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NEGLECTED LESBIAN MOTHERS

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Neglected Lesbian Mothers

NANCY D. POLIKOFF*

Introduction

In June of 2013, Hilda left her two-year-old and ten-month-old children with her partner Joanne while she went to work.[1] Joanne injured the two-year-old, Robert, and both children were removed by the Kansas Department for Children and Families (DCF).[2] After a short stay in foster care, the children were placed with Hilda's mother and her husband.[3] The family reunification efforts were provided by St. Francis Community Services, a faith-based agency under contract with the state.[4] Hilda testified, and there was no denial by the agency, that a case worker asked her if she would ever go back to "loving a man" and told her she needed to be "fixed" so that she did not pass her same-sex "preference" on to

* Professor of Law, American University Washington College of Law; Visiting Scholar, The Williams Institute, UCLA School of Law. I benefited from comments of many colleagues, including Courtney Joslin, Ann Shalleck, Joseph DeFilippis, and Jordan Blair Woods, and from the research assistance of Deidre Dixel (WCL '18), Elizabeth Smithwood (WCL '18), and Sunney Poyner (UCLA '19).

1. *In re* R.M., Nos. 115, 945; 115, 946, 2017 LEXIS 365, at *1 (Kan. Ct. App. May 12, 2017).
2. *Id.* at *5, *6.
3. *Id.* at *6. (The names of the family members are not contained in the opinion and have been selected for ease of reference).
4. Brief for Appellant at 2, *In re* R.M., Nos. 115, 945; 115, 946 2017 LEXIS 365 (Kan. Ct. App. May 12, 2017) (Nos. 2013-JC-30, 2013-JC-31), 2016 WL 7215332.

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her children.[5] Hilda complained about the agency bias.[6] Two years later, the trial court terminated Hilda's parental rights.[7] The appellate court, upholding the termination, made no reference in its opinion to Hilda's testimony about what agency personnel said to her regarding her sexual orientation and rejected her argument that the agency website indicated that it was imposing its Christian religious principles upon her.[8]

Hailey and Jane met in a homeless shelter in Wichita, Kansas, and soon after moved into a trailer with their children, including Hailey's six-year-old son, Jayden.[9] Jayden always thought of himself as a girl.[10] She named herself Hannah at age five and wore nail polish to school in the second grade.[11] Hailey and Jane had never heard the word "transgender," but they found an LGBT-positive church, where they took Hannah and where she could be herself.[12] Meanwhile, one of Jane's children, Bryan, was showing signs of serious mental health problems.[13] Jane wanted help for him and, without access to private resources, she called the state social service agency to try to get him treatment.[14] Bryan complained to the social worker about his mothers and said, among other things, that they encouraged his brother to wear dresses.[15] The social worker interviewed Jayden at school and immediately took the child into state care.[16] The paperwork presented to the court said that Jayden's mother had a female partner and that therefore, he was subject to "more confusion and social difficulties than other children."[17] The judge ruled that Jayden should be

5. *Id.* at 2, 3.

6. Hilda filed a petition for habeus corpus alleging that the state was preventing her from seeing her children because she was in a same-sex relationship. The trial court dissolved the writ as premature, a decision that was upheld by the Kansas Court of Appeals. *In re* R.M., No. 114,004, 2016 LEXIS 132, at *3, *4 (Kan. Ct. App. Feb 19, 2016).

7. *In re* R.M., Nos. 115, 945; 115, 946, 2017 LEXIS 365, at *9 (Kan. Ct. App. May 12, 2017).

8. *Id*. The written opinion in this case contains information that could be sufficient to justify the trial court's rulings. The mother's claims of sexual orientation bias, however, were not adequately developed and addressed, and it is therefore impossible to determine if such bias played a role in her loss of parental rights.

9. Andrew Solomon, Far From the Tree: Parents, Children, and the Search for Identity 646, 647 (2012).

10. *Id.* at 646.

11. *Id.* at 646–47.

12. *Id.* at 647.

13. *Id.* at 648.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

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placed in a foster home with "healthy parents."[18] The state social worker repeatedly said, "[w]e're not giving this child back to lesbians."[19]

In Fairbanks, Alaska, in 2011, Gloria and Alice decided to start a family. Same-sex marriage was not yet legal in the state. Gloria gave birth to Kate in 2012 and to Anthony in 2013. Gloria worked outside the home and Alice was the children's primary caregiver. The Office of Child Services became involved with the family in response to concerns about Alice's physical discipline of the children and removed them in May 2014.[20] The petition named only Gloria as a parent. Gloria's court-appointed counsel argued that Alice should be made a party and appointed her own lawyer. Alice filed a *pro se* motion to that effect as well. The judge refused. The couple married a few months later and Alice filed a second motion, which was again denied. Alice and Gloria obtained new birth certificates for their children naming both of them as parents pursuant to a regulation permitting such an action for newly married lesbian couples who could show they were together when their children were born. Alice filed another motion, as well as a motion to intervene, and again those were denied. Gloria at all times supported Alice's motions. Two years later, Gloria's parental rights were terminated after a trial from which Alice was largely excluded.[21]

Jann and Jamie made a decision to raise a child.[22] They chose Jamie to bear the child based on health concerns.[23] When Jerome was two months old, the couple married.[24] After they split up, Jann filed a petition for joint custody.[25] The court found that Jann had no standing under New York law to claim custody or visitation rights.[26] Jamie later moved in with a boyfriend. When Jerome was just under three, he showed up to daycare with red marks and bruising consistent with being slapped hard on both

18. *Id.*

19. *Id.*

20. The facts and procedural history of this case are found in the mother's brief to the Alaska Supreme Court. Opening Brief of Appellant, G.W. v. Alaska, No. S-16516 (Mar. 16, 2017) (unreported; on file with author).

21. After G.W. filed her brief in the Alaska Supreme Court, the state stipulated that the trial court's failure to recognize Alice as a parent was an error, and the parties stipulated to vacating the termination of Gloria's parental rights and remanding for proceedings in which Alice would also be treated as a parent. Stipulation to Remand, G.W. v. Alaska, No. S-16516 (Alaska Sup. Ct., Apr. 28, 2017, (unreported; on file with author).

22. *See* John Leland, *Parenthood Denied by Law: After a Same-Sex Couple's Breakup, a Custody Battle,* N.Y. Times, Sept. 12, 2014, at 3.

23. *Id.* at 3.

24. *Id.* at 4. This is a fictional name.

25. *Id.*

26. Paczkowski v. Paczkowski, 128 A.D.3d 968, 968 (N.Y. App. Div. 2015).

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sides of his face. After an investigation, child protective services removed the child and placed him in foster care. The agency refused to allow Jann to visit Jerome.[27]

These are the stories of lesbian mothers. They are not the lesbian mothers whose narratives occupy most legal scholarship, public policy advocacy, test case litigation, or media portrayals of same-sex couples raising children. They are mothers with same-sex partners whose children have been removed by the child welfare system. Only one study of mothers who lost custody of their children to the state has asked about sexual orientation, and that study found that the mothers who identified as lesbian or bisexual were four times more likely than those who identified as heterosexual to suffer such loss.[28]

Research and advocacy concerning same-sex families has largely ignored the distinctive needs of this set of parents. For that reason, I call them neglected lesbian mothers. In Part I of this article, I document the existence of this population. I use case law examples; the small amount of existing research; the demographic data demonstrating convergence of lesbians most likely to be mothers with mothers most likely to have children removed; and data establishing that sexual minority parents disproportionately experience risk factors associated with increased likelihood of child welfare system involvement. In Part II, I comment on the invisibility of this group and the missed opportunities for research to learn more about them. I speculate that the visibility in marriage equality advocacy of practically perfect same-sex couples—often raising adopted children—has exacerbated the inability to see the lesbian mothers whose children wind up in state care and sometimes available for adoption. In addition, advocates often defend against attacks on LGBT parenting by emphasizing the number of children in state care who need permanent homes. This argument comes at the expense of acknowledging the racial and economic injustice of the child welfare system that results in the removal of too many children from their parents, including LGBT parents. In Part III, I describe the distinctive legal issues this constituency faces, including discrimination, especially at the hands of faith-based agencies; failure to properly ascribe parentage to a nonbiological same-sex parent; and failure to include a partner or former partner who is not a parent

27. Leland, *supra* note 22.

28. 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. 283-96 (2016)(hereinafter Harp & Oser). The finding was statistically significant with a p value of <0.001.

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within the categories of relatives and family members that take on special meaning in the child welfare context. I conclude in Part IV with a call for litigation, legislative and administrative advocacy, and education, all of which have a role to play in assuring justice for LGBT parents at risk of losing custody of their children to the state or suffering involuntary termination of parental rights.

I. Lesbian Mothers in the Child Welfare System

Naturally, the stories I began with constitute evidence that this group exists, and many more stories emerge from cases in which, regardless of the legal issue, the factual background includes a child who has been removed by the state from a parent with a current or former same-sex or transgender parent.[29] Researchers studying other matters have also identified, as participants in their studies, lesbians whose children were removed by the state.[30]

In addition to this anecdotal evidence, one research study examined the significance of numerous factors, including sexual orientation, on black women's loss of children to the child welfare system, and the results are staggering.[31] The study began using data from 643 black women

29. *See*, e.g., *In re* M.C., 123 Cal. Rptr. 3d 856, 866 (Cal. Ct. App. 2011) (child welfare authorities removed child after mother's new boyfriend stabbed mother's estranged wife); *In re* M.L., No. 17-0968, 2017 LEXIS 974 (Iowa App. Sept. 13, 2017) (child raised by mother and her wife removed because of mother's heroin use); Thorndike v. Lisio, 154 A.3d 624 (Me. 2017) (transgender *de facto* parent reported the biological parent to the child welfare agency after the ten-year-old son, who had bruises, revealed that his biological mother's boyfriend had beaten him); *In re* Christopher YY, N.Y.S.3d (N.Y. App. Div. 2018) (sperm donor estopped from challenging the marital presumption of parentage attached to the biological mother's wife, and the neglect petitions against the parents and placement of the child in foster care subsequent to the trial court ruling on the marital presumption did not alter the correctness of estopping the sperm donor's paternity claim); *In re* Custody of A.F.J., 319 P.3d (Wash. 2013) (nonbiological mother who was a *de facto* parent under state law called child welfare authorities after the mother's repeated drug abuse in the presence of the child). The Chicago-based Family Defense Center represented on appeal from termination of parental rights a bi-racial mother who had used marijuana and who was also a lesbian. *Young Mother's Parental Rights Terminated for Smoking Marijuana,* Family Defense Ctr. (Aug. 4, 2016), https://www.familydefensecenter.net/young-mothers-parental-rights-terminated-for-smoking-marijuana/.

30. One study of thirty-one mothers whose children had been removed noted that two mothers were lesbians. Ana Rocío Escobar-Chew, Marsha Carolan, & Kathleen Burns-Jager, *Connecting Trauma and Health for Mothers in the Child Welfare System*, 27 J. Feminist Fam. Therapy (2015). In a study of pregnancy among young black lesbians, one of the fourteen young women in the study had given birth to a child at age fifteen and had that child removed by child protective services. Sarah J. Reed, Robin Lin Miller, & Tina Timm, *Identity and Agency: The Meaning and Value of Pregnancy for Young Black Lesbians*, 35 Psychol. of Women Q. 571–81, 574 (2011).

31. Harp & Oser, *supra* note 28, at 291.

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collected as part of the Black Women in the Study of Epidemics (B-WISE) research project.[32] Participants were divided among those in prison, those on probation, and those not currently involved in the criminal justice system.[33] Of the 643, there were 339 mothers with at least one biological child under eighteen. Researchers gathered data from those mothers to determine the likelihood of, and factors associated with, either official custody loss through the child welfare system or informal loss, which was defined as a private arrangement for the child to live with someone else that was not ordered by child welfare authorities.[34] Each participant was asked if she had lost custody of any child in the previous year (or the year prior to incarceration for those who were in prison).[35] Of the 339, 145 had experienced official custody loss, 79 had experienced informal custody loss, and 115 had experienced no custody loss.[36]

Researchers asked the participants to self-identify as either gay/lesbian/bisexual or heterosexual and 21.3% identified as gay/lesbian/bisexual.[37] Those who reported being lesbian or bisexual were 4.19 times more likely to have lost official custody when compared with their heterosexual counterparts.[38] In addition, those who experienced official custody loss were over three times more likely than the mothers who experienced no custody loss to identify as lesbian or bisexual.[39] The researchers called for future research to examine why being lesbian or bisexual is predictive of official custody loss for African American mothers.[40]

Beyond this one study, there is demographic information about both same-sex couples raising children and children removed by the state that supports the likelihood of a significant population of parents in same-sex relationships facing child welfare issues.

32. *Id.* at 286.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 288.
38. *Id.* at 291. The finding was statistically significant with a p value of <0.001.
39. *Id.* at 289. The finding was statistically significant with a p value of <0.001.
40. *Id.* at 293.

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Racial disproportionality in state removal of children has been thoroughly documented.[41] African American children make up 13.8% of all children in the country, but make up 22.6% of all children identified by child and protective services as possible victims of abuse and neglect and 24.3% of the population of children in foster care.[42] A November 2016 government report, *Racial Disproportionality and Disparity in Child Welfare,* provides not only those numbers, but also studies finding racial bias, such as two in Texas which found that although African American families were assessed with lower-risk scores than white families, they were more likely to have their children removed.[43] This data bolsters the 2002 analysis of Law Professor Dorothy Roberts in her groundbreaking study of racism in the child welfare system, *Shattered Bonds: The Color of Child Welfare*.[44]

What may be less known is the racial disproportionality of same-sex couples and lesbian mothers raising children. The data on same-sex couples comes from the Census and American Community Survey (ACS). The data on lesbian mothers comes from the National Survey of Family Growth (NSFG). These are population-based sources that provide a vivid picture of parenting demographics, demonstrating that parenting by lesbians and by same-sex couples is most common among African-Americans and that those parents experience economic disadvantage.

Researchers at the Williams Institute at UCLA School of Law, using the Census and the ACS, have found that 41% of African American individuals in same-sex couples are raising children compared to 16%

41. *See, e.g.*, Child Welfare Information Gateway, Children's Bureau, Racial Disproportionality and Disparity in Child Welfare 1 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [hereinafter HHS Disproportionality]; Alicia Summers, National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care 2013 Technical Assistance Bulletin 1 (2015), http://www.ncjfcj.org/sites/default/files/NCJFCJ%202013%20Dispro%20TAB%20Final.pdf; Dennette Derezotes, *Child Welfare Commentary*, *in* Racial and Ethnic Disparity and Disproportionality in Child Welfare and Juvenile Justice: A Compendium 41 (Ctr. for Juv. Justice Reform ed., 2009), http://cjjr.georgetown.edu/wp-content/uploads/2015/03/RacialandEthnicDisparity_January2009.pdf; Marian S. Harris, Racial Disproportionality in Child Welfare (2014).

42. HHS Disproportionality, *supra* note 41, at 3.

43. HHS Disproportionality, *supra* note 41, at 6.

44. Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002). For subsequent analyses by Professor Roberts, *see* Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 Child Welfare 125 (2008); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474 (2012).

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of white individuals in same-sex couples.[45] These parents do not live in enclaves of gay-friendly communities with statistically higher numbers of same-sex couples; rather, they live in the parts of the country and in the urban neighborhoods where there are higher proportions of African Americans.[46] In addition, children living with same-sex couples are much more likely to be poor than their counterparts living with different-sex couples, and race plays a substantial role in identifying who those poor children are.[47]

Researchers using the nationally representative National Survey of Family Growth (NSFG) compared parents and nonparents who identified as lesbian, bisexual, or heterosexual, and they also found evidence of racial disproportionality.[48] The typical lesbian parent was less likely to have completed college, more likely to be a woman of color, and more likely to live in a central city than her heterosexual counterpart.[49] Lesbian parents were also much more likely than their lesbian nonparent counterparts to be black, Hispanic, and foreign-born; to have less education; and to live in central city areas.[50] Among the Black, non-Hispanic lesbians in the study, 48.8% were parents; for white, non-Hispanic lesbians, 15.2% were parents.[51]

Lesbians were less likely than heterosexuals or bisexuals to have biological children, but the extent of the difference varied substantially by race and ethnicity.[52] "[D]espite media portrayals of lesbian parents as mainly white, well-educated, and middle-class," the authors note, "the adjusted probability of motherhood for white lesbians is lower than for any other group."[53] That probability, which they found to be less than 0.18, contrasted with a more-than three times greater adjusted probability

45. Angeliki Kastanis & Bianca D.M. Wilson, Williams Insti., Race/Ethnicity, Gender and Socioeconomic Wellbeing of Individuals in Same-Sex Couples 2 (2014), https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/census-comparison-feb-2014/.

46. Angeliki Kastanis & Gary J. Gates, Williams Insti., LGBT African-American Individuals and African-American Same-Sex Couples 3, 1 (2013), https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-african-american-oct-2013/.

47. M.V. Lee Badgett et al., Williams Insti., New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community 8, 16 (2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf.

48.Karin L. Brewster, Kathryn Harker Tillman, & Hanna Jokinen-Gordon, *Demographic Characteristics of Lesbian Parents*, 33 Population Res. & Pol'y Rev. 503, 522 (2014).

49. *Id.* at 513.

50. *Id.* at 522.

51. *Id.* at 514.

52. *Id.* at 517.

53. *Id.* at 522.

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of motherhood among black, non-Hispanic lesbians (0.62).[54] Black, non-Hispanic lesbians were nearly as likely to be biological parents as white, non-Hispanic heterosexual women (0.63).[55] The researchers concluded, consistent with the Williams Institute data on same-sex couples raising children, that "the sociodemographic characteristics of lesbian parents place their families at a relative disadvantage."[56]

Juxtaposing racial disproportionality in the removal of children by the state and racial disproportionality in childrearing by lesbians and same-sex couples does not prove that children raised by lesbians or in same-sex couples are removed by the state. But when read alongside the one study that examined this issue, it is highly suggestive. In addition, there is research showing that 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.

For example, a 2016 study of homeless and housing insecure young adults (eighteen to twenty-four years old) in Harris County, Texas, found that 24% of the overall sample identified as LGBTQ;[57] 27% of those were parenting or pregnant. Of those in the overall sample who were parenting or pregnant, 32% of the mothers, and 8% of the fathers, identified as LGBTQ. Research shows that even one experience of homelessness increases the risk of child welfare system involvement[58] and that housing problems delay reunification for 30% to 50% of children in foster care.[59]

A 2018 study of a nationally representative sample of youth involved in the child welfare system found that, three years after the date the youth were first referred for an investigation, 15.5% identified as lesbian, gay, or

54. *Id.* at 517.

55. *Id.*

56. *Id.* at 522.

57. Sarah C. Narendorf, Sheara Williams Jennings & Diane Santa Maria, *Parenting and Homeless: Profiles of Young Adult Mothers and Fathers in Unstable Housing Situations,* 97 Families in Society 200–210 (2016) (the definition of mothers and fathers in the study included those who were pregnant or, for men, those who were awaiting the birth of their child).

58. Debra J. Rog, Kathryn A. Henderson, Laurel M. Lunn, Andrew L. Greer & Mei Ling Ellis, *The Interplay Between Housing Stability and Child Separation: Implications for Practice and Policy,* 60 Am. J. Community Psychol. 114–24 (2017) (citing numerous studies).

59. Patrick J. Fowler & Michael Schoeny, *The Family Unification Program: A Randomized-Controlled Trial of Housing Stability,* 94 Child Welfare 167–87 (2015) (citing studies).

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bisexual, and their mean age was sixteen-and-a-half years old.[60] Over 29% of those who identified as LGB had a child of their own. The researchers found this to be "a larger than expected percentage," and indicated a need for services to prevent child welfare involvement of these youth *as parents*.[61] Involvement in the child welfare system as a child is a risk factor for later facing a child welfare investigation as a parent.[62]

A comprehensive 2016 report using several studies documented LGBT food insecurity.[63] Data from Gallup showed that LGBT adults raising children were 1.71 times more likely than non-LGBT adults raising children to have not had enough money for food in the previous year.[64] The population-based National Survey of Family Growth showed that LGB adults raising children were more than twice as likely as straight adults raising children to have received food stamps in the previous year, and same-sex couples raising children were almost twice as likely as different-sex couples raising children to have received food stamps in the previous year.[65] Research has shown that the odds of a caregiver being investigated for child neglect double if that caregiver experiences food hardship.[66]

More research in this area is needed to document the existence and circumstances of LGBT parents who experience child welfare proceedings. But a group must be seen and acknowledged before it is likely to be the subject of research, and, as the next section explains, this group has remained invisible.

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60. Alan J. Dettlaff & Micki Washburn, U. Houston Graduate C. Soc. Work, Outcomes of Sexual Minority Youth in Child Welfare, (2018), https://cssp.org/wp-content/uploads/2018/08/Sexual-Minority-Youth-in-Child-Welfare_providers_final.pdf.

61. *Id.* at 12–13 (emphasis added).

62. Charlyn Harper Browne, Ctr. for the Study of Soc. Pol'y, Expectant and Parenting Youth in Foster Care: Addressing their developmental needs to promote healthy parent and child outcomes 11 (2015), (children of youth in foster care are five times more likely to spend time in foster care themselves than children of same-age parents in the general population).

63. Taylor N.T. Brown, Adam P. Romero & Gary J. Gates, Food Insecurity and SNAP Participation in the LGBT Community, Williams Insti. (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf

64 *Id.* at 26.

65 *Id.* at 27.

66. Mi-Youn Yang, *The Effect of Material Hardship on Child Protective Services Involvement,* 41 Child Abuse and Neglect 113, 122 (2015).

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II: Invisibility and Its Consequences

This Part speculates about why research[67] and advocacy[68] have neglected this group of same-sex couples with children and their distinctive needs. To begin, the reason behind this cannot be that at least some in this subgroup of parents have transgressed and are, for that reason, unworthy of attention. LGBT prisoners and LGBT persons in the criminal justice system have frequently have been the subject of research and advocacy, yet they too have often transgressed.[69] The LGBT rights movement knows how to be nonjudgmental while working to identify needs specific to LGBT subgroups and to protect those subgroups from discrimination.

That the LGBT parents losing their children are predominantly poor is also an inadequate explanation. Although LGBT organizations focus less than I would like on the concerns of the poorest LGBT individuals and same-sex couples, there have been several reports documenting LGBT

67. Social scientists and mental health professionals have published many hundreds of articles about gay and lesbian parents. Not one has examined LGBT parents facing removal of their children and loss of parental rights in the child welfare system. *See* Abbie E. Goldberg, Nanette K. Gartrell, & Gary Gates, Research Report on LGB-Parent Families (2014) (summarizing research and calling for additional research but not mentioning parents in the child welfare system). The one research study containing a finding of the disproportionate extent to which lesbian and bisexual mothers lose their children to the state came not as a result of examining lesbian and bisexual mothers but in a project looking at child custody loss where the data collection included a question about sexual orientation. Harp & Oser, *supra* note 28.

68. LGBT litigation groups have provided occasional representation and assistance in cases arising in the child welfare context. The National Center for Lesbian Rights (NCLR), for example, represented an ex-partner, nonbiological mother who sought *de facto* parent status for a child who entered foster care after the biological mother abused an older daughter. A.G. v. D.W., No. B175367, 2005 WL 1432744 (Cal. Ct. App. 2003). NCLR also regularly provides behind-the-scenes, and therefore unpublicized, technical assistance to lawyers representing gay and lesbian parents, and such cases can include those arising in the child welfare context. The ACLU of Alaska filed a brief, reviewed by the ACLU LGBT Rights Project, in the case of Gloria and Alice, urging recognition of the marital presumption of parentage. Amicus Curiae Brief of the ACLU of Alaska Foundation, G.W. v. Alaska, No. S-16516 (Alaska Sup. Ct. Mar. 28, 2017) (unreported; on file with author). These sporadic contributions do not alter the fact that no organization has explicitly identified LGBT parents facing state removal of their children as a constituency that they serve; developed a project or sought funding to serve this population; or identified the issues this population faces and initiated efforts, alone or in coalition, to remedy those wrongs.

69. *See, e.g.*, Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey*, 107 Amer. J. Pub. Health, 234 (2017); Jody Marksamer & Harper Jean Tobin, Nat'l Ctr. for Transgender Equality, Standing with LGBT Prisoners: An Advocate's Guide to Ending Abuse and Combatting Imprisonment 86 (2014), http://www.transequality.org/sites/default/files/docs/resources/JailPrisons_Resource_FINAL.pdf.

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poverty and identifying critical issues; none includes state removal of the children of poor LGBT parents.[70]

I believe the explanation begins with examining the distinctive place parenting by same-sex couples has held in LGBT advocacy. Initially, critics argued that children raised by LGBT parents would suffer disadvantage.[71] They opposed adoption by lesbian and gay individuals and same-sex couples.[72] They subsequently opposed same-sex marriage on the grounds that it was bad for children.[73] Now that they have lost on marriage, they argue that those with religious or moral objections must be allowed to discriminate against LGBT families.[74]

LGBT advocates have been able to point to decades of research demonstrating that children are not harmed living with gay and lesbian parents.[75] As a result of that research, every major child welfare and mental health organization in the country has supported gay parenting in courts and legislatures.[76] Advocacy organizations have in turn used that research to develop best practices for adoption agencies working with

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70. *See, e.g.,* Poverty Is an LGBT Issue: An Assessment of the Legal Needs of Low Income LGBT People, Legal Services NYC (2016), http://www.legalservicesnyc.org/storage/PDFs/lgbt%20report.pdf; Intersecting Injustice: A National Call to Action: Addressing LGBT Poverty and Economic Justice for All, Soc. Justice Sexuality Project, Graduate Ctr., CUNY (Lourdes Ashley Hunter, Ashe McGovern, & Carla Sutherland eds., 2018), https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FINAL+PovertyReport_HighRes.pdf.

71. For an early work in this area, and its rebuttal, *see* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children,* 1997 U. Ill. L. Rev. 833, and Carlos A. Ball and Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents,* 1998 U. Ill. L. Rev. 253.

72. Early restrictions on gay and lesbian adoption and/or foster parenting came in Florida, Massachusetts, and New Hampshire. *See* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L. Q. 523 (1999). More recently, ACLU litigation has overturned foster parenting and adoption bans in Arkansas and Nebraska. *See* Stewart v. Heineman, 892 N.W.2d 542 (Neb. 2017); Ark. Dep't of Hum. Servs. v. Cole, 380 S.W.3d 429 (Ark. 2011); and Dep't of Hum. Servs. v. Howard, 238 S.W.3d 1 (Ark. 2006).

73. For a discussion of the various child-centered reasons offered in opposition to same-sex marriage, *see* Courtney G. Joslin, *Searching for a Harm: Same-Sex Marriage and the Wellbeing of Children*, 46 Harv. Civ. Rts.-Civ. Lib. L. Rev. 81 (2011).

74. *See Discrimination Against Catholic Adoption Services,* U.S. Conf. Catholic Bishops, http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm.

75. *E.g.,* Wendy D. Manning, Marshal Neal Fettro & Esther Lamidi, *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief,* 33 Population Res. Pol'y rev. 485 (2014).

76. *See* Leslie Cooper & Paul Cates, Too High a Price: The Case Against Restricting Gay Parenting, 15–24 (2nd ed. 2006) (summarizing position statements of major child welfare organizations).

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same-sex couples. The most prominent of these efforts is the Human Rights Campaign's All Children All Families Project.

No one has ever claimed that lesbian and gay parents are faultless or that they are more fit as a group than heterosexual parents are as a group. Nonetheless, gay rights advocates might imagine that drawing attention to even one lesbian or gay parent who is neglectful or abusive could give opponents ammunition to assert the undesirability of lesbian and gay parenting generally.[77] This concern should not stop advocates for LGBT families from addressing the needs of LGBT parents in child welfare proceedings, however, as the first goal in such proceedings is reunification of the family. Whether that family is a same-sex couple and their child or a single LGBT parent and child, advocates should want to be vigilant that opposition to LGBT parenting does not infect the decision-making of child welfare authorities.

The fight for marriage equality set up a particular dynamic. Opponents cited concerns about LGBT parenting, and proponents responded by portraying same-sex couples raising children as practically perfect. Going further, the desirability of same-sex couples raising children was most championed in the context of their willingness to adopt children in state care. I have written elsewhere about the characteristics of the same-sex couple plaintiffs in the Supreme Court marriage equality litigation.[78] Those couples were disproportionately white, male, and raising adoptive children. Although only 22% of same-sex couples with children have an adopted child, 2.5 times that percentage of the parent-plaintiffs—55%—were raising adopted children.[79]

The most direct juxtaposition of such families with the families of children in the foster care system came in Judge Posner's Seventh Circuit same-sex marriage ruling in *Baskin v. Bogan*.[80] Essentially, the opinion referred to children in foster care as "abandoned" and "unwanted," and to the desirability of allowing same-sex couples to marry so that they could

77. Such a result ensued in California in 1986 when a male couple who had presented to a child welfare agency as a heterosexual married couple beat to death a child placed in their care. As a result of this tragedy, the California Department of Social Services issued a new policy disapproving all adoption by unmarried couples. The policy was widely understood as a decision to disapprove adoption by gay and lesbian couples. *See* Marie-Amelie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 Harv. Civ. Rts.-Civ. Lib. L Rev. 363, 407–08 (2016).

78. Nancy D. Polikoff, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. Penn. L. Rev. Online 99, 104 (2016).

79. *Id.* at 106, 107.

80. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).

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provide better homes for those children.[81] Posner implicitly differentiated marriage-seeking, largely white, economically advantaged same-sex couples from marriage-rejecting, largely black, economically struggling mothers, who, in his eyes, did not want their children or have sufficient personal responsibility to care for them.[82]

This offensive and wrong-headed view of the parents who lose their children to the state should have garnered some pushback from gay rights advocates. The child welfare system separates too many children from their parents, often using vague child neglect statutes employed almost entirely against poor communities.[83] Research shows that, in marginal cases, children who remain at home do better than those who are removed and placed in foster care.[84] Racial and economic justice activists decry the mass removal of poor children of color from their families.[85] They refer to these practices as "Jane Crow."[86] The research study cited earlier in this article showed that families headed by African-American lesbian and bisexual mothers are especially vulnerable to losing their children.[87]

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81. *Id.* at 654, 662, 672.

82. If Judge Posner had read Dorothy Roberts's book, *Shattered Bonds*, he would have been introduced to a vast network of mothers in his home town of Chicago who had not abandoned their children, wanted their children returned very much, and were facing daunting, systemic, and unjustified hurdles in achieving family reunification.

83. For an example of the differential application of drug laws against poor parents, *see* Emma S. Ketteringham & Mary Anne Mendenhall, *Some Pro-Pot Parents Blog, Others Lose Their Children,* Huffington Post (Dec. 12, 2012), https://www.huffingtonpost.com/emma-s-ketteringham/some-propot-parents-blog-_b_1962580.html.

84. In cases where investigators disagreed about whether a child should be removed from a parent, the children placed in foster care had worse outcomes than those who remained at home, looking at delinquency and teen pregnancy rates, earnings as a young adult, and adult criminal behavior. Joseph J. Doyle Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care,* 97 Am. Econ. Rev. 1583–1610 (2007); Joseph J. Doyle Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care,* 116 J. of Pol. Econ. 746–770 (2008). For a discussion of these results, see Nat'l Coal. for Child Protec. Reform, The Evidence Is In (2015), https://drive.google.com/file/d/0B291mw_hLAJseVk3VnFGTGR1cEk/view.

85. *See* 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 (2016); Erin Cloud, Rebecca Oyama, & Lauren Teichner, *Family Defense in the Age of Black Lives Matter,* 20 CUNY L. Rev. F. 68 (2017); Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, The Appeal (May 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/.

86. Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of "Jane Crow,"* N.Y. Times, (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

87. Harp and Oser, *supra* note 28.

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Now that the assault on LGBT parenting has moved to the arena of legislation and litigation to allow anti-gay discrimination based on religious and moral beliefs, LGBT advocates counter with uncritical assertions of the numbers of children in foster care and the tragedy of denying those children capable foster and adoptive parents.[88] But this obscures the earlier tragedy producing the large number of children in state care—the excessive removal of children from their parents, some of whom are LGBT.

It is striking how little we know about the parents of children who are adopted out of foster care by same-sex couples. In litigation, complaints may provide a brief description of the parents and their transgressions, but this is likely just enough to present a profound contrast to the same-sex couples who want to adopt their children. For example, April DeBoer and Jayne Rowse, one of the couples in the marriage equality cases consolidated in the Supreme Court, described the circumstances leading to their adoption of three children as follows: "R's" biological mother was nineteen-years-old, had received no prenatal care, and had given birth at home; "N" was born to a homeless mother with psychological impairments; and "J" was born prematurely to a drug-addicted prostitute who abandoned him at birth.[89]

Hidden from sight in such descriptions are the numerous systemic impediments the birth parents may have faced along the way, such as the state's failure to provide legally mandated services to prevent the removal of children; lack of adequate mental health and substance abuse treatment facilities and unrealistic timeframes for rehabilitation; insufficient reunification efforts; and requirements for reunification that are inappropriate or that fail to account for the absence of paid leave, safe and affordable housing, and public transportation. These impediments are not accidental. They are the deliberate consequence of eliminating the social safety net and privatizing dependency; constructing poor mothers of children in foster care as morally culpable; and creating monetary incentives for states to place children for adoption rather than return them to their parents.[90]

88. For example, the January 2019 issue brief, *Every Child Deserves a Family*, features prominently on the first page a graphic containing in large, bright orange numbers, the number of children in foster care and awaiting adoption. FAMILYEQUALITY.ORG, http://www.lgbtmap.org/file/Brief-Kids-Pay-Price-January-2019.pdf.

89. Amended Complaint for Declaratory and Injunctive Relief at 2, DeBoer v. Snyder, 973 F. Supp. 2d 757, 12-CV-10285 (E.D. Mich. 2013).

90. *See* ROBERTS, *supra* note 44; LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 113 (2012).

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When advocates for LGBT adoption turn a blind eye towards the systemic injustices of the child welfare system, they simultaneously miss the parents with same-sex partners who are victimized by those injustices and who may face additional hurdles because they are LGBT. They also miss the children of those LGBT parents who suffer real harm, as do all children, when they are inappropriately deprived of their parents.[91]

Lesbian mothers whose children are removed by the state suffer from what I call "exacerbated invisibility." An invisible population is unseen, hidden, and unnoticed. Exacerbated invisibility occurs when a population with some characteristics common to the unseen group receives substantial notice, thereby eclipsing the possibility of imagining beyond that more visible group. Practically perfect same-sex couples raising children—often children adopted from foster care—were prominent in the fight for marriage equality and remain prominent in the fight against religious-based discrimination. They have been implicitly, if not explicitly, contrasted with the families of the children waiting in foster care for adoptive homes. I believe these circumstances made it impossible to recognize that there are same-sex couples at risk of losing their children to the state—and children at risk of losing their LGBT parents—and that those families have distinctive needs. This might explain why the Human Rights Campaign's All Children All Families Project is self-proclaimed to exist because of the LGBTQ youth in foster care and the LGBT adults who wish to become foster and adoptive parents, but not because there are LGBT parents and their children who are being inappropriately and unnecessarily separated from each other by the child welfare system.

It is not necessary to choose between work on behalf of LGBT parents whose children face removal and LGBT individuals and couples who want to adopt out of foster care; their interests are not at odds. But the two groups of parents have vastly different demographics. Those who adopt children are much more likely to be white and economically privileged; those losing their children are much more likely to be black or brown

91. The intense public outcry against the Trump administration policy separating immigrant children from their parents at the border prompted a number of commentators to compare the policy to the operation of the child welfare system. *See* Rachel Blustain, *Our Foster-Care System Shouldn't Separate Families Either*, THE NATION, July 26, 2018; NCCPR Child Welfare Blog, *Donald Trump's Child Hostages: What Trump is Doing to Migrant Children is Nothing Like What the Foster-Care System Does—Except Where It Is,"* NCCPR.ORG (June 20, 2018), https://www.nccprblog.org/2018/06/donald-trumps-child-hostages-what-trump.html. For a discussion of the harm that removal, even for a short time, does to a child, *see* Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children who Spend Less Than Thirty Days in Foster Care,* 19 U. PENN. J. L. & SOC. CHANGE 207, 210–13 (2016).

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and poor.[92] Seeing and advocating for parents who face child welfare investigations will bring LGBT advocates face to face with the realities that advocates for racial and economic justice have long articulated, and this will advance the well-being of poor children and children of color. It will end the invisibility of these LGBT families. This work is a critical component of any commitment to address the needs of LGBT families most likely to struggle with the effects of racism and poverty.

While a more critical view of the system that results in children in foster care should change the way advocates talk about those children and their families, this will in no way impede forceful opposition to anti-gay adoption and foster parenting legislation and litigation. There will always be some children who need foster and adoptive parents, and discrimination against the LGBT individuals and same-sex couples who want to care for them is wrong.

Here is one example of the exacerbated invisibility of LGBT parents facing child removal. In December 2014, the Department of Health and Human Services (HHS) published a report co-authored by Williams Institute demographer Gary Gates entitled *Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs*.[93] This report of over 150 pages included one paragraph acknowledging the possibility of LGBT parents facing investigation by child welfare agencies. It noted that:

> A small proportion of LGBT parents may be involved in child welfare agency investigations intended to protect children from abuse or maltreatment. *We did not identify any previous research on LGBT parents' experiences with these types of services.* Studies in this area may explore whether and how service provision, quality, or outcomes differ for LGBT and non-LGBT parents. Specific research questions may include the following: [1] To what extent are LGBT parents involved in child protective service interventions? Does the likelihood of this involvement differ between LGBT and non-LGBT parents? Does it differ by agency location? [2] What are the experiences of LGBT parents who are investigated or whose

92. Gary J. Gates, *For Same-Sex Parents, a Tale of Two Paths to Parenting,* Huffington Post (Feb. 16, 2012), https://www.huffingtonpost.com/gary-j-gates/for-samesex-couples-a-tal_b_1277784.html.

93. Andrew Burwick et. al, Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs (2014), https://www.acf.hhs.gov/sites/default/files/opre/lgbt_hsneeds_assessment_reportfinal1_12_15.pdf.

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children are removed from their care? What services or assistance do they receive? Do these experiences differ from those of non-LGBT parents?[94]

The next month, the follow up HHS-commissioned report made recommendations for future research.[95] It identified four topics, three of which concern LGBT youth.[96] Those three topics were: (1) "risk of experiencing child maltreatment . . . among LGBT people," (2) "experiences of LGBT youth in child welfare programs," and (3)"effectiveness of child welfare services for LGBT youth."[97] The fourth topic, the only one concerning adults, identified for future research "participation of LGBT adults in child welfare programs."[98] Although this might have included LGBT parents whose children are removed from the home, it did not. Rather, the only two research questions identified under this topic concerned the experiences of prospective LGBT foster and adoptive parents with public child welfare agencies and the extent to which those agencies engage LGBT adults as foster and adoptive parents.[99] Because the list of recommendations ignored LGBT parents whose children are removed, it also omitted any topics concerning the children of those parents.[100]

Thus, what effectively happened here was that the first report explicitly found that there was no research on LGBT parents whose children are removed by the state and, then, the second report made recommendations for future inquiry that guaranteed there would be no research. This indifference to a highly marginalized population of LGBT-headed families had immediate policy consequences.

In the waning weeks of the Obama administration, HHS promulgated a final rule revamping the Adoption and Foster Care Analysis Reporting System (AFCARS), the statutorily mandated data collection and analysis program of the Administration on Children, Youth and Families (ACYF)

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94. *Id*. at 53 (emphasis added). Note that the 2016 research study finding lesbian/bisexual status predictive of black mothers losing their children to the state, Harp and Oser, *supra* note 28, had not been published at the time of this report.

95. Andrew Burwick, Scott Baumgartner, & Gary Gates, Office of Planning, Research & Evaluation, Human Services for Low-Income and At-Risk LGBT Populations: Research Recommendations on Child Welfare Programs 1 (2015), https://www.acf.hhs.gov/sites/default/files/opre/lgbt_hs_recommendations_childwelfare_508compliant030615_nologo.pdf.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id*. at 2.

100. *Id.*

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within HHS.[101] Under the rule, state agencies must collect and report data on the sexual orientation of children who enter state care, as well as that of the foster parents, adoptive parents, and legal guardians with whom children are placed.[102] This final rule was the culmination of efforts by LGBT researchers and advocacy organizations.[103] However, the rule is silent on, and therefore does not require, data collection on the sexual orientation of parents whose children are removed from their homes and placed in foster care. Even after years of advocacy efforts, and during the most LGBT-positive administration in history, this was a missed opportunity to document the existence of a group of disadvantaged LGBT parents with distinctive legal issues. It is those distinctive issues to which I now turn.

III. The Distinctive Legal Issues

Lesbian mothers and same-sex couples facing child welfare investigations encounter the same unjust obstacles other parents face. But there are three distinctive issues affecting lesbian mothers and same-sex couples that need immediate attention. The first two issues are discrimination and accurate identification of parentage—issues that arise in many contexts in addition to child welfare proceedings. This Part focuses on the aspects of those two issues that are particularly salient when the state removes children from LGBT parents. The third issue is unique to child welfare proceedings. It concerns the legal significance of families and relatives in such cases, and the importance, therefore, of determining who counts as family. I explore these three issues in turn.

A. Discrimination

From the moment a child welfare worker responds to a report concerning alleged abuse or neglect, there are many points at which discrimination on the basis of sexual orientation or gender identity can take place. The first, of course, is whether to immediately remove the child from the home. A child's gender variance should never trigger removal from supportive

101. Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524 (Dec. 14, 2016) (to be codified at 45 C.F.R. pt. 1355). Under the Trump administration, implementation of this rule has been delayed until October 1, 2020.

102. *See id.* at 90,570. To address privacy concerns, the rule permits a decline response option and indicates that "information on sexual orientation should be obtained and maintained in a manner that reflects respectful treatement, sensitivity, and confidentiality." *Id.* at 90,526.

103. *E.g.*, *id*. at 90,526.

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parents,[104] but Hailey and Jane faced the additional hurdle of an agency's assumption that their lesbian relationship caused Jayden to be confused, prompting emergency removal with no prior notice. When they did go to court, they faced a judge who ordered foster care so that Jayden could be with "healthy parents."

The story of Hailey, Jane, and Jayden contains another cautionary note. Jane contacted the state agency that ultimately removed Jayden because her teenage son attempted suicide and she was too poor to engage private therapeutic services for him.[105] It was that teenager's complaints about his family that triggered Jayden's removal.[106] Poor families face surveillance because they live in public housing, receive Temporary Assistance for Needy Families (TANF) or other public benefits, or, as in this instance, need other help they cannot pay for in the private sector. Poor LGBT parents are thereby exposed to the possibility of discrimination by governmental officials who may be all too ready to judge them as behaviorally or ethically deficient because they are poor.

Indeed, as law professor Khiara Bridges has documented, poor pregnant women who apply for Medicaid benefits in order to obtain prenatal care subject themselves to a series of highly intrusive questions unconnected to either their financial eligibility or physical health.[107] These interrogations touch on, among other things, their households, social supports, whether the pregnancy is wanted or unwanted, and the existence of family problems. A poor woman asked the long battery of required questions knows that the state is trying to determine if she will be a good mother. If that woman has a same-sex partner, the questions may necessitate disclosures she would rather keep private. As a poor woman, however, she does not have that option.

The heightened vulnerability of poor LGBT parents can be illustrated by contrasting the story of Hailey and Jane with that of Sean, another gay

104. For examples of parents who have faced child welfare proceedings for affirming their gender variant children, *see* Gretchen Rachel Hammond, *Can the Child Welfare System Handle Trans Children? Part One,* Windy City Times (Apr. 5, 2017), http://www.windycitymediagroup.com/lgbt/Can-the-Child-Welfare-System-Handle-Trans-Children-Part-One-of-a-Series/58703.html; Gretchen Rachel Hammond, *Can the Child Welfare System Handle Trans Children? Part Two,* Windy City Times (Apr. 11, 2017), http://www.windycitymediagroup.com/lgbt/Can-the-child-welfare-system-handle-trans-children-Part-Two/58759.html; Gretchen Rachel Hammond, *Can the Child Welfare System Handle Trans Children?* Windy City Times (Apr. 19, 2017), http://www.windycitymediagroup.com/lgbt/Can-the-Child-Welfare-System-Handle-Trans-Children-Part-One-of-a-Series/58703.html.

105. Solomon, *supra* note 9, at 648.

106. *Id.*

107. *See* Khiara Bridges, The Poverty of Privacy Rights (2017).

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parent who supported his gender-variant child. Sean, a single gay man, adopted a five-year-old girl from foster care. She favored boy clothing and short haircuts. By the end of third grade, she was asking to be called Michael and wanted to use the boy's restroom. Sean discussed this with Michael's therapist and a local LGBT health clinic, and at their suggestion, he made an appointment with a university-affiliated endocrinologist to explore hormone therapy. The day before the appointment, child protective services ("CPS") pulled Michael out of class to interview him. Sean learned that an older physician he had never met, who knew or assumed that Sean was gay, called CPS because he believed Michael's gender expression had to be related to sexual abuse. CPS launched a full investigation.[108]

Sean was economically comfortable, lived in an urban gay mecca, and had the resources to aggressively fight the child welfare authorities. His advocacy and his threats of legal action made it possible for Michael to remain at home. Hailey and Jane had met in a homeless shelter and were economically struggling to raise their children in a trailer in a Midwest state. They lacked sufficient power to resist the state's intrusion into their family.

Openly articulated discrimination may be less common than in the past,[109] and it is difficult to know the extent to which it continues to exist. As noted above, AFCARS does not, and will not in the future, require data collection on the sexual orientation of parents whose children are removed, thereby depriving researchers of meaningful information from which to develop hypotheses. This makes especially important the result of the B-WISE research finding lesbian and bisexual women vastly overrepresented in the population of black mothers whose children were removed by the state. In most jurisdictions, child welfare proceedings are closed to the public. Opponents of this closed system cite numerous evils that thereby remain immune from critical scrutiny.[110] Discrimination is one of those evils.

108. The story of this case is contained in Tey Meadow, *"Deep Down Where the Music Plays": How Parents Account for Childhood Gender Variance,* 14 Sexualities 725, 734–37 (2011).

109. In an early analysis of custody issues facing lesbian mothers, Nan Hunter and I cited cases from California and Michigan in which the mother's lesbianism was an explicit basis for the state removing the children from her care. Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 Buff. L. Rev. 691 (1976).

110. *See* Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare,* 63 Maine L. Rev. 1 (2010) (observing that, among other things, confidentiality laws result in silencing parents, unnecessarily placing children in foster care, and racial discrimination).

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Even when temporary removal is justified, as in the instance of Hilda's son, Robert, there are subsequent opportunities for discrimination. The state is required to provide services aimed at reunifying the parents and child.[111] An agency has virtually unfettered discretion, however, in identifying requirements that a parent must meet before reunification and in placing conditions on the parent's ability to visit with the child while in foster care. There is a special reason to be concerned when faith-based agencies, such as that assigned to Hilda's family, provide these reunification services. These are often the same agencies that refuse to license same-sex couples as foster and adoptive parents.

Ten states have passed legislation explicitly allowing child placement agencies receiving state funding to discriminate in provision of services if nondiscrimination would conflict with the religious or moral beliefs of the agency or its workers.[112] Some laws are written broadly, specifying that no agency can be required to provide "adoption services" that conflict with sincerely held religious beliefs.[113] Others contain an exhaustive list of services, such as the Texas statute, that explicitly names family preservation and reunification services in a list of child welfare activities that a private agency receiving state funding may decline to provide if it interferes with the agency's sincerely held religious beliefs.[114]

Although Kansas, where Hilda's family lived, did not at the time have a law explicitly protecting child welfare agencies that discriminate, it did pass such a law in 2018.[115] Kansas also has a general statute prohibiting the state from excluding from government programs or otherwise burdening an individual or entity who acts or refuses to act based upon a sincerely held religious belief.[116] A faith-based agency might try to invoke even such a statute as justification for retaining a contract with the state to deliver child welfare services while discriminating against LGBT parents.

LGBT advocates should be concerned about the impact of these laws on the provision of services during the critical period after removal of a child, which is when the actions of a supervising agency have enormous impact on whether the child will ever be returned home. In addition, these laws

111. Child Welfare Information Gateway, Children's Bureau, Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children, 1 (2016), https://www.childwelfare.gov/pubPDFs/reunify.pdf [hereinafter Reasonable Efforts].

112. Movement Advancement Project, *Equality Maps: Foster and Adoption Laws*, lgbt.org, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last visited Jan. 22, 2019).

113. Mich. Comp. Laws Ann. § 710.23g (West 2015).

114. Tex. Civ. Prac. & Rem. Code Ann. § 110.001-.012 (West 1999).

115. Kan. Stat. Ann. § 59-2111 (2018).

116. Kan. Stat. Ann. § 60-5301-05 (West 2013).

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shield agencies that place the child of a lesbian mother in a home with foster parents who actively disparage LGBT people. Agencies that refuse to license same-sex couples as adoptive parents take that position up front and openly, and the couple may be able to seek out a different agency as a result. Parents whose children are in foster care, however, have no control over the agency assigned to work with them, and the vast discretion afforded to said agency means that bias may be difficult to detect.

Advocates have criticized religious exemption laws, but the distinctive plight of LGBT parents whose children have been removed has received scant attention. In September 2017, the Movement Advancement Project, the Child Welfare League of America, and the National Association of Social Workers launched the "Kids Pay the Price" campaign to bring attention to the harms of allowing faith-based agencies to discriminate.[117] The overwhelming focus in the campaign's ads and literature is on discrimination against prospective foster and adoptive parents and then, secondarily, on inappropriate placements and services for LGBT youth in foster care.[118] Although the text of the principal campaign publication includes refusal to offer family reunification or support services to a family with two same-sex parents or an LGBT parent on its long list of potential evils that agencies could commit, the narrative portion of the publication focuses on children in need of adoptive homes, as does the advertisement the campaign produced and the examples provided to media covering the campaign.[119] The Human Rights Campaign produced a 2017 report on the same subject, *Disregarding the Best Interest of the Child: License to Discriminate in Child Welfare Services*.[120] It, too, fails to identify the harms to children and parents of assigning supervision of a child in foster care whose parents are LGBT to a faith-based agency that discriminates on the basis of sexual orientation or gender identity.

The city of Philadelphia cancelled Catholic Charities' contract to license foster and adoptive parents because of their anti-gay policies, but Catholic Charities still provides case management services to a large segment of

117. Movement Advancement Project, *Kids Pay the Price*, LGBT.ORG, http://www.lgbtmap.org/policy-and-issue-analysis/kids-pay-the-price (last visited Jan. 31, 2019).

118. *Id.*

119. MOVEMENT ADVANCEMENT PROJECT, CHILD WELFARE LEAGUE OF AM. & NAT'L ASSOC. SOC. WORKERS, KIDS PAY THE PRICE: HOW RELIGIOUS EXEMPTIONS FOR CHILD WELFARE AGENCIES HARM CHILDREN 2, 3 (2017), https://www.lgbtmap.org/file/Kids%20Pay%20the%20Price%20FINAL.pdf.

120. CATHRYN OAKLEY, HUMAN RIGHTS CAMPAIGN FOUNDATION, DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES (2017), https://assets2.hrc.org/files/assets/resources/licenses-to-discriminate-child-welfare-2017.pdf.

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the Philadelphia children in foster care and their parents, including LGBT parents.[121] Such services often determine whether a child will return home, and the City, as well as LGBT advocates, should be as concerned about anti-gay discrimination in that context as in the context of licensing foster and adoptive parents.

The American Civil Liberties Union (ACLU) has filed a court challenge to the Michigan statute allowing faith-based agencies to discriminate.[122] The plaintiffs are two lesbian couples who sought to adopt and were turned away and a woman who as a child was placed in foster care and who objects, as a Michigan taxpayer, to permitting discrimination that would block the licensing of qualified foster parents on the basis of an agency's religious beliefs. Without a plaintiff alleging discrimination in reunification and other support services, the harm such discrimination causes by separating children from parents who are able to care for them remains invisible.

B. Accurate Identification of Parentage

The most critical legal issue that can arise for a same-sex couple in a child welfare case is whether the biological mother's partner (or former partner) will be considered a parent. If the partner is living in the home with the biological mother and the children, certain consequences kick in. Parents in child neglect and abuse cases are generally entitled to court-appointed counsel.[123] They also must receive federally mandated reunification services aimed at returning children to their parents.[124] In addition, before such parents can be permanently deprived of their children, the state must prove the elements of a separate termination of parental rights statute by clear and convincing evidence.[125]

When the second parent is not living with the child and there are no allegations of abuse or neglect involving that parent, different consequences

121. Julia Terruso, *Judge Denies Catholic Social Services Discrimination Claim in Foster Care Case*, PHILA. INQUIRER, July 13, 2018, http://www.philly.com/philly/news/foster-care-philadelphia-dhs-same-sex-couples-catholic-social-services-lawsuit-20180713.html.

122. The case has withstood a motion to dismiss filed by the state. Dumont v. Lyon, No. 17-CV-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018).

123. VIVEK SANKARAN, A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS AND DEPENDENCY 1 (2016), http://youthrightsjustice.org/Documents/SurveyParentRighttoCounsel.pdf. For an example of the consequences of failure to provide legal counsel to parents, see Rachel Blustain, *Defending the Family: The Need for Legal Representation in Child-Welfare Proceedings*, THE NATION (Jan. 16, 2018), https://www.thenation.com/article/defending-the-family-the-need-for-legal-representation-in-child-welfare-proceedings/.

124. REASONABLE EFFORTS, *supra* note 111, at 2.

125. Santosky v. Kramer, 455 U.S. 745, 748 (1982).

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ensue. A large number of states require the agency to notify an absent parent of the child welfare proceeding.[126] In some states, a nonoffending parent is entitled to immediate physical custody of the child pending resolution of the case or to placement of the child once the charges are adjudicated.[127] In fewer states, the availability of a nonoffending parent deprives the court of jurisdiction to hear the child welfare case once legal custody has been transferred to that parent.[128]

Nonbiological parentage has, of course, been the subject of scores of cases, law review articles, statutes, and public policy efforts, and there are numerous jurisdictions in which a biological mother's same-sex partner can be adjudicated a legal parent.[129] But the actors in a child welfare proceeding—from the agency workers, to the counsel appointed for a biological parent, to the judge—may be unaware of those precedents or may refuse to apply them. In a particularly tragic case in the District of Columbia, a former partner who had raised her nonbiological child on her own for six years lost that child forever when the biological mother was found to have neglected her other children and ultimately lost all her parental rights. No one flagged that the former partner qualified as a *de facto* parent under D.C. law and could have filed for custody of the child she had raised.[130]

There are some states that have gotten it right, however. In a particularly notorious California case, the state took custody of a child after the child's biological mother, Melissa, conspired with her new boyfriend to attack the child's nonbiological mother, Irene, landing Melissa in jail and Irene in the hospital.[131] Irene was a legal parent both because she received the child into her home and held out the child as her own and because she was married to Melissa at the time of the child's birth.[132] The state appointed counsel for and provided reunification services to Irene, as well as Melissa.[133]

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126. Martin Guggenheim & Vivek S. Sankaran, Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders 204, 205 (2015).

127. *Id.* at 205–06.

128. For a summary of states falling into each of these categories, *see id.* at 204.

129. *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 Fam. L. Q. 495 (2014). The newly adopted Uniform Parentage Act (2017) contains numerous paths to parentage for nonbiological parents. *See* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 Yale L.J. Forum 589, 592 (2018).

130. Telephone conversation of author with Chandra Walker Holloway, attorney for biological mother (May 23, 2013) (on file with author).

131. *In re* M.C., 123 Cal. Rptr. 3d 856, 862 (Cal. Ct. App. 2011).

132. *Id.* at 871.

133. *Id.* at 866.

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The legal status of a partner of a child's biological or adoptive parent has arisen most frequently in private, post-dissolution litigation, with a biological/adoptive mother opposing the child's other parent's visitation rights or custody. A child welfare proceeding provides another venue in which a biological/adoptive parent may seek to erase another parent from the child's life. Melissa did not want Irene to be considered a parent, but she was unsuccessful because California law already clearly recognized nonbiological parents in child welfare cases.[134] Advocates for lesbian and gay families in other states should expect such cases and should consider education and outreach efforts to protect the nonbiological parent-child relationship in this context. This is another instance in which the closed nature of most child welfare proceedings can lead to injustice by making it impossible to monitor appropriate determinations of parentage when the biological parent objects.

Problems in determining parentage may occur, however, even when the parents are united. Consider the example of Alice and Gloria from Alaska.[135] Alice was disregarded as a parent throughout the entire process, even though Gloria completely supported her assertion of parentage. In Alaska and a few other states, a parent in the context of a child welfare proceeding is defined as a "biological or adoptive parent."[136] A 2014 Iowa Supreme Court ruling applied that definition literally, thereby excluding Daniel, a father who, on his own for two and a half years, had raised the child born to his wife while she was in prison.[137] The court said the statute's language was unambiguous and that Daniel was not a necessary party to the child welfare proceedings because he was not the child's biological father. The court reasoned that limiting the definition of parent to biology and adoption was good policy because it avoided "superfluous litigation that would bog down timely decision making for children in

134. The first case to hold that California's "holding out" parentage was not automatically rebutted by evidence that the father was not the child's biological parent occurred in the context of determining parentage in a child welfare proceeding. *See In re* Nicholas H, 46 P.3d 932 (Cal. 2002).

135. G.W. v. Alaska, No. S-16516 (Mar. 16, 2017) (unreported; on file with author).

136. *See, e.g.,* ALASKA STAT. § 47.10.990 (26) (1957) (biological or adoptive); IDAHO CODE § 16-2002 (11) (1963) (birth or adoptive mother, adoptive father, *biological* father of child conceived or born during marriage, unmarried biological father) (emphasis added); IND. CODE ANN. § 31-9-2-88 (LexisNexis 2011) (biological or adoptive parent); IOWA CODE § 232.2 (39) (2016) (biological or adoptive); KY. REV. STAT. ANN. § 600.020 (LexisNexis 1986) (biological or adoptive mother or father); WIS. STAT. § 48.02 (1971) (biological or adoptive but also includes a husband who has consented to artificial insemination of his wife pursuant to numerous statutory requirements).

137. *In re* J.C., 857 N.W.2d 495, 508 (Iowa 2014).

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need of assistance. . . ."[138] Needless to say, such an interpretation impacts all nonbiological parents in same-sex couples. It also disregards the developments in modern parentage law that reflect the use of assisted reproduction and other complex ways in which people have families.

Courts and agency personnel in child welfare cases are accustomed to inquiring about a child's biological father, but this is not always the appropriate inquiry. A New York case, described by the mother's attorney from Brooklyn Defender Services, illustrates this problem.[139] The biological mother had two children.[140] The biological father of one child was in court for the hearing when the petition was filed.[141] The agency said it did not have contact information for the other father.[142] Because the mother's attorney was attuned to parentage for same-sex couples, that attorney reported to the court that the other legal parent was the woman to whom the mother was married at the time of the second child's birth.[143] That parent was no longer living with the biological mother and already had notice of the proceedings.[144] The judge persisted in inquiring who the father was, and the lawyer argued that there was no legal father, that the biological father was a sperm donor, and that notice to him was not appropriate.[145] Eventually, the judge understood the situation, did not require notice to the biological father, and apologized to the biological mother.[146]

The mother's attorney believed that, even in New York City courts, there would be some judges who would have ruled differently. In parts of the country less sympathetic to same-sex couples raising children, it may be even more difficult to get agency personnel and judges to accurately determine and apply the law regarding legal parentage. This is another instance in which the fact that child welfare proceedings are usually closed makes it difficult to learn the extent of a serious problem affecting same-sex couples raising children.

138. *Id.* at 503.
139. Author conversation with Kylee Sunderlin (June 16, 2017) (on file with author).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

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C. Identifying a Child's Relatives or Family Members

Relatives of a child removed by the state have a status with no equivalent in other areas of family law. This premise opens up the possibilities for a partner or former partner who has played a parental role in the child's life and who may have much to offer the child. This Section addresses the definitions of "relative" under state laws and the legal significance of meeting that definition. It then identifies the potential conflict that might ensue if the parent, or the parent's family of origin, does not want a former partner involved with the child.

1. The Role of Family Members

Since the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), federal law has required states to consider giving preference to relatives over unrelated persons in foster homes when placing a child.[147] The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 subsequently expanded the significance of relative status. It requires that, within thirty days of removal, "the state shall exercise due diligence to identify and provide notice to the following relatives: all adult grandparents . . . and other adult relatives of the child . . . subject to exceptions due to family or domestic violence . . . ."[148] The notice must explain the options for participating in the care and placement of the child, describe the requirements to become a foster parent and the services and support that are available for children placed in foster homes, and describe the availability of kinship guardianship assistance payments, if the state provides such assistance.[149] The Fostering Connections Act also makes it easier for relatives to become licensed foster parents by permitting waiver of nonsafety-related licensing standards.[150]

Federal law does not define "relative," instead leaving the definition to each state. Who counts as a relative under state law, regulation, or policy is of critical significance when a child is removed from a parent who has, or had in the past, a same-sex partner who participated in raising the child. As discussed in Section B above, there are many states in which a partner or former partner can meet the definition of a parent and should be treated as such in the child welfare proceeding. There are circumstances, however, under which a partner or former partner will not be a legal parent. For

147. 42 U.S.C. § 671(a)(19) (2008).
148. *Id*. § 671(a)(29) [hereinafter the Fostering Connections Act].
149. *Id*. § 671(a)(29)(B)–(D).
150. *Id.* § 671(a)(10)(D).

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example, the particular state may have a narrow definition of parent that the individual cannot satisfy.[151] Alternatively, the partner or former partner may have raised the child but not since birth and may be more of a stepparent, even if not married to the biological parent. It would be better policy than what is currently in place in many states for such a person to count as a "relative" and to receive the required notice concerning the child and, as a result, the opportunity to be considered for preferential placement.[152]

Completely outside the context of LGBT families, child welfare advocates and professionals have recognized that children often have familial relationships with adults who are not recognized as legal family members. Therefore, a number of states use expansive definitions of "relative" to capture those relationships. California uses the term "nonrelative extended family member" (NREFM), defined as any "adult caregiver who has an established familial . . . or mentoring relationship with the child."[153] Several states, including Arkansas, Georgia, and New Mexico, use the term "fictive kin."[154] For example, New Mexico's definition of "fictive kin" is a "person not related by birth or marriage who has an emotionally significant relationship with the child."[155] "Relatives" are then defined as "mothers, fathers, brothers, sisters, grandparents, aunts, uncles, nieces, nephews, first cousins, mother-in-laws, father-in-laws, sister-in-laws, and brother-in-laws, as well as fictive kin."[156] Hawaii uses the culturally specific term "hanai relative," which includes an adult,

151. In Illinois, for example, planning for the adoption of a child and then raising that child as a parent for several years will not make someone a parent unless he or she completes the formal adoption of the child. *See* In re Scarlett Z.-D., 28 N.E.3d 776 (Ill. 2015). The same person would clearly be a legal parent in other jurisdictions. *See, e.g.,* Chatterjee v. King, 280 P.3d 283 (N.M. 2012).

152. As a nonparent, a partner or former partner should not trump the rights of the parent. There are justifiable concerns that kinship placement diverts attention and resources from reuniting parent and child. *See* Annie E. Casey Foundation, The Kinship Diversion Debate: Policy and Practice Implications for Children, Families, and Child Welfare Agencies 8, 9 (2013). It is always critical to distinguish between a same-sex partner who is a child's legal parent and thus equal in legal and constitutional status to the child's biological parent, *see supra* Part III(b), and a same-sex partner who is not a legal parent but who should come within the definition of "relative" for kinship care purposes.

153. Cal. Welf. & Inst. Code § 362.7 (West 2014).

154. Ark. Code Ann. § 9-28-108(a) (West 2017); Ga. Code Ann. § 15-11-2(33) (West 2017); N.M. Code R. § 8.26.4.7(P) (West 2018).

155. N.M. Code R. § 8.26.4.7(P) (West 2018).

156. *Id*. § 8.26.4.7 (Y).

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nonblood relative found "to perform or to have performed a substantial role in the upbringing and or material support of a child . . . ."[157]

Some states do not define "relative" expansively or use a term such as "fictive kin," but do include for preferential placement those individuals who have played a particular role with a child. Pennsylvania, for instance, includes an "individual with a significant, positive relationship with the child or family"[158] and Arizona lists "a person who has a significant relationship with the child."[159]

Perhaps because "relatives" appears in two different federal statutes passed more than ten years apart, the same state may define the term inconsistently. For example, the section of the New Mexico Administrative Code requiring notification to "relatives" of a child's removal requires notice only to "grandparents, aunts and uncles, adult siblings, and any other relative that the parent identifies as a potential placement resource[,]"[160] even though, for foster care placement purposes, the New Mexico Administrative Code defines relatives to include "fictive kin." North Carolina allows for placement with "nonrelative kin,"[161] and the agency policy manual defines kinship as "the self-defined relationship between two or more people . . . based on biological, legal, and/or strong family-like ties,"[162] but the statute requires the agency to notify only relatives and custodial parents of the child's siblings or those with legal custody of the child's siblings.[163]

This area of law urgently needs advocacy on behalf of children raised by same-sex couples. Numerous states use a narrow definition of "relative"

157. Haw. Rev. Stat. § 587A-4 (2017).
158. 62 Pa. Stat. and Cons. Stat. § 1302 (West 2015).
159. Ariz. Rev. Stat. Ann. § 8-514.02(A) (2017); Ariz. Rev. Stat. Ann. § 8-845(2) (2014).
160. N.M. Code R. § 8.10.7.7 (West 2010).
161. N.C. Gen. Stat. Ann. § 7B-505(c) (West 2017).
162. N. C. Div. Soc. Servs., *1201 Child Placement Services: IV. Placement Decision Making*, *in* Family Services Manual (2017), https://www2.ncdhhs.gov/info/olm/manuals/dss/csm-10/man/1201sIV.pdf..
163. N.C. Gen. Stat. Ann. § 7B-505(b) (West 2017).

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in statutes or regulations. Louisiana[164] and Michigan,[165] for example, are among several states that contain an exclusive list of specific legal relationships.[166] Maryland and Nevada limit relatives to those related by blood or marriage within five degrees of consanguinity or affinity.[167] The Maryland definition is explicitly based on the state's estates and trusts code, [168] even though the purpose of orderly property distribution through intestate succession bears no resemblance to the purpose of optimal child placement decisions. Advocates in these states should look for opportunities to expand the definition of relative, using the available more inclusive models. This is not an exclusively same-sex couple issue, and therefore other advocacy organizations should be willing to join in such efforts. For example, Grandfamilies.org, a national legal resource organization that supports grandfamilies, states that, when it comes to defining "relative," "it is best practice . . . to include 'fictive kin'—i.e., god parents and people with close, family like relationships with the child."[169]

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164. By statute, "relatives" for purposes of kinship foster care placement are limited to those persons related by blood or marriage in at least the second degree to the child's parent or stepparent. La. Stat. Ann. § 46:286.1(D)(1) (2017). The state's administrative code further clarifies that subsidized kinship placements are limited to biological or adoptive relatives who are:

1. grandfather or grandmother (extends to great-great-great);
2. step-grandfather or step-grandmother (extends to great-great-great);
3. brother or sister (including half-brother and half-sister);
4. uncle or aunt (extends to great-great);
5. first cousins (including first cousins once removed);
6. nephew or niece (extends to great-great);
7. stepbrother or stepsister.

La. Admin. Code tit. 67 § 5327(A).

165. Related means "the relationship by blood, marriage, or adoption, as parent, grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the individuals described in this definition, even after the marriage has ended by death or divorce." Mich. Comp. Laws Ann. § 722.111(y) (West 2018).

166. When a biological mother is or was married to a same-sex partner, the stepparent relationship may be on the list of relatives. *See* Mich. Comp. Laws Ann. § 722.111(y) (West 2018). Oregon's regulation includes "stepparent(s) or ex-step parents who had a personal relationship with the child entering foster care." Or. Admin. R. 413-070-0069 (2017). This is insufficient because a same-sex partner can participate fully in raising a child without being married to the child's biological parent.

167. Md. Code Regs. 07.02.25.02(18) (2018); Nev. Rev. Stat. Ann. § 432B.550 (West 2017).

168. Md. Code Ann. Est. & Trusts § 1-203 (West 2018).

169. *Notification of Relatives: Summary and Analysis,* Grandfamilies.org, http://grandfamilies.org/Topics/Notification-of-Relatives/Notification-of-Relatives-Summary-Analysis (last visited Jan. 30, 2018).

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In a state that broadly defines relatives entitled to preferential placement, advocates should urge that regulations governing notice should be reformed to render them consistent with the Fostering Connection Act. It does little good to provide for a placement preference with a person who does not know that the child has been removed by the state. States may be reluctant to expand notice requirements because of the time and effort involved in determining who to notify, but the addition of a category that includes those who have played a parental role in the child's life would not create a significantly more onerous burden than does requiring the tracking down of distant cousins and other relatives.

Identification as a family member also matters during the stage in child welfare proceedings in some states known as "family group decision-making" (FGDM). This is a generic term for many different processes that involve family members in decisions about the future of a child's care. Child welfare agencies work in tandem with family members to determine what is best for the child. The philosophy of FGDM emphasizes a highly inclusive definition of family, including talking to the child about who he or she considers family.[170]

2. Potential Roadblocks to a Same-Sex Partner's Status as a Family Member

Even when state law is expansive enough to include a current or former same-sex partner within the definition of relative, there may be other impediments to that person's inclusion in the process. These include discrimination as practiced by agencies, especially those that are faith-based, and hostility by the child's parent or other relatives.

Notification of relatives, inclusion of those relatives in decision-making, and identification of preferences for the child's placement all lie within the purview of the agency supervising the case once the child has come under the jurisdiction of the court. An agency that refuses to license LGBT foster parents will not license a current or former same-sex partner as a kinship caregiver. This may deny the child the best possible placement opportunity. This is another reason to oppose legislation allowing faith-based agencies to determine child welfare services based upon their religious beliefs, rather than the child's best interests.[171]

170. Am. Humane Assoc. & FGDM Guidelines Comm., Guidelines for Family Group Decision Making in Child Welfare 26 (2010), http://www.ucdenver.edu/academics/colleges/medicalschool/departments/pediatrics/subs/can/FGDM/Documents/FGDM%20Guidelines.pdf.

171. Indeed faith-based agencies' discriminatory practices could exclude any LGBT relative, such as a grandmother or adult sibling in a same-sex relationship, from providing kinship care.

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Parents are justifiably given a role in identifying family members for possible kinship placement. Federal law and conforming state law require agencies to notify relatives identified by the parent, but this is not always a reliable way to locate a former same-sex partner who has raised a child. Consider the example of Jerome given at the beginning of this article.[172] When his parents split up, the biological mother, Jamie, kept the nonbiological mother, Jann, from seeing the child—and New York law, at the time, gave Jamie that power. Had Jamie moved away with Jerome, Jann may not have learned that child welfare authorities had taken the child into state care as a result of abuse by Jamie's boyfriend. Given Jamie's hostility toward Jann, she would not likely have provided her name as a relative to notify.

Some state laws go farther and actually limit placement with those who are not legal relatives to individuals named by a parent. Massachusetts, for example, identifies an exclusive list of relatives entitled to kinship placement but has added to that list "a significant other adult to whom a child *and the child's parent(s)* ascribe the role of family based on cultural and affectional ties or individual family values."[173] This, in essence, gives a parent veto power over a person who may have functioned as the child's parent and may be the best alternative placement for the child. As parents attempting to exercise such veto power in post-dissolution custody and visitation cases have been largely rebuffed by state courts,[174] they should not have such veto power in child welfare matters.

Even when the parent is supportive of a former partner's involvement with the child, other relatives may pose an obstacle. The child's grandparents and other close relatives have an undeniable role in the child welfare proceedings. Those individuals may be hostile to the parent's sexual orientation and may deliberately seek to exclude a same-sex partner. In one Iowa case, a child removed based on her mother's heroin use was placed with a grandmother rather than the mother's non-substance-abusing wife, and when the agency returned the child to the wife seventeen months later

172. Paczkowski v. Paczkowski, 128 A.D.3d 968, 968 (N.Y. App. Div. 2015). In this case, Jann should have been considered Jerome's legal parent and would have so qualified under the laws of several jurisdictions and under the Uniform Parentage Act (2017). I use this factual situation merely to illustrate that a parent's hostility towards a former partner should not by itself keep that partner from designation as a relative.

173. 110 Mass. Code Regs. 18.04 (2018) (*emphasis added*).

174. *See* Nat'l Ctr. for Lesbian Rights, Legal Recognition of LGBT Families 5, 6 (2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.

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the grandmother contested that decision.[175] Some state statutes actually facilitate such exclusion, such as that in Colorado where a nonrelative can be included if that person is "*ascribed by the family* as having a family-like relationship" with the child.[176] If the child has a biological father, even if he has not raised the child, his view and that of his family will be included in the child welfare process and may be influenced by homophobia.

IV. Looking Ahead

This Article is a call to action. Both qualitative and quantitative research is critical to a better understanding of this particularly vulnerable group of LGBT parents and their children. Researchers who focus on LGBT families can pair with researchers who focus on parents in the child welfare system to develop the proper instruments for increasing our knowledge base.

LGBT advocacy and litigation groups do not need to wait for more research, however. They can take a number of steps to serve this population right now. The first critical step is simply identifying this cohort of LGBT parents as a constituency they serve and including them in action plans and priorities. For example, the Human Rights Campaign can expand its existing All Children All Families Project to encompass these children and these families. As part of this work, no agency that refuses to license LGBT foster or adoptive parents should be permitted to manage the cases of children in foster care whose parents are LGBT. The likelihood of bias is too great, and the stakes are too high. LGBT organizations are already fighting discrimination by these agencies, and they should make this explicit demand part of their work.

Legal groups should reach out to lawyers who focus on parents in the child welfare system, such as the American Bar Association National Alliance for Parent Representation and the network to which it is connected.[177] Such a mutually beneficial arrangement will educate those who work on the front lines who simply may be unaware, for example, of developments in parentage law, while also funneling information back to the LGBT groups about where systemic advocacy is needed. They can

175. In the Interest of M.L., 908 N.W.2d 882 (Iowa Ct. App 2017). These facts are contained in the opinion even though not relevant to the legal issue on appeal in the case.

176. Colo. Code Regs. § 2509-8:7.708.11; Colo. Code Regs § 2509-1:7.000.2 (emphasis added).

177. The website for the ABA National Alliance for Parent Representation lists numerous national and local legal representation, training, and advocacy groups. *See* Am. Bar Ass'n, Nat'l Alliance for Parent Representation, *Partners in the Field*, ambar.org, https://www.americanbar.org/groups/child_law/project-areas/parentrepresentation/professional-development/ (last visited Jan. 31, 2019).

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also begin to identify, on a state level, where legislative or administrative advocacy is necessary to recognize the family status of partners and ex-partners who are not legal parents.

Several LGBT legal groups have longstanding, ongoing efforts at parentage law reform, both through litigation and legislation. Such reforms can create the law necessary to protect same-sex couples and their children in the child welfare context. Incorporating those changes into that context, however, may require additional education of the actors in state agencies and courts who interact with these families.

Finally, arguments in support of LGBT adoption and foster parenting should take into account the many longstanding critiques of the child welfare system. Discrimination against same-sex couples who want to adopt is wrong. But there are too many children in foster care, some of whom have LGBT parents. Joining the efforts to reduce those numbers by keeping more children with their families will benefit those parents and will align LGBT rights advocacy with work on behalf of racial and economic justice.

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