are more likely to lack health insurance and thus seek care from public clinics and hospitals, which are supervised by the government and staffed by mandatory reporters.<sup>99</sup> Black women are more likely to be reported to the family regulation system than white women, even when there is not a disparity in the factors leading to that reporting.<sup>100</sup> For example, a 1990 Florida study found that, even though the prevalence of a positive drug screen was the same for pregnant Black and pregnant white women (14.8%) and the same at private and public prenatal clinics, Black women were ten times more likely to be reported than white women.<sup>101</sup> Black women are more likely to lose custody of their children as compared to other women and less likely to achieve reunification.<sup>102</sup>

A robust body of research exists on longstanding racial biases in the family regulation system, over-policing of Black communities, and state tendencies to hold poor Black

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*Sexual Orientation*, 79 JAMA PSYCH. 377 (2022) (finding that LGBTQ+ adults had a higher probability of eight different adverse childhood experiences as compared to heterosexual adults; disparities between LGBTQ+ adults and heterosexual adults were greatest for sexual abuse); Fish et al., *supra* note 18 (finding that, as compared to heterosexual youth, LGBTQ+ youth are 2.5 times as likely to experience foster care placement, and are largely overrepresented in both child welfare services and out-of-home placement).

96 See sources cited *supra* note 90.

97 *Id.* See also BIANCA D.M. WILSON ET AL., WILLIAMS INST., RACIAL DIFFERENCES AMONG LGBT ADULTS IN THE US (2022) (examining differences in health and socioeconomic wellbeing among adult, white LGBT people versus adult LGBT people of color).

98 Scherer, *supra* note 71.

99 Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 SOC. POL. 258, 260 (2020).

100 *Id.* See also Dinah Ortiz, *We Need More Focus on How the Drug War Attacks Parents of Color*, Filter (Mar. 28, 2019), <https://filtermag.org/we-need-more-focus-on-how-the-drug-war-attacks-parents-of-color/> [<https://perma.cc/XZJ7-HC3H>] (“It leaves me with no doubt as to why family courts are filled with low-income black and brown families. It’s because *these* are the families who are surrounded by mandated reporters at every turn.”).

101 Carla-Michelle Adams, *Criminalization in Shades of Color: Prosecuting Pregnant Drug-Addicted Women*, 20 CARDOZO J.L. & GENDER 89, 103–04 (2013).

102 Harp & Bunting, *supra* note 99, at 265–68.

parents to an upper-middle class white standard.<sup>103</sup> In 2001, sociologist and law professor Dorothy Roberts wrote in her book *Shattered Bonds*, “[i]f you came with no preconceptions about the purpose of the child welfare system you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families.”<sup>104</sup> Demographic data strongly suggest that this research on the family regulation system’s biases and failures might be more relevant to LGBTQ+ parents than the myth of affluence belies.

Statistics about LGBTQ+ people in general also hold true in statistics about LGBTQ+ parents specifically. LGBTQ+ parents are more than three-fourths likely to be female.<sup>105</sup> Studies also show that “about 1 out of every 3 individuals in same-sex couples raising children are people of color,” and same-sex couples of color are more likely to be raising children compared to same-sex white couples.<sup>106</sup>

Paying attention to the particular systemic hurdles and lack of protections that LGBTQ+ parents encounter is vital. As legal advocate Catherine Sakimura says of low-income LGBTQ+ families, “[t]he needs of these families differ in important ways from the needs of more affluent LGBTQ families as well as from those of low-income families in general.”<sup>107</sup> Beyond dispelling myths about LGBTQ+ parenthood, this data informs the intersectional approach that advocates and researchers should take in understanding

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103 See, e.g., SHATTERED BONDS, *supra* note 19, at 59 (discussing caseworkers’ tendency to assess cases against the archetype of a white, upper- or middle-class nuclear family); Dettlaff et al., *Disentangling Substantiation*, *supra* note 19, at 1635 (finding that caseworkers have a higher risk threshold for removing children from white families than from Black families); Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. OF PUB. HEALTH 274, 274 (2017) (finding that 53% of Black children will experience a child protective services investigation by age eighteen, as compared to 37.4% of all children); ELISA MINOFF & ALEXANDRA CITRIN, CTR. FOR STUDY OF SOC. POL’Y, SYSTEMICALLY NEGLECTED: HOW RACISM STRUCTURES PUBLIC SYSTEMS TO PRODUCE CHILD NEGLECT 13–15 (2022) (examining the ways in which the family regulation system “surveils and threatens families of color”).

104 SHATTERED BONDS, *supra* note 19, at 6.

105 GARY GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSIS OF THE 2013 AMERICAN COMMUNITY SURVEY 2 (2015) (finding that 77% of same-sex couples raising children were female); Taylor, *supra* note 63 (“In 2019, 22.5% of female same-sex couple households had children under 18 present, compared with 6.6% of male same-sex couple households.”).

106 ANGELIKI KASTANIS & BIANCA D.M. WILSON, WILLIAMS INST., RACE/ETHNICITY, GENDER AND SOCIOECONOMIC WELLBEING OF INDIVIDUALS IN SAME-SEX COUPLES 1 (2014). See also APA SOGI Resolution, *supra* note 74, at 4 (“current demographic evidence suggests that a majority of sexual and gender minority parents are likely to be people of color”) (internal citations omitted).

107 Sakimura, *supra* note 89, at 137.

the legal challenges LGBTQ+ parents face, assessing why LGBTQ+ parents experience disproportionately high intervention from the family regulation system, and reimagining an equitable system of child welfare.

### F. Inequity in Access to Resources

An intersectional understanding of LGBTQ+ parenthood informs analyses of further inequities for LGBTQ+ parents—namely, the formal legal steps often required to ensure that their parentage is recognized by the law. Generally, a parent is recognized as a legal parent if they are a biological or adoptive parent, or if the state otherwise recognizes them as a legal parent, such as through a parental judgment or a legal presumption of parenthood.<sup>108</sup> Every state recognizes biological parents and adoptive parents as legal parents.<sup>109</sup> While some states have modernized parentage law to reflect the realities of modern, non-nuclear families, others have not done so or are even resistant to such change.<sup>110</sup> Non-nuclear family units have thus raised new areas of uncertainty in family law, especially in states that have not modernized their laws.

The lack of adequate legal parental protections makes it difficult for LGBTQ+ parents to assert parentage rights. This makes it necessary, or at least legally advisable, for LGBTQ+ parents to go to great lengths to secure their legal relationship to their children.<sup>111</sup> A 2020 *New York Times* article called “Legal Basics for L.G.B.T.Q. Parents” states that “parenthood for L.G.B.T.Q. people doesn’t come cheap” and recommends consulting “an experienced family lawyer” to help with “legal workarounds” for state laws with limited protections for LGBTQ+ parents.<sup>112</sup> The fact that LGBTQ+ parents are more likely to live in poverty<sup>113</sup> highlights how unrealistic and inequitable it is to expect LGBTQ+ parents to access or afford these kinds of services. Yet these legal workarounds are vital to protect

108 See Douglas NeJaime, *Who Is a Parent?*, A.B.A. (May 10, 2021), [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2021/spring/who-a-parent/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2021/spring/who-a-parent/) [https://perma.cc/QY6F-MWQV].

109 *Id.*

110 *Id.*

111 See David Dodge, *Legal Basics for L.G.B.T.Q. Parents*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/article/legal-basics-for-lgbtq-parents.html> [https://perma.cc/8UGC-8STR].

112 *Id.*

113 See Joslin & Sakimura, *supra* note 6, at 84–87; PATHWAYS INTO POVERTY, *supra* note 89; 2015 U.S. TRANSGENDER SURVEY, *supra* note 89.

parentage rights if LGBTQ+ parents experience family regulation investigation or if a private custody battle ensues.

In many states, a person who is not a legal parent cannot make legal decisions for the child, even if they live with the child and act as the child’s parent.<sup>114</sup> This means a non-legal parent might not be allowed to consent to the child’s medical care, the child might not be allowed to inherit from the non-legal parent in the absence of a will, and the non-legal parent could have no custody or visitation rights if something happens to the legal parent.<sup>115</sup> If a legally married couple has a child, they are automatically assumed to both be legal parents; this presumption applies to same-sex parents, but most states have not explicitly affirmed their application of this presumption via legislation.<sup>116</sup>

Legal parentage is important. Without legal recognition, LGBTQ+ parents’ claim to parentage is at the mercy of judges and social workers. Even if a LGBTQ+ parent is listed on their child’s birth certificate, courts can use the absence of biological or adoptive ties to decline a judgment of legal parentage.<sup>117</sup> In light of American jurisprudence on LGBTQ+ parenting and the “best-interests” of the child,<sup>118</sup> and in combination with the recent rise

114 See NAT’L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES 1 (2019), [https://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf) [https://perma.cc/4VYE-JCNA].

115 *Id.*

116 *Id.* Despite this presumptive application of parentage rights to same-sex married parents, same-sex parents (both married and unmarried) still encounter numerous hurdles to establishing their parentage, especially when one parent is not biologically related to the child. See, e.g., Matt Lavietes, *A Lesbian Lost Her Son to His Sperm Donor. Should Other Gay Parents be Concerned?*, NBC NEWS (Feb. 17, 2023), <https://www.nbcnews.com/nbc-out/out-news/lesbian-lost-son-sperm-donor-gay-parents-concerned-rcna71199> [https://perma.cc/FMN4-HQA8] (describing a recent case in which a married lesbian couple had a child via a sperm donor, the couple later split up, and an Oklahoma judge declined to recognize the non-biological mother’s parentage rights, arguing that the parentage presumption does not apply because Oklahoma’s parentage law predates the state’s legalization of same-sex marriage); Frank J. Bewkes, *Unequal Application of the Marital Presumption of Parentage for Same-Sex Parents*, CTR. FOR AM. PROGRESS (Nov. 25, 2019), <https://www.americanprogress.org/article/unequal-application-marital-presumption-parentage-sex-parents/> [https://perma.cc/66RW-AEUQ] (discussing unequal application of parentage in cases of surrogacy or when children of same-sex couples are born abroad).

117 See *id.* at 4.

118 See Mayo-Adam, *supra* note 27, at 4 (“Denying custody and visitation because of a parent’s LGBTQ status under the ‘best interests of the child’ standard has become more uncommon for biological parents over time, with many courts overturning precedents such as those set in the *Bottoms* and *Daly* cases (at least in urban and liberal areas of the country). However, the discretion granted to judges under the ‘best interests of the child’



in surveillance of LGBTQ+-affirming families,<sup>119</sup> the consequences could indeed be dire. Second parent adoption and stepparent adoption, wherein a non-biological parent formally adopts the child in order to secure their legal relationship, are common routes for LGBTQ+ parents. But access to these legal protections vary state to state, as their effectiveness often depends on states' willingness to properly apply precedent involving cisgender, heterosexual parents to LGBTQ+ parents.<sup>120</sup>

Affluent LGBTQ+ couples might have access to legal procedures like second parent adoptions or guardianship agreements, and estate planning measures like wills, medical authorizations, and advanced directives to protect themselves from discrimination on the basis of being a LGBTQ+ parent. However, preemptively incurring costly legal fees in an attempt to secure recognition of parenthood by the state is a luxury that many LGBTQ+ parents likely cannot afford.

## II. State Treatment of LGBTQ+ Parents: Lessons from the Private Custody and Foster/Adoption Context

A growing number of states have explicit protections for stepparents/second parents, foster care parents, prospective adoptive parents, and youth in the family regulation system against SOGI discrimination.<sup>121</sup> Similar explicit protections for LGBTQ+ parents in private custody are emerging in some progressive states.<sup>122</sup> Such protections prevent judges from explicitly finding that a parent's sexual orientation or gender identity is not in the child's

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standard continues to enable judges to consider LGBTQ status when making custody and visitation decisions. Nonbiological parentage for LGBTQ people is especially precarious because, in addition to prejudices surrounding LGBTQ status, judges can falsely presume that biological parentage better suits the 'best interests of the child' rather than nonbiological parentage."); see also Damon Rittenhouse, *What's Orientation Got to Do With It?: The Best Interest of the Child Standard and Legal Bias Against Gay and Lesbian Parents*, 15 J. POVERTY 309–29 (analyzing judicial bias that lesbian and gay parents face in litigating custody cases).

119 See, e.g., sources cited *supra* notes 80–81 and accompanying text.

120 See sources cited *supra* notes 116, 118.

121 See generally MOVEMENT ADVANCEMENT PROJECT, RELATIONSHIP & PARENTAL RECOGNITION: ADOPTION NONDISCRIMINATION (2023), <https://www.lgbtmap.org/img/maps/citations-adoption-joint.pdf> [https://perma.cc/4VSE-7Y3K] (presenting a state-by-state overview of laws and policies that either enable or prevent discrimination against LGBTQ+ individuals by state-licensed child welfare organizations).

122 See sources cited *infra* notes 244–47 and accompanying text (describing California and New York's explicit statutory protections for LGBTQ+ parents in private custody cases).

best interests.<sup>123</sup> However, no such explicit protections exist to prevent judges in the family regulation system from (explicitly or implicitly) finding that LGBTQ+ parenthood constitutes neglect or abuse to a child.<sup>124</sup>

While *Obergefell* does justify protecting same-sex marriage by invoking the rights of children in LGBTQ+ households, the Court did not specifically address LGBTQ+ legal parental rights.<sup>125</sup> As such, in states without additional protections for LGBTQ+ people and LGBTQ+ parents in particular, the courts can be reluctant to—or refuse to—apply cisgender, heterosexual family law precedent to LGBTQ+ families.<sup>126</sup> Also, *Obergefell* does not afford equal dignity to those in nonmarital partnerships.<sup>127</sup> Moreover, modern parent doctrines are incredibly complicated and vary by state, even without the added layer of differing LGBTQ+ parenthood treatment.<sup>128</sup>

Part II examines the status of LGBTQ+ parents in the private custody and foster/adoption contexts to inform the conversation on LGBTQ+ parents and their interactions with the state via the family regulation system. Evidence from these contexts helps make up for the lack of data concerning LGBTQ+ parents and child removal by the state. Private custody cases show LGBTQ+ parents attempting to assert their parental rights and the discrimination they faced from ex-spouses, family members, and courts. Case law on LGBTQ+ people in the adoption and foster parent context shows the extent to which the interrelation of religious freedom doctrines and LGBTQ+ rights impact the LGBTQ+ parents who are at risk of losing their children to the state. The interrelatedness of religious freedom and LGBTQ+ rights, compounded by wider issues of anti-LGBTQ+ discrimination in the United States, speaks to the heightened stakes of this descriptive argument about the existence of a problem concerning LGBTQ+ parents and child removal by the state.

123 See *infra* III.C (describing, in part, existing state-level statutory protections and services).

124 This is not to say that general nondiscrimination principles might not apply, but that there are not explicit protections that prevent misinformation about LGBTQ+ status being weaponized against parents. See sources cited *infra* notes 125–28.

125 See Alison Gash & Judith Raiskin, *Parenting without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood*, 43 L. & SOC. INQUIRY 82, 83 (2018).

126 *Id.*

127 See Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 635 (2018) (“Elevating marriage as an ideal family degrades people who live in and value other types of families.”).

128 See Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023) (discussing functional parent doctrines across the United States, their sources of authority, and when, how, and to whom courts apply them).

### A. Private Custody

For most of American judicial history, a parent's LGBTQ+ status alone was sufficient reason for a judge to deny them custody of, or visitation rights with, their children.<sup>129</sup> Legal records and anecdotal evidence tell stories of LGBTQ+ parents who lost their children as a result of convictions under statutes criminalizing homosexuality, or because their SOGI was weaponized against them during custody proceedings.<sup>130</sup> This sub-section focuses on the discrimination faced by LGBTQ+ parents in the private custody context, which informs the discrimination faced by LGBTQ+ parents in the family regulation system.

LGBTQ+ parents have long been subject to de jure and de facto discrimination by judges, legislators, social workers, family members, and society at large.<sup>131</sup> Many LGBTQ+ parents came out in the wake of the liberation movements of the 1970s and 1980s.<sup>132</sup> During that time, judges did not shy away from overt discrimination against these LGBTQ+ parents.<sup>133</sup> In the 1980s, some states began to require evidence that a parent's homosexuality adversely impacted their children's welfare in order to deny parental rights

129 See Davidson, *supra* note 50 (“When same-sex couples with children separated, the non-biological parent historically could be cut off from the children they had helped raise, with no recourse. In response, de facto parentage, in loco parentis, and parenthood by equitable estoppel doctrines were invoked to preserve the parental bonds children had formed with those who had acted as a parent to them with their biological parent's consent. Acceptance of these doctrines took time, however. For example, New York did not grant standing to a non-biological, non-adoptive parent to even seek custody until 2016.”).

130 Daniel Winunwe Rivers speaks on the impact of these cases, as well as the inability to truly know the scope of discrimination against LGBTQ+ parents in private custody cases, in his book *Radical Relations*. He writes, “[t]hose custody cases involving lesbian and gay parents that are traceable represent only the tip of the iceberg. Due to child privacy concerns and a desire to have the latitude of judges unfettered by publicity, decisions largely went unpublished. Only when a decision was appealed did it become public. Appellate decisions, therefore, make up the majority of the historical record. Thus, with a few exceptions, we know little of lesbians and gay men who lost custody of their children outright and never appealed the original decision. In addition, the public record does not include the many custody cases that were settled out of court. The cases that did become known, however, often received a great deal of attention in both the mainstream and grassroots gay and lesbian community media, which meant that legal prejudice against lesbian and gay parents, as well as its gradual lessening, had a social impact far beyond the courtroom.” RIVERS, *supra* note 40, at 55.

131 See Riley, *supra* note 33 (presenting a comprehensive review of discrimination against LGBTQ+ parents, with a focus on lesbian mothers); Lyon, *supra* note 36 (describing widespread societal discrimination against LGBTQ+ parents, noting that lesbian mothers were denied custody or visitation as a consequence of anti-LGBTQ+ discrimination).

132 See sources cited *supra* notes 44–49 and accompanying text.

133 See *Best Interests of the Child*, *supra* note 44.

in the private custody context.<sup>134</sup> Even so, the criteria for child removal or termination of parental rights varied widely by state. In 1994, Paula Brantner of the National Center for Lesbian Rights remarked, “The cases are all over the map . . . In Missouri and Virginia, for example, the rule has been if you are gay, you lose your child. In California, it is pretty well established that sexual orientation is not a basis for taking away custody of a child, except where there is evidence of parental unfitness.”<sup>135</sup> This wide range of state outcomes continues today; one's rights as a LGBTQ+ parent are heavily location-dependent.

A parent's LGBTQ+ status was historically grounds for discrimination in private custody cases. In the 20th century, LGBTQ+ parentage cases primarily involved LGBTQ+ parents fighting for custody of their biological children from previous heterosexual relationships.<sup>136</sup> Parental unfitness based on sexual orientation is a recurring theme in custody disputes. In 1995, Mary Ward, a lesbian, lost custody of her 12-year-old daughter in Florida after her ex-husband petitioned the court, even though he had pled guilty to and served time for the murder of his first wife.<sup>137</sup> The state judge said “he wanted to give the child a chance to live in ‘a nonlesbian world,’” concluding that letting Mary retain custody was not in the best interests of their child.<sup>138</sup>

Also in 1995, Sharon Bottoms Mattes lost custody of her two-year-old son in Virginia state court to her mother, who sued for custody on the grounds that Sharon was an unfit mother because she lived with her same-sex partner.<sup>139</sup> In his ruling, the judge in Sharon's case said, “[t]he child would be living daily under conditions stemming from active lesbianism practiced in the home, may impose a burden upon a child, by reason of the

134 See Davidson, *supra* note 50 (“It was not until the 1980s that states began employing a ‘nexus’ test, requiring evidence of a parent's homosexuality's adverse impact on their child's welfare to be considered.”).

135 David G. Savage, *Lesbian Regains Custody of Son After Legal Battle: Family: Mother Had Been Ruled Unfit Because of Her Relationship with Another Woman. Appeals Court Decision is Hailed by Gay-Rights Advocates*, L.A. TIMES (June 22, 1994), <https://www.latimes.com/archives/la-xpm-1994-06-22-mn-7141-story.html> [<https://perma.cc/U3XM-C75C>].

136 Note that some cases from the 1990s were explicitly overturned in state courts (as in New York) or have had serious doubt cast upon them by *Obergefell* dicta.

137 *Lesbian Who Sought Child Custody Dies*, N.Y. TIMES (Jan. 23, 1997), <https://www.nytimes.com/1997/01/23/us/lesbian-who-sought-child-custody-dies.html> [<https://perma.cc/435X-NX4N>].

138 *Id.*

139 Judy Woodruff, *How ‘Homophobia’ Denied Sharon Bottoms Custody of Her Son in the 1990s*, PBS NEWS HOUR (Feb. 20, 2019), <https://www.pbs.org/newshour/show/how-homophobia-denied-sharon-bottoms-custody-of-her-son-in-the-1990s> [<https://perma.cc/CNE9-8NTM>].

social condemnation attached to an arrangement.”<sup>140</sup> The criminalization of homosexuality, widespread homophobia, and the lack of protections from SOGI discrimination certainly gave these 20th century cases more legal grounding at the time, and thus judges were more overt in stating that they deemed these parents unfit because they did not see how parental fitness and LGBTQ+ status could coexist.

While the courts’ language today is not always as flagrantly discriminatory as it was in the past, LGBTQ+ parents still face discrimination and loss of custody in both private custody disputes and the family regulation system. In 2013 (pre-*Obergefell*), a Texas judge enforced a “morality clause” in a custody agreement against LGBTQ+ mother Carolyn Compton at the request of her ex-husband, effectively splitting up Carolyn and her same-sex partner in order for Carolyn to retain custody of her two children.<sup>141</sup> The morality clause stated that Carolyn could not have anyone she was dating or intimate with at her home past nine p.m. unless they were married.<sup>142</sup> Carolyn and her partner had been together for three years and lived together at the time of the ruling, but they could not legally comply with the clause because Texas did not recognize same-sex marriage.<sup>143</sup> Carolyn’s partner had to move out, under threat of losing custody of the children, disrupting the home and their family.

Transgender parents face special vulnerabilities to having their parental rights terminated.<sup>144</sup> While people in same-sex relationships often have state-level protection from overt discrimination based on sexual orientation, these protections do not always extend to gender identity.<sup>145</sup> Since at least 1980, transgender parents have been told in court that their gender identity or their choice to undergo hormone treatment or gender affirming surgery goes against their child’s best interests.<sup>146</sup> Although lesbian, gay, and bisexual parents are

140 *Id.*

141 Meredith Bennett-Smith, *Lesbian Parents Say Texas Judge’s ‘Morality Clause’ Ruling Will Force Them Apart*, HUFFPOST NEWS (Dec. 6, 2017), [https://www.huffpost.com/entry/lesbian-texas-morality-clause\\_n\\_3308136\\_\[https://perma.cc/8E9R-KLFA\]](https://www.huffpost.com/entry/lesbian-texas-morality-clause_n_3308136_[https://perma.cc/8E9R-KLFA]).

142 *Id.*

143 *Id.*

144 Joslin & Sakimura, *supra* note 6, at 89.

145 See MOVEMENT ADVANCEMENT PROJECT, *supra* note 121.

146 Joslin & Sakimura, *supra* note 6, at 89. Joslin & Sakimura reference, *e.g.*, *In re Paige Y.*, No. W10CP12016230A, 2013 WL 1715743, at \*1 (Conn. Super. Ct. Mar. 26, 2013) (upholding a permanency plan calling for termination of one of the biological parents’ rights based mainly on that parent’s decision

generally making progress against overt discrimination in private custody disputes and family regulation proceedings, transgender parents still remain “extremely vulnerable” to discrimination and continue to have their parental rights terminated explicitly because of their gender identity.<sup>147</sup>

## B. Foster Care and Adoption

This Note also looks to discourse around LGBTQ+ people seeking to become foster or adoptive parents, and the connected conversation around religious freedom, to make its descriptive argument about LGBTQ+ parents losing their children to the state.

It is beyond the scope of this Note to fully analyze the legal challenges facing LGBTQ+ people seeking to become foster or adoptive parents. However, discrimination against LGBTQ+ adults in the foster and adoption systems is relevant to the termination of LGBTQ+ parental rights because some state contractors offer both foster care and case management services. Just as some contractors discriminate against LGBTQ+ people in their foster and adoption licensing services, they can also discriminate against LGBTQ+ parents during case management and reunification proceedings.

### 1. The Power of Reunification

As with the family regulation system generally, reunification processes and requirements vary by state. Reunification involves returning a child to their parent(s) after a removal has occurred. If a child is removed from their home, an investigation ensues, and the local family court or juvenile court will likely oversee the case.<sup>148</sup> The judge oversees proceedings and listens to recommendations from those involved in the case management, but the primary goal of the system is supposed to be reunification.<sup>149</sup> However, there are known racial disparities in reunification outcomes, and “African American children are

to undergo a gender transition); *M.B. v. D.W.*, 236 S.W.3d 31 (Ky. Ct. App. 2007) (terminating transgender parent’s parental rights because child was distressed by the parent’s transition); *Matter of Darnell*, 619 P.2d 1349, 1352 (Or. Ct. App. 1980) (upholding termination of the mother’s parental rights based primarily because she continued to have a relationship with a transgender partner).

147 Joslin & Sakimura, *supra* note 6, at 89.

148 Derek Williams, *What Is the Reunification Process?*, GLADNEY CTR. FOR ADOPTION (Nov. 22, 2020), <https://adoption.org/what-is-the-reunification-process-2> [https://perma.cc/LM63-D482].

149 *Id.*



less likely to exit foster care through reunification than White children.”<sup>150</sup>

While the ongoing legal battles over state-contracted foster care and adoption agencies might not appear to impact the conversation about LGBTQ+ parents’ loss of children to the state, the issues are interrelated. Some of the same contractors that provide licensing services for potential foster and adoptive parents also provide case management for children who have already been removed from their homes.<sup>151</sup> These contractors have the power to decide if, when, and on what terms, parents can reunify with their children. This means contractors have strong control as to whether the child will return to their family or whether the state will terminate the parents’ rights. Polikoff sums up the importance of reunification power, writing:

Reunification services can be the most critical component of determining a child’s fate. If an agency determines that a parent should attend classes, mental health counseling, or job placement services, the parent’s failure to do any of those things can lead to termination of parental rights. If an agency sets up a parent’s visitation with her child at a particular place on a particular day, the parent’s failure to attend can lead to termination of parental rights. That the services may be unnecessary; that the schedule might conflict with a parent’s job, or care responsibilities for other children, or other appointments for housing assistance or some other necessity; those things may turn out to be irrelevant. The power of the supervising agency to set the rules and then determine if they have been broken is, literally, awesome.<sup>152</sup>

Reunification, as with all aspects of the investigative process once it reaches removal

150 *Reunifying Families*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/permanency/reunifying-families/> [<https://perma.cc/N6XQ-A8F3>]. Multiple studies have shown that Black children are less likely to achieve reunification than white children. *See, e.g.*, Christian M. Connell et al., *Leaving Foster Care—The Influence of Child and Case Characteristics on Foster Care Exit Rates*, 28 CHILD. & YOUTH SERVS. REV. 780 (2006); R. Anna Hayward & Diane DePanfilis, *Foster Children with an Incarcerated Parent: Predictors of Reunification*, 29 CHILD. & YOUTH SERVS. REV. 1320 (2007); Emily Putnam-Hornstein & Terry V. Shaw, *Foster Care Reunification: An Exploration of Non-Linear Hierarchical Modeling*, 33 CHILD. & YOUTH SERVS. REV. 705 (2011).

151 *Fulton: The Challenge*, *supra* note 16.

152 Nancy Polikoff, *What ELSE is Wrong with Philadelphia Catholic Charities?*, BEYOND (STRAIGHT & GAY) MARRIAGE (Aug. 12, 2020), <http://beyondstraightandgaymarriage.blogspot.com/2019/02/what-else-is-wrong-with-philadelphia.html> [<https://perma.cc/B683-55JF>].

status, must receive court approval, so the power is not completely in the case manager’s hands. However, as Polikoff points out, the case managers often “set the rules” of reunification.<sup>153</sup> Again, this varies by state, but few protections exist against potentially unfair reunification terms because there is ample subjectivity throughout the reunification process. There are no explicit safeguards to prevent judges from finding that a parent’s LGBTQ+ status constitutes child neglect or abuse. “Neglect” is an incredibly subjective and vaguely defined term, and, as such, it functions as a catch-all for many rationales for removal or termination of parental rights. In 2021, 63% of child removals were based on neglect allegations.<sup>154</sup> As an example of the general lack of protections and the room for subjectivity in the status quo, some states are now starting to pass statutes prohibiting child removal because of family poverty or homelessness alone, but this is the exception, not the norm.<sup>155</sup> In this context, many states’ judges could order child removal if the requirements for reunification, such as shelter or childcare, are not met, even if those factors are out of the parents’ control or are the result of systemic poverty.

Because of the wide latitude given to courts and case managers, there are few guardrails against implicit or explicit bias in removal or reunification decisions. Implicit bias is a serious concern for LGBTQ+ parents, especially in considering the intersectionality of race, socioeconomic status, and LGBTQ+ identity. It is well known that Black and low-income families have disproportionately worse outcomes in the system.<sup>156</sup> In considering bias against LGBTQ+ parents, it is important to note that they may be experiencing intersectional bias. While explicit bias is rare, it does still occur, and this Note opines that it likely occurs more in states with fewer protections given to LGBTQ+ people more generally. For example, in 2017, a Kansas court explicitly grounded its reasonings in SOGI discrimination when it removed a transgender child from her lesbian parents’ custody and

153 *Id.*

154 ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT – NO. 29, at 2 (2022).

155 *See* Michael Fitzgerald, *New Bill Would Require States To Distinguish Poverty From Child Neglect*, THE IMPRINT (July 28, 2023), <https://imprintnews.org/child-welfare-2/new-bill-would-require-states-to-distinguish-poverty-from-child-neglect/243316> [<https://perma.cc/9V9A-ANF3>] (reporting on a bill introduced in Congress that would “require[] states to avoid maltreatment investigations that center solely on a family’s homelessness or lack of financial resources.” The article also discusses a new program in New York and recent statutes passed in California aimed at preventing investigations or removals based on poverty alone).

156 Dorothy Roberts is well known for her work on this subject. *See* TORN APART, *supra* note 19; SHATTERED BONDS, *supra* note 19; *Poverty, Race, and New Directions*, *supra* note 19.

placed her in foster care.<sup>157</sup> The social worker and the judge exhibited a mix of explicit homophobia and transphobia in their remarks, stating that the child was confused about her identity because she lived with two mothers.<sup>158</sup> The judge said that the child should be in a foster home with “healthy parents,” and the social worker said repeatedly, “[w]e’re not giving this child back to lesbians.”<sup>159</sup>

## 2. Anti-LGBTQ+ Discrimination: Religious Organizations in Foster & Adoption Services

In the United States, child welfare services originated in nongovernmental child protection societies, which often had a religious or charitable affiliation.<sup>160</sup> Organized, non-governmental child welfare services began in the late 19th century, and the government did not become involved in child welfare until the 1960s, when states began to pass child abuse reporting laws.<sup>161</sup> The federal government became formally involved with the passage of the Child Abuse Prevention and Treatment Act of 1974.<sup>162</sup> As a result of the history of privatization and later government involvement, the modern family regulation system is a complicated network of federal, state, and private actors. In general, family law varies tremendously from state to state.

States vary widely in the extent to which they privatize or contract out foster, adoption, and case management services.<sup>163</sup> Florida, Kansas, and Texas privatize most

157 ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY 646, 647 (2012).

158 *Id.*

159 *Id.* at 648.

160 See Linda Gordon, *Child Welfare: A Brief History*, VA. COMMONWEALTH UNIV. LIBRS. SOC. WELFARE HIST. PROJECT (2011), <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/child-welfare-overview/> [<https://perma.cc/KZ37-QMLU>] (describing the American child welfare system’s origins in religious and charitable orphanages, followed by a proliferation of nongovernmental child welfare societies in the late nineteenth and early twentieth century).

161 See John E. B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008) (presenting a comprehensive history of the development of the family regulation system (or “child protection”) in the United States).

162 *Id.* at 457.

163 U.S. DEP’T OF HEALTH & HUM. SERVS., EVOLVING ROLES OF PUBLIC AND PRIVATE AGENCIES IN PRIVATIZED CHILD WELFARE SYSTEMS (2008) [hereinafter EVOLVING ROLES].

of their programs.<sup>164</sup> Even in a privatized system, the state retains ultimate authority and responsibility for cases.<sup>165</sup> However, states like Kansas and Florida assert that they fulfill that obligation solely through “administrative oversight, quality assurance, and monitoring.”<sup>166</sup> This does not mean that the state reviews each case or is involved in the day-to-day operations of these contracting agencies.<sup>167</sup> Rather, “contract monitors from the state or county monitor large numbers of cases and/or evaluate overall contractor performance.”<sup>168</sup> Thus, in states that privatize a large portion of their family regulation services, it appears unlikely that state actors would really know if their contractors were engaging in systemic discrimination against LGBTQ+ parents.<sup>169</sup>

States again vary widely in their laws and regulations concerning religious contractors’ ability to discriminate against LGBTQ+ people on the basis of religious beliefs. Fourteen states explicitly “permit[] state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBTQ people and same-sex couples, if doing so conflicts with their religious beliefs.”<sup>170</sup> Sixteen states have “no explicit protections against discrimination in foster care based on sexual orientation or gender identity.”<sup>171</sup> Six states have a “statute, regulation, and/or agency policy [that] prohibits discrimination in foster care based on sexual orientation only.”<sup>172</sup> Twenty-eight states have a “state statute, regulation, and/or agency policy [that] prohibits discrimination in foster

164 *Id.* at 3 (describing Florida and Kansas’s privatization); OFF. COMMUNITY-BASED CARE TRANSITION, IMPLEMENTATION PLAN FOR THE TEXAS COMMUNITY-BASED CARE SYSTEM (2023), [https://www.dfps.texas.gov/CBC/documents/2023-29-12-Annual\\_Community-Based\\_Care\\_Implementation\\_Plan.pdf](https://www.dfps.texas.gov/CBC/documents/2023-29-12-Annual_Community-Based_Care_Implementation_Plan.pdf) [<https://perma.cc/L9Z5-9KSC>] (describing Texas’ ongoing plan to privatize its system through a “community-based care” model).

165 EVOLVING ROLES, *supra* note 163, at 5.

166 *Id.*

167 *Id.*

168 *Id.*

169 Unless they are analyzing the demographics of children and parents involved in the system. However, data on parent sexual orientation and/or gender identity is not collected, so it appears impossible for monitors to know whether such discrimination is happening even if they are looking at the overall trends in cases.

170 *Foster Care Laws and Regulations*, MOVEMENT ADVANCE PROJECT (2024), [https://www.lgbtmap.org/equality-maps/foster\\_care\\_laws](https://www.lgbtmap.org/equality-maps/foster_care_laws) [<https://perma.cc/8GS6-97W5>].

171 *Id.*

172 *Id.*

care based on sexual orientation and gender identity.”<sup>173</sup> These categories overlap; six states with a nondiscrimination statute, regulation, or policy also have an exemption for contractors’ well-founded religious beliefs.<sup>174</sup> As expected, the states that explicitly allow religious contractors to discriminate against LGBTQ+ people on the basis of well-founded religious beliefs include those like Texas and South Carolina, which have been at the center of recent legal cases concerning these policies.<sup>175</sup>

States also vary in their dealings with religiously affiliated child welfare organizations. Many states contract with Christian organizations for family regulation services. Not every Christian organization discriminates against LGBTQ+ individuals, but a meaningful amount do, refusing to accept LGBTQ+ people as foster or adoptive parents. The data on this topic is sparse; studies are beginning to be released on religious foster care agencies’ disparate treatment of same-sex prospective foster parents as compared to opposite-sex prospective foster parents, but authors cite statistical limitations that prevent them from reaching “robust” findings.<sup>176</sup>

In recent years, there have been several such high-profile legal cases involving states either trying to end their contracts with religious organizations that discriminate against LGBTQ+ adults or trying to defend their ability to grant these organizations an exception from compliance with anti-discrimination laws, allowing them to discriminate against LGBTQ+ adults while still receiving federal funding for their programs. The subsections that follow discuss these cases.

#### a. States Defending Religious, Discriminatory Contractors

In December 2022, Texas Attorney General Ken Paxton filed a lawsuit against the federal government, seeking to challenge a federal rule prohibiting recipients of federal funds for adoption and foster programs from discriminating based on factors like gender identity, sexual orientation, or same-sex marriage status.<sup>177</sup> Paxton and other state government officials wanted religiously affiliated contractors to continue discriminating

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See *infra* Part II.B.2.a (discussing case studies in Texas and South Carolina).

<sup>176</sup> See Mattie Mackenzie-Liu et al., *Do Faith-Based Foster Care Agencies Respond Equally to All Clients?*, 37 J. POL’Y STUD. 41, 42 (2022).

<sup>177</sup> Complaint at 2, Texas v. Becerra, No. 3:22-cv-00419 (S.D. Tex. Dec. 12, 2022).

against LGBTQ+ people seeking to become foster or adoptive parents without losing federal funding.<sup>178</sup> In March 2024, the court granted a motion to dismiss, finding that “the challenge to the SOGI [sexual orientation and gender identity] rule is as moot today as it was in Texas’s first challenge before this court,”<sup>179</sup> and likewise finding that the actions taken by HHS Secretary Becerra since Texas’s last lawsuit are “unripe.”<sup>180</sup>

The “challenge” the judge is referring to is *Texas v. Azar*, a 2020 case in which Texas brought essentially the same claim regarding the SOGI rule against the Department of Health and Human Services (HHS), arguing that the Catholic Archdiocese was unable to partner with the state in a foster care initiative because of the alleged threat of HHS enforcing its nondiscrimination principles.<sup>181</sup> The court dismissed this claim as moot “because HHS has made ‘absolutely clear’ that the challenged provisions will not be enforced against the State as it pertains to the Archdiocese.”<sup>182</sup> Texas sued again in 2022 in reaction to policies advanced made by the Biden administration. In response to an executive order signed by President Biden on his first day in office, HHS Secretary Becerra issued several memorandums and directives aimed at improving equity for LGBTQ+ children in foster care.<sup>183</sup> However, no actions have been taken by HHS to enforce the new guidance issued by Becerra.<sup>184</sup> Thus, the court held that these issues were not ripe for adjudication.<sup>185</sup> Texas’ repeated challenges of these nondiscrimination principles is concerning, as Attorney General Paxton is essentially telling the federal government to expect serious pushback should the nondiscrimination principles ever be enforced. This speaks to the staying power of anti-LGBTQ+ litigation and rhetoric in family regulation; if states like Texas are hostile towards LGBTQ+ children in foster care and prospective LGBTQ+ foster parents, they

<sup>178</sup> Press Release, Tex. Off. of the Att’y Gen, Paxton Sues Biden to Defend Religiously-Affiliated Adoption Agencies from Federal Government’s “Sexual Orientation” and “Gender Identity” Rules (Dec. 12, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-defend-religiously-affiliated-adoption-agencies-federal-governments-sexual> [https://perma.cc/D7TV-KKJ3].

<sup>179</sup> Texas v. Becerra, No. 3:22-cv-00419, at 8.

<sup>180</sup> *Id.* at 18.

<sup>181</sup> See Texas v. Azar, 476 F. Supp. 3d 570 (S.D. Tex. 2020).

<sup>182</sup> *Id.* at 580.

<sup>183</sup> Texas v. Becerra, No. 3:22-cv-00419, at 6–7.

<sup>184</sup> *Id.* at 14–15.

<sup>185</sup> *Id.* at 18.



can be expected to behave similarly towards LGBTQ+ parents caught up in the family regulation system.

In May 2019, Lambda Legal and the American Civil Liberties Union (ACLU) filed a lawsuit against South Carolina and the South Carolina Department of Social Services on behalf of a same-sex couple who sought to become foster parents in South Carolina but were turned away by Miracle Hill, South Carolina's largest state-contracted foster care agency.<sup>186</sup> Miracle Hill is an Evangelical Protestant Christian organization that will not work with anyone who is not Evangelical Protestant Christian, in a same-sex couple regardless of religion, or lives with a partner but is not married, regardless of sex or sexual orientation.<sup>187</sup> South Carolina has actively fought to keep its federal funding and to obtain an exemption for Miracle Hill to discriminate against applicants in this way, based on well-founded religious beliefs.<sup>188</sup>

In September 2023, the District Court for South Carolina issued a summary judgment in favor of the State.<sup>189</sup> The court's attitude towards plaintiffs was, at best, dismissive, stating that the couple could have worked with another foster care agency or worked directly with the state (though the viability of these other options was not considered).<sup>190</sup> The court also largely avoided plaintiff's arguments concerning discrimination based on LGBTQ+ status, instead focusing on religious discrimination, as Miracle Hill's official reason for rejecting the couple's application was that their Unitarian faith "does not align

186 See generally *Rogers v. Health and Human Services*, ACLU (Nov. 1, 2023), <https://www.aclu.org/cases/rogers-v-health-and-human-services> [<https://perma.cc/S72D-HP52>] (explaining the facts of the case, including Miracle Hill's role in South Carolina's foster care system).

187 *Id.*

188 See Exec. Order No. 2018-12, State of South Carolina Executive Department, Office of the Governor (filed Mar. 13, 2018) (ordering the South Carolina Department of Social Services to "not deny licensure to faith-based CPAs [Child Placing Agencies] solely on account of their religious identity or sincerely held religious beliefs"); Letter from Henry McMaster, Governor of S.C., to Steven Wagner, Acting Assistant Sec'y Admin. Child. & Fams. (Feb. 27, 2018) (requesting that the Department of Health and Human Services exempt South Carolina from its non-discrimination grantmaking policy, on the basis of faith-based CPAs' sincerely held religious beliefs).

189 *Rogers v. McMaster*, No. 19-cv-01567, 2023 WL 7396203 at \*2 (D.S.C. Sept. 29, 2023), <https://www.aclu.org/cases/rogers-v-health-and-human-services?document=rogers-v-health-and-human-services-plaintiffs-motion-summary-judgment#legal-documents> [<https://perma.cc/HGX8-4HJZ>].

190 *Rogers*, 2023 WL 7396203, at \*10.

with traditional Christian doctrine."<sup>191</sup> The court held that Miracle Hill's activities as a state-contracted foster care agency did not rise to the level of state action, and that the state is not responsible for Miracle Hill's recruitment policies because their contract does not delegate the recruitment of foster parents to Miracle Hill (although the contract is arguably premised on such recruitment because it concerns the placement of children in state custody with Miracle Hill's foster parents).<sup>192</sup> Thus, the court rejected plaintiff's Equal Protection Clause and Establishment Clause claims.<sup>193</sup>

### b. Trying to Sever Ties with Religious Contractors

While some states are fighting legal battles to protect religious organizations' right to discriminate against LGBTQ+ people in foster, adoption, and case management proceedings, other state and local governments are trying to end relationships with religious contractors who refuse to accept LGBTQ+ applicants. However, it is not easy to cut ties with a religious agency on the basis of anti-LGBTQ+ discrimination. In 2018, the city of Philadelphia stopped referring children to two agencies after it learned they would not grant foster parent licenses to same-sex couples. One of those agencies was Catholic Social Services (CSS).<sup>194</sup> Philadelphia decided not to renew its contract with CSS, and CSS sued Philadelphia, asking the District Court to order the city to renew its contract.<sup>195</sup> CSS argued that, as a Catholic organization, it had the right to reject same-sex couples based on its rights to free speech and free exercise of religion.<sup>196</sup> The District Court sided with Philadelphia, and the Third Circuit affirmed.<sup>197</sup> The Supreme Court reversed and remanded on narrow grounds, holding that Philadelphia's refusal to contract with CSS unless CSS agrees to certify same-sex couples violated the First Amendment's Free Exercise Clause.<sup>198</sup> The Court did not consider whether Philadelphia violated the Free Speech Clause. Upon

191 *Rogers*, 2023 WL 7396203, at \*5.

192 *Rogers*, 2023 WL 7396203, at \*7–8.

193 *Rogers*, 2023 WL 7396203, at \*8–9.

194 See *Fulton v. City of Philadelphia*, ACLU (Nov. 8, 2021), <https://www.aclu.org/cases/fulton-v-city-philadelphia> [<https://perma.cc/5N88-VQ7L>] (presenting the facts of the case and an overview of the legal timeline).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Fulton v. Philadelphia*, 593 U.S. 522, 542 (2021).

remand, the parties entered into a Joint Motion for Consent Judgment.<sup>199</sup> The District Court's order held, in part, that Philadelphia could not refuse to contract with CSS or refuse to refer children to CSS "on the basis that CSS exercises its religious objection to certifying same-sex or unmarried couples as foster parents."<sup>200</sup>

LGBTQ+ activists widely view *Fulton* as a loss, although its impact and scope are limited.<sup>201</sup> In its majority opinion, the Court avoided answering whether a government contractor could violate antidiscrimination laws. The majority mostly rested its opinion on the fact that Philadelphia could have granted CSS a religious exception to antidiscrimination requirements but did not. In his concurrence, Justice Alito remarked that the Court will have to directly answer the question of whether a government contractor could violate antidiscrimination laws soon.<sup>202</sup> While the current composition of the Supreme Court does not make LGBTQ+ parents and advocates hopeful about the contents of such an answer, some scholars like Chris Gottlieb argue that the discussion around *Fulton*, which pits religious expression against LGBTQ+ rights, misses the broader point of foster care—it is supposed to be about promoting the welfare of children and ideally helping them achieve reunification, not enabling adults to become foster parents.<sup>203</sup> Gottlieb calls for a the purposes of foster care and the needs of foster children to be centered in *Fulton* and broader discussions.<sup>204</sup>

*Fulton* shows how difficult it is to sever ties with religious organizations who discriminate against LGBTQ+ people in the context of foster care, adoption, and case management services. As Polikoff and other scholars argue, *Fulton* and the difficulty of

199 Order Granting Joint Motion for Consent Judgement, *Fulton v. City of Philadelphia* (Oct. 1, 2021), <https://www.aclu.org/cases/fulton-v-city-philadelphia?document=Order-Granting-Joint-Motion-for-Consent-Judgement> [<https://perma.cc/CSG8-KPQ4>].

200 *Id.* at 3–4.

201 See, e.g., Mary Catherine Roper, *What Fulton v. City of Philadelphia Means for LGBTQIA+ Families and Individuals*, ACLU PA. (June 18, 2021), <https://www.aclupa.org/en/news/what-fulton-v-city-philadelphia-means-lgbtqia-families-and-individuals> [<https://perma.cc/2LZA-Q9ML>] (“While the decision is not what the ACLU of Pennsylvania was hoping for, it is a very narrow ruling that does not change the law for families outside of Philadelphia . . . This ruling means that, at least for now, CSS can refuse to work with LGBTQIA+ families who want to open their homes to kids in need.”).

202 *Fulton*, 593 U.S. at 545 (Alito, J., concurring).

203 Chris Gottlieb, *Remembering Who Foster Care is for: Public Accommodation and Other Misconceptions and Missed Opportunities in Fulton v. City of Philadelphia*, 44 *CARDOZO L. REV.* 1, 5 (2022).

204 *Id.* at 6–7.

curbing anti-LGBTQ+ discrimination by religious actors has serious implications for LGBTQ+ parents, especially considering the power that contractors wield in handling reunification services.<sup>205</sup>

Moreover, as Polikoff notes, both parties in *Fulton* would likely agree on the premise that the city needs more foster parents. However, Polikoff encourages a reframing of the issue, stating that the city could remedy its need for foster parents by removing less children from their homes and reunifying families faster. Polikoff says, “Poverty is routinely confused with neglect, resulting in the traumatizing separation of parents and children. Housing problems — not parental shortcomings — delay reunification for 30% to 50% of children. Most of the children in foster homes do not belong there.”<sup>206</sup> Polikoff calls LGBTQ+ advocates to “care about the excessive removal of children as a matter of racial justice,” and posits that it is also unmistakably a LGBTQ+ issue.<sup>207</sup> Again, an intersectional lens is needed to both understand the harms of the family regulation system and to advance reforms.

### III. Solutions

Part III of this Note focuses on solutions. If LGBTQ+ parents are experiencing unjust and disproportionate child removal by the family regulation system, what can be done? This Note calls for a reimagining of child welfare, movement towards abolition of the family regulation system, and the advancement of transformative change. This Note also discusses potential solutions of state statutory protections and implementation of federal oversight, makes a constitutional argument against discrimination based on parent LGBTQ+ status, and calls for more research and awareness on the topic of LGBTQ+ parent loss of children to the state.

205 See Nancy Polikoff, *On Fulton v City of Philadelphia, Both Sides Miss the Most Important Point*, THE IMPRINT (Nov. 3, 2020) <https://imprintnews.org/child-welfare-2/fulton-city-philadelphia-both-sides-miss-most-important-point/49025> [<https://perma.cc/HVK8-K24Z>] (“Philadelphia continues to contract with [CSS] to conduct case management in one area of the city, which means every lesbian mother whose child is removed there has to satisfy a Catholic Charities caseworker before her child is returned. An agency that so fiercely defends its right to keep same-sex couples from fostering and adopting cannot be trusted to fairly assess whether a lesbian or bisexual mother can raise her own child.”).

206 *Id.*

207 *Id.*

### A. Abolition & Reimagining Child Welfare

In the wake of the 2020 Black Lives Matter protests, “mainstream academic organization[s]” began to call for abolition of the family regulation system, joining advocates like Dorothy Roberts in calling for a “radically reimagined way of caring for families.”<sup>208</sup> While abolition is a “bold demand,” Roberts believes that decades of advocating for transformation of the system have only resulted in tweaks to “a system that was inherently racist and fundamentally flawed.”<sup>209</sup> Echoing this sentiment, Alan Dettlaff, former dean of the University of Houston Graduate College of Social Work, states, “[R]eforms ask the system to forcibly separate families in a way that’s a little bit less racist, a little bit nicer and a little bit more palatable to the general public. And that’s just not possible. Family separation causes harm every time. And until that ends, the system is never going to change.”<sup>210</sup>

While the movement for abolition of the family regulation system is a “decentralized, collectivist project” that can feel “opaque,”<sup>211</sup> Roberts “positions abolition as a hopeful and generative project, one that asks that we ‘imagine and build a more humane, free, and democratic society’ that no longer relies on systematic violence to meet human need and solve social problems.”<sup>212</sup> The calls for abolition of the family regulation system are contextualized in calls for abolition of many “interconnected systems of oppression, from the wage system, to environmental exploitation, to the military industrial complex.”<sup>213</sup>

A common counterpoint raised against abolition of the family regulation system is to ask, what about the children who are suffering real abuse at home? The response is rather simple. As abolition advocate Joyce McMillan says, “[I]t’s not about ‘what about

208 Roxanna Asgarian, *The Case for Child Welfare Abolition*, IN THESE TIMES (Oct. 3, 2023), <https://inthesetimes.com/article/child-welfare-abolition-cps-reform-family-separation> [https://perma.cc/QZ2R-PLJ7].

209 *Id.*

210 *Id.* Dettlaff was “abruptly” removed as dean in 2022, nine days after a CBS segment aired in which “Roberts and Dettlaff were each quoted extensively, explaining the punitive nature of the system and bringing abolitionist ideas to the most mainstream of audiences.” *Id.*

211 Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12:1 COLUM. J. RACE & L. FORUM 1, 3 (2022).

212 *Id.* at 4 (quoting Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7–8 (2019)).

213 *Id.* at 4.

the children who need help?”—it’s about how to get the people who need help real help, and leave the other people alone.”<sup>214</sup> Thus, the abolition movement is not calling for a completely hands-off approach to child welfare. Rather, the abolition movement asks us to reimagine how we can promote the goal of child welfare through “true systems of community-based and community-defined support.”<sup>215</sup>

Proposed abolitionist reforms include mobilization of mutual aid,<sup>216</sup> moving from government control to government support,<sup>217</sup> transforming the conditions that lead to harm,<sup>218</sup> centering scientific reasoning in our understandings of family welfare (particularly as it relates to substance use),<sup>219</sup> and repealing laws like the Adoption and Safe Families Act (ASFA).<sup>220</sup> Models of what abolition can look like do exist. Law professor Anna Arons argues that the shutdown of New York City in response to the COVID-19 pandemic is a successful case study for a future without the family regulation system.<sup>221</sup>

While this Note supports abolishing the family regulation system, this change is not likely to happen soon. Though abolition of the system is becoming a more mainstream stance, there are still many in academia and government who are hostile to pro-abolitionist

214 Asgarian, *supra* note 208. See also Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/> [https://perma.cc/LVY4-S3GK] (“When I say we need to abolish ACS, I mean we need to abolish ACS needlessly removing children. We shouldn’t be traumatizing families, children, and communities.”).

215 Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11:3 COLUM. J. RACE & L. 767, 807 (2022).

216 Arons, *supra* note 211, at 22–25.

217 *Id.* at 25–27.

218 See Mack, *supra* note 215, at 808.

219 See Marc Canellas, *Abolish and Reimagine: The Pseudoscience and Mythology of Substance Use in the Family Regulation System*, 30:2 GEO. J. POVERTY L. & POL’Y 169 (2023).

220 See Asgarian, *supra* note 208 (“Passed in 1997, the law starts a clock the day a child is removed; if a child remains in foster care for 15 of 22 consecutive months, states are required to initiate the termination of their parents’ rights . . . Advocates for parents involved in the system say that the issues they’re struggling with, often including substance use and housing insecurity, aren’t easily solvable on a 15-month timeline, particularly with the child welfare system’s punitive approach.”).

221 Arons, *supra* note 211 *passim*.



ideology.<sup>222</sup> Some with pro-abolitionist ideologies have been censored or received professional or academic discipline, ostensibly for their abolitionist views.<sup>223</sup>

Moreover, “reducing and dismantling [the family regulation] system is only a first step. In order for abolition to work, it needs just as much of a push toward non-carceral community supports — most importantly, actual investment in our social safety net, which has been systematically stripped to the bones.”<sup>224</sup> Reimagining child welfare involves “chipping away at oppressive institutions” and “[m]aking incremental changes to the systems, institutions and practices that maintain systemic oppression and differentially target marginalized communities.”<sup>225</sup> Thus, the movement for abolition of the family regulation system is a long-term project. In the meantime, reforms within the system can be guided by abolitionist principles and frameworks.<sup>226</sup>

### B. Transformational Change in the Family Regulation System

While continuing to advocate for abolition, changes can be made now to promote equity for all families, including those with LGBTQ+ parents, that are in the system now or are at risk of being drawn into the system. One obvious, yet much-needed, solution is that states must abolish policies that explicitly attack LGBTQ+ parents and families.<sup>227</sup>

In a more overarching example of transformative change, law professor Josh Gupta-

222 See Asgarian, *supra* note 208.

223 *Id.* (describing the removal of a former Graduate College of Social Work dean, who was seemingly removed for his abolitionist views; a university investigation of a graduate social work student for a group project that advanced community-based alternatives to calling social workers; and the censorship and firing of an advisor on child welfare issues to the New York state courts for her abolitionist views).

224 *Id.*

225 Mack, *supra* note 215, at 806 (first quoting Critical Resistance, *Abolitionist Steps*, in THE ABOLITIONIST TOOLKIT 48, 48 (2004), <http://criticalresistance.org/wp-content/uploads/2012/06/Ab-Toolkit-Part-6.pdf> [https://perma.cc/X9BU-X6AX]; then quoting Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), <https://truthout.org/articles/big-dreams-and-bold-steps-toward-a-police-free-future> [https://perma.cc/BB67-D3JP]).

226 *Id.* at 806–07 (citing SURVIVED AND PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 3 (2020), <https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf> [https://perma.cc/V9H3-M6LL]).

227 Joslin & Sakimura, *supra* note 6, at 104.

Kagan presents a comprehensive overview of issues surrounding bias and indeterminacy in the system.<sup>228</sup> Gupta-Kagan posits:

First, child protection law is substantively indeterminate; it does not precisely prescribe when state agencies can intervene in family life and what that intervention should entail, thus granting wide discretion to child protection agencies and family courts. Second, by granting such discretion, the law permits race, class, sex, and other forms of bias to infect decisions and regulate low-income families and families of color.<sup>229</sup>

In a system with such wide discretion, the overt or subconscious biases of judges, lawyers, and social workers can determine whether a parent loses or gets to keep custody of their child.<sup>230</sup>

The main issue contributing to this indeterminacy and discretion is the lack of precise definitions for neglect and abuse.<sup>231</sup> Existing categories are “simply too broad” and do not distinguish between different severity levels of abuse or neglect.<sup>232</sup> The definition of neglect is arguably the best starting point for reform, as “CPS agencies identify ‘neglect’ as the type of maltreatment at issue for 74.9% of children they deem maltreated after investigation. Neglect similarly accounts for three-quarters or more of cases in which CPS agencies remove children from their families and place them in foster care.”<sup>233</sup>

228 Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL’Y REV. 217 (2022).

229 *Id.* at 217.

230 “At such a proceeding [in which the State considers termination of parental rights], numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge . . . Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” Santosky v. Kramer, 455 U.S. 745, 762–63 (1982) (internal citation omitted).

231 Gupta-Kagan, *supra* note 228, at 272–76.

232 *Id.* at 276.

233 *Id.* at 233–34 (first citing ADMIN. OF CHILD. & FAM., CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERV., CHILD MALTREATMENT 2019, at 47 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf> [https://perma.cc/8UX2-N9WM]; and then citing ADMIN. OF CHILD. & FAM., CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERV., THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020, No. 27, at 2 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [https://

The current vague definitions of neglect and abuse punish low-income people at disproportional rates, reflective of structural racism in the family regulation system.<sup>234</sup> For example, South Carolina defines “child abuse or neglect” to include any failure “to supply the child with adequate food, clothing, shelter, or education, . . . supervision appropriate to the child’s age and development, or health care,” which poses a “substantial risk of causing physical or mental injury.”<sup>235</sup> A parent who is struggling with food or housing insecurity falls under this definition, regardless of how much they love their children and do their best to provide for their child. LGBTQ+ parents are more likely to be low-income and people of color,<sup>236</sup> so issues of structural racism and classism have a direct impact on LGBTQ+ parents in the family regulation system.

States should make the definitions of neglect and abuse more specific to prevent bias against non-white, low-income, and LGBTQ+ parents. When definitions are too broad and vague, the biases of judges and agency workers can come through, as they make assumptions about what is best for the child and the degree to which parents are unfit.<sup>237</sup> Gupta-Kagan suggests implementing specific, tiered definitions that mirror criminal codes by distinguishing between degrees of harm caused or attempted and then linking certain degrees of harm to certain remedies.<sup>238</sup> For example, the lowest tier of neglect may never allow family separation. A parent who leaves an older child home alone to go to work because they lacked childcare is not necessarily neglectful, even though this falls within

perma.cc/LC27-WJL7)).

234 Gupta-Kagan, *supra* note 228, at 220; SHATTERED BONDS, *supra* note 19, at 6.

235 S.C. CODE ANN. § 63-7-20(6)(a)(iii) (2023). South Carolina’s statute is unfortunately the norm across all states. A 2022 study found that “all states include at least one broad income-related factor in their definitions of maltreatment. . . . Of the 45 states that specify subtypes of maltreatment, almost one third include five or more income-related subtypes . . . . Almost half of all states do not exempt financial inability to provide for a child in how they define maltreatment.” Sarah Catherine Williams et al., *In Defining Maltreatment, Nearly Half of States Do Not Specifically Exempt Families’ Financial Inability to Provide*, CHILDREN (Feb. 23, 2022), <https://www.childtrends.org/publications/in-defining-maltreatment-nearly-half-of-states-do-not-specifically-exempt-families-financial-inability-to-provide> [https://perma.cc/KA52-EZ4D]. At least two states other than South Carolina explicitly include homelessness—among other factors like those listed in South Carolina’s statute—in their definitions of neglect, and thus as grounds for removal of the child from their family. See COLO. STAT. § 19-3-102(1)(e); CONN. GEN. STAT. §§ 46b-120(6), 46b-129(j). *But see* WASH. REV. CODE § 26.44.020(19) (explicitly stating that poverty and homelessness alone are not abuse or neglect to the child).

236 See sources cited *supra* notes 89–90.

237 Santosky v. Kramer, 455 U.S. 745, 762–63 (1982); Gupta-Kagan, *supra* note 228, at 223.

238 Gupta-Kagan, *supra* note 228, at 275–76.

the technical definition of neglect under the black-letter law because of the purported risk of harm.<sup>239</sup>

Finally, the incentives in the family regulation system should shift from incentivizing removal and towards incentivizing family unity. A system with broad definitions of neglect and abuse empowers the state to take children away from their parents and pay foster parents to care from them, instead of providing money and resources to parents to care for their own children.<sup>240</sup> This issue speaks to the intersectional issues of structural racism and broader issue of holding all parents to a white, heterosexual, cisgender, middle-class standard. Regardless of the intention of states and agencies, there are clear “financial incentives for foster placements and adoptions but not for returning children to their parents.”<sup>241</sup> If states reframe the goal of the family regulation system as ensuring family unity, and only reserving child removal and termination of parental rights for legitimate child welfare issues, all parties involved can achieve better outcomes. To that end, states should prioritize prevention of family regulation involvement.

If a parent is struggling to provide food for their children, pay for doctors’ visits, or arrange childcare when they are working, the state should help the parent pay for or otherwise access those services rather than initiating an investigation against them on allegations of neglect. In short, funds should be redirected from foster care into keeping families together. This is not to suggest that foster care services are not in need of funding, but rather that putting more funding towards family unity would likely reduce the number of children in foster care and thereby the need for as many foster care services. Family unity should be the goal of a system centered around child welfare.

239 *Id.* at 276. Gupta-Kagan notes that a judge might fear severe harm might come to the child, but the probability of such harm in this situation is low. *Id.*

240 *Fulton: The Challenge*, *supra* note 16; Gupta-Kagan, *supra* note 228, at 220–21 (“Legal obligations on the state to work to keep families together are so vague in substance and weak in practice that states can and do spend tens of thousands of dollars taking care of children they have removed from parental custody after failing to spend similar sums keeping families together.”).

241 *Fulton: The Challenge*, *supra* note 16. See also Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families*, TALK POVERTY: CTR. FOR AM. PROGRESS (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/index.html> [https://perma.cc/ERB6-ZU3M] (demonstrating that, as a result of funding structures and incentives, the federal government spends almost 10 times more on foster care and adoption than on reunification programs); OFF. OF ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD (July 31, 2005) (“Title IV-E funds foster care on an unlimited basis without providing for services that would either prevent the child’s removal from the home or speed permanency.”).

These changes have a high likelihood of reducing discrimination against LGBTQ+ parents but a low likelihood of being implemented on a national level. Because family law is in the domain of state control, these changes would have to be implemented on a state-by-state basis. While some states, like California and New York, are making strides towards separating issues of poverty from issues of child welfare,<sup>242</sup> broader changes of specifying and narrowing the scope of neglect remain unaddressed. Other states would likely resist such changes, wanting to maintain the broad discretion of judges and case managers without rectifying its pitfalls. However, anticipated resistance to transformational reforms should not lessen the importance of such reforms. Any efforts to resolve the law's bias and indeterminacy, or to shift law and policy towards encouraging family unity, would move the needle forward.

### C. Implementation of State-Level Statutory Protections, Services

For states committed to protecting LGBTQ+ individuals and LGBTQ+ parents, state-level policies exist that can be implemented to protect LGBTQ+ parental rights and family integrity. Of course, states vary widely on their LGBTQ+ policies. Progressive states (those with strong pro-LGBTQ+ policies) have an opportunity to raise the bar and help protect LGBTQ+ parents from discrimination in the family regulation system. This Note suggests implementing statutory protections that explicitly prohibit discrimination in the family regulation system based on parent LGBTQ+ status and providing resources for LGBTQ+ parents who might face child removal.

First, progressive states have begun recognizing the need to protect LGBTQ+ parents from discrimination in private custody cases. Some states are beginning to implement positive rights for LGBTQ+ parents that prohibit discrimination based on gender identity and sexual orientation in private child custody cases. For example, in October 2019, California passed Senate Bill 495, which prohibits courts from considering sex, gender identity, gender expression, and sexual orientation in child custody cases.<sup>243</sup> New York has introduced a similar bill, Senate Bill S5402, which, if signed into law, would prevent judges from considering sex, sexual orientation, gender identity in child custody cases and from prohibiting a parent from undergoing a gender reassignment in child custody

<sup>242</sup> See discussion *infra* Part III.C.

<sup>243</sup> CAL. FAM. CODE § 3011(b) (2019) (“the court shall not consider the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative in determining the best interests of the child.”).

cases.<sup>244</sup> Extending such protections from private custody to the family regulation system context would help protect LGBTQ+ parents from explicit discrimination. This bill has been introduced in the New York State Senate in various iterations since the 2011–2012 Legislative Session but has failed to pass in both the Senate and the Assembly.<sup>245</sup> While the Senate passed S5402 in 2023, in January 2024, the bill died in the Assembly and returned to the Senate.<sup>246</sup>

Second, even when legal protections exist on paper, in practice, LGBTQ+ parents often lack the resources to fight for their parental rights in court when faced with family regulation investigation.<sup>247</sup> Resources, like money to pay for an attorney or the socioeconomic power to threaten legal action against a case management officer for discriminatory behavior, are often make-or-break in family regulation cases.<sup>248</sup> Some states, like New York, have created statutory rights to free legal counsel for all parents who are under investigation for alleged neglect or abuse of their child.<sup>249</sup> States that adopt similar measures would help LGBTQ+ parents overcome barriers in navigating the family regulation system. In cases where the parent experiences discrimination, access to counsel could be essential in overcoming that discrimination.

Third, some states have implemented prevention services aimed at keeping families together. In New York, prevention services are available to parents regardless of whether they are part of an open Administration for Children's Services (ACS) investigation.<sup>250</sup> These services can help parents with childcare needs and connect them with resources

<sup>244</sup> S. S5402 (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2023/S5402> [<https://perma.cc/RUW8-6PPA>].

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See discussion *supra* Sections I.D, I.E.

<sup>248</sup> See *Neglected Lesbian Mothers*, *supra* note 21, at 88–89, 107 (contrasting the case of a single gay father with a transgender child who used his resources to “aggressively fight the child welfare authorities” when threatened with a CPS investigation, and the case of two low-income, rural lesbian mothers who lost custody of their transgender child. Both parents had trans children, and both children's identity was the stimulus for family regulation involvement. Only the outcomes were different).

<sup>249</sup> N.Y. FAM. CT. ACT § 262 (McKinney 2012). See also *Get Help With Your Case*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., <https://www.nyc.gov/site/acs/child-welfare/get-help-with-your-case.page> [<https://perma.cc/4EL5-HFZ7>].

<sup>250</sup> *Prevention Services*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., <https://www.nyc.gov/site/acs/for-families/prevention-services.page> [<https://perma.cc/576W-RFMW>].



regarding mental health, special medical needs, and overall child well-being.<sup>251</sup> However, concerns have been raised regarding the ways in which the system can weaponize prevention services against parents by making them mandatory or conditioning a favorable result on the outcome of these services.<sup>252</sup> Indeed, one can argue that LGBTQ+ parents (along with low-income parents and parents of color) would be reluctant to take advantage of these services, as they could subject them to more surveillance and thus put them at more risk of having their parental rights terminated. Prevention services should be reimagined to facilitate family integrity rather than more surveillance and punishment. Mutual aid projects, rather than the state, might be a better conduit for these goals.<sup>253</sup>

#### D. Constitutional Arguments: Focus on Parents' Rights

As family law is mostly in the domain of state law, many states will likely not repeal laws that harm LGBTQ+ parents or implement reforms that promote LGBTQ+ family dignity—either within or outside of the family regulation system—until the courts find that these states' treatment of LGBTQ+ parents is barred by existing nondiscrimination principles, curbed by parents' constitutional rights, or both. Established constitutional parental rights can arguably protect LGBTQ+ parents currently facing discrimination in the family regulation system, both in cases pitting religious freedom and anti-discrimination principles against each other, and in individual cases where a parent is discriminated against based on their LGBTQ+ status.

There is opportunity for the federal government to focus on established parental rights in its litigation strategy in cases challenging anti-discrimination rules for federal funding. In answering future challenges like Texas Attorney General Paxton's<sup>254</sup> to administrative rules on federal funding, the federal government should highlight the reunification and case management services that these contractors provide to existing parents.

Scholars like Chris Gottlieb have similarly argued that the conversation around

251 *Id.*

252 *See* Burrell, *supra* note 13, at 138 n.59 (“In New York, families are often offered preventative services rather than taken to court. While these services are explained to be voluntary, parents have often reported that if they did not agree to the services, court intervention was threatened.”).

253 *See* Arons, *supra* note 211, at 22–25 (advocating for mutual aid through an abolitionist lens, and describing examples of family-support mutual aid projects in New York City during the COVID-19 pandemic).

254 *See* sources cited *supra* notes 177–85 and accompanying text.

religious agencies' refusal to accept LGBTQ+ foster and adoption applicants misses “that the most important constitutional interest at stake in the foster care context are the right of parents to raise their children and the right of children to maintain their family ties when they are placed in foster care.”<sup>255</sup> The rights of parents have more constitutional grounding than the rights of prospective foster parents. As such, this is an area where the federal government can find longstanding legal grounding under the Fourteenth Amendment to support its nondiscrimination policies for recipients of federal funds.

Foster parents are essentially independent contractors. They are licensed and supervised by the state or by a foster organization in contract with the state. As such, the rights of prospective foster parents are tenuous; there is no fundamental right to be awarded a state contract, even if there is an inherent wrong to being turned down on the basis of one's gender identity or sexual orientation. As Gottlieb says, “[Foster care] is a service for foster children . . . not a service *for* foster parents.”<sup>256</sup> There is limited legal ground for fighting discrimination against foster parents versus fighting discrimination against parents, who have an established “fundamental right to make decisions concerning the care, custody, and control of their children” under the Fourteenth Amendment.<sup>257</sup>

While discrimination against LGBTQ+ people seeking to foster and adopt is indeed serious, granting these contractors licenses to discriminate on religious grounds also opens the door for those same organizations to discriminate against LGBTQ+ parents in case management and reunification proceedings. This is arguably the more consequential topic of the two. While an LGBTQ+ adult seeking to foster or adopt can theoretically find another agency to work with, the LGBTQ+ parent in the family regulation system does not get to select with whom they work with. The prospective foster or adoptive parent might have to spend more time and money finding an organization that will work with them, which is inequitable. “Parents whose children are in foster care, however, have no control over the agency assigned to work with them, and the vast discretion afforded to said agency means that bias may be difficult to detect.”<sup>258</sup> If state contractors are enabled by challenges like Paxton's to discriminate against LGBTQ+ people on religious grounds, these contractors could outright deny reunification on the basis of the parent's LGBTQ+ status, conflating such status with neglect or abuse, all while receiving federal funding.

255 Gottlieb, *supra* note 203, at 1.

256 *Id.* at 52.

257 *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

258 *Neglected Lesbian Mothers*, *supra* note 21, at 109.

By focusing its responses to challenges like Paxton's on the way that such license to discriminate would infringe on parents' constitutional rights, the federal government arguably has a better chance of convincing the courts to uphold the administrative antidiscrimination rules as a condition of federal funding. Case law evinces the strong history of parental rights.<sup>259</sup> Moreover, case law shows that the fundamental liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."<sup>260</sup>

There is also an argument for the unconstitutionality of discrimination against parents based on LGBTQ+ status. The federal government can use this argument to ground its position against a challenge like Paxton's, or individual lawyers can use this argument when representing an LGBTQ+ parent faced with discrimination in the family regulation system. This argument combines *Obergefell* and *Palmore v. Sidoti* to argue that discrimination based on parental LGBTQ+ status is unconstitutional.

In *Obergefell*, the Court's holding is facially limited to protecting same-sex marriage.<sup>261</sup> However, *Obergefell*'s dicta also states that LGBTQ+ people "have a constitutional right to birth, adopt, and raise children—and that the children of gay parents hold dignitary rights as well."<sup>262</sup> This is further reinforced by the dicta in *United States v. Windsor*, a 2013 case in which the Court said in dicta that the federal gay marriage ban "makes it even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family, as it "humiliates tens of thousands of children now being raised by same-sex couples."<sup>263</sup> Thus, arguably, *Obergefell* grounds its protection of same-sex marriage in the dignitary interest of same-sex-parent families. This can be extended to all families with LGBTQ+ parents (e.g., unmarried LGBTQ+ couples with children, couples where only one person is LGBTQ+, parents who are transgender or nonbinary). This assertion of the

259 "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65.

260 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Furthermore, as long as "there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." *Id.* at 766–67.

261 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

262 Stern et al., *supra* note 55, at 93.

263 *United States v. Windsor*, 570 U.S. 744, 772 (2013).

constitutional rights of LGBTQ+ adults to be parents, and to protect the dignity interest of their children, can then be combined with the 1984 Supreme Court case of *Palmore v. Sidoti*.

In *Palmore*, the Court considered a case where a white father sought custody of his child from his white ex-wife, who had remarried a Black man. Despite acknowledging the fitness of both the mother and the stepfather as parents, the trial court granted the father custody solely on the grounds that the child would be subject to social stigma for living with a Black stepfather.<sup>264</sup> The Supreme Court reversed. Interestingly, the Court widened its framing of the question presented before stating the holding, opining:

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.<sup>265</sup>

Arguably, *Palmore* stands for the assertion that it violates the Equal Protection Clause to consider any private bias, not just against race or ethnicity, but against other attributes like LGBTQ+ status, in determining child custody. Moreover, while *Palmore* is situated within the context of private custody, this Note argues for its extension into the family regulation context. If it violates Equal Protection principles to consider factors like a stepparent's race when deciding which parent receives custody of their child, it should also violate Equal Protection principles to consider those same factors when deciding whether the parent(s) or the state should maintain custody of the child. Even though private custody cases often follow a divorce and family regulation proceedings often result from a state investigation, they both share basic components like assessing parental fitness, considering the child's best interests, and ultimately deciding whether a child gets to go home with a parent who is fighting to maintain their legal parental rights. In these shared attributes of the two different kinds of legal proceedings, there is a connection between *Palmore*'s assessment of private custody considerations and treatment of parents in the family regulation system.

This combination of *Obergefell* and *Palmore* makes the case for protecting against

264 *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984) (discussing the trial court's rationale).

265 *Id.* at 433.

any consideration of parents' LGBTQ+ status in family regulation proceedings. Individual lawyers can reference those cases to argue for an extension of their principles from the realms of marriage and private custody to the family regulation system. This argument can also be used at a higher level to grant greater protections to LGBTQ+ parents nationwide through an extension of existing case law. This legal strategy, especially if it reaches the Supreme Court, could be a vehicle for transformative, nationwide change in the treatment of LGBTQ+ parents in the family regulation system. However, the current composition of the Court casts doubts on its willingness to accept such an argument.

### E. Utilization of Federal Oversight Apparatuses

The federal government should use its oversight apparatus to further ensure that federally funded programs are not discriminating against parents on the basis of their LGBTQ+ status. There is also opportunity for greater federal action to protect LGBTQ+ parents from state intervention, both in litigation and in federal oversight action, if the federal government is willing to engage. The current administration is likely to be amenable to these suggestions,<sup>266</sup> especially in light of backlash against recent judicial decisions regarding federal funding for adoption and foster programs.<sup>267</sup>

One example of federal action that should be extended to account for the family regulation system's treatment of LGBTQ+ families is the use of Child & Family Service Reviews (CSFRs). As a condition of federal funding, the Children's Bureau conducts regular reviews of states' family regulation systems through CSFRs.<sup>268</sup> The goals of CSFRs are to

266 The Biden Administration's steps to create greater protections for LGBTQ+ youth in foster care suggest amenability to this Note's suggestions. *See, e.g.,* Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, 88 Fed. Reg. 66752 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. pt. 1355) (proposing a rule to specify steps that agencies must take in creating a 'safe and proper' care plan for LGBTQ+ youth in foster care).

267 This backlash is largely in relation to the outcomes of *Rogers v. McMaster* (*see supra* notes 186–93 and accompanying text) and *Fulton v. City of Philadelphia* (*see supra* notes 194–200 and accompanying text). *See, e.g.,* Aryn Fields, *The Human Rights Campaign Reacts to Supreme Court Decision in Fulton v. City of Philadelphia*, HUM. RTS. CAMPAIGN (June 17, 2021), <https://www.hrc.org/news/the-human-rights-campaign-reacts-to-supreme-court-decision-in-fulton-v-city-of-philadelphia> [<https://perma.cc/P4WU-24SE>] (discussing *Fulton*'s discriminatory implications and presenting widespread criticism of incorporation of discriminatory principles into the family regulation system); *Foster Agencies Get Free Pass, Kids Pay the Price*, CHILD.'S RTS. (May 24, 2019), <https://www.childrensrights.org/news-voices/foster-agencies-get-free-pass-kids-pay-the-price> [<https://perma.cc/DK7D-EX88>] (reacting to *McMaster*'s discriminatory implications and noting significant Congressional disapproval of the Trump Administration's issuance of a waiver to South Carolina).

268 *See Child & Family Service Reviews (CSFRs)*, CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS.

“ensure conformity with federal child welfare requirements; determine what is actually happening to children and families as they are engaged in child welfare services; [and] assist states in helping children and families achieve positive outcomes.”<sup>269</sup> CSFRs should make discrimination on the basis of parents' LGBTQ+ status a condition to funding. Statistically significant discrimination, perhaps measured by how disproportionate the removal rates or parental rights' termination rates are for LGBTQ+ parents, could be considered as a lack of conformity with federal requirements. The federal government could then step in to assist the programs in eliminating unconscious or deliberate bias against LGBTQ+ parents, or even pull funding from programs that refuse to act in a nondiscriminatory way. This extension of CSFRs would also require the federal government to collect data on parents' sexual orientation and gender identity, which would help prove that there is disproportionate removal of children from LGBTQ+ parents and perhaps identify any geographic or other trends in removal rates.

### F. Suggestions for Future Research

Most research on the interactions between the family regulation system and the LGBTQ+ community focuses on LGBTQ+ youth in the family regulation system or LGBTQ+ people seeking to foster or adopt. Scholarship is beginning to point out how LGBTQ+ families and parents face unique impacts by the family regulation system, but more work can be done on this important topic.<sup>270</sup> While historical treatment of LGBTQ+ parents and overlapping evidence from private custody, foster and adoption, and treatment of other marginalized groups in the family regulation system helps give credence to existing data showing disproportionate child removal from LGBTQ+ parents, more research is needed.

This lack of data is likely fueled by a few factors. First, because family law is in the domain of states, it is generally difficult to collect comprehensive, national data on the family regulation system across all state systems.<sup>271</sup> Second, existing data focuses on children in foster care, not on their parents. The Department of Health and Human Services

(Sept. 22, 2022), <https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews> [<https://perma.cc/F7MX-KCFR>].

269 *Id.*

270 Joslin & Sakimura, *supra* note 6, at 83–84.

271 *See generally* Sarah Font, *Data Challenges and Opportunities in Public Welfare*, AM. ENTER. INST. (2020), <https://www.aei.org/wp-content/uploads/2020/03/Data-Challenges-and-Opportunities-in-Child-Welfare.pdf?x91208> [<https://perma.cc/63DF-G74P>] (presenting the insufficient and unreliable nature of federal, state, and local aspects of family regulation data systems).



(HHS) releases annual data on children in foster care via its Adoption and Foster Care Analysis and Reporting System (AFCARS).<sup>272</sup> These reports detail the number of children in foster care, their age, their race and ethnicity, their length of time in the system, and their reason for removal.<sup>273</sup> These are the only factors collected by the government at a national level; statistics on LGBTQ+ youth in the system come from outside studies.<sup>274</sup> Third, the practicalities of collecting data on LGBTQ+ parents' interactions with the family regulation system presents a few difficulties. National collection of this data would rely on state reporting; some states might resist collecting this data, and some parents might not want to share their LGBTQ+ status with a caseworker for fear of implicit or explicit discrimination. More broadly, any collection of such data should include all parents who interact with the family regulation system, not just those whose children end up in foster care (either temporarily or permanently). The federal government currently focuses on data stemming from children who have entered foster care; it would be another ask altogether to require states to submit information on all families who come into contact with the family regulation system.

Finally, in considering the possibility of non-governmental sources analyzing the interactions between LGBTQ+ parents and the family regulation system, the options are sparse. CPS cases and foster care records are generally not made public for privacy reasons.<sup>275</sup> It would be a monumental task to parse through lawsuits and publicly available

272 *Adoption and Foster Care Analysis and Reporting System (AFCARS)*, CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS. (May 30, 2023), <https://www.acf.hhs.gov/cb/data-research/adoption-fostercare> [<https://perma.cc/MB3L-RVQP>].

273 ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., No. 29, THE AFCARS REPORT (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/6EGK-7XAN>].

274 *See, e.g., LGBTQ+ Youth in Foster Care: Fact Sheet*, CHILD.'S RTS. (2023), <https://www.childrensrights.org/wp-content/uploads/2023/01/CR-LGBTQ-Youth-in-Foster-Care-2023-Fact-Sheet.pdf> [<https://perma.cc/Z3WN-E5MF>] (presenting nongovernmental study results on the overrepresentation of LGBTQ+ youth in the foster system and associated factors, such as likelihood of experiencing abuse and homelessness); Painter et al., *Improving the Mental Health Outcomes of LGBTQ Youth and Young Adults: A Longitudinal Study*, 44 J. SOC. SERV. RSCH. 223 (2018) (presenting nongovernmental study results on LGBTQ+ youth's mental health disparities and support and services they received).

275 *See, e.g., FAQ*, CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS. (2023), <https://www.acf.hhs.gov/cb/faq/can10> [<https://perma.cc/4VR4-Z5VK>] (reporting that, while this varies by state, parents' information and the results of any family regulation investigation are generally kept in a private database managed by each state, and this information is generally only used or seen by the state); *Requesting Child Protective Records*, N.Y.C., <https://www.nyc.gov/assets/acs/pdf/about/2017/requestingprotectiverecords.pdf> [<https://perma.cc/PX4C-2HR8>] (reporting that child protective records are not available to request in New York City, unless

records to gather data on parents' LGBTQ+ status, and any result would likely be an incomplete picture. LGBTQ+ status of parents in individual cases might not be mentioned in records, and implicit bias is hard to measure. Private studies would likely need to be conducted of parents who have interacted with the family regulation system, which requires time, money, and willing participants.

The federal government has missed opportunities to collect data or conduct research on the sexual orientation and gender identity of parents who have experienced child removal; the government has either shot down or ignored these opportunities. In 2014, HHS published a 150-page report titled *Human Services for Low- Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs*.<sup>276</sup> The report included only one paragraph on LGBTQ+ parents in the family regulation system. The authors stated that they did not identify any research on LGBTQ+ parents' experiences with the family regulation system and then made several suggestions for future research.<sup>277</sup> However, a follow-up HHS report only made research recommendations concerning LGBTQ+ youth in child welfare programs and the participation of LGBTQ+ adults in those programs as foster and adoptive parents.<sup>278</sup> The research recommendations did not include anything about LGBTQ+ parents specifically,<sup>279</sup> even though the first report clearly stated that no such research existed at the time and had even made preliminary research suggestions. Polikoff describes this omission as a sign of "indifference to a highly marginalized population of LGBT-headed families."<sup>280</sup>

There is also missing data on LGBTQ+ adults and youth in the family regulation system more generally. The federal government could implement requirements regarding data collection, and more private research could also be done in this area. There have

someone is requesting their own records).

276 ANDREW BURWICK ET AL., HUMAN SERVICES FOR LOW-INCOME AND AT-RISK LGBT POPULATIONS: AN ASSESSMENT OF THE KNOWLEDGE BASE AND RESEARCH NEEDS (2014), [https://www.acf.hhs.gov/sites/default/files/documents/opre/lgbt\\_hsneeds\\_assessment\\_reportfinal11\\_12\\_15.pdf](https://www.acf.hhs.gov/sites/default/files/documents/opre/lgbt_hsneeds_assessment_reportfinal11_12_15.pdf) [<https://perma.cc/MR3A-V4CQ>].

277 *Id.* at 53.

278 ANDREW BURWICK ET AL., OFF. OF PLAN., RSCH. & EVALUATION, HUMAN SERVICES FOR LOW-INCOME AND AT-RISK LGBT POPULATIONS: RESEARCH RECOMMENDATIONS ON CHILD WELFARE PROGRAMS 1 (2015), [https://www.acf.hhs.gov/sites/default/files/opre/lgbt\\_hs\\_recommendations\\_childwelfare\\_508compliant030615\\_nologo.pdf](https://www.acf.hhs.gov/sites/default/files/opre/lgbt_hs_recommendations_childwelfare_508compliant030615_nologo.pdf) [<https://perma.cc/S8PH-DQAX>].

279 *See id.* at 2 (presenting research recommendations).

280 *Neglected Lesbian Mothers*, *supra* note 21, at 103–04 (describing the HHS report and the lack of follow-up).

been attempts to do so. In 2016, under the Obama administration, HHS' Administration for Children and Families (ACF) released a final rule<sup>281</sup> that would have required states to collect and report data on LGBTQ+ youth, foster parents, adoptive parents, and legal guardians.<sup>282</sup> This rule was never implemented. The effective date was delayed twice, and HHS "fully revers[ed]" its position in 2018, "proposing the elimination of the requirement that states collect and report data on the sexual orientation of youth age 14 and older, foster parents, adoptive parents, and legal guardians."<sup>283</sup> In its Notice of Proposed Rulemaking, "ACF noted its intent 'to reduce the AFCARS reporting burden' and its agreement with concerns stated in public comments that sexual identity was too 'sensitive and private' to report 'in a government record.'"<sup>284</sup> Finally, the Trump administration fully eliminated all of the 2016 rule's requirements in 2020.<sup>285</sup>

ACF could reinstate these rules and expand them to include collection of data specifically on the LGBTQ+ status of parents. Private studies could be an alternative to government collection, if government data collection threatens the introduction of more bias. Purposeful data collection will help the public understand the particular challenges of LGBTQ+ parents in the family regulation system and the need for transformational change; help organizations obtain funding for and develop programs to better support LGBTQ+ parents; and help push for laws and policies that would improve outcomes for LGBTQ+ people in the family regulation system.

In existing scholarship, much of the data and attention is focused on lesbian, bisexual, and gay people. Further research and focus on other members of the LGBTQ+ community, such as nonbinary parents and transgender parents, would help create a more accurate picture of the LGBTQ+ community's interactions with the family regulation system. This is especially important as transgender people seem to be currently facing the most attacks

281 45 C.F.R. § 1355 (2016).

282 Jordan Blair Woods, *The Regulatory Erasure of LGBTQ+ Foster Youth*, REGUL. REV. UNIV. PA. CAREY L. SCH. (June 22, 2021), <https://www.theregreview.org/2021/06/22/woods-regulatory-erasure-lgbtq-youth/> [<https://perma.cc/7FMZ-H87H>] (stressing that youth in the foster system could decline to report their sexual orientation and/or gender identity if they felt uncomfortable or unsafe sharing that information).

283 *Id.*

284 *Id.* (quoting Adoption and Foster Care Analysis and Reporting System, 84 Fed. Reg. 16572, 16574 (proposed Apr. 19, 2019)).

285 *Id.*

and erosion of rights,<sup>286</sup> and transgender parents are especially vulnerable in the family regulation system.<sup>287</sup>

Following the lead of S. Lisa Washington and other scholars, more attention should be paid to intersectionality in regards to parents and the family regulation system.<sup>288</sup> Paying attention to parents' intersecting identities, such as race, socioeconomic class, sexual orientation, and gender identity, can elucidate how concepts like heteronormativity and racism compound to reinforce inequity in the system.<sup>289</sup> Intersectionality is crucial in this discussion of LGBTQ+ parents and the family regulation system. There is robust scholarship on the way that the family regulation system impacts parents, children, and communities of color.<sup>290</sup> Scholars studying LGBTQ+ parentage can learn from this existing scholarship, working in tandem to achieve better outcomes all parents.

Research can also be done on intersections between the LGBTQ+ identity of the parent(s) and their child(ren). When both parent and child are members of the LGBTQ+ community, do they face any heightened or different risks? Available information suggests that they do. Emerging scholarship shows that, historically, judges often looked favorably on gay or lesbian parents who "proved" that their child was heterosexual and gender-conforming "despite" their parents' homosexuality.<sup>291</sup> While this was likely a necessary argument in the 1970s and 1980s for a LGBTQ+ parent trying to keep custody of their

286 See Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing In States Across the Country*, HUM. RTS. CAMPAIGN (May 23, 2023), <https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country> [<https://perma.cc/W7TL-8QUH>] (reporting that, in 2023, "Over 520 anti-LGBTQ+ bills have been introduced in state legislatures, a record; over 220 bills specifically target transgender and non-binary people, also a record; and a record 70 anti-LGBTQ laws have been enacted so far this year, including: laws banning gender affirming care for transgender youth: 15; laws requiring or allowing misgendering of transgender students: 7; laws targeting drag performances: 2; laws creating a license to discriminate: 3; laws censoring school curriculum, including books: 4 . . . More than 125 bills would prevent trans youth from being able to access age-appropriate, medically-necessary, best-practice health care, in addition to more than 45 bills banning transgender students from playing school sports and more than 30 'bathroom bills,' a figure that exceeds the number bathroom bills filed in any previous year.").

287 See sources cited *supra* note 146.

288 See Washington, *supra* note 9.

289 See *id.* at 186–88.

290 See sources cited *supra* notes 19, 103.

291 Gutterman, *supra* note 45 (discussing parents who use homophobic and transphobic logic to argue that parents who support their child's LGBTQ+ identity are not fit to parent their children).

child, it has set an unfortunate precedent wherein LGBTQ+ parents who have LGBTQ+ children are perceived as having a potentially unhealthy or negative influence on their child.<sup>292</sup> Research is emerging on parents who lose custody of their children after supporting that child's transgender or gender-nonconforming identity.<sup>293</sup> This topic will likely become even more relevant going forward in both family regulation cases and in private custody cases, as more LGBTQ+ people feel safe enough to come out as children or teenagers, and more parents are supportive of their children's identities.

Finally, research on the LGBTQ+ perspective in child welfare services also reveals knowledge gaps "about social workers' attitudes, knowledge and experiences regarding working with LGBTQ individuals."<sup>294</sup> More research could be done on the perspective of social workers, including what they are taught in educational programs about parents and families beyond a white, middle-class, heterosexual, cisgender lens. Understanding how social workers might approach a case with LGBTQ+ parents can help present opportunities for updating curriculum requirements and internal controls in social work organizations.

In all of these areas, gathering data will highlight that there is conclusively a discriminatory issue of LGBTQ+ parents losing their children to the family regulation system at a disproportionate rate. Further research and data could ignite a call to action for family integrity and dignity not only for LGBTQ+ parents, but all parents who risk family regulation intervention. It is easy to dismiss discrimination claims as one-off instances of "bad apple" judges or social workers without data proving there is a much larger problem at hand.

## CONCLUSION

As we grapple with how to ensure safety and well-being of LGBTQ+ people in the United States, we cannot forget about LGBTQ+ parents who are losing their parental rights and their children to the family regulation system. The available data and other relevant evidence suggest that LGBTQ+ parents are having their children removed at a disproportionate rate, which is suggestive of anti-LGBTQ+ discrimination against parents throughout the family regulation system. Removal of children from homes and termination

<sup>292</sup> *Id.*

<sup>293</sup> See Katherine A. Kovalanka et al., *An Exploratory Study of Custody Challenges Experienced by Affirming Mothers of Transgender and Gender-Nonconforming Children*, 57 *FAM. CT. REV.* 54, 54 (2019).

<sup>294</sup> Kaasbøll et al., *What is Known About the LGBTQ Perspective in Child Welfare Services: A Scoping Review*, 27 *CHILD & FAM. SOC. WORK* 358 (2022).

of parental rights are serious measures that should be reserved for legitimate child welfare issues.

It is important to investigate whether the discretion given to agency workers and judges is resulting in LGBTQ+ parents being over-policed. This is especially relevant when states contract with religious, anti-LGBTQ+ organizations for case management services. Paying attention to intersections of race, class, gender identity, and sexual orientation is critical in understanding how and why LGBTQ+ parents encounter discrimination in the family regulation system, and what can be done to promote equity for LGBTQ+ parents. Ensuring protection from discrimination and fair treatment when LGBTQ+ parents come into contact with the family regulation system are critical in the overarching struggle to ensure equity, safety, and quality of life for LGBTQ+ people. In seeking these aims, we must continually ask, "[H]ow do we respond to, prevent, and heal harm within communities without causing more harm?"<sup>295</sup> Transformational change, guided by abolitionist principles and frameworks, is needed to reimagine family dignity in the United States.

<sup>295</sup> See Mack, *supra* note 215, at 807.