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The editors and staff members of *CJGL* are grateful for your support. We look forward to your continued readership and welcome your contributions and responses.

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Table of Contents

ABORTION, FULL FAITH AND CREDIT, AND THE "JUDICIAL POWER" UNDER ARTICLE III: DOES ARTICLE IV OF THE U.S. CONSTITUTION REQUIRE SISTER-STADTE ENFORCEMENT OF ANTI-ABORTION DAMAGES AWARDS?

LEA BRILMAYER*

Abstract

Interstate judgments enforcement is governed by the Full Faith and Credit Clause of Article IV of the Constitution, together with its implementing statute, 28 U.S.C. 1738. Although a highly technical area of the law, interstate judgments enforcement has important social repercussions for some very modern problems of great cultural significance. One of the currently significant applications is the interstate enforcement of judgments rendered in civil suits based on state anti-abortion laws. For example, Texas statute S.B. 8 gives anyone who wishes to sue a civil cause of action against persons who facilitate abortions. Even complete strangers to the abortion can decide to become a plaintiff in such an action and can sue for money "damages" despite having suffered no injury.

Non-experts seem to have the impression that the Full Faith and Credit Clause presents an ironclad requirement that judgments of sister states must always be enforced. If that were the case, states that recognize reproductive freedom would be obliged to enforce judgments entered into in states like Texas, despite their strong public policy against such actions. This Article shows why this impression is mistaken.

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First, the full faith and credit principle has for centuries been subject to exceptions, several of which are potentially relevant in the reproductive freedom context. These include lack of subject matter jurisdiction, the public policy exception, and the penal law exception. In addition, a uniform law adopted in forty-eight states (the Uniform Enforcement of Foreign Judgments Act) permits the state enforcing the judgment to apply its own judgments law to an interstate enforcement proceeding. The enforcing state will therefore apply to foreign state judgments any exceptions to judgments enforcement law that it has as a general matter for its own domestic judgments.

Second, and more importantly, the Clause and statute both contain an important qualification: they apply only to "judicial" actions. This exception prevents a state from requiring sister-state enforcement of decisions that do not meet the usual tests for a judicial "case or controversy" (as defined in Article III of the Constitution). Article III and Article IV both use the word "judicial" to specify the standard necessary for the exercise of federal power. These two neighboring constitutional provisions are supported by a common historical origin (they were drafted at the same time and by some of the same people at the constitutional drafting convention) and fulfill comparable functions. If the two constitutional provisions are treated the same, judgments under statutes like Texas S.B. 8 would not be given mandatory force in other states because such cases would not meet the standing requirement imposed by Article III.

INTRODUCTION

The bitter battle over the constitutional right to an abortion has already plagued American politics for nearly half a century. The 1973 decision in *Roe v. Wade* was followed by decades of intensive political organizing, fundraising, lobbying state legislatures, filing court challenges, and manipulation of the process for selection of federal judges and justices.[1] Anti-abortion states repeatedly passed restrictive legislation chipping away at the protections that *Roe* had recognized.[2] In September 2021, boldly defying *Roe* in the

1 Roe v. Wade, 410 U.S. 113 (1973). *See generally* N.E.H. HULL & PETER CHARLES HUFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (3d. ed. 2021). For an in-depth account of the Supreme Court decisions dealing with state's efforts to chip away at *Roe*, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008). Two cases dealing with the push-back against *Roe* are *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) and *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020). The importance of the popular reaction to *Dobbs* for purposes of interstate enforcement doctrine is discussed *infra* at note 116.

2 *See generally* N.E.H. HULL & PETER CHARLES HUFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (3d. ed. 2021).

expectation that the newer members of the Supreme Court would back it up, the State of Texas adopted S.B. 8—the Texas Heartbeat Act, which abandoned all pretense of deference to *Roe*.[3] Less than twelve months later, *Roe* was history.[4]

Roe's overruling in 2022 was not the end of the story; it merely kicked off the next act in the drama, as *Roe*'s enemies immediately moved the goalposts. A campaign supposedly designed to protect state autonomy from federal interference morphed quickly into a campaign to stamp out abortion in all fifty states.[5] Half a century of bitter battle is already behind us, and the principal actors are just getting warmed up.

One of the aspects of this dispute that has come into focus since *Roe*'s demise is the conflict of laws implications of these rulings.[6] Not content merely to outlaw local abortions, some states have threatened to apply their laws to women leaving the state to obtain the procedure. Nonresident women's rights advocates, as well as medical professionals practicing elsewhere, worry that they could be subjected to the Texas law.[7] Contemplating the prospect of Texas courts entering awards against out-of-state defendants, constitutional theorists who would ordinarily cringe at the words "conflict of laws" are now getting around to thinking about extraterritoriality. But the issue of extraterritorial applicability of state anti-abortion law is just a taste of things to come. Even once that issue is done with,

3 The popular name of the statute reflects its prohibition of abortion once the fetal heartbeat could be detected. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 205(a) (West 2021).

4 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

5 *See, e.g.*, Glenn Kessler, *These Republicans Cheered Abortion Policy Going to States. They Are Also Sponsoring a Federal Ban.*, WASH. POST (Sept. 7, 2022), https://www.washingtonpost.com/politics/2022/09/07/these-republicans-cheered-abortion-policy-going-states-they-are-also-sponsoring-federal-ban/ [https://perma.cc/KU4E-CU8V].

6 Even prior to the point that the issue became of general interest, conflicts of laws scholars had begun to address the question of extraterritoriality. *See, e.g.*, Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993); Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

7 Out of state providers would most likely be affected if Texas law was held applicable to Texas women leaving their state to obtain an abortion elsewhere. One of the issues on which attention was focused was therefore whether the right to travel would protect the pregnant person's right to seek an abortion in another state. *See, e.g.*, CENTER FOR REPRODUCTIVE RIGHTS, *Roe v. Wade*, https://reproductiverights.org/roe-v-wade/ [https://perma.cc/DM54-B557] (discussing the reaction to overruling of *Roe* generally); Adam Liptak, *The Right to Travel in a Post-*Roe *World*, N.Y. TIMES (July 11, 2022), https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html [https://perma.cc/AR5P-U9WM].

we will still have to deal with problems about the interstate enforceability of the resulting judgments. That brings us to the question that this Article addresses.

Must sister states enforce these anti-abortion awards? It is obviously crucial to the Texas enforcement scheme that losing defendants in these Texas cases actually pay. If they do not, the threat to out-of-state providers will not be credible; possible plaintiffs will not be incentivized to bring suit, and out-of-staters will not be deterred. To maximize the nationwide impact of its statute, Texas must be able to reach out-of-state abortion clinics and women's rights organizations, especially large nonprofits that publicize their services within Texas, deliver medical care to patients from Texas, or offer support to women who need help leaving Texas to get to a clinic. These are repeat players, and the multiple applications of Texas law has potential to drive them into bankruptcy unless they can find protection for their assets in a sanctuary state. Whether you applaud Texas's ambition or find it appalling, there is no denying that the prospect of being sued in Texas is much more of a threat to outside organizations if Texas plaintiffs can reach out-of-state assets to satisfy a Texas judgment.[8] Can they?

This question is of immediate importance. Pro-choice states are considering the adoption of legislation protecting persons who assist in obtaining abortions from harassment by litigation brought under the anti-abortion laws discussed in this Article. Connecticut, for example, has already passed a "claw-back" statute for persons caught up in anti-abortion litigation in states such as Texas.[9] It provides that an individual who suffered a judgment under one of these laws "may recover damages from any party that brought the action leading to that judgment or has sought to enforce that judgment."[10] Damages include recovery of the money paid under the other state's judgment with attorney's fees. The constitutionality

8 *See, e.g.*, *Lawsuit Filed to Stop Texas' Radical New Abortion Ban*, PLANNED PARENTHOOD (July 13, 2021), https://www.plannedparenthood.org/about-us/newsroom/press-releases/lawsuit-filed-to-stop-texas-radical-new-abortion-ban [https://perma.cc/48NE-HNS5].

9 The statute states:

> When any person has had a judgment entered against such person, in any state, where liability, in whole or in part, is based on the alleged provision, receipt, assistance in receipt or provision, material support for, or any theory of vicarious, joint, several or conspiracy liability derived therefrom, for reproductive health care services that are permitted under the laws of this state, such person may recover damages from any party that brought the action leading to that judgment or has sought to enforce that judgment.

Damages include recovery of the money paid under the other state's judgment, with attorney's fees. 2022 Conn. Acts. 22–19 § 1(b) (Reg. Sess.).

10 *Id.*

of such legislation depends on the Full Faith and Credit Clause, but the case law addressing such issues is quite sparse, and only very recently have any scholars paid attention to the topic at all.[11] The strength of a state's commitment to adopting legislation protecting reproductive rights depends in substantial part on whether the legislation in question is believed capable of surviving constitutional challenge.

The magnitude and sensitivity of the competing interests on either side reveal a real-world importance that is simply not apparent to the typical teacher or student in a conflicts course. The typical law school course on conflicts lavishes time on hypotheticals about guest statutes, married women's contracting laws, and uncles eloping to Rhode Island with their nieces.[12] This is not adequate preparation for dealing with a problem of the current abortion dispute's intensity and staying power.

The key to this question lies in the relationship between Article III and Article IV of the Constitution. Both are limited to "judicial" procedures, and this fact disqualifies disputes that cannot meet Article III case or controversy standards. To illustrate: assume that the law of a particular pro-life state provides for advisory opinions, and the legislation that authorizes advisory opinions specifies that they have the force of precedent. In addition, the state's domestic law disallows attempts to re-open judgments.

The potential effect of these assumptions, taken together, is startling. Traditional understandings of interstate judgments enforcement would seem to entitle the state's advisory opinions to full faith and credit.[13] They would be enforceable anywhere in the United States. Moreover, because the opinions were advisory, the state's judges would not have to wait for an actual case to raise an issue. They could simply issue edicts at will. There would be nothing to stop such a state from flooding the airwaves with its opinions

11 Two very recent scholarly discussions of such exceptions are Diego A. Zambrano, Mariah E. Mastrodimos & Sergio F.Z. Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, N.Y.U. L. REV. ONLINE 382 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/10/98-NYU-L-Rev-Online-382.pdf [https://perma.cc/8LMY-E2PK] and Haley Amster, *Abortion, Blocking Laws, and the Full Faith and Credit Clause*, 76 STAN. L. REV. ONLINE 110 (2024), https://review.law.stanford.edu/wp-content/uploads/sites/3/2024/01/Amster-76-Stan.-L.-Rev.-Online-110.pdf [https://perma.cc/EWV5-7ZMG]. Both were published while the manuscript for the present Article was in preparation.

12 *See, e.g.*, *In re* May's Estate, 114 N.E.2d 4 (1953).

13 For the exposition of statutory and constitutional provisions relating to full faith and credit, *see infra* Part II. On the binding effect of advisory opinions, *see* Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207, 1220 n.38 (2022).

about everything from same sex marriage to the rights of transgender people. And sister states would be obliged to give these opinions "full faith and credit."

Surely the Constitution would not require other states to enforce that state's advisory judgments. But why not? Existing understandings of the Full Faith and Credit Clause lack the tools necessary to answer this question. This Article provides both the tools and an answer. They lie in the intentions of those who drafted the Constitution to limit judicial authority to what was familiar at the time of the drafting. Federal courts cannot transgress these limits, but neither can a state court, seeking to force its will upon the other states.

Part I of this Article summarizes the Texas statute. Then, Part II briefly discusses the defenses to the full faith and credit obligation to honor a sister state's judgments that are currently most widely recognized. They are not clearly dispositive of the matter. These are accompanied by one unfamiliar defense, based on the Uniform Enforcement of Foreign Judgments Act (UEFJA). Under this Act, a Texas judgment enforced in Connecticut court will be governed by Connecticut law on the question of whether it can be reopened. We will see that although this part of the UEFJA might seem inconsistent with the federal full faith and credit statute, it has never been found preempted. Part II of the Article gives the reasons why.

Part III then turns to a more forceful and important defense. It argues that—entirely independently of any of the standard defenses—the Full Faith and Credit Clause contains within it limitations that make it inapplicable to Texas anti-abortion awards. Because the Clause applies only to "judicial" proceedings, and because the Supreme Court has defined "judicial" proceedings as limited to Article III cases or controversies, the unusual procedural posture of these Texas cases disqualifies them for full faith and credit purposes. Part IV applies the arguments in Part III to questions of implementation.

I. Essentials of the Texas "Heartbeat Act"

After *Roe v. Wade* was decided in 1973, abortion opponents worked tirelessly for years to find ways to deter or penalize abortion that would survive the scrutiny of the federal courts; their success was halting and gradual, gaining ground over time mainly by the nomination of justices selected specifically for their hostility to *Roe*.[14] When the remaining shreds of reproductive freedom were officially laid to rest in 2022, the state of

14 Michael Scherer et al., *49-year Crusade: Inside the Movement to Overturn* Roe v. Wade, WASH. POST (May 7, 2022), https://www.washingtonpost.com/politics/2022/05/07/abortion-movement-roe-wade/ [https://perma.cc/UQS9-2VUA].

Texas was ready to exercise its newfound freedom from federal oversight; eager for exactly this overruling, it had in the previous year put in place a new law forbidding almost all abortions.

Texas S.B. 8 definitely pushed the envelope as a matter of substantive constitutional law; it announced standards for obtaining an abortion that were more restrictive than anything that could at that point be found in U.S. Reports.[15] But S.B. 8 is also notorious for its unprecedented strategy for avoiding federal court review. The novel procedural mechanism that Texas devised was designed to be put in motion exclusively through individually initiated private actions, rather than through enforcement by the state. The plaintiffs were to be private citizens, not necessarily possessed of any personal connection to the abortion that was the subject of the case. Despite having no personal connection or other kind of concrete interest—and thus no personal loss to compensate—these enforcers were to be generously rewarded for exposing other private citizens who did have a connection with the abortion in question.

Under S.B. 8, anyone who can prove that an abortion took place, was attempted, or possibly even was "intended," can collect damages from persons who had somehow assisted termination of the pregnancy in any way.[16] For each abortion proven, defendants would be required to pay plaintiffs $10,000 at a minimum plus attorney fees.[17]

> Sec. 171.208 (a): Any person, other than an officer or employee of a state or local government entity in this state, may bring a civil action

15 The standard at the time that the statute was adopted was based on a long line of precedents, starting with *Griswold v. Connecticut*, 381 U.S. 479 (1965), which traced the right of privacy beyond the Bill of Rights to the First, Third, Fourth, Fifth, and Fourteenth Amendments to hold that there is an implied fundamental right to privacy in the U.S. Constitution that permits the use of contraceptives by married persons. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended *Griswold* to include an individual right to contraception. *Roe v. Wade*, 410 U.S. 113 (1973), later held that the right to privacy protects a woman's right to choose to have an abortion. While *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), shifted the underlying framework of reproductive rights cases from privacy to liberty, it reaffirmed the central belief that liberty of intimate choices is central to a person's dignity under the Fourteenth Amendment. Texas S.B. 8 violated much of this jurisprudence. For example, the Act prohibited abortions after the point that a fetal heartbeat was detectable. TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 205(a) (West 2021). Some of the substantive discrepancies are listed in the dissenting opinion of Justice Sotomayor in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (Sotomayor, J., dissenting). *Cf. Casey*, 505 U.S. at 846 (describing the prior state of federal constitutional law on abortions).

16 HEALTH & SAFETY § 171.208.

17 HEALTH & SAFETY § 171.208 (b)(2).

> against a person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, . . . or (3) intends to engage in the conduct described by Subdivision (1) or (2).[18]

Because the party who files the civil damages action does not need to have any connection to the case, but could be simply a self-appointed or even randomly-chosen enforcer of the law, it would be impossible to know the identity of the complaining party in advance.[19] No federal court would be able to keep the law from going into effect because there were no identifiable individuals at whom an injunction could be directed. The purpose of this unprecedented approach was no secret. By specifying only private enforcement, Texas sought to make preemptive federal court action impossible.[20]

What was not obvious to most observers, however, were the potential consequences of this strategy for the extraterritorial applicability of the statute. This sort of civil damages remedy is, in several respects, much better suited than traditional criminal law prosecutions for regulating activities taking place in other states. Criminal law is implemented largely through official state activity, such as investigation, apprehension of suspects, and incarceration in jails and prisons. Texas law enforcement would encounter serious problems in carrying on investigations and in locating, pursuing, and arresting suspected violators in other states—particularly if the other state was one that recognized a woman's right to choose. Civil liability enforced exclusively by private actors avoids this problem.

This is because civil damages remedies are considered "transitory" (meaning that a dispute does not have to be litigated in the place where it arose) while venue in criminal cases may be limited (e.g., to the place where the alleged crime occurred).[21] In addition,

18 HEALTH & SAFETY § 171.208(a).

19 Suit against the state itself is not permissible because of the Eleventh Amendment and the doctrine of sovereign immunity. *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999).

20 *See* Whole Woman's Health v. Jackson, 595 U.S. 30 (2021); cited in *In re* Whole Woman's Health, 142 S. Ct. 701 (2022) (Sotomayor, J., dissenting) ("This structure was designed to make it more complicated for courts to enjoin the law's enforcement on a statewide basis.").

21 A cause of action is referred to as transitory if it can be brought in any court that can obtain personal jurisdiction over the defendant. Venue in criminal cases is more limited. In bringing prosecutions under federal law, the federal government is bound by both U.S. CONST. art. III, § 2, cl. 3 and U.S. CONST. amend. VI. The former provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." U.S. CONST. art. III, § 2, cl. 3. The latter provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. CONST. amend. VI. The state courts, in contrast, are bound by their own rules of venue as well as by the Sixth Amendment, which has been incorporated through the action of the Fourteenth Amendment Due Process Clause. U.S. CONST. amend. VIX, § 1.

with private civil actions, the state avoids assuming a responsibility of fairness to criminal defendants, such as the requirement that the state provide the defendant with legal representation at its own expense.[22] The higher burden of "proof beyond a reasonable doubt" which pertains in criminal trials is also avoided. Under the new law, enforcement costs are privatized and shifted onto the defendant in the form of an award of costs and attorney's fees. For all these reasons, civil liability is far easier than criminal liability to extend extraterritorially. To any state contemplating extraterritorial regulation of abortion, the Texas strategy must have looked like a real winner.

Of course, there are complications in interstate cases that do not arise in purely domestic cases. Chief among these are possible difficulties in getting personal jurisdiction over the absent defendant and the need to show an adequate basis for applying Texas law.[23] Both of these require that the defendants and/or the events of the dispute have some connection with the forum state; their relevance is obvious.

A third complication, however, has until this point escaped attention. It is the subject of this Article: interstate judgments enforcement. Simply because the defendant might not be a resident of Texas, and thus would likely not have any property situated in Texas, an award in a case relating to an out-of-state abortion is more likely than an award in a purely domestic case to require some kind of enforcement proceeding outside of Texas. If Texas welcomes into its courts litigation over abortions occurring in other states, prevailing plaintiffs are fairly likely to face problems with interstate enforcement. Pro-choice states are unlikely to be enthusiastic about implementing S.B. 8 judgments and may be tempted to resist. If they do resist, then prevailing plaintiffs from Texas will be dependent on the support of federal full faith and credit principles.

22 The right to a lawyer in criminal trials is provided by the Sixth Amendment. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). The presumption of innocence is generally attributed to the Due Process Clause of the Fifth and Fourteenth Amendments, although those two Amendments do not use that precise language. *See* U.S. CONST. amend. V, § 1; U.S. CONST. amend. XIV.

23 The personal jurisdiction and choice of law requirements are both attributable to the Due Process Clause. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (discussing due process limits on choice of law); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (discussing due process limits on personal jurisdiction).

Such potential problems have not dimmed the luster of Texas's imaginative approach to abortion regulation. The approach has caught on quickly in parts of the country where eliminating abortion seems to be the highest priority item on state governments' agendas.[24] But the procedural innovation that Texas adopted, while creative, came at a price. In taking the approach that it did, Texas cut some jurisdictional corners. What remained after all the procedural tinkering was finished was a statute that failed to meet the usual criteria for standing to sue.[25]

But (you are probably asking) why does this matter? The Article III requirement of standing to sue (you may point out) applies only in federal courts. That is true, but beside the point. The point here is that a judgment that is enforceable in Texas might nevertheless be unenforceable elsewhere. The reason is that a case in state court that would not qualify for Article III case-or-controversy jurisdiction does not qualify for the support of the Article IV Full Faith and Credit clause.

This Article explains the connection between Article III and the Article IV Full Faith and Credit Clause. Both Articles use the word "judicial" to limit the reach of powers newly granted by the U.S. Constitution. Article III does so by tethering the grant of power to the new federal judicial system to the traditional common law case method. This limitation was crucial to reassuring skeptics at the constitutional drafting convention who feared a

24 *See, e.g.*, Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban — And These States Might Be Next*, FORBES (Mar. 23, 2022), https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/ [https://perma.cc/4NNM-MHZW]; Alison Durkee, *South Dakota Governor Latest to Introduce Texas Abortion Copycat Bill — Here Are All the States Weighing Similar Ban*, FORBES (Jan. 21, 2022), https://www.forbes.com/sites/alisondurkee/2022/01/21/south-dakota-governor-latest-to-introduce-texas-abortion-copycat-bill---here-are-all-the-states-weighing-a-similar-ban/ [https://perma.cc/5CXA-VKD6]. State laws that nullify constitutional rights by handing off enforcement to private parties have also been adopted in other substantive areas, such as civil rights, gender equality, and freedom of speech. For example, Tennessee has authorized students and teachers to sue schools that allow transgender students to use restrooms that correspond with their gender identity. *See* Tennessee Accommodations for All Children Act, H. B. 1233, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021). A Florida law allows students to sue schools that permit transgender girls to play on athletic teams. *See* Fairness in Women's Sports Act, S. B. 1028, 2021 Leg., Reg. Sess. (Fla. 2021). Bills across several jurisdictions allow private suits against schools if teachers or visiting speakers discuss critical race theory. *See, e.g.*, Theodore R. Johnson, Emelia Gold, & Ashley Zhao, *How Anti-Critical Race Theory Bills Are Taking Aim at Teachers*, FIVETHIRTYEIGHT (May 9, 2022), https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers/ [https://perma.cc/DTL7-77FH].

25 *See infra* Part IV.

runaway expansion of judicial ambition and power.[26] Article IV's Full Faith and Credit Clause served an analogous purpose. It tethered a state court's newly created ability to create a judgment enforceable interstate to the traditional case method. Whereas Article III protected the elected branches from encroachment by the federal judiciary, Article IV protected sister states from encroachment by one another.

II. Full Faith and Credit: Basic Principles and Recognized Defenses

Few scholars and lawyers outside the cloistered academic community of choice of law experts have the background to deal with problems about interstate enforcement. Familiarity with the law of interstate judgments enforcement is not widespread, even in the fairly privileged population of persons holding law degrees. Justice Robert Jackson called Full Faith and Credit Clause "the [l]awyer's [c]lause of the Constitution"; while well intentioned, this remark probably did little to increase the Clause's popular esteem.[27]

Full Faith and Credit, on its face, is written as though it was an absolute obligation, requiring that a judgment automatically be given total obedience "though the heavens may fall." But that is true of most constitutional provisions, and it does not prevent the creation of exceptions when necessary. The First Amendment is phrased categorically; Congress should make "no law" impinging on free speech or freedom of religion. But even with the First Amendment, exceptions are permitted when there are sufficiently compelling reasons.[28] Similar countervailing considerations apply in the full faith and credit context. Domestic judgments (those where enforcement is sought in the state that issued the award) are not invariably given absolute and total effect; there is no reason that interstate judgments should be entitled to it either.

There is some agreement about which defenses purport to limit the obligation to give full faith and credit. These defenses are familiar from a standard conflict of laws course and from secondary sources dealing with problems of interstate enforcement.[29] Yet the state of the law on the question of which of these defenses are constitutional under the Full

26 *See infra* Part III.C.

27 Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1, 1 (1945).

28 The classic example is the lack of First Amendment protection for the person who falsely cries "fire" in a crowded theater. *See* Schenk v. United States, 249 U.S. 47, 52 (1919).

29 *See generally* LEA BRILMAYER ET AL., CASES AND MATERIALS ON THE CONFLICT OF LAWS, at ch.7 (8th ed. 2019).

Faith and Credit Clause is unsatisfactory. With the few, mostly superannuated, precedents that exist, it is difficult to be confident about the likely outcome if these defenses were challenged under Article IV.

This section of the Article—Part II—summarizes the current state of this body of law, listing the defenses currently generally recognized and identifying some of their major strengths and weaknesses. Part II should dispel any misconception that the Full Faith and Credit Clause is some kind of categorical "iron law" that invariably demands obedience.[30] Part II then describes a uniform act of considerable importance to the problem of interstate judgments enforcement. The Uniform Enforcement of Foreign Judgments Act is not discussed in most secondary sources in the area of conflict of laws. But due to this Act, it is possible to say with some confidence that the law of the enforcing state should apply to determine the defenses that will be applicable to the enforcement of interstate judgments.

A. Constitutional and Statutory Background

One state's obligation to respect another state's judgments is a consequence of Article IV, Section 1 of the U.S. Constitution, the Full Faith and Credit Clause. Section 1 of Article IV states:

> Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.[31]

The Clause reformulates a provision that had appeared in the Articles of Confederation a decade earlier.[32]

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30 William Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 412–13 (1994) (footnote omitted):

> Many lawyers, and some academics . . . do not seem to grasp fully the rules concerning sister-state enforcement and collateral attack. This Article explores the basic rule of sister-state enforcement and its limited exceptions. This basic rule is so clear and strong that it might be called the "Iron Law" of Full Faith and Credit . . . . Once the judgment is final according to the law of F-1, however, the Full Faith and Credit Clause prohibits collateral attack in F-2. This is the Iron Law of Full Faith and Credit.

31 U.S. CONST. art. IV, § 1.

32 Predating the Constitution by around a decade, the Articles of Confederation contained an earlier version of Article IV, which provided that "[f]ull faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." ARTICLES OF CONFEDERATION OF 1781, art. IV. The inclusion of the Clause in the draft Constitution is discussed *infra* Section III.B.2.

The Clause's objective is obvious, reasonable, and appealing. Justice Stone described its rationale in a 1935 decision, *Milwaukee County v. M.E. White*:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the State of its origin.[33]

All states gain when they can count on one another to enforce their legal decisions.

The Clause is a textbook example of the strategy of reciprocity. But the devil, unsurprisingly, is in the details. How much faith and credit must be given? Even within a single legal system, judgments enforcement involves trade-offs between the solid assurances of reliable enforceability and the flexibility needed to adjust an earlier decision when circumstances change or when it is evident that a mistake was made. The interstate context makes things even more complex because two different states may balance these competing factors in different ways.

The Clause's second sentence suggests that the drafters probably expected help from Congress. It gave Congress power to enact "general laws" about proving foreign judgments and describes what effect to give them.[34] The constitutional grant of Congressional authority is rather open-ended. It appears, in theory, to authorize Congressional enactment of virtually anything related to court decisions or legal papers, from procedures for notarizing litigation documents to a complete code of choice of law rules.[35] Congress shortly took up its invitation to "prescribe . . . the effect" of "the public acts, records, and judicial proceedings" of the states.[36] Its contribution to the interstate enforcement of laws and

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33 Milwaukee County v. M.E. White, 296 U.S. 268, 276–77 (1935).

34 U.S. CONST. art. IV, § 1.

35 The suggestion has often been made that by utilizing its powers under Article IV, Congress could solve many of the problems in contemporary choice of law. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 337 (1992).

36 U.S. CONST. art. IV, § 1.

judgments consisted largely of a single statute, which was adopted almost immediately after the Constitution's ratification.[37]

Dating to 1790, the legislation that implements the Full Faith and Credit Clause now appears as 28 U.S.C. § 1738.[38] After reiterating the basic language by which Article IV guarantees Full Faith and Credit, the text continues:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[39]

The statute's most notable feature is its reference to the "law or usage in the courts of such State, Territory or Possession from which they are taken."[40]

B. The Rendering State and the Enforcing State

This federal statute does not itself set rules or standards for the enforcement of judgments. Instead, it functions somewhat like a choice of law rule.[41] It specifies that the rules for enforcing a judgment should be taken from the domestic judgments law of the state that first issued the judgment (the "rendering state," *F(1)*).[42] It does not by its terms

37 The Full Faith and Credit Statute can be found at 28 U.S.C. § 1738.

38 The text of 28 U.S.C. § 1738 has been in place, hardly altered, for almost a quarter of a millennium. The few additions to the original version of the statute dealt largely with specialized topics such as parental kidnapping, child custody, and same-sex marriage. *See* 28 U.S.C. § 1738A (discussing parental kidnapping of children in the course of child custody disputes); Defense of Marriage Act ("DOMA") 28 U.S.C. § 1738C (originally enacted in 1996).

39 28 U.S.C. § 1738.

40 *Id.*

41 This is not to deny that a federal common law of preclusion is sometimes developed in cases of strong federal substantive interest. *See, e.g.*, Deposit Bank v. Frankfort, 191 U.S. 499 (1903). The question of the proper status of judgments of federal courts, given that the language of the statute refers only to states, has been thoroughly dissected. *See, e.g.*, Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Stephen B. Burbank, *Interjurisdictional Preclusion Full Faith and Credit and Federal Common Law*: *A General Approach*, 71 CORNELL L. REV. 733 (1986).

42 *See* 28 U.S.C. § 1738.

attach importance to the domestic judgments law of the state that is now being asked to enforce it (the "enforcing state," *F(2)*).[43]

This choice is significant. States vary in their treatment of many judgments law issues: the length of the time period allowed for enforcing a judgment, whether a judgment can be invoked by someone who would not have been bound had the earlier decision gone the other way, and other similar matters.[44] Most importantly for present purposes, states might potentially take different positions on which defenses and exceptions to the principle of judgments recognition to adopt. We sometimes talk of "preclusion law" or "judgments law" generally, as though there were rules existing independently of actual state decisional law and adopted legislation. But there is, in reality, no more a "brooding omnipresence in the sky" for the law of judgments than there is a brooding omnipresence for tort law, contract law, or anything else.[45] Law of necessity means positive law. Federal law selects the law of the rendering state; it does not, for example, authorize formulation of a general common law of judgments enforcement.

By selecting the applicable law of judgments, the federal statute provides a standard for comparison. A state is obliged to give "full faith and credit" to a sister state's judgments, but how much credit does that entail? The adjective "full" does not mean that the principle of interstate enforcement is universal or inviolable. As the exceptions below illustrate, what this statute has meant in practice is simply that departures from the judgments law

43 *See id.*

44 For a discussion of the relative merits of applying the judgments statutes of limitations of *F(1)* and *F(2)*, *see* Comment, *Revival of Judgments Under the Full Faith and Credit Clause*, 17 U. CHI. L. REV. 520, 520 (1950):

> Many state's interpretation of the full faith and credit clause. Their major objection stems from that Court's insistence that a judgment of one state be given effect in all sister states irrespective of the fact that the judgment could not have been obtained in the state where enforcement is sought because inconsistent with, or repugnant to, the public policy of that state. The only concession made permits the forum to ignore foreign procedure and apply its own.

The second issue, referred to as the problem of "nonmutual collateral estoppel," is discussed in United States v. Mendoza, 464 U.S. 154 (1984) (explaining that nonmutual collateral estoppel does not apply against the United States government).

45 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). This idea is, of course, part of the holding of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

of the rendering state must be justified. And a departure that is grounded in the text of 28 U.S.C. § 1738 itself is surely adequately justified, as we shall see.[46]

C. Departures from *F(1)* Judgments Law

The Full Faith and Credit Clause and its accompanying statute are no different from the status of any other constitutional provision or piece of legislation; the literal terms of the law give way when a good enough reason exists. Despite being given a substantial head start, *F(1)* (the first court, meaning the one that issued the judgment initially) does not come out noticeably better than *F(2)* (the second court, meaning the court that enforces the judgment) in the race to have its judgments law applied.

First, there are entire subcategories of judgments law that are simply not governed by the Clause or its statute; they have their own special rules. Criminal law, for example, is a world apart, with totally different institutions such as the right of habeas corpus.[47] Judgments that are "not on the merits" are treated as falling outside of the Clause's scope.[48] Special rules address particular subject matter areas. Workers' compensation awards and awards of title to real property are examples of specialization in judgment enforcement.[49] Divorce and child custody law are other subspecialties with their own, specialized, rules of judgment recognition.[50]

The special treatment of these substantive topics is not necessarily inconsistent with the constitutional text or otherwise aberrational. These categorical exclusions can mostly

46 The second half of this Article addresses just such a reason for refusing enforcement. *See infra* Parts III–IV.

47 The right to habeas corpus is found in U.S. CONST. art. I, § 9, cl. 2; it is only one of the distinctive characteristics of judgments recognition in the criminal law. Another example is the Double Jeopardy Clause. *See* U.S. CONST. amend. V.

48 *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 (AM. L. INST. 1969) (noting that a judgment not on the merits will be recognized in other states only for issues actually decided); Reynolds, *supra* note 30, at 418 ("[J]udgments that are not 'on the merits' are generally held not to be entitled to Full Faith and Credit. Judgments not on the merits make up one large class of judgments that lack claim-preclusive effect . . . includ[ing] those based on lack of subject matter jurisdiction . . .").

49 For a discussion of the special rules relating to workers' compensation, *see* Thomas v. Wash. Gas Light, 448 U.S. 261 (1989) (plurality opinion). For a discussion of the special "land taboo," *see* Fall v. Eastin, 215 U.S. 1 (1909).

50 For the special rules relating to family law, including divorce and child custody, *see generally* LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS at ch. 7 § D (8th ed. 2019).

be explained by the distinctive policies underlying the substantive topic in question. Criminal law requires preclusion rules that reflect the ongoing nature of the remedy of incarceration. The law relating to child custody awards understandably reflects the view that the welfare of the child is almost always more important than formal considerations of the finality of judgments. It sometimes seems that there is a separate law of judgments for every substantive area of the law.

In the face of such substantive variability, the federal provisions for full faith and credit are no more automatically dispositive than any other federal (or state) law. It is to be expected that policies or rights will sometimes come into competition, and they must somehow be reconciled. The resulting balancing of interests has led to a series of defenses and exceptions that reflect these competing concerns. The existing recognized defenses include the presence of jurisdictional defects and defenses based on analogous defenses to choice of law.

1. Jurisdictional Defects

The policies underlying the Full Faith and Credit Clause and its statute are not automatically dispositive when they come in conflict with jurisdictional requirements. As is commonly known, lack of personal jurisdiction may deprive one state court of the ability to bind another, although whether it provides a basis for collateral attack in a particular case depends on whether the defendant has preserved his or her rights effectively.[51] Collateral attack is resistance to a judgment in another forum after it is entered as final; direct attack means direct appeal before entering a judgment or attack through the rendering state's own processes for vacating a judgment. Preserving the right to challenge on the basis of lack of personal jurisdiction requires refusing to appear in the first proceeding—a hard choice to put to an absent defendant. In this respect, personal jurisdiction is unlike subject matter jurisdiction, which can be raised by a judge sua sponte at any time until a final judgment is reached (and even after that, according to some authorities).[52] Subject matter jurisdiction has greater potential as a defense to enforcement of an S.B. 8 award, but problems remain.

51 *See* Baker v. Gen. Motors Corp., 522 U.S. 222 (1998). Additionally, the Supreme Court has indicated on a number of occasions that judgments cannot foreclose claims that the original rendering state would not have had the authority to consider because the matter was beyond its jurisdiction; *see id.* at 241 ("[A] Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve"). *See also Thomas*, 448 U.S. at 282–83 (plurality opinion) ("Full faith and credit must be given to [a] determination that [a State's tribunal] had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.").

52 *See* FED. R. CIV. P. 12(h).

It is often said, as a general matter, that the Clause and its statute apply only to "valid" judgments, that is, ones in which the rendering court has personal and subject matter jurisdiction.[53] Judgments that are not "valid" are for that reason not entitled to enforcement and are said to be "void."[54] Thus an early case dealing with this issue, *Thompson v. Whitman*, declared that "where the jurisdiction of the court which rendered the judgment has been assailed," the judgment will be subject to collateral attack.[55] *Thompson* quoted Justice Story as authority; in its inclusion of the Full Faith and Credit Clause, Story wrote, "[t]he Constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory."[56]

Subject matter jurisdiction has, potentially, many different facets; what counts as subject matter jurisdiction is not necessarily the same in every court.[57] In federal courts, for instance, subject matter jurisdiction includes the subject matter of the case (e.g., federal question jurisdiction), diversity of the parties, amount in controversy, and whether a dispute qualifies as a "case or controversy."[58] A state might provide a right of collateral attack for defects in every one of these, or none of these. It might provide that failure to raise a claim of lack of jurisdiction means that the claim is forfeited; jurisdictional objections might survive until final judgment or even might remain viable after judgment, indefinitely.[59]

Despite these many variations on a theme, the general position that lack of subject matter jurisdiction provides a defense to judgment enforcement is typically stated categorically.

53 *See* RESTATEMENT (FIRST) OF JUDGMENTS § 1 (AM. L. INST. 1942).

54 *Id.*

55 Thompson v. Whitman, 85 U.S. 457, 462 (1873).

56 "It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other State . . . But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story . . . adds: '. . . this does not prevent an inquiry into the jurisdiction of the court . . . The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'" *Id.*

57 In the present context, there are other consequences of the lack of standing to sue under the Article III standard. *See infra* Part IV.

58 *See* 28 U.S.C. § 1331 (defining federal question jurisdiction); 28 U.S.C. § 1332 (defining diversity jurisdiction); U.S. CONST. art. III, § 2 (defining judicial power as extending to "cases or controversies").

59 Compare, for example, the rule that personal jurisdiction is waived unless asserted almost immediately. *See* FED. R. CIV. P. 12(h).

Such categorical declarations are sprinkled liberally through the case law. For example, *Huntington v. Attrill*[60] was decided in 1892, before the turn of the twentieth century, while *Baker v. General Motors*[61] was written more than a century later in 1997. The Court reiterated this conclusion as recently as 2016, when it stated in a recent *per curiam* decision that "[a] State is not required . . . to afford full faith and credit to a judgment rendered by a court that did not have jurisdiction over the subject matter or the relevant parties."[62]

Throughout these many years, the Supreme Court's declarations of this principle have been almost identically phrased. The Court wrote in *Huntington*:

> These provisions of the constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties.[63]

Baker similarly declares: "A final judgment in one State, if rendered by a court *with adjudicatory authority over the subject matter* and persons governed by the judgment, qualifies for recognition throughout the land."[64] And *Milliken v. Meyer* (which was written roughly halfway through the interval separating *Huntington* from *Baker*) declares as follows: "Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry."[65]

60 *See* Huntington v. Attrill, 146 U.S. 657, 685 (1892).

61 *See* Baker v. Gen. Motors Corp., 522 U.S. 222 (1998).

62 V.L. v. E.L., 577 U.S. 404, 407 (2016) (citing Underwriters Nat'l Assurance Co. v. N. C. Life & Accident & Health Ins. Guar. Ass'n., 455 U.S. 691, 705 (1982)). *V.L.* also describes limited collateral attack on judgment alleged to be lacking in subject matter jurisdiction: "That jurisdictional inquiry, however, is a limited one. '[I] f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.'" *V.L.*, 577 U.S. at 407 (quoting Milliken v. Meyer, 311 U.S. 457, 462 (1940) (quoting Adam v. Saenger, 303 U.S. 59, 62 (1938))).

63 *Huntington*, 146 U.S. at 685 (emphasis added).

64 *Baker*, 522 U.S. at 223 (emphasis added).

65 *Milliken*, 311 U.S. at 462. *Accord* Milwaukee County v. M.E. White, 296 U.S. 268, 275 (1935) ("Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction.") and United States v. Munsingwear, 340 U.S. 36, 39 (1950) (describing as the "classic statement of the rule of *res judicata*" the principle that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same

"Of course," the Court has observed, subsequent challenge on the basis of lack of subject matter jurisdiction must be permitted.[66]

The Restatements of Conflict of Laws and of Judgments reveal a certain lack of consensus but largely come to the same conclusion. According to the Second Restatement of Conflicts, when a judgment of one state is attacked in another state, the judgment must be recognized if valid.[67] The Second Restatement of Judgments states that "[a] judgment is *valid* for this purpose *if the rendering court had jurisdiction of the subject matter*, if the court had territorial jurisdiction, and if adequate notice was given to the party assuredly bound by the judgment."[68] Such questions regarding the validity of the judgment are determined by the court being asked to recognize the judgment.[69] Conversely, under the Second Restatement of Judgments, an invalid judgment is not entitled to full faith and credit, and judgments from courts lacking in subject matter jurisdiction can be avoided in a subsequent action.[70] A judgment rendered in one state and relied upon in a subsequent action in another state may be collaterally challenged if the original court lacked subject matter jurisdiction.[71]

Authorities such as these seem, on their face, to put jurisdictional requirements into conflict with the finality policies of the Full Faith and Credit statute and the judgments law of the rendering state. Because of the categorical position apparently taken by the Statute, those principles of finality appear to clash with jurisdictional requirements. This is misleading; the jurisdictional requirements are not preempted by the federal Full Faith and Credit Statute. In cases like *Thompson v. Whitman* and *D'Arcy v. Ketchum*, the Supreme Court easily reconciled defenses based on lack of jurisdiction with the statutory full faith and credit requirement.[72]

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parties or their privies." (quoting S. Pac. R. Co. v. United States, 168 U.S. 1, 48–49 (1897))).

66 *Milliken*, 311 U.S. at 462 (stating that the lack of subject matter jurisdiction is "of course" open to inquiry in the enforcing state).

67 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93, 98 (AM. L. INST. 1971).

68 RESTATEMENT (SECOND) OF JUDGMENTS § 81 cmt. a (AM. L. INST. 1982) (emphasis added).

69 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 104 cmt. a, 105 cmt. b (AM. L. INST. 1971).

70 RESTATEMENT (SECOND) OF JUDGMENTS § 81 (AM. L. INST. 1982).

71 *Id.*

72 *See generally* Thompson v. Whitman, 85 U.S. 457 (1873); D'Arcy v. Ketchum, 52 U.S. 165 (1850).

In *D'Arcy*, a judgment had been issued in New York—*F(1)*—after a proceeding in which the defendant's joint debtors had not been properly made parties.[73] New York judgments law would have enforced the judgment against the absent debtors. The plaintiff claimed that the Full Faith and Credit statute required application of the law of *F(1)* (that is, New York) because New York was the state in which the judgment was made.[74] This argument was unsuccessful.[75] Prior to the adoption of the Constitution, the Court reasoned, jurisdiction would not have existed, and the Full Faith and Credit Clause was not designed to create jurisdiction in situations where it did not already exist.[76] Similarly, in *Thompson v. Whitman*, the Court noted that to construe the Clause as overriding the earlier principle that jurisdictional defects gave a right to reopen would effectively provide jurisdiction in cases where it had not previously existed.[77] "The Constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory," the Court wrote.[78]

In *D'Arcy*, the Supreme Court pointed out that neither Article IV nor the Full Faith and Credit Statute had ever been interpreted to bar otherwise valid defenses to the enforcement of a judgment.[79] "[I]n our opinion," the Court explained, "Congress did not intend to overthrow the old rule [allowing collateral attack for want of jurisdiction] by the enactment that such faith and credit should be given to records of judgments as they had in the state where made."[80]

But honesty requires recognition of the authority on the other side.[81] It can be argued

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73 *D'Arcy*, 52 U.S. at 176.

74 *See id.*

75 *See id.*

76 *See id.*

77 *Thompson*, 85 U.S. at 461.

78 *Id.* at 469 (1873).

79 *D'Arcy*, 52 U.S. at 176 (denying that the enforcing state has an obligation to apply the law of the rendering state to a question regarding the status of judicial records).

80 *Id.*

81 For a view contrary to the one discussed in the text, *see, e.g.*, James W.M. Dwyer, *Recent Decisions: Full Faith and Credit and Collateral Attack on the Determination of Jurisdiction*, 48 MARQ. L. REV. 102, 103 (1964) ("The rule against collateral attack on the jurisdiction of a court is a mandate of the United States Constitution.").

that while jurisdictional defects leave a judgment vulnerable, this vulnerability is cured if the question was litigated in the first award.[82] That is the rule for personal jurisdiction; the defendant has the opportunity to object to personal jurisdiction, but not to raise the defense repeatedly.[83] In that context, preclusion has been treated as appropriate even if the issue was not litigated, so long as the party who now raises the issue had an *adequate opportunity* to litigate the issue.[84] Subject matter jurisdiction is different; it survives a failure to raise the question, with the court at all times empowered to bring the matter up sua sponte.[85] So, it is arguable that subject matter jurisdiction should be a basis for collateral attack even though personal jurisdiction is not.[86]

In short, there is disagreement about whether supposedly void judgments provide an adequate basis for collateral attack.[87] Perhaps some other defenses to

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82 *See* Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n., 455 U.S. 691, 706 (citation omitted):

> This Court has long recognized that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." [citing cases] . . . Any doubt about this proposition was definitively laid to rest in [Durfee v. Duke, 375 U.S. 106, 111 (1963)], where this Court held that "a judgment is entitled to full faith and credit even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." . . . If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts. From our examination of the record, we have little difficulty concluding that the Rehabilitation Court fully and fairly considered whether it had subject matter jurisdiction to settle the pre-rehabilitation claims of the parties before it to the North Carolina deposit.

83 *See* FED. R. CIV. P. 12(h)(1).

84 *See id.*

85 *See FED. R. CIV. P.* 12(h)(3).

86 Note that under the theory advanced in this Article, the defendant can raise the lack of standing to sue at the judgments enforcement stage. But standing under Article III will not yet have been litigated at that point because the original judgment was rendered by Texas. State courts, of course, are not bound by Article III.

87 *See, e.g.*, Stoll v. Gottlieb, 305 U.S. 165, 172 (1938) (footnote omitted) (holding that where subject matter jurisdiction was litigated in the first proceeding, it could not be relitigated collaterally):

> An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction, the question is whether the former judgment is *res judicata*. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties did have jurisdiction of the subject matter of the litigation. In this case, the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

interstate judgments enforcement are more conclusive.

2. Choice of Law Defenses

Several familiar exceptions to the Article IV obligation of interstate judgments enforcement are analogous to familiar principles of choice of law. Choice of law concepts and principles, in other words, have in some instances been adapted and applied to the judgments context as well.

For example, as a matter of choice of law, the forum generally applies its own rules to procedural issues—the mechanics of the litigation—regardless of the source of a case's substantive law.[88] An analogous principle of *lex fori* is used in the context of judgments enforcement; it has long been agreed that the forum applies its own rules about the mechanical aspects of judgments enforcement.[89] If the Full Faith and Credit Statute were read literally, the enforcing state would instead apply the mechanical "procedural" rules of the rendering state.

This example of the mechanical aspects of enforcement procedures may not be of much interest in the abortion context. But there are three other areas in which interstate judgments law has followed choice of law doctrine: tax or revenue laws,[90] penal laws,[91]

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88 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (AM. L. INST. 1971).

89 *See* McElmoyle v. Cohen, 38 U.S. 312, 324 (1839) (stating that a judgment may be enforced only as "laws [of enforcing forum] may permit"); Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998) ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister-state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.") (citing McElmoyle *ex rel.* Bailey v. Cohen, 13 Pet. 312, 325 (1839) (stating that a judgment may be enforced only as "laws [of enforcing forum] may permit")); RESTATEMENT (SECOND) OF JUDGMENTS, § 99 (AM. L. INST. 1969) ("The local law of the forum determines the methods by which a judgment of another state is enforced.")).

90 *See* Milwaukee County v. M.E. White, 296 U.S. 268 (1935).

91 *See* Huntington v. Attrill, 146 U.S. 657 (1892).

and laws contrary to public policy,[92] the second and third of which are potentially quite significant for S.B. 8 awards.

a. Tax Laws and Judgments

In the case of tax laws, the explanation traditionally given for not enforcing tax judgments was more or less identical with the explanation for not applying the other state's substantive tax law. Conventional choice of laws principles held that taxation was a government function, and a state cannot impose the costs of carrying out its governmental operations on another state.[93] This principle was thought to be as relevant when the issue was enforcement of judgments as when the issue was choice of law.

Then, in 1935, the Court decided *Milwaukee County v. M.E. White*.[94] It acknowledged that the creation of exceptions to apparently categorical rules was consistent with the Clause's basic purposes:

> Such exception as there may be to this all-inclusive command is one which is implied from the nature of our dual system of government, and recognizes that, consistently with the full faith and credit clause, there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another. That there are exceptions has often been pointed out . . .[95]

But the Court nevertheless held that the tax judgments of other states must be enforced. And this continues to be the rule regarding enforcement of tax laws. The Court has not definitively indicated whether states must enforce each other's tax laws as a matter of choice of law[96] but has simply held that even if states are free to refuse to enforce one another's tax laws, this result would not carry over to tax judgments.[97]

92 *See* Reynolds, *supra* note 30, at 436.

93 *See generally* Clark J.A. Hazelwood, *Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments*, 19 MARQ. L. REV. 10 (1934).

94 Milwaukee County v. M.E. White, 296 U.S. 268 (1935).

95 *Id.* at 273.

96 *See id.* at 275 (distinguishing between enforcement of judgments and enforcement of the underlying substantive law).

97 *See id.*

b. Penal Laws and Judgments

The second choice of law-inspired defense against interstate judgments enforcement is possibly relevant in the abortion context. As Chief Justice Marshall famously wrote in *The Antelope*: "[t]he Courts of no country execute the penal laws of another."[98] The Restatement (Second) of Conflict of Laws supports this "penal law" exception[99] and it is recognized, albeit in a somewhat different context, in the Federal Rules of Civil Procedure.[100] As with the exception for non-enforcement of another state's tax law, the explanation for non-enforcement of penal laws is that a state's administration of its penal law is considered one of its government functions, and no state is entitled to shift the burden of carrying out its governmental functions onto other states.[101]

The precise contours of the exception are unsettled. Criminal laws and criminal law judgments are in this category, although the penal law exception is not limited to criminal law. In *Huntington v. Attrill*, the Supreme Court defined this historic exception to the Full Faith and Credit Clause as not requiring enforcement of a judgment when the statute is penal in the "international sense."[102] The Court explained that the determination of whether a statute is penal in the international sense depends upon "whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."[103] A law, or the judgments applying it, is "penal" if it is designed to deter or punish conduct and the remedy that is imposed is not geared to the damage done but is proportioned to provide more plausible deterrence.

This definition of "penal" laws or judgments is certainly broad enough to include cases brought under the contemporary anti-abortion laws modeled on the Texas statute. It is clear

98 *See* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

99 *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89 Reporter's Note (AM. L. INST. 1969) (listing types of cases classified as penal). For a twentieth-century application, see Loucks v. Standard Oil, 120 N.E. 198 (N.Y. 1918) (Cardozo, J.).

100 For a general discussion of the penal law exception, *see* Reynolds, *supra* note 30, at 434. The penal law exception is reflected in Rule 60 (dealing with the effect of judgments) of the Federal Rules of Civil Procedure. Rule 60 lists as a basis for release from a final judgment the fact that "[t]he judgment was procured by fraud or is penal in nature." FED. R. CIV. P. 60.

101 *See* Hazelwood, *supra* note 93.

102 *See* Huntington v. Attrill, 146 U.S. 657, 679 (1892).

103 *See* Reynolds, *supra* note 30, at 435.

that the objective of the law is punishment, not compensation; the plaintiff has suffered no harm and has no basis for demanding compensation. The measure of damages, in addition, does not seem to reflect any compensatory objective; the statute simply provides that it must be at least $10,000 plus attorney's fees, per abortion.

Enforcement of judgments based on penal law is different in one respect, however; there is no analog to *Milwaukee County*, in which the Supreme Court assessed the constitutionality of the refusal to enforce tax judgments. No definitive Supreme Court holding deals with the constitutionality of the penal law exception in the judgments context.

c. Laws and Judgments Contrary to Public Policy

The best known of the three categories of choice of law exceptions is probably the public policy exception. It states that the forum's own strongly held public policy can override application of another state's law that would otherwise be applicable.[104] Assume, for example, that the forum would ordinarily apply the contracts law of the place of contracting. But some particular case involves a contract for a sale of both of the defendant's kidneys. If the place of contracting would enforce a contract for the sale of both kidneys, but the forum would not, then the forum might use the public policy doctrine to excuse it from having to enforce a contract that it found deeply objectionable. The abortion controversy would surely be the perfect example of the public policy exception, for there could hardly be a more apt illustration of a dispute between two deeply irreconcilable positions than the debate between the right to life and the right to choose.

The public policy exception is acknowledged as valid in choice of law.[105] The applicability of the public policy argument to judgments enforcement, however, is another matter.[106] If applied to judgments, the public policy exception would excuse the forum from having to implement a *judgment* that is offensive to forum moral beliefs. Here, the authority is divided.

On the one hand are statements such as Justice Ginsburg's in *Baker v. General Motors Corp.*, declaring categorically that there is no "roving public policy exception."[107] Justice Stone apparently concluded differently in *Milwaukee County*, where he wrote that "the nature of our dual system of government" establishes that, consistent with the Full Faith and Credit Clause, "there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another."[108] Likewise, the Second Restatement of Conflict of Laws is of the view that the public policy exception still exists for judgments that reflect policies unacceptable to the forum.[109] A sister state (it is claimed) is not required to enforce judgments that "involve an improper interference with the important interests of the sister state."[110]

Judged by the usual standards, Justice Ginsburg's view in *Baker* is much more authoritative than Justice Stone's.[111] *Baker* is sixty years more recent and the decision was unanimous.[112] It is unclear, however, whether *Baker* was written with the intent to reject the public policy exception for judgments generally or only to forbid its indiscriminate use. Justice Ginsburg's opinion takes aim at the idea of a "roving public policy exception" that could apply "ubiquitous[ly],"[113] and this was quite appropriate for *Baker*. *Baker* involved technical questions about the eligibility of witnesses subject to court orders to testify in subsequent trials in other states.[114] This issue is hardly a hot button question of great moral force; if the public policy exception had been available in *Baker*, hardly any case would be beyond its reach. Any time that a state preferred to relitigate the merits of a case, public policy would have supplied a reason.

Therefore, it is appropriate to ask whether a more convincing example of a conflict of two states' public policies—an example like abortion—might perhaps result in the

104 *See, e.g.*, Reynolds, *supra* note 30, at 436 (discussing the public policy exception).

105 *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 223 (1998) (citations omitted) ("A court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy, but our decisions support no roving 'public policy exception' to the full faith and credit due *judgments*.").

106 The most forceful statement of the effect of Article IV on the public policy exception is Justice Ginsburg's opinion in *Baker*, 522 U.S. at 223.

107 *See id.*

108 *See* Milwaukee County v. M.E. White, 296 U.S. 268, 273 (1935).

109 *See* Reynolds, *supra* note 30, at 413.

110 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (AM. L. INST. 1971). *See generally* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 961 (1956).

111 *Compare Baker*, 522 U.S. at 223, *with* Milwaukee County v. M.E. White, 296 U.S. 268 (1935).

112 There were, however, two concurring opinions, one by Justice Scalia and the other signed by Justices Kennedy, O'Connor, and Thomas. *See Baker*, 522 U.S. at 241 (Scalia, J., dissenting); *id.* at 243 (Kennedy, J., dissenting).

113 *Id.* at 234.

114 *See id.*

retention of the public policy exception in at least some cases.[115] The public's reaction to the overruling of *Roe* certainly indicates the extreme importance of the issue of freedom of choice to women all around the nation.[116] It is entirely possible that *Baker* would be held not to govern an anti-abortion award; if so, the public policy exception for interstate judgments enforcement would live to see another day.

3. The Uniform Enforcement of Foreign Judgments Act

In all states other than Vermont and California,[117] enforcement of money damages awards is governed by uniform state law, according to which the applicable law is the judgments law of the state where enforcement is sought—*not* the judgments law of the state that rendered the decision.[118] The Uniform Enforcement of Foreign Judgements Act (UEFJA) states that a foreign judgment "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying" as a judgment of the state that is enforcing the judgment.[119] Texas should therefore not be surprised to learn that the enforcement of Texas judgments is governed by the law of the state where enforcement is sought. Texas should both expect other states to comply with their obligations under the Act and should itself comply with these obligations.

115 *See id.* at 234. ("In assuming the existence of a ubiquitous 'public policy exception' permitting one State to resist recognition of another State's judgment, the District Court in the Bakers' wrongful-death action . . . misread [this Court's] precedent").

116 *See, e.g.*, Danielle Kurtzleben, *What We Know (And Don't Know) About How Abortion Affected the Midterms*, NPR (Nov. 25, 2022), https://www.npr.org/2022/11/25/1139040227/abortion-midterm-elections-2022-republicans-democrats-roe-dobbs [https://perma.cc/EAU9-M3N6].

117 Vermont and California are not included in the generalized discussion below; all other states apply the Uniform Act. UNIF. L. COMM'N, *Enforcement of Foreign Judgments Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=e70884d0-db03-414d-b19a-f617bf3e25a3#LegBillTrackingAnchor [https://perma.cc/XA55-AW4P].

118 Texas has adopted the revised version of the act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35 (West 2023).

119 Uniform Enforcement of Foreign Judgments Act, 28 U.S.C. § 2467 (1964). This revised version of the Act states:

> Section 2. A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the Clerk of [any District Court of any city or county] of this state. The Clerk shall treat the foreign judgment in the same manner as a judgment of the [District Court of any city or county of] of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a [District Court of any city or county] of this state and may be enforced or satisfied in like manner.

a. Consequences of the Uniform Act

The references to "defenses" and to "reopening or vacating" judgments make the UEFJA undeniably applicable in the present context. "Defenses" would include any or all of the exceptions to full faith and credit listed above. If, for example, a survey of the enforcing state's judgments law revealed that it refused to enforce awards that were rendered without subject matter jurisdiction, that defense would be available as a justification for refusal to enforce a foreign award. It is a norm of nondiscrimination.

The defense to interstate enforcement contained in the UEFJA is different in kind from the three that have analogs in choice of law (tax law, penal law, and public policy). The Act has the status of state legislation; it has been adopted by forty-eight of this country's fifty state legislatures.[120] The Act cannot be repealed or restricted in application except by constitutional challenge, by federal statutory preemption, or by subsequent state legislation.

A good argument can be made that a defense that is suspect for full faith and credit reasons would nevertheless be constitutional if applied pursuant to UEFJA. The explanation would be that the states would have all consented to other states relying on the defense in question. The problem would be analogous to enforcement of choice of forum clauses. Choice of forum clauses are generally enforceable.[121] And they are enforceable even when they designate a forum that could not have exercised jurisdiction consistently with the Due Process Clause if no contractual provision had been agreed to. The act of giving consent can, in appropriate circumstances, change the rights that people hold.[122]

In widely adopting the UEFJA, the states have agreed to a reciprocal exchange by which each state agrees to apply its own defenses in an enforcement proceeding in its own courts. This has several implications. First, by agreeing to the application of local judgments law, the state promises, in effect, not to discriminate against foreign judgments. That is to say, the state agrees that foreign judgments should be treated like local judgments. A state that agrees to this reciprocal exchange also consents to the application of *F(2)* law if one of its own awards must be enforced out of state.

The drafters of the Uniform Act had good reason to designate the enforcing state's law for determining preclusive effect. This is a practical choice because it means that cases

120 *See* Uniform Enforcement of Foreign Judgments Act, 28 U.S.C. § 2467 (1964).

121 *See* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).

122 This assumes that valid consent was freely given and that the right in question was waivable.

underway in a single state will be treated uniformly. It reduces the burden on the enforcing court by not requiring it to apply a foreign law. And the Court has seemed to approve of this choice from time to time.[123] There is only one real objection to it: it seems at first to contradict the federal Full Faith and Credit statute. If so, then it would be preempted.

b. Preemption: The Effect of Federal Law on the Uniform Act

The UEFJA and the Full Faith and Credit Statute are similar in an important respect: both essentially operate like choice of law rules. They do not specify which defenses are valid but instead designate which state's law should apply on issues of judgments enforcement. Both are what choice of law theorists would call "jurisdiction selecting" rules because they do not tell you what result is correct, but only which state is the correct one for supplying the governing law.[124]

But the two statutes specify two different states. The Full Faith and Credit Statute requires giving judgments the effect that they would have if enforced in the state in which the award was rendered.[125] It singles out the judgments law of *F(1)*.[126] The UEFJA specifies, instead, giving the same effect as the state that is called upon to enforce the judgment: the law of *F(2)*.[127] UEFJA seems on its face to be inconsistent with a federal statute—the federal Full Faith and Credit Statute—and the consequence of such a conflict would be clear: the Uniform Act would be invalid under the Supremacy Clause.

123 *See, e.g.*, Watkins v. Conway, 385 U.S. 188 (1966) (upholding application of forum judgments law rather than the law of the rendering state because it was not discriminatory).

124 Professor Larry Kramer defined "jurisdiction selecting" rules—which he identifies as part of the "traditional approach," as follows:

> [J]urisdiction-selecting rules . . . operate according to the nature of the dispute and the locale of some critical event, without regard to the content of the law in question. Thus, tort cases are governed by the law of the place where the injury occurred, contract cases are governed by either the law of the place where the contract was made or the law of the place where it was to be performed, depending upon whether the question concerns validity or performance; succession to personalty is determined by the law of the decedent's domicile; and so on.

Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 CHI. L. REV. 1301, 1301 (1989) (footnote omitted).

125 *See* 28 U.S.C. § 1738.

126 *See id.*

127 *See* Uniform Enforcement of Foreign Judgments Act, 28 U.S.C. § 2467 (1964).

However, federal preemption is not a problem for the Act when 28 U.S.C. § 1738 is taken as a whole. The Statute requires giving the judgment the same full faith and credit as it would have by the "laws of Texas." But *the Uniform Act is part of the laws of Texas*; it was adopted in 1985 by the Texas state government.[128] Indeed, simply because it is later in time, it supersedes any contrary Texas law, as per the clear intention of the Texas Legislature. Applying *F(2)* judgments law is not inconsistent with the Full Faith and Credit Statute; it is actually *required by* the Full Faith and Credit Statute because that statute refers to the law of Texas, which in turn refers to the law of *F(2)*.

In the somewhat arcane jargon of choice of law, the reference to *F(1)* law in the federal statute should be understood as a reference to the *whole* law (including the state's choice of law rules) and not just the *internal* law (that is, substantive laws) of the rendering state.[129] Conflicts scholars will recognize this as the principle of renvoi.[130] Renvoi means simply that the court applying "the law of State *A*" will include the choice of law rules of State *A*, which may instruct the forum to actually apply the law of State *B*, if State *A* itself would apply the law of State *B*. The Supreme Court has interpreted federal statutes in exactly this way. In *Richards v. United States*, the Federal Tort Claims Act called for application of the "law" of the state where the negligent act or omission occurred.[131] The Supreme Court held that this meant the *whole law* of the place where the act or omission occurred, which is to say, the substantive law of that state, together with the state's conflict of law rules.[132]

The practice of renvoi has generally been discredited in the context of choice of law. The majority position is that a choice of law rule stating that the court should apply "the law

128 *See* TEX. CIV. PRAC. & REM. CODE ANN., § 35.

129 RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 1.03 (AM. L. INST., Tentative Draft No. 2, 2021) ("Law, Internal Law, and Whole Law Defined"):

> (1) As used in this Restatement, the "internal law" of a state is a state's law exclusive of its choice-of-law rules. It is the body of law which the courts of that state apply when they have selected their own law as the rule of decision for one or more issues.
> (2) The "whole law" of a state is that state's internal law, together with its choice-of-law rules.
> (3) "Law" without further specification refers to a state's internal law.

130 On the classic analysis of the doctrine of renvoi, *see generally*, Erwin Griswold, *Renvoi Revisited*, 5 HARV. L. REV. 1165 (1938); RESTATEMENT (THIRD) OF CONFLICT OF LAWS §5.06. (AM. L. INST., Tentative Draft No. 3, 2022).

131 Richards v. United States, 369 U.S. 1, 9 (1962) (applying the Federal Tort Claims Act). The relevant provisions of the Tort Claims Act are now found in 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671–2680.

132 *Richards*, 369 U.S. 1.

of the place of the accident," for example, should typically *not* be interpreted as requiring application of that state's choice of law rules.[133] The usual practice is to reject renvoi and apply only the state's internal (that is, domestic substantive) law.

But there is an exception, one that the Third Restatement expressly recognizes: it is for where the most important consideration is a policy of achieving uniformity. In such cases, renvoi is required.[134] Interstate enforcement of judgments is such a situation; indeed, the instructions in the Full Faith and Credit Statute are to enforce awards in such a way as to give the judgment "the same full faith and credit" as they have in the rendering state.[135] To achieve that objective, it is necessary to interpret the Full Faith and Credit statute as instructing the moving party to ask for application of the state's *whole* law—its substantive law together with its choice of law rules.

This is the only interpretation that upholds both 28 U.S.C. § 1738 and the UEFJA. Generally speaking, it is said that courts should avoid statutory constructions that result in a finding of unconstitutionality.[136] Under any interpretation other than the one offered here, there would be no application of the UEFJA that did not contradict the federal statute. It would make no sense for the drafters of the Uniform Act (who would have been selected from a nationwide pool of recognized experts on the subject) to propose a law with such a glaring defect. It would be much more likely that the drafters assumed that when the federal statute provided for giving "the same full faith and credit . . . as they have by law or usage in the courts of [the state that rendered the judgment]" that this included *all* of

133 RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.06. (AM. L. INST., Tentative Draft No. 3, 2022).

134 *See id.*:

> § 5.06. Significance of the Choice-of-Law Rules of Another State: Renvoi
> (1) When the forum's choice-of-law rules direct it to apply the law of some state, the forum applies the internal law of that state, except as stated in subsection (2)
> (2) When the objective of the particular choice-of-law rule is that the forum reach the same result on the facts as would the courts of another state, the forum applies the choice-of-law rules of the other state, subject to considerations of practicability and feasibility.

135 28 U.S.C. § 1738.

136 Michaelson et al. v. United States *ex rel.*, 266 U.S. 42, 64 (1924) (citing Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924)) articulated this presumption as follows:

> If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented; and it therefore becomes our duty, as this court has frequently said, to construe it, "if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

the rendering state's laws, including its conflict of laws rules.[137] The credit that a judgment has "by law or usage in the courts of [*F(1)*]" necessarily includes the UEFJA as one of the state's "laws."[138]

The effect of the Full Faith and Credit Clause of the Constitution, and of the statute that was adopted pursuant to it, is therefore to apply the judgments law of the state that is called upon to enforce the judgments. Although the statute on its face might at first be thought to specify the law of *F(1)*, this fails to take into account the conflict of laws principles in *F(1)* law. In adopting the Uniform Act, *F(1)* agreed that its judgments would be subject to the defenses of the enforcing state; the other adopting states did so, as well. This agreement is enforceable because Congress had the authority to determine the credit that an interstate judgment should have, and it exercised that authority by its reference to the "law or usage" of the state that awarded the judgment.[139]

III. Article III, Article IV, and the Requirement of a Judicial Proceeding

The Full Faith and Credit Clause and 28 U.S.C. § 1738 both provide that full faith and credit must be given to "public Acts, records, and judicial proceedings."[140] The problem of interstate judgments enforcement falls under the third category and not either of the first two. This third category is referred to as including judicial proceedings but does not elaborate. The adjective "judicial" has gone almost entirely unremarked for more than two hundred years. This silence should be corrected.

Well-established canons of construction provide that a word that has been included in a statute or constitutional provision is presumptively meaningful and included by design.[141] The name most prominently associated with canons of statutory construction is that of Justice Antonin Scalia. He identified two maxims that are undeniably relevant here: the

137 28 U.S.C. § 1738.

138 *Id.*

139 *Id.*

140 U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738.

141 *See* Antonin Scalia & Bryan A. Garner, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE 80, 80 (2015).

"presumption of consistent usage" and the "surplusage canon."[142] Justice Scalia stated them in the following terms:

> **Presumption of Consistent Usage.** A word or phrase is presumed to bear the same meaning throughout a text . . . .
>
> **Surplusage Canon.** If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.[143]

The word "judicial" cannot, therefore, be dismissed as trivial, superfluous, or redundant. It is "an elementary canon of construction," the Supreme Court has said, that "a statute should be interpreted so as not to render one part inoperative."[144] It elaborated: "[t]he cardinal principle of statutory construction is to save and not to destroy,"[145] and "[i]t is [our duty] to give effect, if possible, to every clause and word of a statute."[146] Although this general principle is not the property of adherents to any particular judicial philosophy, it is particularly appropriate for our current textualist Supreme Court.[147]

A. *Fidelity National Bank v. Swope*

Fidelity National Bank v. Swope[148] provides an example of what it would mean to give effect to the word "judicial" in this context. *Swope* involved Kansas City property owners and taxpayers challenging certain special taxes as unconstitutional.[149] The Kansas City

142 *Id.*

143 *Id.*

144 Colautti v. Franklin, 439 U.S. 379, 392 (1979) ("[T]he elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955))); *see* United States v. Menasche, 348 U.S. 528, 538–39 (1955) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

145 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

146 Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

147 The role of textualism in defining the word "judicial" is discussed *infra* Section III.B.1.

148 *See* Fidelity Nat. Bank & Trust Co. v. Swope, 274 U.S. 123 (1927).

149 *See id.*

charter provided a procedure by which the city could initiate an action before a nearby county circuit court to authoritatively adjudicate the validity of any challenges to the special tax.[150] At this forum, the Circuit Court rejected the owners' claims and upheld the assessments; the property owners allowed the judgment to become final without attempting to appeal.[151] The property owners later tried to challenge the constitutionality of the ordinance a second time.[152] They did so in federal district court, airing the same arguments as had been rejected in the earlier state court decision.[153] The trial and appellate courts both agreed and declared the assessments unconstitutional;[154] in a unanimous opinion authored by Justice Stone, the Supreme Court reversed.[155]

The Supreme Court declared that "the parties to [the earlier judgment] are concluded by the judgment *if the proceeding was judicial rather than legislative* or administrative in character."[156] The Court concluded that the first state court determination was entitled to *res judicata* because the original determination satisfied that test.[157] The explanation given for characterizing the first proceeding as "judicial" is revealing. The Court wrote "[t]hat the issues thus raised and judicially determined would constitute a case or controversy . . . could not fairly be questioned."[158] The Court added, for good measure, that "the judgment is not merely advisory"[159] and that the case would have qualified for removal to federal court as a case or controversy within the federal judicial power.

The reasoning in *Swope* is highly suggestive of language used by Article III of the Constitution.[160] Both *Swope* and the Article III requirement contrast "judicial" acts with

150 *See id.* at 128.

151 *See id.* at 129.

152 *See id.* at 126.

153 *See id.*

154 *See id.* at 126, 129.

155 *See id.*

156 *Id.* at 130 (emphasis added).

157 *See id.*

158 *Id.* at 131.

159 *Id.* at 134.

160 The claim that is being made here is not that the initial judgment had a defect of subject matter jurisdiction and is therefore void. For a discussion of the effects of absence of jurisdiction, *see supra* Section II.C.1. There

"legislative" acts, and both contrast "cases or controversies" with "advisory opinions."[161] The requirement that, in order to be judicial, the earlier determination should be one that "would constitute a case or controversy" is an obvious reference to the "case or controversy" requirement of Article III.[162] *Swope* therefore supports the conclusion that for a legal decision to be binding on decision makers elsewhere in the judicial system, it must have been "judicial" *in the sense intended by Article III*. The word "judicial" in Article IV, in other words, refers to the same characteristic as the word "judicial" in Article III: it is used to indicate that the dispute is a justiciable case or controversy.[163]

B. Judicial Proceedings: A Textualist and Originalist Interpretation

Within the originalist framework that dominates the thinking of a majority of the current Supreme Court, the most important types of evidence are textual and historical. Both textual and historical evidence support the interpretation of *Swope* provided here: that the word "judicial" in Article IV has the same meaning as the word "judicial" in Article III. In addition to textual and historical arguments, the Court has also taken into account the basic assumptions underlying the entire constitutional structure, such as state sovereignty

need be no defect in subject matter jurisdiction for the argument under discussion now to apply. The state court that issued the initial judgment is not bound by Article III; therefore, a lack of standing to sue that would defeat jurisdiction in a federal court might not have that effect in a state court. The point is not that there was no subject matter jurisdiction in *F(1)*, but that a judgment that (from the state law perspective) is valid might nevertheless not be entitled to full faith and credit because it fails to satisfy the federal standard for the Clause and the Statute to apply.

161 *Compare* Fidelity Nat. Bank & Trust Co. v. Swope, 274 U.S. 123 (1927) *with* U.S. CONST. art. III.

162 *See* Muskrat v. United States, 219 U.S. 346, 357 (1911) ("By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . . .")

163 The restriction to "judicial" proceedings of full faith and credit is reminiscent of the doctrine of administrative law which says that when administrative agencies make determinations, they preclude subsequent relitigation only if the facts were decided in their "judicial" capacity. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Hanover Bank v. United States, 285 F.2d 455 (Ct. Cl. 1961); Fairmont Aluminum Co. v. Comm'r, 222 F.2d 622 (4th Cir. 1955); Seatrain Lines, Inc. v. Pennsylvania R. Co., 207 F.2d 255, n.21 (3d Cir. 1953)). *See also* Goldstein v. Doft, 236 F. Supp. 730 (S.D.N.Y. 1964) (*aff'd*, 353 F.2d 484; *cert. denied*, 383 U.S. 960) (applying collateral estoppel to prevent relitigation of factual disputes resolved by an arbitrator) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.").

and separation of powers. These structural arguments also support the claim that the two uses of the word "judicial" have the same meaning.

1. Textual Arguments

The current Supreme Court is committed to textualism as a method of statutory interpretation.[164] As textualists, the majority of the justices believe that it is meaningful to treat words and phrases as having real, objective meaning. Interpretation is not a subjective process going on in the mind of the interpreter; there are "true" and "false" interpretations, just as there are true and false positions in science.

These justices are also originalists; as such, they hold that this real, objective meaning does not change over time.[165] Originalists reject the idea of a "living Constitution," instead believing that the constitutional text ought to be given the same meaning today as it had at the time that it was written. In the present context, originalism and textualism point in the same direction; they are both supportive of the claim that Article IV's use of the term "judicial" should be understood as the same as Article III's.

Textualism leads directly to this position. If text is what matters, and the text is the same in both cases, then in both contexts the meaning should be the same. The point is not only that the identical word is used twice, only a few paragraphs apart—although that fact, standing alone, would compel the same conclusion. In addition, the texts of Article III and Article IV share various meaningful characteristics that draw them together in function and focus.[166]

Consider once more the wording of the two provisions: Article III reads, "[t]he *judicial* power of the United States shall be vested in one supreme Court,"[167] whereas Article IV reads, "Full Faith and Credit shall be given in each State to the public Acts, Records, and *judicial*

164 *See generally* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016); Tara Leigh Grove, *Which Textualism?* 134 HARV. L. REV. 265 (2020); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053 (2017); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667 (2019).

165 *See* Megan Cairns, *Originalism: Can Theory and Supreme Court Practice be Reconciled?*, 19 GEO. J. L. PUB. POL'Y 263 (2021).

166 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

167 U.S. CONST. art. III (emphasis added).

Proceedings of every other State."[168] Both articles deal with the work of the courts—Article III with the creation and methodology of federal courts, and Article IV with the relations between the states' judicial systems.[169] As will be shown below, both involve the limits on power. Article III creates the potential for a powerful federal court system, but the word "judicial" keeps its power within bounds.[170] Article IV, similarly, increases the power of state courts by giving them—for the first time—the ability to issue judgments with assured interstate implementation, but it then limits that power to "judicial" proceedings.[171] We will see below that these similarities are not coincidental; both references help to maintain a traditional, modest judicial role. During the Constitution's drafting, tethering the potential power of courts to traditional roles was reassuring to skeptics whose main concern was the Constitution's potential encouragement of a judicial system run amok.

One manner in which the two Articles are different is the term that the word "judicial" modifies.[172] In Article III, "judicial" modifies the term "power," and in Article IV, "judicial" modifies the term "proceedings."[173] The difference does not matter. It is simply symptomatic of the fact that the former is a decision made at the outset of a case and the latter relates to the award at the conclusion of a case. This choice of words actually further confirms the strength of the links between these two articles. Judicial power is simply the potential for an actual judicial proceeding. Power exists even when it is not being exercised; it consists of an ability to carry out one's wishes. But to be a proceeding, something must actually happen. A proceeding is something that is able to take place because power exists. The ability to hold proceedings reduces, at its core, to the existence of power and the most obvious way to prove that a court has power is to examine its proceedings. Without power, there can be no proceedings; without proceedings, power would be invisible.

2. Originalist Interpretation and the Drafting Process

Textualism is therefore supportive of the claim that the word "judicial" in Article IV should be interpreted by reference to the meaning of the same word in Article III.

168 U.S. CONST. art. IV (emphasis added).

169 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

170 *See* U.S. CONST. art. III.

171 *See* U.S. CONST. art. IV.

172 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

173 *See id.*

Originalism is also supportive of that conclusion, although the reasoning is less obvious. The explanation requires a brief investigation of the historical circumstances in which the words in question appeared. What is known about the drafting process reveals that it would have been almost impossible for the Constitution's drafters to have had two different meanings in mind for the two appearances of the word "judicial."

The phrase "full faith and credit" was taken by the Framers of the Constitution from one of the Articles of Confederation. Although there is evidence that the phrase had been in use at least one hundred years before the provision in the Articles of Confederation was drafted,[174] not much is known about it.[175] The record states that on November 10, 1777, the Continental Congress named a committee to review "sundry propositions."[176] Then on November 11, the committee proposed new articles; a Full Faith and Credit Clause was included.[177] Four days later, the Articles of Confederation were adopted, and their version of the Full Faith and Credit Clause became law.[178]

The record is a bit more informative when it comes to Article IV's subsequent inclusion in the constitutional text. The Convention considered the Full Faith and Credit Clause as early as May 28, 1787, when Charles Pinckney, a South Carolina delegate, proposed its inclusion in the nascent Constitution.[179] Pinckney wrote that he had formulated the clause "exactly upon the principles of the 4th article of the present Confederation," with one small exception granting the enforcement of executive orders to return "fugitives of justice" to the states of their crimes.[180] Meetings of the Committee of Detail show that the Committee

174 *See* Stephen E. Sachs, *Full Faith and Credit in the Early Congress,* 95 VA. L. REV. 1201, 1217 (2009) ("[T]he term had been used for over a hundred years to indicate high evidentiary value. For example, a 1662 London translation of a Franco-Spanish treaty provided for both governments to issue maritime passports and bills of lading, to confirm a vessel's ownership and cargo . . . .").

175 *See, e.g.*, James D. Sumner, Jr., *The Full-Faith-and-Credit Clause — Its History and Purpose*, 34 OR. L. REV. 224, 235 (1955) (explaining that little attention was given to the full faith and credit provision before and during ratification). *See also* Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 9 (1944) ("There is almost no reference to [the Full Faith and Credit Clause] in the debates in the various states on adopting the Constitution.").

176 Charles Thomson, 9 J. CONT'L. CONG. 883, 885 (1774–1789).

177 *Id.* at 887.

178 *Id.* at 909.

179 MAX FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 112 (1911) [hereinafter 3 FARRAND'S RECORDS].

180 *Id.*

affirmed the clause's inclusion in some form in July, though the exact wording of the updated clause is unclear from the record.[181] More heated debate over the Full Faith and Credit Clause began on August 29, 1787.[182] In the draft then considered by delegates, the clause read: "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."[183] Delegates seemed to express discomfort with the clause's scope, which was broader than that of its Articles of Confederation predecessor. Different proposals were considered.

In one proposal, delegate James Madison suggested allowing Congress to provide for "the execution of Judgments in other States." [184] The Articles of Confederation version of the clause had provided only for the authentication of court judgments and not their enforcement.[185] Farrand's Records reports the objections of delegate Edmund Randolph: "Mr. Randolph said there was no instance of one nation executing judgments of the Courts of another nation."[186] Randolph then moved to commit a new version of the clause, one clarifying that the Constitution would allow only for the authentication and not enforcement of foreign records. It did not contain the requirement of a "judicial proceeding":

> Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act — and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.[187]

Randolph's version was committed with unanimous support.[188]

However, Gouverneur Morris, Pennsylvania delegate, subsequently introduced a version more nearly resembling the one in the Articles of Confederation. He suggested that the clause should read: "Full faith ought to be given in each State to the public acts, records, and judicial proceedings of every other State; and the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings."[189] Gouverneur Morris thereby reinserted the phrase "judicial proceedings," which Randolph's proposal had omitted. Although the language of the Full Faith and Credit Clause shifted slightly after this point, the requirement that full faith be extended to "judicial proceedings" remained with the text until it ultimately became Article IV.[190]

Consideration of the phrasing of Article III was underway virtually simultaneously with the drafting of Article IV. The phrase "judicial power" first appeared in written records of the Convention's proceedings in an outline of the speech James Wilson gave on June 16, 1787, in his discussion of Article III.[191] On August 6, 1787, the Committee of Detail presented a draft Constitution to the delegates.[192] In this draft, the Committee employed the phrase "judicial power" in what was then referred to as Article XI.[193] The subsequent draft

181 Notes on the Committee's proposed draft merely read, "Full Faith & Credit" without elaboration. MAX FARRAND, 2 THE RECORD OF THE FEDERAL CONVENTION OF 1787 174 (1911) [hereinafter 2 FARRAND'S RECORDS].

182 *Id.* at 447–48.

183 The newly proposed clause extended full faith to "the acts of the Legislatures," for example, whereas the Articles of Confederation had granted it only to acts, records, and judicial proceedings of "courts and magistrates." U.S. ARTICLES OF CONFEDERATION, art. IV. *See also* Sachs, *supra* note 174, at 1227. Given this difference, Mr. Williamson initially rejected the broad clause, proposing a return to the language of the Articles of Confederation. Mr. Pickney proposed limiting the clause's reach with a prefatory statement that seemed to restrict its import to bankruptcies and bills of exchange. It read, "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange . . . ." 2 FARRAND'S RECORDS, *supra* note 181, at 445. Nine of eleven delegates present moved to commit Pickney's motion. But, even with Pickney's caveat, the Framers were still uncomfortable with the clause's reach. Another divide became clear when James Madison suggested they might authorize Congress to provide for the "the execution of Judgments in other States." Sachs, *supra* note 174 at 1224–26 (2009). The Articles of Confederation version of the clause had provided only for the authentication of court judgments and not their enforcement. *Id.*

184 2 FARRAND'S RECORDS, *supra* note 181, at 448.

185 U.S. ARTICLES OF CONFEDERATION, *supra* note 183. *See also* Sachs, *supra* note 174, at 1227.

186 2 FARRAND'S RECORDS, *supra* note 181, at 448.

187 *Id.*

188 *Id.* ("The motion of Mr. Randolph was also committed nem: con:")

189 *Id.*

190 For example, on James Madison's motion, the Framers replaced "ought to" with "shall." 2 FARRAND'S RECORDS, *supra* note 181, at 489.

191 Outline of James Wilson's Speech (June 16, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 276, 280 (Max Farrand ed., rev. ed. 1937). ("The legislative and executive Powers are too feeble and dependent — They and the judicial Power are too confined"). Similar phrases also appeared earlier that summer. Most closely in language, Robert Yates's notes reference "judicial and legislative" power on June 6. *See id.* at 141. A June 13 account in *Farrand's Records* also makes note of a resolution about "judiciary powers." *Id.* at 231.

192 MAX FARRAND, 1 THE RECORD OF THE FEDERAL CONVENTION OF 1787 280 (1911) [hereinafter 1 FARRAND'S RECORDS].

193 Report of the Committee of Detail (Aug. 6, 1787), *in* The Gilder Lehrman Collection, https://www.gilderlehrman.org/collection/glc0081901 [https://perma.cc/Z7JK-ZFD7] ("The Judicial Power of the United

of the Committee of Detail, however, used different language; it stated "*the Jurisdiction* of the Supreme Court shall extend . . ."[194] On August 27, Gouverneur Morris and James Madison moved to strike "the jurisdiction of the Supreme Court" and replace it with the term "judicial power."[195] Their motion was committed with unanimous support.[196]

This reinsertion of the phrase "judicial power" took place only two days prior to the consideration of Article IV.[197] Gouverneur Morris, who had been responsible for adopting the phrase "judicial proceedings" into Article IV, was also responsible for including the term "judicial power" in Article III.[198] Moreover, Morris also deserves some credit for the subsequent retention of the phrase "judicial power" in the final text.[199] On September 8, 1787, a mere five days after Morris finished editing the Full Faith and Credit Clause, he joined the Committee of Style.[200] Consisting of five delegates, including Morris, the Committee was "appointed by Ballot to revise the stile [sic] and arrange the articles" of the Constitution.[201] Among the Committee's responsibilities was ensuring the consistent use of words across the Constitution.[202] Morris, by many accounts the most influential delegate on the Committee, had already demonstrated he was highly attuned to the meaning and usage of specific words in other drafting assignments.[203]

States shall be vested in one Supreme Court . . . .").

194 2 FARRAND'S RECORDS, *supra* note 181, at 186 (emphasis added).

195 James Madison, Convention Notes (Aug. 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 181, at 425–26, 431.

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 James Madison, Convention Notes (Sept. 8, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 181, at 547, 553.

201 *Id.*

202 *See id.* To give one example, the word "legislature" appeared fifty-one times in the draft the Committee received. *Id.* at 565–80. There, the word referred to both state legislatures and the national legislature. In the Committee's revised draft, however, in place of each mention of the national legislature, the Committee instead used the word "Congress." *Id.* at 590–603. The Committee eliminated the situation in which one word, "legislature," referred to two different things. *Compare id.* at 565–80 *with id.* at 590–603.

203 William Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 4, 14 (2021) ("Equally significant for Morris was words and precise word choice. A powerful example of his attention to language (as well as his capacity for deception) is

The Committee made one more significant change: it changed the placement of the two Articles in the final document.[204] Before the Committee issued its edits, what is now Article III was located at Article XI, and what is now Article IV was Article XVI.[205] The Committee rearranged the Articles so that the one requiring full faith and credit was placed immediately following the one providing for a federal judicial branch. In other cases where the Committee rearranged text, the changes reflected its desire to place closer together two similar provisions.[206] It is not a coincidence that the two uses of the word "judicial" ended up in successive articles, just a few paragraphs apart.[207] Their placement underscored the connections between the two provisions.

Given the historical context in which these terms were included and arranged in the Constitution, several conclusions about the drafting history seem unavoidable. First, the Articles in question were drafted and edited with care and attention; there is no basis for treating the word "judicial" as careless or coincidental. Second, because the phrase "judicial proceedings" was already in use in the Full Faith and Credit Clause of the Articles of Confederation, those who drafted Article III would very likely have been familiar with the word "judicial" from that usage.[208] Third, the two uses of the word are only a few paragraphs away from one another in the constitutional text.[209] This placement was deliberate, probably reflecting a perception of continuity of subject matter. Fourth, although Article IV was

the Territories Clause"). Morris developed his attention to language during his years of experience writing legal documents. *See id.* at 13. Before joining the Constitutional Convention, he was involved in drafting New York's 1777 Constitution and had written hundreds of reports and statues as a New York Legislator and representative in the Continental Congress. *Id.* Given Morris's legal experience and demonstrated focus on word choice, it is even more notable that he, out of all delegates, not only introduced "judicial" to both Article III and Article IV but also, through his role on the Committee, preserved the document's use of the word. *Id.*

204 *Compare* 2 FARRAND'S RECORDS, *supra* note 181, at 590, 600–02, *with* 2 FARRAND'S RECORDS, *supra* note 181, at 565, 575–78.

205 *Id.*

206 To give an example, the Committee combined clauses originally located in Article VII, Article VIII and Article XX into one section, the new Article VI, because all pertained to the power of the Constitution. *Compare* 2 FARRAND'S RECORDS *supra* note 181, at 603 *with* 2 FARRAND'S RECORDS, *supra* note 181, at 571–72, 579.

207 *See* U.S. CONST. art. III; U.S. CONST. art. IV.

208 Article IV of the Articles of Confederation stated that "[f]ull faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 3.

209 *See* U.S. CONST. art. III.

originally drafted for the Articles of Confederation, about a decade earlier than the drafting of Article III, final edits and the decisions to include the two Articles in the text of the Constitution were made within a few days of each other.[210] They were, moreover, promoted by the same man: Gouverneur Morris.[211] All in all, it is virtually certain that the proponents of each of the two uses of the word "judicial" were aware of the existence of the other use. Yet no effort was made to distinguish the two uses of the word.

3. Originalism and the Word "Judicial"

What is at stake in this short foray into the history of the Constitution's drafting? Why does it matter that when the Framers wrote "judicial" for purposes of Article IV, they had the same thing in mind as when they wrote "judicial" for purposes of Article III? It matters because if "judicial" in the two Articles means the same thing, then evidence about one is also relevant to our understanding about the other. It would be possible to learn about the meaning of Article IV by studying the way that similar issues are treated in regard to Article III.

In theory, it would also be possible to learn about the meaning of Article III by studying Article IV. In fact, however, our understanding of the meaning of Article III does not stand to profit much from what we know about Article IV. The reason is that there is a substantial jurisprudence already in existence which interprets Article III, but almost nothing in the Article IV literature that might help to understand Article III. The helpful analysis in the Article III context owes its existence to disputes raising standing, ripeness, and mootness issues. The large number of such disputes has resulted in an enormous number of judicial decisions on the subject, some of them quite thoughtful.

The lessons that Article III would tell about Article IV are familiar ground to any constitutional lawyer or academic. For many years, the Court has explained the phrase "judicial power" and the cases or controversy doctrines implementing it in terms of the conditions that the Framers would have been familiar with when drafting the constitutional provision in question. The methodology applied has been more or less originalist, although not dogmatically so.[212]

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210 *See* 2 FARRAND'S RECORDS, *supra* note 181, at 441, 447–48.

211 *Id.*

212 The originalist character of the Court's Article III opinions is well illustrated by the excerpt from Coleman v. Miller, 307 U.S. 433, 460 (1937) (Frankfurter, J., dissenting). *See infra* note 213 and accompanying text.

Justice Frankfurter provided a classic description of this method of interpretation in *Coleman v. Miller*, which interpreted the Judiciary Act of 1789:

> In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase . . . Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster, and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."[213]

One need not be a strict originalist to see the appeal of this approach. As Raoul Berger wrote, "[g]iven a document which employed familiar English terms—*e.g.* 'admiralty,' 'bankruptcy,' 'trial by jury'—it is hardly to be doubted that the Framers contemplated resort to English practice for elucidation, and so the Supreme Court has often held."[214]

The conventional explanation for these justiciability doctrines is that they serve to commit the judiciary to a more modest role in government. The word "judicial" functions, in effect, as a code word signifying adherence to the case or controversy method of judicial decision making.

C. The Rationale for the Requirement of "Judicial" Character

The Supreme Court has a standard explanation that recurs fairly consistently in the cases interpreting the phrase "case or controversy" in Article III.[215] It explains the inclusion

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213 Coleman v. Miller, 307 U.S. 433, 460 (1937) (Frankfurter, J., dissenting).

214 Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969).

215 The Court's analysis of justiciability has received mixed reviews. Negative assessments are based on various lines of reasoning. There are scholars who doubt the historical account of the doctrine's derivation. *See generally* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142–43 (1993); Berger, *supra* note 214, at 816 (stating that the Constitution does not require the limits that the Supreme Court has placed on standing). There are also scholars who quibble with particulars of the historical account but think it is overall close enough to continue using it. *See, e.g.*, James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 2 (2001) ("[G]iven the historical context, the contemporary injury-in-fact rule is an acceptable interpretation of Article III, because it reflects not only the Framers' likely concept of what courts

of the word "judicial" as a commitment that the courts would maintain the traditional common law method, a commitment that was necessitated by fears amongst some of the delegates that the courts would abuse powers that the Constitution granted.

1. The Conventional Wisdom in Federal Courts

The word "judicial" was used to provide reassurance to skeptics fearful of the aggressive growing power of judges that the federal constitution newly empowered. Inclusion of the requirement of a "judicial" proceeding is a way of saying that a grant of judicial power is a grant of judicial power "as we currently understand judicial power to be defined, today"—that is to say, in 1787. This use of the word is part and parcel, in other words, of the Supreme Court's commitment to originalism.

The conventional explanation of the word "judicial" in Article III is as follows. The creation of an American supreme court and (eventually) federal trial and intermediate appellate courts was not taken for granted as the drafting of the U.S. Constitution got underway. To the contrary, inclusion of a system of federal courts was controversial. In supporting the proposal for federal courts, the Federalists had to allay the concerns of those skeptics who saw a federal judiciary as a potential threat to the balance of power.[216] The skeptics feared that the creation of federal courts would set in motion a long term problem of increasingly aggressive federal judicial overreaching.[217] The key to gaining acceptance

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did, but also their view of the judicial role in maintaining the separation of powers[.]"); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("We do not claim that history *compels* acceptance of the modern Supreme Court's vision of standing . . . We do, however, argue that history does not *defeat* standing doctrine; . . . its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning"). Unsurprisingly, the justices who have supported decisions to deny standing tend to be more positive about the doctrine. *See, e.g.*, John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1219 (1993) (stating that the *Lujan* decision "is a sound and straightforward decision applying the Article III injury requirement . . . .").

216 *See* 2 FARRAND'S RECORDS, *supra* note 181, at 430 ("Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.").

217 The Anti-Federalists predicted that the Constitution would empower federal judges to "enlarge the sphere of their power beyond all bounds." *See* HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 168 (1981) (expressing concern that the federal courts would exceed their jurisdiction); *id.* at 182 (arguing "that the supreme court under this constitution would be exalted above all other power in the government, and subject to no control"). An important initial opponent of the plan to establish lower federal courts with jurisdiction to hear constitutional claims was James Madison; one author reports that Madison was said to have little confidence in courts. *See* Richard Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 292 (1997).

of the proposal set out in Article III was to emphasize the restraints under which so-called "Article III" courts would operate.[218] Keeping the proposed federal courts system from becoming too powerful was therefore as much of interest to the proponents of federal courts as it was to the opponents.[219]

Proponents of a federal court system understood the value of framing their proposal in modest terms. Making a credible commitment in the Constitution to maintaining the power balance required finding some device that would hold the courts' role to approximately what it was at the time of drafting. The strategy adopted to prevent the federal courts from expanding their power at the expense of the other branches of government was the common law method. Inserting the word "judicial" into the text of Article III effectively signaled that the power that was being given to these courts was limited to resolution of the sort of disputes that were traditionally considered justiciable in British/American common law history.[220]

Under the common law method, decisions are supposed to be made only when necessitated by the circumstances, that is to say, by the presentation of a case that raises the issue. And decisions are expected to be written as narrowly as reasonably possible. For opportunities to decide legal issues, therefore, common law judges are supposed to remain dependent on the parties, who bring them legal questions wrapped up in actual and concrete disputes. Courts, in principle, have only the most limited ability to anticipate

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218 THE FEDERALIST NO. 83 (Alexander Hamilton); THE FEDERALIST NO. 48 (James Madison) (arguing for maintaining limits on the authority of the courts); THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Oxford World's Classics 2008) (arguing that the federal courts would be "the weakest of the three departments of power" because it would possess "neither force nor will, but merely judgment"); THE FEDERALIST NO. 81, at 396 (Alexander Hamilton) (Oxford World's Classics 2008) (emphasizing the "comparative weakness" of the Judicial Branch).

219 *See, e.g.*, Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1761–63 (2004) (stating that there was general agreement on both sides that there should be only "limited" "judicial intrusions into the political realm").

220 This account is essentially the holding of Marbury v. Madison, 5 U.S. 137, 177 (1803). An Article III court has the power to decide issues of constitutional law because Article III gives it the power to decide cases, and the power to decide cases assumes that the court will decide the case in accordance with the law—including any relevant constitutional provisions. The textual grounding for the requirement of a justiciable "case or controversy" lies in Article III's vesting of "judicial power" in these courts, for the Supreme Court has held that the inclusion of the qualifier "judicial" limits the power of Article III courts to acts that would have been considered justiciable by the Constitution's framers. *See* Roberts, *supra* note 215.

legal questions or to take initiative to frame the issues favorably. The Article III "case or controversy" doctrine displays a judicial commitment to remaining within the traditional "judicial" power. It is therefore not surprising that the court has consistently explained the limitation to judicial functioning as a consequence of its originalism.

2. Applying the Conventional Wisdom to State Courts

The account is less obvious when the distribution of power concerns the relative authority of different state judicial systems. There is little information about what the Framers actually had in mind when they included the Full Faith and Credit Clause in the Constitution. But given that, at the same time, they were considering the dynamics of federal judicial power (in their deliberations over Article III),[221] a similar explanation could go as follows.

At the end of the Revolutionary War, the thirteen colonies were legally free to treat each other as they would have treated foreign nations. Massachusetts owed no more respect to a legal decision made by New Jersey than it owed to legal decisions made by France. Both were matters of comity, not of legal obligation. The proposal to include in the new Constitution some provision for recognition of other states' legal decisions would therefore have been attractive. In the Article IV context, a commitment to assist in the enforcement of one another's legal rulings offered great gains in efficiency and financial stability. States would be more likely to cooperate if they had assurances that other states would responsively cooperate; the tendency to act cooperatively would therefore feed on itself and grow stronger over time.

But if the potential benefits were obvious, so were the costs. What was to prevent one state with particularly aggressive opinions from using the newly created obligation to respect earlier judgments of other states to try to decide matters that were not properly before it? Comparable language in the Articles of Confederation had presented no problems along these lines. But that provision carried with it no prospect of federal enforcement as there were no federal courts; the addition of a Supreme Court with the authority to review state court decisions and enforce the Full Faith and Credit Clause could have caused some hesitation.[222]

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221 *See supra* Part III.B.2.

222 The hesitation some of the Framers had about the addition of a red-blooded Full Faith and Credit Clause is described *supra* Section III.B.2.

The Full Faith and Credit Clause's reliance on the term "judicial proceedings" would have reassured the skeptics who feared that requiring credit to sister-state judgments might introduce major changes in the operations and functions of courts. It may have seemed likely that the individual states would have continued to follow the common law method of adjudicating legal issues only when they arose in concrete cases, but the inclusion of the word "judicial" in Article IV made this assumption official. Conditioning the assistance of the federal system upon compliance with federal norms about judicial function would be a natural remedy for the potential of state court overreaching. The U.S. Constitution in this way provided assurances that the enhanced enforcement powers of the Full Faith and Credit Clause would not be used to facilitate overreaching by states with overtly political objectives. The word "judicial," in short, conveyed the same commitment in the Article IV context as it did in the Article III context.

The wisdom of this reasoning is apparent if one thinks about the kinds of decisions that would have been eliminated by the imposition of Article III justiciability standards. The clearest example would be an advisory opinion. If advisory opinions were entitled to full faith and credit, then a state court might simply take the initiative to address the legal merits of any question that it found interesting or important. There would be a strong incentive to be the first to speak to a question in order to take advantage of the tabula rasa and commit other states to one's position through the operation of full faith and credit. The phrase "judicial proceeding" in Article IV effectively disqualifies advisory opinions from the protection of full faith and credit.

This conclusion is actually quite sensible. States cannot, and surely do not, expect that Article IV's support for interstate judgments will apply to everything that a state court has decided. Courts make decisions about all sorts of things—everything from which of several applicants to award a judicial clerkship to, to the promulgation of local rules of civil procedure—and it is taken for granted that not all of these things are entitled to full faith and credit simply because they have been announced by a judge or deal with the business of running a court. It is *cases* that qualify for interstate enforcement as a matter of federal constitutional law.

In federal courts, only disputes that qualify under the "case or controversy" standard of Article III are decided by courts, so the problem of full faith and credit applying to advisory opinions does not arise. But state courts may be empowered under state law to do many other things, including writing advisory opinions. The federal judiciary is not about to say that the states' own courts cannot grant requests for advisory opinions, but it *can* say that interstate enforcement of advisory opinions (or other disputes that would not qualify under

Article III) is not supported by Article IV. To meet the federal standard at the enforcement of judgments point, a dispute should meet the federal standard at the jurisdictional point.

As with Article III, the inclusion of the word "judicial" implicitly pledges that earlier ways of doing things will be preserved. There should be, at a minimum, a presumption that two uses of the word "judicial," dating to the same time period, are identical. The burden of proof should rest on those who would deny the commonality of the two Articles' meanings of the word.

IV. Applications

If the same meaning is given to the word "judicial" in Article IV as is given to the word "judicial" in Article III, then the end result is to condition federal support under full faith and credit upon satisfaction of the Article III "case or controversy" requirement. The most important part of that requirement, for present purposes, is the doctrine of standing to sue. The Texas Heartbeat Act is likely to generate litigation that would fail to meet that standard. Because of the peculiar procedural posture of cases brought under that statute, the individuals who bring such cases are likely to lack the sort of concrete individual interest that the Supreme Court has consistently demanded if a dispute is to be thought of as falling within the traditional "judicial power."[223]

A. The Problem with the Texas Heartbeat Act

S.B. 8's novelty lies in its unusual procedural vehicle: civil suits brought by private individuals that reward those individuals' identification and prosecution of persons with some sort of involvement in an abortion.[224] Complaints brought to court pursuant to this statute are different from traditional torts cases in several important ways.[225]

A civil damages remedy usually requires a defendant who unlawfully caused an injury to provide compensation to the individual who was injured, with the amount of compensation

223 *See* Thole v. U.S. Bank N.A, 140, S. Ct. 1615, 1618 (2020) ("To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent . . . ").

224 *See* TEX. HEALTH & SAFETY CODE § 171.207 ("Limitations on Public Enforcement") (West 2021).

225 The plaintiff's recovery is referred to, after all, as "damages." The Texas statute refers to the relief awarded that way. *See, e.g.*, TEX. HEALTH & SAFETY CODE §171.208(c) (West 2021) (referring to defendant having already paid "the full amount of statutory damages.")

reflecting the extent of the injury.[226] But there is no traditional injured party to bring suit in an anti-abortion case; the people who seek to deter abortions are not individuals who were injured by a particular abortion but persons with ideological objections to abortion as a general matter.[227] Those who argue that women are entitled to reproductive freedom, indeed, make exactly this point: control over one's reproductive functions is a private matter which does not implicate the legitimate interests of either the state or other private parties.

Through S.B. 8, the Texas legislature created a cause of action by imposing a legal obligation upon persons who have facilitated abortions to pay certain amounts to the plaintiffs who prove that such abortions have occurred.[228] It characterized the cash payments given to these self-appointed volunteers as "damages."[229] This characterization fools no one; it is evident that the plaintiff has not suffered any harm by the abortion in question and, therefore, does not need "damages." It will not work to try to paint the woman who had the abortion as the injured party because she does not receive damages. In short, the plaintiff claims a financial reward *because someone else had supposedly been injured*. This is precisely the sort of dispute that the U.S. Supreme Court has consistently dismissed as lacking standing under Article III of the Constitution.[230]

226 The civil action in question is created by TEX. HEALTH & SAFETY CODE §§ 171.207 and 171.208 (West 2021): "Sec. 171.207. ("LIMITATIONS ON PUBLIC ENFORCEMENT. (a)Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208."). Thus, no actions may be brought by the state. And no limitations are imposed on the private parties who might initiate a case. § 171.208 imposes no qualifications of traditional standing to sue on the plaintiff in the action; it merely states: "(d) Notwithstanding Chapter 16, Civil Practice and Remedies Code, or any other law, a person may bring an action under this section not later than the fourth anniversary of the date the cause of action accrues."

227 Of course, the anti-abortion view is that it is the fetus that is harmed. But even if one is willing to grant the fetus the necessary status to have a claim, there are serious issues about how to choose the fetus's representative. It would be peculiar to simply allow private parties to intervene at will, without having any connection at all to the dispute. That is, however, the result that would occur if the Texas scheme for "selecting" plaintiffs were followed.

228 *See* TEX. HEALTH & SAFETY CODE § 171.208(b)(2) (West 2021) ("Civil Liability for Violation or Aiding or Abetting Violation").

229 *Id.*

230 *See* Hollingsworth v. Perry, 570 U.S. 693, 708 (2013) ("But even when we have allowed litigants to assert the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.") (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)) (internal quotation marks omitted).

B. Article III Standing to Sue: A Brief Refresher

The basic principles of Article III jurisdiction need no introduction.[231] Article III of the Constitution grants "the judicial power" to the Supreme Court and such lower federal courts as Congress might later create.[232] In exercising this power, so-called Article III courts are limited to justiciable "[c]ases or [c]ontroversies."[233]

The Court explained the meaning of "cases and controversies" in *Muskrat v. United States* in terms of "regular proceedings" established in order to protect rights: "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . . ." [234] "Cases or controversies" included "suit[s] instituted according to the regular course of judicial procedure."[235] Moreover, "judicial power" referred to the right to determine actual controversies "duly instituted" in courts of proper jurisdiction.[236] In other words, "cases or controversies" essentially refers to ordinary cases that happened to raise legal issues; the parties received a chance to argue about their rights because it was necessary to resolve the case.

Citing the long-standing commitment to this distinctive image of judicial power, the Court has refused to take jurisdiction in cases that do not reflect the traditional mode.[237] This refusal reflects the underlying rationale for the requirement of an "injury" (also sometimes

231 This article is only intended to present a very truncated view of the standing doctrine. For a more developed account of the author's positions and arguments on the subject, *see* Lea Brilmayer & Callie McQuilkin, *Standing and Substance: Legitimacy, Tradition, and Injury in the Doctrine of Standing to Sue*, U. PA. J. CONST. L. (forthcoming).

232 U.S. CONST. art. III, § 2, cl. 1.

233 *Id.*

234 Muskrat v. United States, 219 U.S. 250, 357 (1911) ("By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.").

235 *Id.* at 356 ("What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies.' A 'case' was defined . . . to be a suit instituted according to the regular course of judicial procedure.").

236 *Id.* at 361 ("That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.").

237 *See id.*

referred to as an "injury in fact," or a "concrete" injury). As previously mentioned, the inclusion of the term "judicial" was intended precisely to allay the concerns of skeptics who feared the uncontrolled growth of judicial power.[238] Tethered to the traditional judicial function, the judiciary was unlikely to excessively expand over time and upset the balance of power that the Framers were planning.[239]

The last century has seen enormous amounts of both scholarly writing and litigation over what this means and whether the Court's position is sound, historically or otherwise. The details of the development of this doctrine are too lengthy and complex to fully cover in the space available in this Article. Nonetheless, it is possible to introduce enough material from the case law to get a sense of what the requirement would mean in the full faith and credit context. Recent case authority indicates strongly that the typical S.B. 8 case would not satisfy the standing requirement.

C. Justice Kavanaugh's Hypothetical Hawaiian Plaintiff

The Court's message about the nature of the proper judicial function has been basically unchanged over many years, and the issues of judicial function that most commonly appear in reproductive freedom cases have been familiar for decades.[240] On no point has the Supreme Court been more adamant than the requirement that, before they can bring a case to court, plaintiffs must have suffered a "harm" or an "injury."[241] This is part of the doctrine of "standing." Standing cases have long been a mainstay of the Supreme Court's docket;[242]

238 *See supra* Part III.C.1.

239 *Id.* at 355 ("These cardinal principles of free government had . . . guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power.").

240 It is not unusual to find abortion-related cases with justiciability problems. There are several reasons for this. First, if a pregnant woman wishes to challenge a restriction, she is likely to run into the problem that the issue is "capable of repetition yet evading review." Singleton v. Wolff, 428 U.S. 106, 117 (1976) (quoting Roe v. Wade, 410 U.S. 113, 125 (1973)). Additionally, cases that challenge the constitutionality of abortion restrictions often rely on third-party standing. This is because of the sensitivity of the issue (which makes women unwilling to face the publicity of having their names attached). In *Singleton v. Wolff*, the Supreme Court established that physicians can bring lawsuits on behalf of their abortion-seeking patients to ensure they have access to care. *See* Singleton v. Wolff, 428 U.S. 106 (1976).

241 The case of TransUnion L.L.C. v. Ramirez, 594 U.S. 413, 417 (2021), discussed *infra* has an extensive discussion of "harm" sufficient to create standing to sue.

242 It is not possible to list even a representative sample of the cases on justiciability; the cases are numerous, from almost every period in the Court's history, and extremely varied. *See generally* Flast v. Cohen, 392 U.S.

other doctrines related to the "same case or controversy" limitations are mootness, ripeness, and political question.

To determine what impact the standing doctrine would have on cases brought under the Texas Heartbeat Act, one need only consult Justice Kavanaugh's recent opinion in *TransUnion v. Ramirez*.[243] It provides a useful illustration of what is meant by "concrete" harm.[244] Justice Kavanaugh introduces a hypothetical involving two plaintiffs to explain the distinction between concrete and abstract harm, both of whom object to a factory that is polluting an area in Maine.[245] The first plaintiff is from Maine while the second is from Hawaii:

> To appreciate how the Article III "concrete harm" principle operates in practice, consider two different hypothetical plaintiffs. Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.[246]

The majority opinion in *TransUnion* clearly rejects the argument that the Hawaiian plaintiff in the second lawsuit has standing.[247] The Hawaiian complainant lacks standing because the harm to property took place in Maine; neither he nor any of his property suffered from the complained-of activity.[248] The Maine plaintiff could sue, however, because she

83 (1968) (adjudicating standing to sue); Baker v. Carr, 369 U.S. 186 (1962) (exploring the political question doctrine); Liverpool S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) (stating that the constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies"); Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892); United States v. Ferreira, 54 U.S. 40, 48 (1852).

243 TransUnion L.L.C. v. Ramirez, 594 U.S. 413 (2021).

244 *See id.* at 426.

245 *Id.*

246 *Id.*

247 *Id.* at 413.

248 *Id.*

had property in Maine that was damaged by the pollution.[249]

Justice Kavanaugh's Hawaiian plaintiff is uncannily analogous to the Heartbeat Act plaintiff. In Heartbeat Act cases, just as in the hypothetical, the plaintiff alleges that the defendant unlawfully injured someone who is not a party to the case before the court. In both Heartbeat Act-type disputes and in Justice Kavanaugh's hypothetical, the defendant is now being sued by a self-appointed plaintiff, rather than by the person who the defendant supposedly harmed.

In neither case is there a personal concrete injury (as the Court would have it), and this cannot be changed simply by the legislature announcing that the plaintiff has been harmed. If the only harm is the one that it announces, the harm exists only because the lawmakers say that it does. It is presumed, not proven. It is true by definition, that is to say, it is treated as an unassailable premise and is not a factual assumption at all. This defect is not one that can be cured by legislative action.[250]

The Texas Heartbeat Act, by design, makes the actual empirical state of the world irrelevant. It creates, in effect, an irrebuttable presumption that all members of the community, whoever and wherever they may be, experience suffering when an abortion happens. It is as much a legal fiction as the "fertile octogenarian," familiar from the Rule against Perpetuities.[251] The very fact of its purported universality and inevitability confirms that this is not an empirical statement but an article of faith. This is not an injury-in-fact but rather an injury regardless of the facts. Texas's approach to standing tries to meet the requirement of an injury-in-fact with an injury-in-fiction.[252]

In the alternative, it might be thought that the difference between S.B. 8 cases and the

249 *Id.*

250 While prudential elements contribute to the standing doctrine, the Article III element is of constitutional stature. *See* U.S CONST. art. III.

251 According to Merriam-Webster, "the fertile octogenarian" refers to "a presumption at common law that a woman of any age is capable of having children for purposes of determining the applicability of the rule against perpetuities."; *Fertile Octogenarian Rule*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, https://www.merriam-webster.com/legal/fertile%20octogenarian%20rule [https://perma.cc/8TUV-4U47].

252 A legal fiction is defined as "something assumed in law to be fact irrespective of the truth or accuracy of that assumption." *Legal Fiction*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, https://www.merriam-webster.com/legal/legal%20fiction [https://perma.cc/A7QA-JQ4C]. Another definition of legal fiction is "[a]n assumption that something is true even though it may be untrue." *Legal Fiction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Hawaiian hypothetical lies in the $10,000 minimum reward that successful S.B. 8 plaintiffs receive. The existence of the reward might appear to make the dispute seem more like a traditional case because the plaintiff and defendant are fighting over something concrete. But Justice Kavanaugh does not appear to think so. The plaintiff is still "uninjured"; he does not meet the requirement of having been "harmed."[253] Justice Kavanaugh concludes that "even if Congress affords both hypothetical plaintiffs a cause of action (with statutory damages available)" the second version of the hypothetical (with the Hawaiian plaintiff) would not meet the constitutional requirement:[254]

> . . . the second lawsuit may not proceed because that plaintiff has not suffered any physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts. *An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's "compliance with regulatory law" (and, of course, to obtain some money via the statutory damages)*.[255]

The opinion is clear that the outcome should not be any different simply because the legislature names a statutory remedy.[256]

At first, this position seems rather curious. Why does it not make a difference that the plaintiff expects a statutory remedy if they win the case? It does not answer this question to say (as Justice Kavanaugh does) that the plaintiff is merely trying to ensure the defendant's compliance with regulatory law—the typical tort plaintiff could be described the same way. The Court likewise treats the desire "to obtain some money via the statutory damages" dismissively; it is treated as inconsequential and tangential, although the opinion provides no explanation.[257] The difference between the typical tort plaintiff and the Hawaiian plaintiff is never explained. Precisely, such a desire to obtain money through legislatively

253 *TransUnion*, 594 U.S. at 413.

254 *Id.* at 585.

255 *Id.* at 427–28 (emphasis added).

256 *See id.* ("[T]he public interest that private entities comply with the law cannot 'be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.'") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992)).

257 *TransUnion*, 594 U.S. at 585.

prescribed damages is an important motivation in the typical private law case, where no standing objection can be made.

The result is more defensible if framed in terms of the reasons for requiring a "case or controversy" and for insisting that advisory opinions do not meet that requirement. From that perspective, there are good reasons why it does not make a difference that a statutorily created reward is offered. If all that was required to turn something into a case or controversy was a reward in the form of a sum of money, this could easily be provided in situations where someone wanted an advisory opinion about the constitutionality of a statute. The legislature would merely have to offer an award for the person who successfully mounts a challenge to a piece of legislation.

Justice Kavanaugh's opinion in *TransUnion* has its critics, of course.[258] But whatever the demerits of the principles underlying it, the Court's position is coherent, consistent, and unlikely to change. As a result, few Heartbeat Act plaintiffs are likely to satisfy the concrete harm requirement. Since the existence of a "concrete harm" is constitutionally necessary, cases brought under S.B. 8-type statutes will likely not qualify under the "case and controversy" standard of Article III.[259]

CONCLUSION

This Article begins by asking what would happen if one state sought to impose its views on sister states by dressing them up as requests for advisory opinions and then arguing that the resulting decisions were entitled to full faith and credit. It seems likely that this strategy would be widely, if not indeed universally, rejected. But we currently lack the tools to say why. Doctrinally, this argument is untenable because the earlier proceedings were inconsistent with the Article III case or controversy requirement. Yet, the commonsense reason is that we should not reward states that set out to dominate public discourse.

This Article has formulated its arguments mainly with "conservative" approaches to constitutional interpretation in mind. An argument that depends only on the exact wording of constitutional provisions and on documented historical facts has earned the support of

258 Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62 (2021); Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez?, 98 N.Y.U. L. REV. 269 (2021); Richard Pierce, *Standing Law Is Inconsistent and Incoherent*, YALE J. REGUL. ONLINE (2021).

259 *See TransUnion*, 594 U.S. at 427.

the key originalists and textualists in contemporary American legal culture.[260] Working with the most restrictive positions on constitutional interpretation results in a stronger argument, one able to withstand attacks from all sides of the political spectrum.

It is now more than two hundred years since the Full Faith and Credit Clause and its implementing Statute were adopted.[261] Yet, interstate judgments enforcement is still surprisingly uncharted territory. However, the relative lack of scholarly attention to the subject is not an indication of lack of practical importance, much less lack of theoretical significance. The bulk of the discussion above deals with issues that have never been studied (or even noticed), but their practical and theoretical importance cannot be doubted. When it comes to the Full Faith and Credit Clause, it is surprising what has been overlooked.

This Article addresses two of the less widely known reasons that a judgment from another state need not be enforced. The first of these is the Uniform Enforcement of Foreign Judgments Act, which radically alters the available defenses in the interstate judgments setting. As almost all states have adopted the Uniform Act, we should expect widespread application of the judgments law of the enforcing state. This may surprise people unfamiliar with conflict of laws doctrines but is clearly the correct result under the doctrine of renvoi.

The second half of this Article continues to surprise. The Full Faith and Credit Clause itself contains a good reason for denying enforcement to sister-state judgments. By its own wording, the Clause applies only to "judicial" proceedings, and under existing Supreme Court authority, these Texas judgments are not "judicial." In order to escape the threat of federal court injunction, the Texas legislature designed them so unlike "ordinary" cases that they do not qualify for federal guarantees of interstate enforcement. That is to say, by making them an inappropriate target for federal oversight at the jurisdictional stage, the Texas legislature unwittingly made them inappropriate candidates for federal support at the judgments phase. Poetic justice.

Some may say that the word "judicial" in Article IV does not deserve so much weight—its use was simply random or coincidental. A good textualist, it goes without saying, would not. It is difficult to maintain the claim that the adjective "judicial" in Article IV is insignificant when in Article III the word "judicial"—inserted into the text at the same time and by the same people—is celebrated as a code word for judicial restraint, moderation,

260 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

261 *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738.

and respect for the proper separation of power.[262] The U.S. Supreme Court has made clear the importance it attaches to the Article III reference to "[c]ases or [c]ontroversies" and to the traditional model of common law adjudication:

> These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted [sic] to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.[263]

There may be another explanation for what the word "judicial" was intended to mean when it was employed in the text of Article IV. There may be an explanation of why "judicial" is "a cardinal principle of free government" in one constitutional article but too insignificant to merit attention in the next one.[264] If so, the world is waiting.

Legal resolution of contentious issues such as the right to an abortion is almost guaranteed to provoke the bitterness of at least one party. When a state is required to enforce a judgment that runs counter to the deeply held beliefs of its people, the bitter taste may last a long time. The Full Faith and Credit Clause—along with its better-known sibling, Article III—has worked out an accommodation of the competing moral, legal, and political judgments. It embodies the virtues of the common law method of adjudication, aiming to keep the distribution of power roughly as it stood at the time that the Constitution was drafted. Of course, no accommodation imposed by the Full Faith and Credit Clause is likely to achieve anything deeper than simple tolerance of other states' profound differences—and even tolerance is probably too ambitious an objective. No legal solution will ensure an amicable resolution of the controversy over the right to reproductive freedom. That would be too much to expect of a mere constitutional provision, even the Full Faith and Credit Clause.

262 *See* U.S. CONST. art. III, § 1; U.S. CONST. art. IV, § 1.

263 Muskrat v. United States, 219 U.S. 346, 355 (1911).

264 *Id.*

CRIMINISTRATIVE LAW: DATA-COLLECTION, SURVEILLANCE, AND THE INDIVIDUALIZATION PROJECT IN U.S. CHILD WELFARE LAW

YAEL COHEN-RIMER*

Abstract

Textual analyses of child welfare laws, joined by extensive textual and legal analyses of case law, reveal how the "dance" between the administrative and the criminal in child protective services (CPS) is rooted in the individualized perception of poverty. This individualization, which forms the bedrock of the capitalist American welfare state, promotes the fragmentation of the family unit. Building on individualized perception and reifying it, child welfare laws and practices are neither purely administrative nor criminal, but "criministrative." As such, they serve as a legal shield for the State in its attempts to ensure child welfare; the State refuses to provide protections available in traditional criminal contexts to families involved in CPS investigations, while simultaneously enjoying administrative courts' less restrictive evidentiary rules. This Article follows the thread of individualized surveillance embedded in the law, starting with the conflation of "abuse" and "neglect." This Article proposes three solution pathways, building from practical to theoretical: divorcing neglect from abuse, adopting a Poverty Aware Paradigm, and developing a theoretical framework for an institutionalized "benevolent gaze."

This Article joins growing discussions in critical legal scholarship concerning the carceral nature of the welfare state and the relationship between care and punishment in the United States. This Article adds a further dimension to these discussions by asserting that child welfare law is more aptly described as criministrative law, and by exposing the rootedness of the individualized perception of poverty in the organizing concepts of the child welfare system. Finally, this Article calls for a reconstruction of the legal treatment of children who are at risk of harms caused by poverty. If left unchecked, criministrative law will continue to inflict harm upon parents, thus harming the very children that CPS is meant to protect.

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INTRODUCTION

The trouble is he's lazy / The trouble is he drinks
The trouble is he's crazy / The trouble is he stinks
The trouble is he's growing / The trouble is he's grown
Krupke, we got troubles of our own![1]

In the famed Hollywood musical *West Side Story*, members of the teenage gang the Sharks face many problems—not least, a state system that bounces them from pillar to post. In "Gee Officer Krupke," the problems discussed by the Sharks are all framed as individual—as the above lyrics say, the "trouble" is with "him." Now, more than sixty years later, the societal issues portrayed in *West Side Story* are as pertinent as ever in the United States (U.S.). Despite continued criticism of the child welfare system and the many attempts made to curtail its harms,[2] it is still a haunting feature in the lives of many children

1 LEONARD BERNSTEIN & STEVEN SONDHEIM, *Gee Officer Krupke*, in WEST SIDE STORY (Amberson Holdings LLC & Stephen Sondheim 1956, 1957).

2 This growing criticism is slowly starting to be voiced in the legal scholarship, mainly through the works of Dorothy Roberts and Wendy Bach. *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE (2022); *see also* Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. UNIV. L. REV. 1057 (2023) [hereinafter *The Empty Promise of the Fourth Amendment*] ("casual home invasions of the family regulation system are . . . a story of a problem-solving system functioning exactly as it was designed"); Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1 (2022) (exploring the effects of lessening of mandated reporting and growing mutual aid during the COVID-19 pandemic). More critical scholarship can be found outside the legal literature, wherein the issue was identified and critically discussed much earlier. *See, e.g.*, Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAV. 8 (1993) (calling attention to the lack of a definition for child neglect and advancing a definition that does not center parental failure); Anna Gupta, *Poverty and Child Neglect—The Elephant in the Room?* 6 FAM. RELATIONSHIPS & SOC'YS. 21 (2017) (advancing "a more sophisticated and multidimensional analysis of poverty and parenting that incorporates both psychological and social causes in ways that challenge the polarisation of the debate on poverty and neglect"); *see also* William Elliott, *An Asset-Building Agenda for the Twenty-First Century: Giving Families Something to Live For*, 24 J. CHILD. & POVERTY 145 (2018) (discussing upward mobility, education, and wealth redistribution in the U.S.).

and families across the nation.[3] This Article aims to methodically examine child welfare law, arguing that it is in fact "criministrative" law: operating in a legal sphere that is both administrative and criminal.[4] This Article finds traits of "criministration" in three key facets of child welfare law: first, the law in the books, focusing on the language of the law; second, the "law in the banks," looking at how funding is constructed in this context; and third, the law on the ground, examining the practices surrounding report-writing and court cases. This Article then discusses the reframing of child welfare law and child protective services (CPS) as criministrative, pointing to the harms incurred by both individuals and society as a result of their criministrative character. Finally, this Article suggests a novel reconstruction of the legal treatment of children at risk of harms caused by poverty.

Theoretically, the contribution of this Article is to show and discuss the ways administrative and criminal legal aspects of the child welfare system are woven together, producing bureaucratic justifications for data-collection which is then conflated with crime-prevention justifications. Keeping the system administrative in description means that State agencies are only bound by the requirements of administrative courts, with their low evidentiary burden and looser limits to surveillance,[5] while the State simultaneously adheres to criminal logic, legitimizing widespread infringement of rights, harsh and swift legal reactions, and implementation of preventative measures. By not classifying this administrative practice of data-collection as, in fact, a punitive sanction, the legal system avoids the responsibility of coupling data-collection practices and procedure with any correlating protections.[6]

While this Article focuses on data collection—as well as its constructions and implications—it also fits into and contributes to a growing literature recognizing the myriad

3 This is especially true in urban areas. *See* ROBERTS, *supra* note 2, at 37.

4 In 2006, Juliet Stumpf suggested that immigration removal procedures be viewed through a "crimmigration" legal prism. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). Stumpf's article spawned a whole field of crimmigration studies. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015); Ramanujan Nadadur, *Beyond Crimigration and the Civil-Criminal Dichotomy: Applying Mathews v. Eldridge in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L. J. 141 (2013). This Article suggests that a similar move is due in administrative welfare cases.

5 *See* Tarek Ismail, *Family Policing and the Fourth Amendment*, Cal. L.J. 1485, 1518–1527 (discussing CPS home searches, the Child Abuse Prevention and Treatment Act, and administrative search exceptions to the Fourth Amendment).

6 *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–802 (2006) (discussing "[c]onstitutional rules of policing and trial procedure" and privacy in the criminal law context).

ways in which the U.S. welfare state[7] does, in fact, act in ways that mimic carceral, penal State institutions.[8] Activists, journalists, and practitioners point to how one's experience as a welfare recipient eerily resembles the experiences of those imprisoned for or accused of crimes.[9] To emphasize the carceral nature of the welfare system, sociologist and professor Dorothy Roberts refers to the child welfare system as the "family-policing system."[10] Others like law professor Wendy Bach have recognized that, while we like to think of the services provided by the administrative welfare state as care (which is to say, as public goods to be distributed only to the deserving), they are, in fact, intertwined with punishment.[11]

Existing scholarship has drawn attention to the racialized roots and motivators of CPS. This Article adds to this scholarship by identifying poverty—particularly, the

7 This issue is not unique to the U.S. but is common to the liberal welfare-state model, as characterized by scholars like Esping-Andersen. *See* Gøsta Esping-Andersen, *The Three Political Economies of the Welfare State*, *in* WELFARE STATES: CONSTRUCTION, DECONSTRUCTION, RECONSTRUCTION II (Stephan Leibfried & Steffen Mau eds., 2008); Gøsta Esping-Andersen, *Welfare Regimes and Social Stratification*, 25 J. EUR. SOC. POL'Y 124 (2015).

8 *See* Shanta Trivedi & Matthew Fraidin, *A Role for Communities in Reasonable Efforts to Prevent Removal*, 12 COLUM. J. RACE & L. 315 (2022); Shereen A. White et al., *Help Not Hotlines: Replacing Mandated Reporting for Neglect with a New Framework for Family Support*, FAM. INTEGRITY & JUST. 132, (2022); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIOL. REV. 610 (2020); *The Empty Promise of the Fourth Amendment*, *supra* note 2; Tina Lee, *Response to the Symposium, Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being (Foreword)*, 12 COLUM. J. RACE & L. 421 (2022); TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM (2016) [hereinafter CATCHING A CASE]. While this is a growing, recent discussion, it is not entirely new. *See* MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY (2013); David Garland, *The Birth of the Welfare Sanction*, 8 BRIT. J.L. & SOC'Y 29 (1981).

9 *See generally* STEPHANIE LAND & BARBARA EHRENREICH, MAID: HARD WORK, LOW PAY, AND A MOTHER'S WILL TO SURVIVE (1st ed. 2019). *See also* the activities of the activist non-profit JMACforFamilies, which works to combat "family policing" and keep children with their parents; JMACFORFAMILIES https://jmacforfamilies.org/ [https://perma.cc/AV5K-XA3E].

10 ROBERTS, *supra* note 2 *passim*.

11 Scholars have written extensively about many forms of poverty criminalization. *See, e.g.*, BACH, *supra* note 2; Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L. J. 1473 (2020). The welfare-penal continuum is described by some scholars as just that: a continuum between two extremes, one that provides state-administrated assistance or protection of rights, the other that punishes and infringes on those same rights. *But see* David Downes & Kirstine Hansen, *Welfare and Punishment in Comparative Perspective*, *in* PERSPECTIVES ON PUNISHMENT: THE CONTOURS OF CONTROL (Sarah Armstrong & Lesley McAra eds., 2006) (portraying the welfare system itself—as it is constructed and devised today—as a system of punishment targeted at people in poverty).

individualized perception of poverty—as a central focal point in the U.S. welfare context. This Article recognizes this individualized mindset as a mindset that promotes an atomic perception of the person, divorced from their realities, background, and lived experience. This atomization perpetuates the flattening of differences between people and sits at the heart of disciplines assuming-away difference in favor of generic, neutral models. It is the individualization and fragmentation of human interactions and community that enabled the State to enter the private domains of communities and families in the first place. As this Article shows, this individualized perception resides most imminently in the yoking of abuse and neglect, treated by the law—in all of its layers—as one being a more extreme version of the other rather than two distinct phenomena. This yoking both results from and reifies the individualized perception of poverty, leading to a criministrative treatment of families and children who are experiencing poverty.

It is worthwhile to note the connections between these issues and reproductive justice, which is bound up with child welfare through both theoretical framework and practical implication.[12] Arguably, the most extreme form of protecting children from their parents can be found in the anti-abortion movement.[13] Positioning the mother and her unborn baby as competing beings with competing rights and situating the fetus as needing protection from its mother's actions is the epitome of individualization and family separation. This harmful over-individualization, which is prominent in child welfare debates, is steeped in anti-poverty and racial bias. Among other effects, it pits low-income Black mothers against their own children (even those in the womb) more routinely than it does mothers who can afford safe, private, market-based solutions to their needs, from mental health support to professional abortion services.[14]

Against this backdrop, the inquiry at the heart of this Article is the examination of the

12 *See generally* Priscilla A. Ocen, *Unshackling Intersectionality*, 10 DU BOIS REV. 471 (2013); Priscilla A. Ocen, *(E)Racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586 (2015); Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191 (2018); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, AM. U. J. GENDER & L. 1 (1993); Melissa L. Gilliam & Dorothy E. Roberts, *Why Reproductive Justice Matters to Reproductive Ethics*, *in* REPRODUCTIVE ETHICS IN CLINICAL PRACTICE: PREVENTING, INITIATING, AND MANAGING PREGNANCY AND DELIVERY (Julie Chor & Katie Watson eds., 2021).

13 This well-documented and widely-discussed issue can be found, for example, in recent *Harvard Law Review* Forum discussions. *See generally* the papers presented in *Reproductive Justice,* HARV. L. REV., at https://harvardlawreview.org/topics/reproductive-justice/ [https://perma.cc/FK3U-GYSH].

14 *See* Michele Goodwin, *Complicit Bias and the Supreme Court Response*, 136 HARV. L. REV. F. 119 (2022).

central role individual surveillance plays in child welfare law through the individualization project, and the discussion of individualization as both the system's core organizing theory and one of its main harms. In adopting this perspective, this Article joins the broader relational scholarship (including adjacent reproductive justice scholarship) attempting to problematize welfare legal fields and institutions, and suggests moving forward on a more communitarian path.

In the final part of this Article, three points are made with regard to the future construction of child welfare law and CPS. The first, practical point, is the need to conceptually separate neglect and abuse. The second, more theoretical point, discusses an alternative paradigm through which to understand poverty, resulting in a different approach to child neglect. Finally, a third, more philosophical point, discusses the question of State-gaze and the importance of information gathering to the care of children, when done in a non-criministrative way.

I. Background and Context: The U.S. Child Welfare System and its Longstanding Relation to Poverty and Impoverished Families

In the summer of 2022, a little over 100,000 children lived in the city of Boston.[15] Over the year prior, 9,545 reports were submitted regarding allegations of parental maltreatment of those children.[16] According to state[17] and federal law,[18] each report sets an institutional domino effect in motion. The Massachusetts Department of Children and Families (MA DCF) is the first domino to topple: a report triggers a DCF screening, which leads (in the majority of cases) to the opening of a case with Child Protective Services (CPS) and the appointment of a case worker.[19] An investigation is prompted, in which a plan devised by the

15 102,161 children under the age of eighteen, constituting 15.7% of the city's population of 650,706, lived in Boston in 2022, according to the 2022 census. *QuickFacts: Boston City, Massachusetts,* U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/bostoncitymassachusetts [https://perma.cc/5PAL-DRGM] [hereinafter Boston Census].

16 *Department of Children and Families Reports and Data, Quarterly Data Profiles (FY14–Current)*, COMMONWEALTH OF MASS., https://www.mass.gov/info-details/department-of-children-and-families-reports-data#dcf-annual-reports- [https://perma.cc/99HR-U26P] (summation done by researcher, based on four Boston DFC region 2022 quarterly reports).

17 Mass. Gen. Laws ch. 119, § 51A (2020).

18 Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C §§ 5101-5119. *See infra* Section III.A for further discussion of CAPTA.

19 *See* MASS. DEP'T OF CHILD. AND FAM., ANNUAL REPORT FY 2022 30 (2022), https://www.mass.gov/doc/

case worker is presented to the court. Court decisions, by law, lead to another investigation and another decision. If a child is left at home, a social worker will have repeated meetings with the child; the family will be questioned and have their house searched over the course of a year or two before the case is closed.

That is the best-case scenario at this point. If removed from their family home, ostensibly for their protection, most children will spend more than a year away from home before it is decided that it is safe for them to be reunited with their parents.[20] According to its last statistical report, the MA DCF considered that "placement stability" had been achieved if those children, once taken out of their parents' care, were only moved between alternative "homes" (foster care or other state facilities) *twice a year*.[21] Siblings are not guaranteed to be kept together under such circumstances.[22]

Such is the system, based on federal guidelines and operating by means of federal funding, through which the state intends to protect children[23] from maltreatment by their parents. The vast majority of these children are removed from their parents' care because of a specific kind of maltreatment: neglect.[24] Before moving to discuss the specific legal treatment of neglect, a review of CPS and child welfare law's development and origin narratives is needed.

fy-2022/download [https://perma.cc/W6VW-R94S] [hereinafter MA DCF 2022 ANNUAL REPORT] (reporting a "58.7% average combined support/substantiated-concern rate for screened-in reports over the five-year time span of FY2018-22").

20 *Id.* at 16; MASS. DEP'T OF CHILD. AND FAM., QUARTERLY PROFILE – FY 2022, Q4 1 (2022) https://www.mass.gov/doc/quarterly-profile-fy22-q4/download [https://perma.cc/9HF5-CRND].

21 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at xi (2022) ("placement stability (i.e., no more than two placement settings within the first 12 months of out-of-home care)").

22 *Id.* at xi ("In 77% of cases with a minimum of two siblings placed in a DFC foster home at the end of FY2022, two or more of the siblings were placed together—an increase of 3.5% compared to FY2018. Furthermore, 64% of those cases had all siblings placed in the same foster home—an increase of 14.0% compared to FY2018").

23 Referred to in the MA DCF's Annual Report as "consumers." *Id.* at 52.

24 Of the "23,653 children (unduplicated child count) [in Massachusetts] found to have experienced maltreatment in FY2022 . . . 86.7% were victims of neglect." *Id.* at xiii.

A. The Origin Narratives of the Child Welfare System

Three origin stories of the current child welfare legal regime can be found in existing literature. While these origin stories offer different, sometimes competing narratives, a closer reading shows how they weave together, creating the organizing notion behind the child-neglect monitoring net.

First, the *medically-informed story* points to 1962 as the origin of the child welfare system, when "battered child syndrome" was first defined.[25] By 1966, all states had responded to this newly identified syndrome by enacting rules concerning its prevalence, monitoring, and prevention—all of which relied on reporting.[26] Even though the original syndrome described only severely abused children who were physically assaulted by their parents, the medical prism was applied more broadly.[27] Even as the definition of the syndrome expanded to include all harms suffered by children—emotional abuse, neglect, and so on—the baseline approach remained harsh and judgmental toward parents and focused on individual separation as treatment, as it was in the case of the original syndrome.

Second, the *welfare origin story* grounds surveillance and reporting on children in poverty in fact-finding procedures intended to validate (or disallow) welfare eligibility applications. The need to check that there are, in fact, as many dependent children in the household as stated in a welfare application and only one provider (the so-called "man in the house" policy), prompts in-person visits from state officials, information-collection from state agencies, and other means of surveilling and reporting on the family unit's day-to-day life.[28] This framework ties in with the foundational conceptualization of children experiencing poverty as blameless and innocent victims; these characteristics were important in justifying welfare support for low-income parents, who were not conceptualized in the same way. Since the U.S. welfare state was built on the corollary of victimhood and blamelessness,[29] children were the ideal beneficiaries. But, when parents

25 Jane M. Spinak, *The Road to a Federal Family Court*, 58 CT. REV. 8, 8 (2022).

26 *Id.*

27 *See id.* at 8–9; *see also* Michael S. Wald, *Taking the Wrong Message: The Legacy of the Identification of the Battered Child Syndrome,* in C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 91 (Richard D. Krugman & Jill E. Korbin eds., 2012).

28 *See* Ismail, *supra* note 5, at 1505; *see generally* JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY (2001).

29 *See* MICHELE LANDIS DAUBER, *Building the Sympathetic State*, in THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE 17 (2013).

ask for government support, calling upon the "hungry children" image,[30] the State is framed as justified in entering the family home and, in an important way, disqualifying parents.

Lastly, the *family law origin story* foregrounds the legal institutional involvement in discussions of how children were cared for, by which parent, and in what material conditions they lived before family fragmentation (more commonly discussed in this legal realm regarding parental separation).[31] Here, again, we find the notion that the State is justified in taking it upon itself to know what the children's "best interests" are and in telling parents how and/or how not to care for their children. This is the same perception of the State's place that is echoed—and distorted, due to anti-poverty and racial biases—in discussions regarding reproductive justice (broadly) and child welfare (specifically). While not overtly directed at people experiencing poverty, this prism originating in family law supports the harmful atomization of the family unit into its smaller components, which leads to discussions of family members' interests as not necessarily mutually dependent.

Together, the three origin stories capture and cement the State's perception of children as vulnerable, blameless victims of parental malfunction. But, while children might indeed be vulnerable in their dependency,[32] the incorporation of such a perception into welfare

30 *See* Joy Duva & Sania Metzger, *Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice*, 25 PROT. CHILD. 63 (2010); Marjorie L. DeVault & James P. Pitts, *Surplus and Scarcity: Hunger and the Origins of the Food Stamp Program*, 31 SOC. PROBS. 545 (1984). This narrative goes back to the 1960s fight for economic and racial justice. *See* Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339 (2012).

31 Halley and others discuss this in their typology of the "normative levels" in family law. *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J. L. & HUMAN. 1 (2011); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J. L. & HUMAN. 189, 236 (2011). *See also* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 761 (2010) (collecting reports about the welfare of children and their physical conditions in cases of separation, which exist in the "Family Law (FL) 1" category, but the implication for children's presence in the family home as a variable dependent on the economic ability of the parent is an "FL2" category question).

32 Sociologists and historians, too, contest such a blanket conceptualization, developed only relatively recently, in which childhood is portrayed as a social construct. *See generally* JESSICA BALANZATEGUI ET AL., MISFIT CHILDREN: AN INQUIRY INTO CHILDHOOD BELONGINGS (2016); J. Marshall Beier, *Ultimate Tests: Children, Rights, and the Politics of Protection*, 10 GLOB. RESP. TO PROT. 164 (2018); J. Marshall Beier, *Children, Childhoods, and Security Studies: An Introduction*, 3 CRITICAL STUD. ON SEC. 1, (2015); Dustin Ciufo, *Navigating the Identity Constructions—Lived Realities Nexus of International Child Protection: The Global-Local Production of Childhood, Child Rights and Child Domestic Labour in Haiti* (Ph. D. dissertation, University of Guelph, 2015) (on file with author); Nadine Benedix, *Shaping Subjectivity: Locating the Agency of Bolivian Working Children*

law has constantly been distorted by stigma and biases stemming from capitalist (and, later, neo-liberal) conceptualizations and racial prejudice. At different times, these origin stories were also the bedrocks upon which the child-neglect legal structure was built. Starting with Title IV of the Social Security Act of 1935, titled Aid to Dependent Children (ADC), the State's own perceptions and family values were infused into the financial aid given to children and their parents.[33] Later, the support program morphed from ADC to Aid to Family with Dependent Children (AFDC) and then to Temporary Assistance for Needy Families (TANF).[34] The focus on individual responsibility, however, remained firm and even grew, as evident in the name of the 1996 Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA).[35] The search for the "deserving poor" sustained the narrative of vulnerable children in need of protection from their parents' bad fortune, laziness, incompetence, or other limitations (rooted in racial prejudice), as opposed to the hardships of poverty itself justifying State assistance for their families.[36]

II. Methodological Overview

This Article now moves into a presentation and discussion of findings related to surveillance and individualization in the legal treatment of child neglect. It is important to note two things in advance: first, the importance of connecting law on the ground and law in the books, and second, the limitations and obstacles faced by scholars researching areas of law concerning children and families.

Adopting a critical approach to legal research, this Article pulls on both law as it is

in Narrative Practices, 9 EUR. REV. INT'L STUD. 431 (2022).

33 Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 771–72 (2021) (internal citations omitted). "A guiding principle of federal family regulation system policy during the Progressive Era was that government funded financial support for single mothers living in poverty would help minimize the need for children to be removed from their families and placed in orphanages and asylums." *Id.* (internal citation omitted).

34 Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, And the Legacy of the New Property*, 115 NW. U. L. REV. 361, 371 (2020).

35 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

36 *See* Mack, *supra* note 33, at 781 ("Myopically focusing on alleged 'parental defects,' prevents the federal family regulation system from addressing the structural factors that produce marginalized families' adversities. In other words, instead of focusing on structural issues of racism, poverty, housing- and food-insecurity, the family regulation system only focuses on the parent") (internal citations omitted).

framed in legal documents and law as it is practiced and experienced. Focusing on either in isolation would not enable this Article to discuss how written statutory language materializes in court, or to explain how core notions reflected in the framing of regulations affects evidence rules as practiced by judges. Thus, while this Article is not a classically empirical piece, it weaves examples from all layers of the law to lead to the theoretical claim it forwards.

Another methodological issue is the lack of judicial review on a higher level, which de facto impedes public knowledge and scholarly attention. Very few cases in this area of law are heard by the Supreme Court—a reality replicated on the state level.[37] Family court hearings themselves are closed to the public, and the decisions are not published. The only published decisions concerning child welfare law or CPS investigations are those that make it to appellate courts, when the family or CPS challenges the original decision of the lower court. This "ring-fencing" of these cases—out-of-sight in terms of accessibility to scholars and litigators—might seem, at first glance, in contrast with the notion that "the law is all over," as Sarat observed over three decades ago.[38] But it is, in fact, in complete accordance with Sarat's description, creating a sphere in which some, the surveilled, are under constant and complete exposure to the law, while others who have the will and the capacity to study and improve neglected fields of law are met with a wall of secrecy.

This Article is therefore primarily based on extensive review of legal documents. The author reviewed and analyzed all federal laws and Massachusetts state laws regarding child protection. The author also read and analyzed 119 cases and eleven MA DCF documents, as well as advisory documents and manuals for families available at the Juvenile Court's website and the Children's Bureau's website. However, the experiences of people engaged with the child welfare system were not personally collected for this study, and references thereto are based on secondary sources such as ethnographies and self-reporting on social media, as specified in Section III. In a method of reverse engineering, the organizing ideas and core values of child welfare law and CPS are derived from their performance as a coherent operating system.

37 In Massachusetts, as of February 2023, 154 cases had been put before the state's Supreme Judicial Court. Of these, only nine challenged the decision of lower courts in any significant way. Search of Westlaw database by author (conducted Feb. 2023).

38 Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN., 343, 374 (1990).

III. Findings: The Individualization of Surveillance in Three Layers

A. Law in the Books: The Language of Child Neglect

The federal law currently presiding over the legal regime of CPS and related administrative agencies in the U.S. is the Child Abuse Prevention and Treatment Act (CAPTA).[39] According to federal law, each state must enact state rules defining and regulating the legal treatment of child abuse and neglect.[40] This Article will investigate the language of the law, both federal and state, using Massachusetts as an example.[41]

As a matter of both federal and state law, child abuse and neglect are defined and dealt with together.[42] The federal definition, which has been adopted by the states with some minor changes,[43] reads as follows:

39 Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101-5119.

40 *See What is Child Abuse and Neglect? How Does My State Define Child Abuse and Neglect?*, CHILDREN'S BUREAU (Jul. 18, 2013) https://www.acf.hhs.gov/cb/faq/can1 [https://perma.cc/35P5-QEPB] ("Within [CAPTA's] guidelines, each state is responsible for providing its own definitions of child abuse and neglect. Most states recognize four major types of maltreatment: physical abuse, neglect, sexual abuse, and emotional abuse. Additionally, many states identify abandonment, parental substance use, and human trafficking as abuse or neglect").

41 While less in the spotlight of the child welfare system's critics, Massachusetts is an important and interesting case to observe. With high inequality indicators, it is one of the wealthiest states in the U.S. (it ranked second in median family income, surpassed only by Washington, D.C., for a family of four. U.S. DEP'T OF JUST., CENSUS BUREAU MEDIAN FAMILY INCOME BY FAMILY SIZE (2022) https://www.justice.gov/ust/eo/bapcpa/20220401/bci_data/median_income_table.htm [https://perma.cc/QJJ8-C8TW]. But Massachusetts also presents severe racial poverty, with 24% of Black children and 29% of Latine children living in poverty—rates that are higher than that of those collectives in New York. *2022 Kids Count Report Highlights Highs and Lows for Massachusetts Children*, CHILDREN'S LEAGUE OF MASSACHUSETTS (Sept. 2, 2022), https://www.childrensleague.org/2022-kids-count-report-highlights-highs-and-lows-for-massachusetts-children/ [https://perma.cc/F6K4-X49E]. The income gap in Massachusetts was the fourth highest in the U.S. in the mid-2000s, and the third most increased between the late 1980s and mid-2000s. BENITA DANZING & JETTA BERNIER, CHILD POVERTY IN MASSACHUSETTS: A TALE OF TWO STATES 17 (2008), https://www.masslegalservices.org/system/files/library/Child_Poverty_in_Massachusetts.pdf [https://perma.cc/DNW3-WZ3F].

42 Sometimes under the term "maltreatment." *See, e.g.*, Michelle Johnson-Motoyama et al., *Differential Response and the Reduction of Child Maltreatment and Foster Care Services Utilization in the U.S. From 2004 to 2017*, 28 CHILD MALTREATMENT, 152 (2022).

43 While the practices of states differ with regard to child protection policies and agencies' internal rules and operations, the definitions of child maltreatment have little variation. *See* Kendra Kumor, *Systemic Inequality, Systemic Racism in Child Neglect Laws*, 89 FORDHAM L. REV. 113, 117 (2020).

> [T]he term "child abuse and neglect" means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . or an act or failure to act which presents an imminent risk of serious harm.[44]

It is worth mentioning that this is civil law. States' criminal codes adopt different language to address criminal allegations of child abuse.[45]

Initially passed in 1974,[46] CAPTA's first move was bureaucratic, establishing an office devoted to issues of child abuse and neglect at the federal Department of Health and Human Services.[47] CAPTA went on to establish a national clearinghouse, or gateway, for information relating to child abuse and neglect.[48]

Despite the prevalence of the term, federal welfare law does not contain a coherent, distinct, definition of child neglect. Moreover, out of the 403 times the word "neglect" appears in the language of the law, only twice is it *not* paired with the term "abuse" (in phrases such as "abuse and neglect" or "abuse or neglect").[49]

On the state level, definitions of neglect vary in detail but mostly share common aspects. Neglect is the failure to provide food, clothing, shelter, and medical care[50]—material things that are, by definition, missing or challenging to reliably secure for people experiencing severe poverty. Some states, however, have modified the wording they use vis-à-vis child neglect over the years. Specifically, twenty-seven states now include a "poverty exemption"

44 42 U.S.C. § 5101 note (Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. no. 104-235, 110 Stat 3063).

45 *See, e.g.*, Mass. Gen. Laws ch. 265 § 13B (2008); Mass. Gen. Laws ch. 265 § 22A (2008); Mass. Gen. Laws ch. 265 § 23 (2008); Mass. Gen. Laws ch. 265 § 24B (1998); Mass. Gen. Laws ch. 260 § 4C 1/2 (2014).

46 CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2019), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/about.pdf?VersionId=y7C6qleUR3mZJ_UJ5t_dnzCNfO6HPcPs [https://perma.cc/K5T9-N9ET].

47 42 U.S.C. §5101(a).

48 42 U.S.C. §5104.

49 42 U.S.C. §§ 5101–5119 (search conducted by researcher).

50 CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/define.pdf?VersionId=P2GBlQKK7w_ohrCN3oV2TiD6QIkkEjIP [https://perma.cc/S4JF-D49W].

in their definition of neglect.[51] In these states, the law explicitly holds that financial inability to provide for one's child does not fall within the definition of neglect. In the remaining twenty-five states, poverty remains an indicator of child neglect.

Massachusetts's laws on child abuse and neglect are found in Chapter 119 of the General Laws of Massachusetts.[52] Massachusetts has a poverty exemption in its legal definition of child abuse and neglect,[53] which is also affirmed in case law.[54] MA DCF states that neglect will be declared "provided that such inability [to provide minimum care] is not due solely to inadequate economic resources or solely to the existence of a handicapping condition."[55]

However, despite the poverty exemption, Chapter 119 also includes provisions that widen the net. For example, the law makes reference to "neglect, including malnutrition."[56] Article 24 very broadly defines neglect as a situation where a child:

> (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent, or unavailable to provide any such care, discipline, or attention.[57]

Thus, by bundling abuse and neglect together, sometimes under the general umbrella term "maltreatment," the law—both at the federal and the state level—immediately

51 Alaska, Arkansas, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia, and Wisconsin. *Id.* at 6.

52 *See* Mass. Gen. Laws ch. 119, § 51A (2020).

53 Kumor, *supra* note 43, at 119 n.68.

54 *See* Adoption of Yvonne, 170 N.E.3d 1178, 1185 (2021) ("poverty or homelessness are not per se indicative of child abuse or neglect, 110 Code Mass. Regs. § 1.11 (2008), nor may they serve as the sole basis for children's removal"); Adoption of Linus, 73 Mass. App. Ct. 815, 821, 902 N.E.2d 426 (2009).

55 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 23.

56 *See* MASS. GEN. LAWS ch. 119, § 51A (2020) (reporting of suspected abuse or neglect; mandated reporters; collection of physical evidence; penalties; content of reports; liability; privileged communication).

57 MASS. GEN. LAWS ch. 119 § 24 (2008).

designates the parent as the party responsible for creating the circumstances of the child. Neglect equates to the *failure* of the caretaker. While neglect lacks the intention of harm found in abuse, it nonetheless announces that the problem lies with the parent—be it their unwillingness or their inability to rise to the standards of care set by the state.

Rules and regulations stem from and are dictated by the linguistic choices in these legal definitions. Most importantly for our purposes, these linguistic choices set the reporting standard for all mandated reporters and welfare workers. They portray every indication of problems faced by children as a signal of parental failure. Even in places with financial exemptions like Massachusetts, such exemptions are considered only *after* a case has begun to form against the parent and enough evidence to substantiate an exemption claim has been gathered.

B. Law in the Banks: The Funding and Regulation of Responses to Child Neglect

While the law can be declarative and reflect important organizing ideas, it is programs' funding schema that shifts and forms State actions with regard to families. Section III.B turns to the construction of federal funding and how funding molds the perception of child neglect and surveillance nationwide.

1. Funding for "Prevention"

As is the case with many other welfare programs, federal funding for the child welfare system is funneled through the Social Security Act, Title IV. Title IV sets many policy guidelines to which states must adhere if they wish to be federally funded. Following growing criticism of child welfare services, Congress amended Sections B and E of the Social Security Act to reflect a renewed commitment to family integrity.[58] The Family First Prevention Services Act (FFPSA) of 2018[59] was hailed by some as a new way forward, signifying a commitment to the preservation of families and setting new priorities for child protection at the federal level.[60]

58 Mack, *supra* note 33, at 785.

59 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. §§ 50702–50783 (2018).

60 *See, e.g.*, Nora Neus, *Five Years in with Millions Unclaimed, Is Family First Helping Kids and Families Yet?*, YOUTH TODAY (2023), https://youthtoday.org/2023/05/five-years-in-with-millions-unclaimed-is-family-first-helping-kids-and-families-yet/ [https://perma.cc/HP7M-QJES] (recounting the "slow[] but stead[y]" implementation of the FFPSA); Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283 (2019) (commending the FFPSA's focus on preventative care while addressing factors that will make meaningful implementation a "long and challenging process"); Jeffrey Waid & Mimi Choy-Brown, *Moving Upstream: The Family First Prevention Services Act and Re-Imagining Opportunities for Prevention in Child Welfare Practice*, 127 CHILD. AND YOUTH SERV. REV. 106098 (2021) (reviewing the "landmark" FFPSA and its "possible implementation challenges and opportunities").

The FFPSA was the most recent move in what is perceived by many as a long, slow shift in the legal perception and treatment of child abuse and neglect. It declares a switch of emphasis in favor of prevention, replacing the treatment-focused programs that were traditionally at the center of government thinking. Yet despite the alleged refocus, from treatment after the fact to measures designed to prevent abuse and neglect, the new law still constructs a funding scheme that channels money to state programs—some estimate as much as $33,000 a year per child in the system[61]—and not to families in need. This reflects the belief that the parents are themselves the potential risk to children. Thus, the funding is focused on preventing child removal as much as possible but keeps to the initial premise that child safety is a parental maltreatment problem. Because of such premise, the programs funded by the FFPSA are designed to assist parents in educating their children and learning how to maintain discipline in the house.[62] That is, they take for granted that the problem that needs fixing is parental incompetence.[63]

61 ANDREA ELLIOTT, INVISIBLE CHILD: POVERTY, SURVIVAL & HOPE IN AN AMERICAN CITY 405 (2021) [hereinafter INVISIBLE CHILD].

62 See, for example, the definition of "[c]hild requiring assistance" in Mass. Gen. Laws ch. 119, § 21 (2020):

> [A] child between the ages of 6 and 18 who: (i) repeatedly runs away from the home of the child's parent, legal guardian or custodian; (ii) repeatedly fails to obey the lawful and reasonable commands of the child's parent, legal guardian or custodian, thereby interfering with their ability to adequately care for and protect the child; (iii) repeatedly fails to obey the lawful and reasonable regulations of the child's school; (iv) is habitually truant; or (v) is a sexually exploited child.

63 For further criticism, see generally Sean Hughes & Naomi Schaefer Riley, *Five Years On, the Family First Act Has Failed in Its Aims*, THE HILL (Apr. 18, 2023), https://thehill.com/opinion/civil-rights/3951473-five-years-on-the-family-first-act-has-failed-in-its-aims/ [https://perma.cc/S5UM-9NDA]; Charity Carmody, *Evidence-Based Practice Criteria's Effect on the Implementation of the Family First Prevention Services Act in Nebraska and Colorado*, (Aug. 22, 2022) (DLP. dissertation, Northeastern University) (on file with author); Mark F. Testa & David Kelly, *The Evolution of Federal Child Welfare Policy Through the Family First Prevention Services Act of 2018: Opportunities, Barriers, and Unintended Consequences*, 692 ANNALS AM. ACAD. POL. AND SOC. SCI. 68 (2020).

2. Funding for Data-Collection

We cannot fully appreciate the workings of criministrative surveillance without discussing the federal data-collection incorporated into programs funded by the Social Security Act. Since prevention has become the prevailing concept, any information that could be deemed to contribute to or indicate where action should be taken or where neglect is more likely to occur is considered relevant data.

Among the channels designed to process such data is the National Child Abuse and Neglect Data System (NCANDS).[64] The information gathered by NCANDS (and by other channels) is fed into a system designed to predict contributing factors of child abuse or neglect, operating from a preventive paradigm. In Massachusetts, risk assessment is conducted via a Structured Decision Making (SDM) system, through which relevant criteria are graded and aggregated, culminating in an assessment of the level of risk the child faces and the appropriate measures that need to be taken by state agencies to protect them.[65] But the fact that abuse and neglect are graded and assessed on the same spectrum frames neglect as a form of abuse, simultaneously positioning the parent as the risk factor and the State as the accountable preventer. This framing creates a justification for even more assessment, data-collection, and interference, with authorities intruding on family life at increasingly early stages, before any abuse or neglect has actually occurred.

For example, the law provides federal funds for "evidence-based" plans intended to support families and prevent unnecessary child removal to foster care.[66] One of the

64 *National Child Abuse and Neglect Data System (NCANDS)*, CHILDREN'S BUREAU (May 19, 2022), https://www.acf.hhs.gov/cb/data-research/ncands [https://perma.cc/5GA4-6EGY].

65 *See* MASSACHUSETTS DEP'T CHILD. AND FAM., FIVE-YEAR PREVENTION PLAN, NOVEMBER 2022 5, 58, https://www.mass.gov/doc/ma-title-iv-e-prevention-plan/download [https://perma.cc/83YZ-2HDP] [hereinafter MA Five-Year Prevention Plan] (explaining the state's plans to implement SDM in June 2023 and train social workers on its use). *But see* ADMIN. FOR CHILD. AND FAM., CHILDREN'S BUREAU, CHILD AND FAMILY SERVICES REVIEW: MASSACHUSETTS FINAL REPORT 2023 4 (2023) https://www.acf.hhs.gov/sites/default/files/documents/cb/ma-cfsr-r4-final-report.pdf [https://perma.cc/LV2S-JA85] ("According to information in the [Massachusetts] Statewide Assessment, these new [SDM] tools were implemented in June and July of 2023. The [Children's Bureau] would like to know more how the use of the SDM tool is affecting the agency's ability to appropriately assess and manage child safety").

66 *See* CAPACITY BUILDING CENTER FOR STATES, CHILDREN'S BUREAU, PROGRAMS AND SERVICES IN APPROVED STATE PREVENTION PROGRAM PLANS (2024) https://capacity.childwelfare.gov/states/resources/programs-and-services-in-approved-state-prevention-program-plans [https://perma.cc/5SW5-QPJS] (presenting data on states' evidence-based programs, which are reimbursable under FFPSA Title IV-E).

interventions specified in the FFPSA is the Early Childhood Home Visitation Program.[67] With the threat of child removal at the end of the line as a very real possibility, the practice of gathering information becomes, in itself, a punitive measure. This program punishes families in poverty when no allegation of neglect had been made, let alone proven, by marking them as suspicious due to low-income status alone, causing a chain reaction of suspicion in other institutions (such as the child's school), and harming the child's relationship with their parents and their feeling of safety in the home.

In response to the FFPSA, states are encouraged to build an "evidence-based program" to limit children's removal from their homes. Massachusetts presented such a program in February 2022, with the MA DCF asking for federal funding to support three programs: therapy, family therapy, and "Intercept."[68] Another example of the presumption that an individual's lack of personal responsibility (or willpower) lies at the heart of the problem of child neglect can be found in the incorporation of so-called "motivational interviews" by service providers, which are stipulated in Massachusetts regulations according to the requirements of FFPSA.[69] The very name betrays the conviction that a lack of motivation is the crime committed by an uncaring parent who finds themselves interviewed by the service provider—as opposed to myriad systemic injustices and structural obstacles that impede a parent's ability to care for their children as they would if given access to resources and State support.

C. Law on the Ground: Legal Engagement with Child Neglect

Since federal law prohibits child abuse and neglect, and states' receipt of federal funding for welfare programs is dependent on monitoring and preventing child abuse and neglect, states have responded by enacting an intricate web of laws and regulations. Some differ in specifics, but most follow the same construction: the conflation of neglect with abuse, combined with surveillance practices justified by the policy shift toward prevention. Section III.C demonstrates the workings of the law on the ground in this context by

67 Pub. L. No. 115-123, 132 Stat. 64 § 50605. For more information, see *Home Visiting*, OFFICE OF CHILD CARE, https://www.acf.hhs.gov/occ/home-visiting [https://perma.cc/62HH-UGR2].

68 *See* MA Five-Year Prevention Plan, *supra* note 65, at 43–45, 64 ("The goal of Intercept is to reduce the utilization of foster care by preventing entry into care, reducing the time spent in care, and/or reducing the risk of re-entry").

69 *See id.* at 69–70 ("delivery of MI [motivational interviewing] with fidelity will yield improvements in the engagement of families and in the retention of families through the full course of a service. Use of MI will influence the desired impact/service outcomes, but those results cannot necessarily be fully attributed to MI").

reviewing Massachusetts laws on the reporting of child neglect and the judicial review of these reports and investigations.

1. Reporting: The Rules Regarding 51A Reports

Stemming from the federal laws and the funding schemes structuring child protection programs, state rules are devised to operate on the state level under the same operational organizing idea: to protect children from their parents' failure to care for them.

In all U.S. states, child protection laws require agencies to set up and regulate an elaborate web of family surveillance, in which children are deemed at risk of abuse and neglect. Importantly—since, according to federal guidelines, poverty is a major risk factor in neglect[70]—the rules regarding mandatory reporting are, in fact, regulating and standardizing the surveillance of families in poverty.[71]

To review the law on the ground, Section III.C examines Massachusetts state laws and regulations, starting with those concerning the stage preceding a court case: the reporting process. A "51A report" can be filed and submitted to the MA DCF by anyone mandated by law to report risks relating to child abuse or neglect.[72] These reports account for 99% of the caseload at the MA DCF.[73] The MA DCF then "screens-in" those reports (and other calls or complaints, amounting to all intakes received) and undertakes an initial sift to decide which ones warrant a DCF response.[74] Those cases deemed as justifying a response are then screened again, this time through an initial investigation, to decide which are

70 CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, ACTS OF OMISSION— AN OVERVIEW OF CHILD NEGLECT 9 (2001), https://ocfcpacourts.us/wp-content/uploads/2020/06/Acts_of_Omission_000978.pdf [https://perma.cc/M4G6-XPXK] [hereinafter ACTS OF OMISSION].

71 John Eckenrode et al., *Income Inequality and Child Maltreatment in the United States*, 133 PEDIATRICS 454 (2014).

72 Mass. Gen. Laws ch. 119, § 51A(a) (2020).

73 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 25. The DCF received 91,427 case references in 2022, 99% of which (90,558) came via 51A reports. *Id.* The drop in case numbers caused by the COVID-19 pandemic has eased back almost entirely: the number of 51A reports made in 2022 was 5.3% less than those made in 2019. *Id.* at 26.

74 Of the 90,558 so-called "protective intakes" (51As) received in 2022 alleging child maltreatment, 49,067 (54.2%) were "screened-in" for a CPS response. *Id.* at 26.

supported or substantiated and which are unsubstantiated.[75] The investigation is immediate and mandatory, with DCF personnel conducting a home visit with a very open mandate.[76] Each of these steps involves at least one person within the MA DCF scrutinizing the report, sometimes collecting more data to support or disprove the allegation submitted. The data, of all cases and reports, are collected and kept by the DCF.

51A reports are mostly submitted by professionals in the child's environment.[77] Among mandated reporters, the most prolific reporters are law enforcement professionals (who submitted 21.8% of all reports in 2021), educational personnel (15.4%), and medical professionals (12.6%).[78] Laws and regulations construct a very low threshold for reporting and impose no liability for false reporting.[79] Furthermore, financial disincentives are

75 *Id.* at 28. "[T]he Department completed 39,571 responses involving one or more children in FY2022. Of these, there were 16,151 (40.8%) support decisions and 6,806 (17.2%) substantiated concern decisions. The remaining 16,614 (42.0%) were unsupported." *Id.* at xiii. Thus far, 2023 seems to be following along similar lines: out of 19,890 51A reports made in the first quarter of FY2023, 10,723 (54%) were screened-in for a response. MASS. DEP'T CHILD. AND FAMILIES, QUARTERLY PROFILE—FY 2023, Q1 (07/01/2023-09/30/2023) 1, https://www.mass.gov/doc/quarter-1/download [https://perma.cc/9F3W-QVP3]. Of all cases screened in for a response, including those coming from 51A reports and hotline calls, 40% were found to be unsupported. *Id.* According to the 2023 quarterly profile, court referrals have risen slightly, while protective reporting has declined from 99% to 96%. *Compare id.* at 1–2 *with* MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 25.

76 Mass. Gen. Laws ch. 119, § 51B (2013):

> (a) Upon receipt of a report filed under section 51A, the department shall investigate the suspected child abuse or neglect, provide a written evaluation of the household of the child, including the parents and home environment . . . (b) The investigation shall include: (i) a home visit at which the child is viewed, if appropriate; (ii) a determination of the nature, extent and cause or causes of the injuries; (iii) the identity of the person or persons responsible therefore; (iv) the name, age, and condition of other children in the same household; (v) an evaluation of the parents and the home environment; and (vi) all other pertinent facts or matters.

77 "The vast majority of 51A reports are filed by mandated reporters, including first responders, school personnel, and health care professionals who are required by law to report suspected child abuse and neglect to DCF." MA DCF 2022 ANNUAL REPORT, *supra* note 19, at vi. In 2021, more than two-thirds (67%) of reports alleging child abuse or neglect nationwide were submitted by professionals. CHILDREN'S BUREAU, CHILD MALTREATMENT 2021 xi [hereinafter CB CHILD MALTREATMENT REPORT], https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf [https://perma.cc/T7PG-2WDN].

78 "Nonprofessionals, including friends, neighbors, and relatives, submitted fewer than one-fifth of reports (17.1%) [in 2021]. Unclassified sources submitted the remaining reports (16.0%). Unclassified includes anonymous, 'other,' and unknown report sources. States use the code 'other' for any report source that does not have an NCANDS designated code." CB CHILD MALTREATMENT REPORT, *supra* note 77, at xi.

79 C. M. v. Commissioner of Department of Children and Families, 169 N.E.3d 466 (2021).

set to ensure reporting; for example, fines are set for failing to report.[80] And, in certain circumstances, it is a criminal offense *not* to report.[81]

The outlook of professionals when it comes to the children in their care is shaped, then, by the legal definitions of neglect, the legal inseparability of abuse and neglect, and a fear of under-reporting (coupled with no consequences for over-reporting). Since there is no separate process for abuse versus neglect, 51A reports are a catch-all, and all reports initiate the same DCF response, even though most reports raise concerns about neglect and not abuse.[82]

The reporting process is also highly skewed by stigma and bias. This can be seen most strikingly in the over-reporting of cases involving children of color. Only 11% of reports submitted to the DCF in 2022 in the Boston area involved white children, even though 50.1% of Boston's population is white.[83]

Not all reports made to the MA DCF reach the courts. When a DCF case is opened, the state has essentially two options: to remove the child immediately or to leave the child in their parent(s)' care, but the investigation continues. In both scenarios, the parents are

80 Mass. Gen. Law ch. 119, §51A(c) (2020):

> . . . whoever violates this section shall be punished by a fine of not more than $1,000. Whoever knowingly and willfully files a frivolous report of child abuse or neglect under this section shall be punished by: (i) a fine of not more than $2,000 for the first offense; (ii) imprisonment in a house of correction for not more than 6 months and a fine of not more than $2,000 for the second offense; and (iii) imprisonment in a house of correction for not more than 2½ years and a fine of not more than $2,000 for the third and subsequent offenses.

81 Reporting of Child Abuse, 18 U.S.C. § 1169; Failure to Report Child Abuse, 18 U.S.C. § 2258.

82 In Massachusetts in 2022, the most frequent allegation type in 51A reports was neglect (73.1%). The most frequent allegation in 51B supported responses also pertained to neglect (86.6%). In total, there were 23,653 children (unduplicated child count) found to have experienced one or more types of maltreatment in Massachusetts in 2022. Of these, 86.7% were found to have experienced neglect. MA DCF Annual Report, *supra* note 19, at 32.

83 Boston Census, *supra* note 15. In Massachusetts in 2022, Latine children had a Rate of Disproportionality (RoD) indicator of 1.7. Black children had a ROD of 1.4, both indicating overrepresentation. White children had a RoD of just 0.6, indicating underrepresentation. *Id.* at 4.

expected to accept any assistance plan offered, including training.[84] According to the MA DCF's definition of "substantiated" claims:

> At the conclusion of the CPS Response, a "determination" is made. A "substantiated concern" finding means that there is "reasonable cause to believe" that the child was neglected, the actions or inactions by the parent(s)/ caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being.[85]

Thus, a finding of "substantiated concern" and the resulting continuation of criministrative surveillance of the family are the result of an *administrative* threshold ("reasonable cause to believe") that might result in drastic state action (child removal and/or parental rights termination) that is more reminiscent of *criminal* proceedings. This criministrative surveillance can include the collection of incriminating data, the state's right to enter the home and to contact all potential witnesses, and eventually the removal of children from their parents' custody, even against the child's express wishes.[86]

According to the guidelines reinforced under Title IV of the FFPSA, each ongoing case in the MA DCF is conducted under a "prevention plan."[87] The family assessment is undertaken by the Department and is organized around five "protective factors": knowledge of parenting and child development; social and emotional competence of the children; parental resilience; social connection; and concrete support in time of need.[88] The plan is updated or revisited every six months (or upon a major change of circumstances in the family, such as loss of housing, death, or birth).[89] Part of the state's assessment is based on

84 Mass. Gen. Laws ch. 119, § 51B(g) (2013):

> The department shall offer appropriate services to the family of any child which it has reasonable cause to believe is suffering from any of the conditions described in the report to prevent further injury to the child, to safeguard his welfare, and to preserve and stabilize family life whenever possible. If the family declines or is unable to accept or to participate in the offered services, the department or any person may file a care and protection petition under section 24.

85 MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 28.

86 For description of these events, see generally Fong, *supra* note 8; INVISIBLE CHILD, *supra* note 61; ROBERTS, *supra* note 2; BARBARA KINGSOLVER, DEMON COPPERHEAD (2022).

87 *See* MA Five-Year Prevention Plan, *supra* note 65.

88 *Id.* at 4.

89 *Id*. at 11.

the choice the family makes to "become and stay involved" with prevention programs.[90]

The report is submitted to the MA DCF to be analyzed and substantiated. According to the rules and regulations of the MA DCF,[91] its mission is to balance two mandates: to "protect children" and to "respect the right of families to be free from unwarranted state intervention."[92] Yet the primary principle of service is to "ensure the safety of the children."[93]

2. Judicial Review of the Administrative System

It is important to stress that the process described above and hereinafter is constructed under administrative law.[94] Nonetheless, in Massachusetts, it is the Juvenile Court that deals with cases of child abuse and neglect—the same court that deals with young offenders, meaning that its judges are used to employing the logic of criminal law and a criminal law approach to cases and parties.[95] If a case involves issues of parental substance misuse, the Juvenile Court convenes under a "family treatment court," which is framed as a specialized therapeutic-oriented, collaborative setting that "focuses on issues of parental abuse and neglect raised through the filing of a care and protection [case] in the Juvenile Court by treating the parents' underlying substance use disorder."[96]

While this is framed as a judicial decision (the court is the only actor responsible for making determinations concerning parental rights, not the MA DCF), this is actually a process of judicial review of a decision already made by the administrative agency—starting with the decision to open an investigation and followed by the family plan and

90 *Id*. at 6.

91 110 CMR 1.00: Principles and Responsibilities of the Department of Social Services.

92 *Id*. at 1.01.

93 *Id*. at 1.02.

94 *See generally* MASS. GEN. LAWS ch. 119, §§ 1–182.

95 COMMONWEALTH OF MASS. JUV. CT. DEP'T, R. 1, JUVENILE COURT RULES FOR THE CARE AND PROTECTION OF CHILDREN (2018), https://www.mass.gov/juvenile-court-rules/rules-for-the-care-and-protection-of-children-rule-1-scope-of-rules [https://perma.cc/55X5-JFUT] [hereinafter MA JUVENILE COURT RULES].

96 COMMONWEALTH OF MASS. JUV. CT. DEP'T, JUVENILE COURT STANDING ORDER 2-23: ACCESS TO RECORDS AND THE ROLE OF THE JUDGE IN FAMILY TREATMENT COURT (2023), https://www.mass.gov/juvenile-court-rules/juvenile-court-standing-order-2-23-access-to-records-and-the-role-of-the-judge-in-family-treatment-court [https://perma.cc/JVA4-JHEJ].

decisions around whether, and to what extent, parents comply with the plan.

Court cases concerned with child protection are only the tip of the iceberg when it comes to the MA DCF's engagement with families and its power to decide that a child needs to be removed from his or her home. Most often, a case starts with a petition submitted under Massachusetts General Law Chapter 119 to hold an emergency hearing.[97] Such a hearing for emergency removal is conducted ex-parte, with only the MA DCF in the courtroom.[98] The petition is supposed to be filed with an affidavit.[99] Once a petition is filed, there is a summons (just like in criminal cases).[100]

The evidence presented in court can vary but must include an affidavit with every motion,[101] a report that the MA DCF is required to submit with every court hearing (but this requirement does not preclude the judge's discretion to proceed with the trial without receiving this report),[102] and an investigator's report made by a court-appointed investigator.[103]

The investigator's report is framed on the most basic, core understanding that submitting information about the family is the best way to assist the judge in deciding the cases: "Supplied with this information, a judge is better able to undertake the challenging task of deciding the outcome of a care and protection case"; "The Report will assist the court to determine the case management plan, with a focus on achieving timely permanency for

97 The "reasonable cause" standard has been described as a "threshold determination," implying "a relatively low degree of accuracy."' Care and Protection of Robert, 408 Mass. 52, 54–64 (1990).

98 According to MASS. GEN. LAWS ch. 119, § 24 (2008), a "care and protection" petition may be filed on behalf of any child under the age of eighteen who:

> (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian, unwilling, incompetent, or unavailable to provide any such care, discipline or attention.

99 MA JUVENILE COURT RULES, *supra* note 95, at R. 7B.

100 *Id.* at R. 5.

101 *Id.* at R. 7B.

102 *Id.* at R. 10.

103 *Id.* at R. 11.

the child, and to decide the outcome of the case in a fair and prompt manner."[104] The report is supposed to be neutral and unbiased, and the investigators are specifically instructed to avoid language that could skew the court's opinion of the family.[105]

But in practice, the reports produced by investigators are allowed as evidence even if they contain hearsay[106]; though they play an important role in the court's decisions, the information in them is usually not challenged by the courts or the parties. Indeed, these reports amplify family surveillance, since investigators collect data from all potential mandated reporters and others surrounding the family.[107] Even family members who chose, at an earlier time, not to provide the information they had to the social worker because they feared how it could be interpreted are required to pass it on to the court investigator.

The investigator also visits extended family members and any other child, if age appropriate, of the parent who is not named in the petition.[108] This practice deepens the individualizing of the family into ostensibly independent members, dividing parents and marking them as potentially dangerous to other children who were not the focus of the case in question.

The investigator is party to otherwise privileged information.[109] Importantly, the investigative report and the process of data collection are classified in very neutral terms and are intended to gather only "factual information."[110] More than that, the interview with the parents is framed as protective, "an opportunity to provide information that they would

104 COMMONWEALTH OF MASS. JUV. CT. DEP'T, GUIDELINES FOR COURT INVESTIGATIONS AND REPORTS, sections I and II (2020) https://www.mass.gov/guides/guidelines-for-court-investigation-reports [https://perma.cc/25WK-L4C8] [hereinafter MA COURT INVESTIGATION & REPORT GUIDELINES].

105 *See id*. section V. "Example #1: An improper evaluative statement would be 'The apartment was filthy.' A proper descriptive statement would be 'The kitchen sink was filled with dishes covered with dried food and there were dozens of flies and roaches in the apartment.' Example #2: An improper evaluative statement would be 'Father is a well-known drunk.' A proper descriptive statement from an identified source would be 'I saw father yesterday on the street; he was unable to stand and was slurring his words.'"

106 *Id.* at section I*; see* Custody of Michel, 549 N.E.2d 440, 442.

107 MA COURT INVESTIGATION & REPORT GUIDELINES, *supra* note 104, at section IV. R. A(2)–(3).

108 *Id.* at section IV. R. A(4).

109 "The court investigator's appointment form . . . grants the court investigator access to both statutorily privileged and otherwise restricted information." *Id.* at section IV. Rule A(6).

110 *Id.* at section II. *See* Custody of Tracy, 31 Mass. App. Ct. at 484.

like the court to know about themselves and their child."[111] Yet, the investigator's mandate to ask certain questions and collect certain information is highly judgmental and based on the premise of individual responsibility and capability. The resulting language used in the inquiry—including an interest in the "parent's understanding of each child's personality and needs, what [the] parent wishes for the child and how [the] parent would like to see [the] child's situation change"—thus appears "soft," yet presumes that parents are free to choose their life circumstances.[112]

While the interviewees are told there can be no "off the record" discussion in the interviews, this is a relatively mild, administrative, "*Lamb*-type warning"[113] and not a *Miranda*-like warning against self-incrimination.[114]

Following the emergency hearing, a further hearing is scheduled within seventy-two hours, during which it will be decided whether the child should be left with the MA DCF.[115] The parents, who are represented if they are indigent and have specified their implicit will to have a counsel,[116] need to "show cause why the child should not be committed to the custody of the department."[117] Therefore, the presumption is already that the child should be removed from the family home, and the judge must justify writing a decision to the contrary.[118]

111 *Id.* at section IV. R. B(1).

112 *Id*. at section IV. R. B(6).

113 *Id*. at section IV. R. D. The warning is based on the court ruling in *Commonwealth v. Lamb*, 303 N.E.2d 122 (Mass. 1973).

114 There have been activist efforts to promote such reforms. *See, e.g.*, *Active Campaigns: Family Miranda Rights*, JMACFORFAMILIES, https://jmacforfamilies.org/active-campaigns [https://perma.cc/5UU4-HVEP].

115 MA JUVENILE COURT RULES, *supra* note 95, at R. 9 note.

116 Appointed based on MASS. GEN. LAWS ch. 119, § 29 (2011). "A parent must first come forward and appear, or in some way indicate a desire to be heard or to contest the petition, and must demonstrate his or her indigence." *In re* Adoption of Holly, 738 N.E.2d 1115, 1120 (Mass. 2000). *See also* Sara Tiano, *Most States Now Access Federal Funds for Family Court Lawyers*, THE IMPRINT (Feb. 27, 2024) https://imprintnews.org/top-stories/states-access-federal-funds-for-family-court-lawyers/247752 [https://perma.cc/87JZ-D694] (describing the increase in federal funding for parents' counsel yet the lack of a federal mandate for parents' counsel).

117 MASS. GEN. LAWS ch. 119, § 24 (2008).

118 *Id*. The judge must then make the written certification and determinations required by MASS. GEN. LAWS ch. 119, § 29C (2011) (contrary to the welfare certification and reasonable-efforts determination). *See* Care and Protection of Walt, N.E.3d 803 (Mass. 2017).

Finally, ninety days after the opening of the case, a status hearing is scheduled to consider the court-appointed investigator's report and any social worker reports that were asked for in discovery.[119] According to the rules, the mandate of the court is loosely defined and broadly structured:

> Unless previously addressed and resolved, at the status hearing the court shall address but is not limited to addressing: the process of the court investigation or the report; service of process in accordance with Rule 5; discovery motions; child identification; the Indian Child Welfare Act; any special evidentiary issues; the Department's plan to achieve permanence; any issues regarding services being offered or delivered to the family pending trial; the scheduling of a pretrial conference; and compliance with the standing order regarding time standards. Nothing in this rule shall preclude the court from hearing motions, including discovery motions, at other times in the interests of justice.[120]

The last major example of criministrative surveillance that this Article will highlight here is the legal threshold of evidence. In the criminal system, the burden of proof is relatively heavy for the state, whereas in the administrative legal context, the burden of proof is rather low.[121] In fact, the initial assumption of the administrative legal system is to accept the administrative agency's claim.[122] A short discussion of the administrative judicial system is needed to understand its prevailing reasoning and notions, in contrast to those of the criminal system.

As a branch of law, administrative law was mostly developed as a response to the development of the administrative state.[123] As disputes arose regarding the decisions of

119 MA JUVENILE COURT RULES, *supra* note 95, at R. 13 and 14.

120 *Id*. at R. 14B.

121 The burden of proof gets heavier as the trial goes on, and higher in some instances. *See* Adoption of Quan, 21 N.E.3d 182 (Mass. 2014); *see also* Adoption of Yvonne, 170 N.E.3d 1178 (Mass. App. Ct. 2021).

122 For a general discussion of the burden of proof in administrative law, see Anthony Michael Bertelli & Fiona Cece, *Comparative Administrative Law and Public Administration*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 174 (Peter Cane et al. eds., 2020).

123 *See generally* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1983); Michael Asimow, *A Comparative Approach to Administrative Adjudication*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 577 (Peter Cane et al. eds., 2020).

state authorities, a need emerged for intervention, regulation, and oversight, which was provided by the judicial branch.[124]

While administrative law differs considerably between jurisdictions and is somewhat hard to define,[125] some similarities exist across the board. One particularly interesting common feature is the tendency of administrative courts to look less at facts and more at how those facts were collected, considered, and treated by the administrative agency in question. The courts may demand, for instance, that an administrative agency provide justification or reasoning for its decision, or show that it has a bureaucratic process in place to collect pertinent and relevant information for the decision-making process.

On one hand, the objectivity of judges is strongly challenged by some scholars; but, on the other, they are considered more objective than juries. This opposite tendency—fearing over-politicized decisions but trusting the ostensibly apolitical, neutral judge—is salient in the general guidelines given to judges in administrative proceedings, as opposed to criminal procedural law.[126] Most evidentiary procedure is constructed with juries in mind and is intended to prevent them from being swayed by unsubstantiated yet appealing narratives.[127] In contrast, the professional judge is assumed to assess the credibility and reliability of information presented to them without too many outside constraints on their judgment.

In the context of child protection cases, the legal threshold of "reasonable cause" refers to a collection of facts, knowledge, or observations that tend to support or are consistent with the allegations made. When viewed in light of the surrounding circumstances and the credibility of persons providing relevant information, such information should be that which will lead any "reasonable" person to conclude that a child has been abused or neglected.

124 *See generally* Peter Cane, *Administrative Fact-Finding and Policy-Making*, *in* CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON 238 (2016); Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Gillian E. Metzger, *Legislatures, Executives, and Political Control of Government*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 696 (Peter Cane et al. eds., 2020); Li-Ann Thio, *Courts and Judicial Review*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 721 (Peter Cane et al. eds., 2020).

125 *See* Bertelli & Cece, *supra* note 122; Asimow, *supra* note 123.

126 For a discussion of the burden of proof in this field, see generally Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L. J. 1254 (2012); Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective*, 97 TEX L. REV. 1077 (2019).

127 *See* sources cited *supra* note 126.

This low threshold is combined with judges' almost blanket deference to professionals in the administrative context—a phenomenon in administrative judicial review at-large that is particularly salient in child protection cases.[128] In contrast to parents' and children's testimonies, which are regarded with suspicion by judges and face substantial judgment and scrutiny, experts are assumed to be submitting "objective" reports.[129] Moreover, child protection agencies are regarded as neutral, providing a baseline for the judges' decisions.

Parents are therefore punished twice. First, by being assigned a lower epistemic position and facing a lower burden of proof. Second, by facing the yoking of neglect and abuse and their reification as a parental behavioral issue. Discussions of the latter can be found in the way the courts refer to parental behavior when discussing poverty. A parent's "lack of [a] 'stable home environment"' may be considered in assessing parental fitness.[130] In one case, a "mother's frequent moves with the child" was considered as weighing against her parental fitness.[131] Attempts to address poverty-related conditions, such as housing, in child welfare cases are viewed as not addressing the "real" issue at hand.

128 *See generally* Testa & Kelly, *supra* note 63; Megan Gilligan, Amelia Karraker, & Angelica Jasper, *Linked Lives and Cumulative Inequality: A Multigenerational Family Life Course Framework*, 10 J. FAM. THEORY REV. 111 (2018); Spinak, *supra* note 25.

129 MASS. GEN. LAWS ch. 119, § 21A (2020):

> Evidence in proceedings under sections 21 to 51H, inclusive, shall be admissible according to the rules of the common law and the General Laws and may include reports to the court by any person who has made an investigation of the facts relating to the welfare of the child and is qualified as an expert according to the rules of the common law or by statute or is an agent of the department or of an approved charitable corporation or agency substantially engaged in the foster care or protection of children. Such person may file with the court in a proceeding under said sections 21 to 51H, inclusive, a full report of all facts obtained as a result of such investigation. The person reporting may be called as a witness by any party for examination as to the statements made in the report. Such examination shall be conducted as though it were on cross-examination. Evidence may include testimony of foster parents or pre-adoptive parents concerning the welfare of a child if such child has been in the care of the foster or pre-adoptive parents for 6 months or more, and may include the testimony of the child if the court determines that the child is competent and willing, after consultation with counsel, if any, to testify.

130 *See* Adoption of Oren, 141 N.E.3d 114, 117 (Mass. App. Ct. 2020) (quoting Petitions of the Dep't of Social Serv. to Dispense with Consent to Adoption, 503 N.E.2d 1275, 1282 (Mass. 1987)).

131 *See* Care and Protection of Lillith, 807 N.E.2d 237, 240 (Mass. App. Ct. 2004).

IV. Discussion: Identifying Criministrative Law and Its Roots

A. The Individualized Perception of Poverty and Its Implications

Ideally, according to the capitalist liberal welfare-state argument, the capitalist market is the preferable route by which to allocate resources and fix crises. It is reasoned that the person who does not have enough money to meet their basic needs can head out into the labor market and earn a salary to pay for food and accommodation. The person who cannot find a job that pays enough to cover such needs can simply attend professional training in line with their abilities and thus will be able to mobilize in the labor market. Those dealing with different life challenges, such as raising children, can readily access professional help. People dealing with complex parenting issues—coping with substance abuse or struggling to find the time (or capability, or desire) to play with their child, attend to their emotional needs, or even feed them properly—can always turn to the open market for help.

In the liberal model,[132] the welfare state only steps in when the individual does not have the wherewithal to access the market to fulfill those needs—and it is justified in doing so. Housing Aid rules ostensibly support individuals who are unable to secure housing by private means; income supplements and schemes such as Aid to Families with Dependent Children (AFDC) or the Supplemental Nutrition Assistance Program (SNAP) are meant to sustain those who cannot earn enough income to sustain themselves through the wage market; and CPS protects minors whose parents are financially unable to provide their children with proper care through the service and consumer markets. Incorporating "neglect" into the definition of the issues under the CPS mandate and devoting most of the service's resources and budget to this issue[133] renders parenting (in the sense of caring for one's child) just another essential utility provided by the welfare state.

Tying the concept of childcare (traditionally viewed as a market-based system) to the welfare state support system merges the organizing ideas of both. In the U.S., this entails a penalized version of welfare, in which individuals' (poor) choices are assumed to be the cause of all their woes, and welfare recipients are seen as the victims of their own (deficient,

132 According to the typology of welfare state models (the most popular being that of Esping-Andersen), the U.S. is categorized as a liberal welfare state. *See* sources cited *supra* note 7.

133 As mentioned above, the vast majority of the cases under investigation by CPS are concerned with neglect, not abuse. *See* MA DCF 2022 ANNUAL REPORT, *supra* note 19, at 36. The *Guide for Caseworkers* also makes reference to "[c]hild neglect, the most common form of child maltreatment." *See* Diane DePanfilis, *Child Protective Services: A Guide for Caseworkers*, U.S. DEP'T OF HEALTH AND HUM. SERV. ADMIN. FOR CHILD. AND FAM., 2018, at 32.

questionable) decisions. In this paradigm, by "earning" the status of welfare assistance eligibility, the individual essentially relinquishes at least some of their agency.[134] In the case of parents, this organizing idea supports child removal and the broader conception of State surveillance and/or intervention to protect children from their parents' neglect.

The arguments presented in Part IV are built around two core themes: the concept of surveillance and the modern capitalist State's focus—obsession, perhaps—with individual choices and behaviors. It was Foucault who first drew our attention to the importance of data-collection to the act of governing,[135] which helps control the subjects of State power. But the importance of reporting and information-gathering in the context of child welfare is not only about what information is available to the State and the lack of privacy for people in need of state assistance. It is also about the complete disconnect between information and voice. While the State seems to be getting better and better at gathering information about families who are living in poverty and are thus at risk of falling into the category of neglect, there is still no room for their lived experiences to be heard or their needs to be self-expressed anywhere in the process.

B. The Law of Overlap: Features of Criministrative Law

Two distinct kinds of legal rationales are identifiable in the findings described above. While the term "overlap" might hint to thicker protection of the law, here the overlap leads to losing both forms of protection found in each field of law. That is to say, criministrative surveillance strips parents and children from both the balances provided in administrative law and the constitutional protections provided in criminal law.

Formally, as mentioned above, child protection is framed using the administrative legal rationale. The law is discussed and formulated as a judicial review of an administrative decision. Similar to the usual routine in administrative courts, there is visible bias toward the state's arguments, and the courts tend to accept the state's claims.

The data collection allowed by the courts is wide, unrestricted, and exploratory in nature. It is driven by an assumption of the State as a caring body; the gathering of

134 This phenomenon is not exclusive to child welfare, but rather characterizes the attitude towards people in poverty more generally. *See generally* Yael Cohen-Rimer, *What's Choice Got to Do with It? Addressing the Pitfalls of Using Choice-Architecture Discourse Within Poverty Law*, 86 MOD. L. REV. 951 (2023).

135 Michel Foucault, *Governmentality*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 106 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991) [hereinafter *Governmentality*].

information is portrayed as facilitating assistance and aid, and thus there is no need—unlike in the criminal system—to curtail it.

Because of those premises and tendencies, there are no protection measures provided to parents and families against the collection of data. No search warrant is needed to enter the home, no rules against self-incrimination apply, and welfare recipients generally lack any constitutional protections enjoyed by criminal defendants.

At the same time—and importantly, not formally so—the law of child protection functions as criminal law. Four elements comprise this comparison. First, the individualized condemnation of parents by the courts is similar to that of a criminal defendant. Even outside of the courts, the mere definition of neglect is formulated as a parental failure, not as an objective situation of impoverished conditions endured by the children. Second, removal of children from the home is perceived as punishment for non-compliance. This final punishment "floats" in the background of the whole process, compelling the obedience and cooperation of parents. Third, similarly to criminal procedure, merely entering the formal legal process causes stigma, denunciation, and fragmentation of the parent-child bond. The process places parents in a liminal situation of "semi-guilty,"[136] as they are punished by the process itself even before considering the end result.

In fact, the welfare system in the U.S. is so similar to the criminal system that it can be discussed through the lens of the five generational justifications (or "myths")[137] of the criminal system: (i) it is meant to ensure that people in poverty *repay* their debt to society by "giving back" their autonomy and agency in raising their children (which they must renounce when they take public money);[138] (ii) it is meant to reform the poor via "choice architecture," teaching them to better care for their children (because their poverty is taken as an indication that they do not know how to parent to begin with); (iii) it works to remove ostensibly dangerous actors from society, thereby cementing people in deeper poverty, and, by removing children, it adds to their parents' exclusion (for example, the law

136 *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 42 (Alan Sheridan trans., 1995) [hereinafter DISCIPLINE AND PUNISH].

137 *See* Jonathan S. Simon, *Millennials and the New Penology: Will Generational Change in the U.S. Facilitate the Triumph of Risk Rationality in Criminal Justice*, *in* CRIMINAL JUSTICE, RISK AND THE REVOLT AGAINST UNCERTAINTY 319 (John Pratt & Jordan Anderson eds., 2020).

138 And not only that: parents must also repay the financial costs of foster care for their children. See, for example, recent reports such as that by Joseph Shapiro, *In Some States, an Unpaid Foster Care Bill Could Mean Parents Lose Their Kids Forever*, NPR (Jan. 19, 2023) https://www.npr.org/2023/01/19/1148829974/foster-care-parental-rights-child-support [https://perma.cc/WF4R-U6JP].

restricts the ability of parents whose names are on child abuse registers—which include cases of neglect—to work in any "child-care institutions and other group care settings");[139] (iv) it reinforces public perceptions and norms, flooding impoverished communities and communities of color with mandated reporters who follow parents' every move; and (vi) it relates to the racial threat-to-society notion, leading to egregious stereotypes such as that of the ill-equipped Black mother who is only fit to be a worker but not to bring up children, or the stigma of the "welfare queen" who only brings children into the world to gain a free ticket to state handouts.[140]

V. The Problem with Criministrative Law

We have seen that criministrative surveillance is salient in all aspects of the law, from its organizing idea, history, and language to its foundational schema and its work on the ground, in courts and in society. What follows is an outline of the practical-material and social-rhetorical harms inflicted by criministrative surveillance. This categorization is somewhat artificial, since the two types of harms trigger and perpetuate one another, but analyzing them separately enables us to better understand the layers of damage caused by criministrative surveillance.

A. Practical-Material Harms

1. Destabilization and Strain on Families' Material Resources

The first and arguably most visible harm caused by the child protection process and its threat of child removal is the fracturing of the family and the despair and suffering caused by this separation for parents and children alike.[141] The experience requires parents to devote all their personal resources and energy to legal battles,[142] while the temporary

139 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. § 45 (2018).

140 *See generally* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN (2004).

141 For documentation of this harm, see Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–34 (2019).

142 While parents' counsel is provided in most states, the time, labor hours, travel costs, and other material resources are funneled into the long judicial procedure of reuniting children with their parents. Moreover, the quality, efficacy, and availability of state-provided counsel varies. *See* Vivek Sankaran, *In Child Welfare Cases, Just Any Old Lawyer Won't Do*, THE IMPRINT (Apr. 28, 2020) https://imprintnews.org/child-welfare-2/in-child-welfare-cases-just-any-old-lawyer-will-not-do/42826 [https://perma.cc/8YP2-FLAT] (calling attention to the lack of "high quality legal representation" in child welfare cases); *see also* STATE OF NEW YORK UNIFIED COURT SYSTEM COMMISSION ON PARENTAL LEGAL REPRESENTATION, INTERIM REPORT TO CHIEF JUDGE DIFIORE 6 (2019) https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf [https://perma.cc/2LQX-59M7] ("For decades, reports have chronicled the crisis in parental representation, particularly regarding child welfare proceedings. Instances of inadequate representation, delays in access to representation, and the outright denial of representation, are all too frequent").

loss of their children can trigger or exacerbate mental health crises, substance abuse, and other trauma-induced behaviors.[143] For women in particular, personal resources are aptly described in the literature as being dedicated to dealing with the challenges of "system-impacted" mothering.[144] Once a case is opened, it creates a ripple effect, draining resources that the family now has to channel into preventing the dreaded end result of permanent removal or fighting tooth-and-nail to be reunited with their children.

But the effect begins even before a case is "caught" (to rephrase Lee's apt description).[145] Due to the struggle that living in poverty entails, the resources available (mental, emotional, monetary, temporal, among others) to these families are already stretched to their limit. Now, layered upon this daily struggle, the family finds itself having to navigate the system of criministrative surveillance in order to prevent reporting.[146] Much needed healthcare is not sought because it might lead to reporting. Welfare benefits are not fully utilized because disclosure of private matters will be demanded. Children learn early on not to ask for the assistance they need and to which they are entitled because they know the repercussions might lead to the dismantling of their family. The mental load of navigating the survivalist labyrinth of poverty is exacerbated by the constant shadow of possibly

143 *See generally* INVISIBLE CHILD, *supra* note 61; Sarah Katz, *We Need to Talk about Trauma: Integrating Trauma-informed Practice into the Family Law Classroom*, 60 FAM. CT. REV. 757 (2022); Sarah Lorr & L. Frunel, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 477 (2022).

144 A term coined by Katherine L. Maldonado-Fabela. *See* Katherine L. Maldonado-Fabela, *"In and Out of Crisis": Life Course Criminalization for Jefas in the Barrio*, 30 CRIT. CRIM. 133 (2022).

145 *See* CATCHING A CASE, *supra* note 8.

146 *See* Kelly Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785 (Jun. 2019) ("[low-income] [m]others recognized CPS reports as a risk in interactions with healthcare, educational, and social service systems legally mandated to report suspected child abuse or neglect . . . mothers' practices of information management, while perhaps protecting them from CPS reports, may preclude opportunities for assistance and reinforce a sense of constraint in families' institutional interactions"); Carrie Lippy et al., *The Impact of Mandatory Reporting Laws on Survivors of Intimate Partner Violence: Intersectionality, Help-Seeking and the Need for Change*, 35 J. FAM. VIOLENCE 255 (finding that mandatory reporting laws likely "reduce help-seeking for over a third of [intimate partner violence] survivors").

triggering the invisible fault lines of the criministrative surveillance system surrounding people in poverty.

For children, the damage caused by being removed from the home includes physiological and behavioral harms linked to the anxiety and insecurity caused by separation or the threat of separation. Children's well-being also suffers when they witness their parents' distress.[147] While these harms are evidently intensified when separation actually occurs, they are also likely to have an effect on children whose parents are "merely" under investigation or on those children with other adults in their lives who constitute a risk factor for their parents instead of providing them with assistance.

2. Tainted Systems of Care

In addition to the resources wasted or invested by family members in attempting to avoid the system of criministrative surveillance at all costs, this system's overlap with welfare systems that are formally meant to provide care (housing, healthcare, and so on) limits the true availability of these services for families. Since a call for help can (and, in many cases, most likely *will*) culminate in "catching a case,"[148] parents are reluctant to approach agencies and programs meant to assist them in areas such as domestic violence,[149] substance abuse,[150] housing, or nutrition security.[151] In other words, the overlap between the

147 *See generally* Julie Poehlmann-Tynan et al., *The Health and Development of Young Children Who Witnessed Their Parent's Arrest Prior to Parental Jail Incarceration*, 18 INT'L. J. ENV'T. RES. PUB. HEALTH 4512 (2021); Sherryl H. Goodman et al., *Maternal Depression and Child Psychopathology: A Meta-Analytic Review*, 14 CLIN. CHILD FAM. PSYCH. REV. 1 (2011); Lior Abramson, Yael Paz & Ariel Knafo-Noam, *From Negative Reactivity to Empathic Responding: Infants High in Negative Reactivity Express More Empathy Later in Development, with the Help of Regulation*, 22 DEV. SCI. 1 (2018).

148 CATCHING A CASE, *supra* note 8.

149 *See* Adoption of Yvonne, 170 N.E.3d 1178 (Mass. App. Ct. 2021).

150 *See* Kathryn A. Thomas et al., *The Impact of State-Level Prenatal Substance Use Policies on Rates of Maternal and Infant Mortality in the United States: A Legal Epidemiology Study*, MEDRXIV (2022), https://doi.org/10.1101/2022.11.16.22282429 [https://perma.cc/8CVH-TJAL].

151 *See* Eckenrode et al., *supra* note 71; ACTS OF OMISSION, *supra* note 70. The instructions of the U.S. Department of Health and Human Services clearly state that the very fact of applying for state assistance constitutes an indicator of a potential situation of neglect. The first item on the list of parental "behaviors" that social workers should look out for is employment status. In other words, poverty is considered a "risk factor" in child neglect. *See* Diane DePanfilis, *Child Neglect: A Guide for Prevention, Assessment, and Intervention*, U.S. DEP'T OF HEALTH AND HUM. SERV. 47 (2006); *see also* Hina Naveed, *If I Wasn't Poor, I Wouldn't Be Unfit*, HUM. RTS. WATCH (Nov. 17, 2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare [https://perma.cc/72LP-GTJL].

two systems means that state care is "tainted," leaving these families in a bind.

The fact that *any* call for help draws attention or more surveillance to the home is a major problem: the more eyes that scrutinize a family, the more the threat of judgment, criticism, and sanctions increases, hampering the immediate assistance needed by the families. Note that, while some legal protection is available to people in criminal procedures in terms of privacy and data-sharing, the fact that surveillance is characterized as administrative prevents these protections from being used.[152]

In addition to the material-practical impacts of criministrative surveillance and the threats it imposes on the family unit, the very approach of the state to that unit—fragmenting it into isolated individuals for the purpose of analysis—constitutes a further harm.

Such fragmentation is destabilizing. It entails an invasion of privacy since it mandates that all details of family life be discussed and judged on an ongoing basis. It also causes a split between children and parents, starting when a social worker first sets foot into the home, charged with protecting children from their own parents.

This process not only paints the responsibility of parenting as an individual endeavor as opposed to a communitarian effort but also arguably renders it such. In the legal system, it pits the parents against each other, against their children, and against their extended family and community. The adversarial aspect of the legal treatment is a part of individualization. Indeed, while potentially positive in some ways, the lawyers representing the children are part of this process of atomizing the family. It is a form of mental removal, individualizing the child and their care as a separate problem divorced from the surrounding problems of poverty. Such compartmentalizing creates the illusion that one can care for a child as an isolated "unit" while living in poverty, as if poverty and isolation are not *both* detrimental to child welfare. Failing in this task—almost impossible to fulfill to begin with—is thus framed as a personal failure, both in the parents' eyes and the eyes of the law (and society at large).

152 *See generally* Ismail, *supra* note 5.

B. Socio-Rhetorical Harms

1. Harms Directed at Families: "Legal Gaslighting"

Another problem with far-reaching consequences is that caused specifically by the mismatch of legal definitions, which blurs the lines between the administrative and the criminal. Essentially, the expressive message conveyed by the melding of the two legal systems is a mixed one. On the one hand, non-criminal language is used to convey that the law is conceived and constructed to assist families, protect children, and, more recently, prevent harm to children. On the other hand, non-criminal language is interwoven with the message that parents are unfit, potentially dangerous, and, crucially, unimportant when it comes to deciding what they need to best parent their children.

The contradictory messages sent through the law—one through its language and formal construction and one through its actual practices—creates confusion and distrust, since the law "talks" in one voice but "acts" in another manner. As is the case with forms of gaslighting, this confusion leaves parents unable to pinpoint the problem with child protection law, adding to the obstacles faced by anyone seeking to change the system.[153]

Teachers, medical professionals, and law enforcement actors are all considered by the law to be better placed to know what the children need, what is in their best interests, and how to best serve these. Parents are expected to cooperate with those professionals, primarily with social workers, since they are constructed as care-providing and not punitive. As such, and in stark contrast to the criminal system, the lack of legal protections for parents is not only accepted by the child welfare system, but parents who attempt to assert their rights or push back against the system can face repercussions.[154] Even emotions are held against parents who express them, as one can see in court cases where mothers are reprimanded by judges for expressing their anger, anguish, or fear in the face of their children being taken from them.[155] At the other extreme, mothers' shock at the decision to

153 For an example of a parent attempting to actively push back at the system, see Joyce McMillan's Twitter account: @JmacForFamilies, TWITTER, https://twitter.com/i/flow/login?redirect_after_login=%2Fjmacforfamilies [https://perma.cc/7W6F-U9WW].

154 *The Empty Promise of the Fourth Amendment*, *supra* note 2, at 1064 n.27 (discussing the negative consequences for parents who assert their rights, both in and out of court).

155 Adoption of Yvonne, 170 N.E.3d 1178, 1184 (Mass. App. Ct. 2021) ("These considerations were entirely proper, as was the judge's conclusion that these 'very concerning behaviors … speak to her parenting abilities.'"). A parent's behavior during trial and her ability to manage anger are relevant to parental fitness. *See* Adoption of Querida, 119 N.E.3d 1180, 1185–86 (2019) (judge could consider mother's "volatile" behavior in court room in assessing fitness); Adoption of Ulrich, 119 N.E.3d 298, 308 (2019) (mother's difficulty "managing her anger" deemed relevant to fitness).

have their children removed can render them temporarily incapable of expressing anything other than practical concerns, such as whether housing assistance will also be taken away. Such pragmatic reactions are viewed as signs that the mother is not emotionally involved *enough*, again calling into question her parental abilities.[156] Thus, parents quickly learn that they must relinquish their perspective on their own reality and, instead, submit to the interpretations of experts. Subsequently, they can internalize the view that they have failed, that they *are* failures, rather than that there is a wider political and societal context to their supposed "errors," not least of which being poverty.

The confusion created by the language and practices of the law is related to poverty. On the one hand, as shown above, material conditions resulting from poverty are weighted against parents as individual failing. On the other hand, the question of poverty is removed from the discussion in the courtroom due to the poverty exemption. Thus, attempts to address the problem of poverty itself—to find a stable home, for example—are criticized by courts, which suggest that the parents do not understand the real issue at hand. For example, the Massachusetts Appellate Court once wrote accusingly that "[t]he parent aide noted that the mother 'would often fixate on a frustrating issue such as housing, rather than trying to accomplish the tasks that were asked of her.'"[157]

Reporting with no voice afforded to parents is a specific kind of punishment. Note, for example, the form that parental participation takes in "best interest" hearings: when parents want to be involved in the placement of their removed children, they are often barred from doing so.[158] Furthermore, in the current system's construction, there is no place for the voices of the children themselves;[159] their specific requests to be reunited with family hold little to no weight in the decisions.[160]

156 *See* Adoption of Darlene, 171 N.E.3d 199, 203 (Mass. App. Ct. 2023) ("It was the mother's responsibility to plan each visit, a task she found 'overwhelming.'").

157 *Id.* at 203.

158 *See* Adoption of Quan, 21 N.E.3d 182 (Mass. 2014).

159 *See, e.g.*, Care and Protection of Georgette, 785 N.E.2d 356 (Mass. 2003); Adoption of Erica, 686 N.E.2d 967 (Mass. 1997); In re Lydia, 714 N.E.2d 351 (Mass. 1999).

160 *See*, *e.g.*, Care and Protection of Sophie, 865 N.E.2d 789 (Mass. 2007) (accepting the children's statements into evidence while their specified wish in the trial was to be reunited with their father upon appeal after the Juvenile Court failed to include them in the record).

One of the most damaging aspects of legal gaslighting is the constant dissonance these families experience, shifting between being overly visible, relentlessly observed by the system, and feeling *invisible*—unheard, unrepresented, or misunderstood. This dissonance occurs in the tension between what a person knows to be true and how the law treats their situation, which is entirely at odds with that truth. It is most evident in two particular dynamics, starting with the fact that families in poverty in the U.S. are more likely to be families of color.[161] The parenting culture that parents of color tend to practice is usually more communal and based on extended family structures than white middle-class parenting.[162] This reality creates a gap between what Black parents know as good care and the state's notion of what care should look like; that gap may stray, if misinterpreted, into the law's definition of child *neglect*. The second dynamic in which dissonance and gaslighting are prevalent has to do with poverty more than race: the social construction, supported by the legal language, of parenting as an individual effort (or, at most, a couple's effort), distracts from the fact that, in reality, no one parents alone. While upper- and middle-class parents can purchase market-based solutions to their childcare, healthcare, educational, or therapeutic needs, families in poverty are left to fend for themselves. But when low-income parents approach the state for support—when they "come out" as poor and demand the assistance that is their right—they are punished by being cast into the criministrative net.

In Foucauldian terms, this is governmentality at play—masking the use of legal punitive force to control people in poverty by controlling their reproduction and their attempts at seeking aid for their families. The collection of statistical data, which Foucault identifies as an important aspect of the modern state,[163] is labeled merely administrative and is discussed in the language of care and prevention of harm. The apparent neutrality of data-collection, then, is masking the project of control.

161 *See* Regina S. Baker & Heather A. O'Connell, *Structural Racism, Family Structure, and Black–White Inequality: The Differential Impact of the Legacy of Slavery on Poverty Among Single Mother and Married Parent Households*, 84 J. MARRIAGE & FAM. 1341 (Oct. 2022) (finding that poverty rates were higher for Black families than white families, regardless of family structure); Areeba Haider, *The Basic Facts About Children in Poverty*, CENTER FOR AMERICAN PROGRESS (Jan. 12, 2021) https://www.americanprogress.org/article/basic-facts-children-poverty/ [https://perma.cc/BUC6-597R] (reporting that children of color are disproportionately represented among children in poverty).

162 *See generally* ROBERTS, *supra* note 2.

163 *See Governmentality*, *supra* note 135, at 87–104.

2. Harms Directed at the Public: Reifying Individualized Perceptions of Poverty

Lastly, the law and legal system's treatment of child neglect is harmful since it carries the public declarative force of reinforcing the "individual choice" perception of poverty. This perception, which prevails despite apparent moves toward "prevention" attempts, is that parents in poverty need to be "educated" or somehow "fixed" in order to be able to properly care for their children in their given situation. Recall that the last amendments to the child welfare system, through the FFPSA, are still taking the same approach, providing individual services such as mental health and substance abuse programs or parenting-skills services and training. Motivational interviews are conducted, on the premise that non-cooperation with programs is a personal motivation issue or stems from individual character traits, rather than a reflection of the system's failings. These failings can include ill-fitting programs, for instance, or interviewers (usually external personnel hired by the organization providing the program) who are racist, anti-poor, or otherwise biased.

The insistence on protecting children from poverty through a system that seeks to protect them from their parents fits into a broader public perception of those caregivers. The treatment of child poverty through child protection law serves to sustain the stigma incorporated within the notion of the undeserving poor. We should not channel funding toward the parents, so the popular argument goes, because they will not know how to use it to best care for their children. They will use it for drugs or criminal activity, or waste it in some other way.

Since poverty is so intricately related to race, reifying public perceptions of people in poverty as individuals who have made poor choices is strongly connected to perceptions of racially-marginalized communities. In the child protection context, this unjustified link is strong and disheartening. It is even more of a concern as one moves "upstream," from actual child removal to the initial mandatory reporting and investigations. The racial disparities in reporting mean that a shockingly higher percentage of children of color are monitored and criministratively surveilled than white children. Research also shows the damaging effect of unequal bias on the rest of the process, due to the tendency to "find once you're looking."[164] Such bias, coupled with the recognized economic racial inequality

164 *See, e.g.*, Karla K. Evans & Anne Treisman, *Perception of Objects in Natural Scenes: Is It Really Attention Free?,* 31 J. EXPERIMENTAL PSYCH. 1476 (2005); K. Amano et al., *Finding Keys Under a Lamppost: A Scene-Specific Bias for Target Detection*, 38 PERCEPTION 180 (2009); Julie A. Nelson, *The Power of Stereotyping and Confirmation Bias to Overwhelm Accurate Assessment: The Case of Economics, Gender, and Risk Aversion*, 21 J. ECON. METHODOLOGY 211 (2014).

in the U.S., reinforces the vicious cycle of public opinion and lawmakers' opinion: since poverty equals neglect, and more families of color are poor, parents of color must be bad parents.

Let us return to the specific case of Massachusetts to see how this plays out. Socio-demographically, Massachusetts is overwhelmingly wealthy and white. Recent data show that, while, in absolute numbers, there are more low-income white children in the state than children of color,[165] children of color are disproportionately represented among low-income and impoverished children.[166] If we look at mandatory reporting locales such as public schools, the numbers are even more racially skewed: only 23% of public school students in the Boston area are white.[167] In the major area of mandatory reporting that is public education, reporters mostly see children of color who, as the statistics show, mainly live in poverty. The net of criministrative surveillance is thus cast in a very active manner.

VI. Initial Solutions: Moving Forward from Criministrative Surveillance

As a closing argument, this Article now turns to suggested solutions to the problem of criministrative law, specifically criministrative surveillance. Starting with a practical, almost technical solution, it then moves to a paradigmatic shift, and finally points to a theoretical, somewhat philosophical idea with the potential to better protect children and families.

A. Practical Solutions

First and foremost, the legal concept of child neglect should be divorced from child abuse. Doctrinally, child abuse, like other forms of assault, should be dealt with through the criminal system—ensuring the protections as well as the repercussions that this system is equipped to deliver. Since cases of alleged neglect concerning children living in poverty

165 DANZING & BERNIER, *supra* note 41, at 26 (reporting that "[t]here are more low-income White children (197,674) in Massachusetts than African American (58,150) and Latino (108,502)").

166 *Id.* (finding that "[a] higher proportion of African American and Latino children under 18 live in families who are poor (29% and 36% respectively) than White children (7%). A higher proportion of African American and Latino children under 18 live in low-income families (53% and 69% respectively) than White children (18%)").

167 This statistic includes students attending Boston's Commonwealth charter schools. PETER CIURCZAK, ET AL., KIDS TODAY: BOSTON'S DECLINING CHILD POPULATION AND ITS EFFECT ON SCHOOL ENROLLMENT 1, 34 (Sandy Kendall ed., The Boston Foundation, 2020), https://files.eric.ed.gov/fulltext/ED606397.pdf [https://perma.cc/V3NV-DCT7].

constitutes most of the caseload of the child welfare system, there is a need to properly construct child neglect, not as parental failure related to poverty. Child poverty should be dealt with as a social problem that has little to do with parents' individual choices or behaviors.[168]

Second, this Article proposes the separation of care and punishment. In her seminal book, Bach warns against precisely this conflation, pointing to the dangers of providing care through the criminal system and criminalizing the care system.[169] This Article follows that argument. True care, and the watchful eye that is required to provide it, is possible only in the presence of mutual trust and in the absence of stigma, judgment, and othering. Decriminalizing the administrative welfare state is the only way toward developing a universal, solidarity-based care net.

B. The Poverty-Aware Paradigm: Poverty as a Human Rights Violation

Poverty-Aware Paradigm (PAP) was developed in the social work field and is designed to frame discussions of how social workers can better assist service users.[170] The paradigm is critical in its thinking, perceiving poverty as a human rights violation (not the result of parental failure) and insisting on the development of the theoretical discourse of agency,[171] while simultaneously engaging in agency-based practices.[172] Under PAP, people living in poverty are described as "agents who resist poverty under conditions of severely lacking

168 Kumor, *supra* note 43, at 122.

169 For a thorough discussion of the dangers of providing care through the "pure" criminal system, see generally BACH, *supra* note 2.

170 *See* MICHAL KRUMER-NEVO, RADICAL HOPE: POVERTY-AWARE PRACTICE FOR SOCIAL WORK (2020) (outlining the new paradigm and its implications for professionals at the field of social work) [hereinafter RADICAL HOPE].

171 *See generally* Ruth Lister, *"Power, Not Pity": Poverty and Human Rights*, 7 ETHICS SOC. WELF. 109 (2013); Lucie White, *Human Rights Testimony in a Different Pitch: Speaking Political Power*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 470 (Katharine G. Young ed., 2019); Bruce Porter, *Claiming Adjudicative Space: Social Rights, Equality and Citizenship*, *in* POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM 77 (Margot Young ed., 2007); MARGOT YOUNG ET AL., POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM (2011); Iris Marion Young, *From Personal to Political Responsibility*, *in* RESPONSIBILITY FOR JUSTICE (2011).

172 For examples of such participatory development, see generally Michal Krumer-Nevo, *From Voice to Knowledge: Participatory Action Research, Inclusive Debate and Feminism*, 22 INT. J. QUAL. STUD. EDUC. 279 (2009); DEEPA NARAYAN, VOICES OF THE POOR: CAN ANYONE HEAR US? (2000); Shireen Y. Husain, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings Note*, 79 GEO. WASH. L. REV. 232 (2010); *Giving Poverty a Voice*, ATD FOURTH WORLD UK, https://atd-uk.org/projects-campaigns/giving-poverty-a-voice/ [https://perma.cc/SB2M-43RA].

economic and symbolic capital."[173] The epistemology underlining PAP is critical and relational, whereby information regarding preferred interventions and strategy is obtained through an ongoing dialog with the welfare service-users, placing the emphasis on recognition and solidarity.

Mainly, such a paradigmatic shift from the existing perception of poverty as an individual failure to the suggested perception of poverty as a human rights violation lends weight to the argument that financial support should be delivered directly to families in poverty for them to spend as they deem fit. PAP advocates that the State provide direct financial support to families because it perceives that families are best placed to understand their own needs and evaluate their options. In addition, PAP believes concrete support in areas such as housing, health (including mental health and substance abuse), and nutrition security are essential to any process of protection of the children within the family.[174]

Viewed from such a paradigm, neglect can be understood as a result of the human rights violation that is poverty. It should therefore be treated as such, not by focusing on individual "fixes" such as therapy and coaching to improve parenting skills, but by providing children with practical protection from poverty. Such a perception of situated knowledge treats people in poverty and their lived experiences with dignity. Importantly, it also renders surveillance and reporting unnecessary, since the information is already in the hands of the most relevant decision-makers with regard to providing sustainable care for the children (in "neglect" cases): the parents themselves, and the children. Importantly, such a paradigmatic shift can enlist the subjects currently on opposite sides of the legal case—the social workers and the parents—into a joint operation. Taking on PAP professional training can change the way social workers perceive their own position as well as that of the parents. Subsequently, PAP has the potential to lessen parents' suspicion of and mistrust directed at social workers, leading to cooperation for the sake of the actual wellbeing of the child. As PAP challenges concepts such as power (who holds it, who wields it), knowledge (who is the expert and what knowledge is valued), and choice (what alternatives are given and who chooses), PAP provides a promising change in the field of child welfare.

173 RADICAL HOPE, *supra* note 170, at 32.

174 *See* Michal Krumer-Nevo, *Poverty, Social Work, and Radical Incrementalism: Current Developments of the Poverty-Aware Paradigm*, 56 SOC. POL'Y & ADMIN. 1090 (2022); Shachar Timor-Shlevin, *Contextualised Resistance: The Mediating Power of Paradigmatic Frameworks*, 55 SOC. POL'Y & ADMIN. 802 (2021).

C. A Multi-Directional Panopticon: Protective Attention

Building on the previous theoretical shift and adding to it, it is important to note that adults in poverty do need assistance in important aspects of parenting. *All* parents need help: no one parents alone. Parents in all social classes collect information about their children from different sources and share the care burden with family, community members, educators, medical staff, and care workers. The main difference in the case of parents living in poverty is the criministrative aspect of their relations with these sources of support. Building on the idea of the *panopticon*, a relational, non-criministrative, multi-caring approach to gathering information and seeing the actual needs of the family is best, instead of the assuming the needs of an imagined "typical" family.

The concept of the panopticon is perhaps best known as it was understood by Foucault: to explain and exemplify methods of control and surveillance.[175] Earlier scholars, including Rousseau, had used the concept of the "gaze" and mutual "exposure" to the "daylight" that is public attention as a communitarian ideal, for sunlight is the best antiseptic.[176] In contrast, the Foucauldian reading of Bentham's original idea of a central control tower overseeing all inmates in a prison setting, twenty-four seven, was that it created among the prisoners an internalized, self-censuring notion of being watched, for they lived under the permanent threat of having any misstep observed and punished.[177] Conceptually, it does not require a big leap to see the panopticon as a fitting description of the current systematic result of criministrative surveillance. The modern, benevolent panopticon that I propose here is a two-way street: all are watching all, in a spirit of care and concern, and all perceptions are of equal importance in deciding plans, needs, and avenues of assistance.

If the gaze does not entail punishment, it can theoretically be equal between all actors, dyadic and caring. In fact, such a dyadic system based on a shared gaze is already in place when caring for children of families *not* in poverty, when parents consult with pediatricians and teachers about their offspring. To some extent, such dyadic care exists also in communities in poverty, in alternative (and often multi-parenting) avenues of care. When family members take on the role of traditional parents, when communities notice a member in need (to pay off creditors, supervise children, or provide assistance for food and clothing), they do so because they *watch out for* each other. When this watching is

175 DISCIPLINE AND PUNISH, *supra* note 136, at 200–01.

176 Michel Foucault, *Eye of Power*, *in* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 146, 152 (Colin Gordon ed., 1980).

177 *Id.* at 155.

performed outside of the criministrative surveillance net, it is positive, uplifting, and reassuring. In contrast, when such relations are strained by mandatory reporting and its punitive results, the watching is tainted as well.

Let us now consider what adopting the protective panopticon that I envision might look like in practice, instead of the criministrative system in place today. In short, I suggest that the punitive system remain operational only for (the much rarer) cases of abuse, and that—through lawmaking, policy reform, and training of social workers, lawyers, and judges—a non-punitive approach be implemented, embedded in an institutional mindset of supportive watchfulness rather than surveillance: one that does not seek to punish and ensures that care is not conditioned on cooperation with unwarranted investigations and imposed plans.

CONCLUSION

It is harmful for children to grow up in poverty, and the deeper the poverty, the deeper the harm. But the bundling together of this notion with the current perception of parental neglect is not helpful. It is a legal construction that emanates from the individual choice ethos, reflecting neoliberal and conservative perceptions of mothers, families, and people in poverty.

Examining the laws governing the treatment of child neglect reveals troubling conclusions. It is not only the operationalization of the laws that is called into question by many scholars. It is also, as discussed in this Article, the welfare state's racist, classist, and neo-liberal perceptions of parents and families that keep them trapped in poverty. The law operates through different avenues to control and subjugate people in poverty and marginalized groups by wielding as a constant threat the power to dismantle the family and sever what is perhaps the most sacred human bond: the bond between parent and child.

This Article is agenda-setting in two important senses. First, it aims to provide a new language with which to talk about the system in a way that will illuminate its legal flaws, including the terms "criministrative law" and "legal gaslighting." Adding these concepts to our lexicon can begin to deepen the semantic discussion around poverty and the State's engagement with it, overlapping with discussions on racial biases and discrimination.

Second, it aims to draw attention to harms that, to date, have not been articulated, even as the field of scholars, activists, and advocates addressing and problematizing child protection laws grows. Focusing on the problems caused by constant surveillance and what

I call socio-rhetorical damages makes an important contribution to a bourgeoning field.

Lastly, while I wholeheartedly agree with the spirit of ambitious calls for the outright abolishment of the child protective system nationwide,[178] this Article offers one possible practical step in this direction that could be more readily achieved. Removing neglect allegations from the mandate of CPS by shifting the legal framework from punitive perceptions of poverty to PAP, as suggested here, would remove the bulk of the caseload, reporting, and operation of CPS. Those resources would then be freed up to build a system dedicated to anti-poverty support and protection from poverty for children and their parents.

Of course, for such a paradigm to be adopted, there is a need for profound change in the perception—and pursuit—of individual choice, a concept that stands at the heart of American politics and ethos. It requires no less than a shift from gaze-as-control to gaze as mutual, communal care. The call is therefore not for families to be left alone, but to be held instead of oppressed. To be *seen*, not surveilled. Until it is uprooted from its present positioning in the eyes of the law, child neglect will continue to operate as a legal construct that gaslights and punishes parents in poverty and hampers the *true* protection of children and their welfare.

178 *See, e.g.*, ROBERTS, *supra* note 2.

"WE'RE NOT GIVING THIS CHILD BACK TO LESBIANS": AN EXAMINATION OF LGBTQ+ PARENTS' LOSS OF CHILDREN TO THE FAMILY REGULATION SYSTEM

GRACE MCGOWAN*

INTRODUCTION

People often associate LGBTQ+[1] 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[2] 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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1 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.

2 *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."[3] 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.[4] 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.[5] 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.[6] 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.[7] 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.[8]

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

3 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).

4 *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 ($p < 0.001$).").

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

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

7 See discussion *infra* Part II.

8 *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.[9] 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.[10] The family regulation system's culture of surveillance and fear has been well documented.[11] 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.[12] Moreover, once a family becomes involved in the family regulation system, the ordeal can last from months to years.[13] 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.[14] Even if a child is reunified with their parents, the trauma for both the child and their parents is "often irreversible."[15] 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; and [the] failure to treat chosen family as relatives and kin, which carries special meaning in child welfare placement decisions."[16]

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

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).

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.[20] Some scholarly articles have begun raising awareness about LGBTQ+ families and their interactions with the family regulation system,[21] as well as the intersectionality between marginalized identities and family regulation.[22] 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.[23] Bisexual, transgender, and nonbinary parents are particularly underrepresented in existing literature on LGBTQ+ parents generally.[24] 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.[25] 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?[26] 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,[27] 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.[28]

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.[29] On the contrary, the data shows that a disproportionate number of LGBTQ+ families are non-white and have low socioeconomic status.[30] 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."[31] 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=IwAR3UVA4VDILiZiAFsBx_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."[32]

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.[33] 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 crimiminality [sic], or all three."[34] Thus, LGBTQ+ parents lived in secret, hidden by "a heritage of persecution," [35] which included punishment and oppression by "employers, police, military, government, family, and friends."[36] "[T]here was no sense of [LGBTQ+] community as exists today."[37] 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.[38]

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.[39]

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."[40] 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.[41] 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.[42] 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.[43]

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.[44] Many married LGBTQ+ people came out publicly, divorced their spouses, and sought to maintain custody of children from heterosexual relationships.[45] This was not an easy path. Judges often assumed living with a LGBTQ+ parent was not in a child's best interests.[46] 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 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.").

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).[47] 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."[48] 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.[49]

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.[50] In 1982, Wisconsin became the first state to outlaw discrimination based on sexual orientation.[51] And in 1996, Hawaii became the first state to recognize the same privileges for LGBTQ+ couples as heterosexual married couples.[52]

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

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://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.[53] 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.[54] "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."[55]

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.[56] 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.[57] 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.[58] 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.[59] Most recently, in December 2022, President Biden signed the Respect for Marriage Act into law.[60] This Act prevents states from refusing to recognize out-of-state marriages based on sex,[61] and acknowledges the validity of any marriage between two consenting individuals at the federal level.[62]

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."[63] According to a 2019 study, 29% of LGBT people reported that they were raising children.[64] "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."[65]

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.[66] 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.[67] "Most children today who are being raised by a same-sex couple were conceived in a different-sex relationship."[68] Census data also shows that "same-sex couples are four times more likely than opposite-sex couples to have adopted children or stepchildren."[69] 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.[70] Moreover, as of 2021, 41% of all LGBTQ+ couples that live together are unmarried.[71] 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

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.[72]

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."[73] 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."[74]

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://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.[75] 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."[76] In 2023, a record 510 anti-LGBTQ+ bills were introduced in state legislatures.[77] This is nearly three times as many anti-LGBTQ+ bills as were introduced 2022.[78] 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.[79]

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.[80] 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.[81] 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.[82]

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."[83] Indeed, the plaintiffs involved in marriage equality litigation "were disproportionately white, male, and raising adoptive children."[84] This set up a "direct juxtaposition" between the families involved in marriage equality litigation and "the families of children in the foster care system."[85] 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.[86] 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.[87] Moreover, one group is the face of the movement for LGBTQ+ parents' rights while the other remains largely invisible.

While existing studies are limited,[88] data shows that LGBTQ+ people are more likely to live in poverty,[89] are more likely to be people of color,[90] and are more likely to experience other risk factors associated with state intervention, such as homelessness.[91] 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."[92]

The data is limited, but the evidence shows that LGBTQ+ people are significantly more likely to live in poverty than straight people.[93] Out of all LGBTQ+ people, transgender people and bisexual women have the highest likelihood of living in poverty.[94] 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."[95]

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,[96] and LGBTQ+ people of color are more likely to live in poverty than LGBTQ+ white people.[97] 31.6% of same-sex couples are interracial, as compared to 18.4% of opposite-sex couples.[98] 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.[99] 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.[100] 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.[101] Black women are more likely to lose custody of their children as compared to other women and less likely to achieve reunification.[102]

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

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.[103] 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."[104] 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.[105] 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.[106]

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."[107] Beyond dispelling myths about LGBTQ+ parenthood, this data informs the intersectional approach that advocates and researchers should take in understanding

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.[108] Every state recognizes biological parents and adoptive parents as legal parents.[109] 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.[110] 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.[111] 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.[112] The fact that LGBTQ+ parents are more likely to live in poverty[113] 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://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.[114] 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.[115] 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.[116]

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.[117] In light of American jurisprudence on LGBTQ+ parenting and the "best-interests" of the child,[118] 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://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 an 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,[119] 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.[120]

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.[121] Similar explicit protections for LGBTQ+ parents in private custody are emerging in some progressive states.[122] Such protections prevent judges from explicitly finding that a parent's sexual orientation or gender identity is not in the child's

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.[123] 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.[124]

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.[125] 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.[126] Also, *Obergefell* does not afford equal dignity to those in nonmarital partnerships.[127] Moreover, modern parent doctrines are incredibly complicated and vary by state, even without the added layer of differing LGBTQ+ parenthood treatment.[128]

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.[129] 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.[130] 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.[131] Many LGBTQ+ parents came out in the wake of the liberation movements of the 1970s and 1980s.[132] During that time, judges did not shy away from overt discrimination against these LGBTQ+ parents.[133] 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.[134] 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."[135] 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.[136] 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.[137] 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.[138]

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.[139] 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."[140] 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.[141] 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.[142] 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.[143] 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.[144] 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.[145] 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.[146] 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].

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 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).

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.[147]

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.[148] 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.[149] However, there are known racial disparities in reunification outcomes, and "African American children are

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."[150]

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.[151] 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.[152]

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.[153] 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.[154] 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.[155] 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.[156] 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.[157] 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.[158] 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."[159]

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.[160] 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.[161] The federal government became formally involved with the passage of the Child Abuse Prevention and Treatment Act of 1974.[162] 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.[163] 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.[164] Even in a privatized system, the state retains ultimate authority and responsibility for cases.[165] However, states like Kansas and Florida assert that they fulfill that obligation solely through "administrative oversight, quality assurance, and monitoring."[166] This does not mean that the state reviews each case or is involved in the day-to-day operations of these contracting agencies.[167] Rather, "contract monitors from the state or county monitor large numbers of cases and/or evaluate overall contractor performance."[168] 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.[169]

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."[170] Sixteen states have "no explicit protections against discrimination in foster care based on sexual orientation or gender identity."[171] Six states have a "statute, regulation, and/or agency policy [that] prohibits discrimination in foster care based on sexual orientation only."[172] 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://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://perma.cc/8GS6-97W5].

171 *Id.*

172 *Id.*

care based on sexual orientation and gender identity."[173] These categories overlap; six states with a nondiscrimination statute, regulation, or policy also have an exemption for contractors' well-founded religious beliefs.[174] 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.[175]

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.[176]

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.[177] Paxton and other state government officials wanted religiously affiliated contractors to continue discriminating

173 *Id.*

174 *Id.*

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

176 *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).

177 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.[178] 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,"[179] and likewise finding that the actions taken by HHS Secretary Becerra since Texas's last lawsuit are "unripe."[180]

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.[181] 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."[182] 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.[183] However, no actions have been taken by HHS to enforce the new guidance issued by Becerra.[184] Thus, the court held that these issues were not ripe for adjudication.[185] 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

178 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].

179 Texas v. Becerra, No. 3:22-cv-00419, at 8.

180 *Id.* at 18.

181 *See* Texas v. Azar, 476 F. Supp. 3d 570 (S.D. Tex. 2020).

182 *Id.* at 580.

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

184 *Id.* at 14–15.

185 *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.[186] 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.[187] 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.[188]

In September 2023, the District Court for South Carolina issued a summary judgment in favor of the State.[189] 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).[190] 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."[191] 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).[192] Thus, the court rejected plaintiff's Equal Protection Clause and Establishment Clause claims.[193]

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).[194] 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.[195] 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.[196] The District Court sided with Philadelphia, and the Third Circuit affirmed.[197] 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.[198] 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.[199] 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."[200]

LGBTQ+ activists widely view *Fulton* as a loss, although its impact and scope are limited.[201] 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.[202] 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.[203] Gottlieb calls for a the purposes of foster care and the needs of foster children to be centered in *Fulton* and broader discussions.[204]

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.[205]

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."[206] 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.[207] 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."[208] 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."[209] 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."[210]

While the movement for abolition of the family regulation system is a "decentralized, collectivist project" that can feel "opaque,"[211] 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."[212] 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."[213]

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."[214] 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."[215]

Proposed abolitionist reforms include mobilization of mutual aid,[216] moving from government control to government support,[217] transforming the conditions that lead to harm,[218] centering scientific reasoning in our understandings of family welfare (particularly as it relates to substance use),[219] and repealing laws like the Adoption and Safe Families Act (ASFA).[220] 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.[221]

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.[222] Some with pro-abolitionist ideologies have been censored or received professional or academic discipline, ostensibly for their abolitionist views.[223]

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."[224] 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."[225] 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.[226]

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.[227]

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.[228] 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.[229]

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.[230]

The main issue contributing to this indeterminacy and discretion is the lack of precise definitions for neglect and abuse.[231] Existing categories are "simply too broad" and do not distinguish between different severity levels of abuse or neglect.[232] 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."[233]

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.[234] 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."[235] 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,[236] 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.[237] 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.[238] 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*, CHILDTRENDS (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.[239]

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.[240] 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."[241] 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,[242] 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.[243] 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

242 *See* discussion *infra* Part III.C.

243 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.[244] 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.[245] While the Senate passed S5402 in 2023, in January 2024, the bill died in the Assembly and returned to the Senate.[246]

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.[247] 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.[248] 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.[249] 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.[250] These services can help parents with childcare needs and connect them with resources

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

245 *Id.*

246 *Id.*

247 *See* discussion *supra* Sections I.D, I.E.

248 *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).

249 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].

250 *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.[251] 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.[252] 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.[253]

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[254] 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."[255] 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."[256] 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.[257]

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."[258] 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.[259] 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."[260]

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.[261] 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."[262] 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."[263] 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.[264] 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.[265]

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,[266] especially in light of backlash against recent judicial decisions regarding federal funding for adoption and foster programs.[267]

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

"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."[269] 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.[270] 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.[271] Second, existing data focuses on children in foster care, not on their parents. The Department of Health and Human Services

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).[272] 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.[273] These are the only factors collected by the government at a national level; statistics on LGBTQ+ youth in the system come from outside studies.[274] 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.[275] 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 someone is requesting their own records).

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*.[276] 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.[277] 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.[278] The research recommendations did not include anything about LGBTQ+ parents specifically,[279] 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."[280]

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

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_reportfinal1_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://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[281] that would have required states to collect and report data on LGBTQ+ youth, foster parents, adoptive parents, and legal guardians.[282] 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."[283] 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.'"[284] Finally, the Trump administration fully eliminated all of the 2016 rule's requirements in 2020.[285]

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,[286] and transgender parents are especially vulnerable in the family regulation system.[287]

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.[288] 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.[289] 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.[290] 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.[291] 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.[292] Research is emerging on parents who lose custody of their children after supporting that child's transgender or gender-nonconforming identity.[293] 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."[294] 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 the 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

292 *Id.*

293 *See* Katherine A. Kuvalanka 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).

294 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?"[295] Transformational change, guided by abolitionist principles and frameworks, is needed to reimagine family dignity in the United States.

295 *See* Mack, *supra* note 215, at 807.