

Fractured Families: LGBTQ People and the Family Regulation System

Courtney G. Joslin* & Catherine Sakimura**

In February 2022, the Texas Governor and the Texas Attorney General declared that parents who provide gender-affirming care to their children should be investigated for child abuse. These declarations expressly authorize the surveillance of, intervention in, and possible destruction of LGBTQ families. Discussions of these developments suggest that this kind of regulation of LGBTQ families is new or unusual.

Unfortunately, this is far from the reality. LGBTQ families—families who are disproportionately families of color, Native American families, and families with disabilities—are overrepresented in the family regulation system. But these families and their experiences remain largely hidden from view. This elision is surprising. There is a robust body of scholarship exploring legal developments impacting LGBTQ families in family law and adoption proceedings. There is also a robust body of scholarship exploring racism and other biases in the family regulation system. Almost no attention, however, has been paid to the intersection of these issues—the experiences of adults, especially adults of color, who are LGBTQ and/or supportive of their LGBTQ children and who are caught up in the family regulation system.

DOI:<https://doi.org/10.15779/Z38154DQ2G>

Copyright © 2022 Courtney G. Joslin and Catherine Sakimura

* Martin Luther King Jr. Professor of Law, UC Davis School of Law.

** Executive Director, Legal Services for Children; formerly Deputy Director & Family Law Director, National Center for Lesbian Rights. This piece is grows out of remarks we gave at the *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being* Conference held at Columbia Law School and hosted by the Columbia Journal of Race and Law. We thank the conference participants as well as the students and staff who worked on the conference; Dorothy Roberts for her powerful, insightful, and relentless work on these issues; and Nancy Polikoff and Jane Spinak for organizing the conference.

This Essay seeks to raise awareness about these LGBTQ families, to integrate them into the ongoing conversation about the future of the family regulation system, to identify ways that their experiences are similar to those of other families of origin, and to center some unique challenges they experience. This Essay closes by proposing ways to transform the family regulation system to reduce the unnecessary regulation and separation of families, including but not limited to LGBTQ families.

Introduction	79
I. LGBTQ Parent Families—An Overview	84
A. Demographics.....	84
B. Legal Developments	88
II. LGBTQ People and the Family Regulation System	91
A. Bias, Harm, and the Family Regulation System.....	91
B. LGBTQ Parents	95
C. Affirming Parents of LGBTQ Children	101
Concluding Thoughts and Next Steps.....	104

INTRODUCTION

On February 18, 2022, Texas Attorney General Ken Paxton issued an opinion declaring that any parent who “facilitate[d]” the provision gender-affirming care for their child “could be engaged in child abuse.”¹ The opinion further instructed anyone who believed such conduct was occurring to report the behavior to appropriate state officials.² Within days, Texas Governor Greg Abbott directed the Texas Department of Family and Protective Services (DFPS) to conduct “prompt and thorough investigation[s] of any reported instances” of conduct in violation of the opinion.³

Implementation of these directives was swift. On February 24, 2022, Jane Doe—a parent of a transgender child and an employee of DFPS—was “informed that her family would be investigated in accordance with Governor Abbott’s letter to determine if Jane Doe and [her husband] John Doe had committed [child] abuse by affirming their transgender daughter’s identity and obtaining the medically necessary health care she needs.”⁴

1. Tex. Attorney General Op. No. KP-0401, 1, 12 (Feb. 18, 2022) [hereinafter *Tex. AG Op.*]. Previously the legislature considered, but did not enact, proposed legislation that would have amended the definition of “child abuse” to include the provision of certain types of gender affirming care. Tex. S.B. 1646, 87th Leg., R.S. (2021).

2. *Id.* at 1, 12.

3. Letter from Governor Greg Abbott to the Honorable Jaime Masters (Feb. 22, 2022) [hereinafter *Abbott Letter*].

4. See, e.g., Plaintiffs’ Original Petition, *Doe v. Abbott* (filed March 1, 2022) [hereinafter *Doe v. Abbott Petition*].

The potential consequences for Jane Doe’s family of being caught up in the child welfare system—what we call the “family regulation system”⁵—are devastating. Even limited interactions with the family regulation system can inflict a range of harms. This system—made up of a web of “public, private, and faith-based agencies and institutions, courts,” and state officials—authorizes individuals “to surveil and intervene in families.”⁶ In many cases, this system literally destroys the child’s family of origin by severing not just the physical, but also the legal, relationship between the child and their parents.

Even where that is not the end result, the surveillance itself inflicts harm and trauma.⁷ It undermines the family’s sense of security and disrupts how the family functions; it subjects family members to constant worry and anxiety.⁸ It can also impede parents’ ability to care for their children. Parents may be reluctant to seek needed care, support, or resources for their children out of fear that the providers may report them to family regulation officials. This was the experience of one parent of a transgender young person in Texas. She spoke of her fear that taking her child to receive necessary medical care unrelated to her child’s gender identity might result in them being reported to family regulation authorities.⁹ The parent was worried because doctors are mandatory reporters—people who are required by law to contact family regulation officials if they believe a child is being abused or neglected.¹⁰ As a result of recent developments, any time a Texas family with a transgender child seeks any care for their child, they are being forced to choose between obtaining what they believe to be necessary medical attention, and risking intervention by the family regulation system. This places them—like other targeted families—in an impossible dilemma. They “are fearful of the consequences of following the recommendations of their [children’s] medical providers and equally fearful of the effect not following those recommendations will have on their children’s health.”¹¹

The surveillance may be just the beginning. If state officials believe the parent is engaging in child abuse or neglect, the child can be involuntarily

5. See, e.g., 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 [replacement] terminology . . . *family regulation system* . . . [better] reflects the pervasive impact legally-constructed agencies and courts have on every aspect of the families they touch.” (footnotes omitted)).

6. *Id.* at 433.

7. See, e.g., Rachel Blustain & Nora McCarthy, *The Harmful Effects of New York City’s Over-Surveillance*, THE IMPRINT (Oct. 21, 2019).

8. See, e.g., S. Lisa Washington, *Weaponizing Fear*, __ YALE L.J. FORUM __ (forthcoming 2022) (reporting that “[o]ne of the major findings of the [2021 RISE] study [of system-involved families] is that family regulation-involved parents live in fear”).

9. See, e.g., *When Texas Went After Transgender Care, Part 2*, N.Y. TIMES, THE DAILY (Apr. 21, 2022).

10. TEX. FAM. CODE ANN. § 261.101(b) & (c).

11. *In re Abbott*, 645 S.W.3d 276, 285 (Tex. 2022) (Lehrmann, J., concurring).

removed from the custody of the parents. “When a child is removed from his home, it upsets all aspects of that child’s life.”¹² It abruptly cuts the child off from their parents, their siblings, and other family members. Often the child is also removed from their school, separating them from other supportive adults and their friends. For those children who are then placed in foster care, this placement may be in an unfamiliar setting, with unfamiliar caretakers. Unsurprisingly, placement in foster care has “been shown to negatively impact a child’s ability to form healthy attachments.”¹³ Once in this unfamiliar setting, children experience a much greater likelihood of abuse in foster care than in their homes of origin.¹⁴ Thus, contrary to the purported goal of promoting children’s welfare, removing children from their families of origin based on a purported likelihood of neglect places children at *greater risk* of abuse.¹⁵ In some instances, the child may never be returned to their parents. Even if the removal is a temporary one, it can result in the infliction of life-long, “often irreversible” trauma on the child and the parents.¹⁶

All of this is *in addition to* some unique harms that transgender children face when they enter the family regulation system. For one, they may be abruptly prevented from accessing medically necessary transition-related health care that they previously had been receiving. The consequences of this denial can be serious and irreversible. “[A] solid body of reputable evidence shows that gender-affirming care can be lifesaving and significantly improves mental health and reduces suicide attempts.”¹⁷ Based on this evidence, the American Academy of Pediatrics has “long supported gender-affirming care for transgender youth.”¹⁸ In the wake of these developments in Texas, numerous professional organizations condemned attempts to treat the provision of medically necessary

12. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211–12 (2016). See also Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 533 (2019) (“Removed children may also be alienated from their communities . . . compounding feelings of loss and isolation.”).

13. *Id.* See also Am. Acad. of Pediatrics, Comm. on Early Childhood, Adoption, and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145 (2000) (“[E]motional and cognitive disruptions in the early lives of children have the potential to impair brain development.”).

14. Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 9 (2019) (“[C]hildren placed in stranger foster care face higher risks of physical abuse than other children, in addition to emotional and medical neglect.” (footnote omitted)).

15. *Id.*

16. Jennings, *supra* note 14, at 9.

17. Susan D. Boulware, M.D., et al., *Biased Science: The Texas and Alabama Measures Criminalizing Medical Treatment for Transgender Children and Adolescents Rely on Inaccurate and Misleading Scientific Claims* 4 (April 28, 2022) [hereinafter Boulware, et al., *Biased Science*].

18. AAP, *Texas Pediatric Society Oppose Actions in Texas Threatening Health of Transgender Youth*, Am. Acad. Pediatrics (Feb. 24, 2022), <https://www.aap.org/en/news-room/news-releases/aap/2022/aap-texas-pediatric-society-oppose-actions-in-texas-threatening-health-of-transgender-youth/> [https://perma.cc/5ES6-RWQU].

transition-related care as child abuse. For example, the National Association of Social Workers issued a statement declaring that the actions of the Texas Governor and Attorney General “pose an imminent danger to transgender youth and their families.”¹⁹ Unfortunately, as a result of increasing political attacks on transgender people,²⁰ this care is increasingly difficult for young people to access. Amid this political battle, the only clinic in Texas that had been providing gender-affirming care to transgender young people stopped accepting new patients in November 2021.²¹

Once they have entered the family regulation system, transgender young people may also experience anti-transgender harassment and discrimination from a wide variety of people, ranging from case workers to foster parents.²² In some cases, they may be prevented from identifying and presenting in ways that are consistent with their gender identity. “These forms of gender identity subordination can severely damage a transgender or gender non-conforming youth’s sense of self, and result in several negative outcomes including depression and suicide.”²³

19. *NASW Condemns Efforts to Redefine Child Abuse to Include Gender-Affirming Care*, Nat’l Ass’n Soc. Workers (Feb. 25, 2022), <https://www.socialworkers.org/News/News-Releases/ID/2406/NASW-Condemns-Efforts-to-Redefine-Child-Abuse-to-Include-Gender-Affirming-Care> [<https://perma.cc/HVB5-ZBDC>].

20. *See, e.g.*, Matt Lavietes & Elliott Ramos, *Nearly 240 anti-LGBTQ bills filed in 2022 so far, most of them targeting trans people*, NBC NEWS (Mar. 20, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418> [<https://perma.cc/G3JG-8BS2>].

Attacks on health care officials involved in providing care for transgender young people have increased in recent months. For example, in August 2022, Boston Children’s Hospital was the target of a bomb threat in the wake of the spread of “false information” regarding the hospital’s care for transgender youth. Rick Sobey, *Boston Children’s Hospital Is Target of Bomb Threat After ‘False Information’ Spreads About Transgender Care*, BOSTON HERALD (Aug. 31, 2022).

21. Azeen Ghorayshi, *Texas Youth Gender Clinic Closed Last Year Under Political Pressure*, N.Y. TIMES (Mar. 8, 2022).

On May 12, 2022, a Texas trial court enjoined the hospital and its officials from “enforcing any policy . . . that restricts or prohibits gender-affirming endocrinology care . . . to new or established patients due to the patient’s gender identity or gender dysphoria”). *In re Children’s Med. Ctr. of Dallas*, No. 05-22-00459-CV, 2022 WL 1566139, at *2 (Tex. App. May 18, 2022) (Schenck, J., dissenting). Six days later, the Texas Court of Appeals denied the hospital’s petition for writ of mandamus and emergency motion for temporary relief. *Id.* at *1.

22. *Child Welfare*, Youth.gov (“Unfortunately, a high percentage of LGBTQ+ youth continue to experience verbal harassment or physical violence after they are placed in out-of-home care due to conflicts related to their sexual orientation or gender identity.” (citation omitted)).

23. Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2412–13 (2019) [hereinafter Woods, *LGBTQ Child Welfare*].

Given the stakes, much media attention rightly has been directed on these events in Texas,²⁴ as well as on an even more recently enacted law in Louisiana.²⁵ To date, however, the conversation about these recent developments suggests that this kind of government surveillance of and interventions in lesbian, gay, bisexual, transgender, and queer (LGBTQ)²⁶ families are unprecedented, or at least unusual. That perception, unfortunately, is misleading.

In reality, many LGBTQ families—including LGBTQ families inside and outside the state of Texas—have been swept up in the family regulation system.²⁷ Indeed, LGBTQ people and their families are disproportionately represented in this system. Despite these statistics, these families and their experiences have been and continue to be largely hidden from view. In some respects, this elision is surprising. There is a robust body of scholarship exploring legal developments impacting LGBTQ families in family law and adoption proceedings.²⁸ There is also a robust body of scholarship exploring racism and other biases in the family regulation system.²⁹ To date, however, almost no attention has been paid to the

24. See, e.g., *Texas Supreme Court Oks State Child Abuse Inquiries into the Families of Trans Kids*, NPR (May 13, 2022); J. David Goodman, *How Medical Care for Transgender Youth Became ‘Child Abuse’ in Texas*, N.Y. TIMES (March 11, 2022); Anne Branigin, *In Texas, the Nation’s Largest Children’s Hospital is Halting Gender-Affirming Care for Trans Youth*, WASH. POST (March 8, 2022).

25. The Alabama provision, signed into law on April 7, 2022, allows for the imposition of criminal penalties on anyone providing certain gender-affirming care to a person under age 19. Ala. Legis. 2022-289 (S.B. 184), codified at ALA. CODE § 26-26-2. While this law is not specific to the family regulation system, it could be relied upon to support the position that the provision of such care by a parent is child abuse.

On May 13, 2022, a federal district court enjoined most parts of this Act. *Eknas-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889 (M.D. Ala. May 13, 2022).

26. Some people use more inclusive acronyms to refer to the LGBTQ population. For example, some people use the acronym LGBTQIA+, to be inclusive of intersex people, asexual people, and nonbinary people. Here, however, we made a deliberate choice to use the acronym “LGBTQ” because much of this Essay reports and relies on the finding of empirical research which is limited to studying the experiences of lesbian, gay, bisexual, transgender, and queer people and their families; the research does not purport to report findings on intersex people or non-binary people. Accordingly, in the interest of being accurate, we use the acronym that we think most accurately reflects the data upon which we rely.

27. Two notable exceptions are important pieces written by Professors Nancy Polikoff and S. Lisa Washington. See, e.g., Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 FAM. L.Q. 87 (2018) [hereinafter Polikoff, *Neglected Lesbian Mothers*]; Washington, *supra* note 8.

28. See, e.g., 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).

29. See, e.g., DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) [hereinafter ROBERTS, *TORN APART*]; DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL’Y 63, 71 (1999); Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision*

intersection of these issues—the experiences of families with LGBTQ parents and/or parents who are supportive of their LGBTQ youth, especially parents of color, who are swept up in the family regulation system.³⁰

This Essay seeks to raise awareness about these LGBTQ families—families who are disproportionately non-White, lower income, and include people with disabilities, to integrate them into the ongoing conversation about the future of the family regulation system,³¹ to identify ways that their experiences are similar to those of other families of origin, and to center some unique challenges that they experience. This Essay closes by proposing ways to transform the family regulation system to reduce the unnecessary regulation and separation of families, including but not limited to LGBTQ families.

I.

LGBTQ PARENT FAMILIES—AN OVERVIEW

A. Demographics

In recent years, scholars have drawn attention to the disproportionate racial impact of the family regulation system.³² As Professor Dorothy Roberts shows, “Black families are the most likely of any group to be disrupted by child protection authorities.”³³ Part of the reason little attention has been paid to LGBTQ families swept up in this system is due to a pervasive stereotype that LGBTQ people generally, and LGBTQ parents specifically, are predominantly White and middle class.³⁴

in *Child Welfare*, 33 CHILD. & YOUTH SERVICES REV. 1630, 1630-37 (2011); 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)).

30. *But see* Polikoff, *Neglected Lesbian Mothers*, *supra* note 27.

31. For a recent symposium dedicated to exploring these questions, see *Strengthening Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, hosted by the COLUMBIA JOURNAL OF RACE AND LAW.

32. *See, e.g.*, ROBERTS, SHATTERED BONDS, *supra* note 29 (documenting how the child welfare system disproportionately targets and shatters black families).

33. *Id.* at 8. *See also* Shani King, *The Family Law Canon in A (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 603-04 (2011).

34. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (asserting that “homosexual[s]” “have high disposable income”); *see also* Catherine P. Sakimura, *Beyond the Myth of Affluence: The Intersection of LGBTQ Family Law and Poverty*, 33 J. AM. ACAD. MATRIM. LAW. 137 (2020) (exploring and dispelling the stereotype); Nathan McDermott, *The Myth of Gay Affluence*, THE ATLANTIC (Mar. 21, 2014) (discussing the persistent “belief that LGBT Americans tend to live it up in classy urban neighborhoods”); Kyle C. Velte, *Straightwashing the Census*, 61 B.C. L. REV. 69, 91 (2020) (noting that “the typical portrayal of the LGBT community in the mass media predominantly through imagery of gay, white, professional men with no children.”).

While the existing data is limited,³⁵ the available empirical evidence shows this stereotype is inaccurate.³⁶ With respect to income levels, more than a decade of research reveals that “LGBTQ people in the United States experience poverty at higher rates compared to cisgender heterosexual people.”³⁷ For example, a 2019 Report based on findings from the Behavioral Risk Factor Surveillance System (BRFSS) found that the poverty rate among LGBTQ people is 21.6%; the poverty rate among non-LGBTQ people is significantly lower—15.7%.³⁸ Among LGBTQ people, transgender people and bisexual women are the most economically vulnerable.³⁹ This same study found that almost one-third of transgender people and bisexual women live in poverty.⁴⁰ More recently, findings from the first study to use “nationally representative data on transgender and other gender diverse people from the United States” confirmed the economic vulnerability of these subpopulations, finding that “non-cisgender individuals

35. The data is limited in part due to the fact that the federal government has only recently started collecting data on the sexual orientation and gender identity of respondents and, even today, does so only in limited ways. *See, e.g.*, Velte, *supra* note 34, at 88 (discussing federal governmental surveys that capture information about LGBTQ people). *See also* Carol Morello, *Census to Change the Way It Counts Gay Married Couples*, WASH. POST (May 26, 2014), https://www.washingtonpost.com/local/Census-to-change-the-way-it-counts-gaymarried-couples/2014/05/26/e6c6edd0-e2a3-11e3-9743-bb9b59cde7b9_story.html?noredirect=on&utm_term=.e40c6fb8d050 [https://perma.cc/99EH-8YNS].

36. Bianca D.M. Wilson, Alexandra-Grissell Gomez, Madin Sadat, Soon Kyu Choi, & M.V. Lee Badgett, *Pathways into Poverty: Lived Experiences among LGBTQ People*, THE WILLIAMS INSTITUTE (2020) [hereinafter Wilson, et al., *Pathways into Poverty*]; M.V. Lee Badgett, Laura E. Durso & Alyssa Schneebaum, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, THE WILLIAMS INSTITUTE (2013) [hereinafter Badgett, et al., *New Patterns of Poverty*]; National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2015).

37. Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 1. *See also* *The Complexity of LGBT Poverty in the United States*, Fast Focus Policy Brief No. 53-2021 (June 2021) (“People who identify as lesbian, gay, bisexual, or transgender (LGBT) have higher rates of poverty compared to cisgender (cis) heterosexual people, about 22% to 16% respectively.”), <https://www.irp.wisc.edu/resource/the-complexity-of-lgbt-poverty-in-the-united-states/> [https://perma.cc/N7U7-5H86]; Velte, *supra* note 34, at 94 (“Both as couples and individually, LGBT people are more vulnerable to poverty.” (citation omitted)).

38. M.V. Lee Badgett, Soon Kyu Choi & Bianca D.M. Wilson, *LGBT Poverty in the United States: A Study of Differences Between Sexual Orientation and Gender Identity Groups*, THE WILLIAMS INSTITUTE 1 (2019) [hereinafter Badgett, et al., *LGBT Poverty*]. This study is based on data collected through the Behavioral Risk Factor Surveillance System (BRFSS), which is funded by the Centers for Disease Control (CDC). “Since 2014, the CDC has allowed states to include an optional module with standardized SOGI questions in the BRFSS survey.” The report used findings from the “35 states that included the SOGI module at least once.” *Id.* At 30. Those 35 states are diverse across a variety of metrics.

39. Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 1.

40. Badgett, et al., *LGBT Poverty*, *supra* note 38, at 1 (noting that transgender people have a poverty rate of 29.4%). “Poverty” for purposes of this study was defined to refer to a person whose “family income falls below the official federal poverty threshold.” *Id.* at 6.

have lower employment rates, lower household incomes, higher rates of poverty, greater public assistance use, and increased likelihood of food insecurity.”⁴¹

As a result of structural racism, people who are living in poverty in the United States are disproportionately likely to be people of color.⁴² “[I]t is well established that being from an ethnic/racial minority group makes it more likely that a family will experience fewer neighborhood resources, lower school quality, fewer employment opportunities, mental and physical health issues, and a lower likelihood of home ownership. All of these factors tend to contribute to higher rates of poverty among racial and ethnic minority groups.”⁴³

Consistent with these general patterns, LGBTQ people—again people who are more likely to live in poverty as compared to non-LGBTQ people—are also more likely to be people of color, as compared to cisgender straight men and women.⁴⁴ Moreover, within the LGBTQ community, LGBTQ people of color are more likely to live in poverty than White LGBTQ people.⁴⁵ The rate of poverty among White LGBTQ people is 15.4%. By contrast, the poverty rate among Black LGBTQ people is 30.8%, the rate among Native American or Alaska Native LGBTQ people is 32.4%, and the rate among Latinx LGBTQ people is even higher—37.3%.⁴⁶ A more recent study of transgender and other gender nonconforming people found “consistent evidence that non-cisgender Black individuals fare significantly worse compared to otherwise similar non-cisgender white individuals with respect to economic outcomes.”⁴⁷ LGBTQ people are also more likely than non-LGBTQ people to have a disability.⁴⁸ Here too, consistent with patterns among non-LGBTQ people, LGBTQ people with

41. Christopher S. Carpenter, Maxine J. Lee & Laura Lettuno, *Economic Outcomes for Transgender People and Other Gender Minorities in the United States: First estimates from a nationally representative sample*, SOUTH. ECON. J. 1 (2022).

42. See, e.g., Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation: How America’s Housing System Undermines Wealth Building in Communities of Color*, CENTER FOR AMERICAN PROGRESS (2019) (“For centuries, structural racism in the U.S. housing system has contributed to stark and persistent racial disparities in wealth and financial well-being, especially between Black and white households.”).

43. Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 18.

44. *Id.* at 21 (“[C]isgender straight men and women are more likely than LGBT people to be White.”). See also Sakimura, *supra* note 34, at 137–38, 153.

45. Race and poverty are highly correlated in the U.S. John Creamer, U.S. Census Bureau, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origins Groups* (Sept. 15, 2020). People of color are more likely to experience poverty. Cf. Linda Burton, et al., The Stanford Center of Poverty and Inequality, *Pathways: The Poverty and Inequality Report*, 9 (2017) (“In . . . 2015, one in four blacks and Native Americans, and one in five Hispanics, [we]re poor. This contrasts with one in ten whites and Asians.”).

46. Badgett, et al., *LGBT Poverty*, *supra* note 38, at 13. See also *id.* at 14 (“For nearly all SOGI groups, people of color had significantly higher poverty rates than White people.”).

47. Carpenter, et al., *supra* note 41, at 4.

48. Badgett, et al., *LGBT Poverty*, *supra* note 38, at 22 (“Disability status is also more common for LGBT people: 35.4% of lesbian and bisexual women and transgender people versus 24.3% for cisgender straight women, and 28.4% of gay and bisexual men and transgender people versus 19.5% for cisgender straight men.”).

disabilities are more likely to live in poverty than LGBTQ people without disabilities.⁴⁹

As a result of systemic discrimination, individually, each of these characteristics—being a person of color and having a disability—increases the likelihood that the person will live in poverty.⁵⁰ Being LGBTQ adds additional “catalysts” for economic strain. For example, some LGBTQ people begin adulthood living in poverty as a result of having been “kicked out of their family home or rejected by their family because of their parents’ anti-LGBT attitudes.”⁵¹ In addition, many experience “anti-LGBT bias in employment settings” that may impede their ability to accumulate wealth and achieve economic stability.⁵²

With respect to LGBTQ parents specifically, here too, the data belies the myth of affluence. LGBTQ people raising children are more likely than non-LGBTQ parents to be living in poverty.⁵³ For example, in 2013, “[c]hildren in same-sex couple households [we]re almost twice as likely to be poor as [compared to] married different-sex couple households.”⁵⁴ Overall, 24% of children being raised by same-sex couples live in poverty, as “compared to 14% of children being raised by different-sex couples.”⁵⁵ The high levels of poverty among LGBTQ parents is “perhaps not surprising given that LGBT[Q] parents and those in same-sex couples are more likely to have characteristics associated with a greater likelihood of being in poverty.”⁵⁶ LGBTQ parents are more likely to be female.⁵⁷ In addition, like LGBTQ people generally, LGBTQ parents are disproportionately people of color; indeed, “[a]bout 1 out of every 3 individuals in same-sex couples raising children are people of color.”⁵⁸

49. Karen I. Fredriksen-Goldsen, et al., *Disability Among Lesbian, Gay, and Bisexual Adults: Disparities in Prevalence and Risk*, AM. J. PUB. HEALTH 102 (2012); Movement Advancement Project, *LGBT People with Disabilities*.

50. See, e.g., Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 18.

51. *Id.*

52. *Id.*

53. Badgett, et al., *New Patterns of Poverty*, *supra* note 36, at 2 (“[C]hildren of LGB parents are especially vulnerable to poverty.”).

54. *Id.* at 2.

55. Gary Gates, WILLIAMS INST., *Demographics of Married and Unmarried Same-sex Couples: Analysis of the 2013 American Community Survey 1* (March 2015) [hereinafter Gates, *Same-sex Couples*].

56. Gary Gates, WILLIAMS INSTITUTE, *LGBT Parenting in the United States* (Feb. 2013).

57. Gates, *Same-sex Couples*, *supra* note 55, at 2 (“More than three-quarters of same-sex couples raising children under age 18 are female (77%).”).

58. Angeliki Kastanis & Bianca D.M. Wilson, WILLIAMS INST., *Race/Ethnicity, Gender and Socioeconomic Wellbeing of Individuals in Same-sex Couples*, 1 (2014). See also *id.* (“Racial/ethnic minority individuals in same-sex couples are more likely to have kids compared to White individuals in same-sex couples.”).

B. Legal Developments

While there are still important gaps in the law, the last several decades brought about considerable positive development regarding the treatment of LGBTQ parents *in family law proceedings*—that is, in legal proceedings such as child custody and visitation actions, child support actions, and dissolutions between parents or people claiming to be parents.⁵⁹

Historically, most LGBTQ parents were raising children who were born in the context of different-sex relationships.⁶⁰ In custody disputes between former different-sex partners, one of whom subsequently came out as LGBTQ, the LGBTQ parent frequently lost custody to the non-LGBTQ parent or even to another non-LGBTQ family member due to homophobia.⁶¹ Simply being raised by an LGBTQ parent, some courts reasoned, was harmful to a child. For example, in one infamous case, a lesbian mother lost custody to her mother (the child's grandmother). In explaining that decision, the Virginia Supreme Court wrote:

[L]iving daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the “social condemnation” attached to such an arrangement, which will inevitably afflict the child’s relationships with its “peers and with the community at large.”⁶²

Following decades of research consistently showing that children are not harmed by being raised by LGBTQ parents,⁶³ LGB parents in family law proceedings are now much less likely to lose custody to a non-LGB parent based on overt anti-LGB bias than they were in the past.⁶⁴ To be sure, though, implicit and unexpressed bias against LGB parents can still infect the process.⁶⁵ But,

59. Sometimes the disputes are between other family members. *See, e.g.*, Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families: Real and Imagined*, 90 *FORDHAM L. REV.* 2561 (2022).

60. *See, e.g.*, Dana Rudolf, *A Very Brief History of LGBTQ Parenting*, FAMILY EQUALITY BLOG (Oct 20, 2017), <https://www.familyequality.org/2017/10/20/a-very-brief-history-of-lgbtq-parenting/> [<https://perma.cc/7G35-RDG6>].

61. *See, e.g.*, Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFFALO L. REV.* 691 (1976). *See also* Developments in the Law, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 *HARV. L. REV.* 617, 626 (1989); COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW* § 1:1–1:17.

62. *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995).

63. *See, e.g.*, Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 *PEDIATRICS* 1, 7 (2010) (finding that adolescent children of lesbians were well-adjusted, and that they demonstrated “more competencies and fewer behavioral problems than their peers in the normative American population”); *see also* Abbie E. Goldberg, Nanette Gartrell & Gary J. Gates, *Research Report on LGB-Parent Families*, WILLIAMS INSTITUTE (July 2014); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 *HARV. C.R.-C.L. L. REV.* 81, 101 (2011).

64. *See, e.g.*, JOSLIN, MINTER & SAKIMURA, *supra* note 61, at § 1:8 (noting that today, the vast majority of states apply the “nexus” test).

65. *See, e.g.*, *In re Marriage of Black*, 392 P.3d 1041, 1047 (Wash. 2017) (reversing trial court decision to grant custody to father after mother entered a same-sex relationship where the trial court

again, the general trend with regard to LGB parents in family law proceedings has been in the direction of greater protection. The experience of transgender parents, however, departs from this progress story. Even today, transgender parents remain extremely vulnerable; they continue lose custody in all types of proceedings. For example, in 2007, a Washington state appellate court upheld an award of primary custody to the cisgender mother rather than to the transgender parent,⁶⁶ even though the Guardian ad Litem (GAL)⁶⁷ testified that the transgender parent was the “more nurturing and engaged parent” and, as a result, recommended “that the court designate the [transgender parent] as the primary residential parent.”⁶⁸ Even more troubling, some transgender parents have had their parental rights *terminated* solely because of their transgender status, or because they had transitioned.⁶⁹ For example, in 2007, a Kentucky appellate court upheld the termination of a transgender parent’s parental rights.⁷⁰ Although the decision stated that the parent’s transition was not “in itself, grounds for such termination,” its basis for upholding the trial court’s termination of the parent’s rights was nonetheless based on the parent’s transition.⁷¹ In the court’s words, the transgender parent’s “voluntary decision to undergo [gender confirmation surgery] was about doing what was good for [the parent] . . . and not about what was good for, or otherwise in the best interest of, the parties’ children.”⁷²

based its decision on the fact that the children had been raised in a religious environment that condemned homosexuality).

For explorations of some of the ways in which conscious and unconscious bias can seep into family law proceedings, see, for example, Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213 (2017) (arguing that “unconscious biases may influence a judge’s or custody evaluator’s perception of a parent’s behavior as defensive, passive, or impulsive based on racial or cultural stereotypes”); Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 883 (2000) (arguing that the best interests standard “invites bias of all types”).

66. See, e.g., *Magnuson v. Magnuson*, 170 P.3d 65, 67-68 (Wash. Ct. App. 2007) (upholding a grant of primary custody to the cisgender mother where the trial court based its decision on a concern that the transgender parent was less stable because she was transitioning).

67. In Washington, the court can appoint a GAL to “represent the best interests of a child or incapacitated person involved in a case in superior court.” *Guardian ad Litem (GAL) and Court Visitor*, Washington Courts, https://www.courts.wa.gov/committee/?fa=committee.home&committee_id=105 [https://perma.cc/JA93-TPYX].

68. *Id.* at 68 (Kulik, J., dissenting).

69. See, 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). See also generally Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593 (2019) (examining family law cases involving transgender parents).

70. *M.B.*, 236 S.W.3d at 38.

71. *Id.* at 37.

72. *Id.* at 37–38. In the past, courts used to apply similar reasoning in cases involving LGB parents. See, e.g., *Collins v. Collins*, 1988 WL 30173 (Tenn. Ct. App. 1988) (“While Mother’s homosexuality may be beyond her control, submitting to it and living with a person of the same sex in

A trend in the direction of greater protection is also evident with respect to planned LGBTQ-parent families. The law applicable to these planned LGBTQ-parent families has also evolved in important ways over the last several decades. Historically, non-biological, non-birth parents in these families were entirely unprotected under the law; they were considered legal strangers to their children.⁷³ As a result, they often had no right to maintain a relationship with their child in the event the parents ended their relationship or the biological parent died or became incapacitated.⁷⁴

While that result still persists for many families in some states today, the law increasingly provides ways of recognizing and protecting the parental status of an LGBTQ partner in such families.⁷⁵ For example, in recent years, many courts held that same-sex female spouses are the legal parents of children born during their marriages from the moment of birth, even in the absence of an adoption.⁷⁶ In addition, most states have doctrines or statutes that may protect the relationships between nonmarital, non-biological LGBTQ parents and their children.⁷⁷

a sexual relationship is not. Just as an alcoholic overcomes the habit and becomes a nondrinking, so this mother should attempt to dissolve her ‘alternative life style’ of homosexual living.”) (Tomlin, P.J., concurring).

Today, such reasoning likely would be viewed as impermissible sexual orientation discrimination. *See, e.g.,* McGriff v. McGriff, 99 P.3d 111, 113 (Idaho 2004) (“Sexual orientation, in and of itself, cannot be the basis for awarding or removing custody[.]”).

73. *See, e.g.,* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683 (2005) [hereinafter Joslin, *Legal Parentage*].

74. *See, e.g.,* Nancy S. v. Michele G., 228 Cal. App. 3d 831, 834 (Cal. Ct. App. 1991), *overruled by* Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005) (holding that former same-sex partner was not a parent and had “no right to an award of custody or visitation”); Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016) (holding that former same-sex partner was not a parent and, therefore, had no “standing to seek visitation rights”).

75. *See, e.g.,* NeJaime, *supra* note 28; Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014).

76. *See, e.g.,* Henderson v. Box, 947 F.3d 482, 487 (7th Cir. 2020) (“[A]fter *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages”); Boquet v. Boquet, 269 So.3d 895, 900 (La. Ct. App. 3d Cir. 2019), *writ denied*, 274 So.3d 1261 (La. 2019) (“[W]e must apply [the marital presumption] in such a manner that Brittany, the female spouse of a birth mother, has the same ‘constellation of benefits’ and obligations as those of a male spouse of the birth mother.”); McLaughlin v. Jones in and for County of Pima, 401 P.3d 492, 500 (2017), *cert. denied*, 138 S. Ct. 1165 (2018) (holding that the marital presumption must be applied equally to a female spouse). *But see* In Interest of A.E., 2017 WL 1535101 (Tex. App. Ct. 2017), *review denied*, (Sept. 28, 2018), *abrogation recognized in* Treto v. Treto, 2020 WL 373063 (Tex. App. Ct. 2020).

77. *See, e.g.,* Joslin, *Legal Parentage, supra* note 73. *See also* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, __ COLUM. L. REV. __ (forthcoming 2023) (reporting findings from an empirical study of cases applying functional parenthood doctrines) [hereinafter Joslin & NeJaime, *How Parenthood Functions*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4208364 [https://perma.cc/8DVW-CFW6].

In short, while there are still important gaps in the law, the last several decades brought about considerable positive evolution regarding the treatment of LGBTQ parents in family law proceedings. These critical advancements are due in part to sustained advocacy and attention directed at these areas by legal advocates and scholars.

Much less attention, however, has been paid to the historical and continuing challenges that LGBTQ parent families of origin face in the dual or parallel family law system⁷⁸—*the family regulation system*.⁷⁹ Here, it is typically *the state* rather than a family member that initiates the court involvement. Some of the challenges LGBTQ families of origin face in the family regulation system—including the failure to recognize same-sex partners as family members for purposes of placement and reunification—relate to the failure of courts to consistently apply the family law developments discussed above to cases arising in the family regulation system.⁸⁰ Other challenges are unique to the experiences of people and families in the family regulation system. The Parts that follow begin to fill this critical gap in knowledge and advocacy.

II.

LGBTQ PEOPLE AND THE FAMILY REGULATION SYSTEM

A. *Bias, Harm, and the Family Regulation System*

LGBTQ families in the family regulation system experience similar challenges and harmful outcomes that other families—families that are disproportionately Black and Native American families—experience.⁸¹ The vast majority of investigations of families and separation of families by the family regulation system are on grounds of alleged *neglect* or the likelihood of future

78. Cf. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1186 (2013) (noting that in the early 1960s, Jacobus tenBroek “argued that family law is implemented through ‘a dual system[.]’ . . . One system focused on . . . those who were economically self-sufficient [and another] parallel second system . . . imposed on those who sought public assistance.” (footnotes omitted)). See also, e.g., Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status Part I*, 16 STAN. L. REV. 257 (1964); Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status Part II*, 16 STAN. L. REV. 900 (1964).

79. While these family regulation or dependency cases are typically not called “family law cases,” they are absolutely about the family. These cases can start with the physical removal of the child from the home and from the custody of the child’s parents. And, in some cases, they result in the legal destruction of the family—termination of the legal parental rights of the child’s parents.

80. See, e.g., Khiara Bridges, *Family Law of the Poor* lecture, UC Davis School of Law, Oct. 20, 2021 (arguing that a separate body of family law applies to poor families). In many states, different statutes apply to dependency cases—that is cases in which the state has alleged that the child has been subjected to abuse or neglect. Often there is little overlap between lawyers who work on “family law” cases and those who work in the dependency space.

81. For outstanding discussions of these harms, see ROBERTS, SHATTERED BONDS, *supra* note 29; and ROBERTS, TORN APART, *supra* note 29.

neglect.⁸² (Cases alleging child *abuse* make up a small percentage of cases comparatively.⁸³) Child neglect, which again is the basis for most family regulation investigations, is a particularly vague standard. Among other things, states' broad definitions of "child neglect" commonly extend to include mere "risk" of neglect and failure to protect a child from neglect by another.⁸⁴ In addition, officials investigating neglect claims have a great deal of discretion.⁸⁵ Moreover, it is often difficult to separate allegations of neglect from the effects of poverty.⁸⁶ In evaluating whether a parent has been neglectful, case workers may consciously or unconsciously hold the parent up to a middle-class, White, cisgender ideal.⁸⁷ This bias accounts for much of the overrepresentation of low-income, non-White, LGBTQ people in the family regulation system.

As other scholars and advocates have documented, race and ethnicity feature prominently in the family regulation system.⁸⁸ Families of color are disproportionately represented in the system. This is particularly true for Black and Native American families,⁸⁹ who are overrepresented in the system generally

82. See, e.g., U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *How the child welfare system works* 5 (2020) ("Nearly three-quarters of all child maltreatment cases are related to some form of neglect[.]").

83. For example, in 2018, CPS investigations determined that "10.7 percent of victims suffered physical abuse [and] 7.0% of victims suffered sexual abuse." U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *Child maltreatment 2018: Summary of key findings*, CHILD WELFARE INFORMATION GATEWAY, 3 (2020).

84. See, e.g., Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 511–12 (2013).

85. Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 706–07 (1998) ("These [child protective service] workers make largely discretionary judgments about bad mothering and their underlying assumptions are, for the most part, unexamined and unchallenged. Conversations with workers reveal a deep bias about bad mothering based on race, class, and poverty." (footnotes omitted)).

86. Jennings, *supra* note 14, at 6 ("[T]he majority of families investigated by child protective services are scrutinized because of poverty-related neglect instead of abuse." (footnote omitted)). See also David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 13 (2016) (citing cases where single mothers of color became child welfare involved after their left their children alone to go to work or to apply for a job).

87. See, e.g., Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer Casa Programs*, 20 CUNY L. REV. 23, 47 (2016) ("Notions of pure, good, white motherhood were used to set the bar for what was deemed safe and appropriate parenting, and formed the basis for an expansion of the intrusion into the private family life of those whose parenthood did not conform to that ideal."); Washington, *supra* note 8, at 3 ("White, middle-class, heteronormative norms dictate the standard of child neglect. Those who deviate from the social norm are punished."). For scholarship exploring how gender non-conforming people are targeted in the criminal system, see, for example, Cynthia Godsoe, *Punishment as Protection*, 52 HOUSTON L. REV. 1317–28 (2015); Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1096–97 (2014).

88. See, e.g., Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare* 3–5 (2016).

89. See, e.g., *id.* See also Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 223–25 (2013) ("In 2013, African American children comprised only 13.9% of the overall population of children in the United States but represented nearly

and are more likely to experience more severe outcomes. Black and Native American children are more likely than White children to be removed from their families of origin.⁹⁰ Once removed from their families of origin, “[B]lack children suffer worse consequences—they remain in foster care longer, are moved from home to home more often, and receive less desirable placements than white children.”⁹¹ Across racial and ethnic groups, families that are low-income are also disproportionately represented in the system,⁹² as are parents with disabilities and their children.⁹³ Here too, these families are also more likely to experience worse outcomes.⁹⁴

Involvement in the family regulation system is harmful to the individual families, as well as to their communities.⁹⁵ Even limited interactions with the system can inflict a range of harms. In the words of Congress, the existing research demonstrates that “there is a profound effect on the child and family once a child is removed from [the] home, even for a short time.”⁹⁶ The trauma

double that percent in foster care at 26%. . . . Likewise, Native American children comprised 0.9% of all U.S. children in 2013, but represented double that in foster care at 2%.” (footnotes omitted).

For more in-depth discussions of the experiences of Native American children in the system, see, e.g., Theresa Rocha Beardall, J.D., Ph.D. & Frank Edwards, Ph.D., *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 536 (2021) (arguing “that family separation constitutes a *defining* and continuing feature of the relationship between the U.S. government and American Indian tribal nations”); Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUM. J. RACE & L. 811 (2021).

90. Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb-to-Foster-Care Pipeline”*, 20 CUNY L. REV. 77, 92 (2016) (footnote omitted). See also Cooper, *supra* note 89, at 223–25 (“Children of color tend to remain in care longer than their white counterparts.”).

91. Rakesh Beniwal, Note, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 CONN. L. REV. 1021, 1040 (2017).

92. See, e.g., Sakimura, *supra* note 34, at 150 (“Low-income families make up the vast majority of families involved in the child welfare system[.]”). As noted earlier, due to systemic racism, Black people are disproportionately likely to live in poverty in the United States. See *supra* notes 42–43 and accompanying text.

93. Robyn M. Powell & Sasha M. Albert, *Barriers and Facilitators to Compliance with the Americans with Disabilities Act by the Child Welfare System: Insights from Interviews with Disabled Parents, Child Welfare Workers, and Attorneys*, 32 STAN. L. & POL’Y REV. 119, 127 (2021) (“Decades of research indicate that parents with disabilities and their families are more likely to be involved with the child welfare system and to have their parental rights terminated, compared to nondisabled parents.”). For an exploration of some of the unique challenges parents with disabilities face in the family regulation system, see L. Frunel, Sarah H. Lorr, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 1 (2022).

94. Powell & Albert, *supra* note 93, at 127 (noting a recent study finding “that children of parents with disabilities were less likely to be returned to their parents, and that the odds of termination of parental rights among disabled parents were twenty-two percent higher than among parents without disabilities”).

95. See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 159 (2021) (“In addition to the harm done to individual children, the threat of removal exerts a terrifying control over communities of color, adversely affecting all children who live there.”); see also Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426, 429–34 (2014).

96. Sankaran & Church, *supra* note 12, at 212 (citing Administration for Youth and Families, 65 Fed. Reg. 4051, 4052 (Jan. 25, 2000)).

inflicted by this removal is “often irreversible.”⁹⁷ Removal from the home is profoundly disruptive for the child. “Removal strips the child of his connection to his birth parents, his siblings, his extended family, his friends, and often, his school.”⁹⁸ Not only is the child often suddenly separated from their closest and most important caregivers, they often are suddenly placed in a new and unknown setting—in foster care, with strangers.⁹⁹ For this and other reasons, placement in foster care has “been shown to negatively impact a child’s ability to form healthy attachments.”¹⁰⁰

Moreover, once in this unfamiliar setting, children experience an *increased* likelihood of abuse in foster care than in their homes of origin.¹⁰¹ Thus, ironically, removing children from their families of origin based on a likelihood of neglect places children at greater risk of actual abuse.¹⁰² For example, one study found “substantiated rates of sexual abuse in foster homes to be more than *four times* that of the general population.”¹⁰³ Frequent moves between foster homes also negatively impact children.¹⁰⁴ “According to one study, children with unstable foster care placements experience between thirty-six and sixty-three percent increased risk of behavioral problems compared to those with more stable foster homes.”¹⁰⁵

The harmful effects of the disruption are not limited to the child. Removal from the home can also lead to termination of parental rights. This can happen if the parents are deemed to have failed to demonstrate that they can provide a safe home for the child or are unable to maintain a relationship with the child. If the agency supervising visitation or a foster care placement has a negative assessment of the parent based on conscious or unconscious bias, they might take steps to impede meaningful contact between the parent and the child. This lack of contact—contact that the parent wants but is unable to obtain—can, in turn, lead to termination of parental rights.¹⁰⁶ In practice this can mean that a parent

97. Jennings, *supra* note 14, at 9.

98. Sankaran & Church, *supra* note 12, at 211–12. *See also* Trivedi, *supra* note 12, at 533 (“Removed children may also be alienated from their communities, and may be required to transfer schools, compounding feelings of loss and isolation.”).

99. Sankaran & Church, *supra* note 12, at 211.

100. *Id.* at 212. *See also* Am. Acad. of Pediatrics, Comm. on Early Childhood, Adoption, and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145 (2000) (“[E]motional and cognitive disruptions in the early lives of children have the potential to impair brain development.”).

101. Jennings, *supra* note 14, at 9 (“[C]hildren placed in stranger foster care face higher risks of physical abuse than other children, in addition to emotional and medical neglect.” (footnote omitted)).

102. *Id.*

103. Trivedi, *supra* note 12, at 542–43.

104. *Id.* at 545 (“[F]requent moves . . . have tangible negative consequences and result in worse outcomes for children.” (footnote omitted)).

105. *Id.*

106. *See, e.g.*, In the Interest of R.M., 394 P.3d 902 (Kan. Ct. App. 2017) (upholding termination of mother’s rights based primarily on her lack of contact with the children where the faith-based foster care agency denied her visits and made statements that her sexual orientation was harmful to the children).

whose child has been removed from their care may lose their parental rights merely because they are experiencing homelessness,¹⁰⁷ because they are unable to escape an abuser,¹⁰⁸ or because—for reasons beyond their control—they are unable to regularly visit the child.¹⁰⁹

A parent's involvement in the system can also increase the parent's chance of being or remaining unemployed, poor, and homeless. A substantiated allegation of neglect—even when a child is not actually removed or placed under the jurisdiction of the court—may place the parent on a child maltreatment registry, which can significantly limit their employment options.¹¹⁰ This, in turn, makes it more likely for parents to become homeless and more impoverished, and less likely for the family to be able to remain together safely.¹¹¹ Other family and community members also feel the consequences of shattered families.¹¹²

In sum, the family regulation system allegedly seeks to protect children from abuse and neglect. But in many cases, the system not only increases the child's chances of being abused but also causes life-long harm to the child, their family, and their broader community. These harms are felt disproportionately by low-income families of color.

B. LGBTQ Parents

Although their involvement in the family regulation system is generally overlooked, LGBTQ parents are at disproportionate risk of experiencing family regulation intervention. Contrary to prevailing stereotypes about LGBTQ parent

107. Marta Beresin, *Reporting Homeless Parents for Child Neglect: A Case Study from Our Nation's Capital*, 18 U. D.C. L. REV. 14, 16 (2015) (noting that “courts have terminated parental rights, severing the parent-child relationship permanently, where the sole remaining obstacle to reunification was housing”).

108. V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 249 (1996) (describing such a case).

109. See, e.g., Louise A. Leduc, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, 28 CONN. L. REV. 1195, 1196 (1996) (noting Connecticut law allowing termination of parental rights based on a finding of “no ongoing parent-child relationship”); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1494–95 (2012) (noting laws making it easier to terminate parental rights and the disproportionate impact of such laws on Black incarcerated mothers).

110. See, e.g., Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 2 (2021) (“Originally designed to investigate and process allegations of child maltreatment, registries and the data they contain are now also used by state licensing agencies and public and private employers to identify perpetrators of maltreatment and essentially bar them from employment in occupations that care for children and other vulnerable populations. As a consequence of this use, thousands of parents—mostly mothers—are prevented from engaging in paid care work, undermining their ability to care for themselves and their families.” (footnotes omitted)).

111. *Id.* at 13–16.

112. Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 295 (2021) (discussing the impact of various legal systems, including the family regulation system, on broader communities, particularly communities of color).

families, these families are *more* likely to face poverty,¹¹³ to be non-White, and to have disabilities. Individually, each of these characteristics increase the risk of involvement in the family regulation system.¹¹⁴ When an individual falls into more than one category, the biases that individually increase the risk of system involvement have a compounding effect.¹¹⁵

While the existing data is limited, the few studies that exist suggest that LGBTQ-parent families of color are vulnerable to involvement in the family regulation system. As Professor Nancy Polikoff explains, the results of one of the only empirical studies examining the experience of lesbian and bisexual Black parents of origin in the family regulation system are “staggering.”¹¹⁶ The study included data from 643 Black women, 339 of whom were mothers of minor children. Parents who reported being lesbian or bisexual “were 4.19 times more likely to have lost official custody [of their children] when compared with their heterosexual counterparts.”¹¹⁷

A recent qualitative study exploring the prevalence of poverty among LGBTQ people in two California counties—Los Angeles and Kern Counties—indicates that many low-income LGBTQ parents are impacted by the family regulation system.¹¹⁸ After reviewing the reports from respondents, the study’s authors noted that “[a] significant social factor that emerged from the analysis of the interviews with transgender men was parenting,” including “dealing with

113. Indeed, “[m]ore 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.” Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 1 (citation omitted).

114. See *supra* notes 35–57 and accompanying text. See also *cf.* Polikoff, *Neglected Lesbian Mothers*, *supra* note 27, at 95 (“LGBT individuals, many of them parents, disproportionately experience numerous risk factors known to correlate with facing child welfare investigations, including homelessness and housing instability, food insecurity, substance abuse, incarceration, a history of physical or sexual abuse, and having been a foster child oneself.”).

115. Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 809–10 (2020) (“The idea that status-based forms of subordination are overlapping and mutually interactive is known . . . as intersectionality.”). Kimberlé Crenshaw first theorized and drew attention to the challenges posed by “intersectionality.” See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

116. Polikoff, *Neglected Lesbian Mothers*, *supra* note 27, at 91.

117. *Id.* at 92 (citing 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. RES. 283 (2016)). Indeed, lesbian and bisexual Black mothers were at a much greater risk of losing custody through the child welfare system compared to other Black mothers. Harp & Oser, *supra*.

118. Wilson, et al., *Pathways into Poverty*, *supra* note 36. Seventy-seven percent of the respondents were people of color. *Id.* at 2. As the Report explains, this qualitative study is intended to “inform[] the ongoing dialogue about how sexual orientation and gender identity relate to poverty[.]” *Id.* at 1. To help do so, the researchers “conducted in-person interviews with 93 LGBTQ people in Los Angeles County (n = 60) and Kern County (n = 33) with low incomes or other indicators of economic instability.” *Id.* They chose those two counties because they “represent urban and nonurban environments and thus allow an assessment of circumstances facing LGBTQ people in different kinds of communities.” *Id.*

child protective services.”¹¹⁹ As is true for other low-income parents, structural challenges related to parenting were a prevalent theme among the bisexual respondents to the study. For this population, “[t]he experiences of being a mother living in poverty dominated the narratives.”¹²⁰ A number of the bisexual women specifically discussed their experience with the family regulation system.¹²¹

In addition to challenges faced by other low-income families, anti-LGBTQ bias that these parents face in other areas of their lives may also render LGBTQ families more vulnerable to involvement in the family regulation system.

For example, LGBTQ parents may face difficulty accessing homeless shelters.¹²² One transgender male parent in the *Pathways into Poverty* study reported experiencing difficulty finding a shelter that would take him and his child.¹²³ Lacking shelter for a child can trigger system involvement. Some LGBTQ parents have been rejected by their own families of origin because of their LGBTQ status.¹²⁴ As a result, these parents may be unable to rely on family support in times of crisis, rendering them more vulnerable to entrance into the family regulation system. In addition, family rejection is associated with increased likelihood of “negative health outcomes,” including suicidality, and substance use disorder.¹²⁵ All of these external factors place LGBTQ parents at increased risk of system involvement.

Once an LGBTQ family becomes involved in the family regulation system, the family can experience anti-LGBTQ discrimination at all levels, from social workers who investigate and make recommendations about whether a child is

119. *Id.* at 23.

120. *Id.* at 33.

121. *See, e.g., id.* (discussing Carissa, a white and Latinx, bisexual woman who reported having “had a difficult time maintaining custody of all of her children because of mental health issues and substance abuse”). *See also id.* at 34 (discussing Natalie, a Black, Mexican, and Indian bisexual woman who discussed the need for more services “for parents who are going through CPS (Child Protective Services)”).

Several of the lesbian respondents also discussed their child welfare involvement. *See, e.g., id.* at 36 (describing Katherine, a white lesbian, who had her children “taken from [her]”).

122. Brodie Fraser, Nevil Piers, Elinor Chisholm & Hera Cook, *LGBTIQ+ Homelessness: A Review of the Literature*, 16 INT. J. ENVIRON. RES. PUBLIC HEALTH 2677 (2019) (noting that “LGBTIQ+-identifying people [homeless shelters] can be a site of vulnerability and danger”).

123. Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 24. *See also* Caitlin Rooney, Laura E. Durso & Sharita Gruberg, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, Center for Amer. Progress (Jan. 7, 2016) (“Overall, only a minority of shelters was willing to properly accommodate transgender women.”).

124. Unfortunately, many LGBTQ people are still rejected by their families of origin. *See, e.g.,* Fraser, et al., *supra* note 122.

125. Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346, 346 (2009) (finding that LGB young adults who reported family rejection during adolescence “were 8.4 times more likely to have attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to report illegal drug use, and 3.4 times more likely to have engaged in unprotected sexual intercourse” as compared to LGB peers who reported no or low levels of family rejection).

being abused or neglected, to service providers who care for children and help them reunify with their parents, to decisions by judges and juries separating families.¹²⁶ Case workers may rely consciously or unconsciously on stereotypes about LGBTQ people—including stereotypes that LGBTQ people are overtly or inherently sexual, or stereotypes that they are more likely to engage in inappropriate sexual behavior with or around children—as bases for intervention and possible removal.¹²⁷ For example, Am, an American Indian and white transgender man, reported that his children were “taken [from him] for two years because [he] was transgender.”¹²⁸

Court decisions arising out of child custody proceedings commonly used to rely on stereotyped beliefs about LGBTQ parents. For example, some courts upheld trial court orders denying an LGBTQ parent custody of their child based on the lower court’s conclusion that same-sex hand holding or hugging in front of children was inappropriately sexual.¹²⁹ Gay fathers were particularly vulnerable given the long-standing but inaccurate stereotype of gay men as sexual predators of children.¹³⁰ As the social science evidence dispelling these stereotypes amassed, courts in custody cases were less likely to rely upon them.¹³¹ But while published *family court decisions* are less likely to rely on such stereotypes today, less is known about their prevalence in the family regulation context. And there is reason to fear that they continue to be relied upon in this context. Among other things, officials in the family regulation context are trained to be looking for sexual inappropriateness and there is a tendency to err on the side of removal. In this context, officials may be even more likely to act based on conscious or unconscious stereotypes.

126. See, e.g., *In the Interest of R.M.*, 394 P.3d 902 (Kan. Ct. App. 2017).

127. Cf. Woods, *LGBTQ Child Welfare*, *supra* note 23, at 2375–77 (describing the history of the stereotype of gays and lesbians as sexual predators and its impact on child welfare policy). However, “existing data suggests that heterosexual men are overwhelmingly responsible for child abuse.” Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 176 (1998).

128. Wilson, et al., *Pathways into Poverty*, *supra* note 36, at 24.

129. See, e.g., *Scott v. Scott*, 95-0816, 665 So. 2d 760, 764 (La. App. Ct. 1995), *writ denied sub nom.* *Rowan v. Scott*, 96-0181, 666 So. 2d 1106 (La. 1996) (upholding change of custody away from mother because she did not hide her same-sex relationship and noting that although she and her partner “maintain separate bedrooms, they kiss, hug, embrace, and occasionally hold hands while in the presence of the children and others”); *Ex parte J.M.F.*, 730 So. 2d 1190, 1192 (Ala. 1998) (upholding a change of custody away from mother based on her “open” relationship with a same-sex partner where the two women would “kiss and show romantic affection for each other in the child’s presence”).

130. See, e.g., Woods, *LGBTQ Child Welfare*, *supra* note 23, at 2365 (exploring the historic “demonization of LGBTQ adults as sexual predators and threats to youth”); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 541 (1992) (“The most vicious form of the sex-as-lifestyle assumption portrays gay people, particularly men, as child molesters.” (footnote omitted)).

131. See, e.g., *Maxwell v. Maxwell*, 382 S.W.3d 892, 897–98 (Ky. Ct. App. 2012) (reversing a change of custody away from mother because trial court improperly determined mother was engaging in “sexual misconduct” by being in a same-sex relationship); *Hogue v. Hogue*, 147 S.W. 3d 245 (Tenn. Ct. App. 2004) (reversing the trial court’s restraining order prohibiting the father from exposing the child to the father’s “gay lifestyle” and “gay lover”).

In addition to experiencing bias from individual officials along the way, a number of states recently enacted legislation expressly allowing entire agencies to engage in discrimination against LGBTQ parents and families.¹³² For example, a number of states now have laws authorizing agencies involved in the adoption and foster care system to deny services if the provision of such services would violate the religious tenets or moral beliefs of the agency.¹³³ Some scholarship explores the ways in which these laws can impact prospective adoptive parents who are LGBTQ.¹³⁴

Critically, though, these laws also affect *LGBTQ parents of origin*.¹³⁵ This impact has been almost entirely omitted from the extant discussion of these developments. This is true even though, as Professor Nancy Polikoff explains, the negative impact of these laws on parents of origin can be even more insidious. As Polikoff points out, prospective adoptive LGBTQ parents often can choose to work with other agencies if one agency refuses to work with them or expresses bias due to their LGBTQ status.¹³⁶ By contrast, LGBTQ parents of origin often do not have any choice regarding which agency is providing them services.¹³⁷ As a result, they may have no choice but to work with agencies or individual officials who hold anti-LGBTQ biases.

Another challenge LGBTQ parents face in the system is the reluctance of system officials to recognize non-biological LGBTQ parents as legal parents to their children. Most LGBTQ parent families include at least one non-biological parent.¹³⁸ As noted above, there have been many advances in the recognition of non-biological parents in many states.¹³⁹ Nonetheless, some states still do not extend protections to non-marital, non-biological parents.¹⁴⁰ Moreover, even in states that do, many child welfare officials and even some judges remain unaware

132. See, e.g., Kharis Lund, *Wolves in Sheep's Clothing: How Religious Exemption Laws for Discriminatory Private Agencies Violate the Constitution and Harm LGBTQ+ Families*, 54 FAM. L.Q. 67, 70 (2020).

133. For exploration of legislation allowing anti-LGBTQ discrimination in the context of foster care and adoption decisions, see, e.g., Jordan Blair Woods, *Bigotry, Civil Rights, and LGBTQ Child Welfare*, 120 MICH. L. REV. 1011, 1025–27 (2022) (surveying state laws) [hereinafter Woods, *Bigotry*]; see also JOSLIN, MINTER & SAKIMURA, *supra* note 61, at § 2:9.

134. See, e.g., Woods, *Bigotry*, *supra* note 133, at 1025–26.

135. See, e.g., *id.* (discussing religious exemption laws and their potential application to LGBTQ people).

136. For example, the City of Philadelphia had contracts with many different agencies, only two of whom purported to deny placements with same-sex couples.

137. Polikoff, *Neglected Lesbian Mothers*, *supra* note 27, at 109 (“Parents whose children are in foster care, however, have no control over the agency assigned to work with them[.]”).

138. See NeJaime, *supra* note 28, at 2268.

139. See, e.g., Joslin & NeJaime, *How Parenthood Functions*, *supra* note 77.

140. See, e.g., *Jones v. Barlow*, 154 P.3d 808, 810 (Utah 2007) (“We . . . overturn the trial court’s grant of visitation rights [to the parent’s former non-marital partner] and hold that the common law doctrine of in loco parentis does not independently grant standing to seek visitation against the wishes of a fit legal parent.”).

of these legal advancements.¹⁴¹ If a non-biological parent is not recognized as a legal parent by a dependency court, that parent may not have a right to custody of their child, even if there are no abuse or neglect allegations against them.¹⁴² In such cases, the children may be placed into foster care, despite the presence of a fit parent willing and able to take custody of the child.¹⁴³ Existing research demonstrates that severing the bonds between children and their non-biological LGBTQ parents is damaging to children.¹⁴⁴

The harm does not stop there. If children are removed from their LGBTQ parents by child welfare officials, discrimination and bias can lead to longer stays in foster care and even termination of parental rights. In one recent case out of Kansas, for example, a mother's children were removed from her custody after one of her children was seriously injured while in her same-sex partner's care. The children were placed with a foster home licensed by a faith-based agency, which was given authority to decide whether the mother could visit the children.¹⁴⁵ This agency then denied the mother the ability to have any contact with her children. The evidence suggested that this denial of contact was directly related to the mother's status as an LGBTQ person. The agency told her that "she need[ed] to be fixed so that she d[id]n't pass her same sex preference on to her children." The agency also asked the mother if she could "ever go back to 'loving a man.'"¹⁴⁶ Ultimately, the mother was denied contact with her own children even though there was no allegation that she had abused her children. The state then relied on this lack of contact—contact that was denied because of her sexual

141. See, e.g., Polikoff, *Neglected Lesbian Mothers*, *supra* note 27, at 89 (discussing case where child's non-biological parent was not considered for placement after child was removed and biological mother's rights were terminated, even though both women were the child's parents). Additionally, the authors have encountered several cases where courts refused to recognize non-biological parents in child welfare proceedings.

142. See, e.g., Washington, *supra* note 8, at 8 (discussing a case the author was involved in involving Black LGBTQ parents where, "[i]nstead of placing the children with [the mother's] partner, a transgender man, who the children knew as their father, [CPS] placed [the four children] in stranger foster care").

143. See Polikoff, *Neglected Lesbian Mothers*, *supra* note 27, at 89.

144. The science overwhelmingly shows that it is the quality and nature of the interaction between parent and child, rather than a biological or adoptive connection, that creates and sustains the attachment relationships that so critically impact a child's development. See Susanne Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 CHILD & ADOLESCENT SOC. WORK J. 159, 161 (2003) ("[T]he nature of the interaction . . . is more important than the person's legal or biological tie to the child."); Yvon Gauthier et al., *Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care*, 25 INFANT MENTAL HEALTH J. 379, 394 (2004) (explaining that children suffer greatly when separated from non-biological parent figures). See also Anne Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363 (2022) (summarizing research on the importance of attachment).

145. *In the Interest of R.M.*, 394 P.3d 902 (Kan. Ct. App. 2017).

146. Appellant's Brief, *In the Interest of: R.M. & R.B.*, 2016 WL 7215332 (Kan. App.), 2-3.

orientation—as a basis for terminating her rights.¹⁴⁷ This termination decision was later affirmed on appeal.¹⁴⁸

In sum, in addition to contending with the challenges that all families ensnared in the family regulation system face, LGBTQ parents often confront a range of additional hurdles related to their sexual orientation or gender identity. These hurdles can compound the harms LGBTQ parents and their children experience as the result of system involvement.

C. *Affirming Parents of LGBTQ Children*

Like LGBTQ-parent families, affirming parents of LGBTQ children also face unique hurdles in the family regulation system. In some states, like Texas, affirming parents are being specifically targeted, and their very behavior in supporting their children is identified as the ground for surveillance and intervention.¹⁴⁹ Specifically, as detailed in the opening of this Essay, the Texas Attorney General declared that parents who facilitate the provision of gender-affirming care for their children may be engaged in child abuse.¹⁵⁰ Mandated reporters in Texas have been directed to report any instances of such behavior to appropriate officials. The Texas Governor ordered the Texas Department of Family and Protective Services (DFPS) to conduct “prompt and thorough investigation[s] of any reported instances of these abusive procedures in the State of Texas.”¹⁵¹ Indeed, these investigations have begun.¹⁵²

While this type of *express direction* to child welfare officials to surveil and target affirming parents of LGBTQ children is new, the surveillance and targeting of affirming parents is not. There are no available studies looking specifically at their experience in the family regulation setting. Nonetheless, data examining family court proceedings show that parents who are affirming of their transgender and gender non-conforming (GNC) children regularly encounter bias.¹⁵³ Mothers who are supportive of children who were assigned male at birth

147. The state also relied on the fact that the mother had remained in contact with her same-sex partner.

148. *R.M.*, 394 P.3d at 911.

149. See *supra* notes 1-4 and accompanying text.

150. Tex. AG Op., *supra* note 1.

151. Abbott Letter, *supra* note 3.

152. See, e.g., *Doe v. Abbott* Petition, *supra* note 4.

153. Affirming parents often lose custody in family law proceedings as well based on similar reasoning despite being primary caregivers and despite other failings on the part of the other parent.

There is some literature addressing the experience of LGBTQ youth who are in the child welfare system because of family rejection. See, e.g., Woods, *LGBTQ Child Welfare*, *supra* note 23. However, little is written about LGBTQ youth who are in the child welfare system *because their parents supported their identities*.

but who identify as girls or who are GNC are particularly likely to face such bias.¹⁵⁴

A common theme across both family law and proceedings in the family regulation system is the characterization of mothers who support their transgender and GNC children as mentally ill and as having forced their child into a certain gender expression.¹⁵⁵ For example, a client of one of the co-authors of this Essay had all three of her children removed by child welfare officials because she supported her gender nonconforming child. In that case, after the state's initial petition alleging child abuse and neglect was dismissed as unsubstantiated, the child welfare agency brought a second petition and sought a jury trial. In the trial, state officials relied primarily on information about the mother's support of her GNC child's gender expression. For example, the state portrayed the mother as forcing her child to adopt a feminine name when the testimony and evidence only showed that, after the child initially suggested changing their name to one traditionally feminine name, the mother suggested a different feminine name because the mother thought the name suggested by the child would have been confusing.

The mother in the case described above was not LGBTQ. LGBTQ parents who are supportive of their transgender or GNC children face even greater suspicion. In a recent published decision in the family law context, an Arkansas appellate court upheld a grant of custody to the non-supportive father of a GNC child over the supportive parent.¹⁵⁶ In that case, the mother was married to a woman and had previously had a transgender partner. While with the mother, the child "sometimes [chose] a dress and pink shoes to wear," and the mother would "buy[] him dolls, purses, and wallets if he ask[ed]."¹⁵⁷ In contrast, the father reported that the child did not wear dresses or pink shoes or play with dolls during his visits.¹⁵⁸ As noted above, the court in this case upheld a change of custody from mother to the father. The court did so even though the father had never previously had custody of his then seven-year-old child and the child's attorney ad litem stated that it would be "devastating" for the child to be separated from his mother and sibling.¹⁵⁹

154. Katherine A. Kovalanka, et al., *An Exploratory Study of Custody Challenges Experienced by Affirming Mothers of Transgender and Gender-Nonconforming Children*, 57 FAM. CT. REV. 54, 67 (2019) (noting a "relative overrepresentation of mothers and asserted girls in the study").

155. *Id.* at 66 ("All participants were accused by their ex-partners of causing their children to exhibit gender nonconformity and pressuring the children to assert transgender identities."). See, e.g., *Smith v. Smith*, 2007-Ohio-1394, ¶¶ 1-3 (upholding a change of custody away from mother who supported child's GNC gender expression). See also, e.g., Kovalanka, et al., *supra* note 154, at 61 (noting that "[t]hree participants described how their ex-partners had claimed that the participants had psychological problems . . . and that these issues were the root of the child's gender nonconformity").

156. *Pelayo v. Sims*, 600 S.W.3d 114 (Ark. App. Ct. 2020).

157. *Id.* at 117.

158. *Id.* at 117, 119.

159. *Id.* at 120, 122.

In another case discussed by Nancy Polikoff arising in the family regulation system, a mother who was in a same-sex relationship had her six-year-old child removed and placed in a foster home with “healthy parents”—as the judge described it—after the mother supported her child’s repeated insistence that the child was a girl and not a boy.¹⁶⁰

There are few existing studies exploring cases involving transgender or GNC children either in the family law system or the family regulation system. One of the only studies examining family law custody actions involving transgender or GNC children found that supportive parents of transgender or GNC children were disproportionately likely to lose custody to the non-supportive parent.¹⁶¹ The same study also found that a majority of the respondents reported facing bias in the courts,¹⁶² and that most respondents identified “the need for and importance of better-educated, unbiased family court professionals.”¹⁶³

While there are no existing studies focused on families with transgender and GNC children *in the family regulation system* specifically, anecdotal evidence, including the cases discussed above, suggests that these families also regularly interact with officials who lack sufficient knowledge and education about transgender and GNC children and their care. The authors have seen cases in which non-supportive parents of transgender or GNC children make complaints of abuse or neglect against a supportive parent to state family regulation officials as a tool in a custody dispute. In doing so, they may seek to exploit anti-LGBTQ bias as a means of preventing the supportive parent from maintaining custody.

Moreover, as other scholars have explored in more detail, once LGBTQ children enter the system, they face many challenges.¹⁶⁴ In addition to the types of harms that are inflicted on *all* families swept up in the family regulation system, LGBTQ children face other unique risks. For example, “LGBTQ youth suffer higher rates of physical, sexual, and verbal abuse in foster families and group homes. These challenges cause many LGBTQ youth to leave or be kicked out of child welfare placements only to wind up homeless, funneled into the juvenile justice system, or both.”¹⁶⁵

160. Polikoff, *Neglected Lesbian Mothers*, *supra* note 26, at 88–89 (citing ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY* 646-648 (2012)).

161. Kovalanka, et al., *supra* note 154, at 57 (“In only one of the five cases summarized in law review articles was an affirming parent awarded custody over a nonaffirming parent.”).

162. *Id.* at 63 (reporting that 6 of the 10 respondents reported “facing heteronormativity, cisnormativity, and/or transphobic bias in the family courts”).

163. *Id.* at 65 (“[P]articipants talked about how they would have benefited, or did benefit, when they encountered family court professionals who had sound knowledge of transgender identities and gender nonconformity in childhood or who were at least *not* transphobic.”).

164. See, e.g., *Kids Pay the Price: How Religious Exemptions for Child Welfare Agencies Harm Children*, MOVEMENT ADVANCEMENT PROJECT (2017); Woods, *LGBTQ Child Welfare*, *supra* note 23.

165. Woods, *LGBTQ Child Welfare*, *supra* note 23, at 2348–49.

With regard to transgender youth in particular, once in the system, they may be denied access to medically necessary care. This appears to be a likely outcome under the recent policy changes in Texas and in Alabama. As noted at the outset of this Essay, the Texas Governor and Attorney General have declared that the provision of some types of gender-affirming medical care may be child abuse. In Alabama, recently enacted legislation provides that the provision of gender-affirming care to someone under the age of 19 is a felony crime.¹⁶⁶

The denial of this care can cause profound and, in some cases, irreversible damage. “The harm of not providing gender-affirming care is well documented.”¹⁶⁷ Among other things, “[s]uicidal ideation and attempts have been found to be significantly higher among transgender adolescents who cannot obtain or do not receive gender-affirming care than among their cisgender peers.”¹⁶⁸ Conversely, “[a] solid body of reliable research has shown that the potential next steps in gender-affirming care for adolescents with gender dysphoria—puberty-blocking medications and hormone therapy—have major mental-health benefits, including higher levels of general well-being and significantly decreased levels of suicidality.”¹⁶⁹

CONCLUDING THOUGHTS AND NEXT STEPS

The family regulation system disproportionately regulates poor families of color. Because of the persistent myth that LGBTQ people are affluent and White, LGBTQ parents and supportive parents of LGBTQ youth typically are not contemplated when discussing families of origin in the family regulation system. However, not only are LGBTQ families of origin involved in the system, but they are disproportionately represented. This Essay seeks to shine a light on this reality, and to begin a conversation about how to address the challenges faced by these often overlooked families.

Certainly, policies like those in Texas—policies that *expressly* target LGBTQ families—must be reversed. As this Essay uncovers, however, that alone is not enough. LGBTQ families are harmed by the family regulation system even in the absence of policies targeting LGBTQ families. With regard to these systemic challenges, incremental efforts have been insufficient. There is growing recognition that effective reform of the family regulation system will require a more sweeping transformative change.¹⁷⁰ There is growing

166. Ala. Legis. 2022-289 (S.B. 184), codified at ALA. CODE § 26-26-2. In May 2022, a federal district court enjoined enforcement of some but not all portions of this law. *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889 (M.D. Ala. May 13, 2022).

167. Boulware, et al., *Biased Science*, *supra* note 17, at 12.

168. *Id.*

169. *Id.* at 14 (citations omitted).

170. Notably, the upEND Movement started by the Center for the Study of Social Policy aims to dismantle and end the racist and harmful practices of the current child welfare system. See upEND, Home page, <https://upendmovement.org/> [<https://perma.cc/PJ8G-YH2D>]. See, e.g., Dorothy E. Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 460 (2021) (“[W]e can’t

appreciation that the system must be converted from one that *disrupts* families, to one that strives to *keep them together*, removing children from their families of origin only as a rarely-exercised last resort.

Efforts to achieve more transformational change are longer term goals. This final Part identifies several changes that could be implemented more quickly that could at least mitigate the harms caused by the current family regulation system. While we are not the first to identify these proposed reforms, this Part highlights the ways in which these changes would help address some of the harms experienced by LGBTQ families.

First, the definition of neglect must be changed.¹⁷¹ Most child welfare investigations are based on allegations of neglect or the possibility of neglect.¹⁷² As the Texas example described at the outset illustrates, because the current neglect standard is so vague and discretionary, it allows officials to investigate and separate families based solely on bias and stereotypes, such as a belief that providing gender-affirming care is harmful, or, in other cases, the belief that being raised by an LGBTQ parent is, in and of itself, harmful to children. In addition to the ways in which the current rules can allow anti-LGBTQ bias to infect the process, the existing standards in many states allow for a finding of neglect based on the effects of poverty—such as unstable housing, inadequate childcare during work hours, and the inability to afford food or basic necessities.¹⁷³ Rather than providing support to alleviate those effects of poverty, the system treats these parents as if they are abusive parents. Children removed from their homes due to allegations of parental neglect are often placed in foster care, where they are vastly more likely to be abused. They are also subjected to the lifelong psychological damage caused by separation from their parents.¹⁷⁴

tinker with the flaws of a system designed at its roots to police poor, Black, Indigenous and other marginalized families as a way of maintaining a racial capitalist system.”); *see also* Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Visioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 427 (2021) (arguing that “[i]t is time for transformative change”).

171. To be clear, though, while we think these proposals will *mitigate* some of the harms currently being inflicted by the family regulation system, we do not mean to suggest that they are sufficient response. *See, e.g.*, Washington, *supra* note 8, at 5 (arguing that “[w]e will not define our way out of anti-trans violence, anti-Blackness, and their intersections.”).

172. *Child Maltreatment 2018: Summary of Key Findings*, at 3, CHILD WELFARE INFORMATION GATEWAY (2020) (minority of CPS investigations are based on abuse).

173. *See, e.g.*, Emanuella Grinberg, *When Justice is ‘Merciful’ in Child Abuse Cases*, CNN (Aug. 7, 2014, 1:33 PM), <http://www.cnn.com/2014/08/07/living/shaneshya-taylor-plea-deal> (discussing cases in which low-income, single mothers of color became child welfare involved for leaving their children unattended while working or applying for jobs). *See also* Charlotte Baughman, Tehra Coles, Jennifer Feinberg, Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 507 (2021) (“Most of the allegations our clients face are poverty-related.”).

174. *See, e.g.*, Steven M. Cytryn, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 CARDOZO J.L. & GENDER 81, 89 (2010).

Second, current federal law incentivizes placement outside of the home, termination of parental rights, and adoption.¹⁷⁵ This must change. Rather than incentivize the shattering of families, federal law should incentivize their *maintenance*. This could be done by linking at least some aspects of funding to the percentage of investigated families who are maintained.¹⁷⁶ In addition, more federal dollars should be used to provide housing, childcare, workforce reparation, health care, nutrition support, and other services that the many families experiencing poverty—including LGBTQ families—need to keep their families together and their children safe.

This also requires a shift in risk assessment. Currently, the family regulation system does not account for the risk of harm caused by investigation, regulation, and separation of families and is structured as if foster care is a neutral or beneficial system.¹⁷⁷ This must be remedied. To truly protect the welfare of children—which is the purported goal of the system—involvement in the family regulation system should be triggered only when the risk of harm from the family staying together outweighs the harm caused by the system itself.

Finally, eliminating mandated reporting would reduce the number of inappropriate investigations and removals.¹⁷⁸ Most maltreatment reports are made by mandated reporters.¹⁷⁹ The “vast majority of [these] reports to maltreatment hotlines are not substantiated.”¹⁸⁰ This is the result of several forces.¹⁸¹ Particularly where the allegations are limited to neglect, the subjective nature of what is appropriate parenting allows investigations, surveillance, and family separation based on value judgments and bias. There is evidence that reducing mandated reporting does not increase undetected child abuse.¹⁸²

175. Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303 (2006); DeLeith Duke Gossett, *The Client: How States Are Profiting from the Child’s Right to Protection*, 48 U. MEM. L. REV. 753, 786–87 (2018) (explaining how the federal funding structure incentivizes removing children from poor families).

176. See, e.g., Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD. LEGAL RTS. J. 283, 285 (2019) (describing concerns about the time and income limits); Rosie Frihart-Lusby, Note, *Unconstitutional or Just Bad Policy?: Title IV-E’s AFDC “Lookback” and the Constitutional Guarantee of Equal Protection*, 93 S. CAL. L. REV. 1069, 1075 (2020) (discussing the Family First Prevention Services Act).

177. See, e.g., Dailey & Rosenbury, *supra* note 95, at 165 n. 376 (noting that “[c]urrently, there is no requirement that such emotional trauma [caused by removal from one’s family of origin] be considered”).

178. Robert J. Lukens, *The Impact of Mandatory Reporting Requirements on the Child Welfare System*, 5 RUTGERS J.L. & PUB. POL’Y 177, 184 (2007).

179. Baughman, et al., *supra* note 173, at 508 (noting “[m]andated reporters make approximately two-thirds of all child maltreatment reports”).

180. *Id.*

181. For a more detailed exploration at the “surveillance tentacles” of the mandated reporter system, see *id.*

¹⁸² Michael Fitzgerald, *No Evidence of Pandemic Child Abuse Surge in New York City, But Some See Other Crises For Child Welfare System*, THE IMPRINT (June 15, 2021), <https://imprintnews.org/top-stories/no-evidence-of-pandemic-child-abuse-surge-in-new-york-city-but-some-see-other-crises-for-child-welfare-system/55991> [https://perma.cc/9V5H-XWSS].

Moreover, requiring certain professionals to make child abuse reports whenever they suspect abuse or neglect encourages reporters to “err on the side of caution”—that is, to over-report. This is especially true when the penalty for failing to report abuse or neglect is potential criminal prosecution. Indeed, returning to our Texas example, in his letter, Governor Greg Abbott reminded licensed professionals that they could be subjected to “criminal penalties for failure to report such child abuse.”¹⁸³

Even when mandated reports of possible abuse or neglect are substantiated, this finding can be based on little more than the fact that the report has been made.¹⁸⁴ Moreover, the resulting flood of reports overwhelms child abuse hotlines, increases the potential for unnecessary family separation, and diverts resources from the much smaller number of serious cases requiring intervention. And, as detailed here, while most reports are ultimately unsubstantiated, families have been profoundly impacted along the way.¹⁸⁵ The investigation alone is traumatic for the child and family even when it does not lead to removal and can cause lasting psychological harm to children.¹⁸⁶

* * *

The family regulation system is one of many governmental systems that have fractured families and communities of color. This system operates alongside the criminal justice system to regulate the lives of poor, Black, Native American families, as well as other low-income families. These systems have caused and continue to cause intergenerational trauma and to destroy communities. For too long, critiques about this system have overlooked LGBTQ families of origin who are also disproportionately represented and harmed by this system. This Essay brings this community into the conversation about how to transform the system into one that actually supports—rather than harms—the welfare of children.

183. Abbott Letter, *supra* note 3.

184. Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733 (2021) (critiquing the mandatory reporter system in the medical setting).

185. For a critique of the mandatory reporter system in schools, see, for example, Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools’ Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 610 (2021).

186. See Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 518–21 (2005).