

## **Beyond the Myth of Affluence: The Intersection of LGBTQ Family Law and Poverty**

by  
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In the past few decades, the dominant media narratives about LGBTQ people have focused on white middle-class couples and families. Likewise, statutes protecting LGBTQ parents and their children have often focused on the needs of more affluent parents, and the child welfare system disproportionately removes children from LGBTQ parents of color. In part, the stories shared in the media have helped combat discrimination against LGBTQ adoptive parents and achieve marriage equality, but they have also erased the real experiences of the majority of LGBTQ families. Contrary to persistent myths, most LGBTQ people are not white and affluent. Indeed, LGBTQ people, especially parents, disproportionately live in poverty, and LGBTQ people of color are more likely to be raising children.

Accordingly, the future of LGBTQ family law<sup>1</sup> must focus on the specific needs of low-income LGBTQ families.<sup>2</sup> To adequately address their legal needs, it is important to understand their lived experiences. The needs of these families differ in important ways from the needs of more affluent LGBTQ families as well as from those of low-income families in general. Same-sex couples and transgender people are more likely to experience poverty than different-sex married couples, and same-sex couples of color and transgender people of color experience significantly

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<sup>1</sup> LGBTQ family law is as broad of a topic as family law in general, touching on marriage, divorce and separation, unmarried partners, child custody, child support, and more. This article will focus on LGBTQ parents and LGBTQ children in family law and child welfare proceedings related to sexual orientation, gender identity, or recognition of their family relationships.

<sup>2</sup> This article addresses issues faced by low-income LGBTQ parents as well as parents of LGBTQ children. At times I use “LGBTQ families” as a shorthand to include all families with LGBTQ family members.

higher levels of poverty.<sup>3</sup> In particular, black children with same-sex male parents experience the highest levels of poverty among all types of households.<sup>4</sup> Same-sex couples of color are more likely to be raising children than white same-sex couples.<sup>5</sup>

Many LGBTQ families experience not only the impacts of poverty and racism but also face discrimination based on sexual orientation and gender in their everyday lives. One particularly poignant way these families continue to experience discrimination relates to the unnecessary separation of LGBTQ parents and their children. This happens because of inadequate legal protections or discrimination within the family court and child welfare systems. This separation often leads to devastating effects on the long-term health of the children in these families.

Over the last three decades, many states have banned discrimination against LGBTQ parents in custody proceedings, protected nonbiological parents functioning as parents, and established broader laws—statutes and case law—addressing children born through assisted reproduction and surrogacy.<sup>6</sup> However, many low-income LGBTQ parents are still left out of these protections. For example, many state statutes addressing children conceived through assisted reproduction only provide protections for more expensive types of assisted reproduction, leaving families who conceive through more affordable methods unrecognized by the law and vulnerable to separation. And even in states that do have broader protections, legal recognition re-

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<sup>3</sup> M.V. Lee Badgett et al., WILLIAMS INST., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* (2013) (“*New Patterns of Poverty*”), <https://williamsinstitute.law.ucla.edu/publications/lgb-patterns-of-poverty/>; National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2015), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (according to this survey, nearly one third of transgender people and more than 40% of transgender people of color live in poverty, compared to 12% of the general population).

<sup>4</sup> *New Patterns of Poverty*, *supra* note 3.

<sup>5</sup> Angeliki Kastanis & Bianca D.M. Wilson, WILLIAMS INST., *Race/Ethnicity, Gender and Socioeconomic Wellbeing of Individuals in Same-Sex Couples* 2 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-SS-Couples-Feb-2014.pdf>.

<sup>6</sup> See National Center for Lesbian Rights, *Legal Recognition of LGBT Families* (2019), [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf); See also COURTNEY G. JOSLIN, ET AL., *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* (2019).

quires costly and complex legal actions out of reach for low-income, unrepresented parents. Additionally, transgender parents and children in particular still experience explicit discrimination in child custody, guardianship, and child welfare proceedings, and this result is more likely for low-income, unrepresented parents. Finally, the child welfare system does not prioritize keeping families together and continues to unnecessarily separate parents and children who are low-income, LGBTQ, native, people of color, and people with disabilities.<sup>7</sup>

An important purpose of contemporary child custody statutes is to ensure meaningful and continuing contact between children and parents.<sup>8</sup> Years of social science research has confirmed that protecting a child's attachment bonds to their primary caregivers is vital to their healthy development, overall well-being, and ability to grow into a healthy, autonomous adult.<sup>9</sup> When those attachment relationships are severed, a child can experience severe, lasting emotional and psychological harm.<sup>10</sup> Decades of research also confirms that parental attachment relationships are just as important for children with LGBTQ parents, regardless of biological or legal ties.<sup>11</sup> Despite this research, family law and the child welfare system continue to separate LGBTQ parents and their children, and this burden falls most heavily on low-income families and families of color.

This article will cover family law and child welfare issues faced by low-income LGBTQ parents and families with LGBTQ

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<sup>7</sup> See Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 FAM. L.Q. 87 (2018).

<sup>8</sup> See, e.g., J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213 (2014).

<sup>9</sup> Am. Acad. of Pediatrics: Committee on Early Childhood, Adoption, and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1146 (2000) ("Paramount in the lives of . . . children is their need for continuity with their primary attachment figures").

<sup>10</sup> JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 31-33 (2d ed. 1979); WILLIAM F. HODGES, *INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY* 8 (2d ed. 1991).

<sup>11</sup> See, e.g., Am. Acad. of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341 (2002); Raymond W. Chan, et al., *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443, 454 (1998); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1037 (1992).

children. Section I discusses the need to provide meaningful legal rights and remedies for low-income, nonbiological, LGBTQ parents. Section II addresses the discrimination and challenges faced by LGBTQ parents and parents of LGBTQ children in custody and guardianship proceedings. Section III highlights the failures of the child welfare system and the disproportionate impact on LGBTQ families of color. Each section addresses potential policy and legislative changes that can be sought to address the issues faced by low-income LGBTQ families. Finally, the article concludes with calls to action for advocates in the private and public sectors.

## **I. LGBTQ Parents Are Often Not Legally-Recognized as Parents, and Protections That Exist Often Exclude Low-Income Parents**

### *A. LGBTQ Parentage and Legal Rules Regarding Parental Recognition*

Many LGBTQ parents are not biological parents of their children, and many families with LGBTQ parents have at least one nonbiological parent. Although there has been significant progress in many states in recognizing LGBTQ nonbiological parents, many are still not recognized as parents with a right to seek custody, the obligation to support their children, the right to participate in child welfare proceedings as parents, and all of the other legal rights and obligations that parents have. This is particularly true for low-income parents because state laws often do not address the ways that low-income parents have children and often require costly or complex legal proceedings that are out of reach for low-income parents in order to protect parent-child relationships.

LGBTQ people become parents in all the same ways as non-LGBTQ people, but they are more likely to become parents through assisted reproduction or adoption. One way that many lesbian, bisexual, and queer women, transgender men, and nonbinary people with uteruses conceive children is through at-home insemination<sup>12</sup> using sperm from a donor they know, with-

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<sup>12</sup> Insemination of sperm is any procedure where sperm is placed in a person's body into their uterus, cervix, or vagina.

out any medical involvement.<sup>13</sup> This process is very affordable and can be done with equipment costing just a few dollars.<sup>14</sup> However, many states only recognize nonbiological parents of children born through assisted reproduction and only treat sperm donors as nonparents if a doctor is involved in the insemination.<sup>15</sup> In addition, some states require a written, signed agreement,<sup>16</sup> which many parents—particularly those with limited access to attorneys—do not know that they need to complete. Other states only protect intended parents of children conceived through insemination when the intended parents are married couples.<sup>17</sup> Such rules leave unmarried parents, who are disproportionately low-income and people of color due to lower marriage rates, unprotected.<sup>18</sup> Often, an adoption is the only way for these families to protect their relationships. But the fact that the law in many states allows parents to obtain a second parent adoption<sup>19</sup> does not make this protection a reality for low-income families who cannot afford to hire an attorney or pay for home studies, and who are not able to navigate this often complex legal action unrepresented.

Many low-income LGBTQ nonbiological parents are also parenting children not conceived through assisted reproduction. These parents form families by becoming involved in a relation-

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<sup>13</sup> Although there are no studies on the prevalence of at-home insemination as a means of conceiving children, NCLR receives hundreds of calls each year from LGBTQ parents. In my experience, half or more of parents who conceived through assisted reproduction do so through at-home insemination using a known donor without medical involvement.

<sup>14</sup> Intravaginal insemination requires only a container for semen and a needleless syringe available at any medical supply company. It requires no medical training, and numerous books and websites provide guidance to parents on the process.

<sup>15</sup> JOSLIN, *supra* note 6, at § 3:9-3:10.

<sup>16</sup> *Id.* at § 3:8.

<sup>17</sup> *Id.* at § 3:4.

<sup>18</sup> Gretchen Livingston, PEW RES. CTR., *The Changing Profile of Unmarried Parents* (Apr. 25, 2018); R. Kelly Raley, et al., *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 FUTURE OF CHILDREN 2 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4850739/>.

<sup>19</sup> Many advocates use the phrase “second parent adoption” to refer to a process like stepparent adoption where a parent is added through adoption while retaining the rights of the existing parent. National Center for Lesbian Rights, *supra* note 6.

ship before the birth of a child or during infancy, where the child was conceived through intercourse with a third party during the relationship (through an affair or a relationship with everyone's knowledge<sup>20</sup>), or through one partner's sexual assault. These parents are not protected by assisted reproduction laws but nevertheless function in every way as parents, often from birth.

The failure of the law to protect many LGBTQ parents harms these families in a range of ways. The most common situation in which parentage issues arise is when parents break up. Without legal recognition, the nonbiological parent and the child may be separated and unable to have any contact with each other.<sup>21</sup> For the reasons discussed above, low-income parents are more likely to be unrecognized and unprotected.

Many low-income LGBTQ parents are not only denied legal recognition as parents but the state may also force their sperm donors to be legal fathers, even when none of the parties want this result. Low-income parents who receive federal benefits such as welfare or Medicaid for their children are required by federal law to participate in efforts to establish "paternity" of their children as a condition of receiving benefits.<sup>22</sup> As a result, state and county agencies bring actions against known sperm donors to establish that they are legal fathers who must pay child support, even when neither the parents, child, nor sperm donor want the donor recognized as a parent. In one widely-publicized case in Kansas, two women conceived a child using a known sperm donor they connected with through Craigslist.<sup>23</sup> When the parents later sought Medicaid coverage for their child, the state brought a paternity action against their donor to force him to pay child

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<sup>20</sup> Some lesbian, bisexual, and queer female couples choose to conceive a child by one partner having intercourse with a man during their relationship. This is often viewed as form of sperm donation by the parties, even though it is not assisted reproduction. In my experience, this is more common among low-income parents and parents of color. Polyamorous or non-monogamous LGBTQ parents may conceive in this way with the intention of coparenting with more than two parents.

<sup>21</sup> See, e.g., *White v. White*, 293 S.W.3d 1 (Mo. 2009); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

<sup>22</sup> 42 U.S.C. § 654 (2020).

<sup>23</sup> *Kansas Presses Sperm Donor To Pay Child Support*, NPR (Jan. 3, 2013), <https://www.npr.org/sections/thetwo-way/2013/01/03/168568383/kansas-presses-sperm-donor-to-pay-child-support>.

support.<sup>24</sup> After years of litigation and uncertainty, the court finally recognized that their donor was not a parent,<sup>25</sup> but this is not always the case for similar families.

### B. Policy Solutions for Low-income LGBTQ Parents

There are a number of policies states can adopt that greatly improve protections for low-income LGBTQ parents. These solutions focus on recognizing the ways that low-income LGBTQ parents form families and on providing free, widely accessible means for obtaining legal protections for their parent-child relationships. Marriage is not sufficient to ensure parentage recognition. First, many parents are not married, and marriage rates are significantly lower among low-income people and people of color for a number of reasons, including the social expectation of spending money on a wedding and the mass incarceration of black and brown people.<sup>26</sup> Second, many states do not have clear laws on how non-biological parents are treated even if they are married to the parent who gives birth.<sup>27</sup>

State laws can protect the ways that low-income LGBTQ parents form families by broadening their assisted reproduction statutes to include and protect intended parents who use at-home insemination without medical involvement, by including and protecting unmarried intended parents who use assisted reproduction, and by eliminating requirements that intended parents have signed a written agreement. Additionally, states can embrace doctrines that recognize and protect people who function as parents regardless of any particular mode of family formation. These doctrines include so-called “holding out” parentage provisions, which provide a presumption of parentage based on living with a child and holding the child out as one’s own, as well as various forms of *de facto* or psychological parentage by statute or case

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<sup>24</sup> *Id.*

<sup>25</sup> John Hanna, *Kansas Judge Rules Sperm Donor not on Hook for Child Support*, ASSOCIATED PRESS (Nov. 29, 2016), <https://apnews.com/f5a0689f777f44f6ab62935e55c85156/kansas-judge-rules-sperm-donor-not-hook-child-support>.

<sup>26</sup> Raley et al., *supra* note 18.

<sup>27</sup> JOSLIN, *supra* note 6, at § 5:22.

law. A number of states have adopted these provisions, all of which are also included in the Uniform Parentage Act of 2017.<sup>28</sup>

Another important step states can take is to authorize courts to recognize that in some circumstances, children have more than two parents. For example, a number of cases involve a low-income, same-sex female couple raising a child who was conceived through the gestational parent's prior relationship with a man, where all three of them have functioned as parents.<sup>29</sup> Other families are intentionally formed with more than two parents, such as when a lesbian couple and a gay male friend choose to conceive a child to parent together. States have begun to recognize that these children have the same enduring attachment bonds with more than two parents, and that these bonds must be protected, leading to a number of laws recognizing that children can have more than two legally-recognized parents.<sup>30</sup>

In addition to changes to substantive parentage laws, low-income parents need free, accessible ways to protect and establish their parentage.<sup>31</sup> In the past, the most common way for LGBTQ nonbiological parents to secure their parent-child relationship was through an adoption. But adoptions are usually costly and difficult for unrepresented parents to obtain. States can make a free and much simpler process available to parents by expanding the system of acknowledgments of paternity. Federal law requires every state to allow an unmarried biological father to sign an acknowledgment of paternity at any hospital for free,

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<sup>28</sup> *Id.* § 5:22, Chapter 7; UNIF. PARENTAGE ACT, §§ 204, 609 (2017).

<sup>29</sup> *See, e.g.*, *Tomeka N.H. v. Jesus R.*, No. 1041, 2020 WL 1314993 (N.Y. App. Div. Mar. 20, 2020); *In re M.C.*, 195 Cal. App. 4th 197, 123 Cal. Rptr. 3d 856 (2011), overturned due to legislative action.

<sup>30</sup> *See, e.g.*, CAL. FAM. CODE § 7612(c) (2014); ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (2016); VT. STAT. ANN. tit. 15C, § 206 (2018); WASH. REV. CODE § 26.26A.460 (2019). The Uniform Parentage Act now includes an optional provision allowing recognition of more than two parents. UNIF. PARENTAGE ACT, § 613(c) (2017).

<sup>31</sup> It is important to provide protections for parents beyond the ability to be named on their children's birth certificates. Although birth certificates allow parents to move through daily life and demonstrate their children's parentage, birth certificates alone do not establish legal parentage, which requires underlying substantive parentage law.



which establishes that the father is a parent who must be legally recognized as such by every state.<sup>32</sup>

A modern trend is to expand this process to parents of any gender and to nonbiological parents. Massachusetts and Nevada were the first states to do so,<sup>33</sup> and the Uniform Parentage Act of 2017 followed shortly after with a uniform law on the expansion of this program.<sup>34</sup> Since then, California, Maryland, New York, Vermont, and Washington have changed their laws to allow people of all genders and non-biological parents to obtain acknowledgements of parentage.<sup>35</sup> Opening up the acknowledgments process is key to making protections a reality for low-income parents.

Another way to provide accessible protections to low-income LGBTQ parents is through legislation creating a free, streamlined, confirmatory adoption process for use by married nonbiological parents who are already presumed to be parents under state law. This allows nonbiological parents to use a simpler second parent adoption process that eliminates the need for home studies, background checks, or fees. Obtaining an adoption is the safest and surest way to protect their parent-child relationships. The federal constitution requires states to provide full faith and credit to valid adoptions from other states without exception so long as the issuing court had jurisdiction.<sup>36</sup> This is an even stronger protection for families than acknowledgements of parentage, which are owed full faith and credit under federal statute and can be set aside in some circumstances.<sup>37</sup> Streamlined confir-

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<sup>32</sup> 42 U.S.C. § 666 (a)(5)(C)(iv) (2020).

<sup>33</sup> NEV. REV. STAT. ANN. § 440.285; *Partanen v. Gallagher*, 59 N.E.3d 1133, 1139 (Mass. 2016).

<sup>34</sup> UNIF. PARENTAGE ACT, Art. 3 (2017).

<sup>35</sup> CAL. FAM. CODE §§ 7570-7581 (2020); MD. CODE ANN., FAM. LAW § 5-1028 (2019); 2019 N. Y. Assemb. Bill No. 9506B, N. Y. 242nd Leg. Sess. (effective Feb. 15, 2021); VT. STAT. ANN. tit. 15C, § 301 (2018); WASH. REV. CODE ANN. § 26.26A.200 (2019).

<sup>36</sup> *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (reversing Alabama's refusal to recognize a second parent adoption by same-sex parents from Georgia and holding that states must recognize court orders from other states and cannot review the merits of the action).

<sup>37</sup> Even though adoptions are more secure than voluntary acknowledgements of parentage, acknowledgements are still a vital protection for states to offer. Confirmatory adoptions, even if free, are still more difficult to obtain and most parents will not know that they can do a confirmatory adoption. Every

matory adoptions are available in California, Maryland, and New Jersey.<sup>38</sup>

## **II. LGBTQ Parents and Parents of LGBTQ Children Experience Discrimination in Custody and Guardianship Proceedings**

### *A. Custody Discrimination*

Many LGBTQ parents are biological or adoptive parents. For such parents, it is clear that they have a legal parent-child relationship with their child. For example, bisexual and transgender parents may have and raise children where both parents are biological parents, many LGBTQ parents have biological children from prior relationships, and many LGBTQ parents adopt. Even when parentage is not in dispute, however, LGBTQ parents can lose custody or primary custody of their children because of discrimination based on sexual orientation or gender identity. Similarly, parents who affirm their LGBTQ children can also face discrimination and loss of custody. This result is more likely for low-income parents who are often unrepresented in custody or guardianship proceedings.

Some of the earliest work on LGBTQ family law focused on lesbian and bisexual women who lost custody of their children in the 1970s and 1980s after coming out, leading to the formation of what is now the National Center for Lesbian Rights (NCLR)<sup>39</sup> in 1977. After significant litigation and focus by NCLR and other advocates, most states established through case law that a parent's sexual orientation cannot be considered as a factor in custody proceedings.<sup>40</sup> A few states, however, have continued to

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person who gives birth in a hospital is offered the opportunity to sign an acknowledgement of parentage with an explanation of how to do so.

<sup>38</sup> CAL. FAM. CODE § 9000.5 (2020); MD. CODE ANN., FAM. LAW § 5-3B-27 (2020); N.J. STAT. § 9:17-71 (2020).

<sup>39</sup> See National Center for Lesbian Rights, *Mission and History*, <http://www.nclrights.org/about-us/mission-history/> (last visited Aug. 28, 2020). NCLR quickly expanded to focus on all issues facing LGBTQ people and their families, and LGBTQ family law has remained a core focus of our work.

<sup>40</sup> JOSLIN, *supra* note 6, ch. 1 (2019); *but see Ex Parte H.H.*, 830 So. 2d 21 (Ala. 2002) (a parent's sexual orientation can be considered as a factor in custody determinations).

allow consideration of nonmarital cohabitation with a same-sex partner as a factor or may require a parent not to live with a same-sex partner during custodial time, drawing on older case law and policies disfavoring nonmarital relationships.<sup>41</sup>

Even in states that have laws and policies protecting LGBTQ people, parents may lose custody simply because of their sexual orientation. In a recent case in Washington state, a trial court granted primary custody and sole legal decisionmaking of three children to their father, Charles, because their mother, Rachelle, had begun a relationship with another woman.<sup>42</sup> Even though Rachelle had been the children's primary caregiver their entire lives and there were no allegations that she was not able to care for them adequately, the trial court limited her visitation time, restricted her decisionmaking, and prohibited her from discussing her sexual orientation or religious issues with the children because the children had been raised in a Christian faith that condemned homosexuality and the court felt that the mother's sexual orientation would confuse the children.<sup>43</sup> The Washington Supreme Court reversed the decision, holding that sexual orientation cannot be a factor in custody determinations and noting that "[b]ias . . . permeated the proceedings."<sup>44</sup>

In theory, the same protections for LGBTQ parents in custody or guardianship proceedings should apply equally to transgender parents, but in reality, courts across the country continue to explicitly discriminate against transgender parents in custody proceedings, even using the fact of transition as a basis for terminating parental rights.<sup>45</sup> There have been a few positive cases prohibiting consideration of a parent's gender identity as a factor in custody determinations,<sup>46</sup> but transgender parents across the country continue to lose primary or joint custody, be restricted to

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<sup>41</sup> See, e.g., *Scott v. Scott*, 665 So.2d 760 (La. App. 1995); *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998); *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996). No published cases have squarely addressed this standard in a case involving married same-sex parents post marriage equality.

<sup>42</sup> *In re Marriage of Black*, 392 P.3d 1041, 1043 (Wash. 2017).

<sup>43</sup> *Id.* at 1047, 1052.

<sup>44</sup> *Id.* at 1053.

<sup>45</sup> Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1627–28 (2019).

<sup>46</sup> See, e.g., *Tipsword v. Tipsword*, No. 1 CA-CV 12-0066, 2013 WL 1320444 (Ariz. Ct. App. Apr. 2, 2013); *Christian v. Randall*, 516 P.2d 132 (Colo.

supervised visitation solely because of their gender, be required to present as their gender assigned at birth during visitation, have no contact with their children, or even have their parental rights terminated.<sup>47</sup> This continues to happen despite the existence of studies of transgender parents and their children finding that a parent's transition has no detrimental effect on the child, and that in fact, delaying a parent's transition or delaying disclosing to the child that the parent is transgender is detrimental to children.<sup>48</sup> Nevertheless, transgender parents today still lose custody or visitation based solely on their gender identity.

Parents of LGBTQ children may also experience discrimination in child custody proceedings between parents who disagree about affirming their LGBTQ children or when a relative or other third party seeks guardianship. Parents who wish to affirm their child's sexual orientation or gender often lose primary or joint custody, have restricted decisionmaking, or are granted only supervised visitation to ensure that they do not affirm their children's identities. Today, these cases commonly involve transgender or gender-variant children where one parent believes it is important to affirm the child's gender identity and expression and the other parent does not. Until the last decade, every case I am aware of that involved a custody dispute about affirming a transgender or gender variant child's gender resulted in the af-

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Ct. App. 1973); *In re Custody of T.J.*, No. C2-87-1786, 1988 WL 8302 (Minn. Ct. App. Feb. 9, 1988).

<sup>47</sup> See, e.g., *J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo. Ct. App. E.D. 1997); *In re Marriage of D.F.D.*, 862 P.2d 368 (Mont. 1993); *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986); *B. (Anonymous) v. B. (Anonymous)*, 184 A.D.2d 609, 585 N.Y.S.2d 65 (2d Dep't 1992). Sometimes, desperate transgender parents who are in the process of changing their gender presentation will agree to a provision that they will present themselves as the gender they were assigned at birth during visitation or custodial time to be able to see their children. As their transition progresses, however, this restriction becomes untenable or impossible, and it is difficult to challenge because the parent themselves agreed to the restriction. For understandable reasons, this situation is more common among unrepresented, low-income transgender parents.

<sup>48</sup> Richard Green, *Transsexuals' Children*, INT'L J. TRANSGENDERISM, Oct.-Dec. 1998; Tonya White & Randi Ettner, *Adaptation and Adjustment in Children of Transsexual Parents*, 16 EUR. CHILD & ADOLESCENT PSYCHIATRY 215, 215 (2007); Tonya White & Randi Ettner, *Disclosure, Risks and Protective Factors for Children Whose Parents Are Undergoing a Gender Transition*, 1-2 J. GAY & LESBIAN PSYCHOTHERAPY 142 (2004).

firming parent being granted only limited visitation, even if they were previously the primary caregiver.<sup>49</sup> Through the efforts of many advocates and NCLR's Transgender Youth Project, more of these cases now result in orders allowing a parent to affirm their child's gender identity, and there has been broader recognition of the need for schools and other entities to affirm transgender children.<sup>50</sup>

### B. Custody Solutions

It is important for state law to prohibit consideration of a parent's sexual orientation *and* gender identity in custody proceedings. Additionally, states should not allow custody to be limited based on a parent's cohabitation with a same-sex partner or any unmarried partner. Limitations based on a parent's connection to a third party should only be included in custody orders where there is a specific risk of harm to the child to have a particular person in their lives. Importantly for transgender parents, states should not permit custody orders to require a parent to present a particular gender or assume that a parent's gender transition is harmful to the child.

Even more importantly, judicial and legal education about LGBTQ parents and children is necessary to change the outcomes for these families in practice. Discrimination in these cases often occurs despite the court's true desire to help children because of a lack of understanding about sexual orientation and gender identity. Education is needed about how a parent's sexual orientation and gender has no bearing on their ability to parent as well as information about best practices for adjudicating cases involving LGBTQ parents or children.

Finally, programs to support and educate parents of LGBTQ children are needed to improve outcomes for these chil-

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<sup>49</sup> See, e.g., *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599 (Ohio Ct. App. Mar. 23, 2007).

<sup>50</sup> See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019); *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Kristen L. v. Benjamin W.*, No. S-15302, 2014 WL 2716842 (Alaska June 11, 2014); *What Schools and Parents Need to Know to Support Transgender Students*, ED SOURCE (Aug. 6, 2015), <https://edsources.org/2015/what-schools-and-parents-need-to-know-to-support-transgender-students/83871>.

dren. Nearly all parents in these disputes have a genuine desire to support their children and do what is best for them, but many parents may not understand how harmful it is to attempt to change a child's sexual orientation or gender identity or are misled to believe that response is in their child's best interests. Efforts to change a child's sexual orientation or gender identity are both ineffective and harmful to children and have been resoundingly rejected by medical and mental health associations.<sup>51</sup> Research has also shown that even small acts of acceptance on the part of parents significantly improves LGBTQ children's mental health and reduces the risk of suicide and harmful risk-taking behaviors, making parent education even more vital.<sup>52</sup> When advocates and therapists work with both parents to understand their children's needs and how harmful it is for their child to be prevented from being who they are, custody disputes can often be resolved.

### **III. The Child Welfare System Wrongfully Removes Children from Many Low-Income LGBTQ Parents, Particularly from Parents of Color**

#### *A. Child Welfare Interventions*

Although child welfare is considered a separate area of practice from family law, it is integrally connected to family law for low-income LGBTQ families. Low-income families make up the vast majority of families involved in the child welfare system,<sup>53</sup> and many families experience simultaneous family law and child welfare proceedings. A low-income parent who has lost custody

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<sup>51</sup> See U.S. Dep't of Health & Hum. Serv., Substance Abuse & Mental Health Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (Oct. 2015), <https://store.samhsa.gov/product/Ending-Conversion-Therapy-Supporting-and-Affirming-LGBTQ-Youth/SMA15-4928>.

<sup>52</sup> Caitlin Ryan, et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 *J. CHILD & ADOLESCENT PSYCHIATRIC NURSING* 205 (Nov. 2010), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1744-6171.2010.00246.x>.

<sup>53</sup> Steven M. Cytryn, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 *CARDOZO J.L. & GENDER* 81, 89 (2010).

of their children could have easily lost custody through either kind of proceeding. A more affluent parent is more likely to have only been involved in a child custody proceeding.

The child welfare system in this country is deeply broken. This system has laudable goals of protecting the safety, permanency, and well-being of children who are abused or neglected,<sup>54</sup> but in reality many families are separated primarily because of the effects of living in poverty, and the system fails to prioritize supporting children to remain with their families of origin. Rather than addressing the impact of poverty on children through a robust safety net that supports families, the system focuses its resources on removing children from families living in poverty when the effects of poverty for the children become severe<sup>55</sup> and incentivizes termination of parental rights and placement for adoption as a means of achieving permanency.<sup>56</sup> Additionally, the child welfare system disproportionately removes children from parents of color, native parents, parents with disabilities, LGBTQ parents, and parents of LGBTQ children, and these children remain in the system longer and have worse outcomes.<sup>57</sup> This is caused by both conscious and uncon-

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<sup>54</sup> See, e.g., U.S. Dep't of Health & Hum. Servs., Children's Bureau, *National Goals*, <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2988>.

<sup>55</sup> See, e.g., Cytryn, *supra* note 53, at 81, 89.

<sup>56</sup> Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 Nw. J. L. & Soc. POL'Y 303 (2006).

<sup>57</sup> See, e.g., Ctr. for the Study of Soc. Policy et al., *Disparities and Disproportionality in Child Welfare: An Analysis of the Research* (Dec. 2011), <https://www.aecf.org/resources/disparities-and-disproportionality-in-child-welfare/>; 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](https://cssp.org/wp-content/uploads/2018/08/Sexual-Minority-Youth-in-Child-Welfare_providers_final.pdf) (a disproportionate number of youth in the child welfare system identify as lesbian, gay, or bisexual); Shamini Ganasarajah et al., *Nat'l Council of Juvenile & Family Court Judges, Disproportionality Rates for Children of Color in Foster Care* (Fiscal Year 2015), (2017), <https://www.ncjfcj.org/publications/disproportionality-rates-for-children-of-color-in-foster-care-fiscal-year-2015/>; Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 SOC. SCI. RES. 283 (2016); Robert B. Hill, Ctr. Stud. Soc. Pol'y, for Racial Equity in Child Welfare, *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels* (2007), <https://www.aecf.org/resources/an-analysis-of-racial-ethnic-disproportionality-and-disparity-at->

scious bias in the system,<sup>58</sup> as well as a history of overtly racist policies with continuing effects today, including the removal of native children from their families and having white parents adopt them for the purpose of destroying native culture.<sup>59</sup>

The child welfare system is designed to focus on the harm and potential harm to children from abuse or neglect, even if it has not yet occurred, and in many ways ignores or at least minimizes the harm to children from separating them from their families. The inclusion of neglect and risk of neglect as bases for removal greatly broadens the scope of the system and creates a path to removal of children primarily because of the effects of poverty. As discussed above, the harm caused by separating children from their parents and primary caregivers causes deep and lasting harm to children, affecting every aspect of their development.<sup>60</sup> Of course, some children are at true risk of harm and cannot be protected while remaining with their families of origin, but the current system is not designed to address the needs of those children in particular without sweeping up many other children.

In addition to the psychological impacts of separation on children, parents and children also have a fundamental constitutional right to remain together. The right of parents to the care and custody of their children is deeply embedded in American

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the-nation/; Megan Martin & Dana Dean Connelly, Ctr. for the Study of Soc. Policy, *Achieving Racial Equity: Child Welfare Policy Strategies to Improve Outcomes for Children of Color* 4, 6 (2015), <https://cssp.org/wp-content/uploads/2018/08/achieving-racial-equity-child-welfare-policy-strategies-improve-outcomes-children-color.pdf>; 24 Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 72 (2012), [https://ncd.gov/sites/default/files/Documents/NCD\\_Parenting\\_508\\_0.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf); Nat'l Indian Child Welfare Ass'n, *What Is Disproportionality in Child Welfare?* (2017), <https://www.nicwa.org/wp-content/uploads/2017/09/Disproportionality-Table.pdf>.

<sup>58</sup> See Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 232–33 (2013).

<sup>59</sup> See Katie L. Gojevic, *Benefit or Burden?: Brackeen v. Zinke and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF. L. REV. 247, 256–57 (2020).

<sup>60</sup> See also Cooper, *supra* note 58, at, 218, 240–43 (discussing the harms experienced by children in foster care).



constitutional law.<sup>61</sup> Children also have a core, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life.<sup>62</sup> Despite these real-life harms and the strong constitutional interests families have in maintaining their bonds, the child welfare system does not focus on keeping children with their families of origin.

LGBTQ families disproportionately experience these harms. Many media stories about LGBTQ people and adoption focus on LGBTQ parents adopting children from foster care. LGBTQ people are more likely to adopt children,<sup>63</sup> and this is an important fact given that there is a movement to allow adoption agencies to discriminate against LGBTQ prospective parents.<sup>64</sup> However, a story that is often not heard is that LGBTQ parents of color, especially lesbian and bisexual black mothers, disproportionately have their children removed by the child welfare system, even compared to heterosexual black mothers.<sup>65</sup> These children are also more likely to be placed in foster care because even when there is another parent who is stable and able to care for the child, the court may not recognize the child's nonbiological parent.<sup>66</sup>

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<sup>61</sup> *Lehr v. Robertson*, 463 U.S. 248, 257 (1983); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000); *cf. Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.”).

<sup>62</sup> *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816 (1977).

<sup>63</sup> Gary J. Gates, et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, WILLIAMS INST. 8 (2007), <https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF>.

<sup>64</sup> Movement Advancement Project, *Equality Maps: Foster and Adoption Laws*, [https://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws) (last visited June 4, 2020).

<sup>65</sup> Polikoff, *supra* note 7, at 90 & n.28 (citing Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 SOC. SCI. RES. 283 (2016)).

<sup>66</sup> *Id.* at 89 (2018) (describing a case where a child was removed from lesbian parents and the biological mother's rights were terminated without consideration of the non-biological parent as a placement, even though both mothers were on the child's birth certificate).

Parents of LGBTQ children are also at risk of having their children removed when the state disagrees with their choice to affirm and support their children's sexual orientation or gender identity, particularly if they are low-income. In part, these families are more likely to be involved in child welfare investigations because third parties who are homophobic or transphobic—or even the child's other parent—may report them to child welfare as possibly abusing or neglecting their children. Then when they become involved in an investigation, conscious or unconscious bias on the part of social workers and even judges and juries increases the likelihood that their children will be removed and placed either with other family members or in foster care.

For example, one of our clients, Jane Doe, is a very low-income single mother of three. Her middle child has consistently expressed cross-gender behavior from a young age. Jane Doe had always been the children's primary caregiver and had sole custody since ending an abusive marriage with the father of the two younger children. After years of the middle child expressing cross-gender behavior, she consulted with a child therapist, who advised her to follow the child's lead. Jane Doe began doing so, allowing him to dress as a girl when he wanted but keeping both masculine and feminine clothes available for him so that he could also wear typical boys' clothing when and if he wanted. At this point, a complaint was made to the Department of Health and Human Services (DHHS), which investigated the family. DHHS brought a petition for jurisdiction over the children and removed all three children based on vague charges that her home was dirty and the furnace was broken at the time of the visit. But the petition focused primarily on the fact that she allowed the middle child to dress in girl's clothing. The petition was dismissed as insufficient and the children were returned home. The county then filed a second petition and sought a jury trial, where DHHS again focused on her affirmation of the middle child's gender expression, and the jury voted to remove all three children from her care. The children were then separated and placed with their fathers.

We appealed the decision, and although the court of appeals acknowledged that the removal and actions of DHHS appeared discriminatory and the petition was not brought for a proper purpose, the court affirmed by giving deference to the jury's deter-

mination and relying on the portions of the petition involving effects of the family's poverty. The Michigan Supreme Court reversed and vacated all orders without issuing a substantive opinion. Despite the eventual victory, our client's children's lives were deeply impacted by years of unnecessary separation from their primary parent and each other. Our client also became homeless after losing her livelihood because she was a childcare provider and the decision automatically placed her on a registry of people who have been adjudicated as having abused or neglected a child. She is still experiencing the impacts of DHHS's actions, including exacerbating the contentious and abusive relationship with the father of her two younger children.

#### B. *Child Welfare Solutions*

It is time for the child welfare system to be reimagined and replaced by a different system. The harm caused to children and families cannot be alleviated by small changes. A system that focuses instead on addressing the effects of poverty by providing a true safety net, along with supporting parents through coaching, parenting classes, respite care, and treatment for addiction has the potential to allow the majority of children now in foster care or placed for adoption through foster care to remain with their families of origin. Of course, there will always be some children who cannot safely remain with their families of origin regardless of what support systems may be provided. Some system for removing children is likely still needed, but removal should be a truly last resort.

The best outcome for children is to safely remain with the family who is raising them.<sup>67</sup> All children need safety and stability, but the harm caused by separating children from their primary caregivers should not be ignored or minimized. Additionally, many LGBTQ youth are placed in non-affirming foster homes or group settings, increasing the psychological and emotional harm to these children caused by removal from their families. LGBTQ family law advocates are intimately familiar with the deep and lasting scars caused by separating children

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<sup>67</sup> Cooper, *supra* note 58, at 241 ("children placed in foster care exhibited significant behavior problems when compared to children who received adequate care in the home . . . extend[ing] for years after a child leaves the system").

from their parents. Even when we succeed in reuniting LGBTQ parents and their children, I have seen again and again how these scars remain. Separating children and parents should be reserved for unusual circumstances that cannot be addressed another way.

Parents and children who are native, people of color, people with disabilities, and LGBTQ parents and children have borne the brunt of the failings of the child welfare system, and a new system focused on keeping families together is overdue.

#### **IV. Conclusion**

Despite the unique legal needs of low-income LGBTQ families, few services and programs focus on these families. In 2006, I began the Family Protection Project at the National Center for Lesbian Rights, which focused on improving legal services for low-income LGBTQ parents and their children with an emphasis on serving families of color. At the time, there were only a handful of programs focused on providing local services to low-income LGBTQ people in the country. Today, more LGBTQ organizations provide direct legal services, many legal aid and legal services organizations have LGBTQ projects, and some LGBTQ community centers operate monthly or weekly clinics with law schools or legal aid organizations, but the majority of LGBTQ low-income people still lack access to legal services that are LGBTQ-competent.

Low-income LGBTQ families need not only access to free legal services that are LGBTQ-competent but also advocates who focus on changing discriminatory laws. LGBTQ legal advocacy organizations have begun to focus more on the needs of LGBTQ people who experience poverty, but there is still little focus on enacting laws that specifically serve the needs of low-income LGBTQ families. These families' needs should be a priority. Private attorneys providing pro bono services and legal aid attorneys can play a role as well in shaping the future for these families. Individual attorneys can reach out to LGBTQ legal organizations like the National Center for Lesbian Rights for technical assistance in cases involving issues related to sexual orientation or gender identity, and attorneys who have had such cases can advocate with their legislators to address the legal needs of these families.

The need to address the issues low-income LGBTQ families face has never been greater. Just as for all families, existing challenges have only been exacerbated by the COVID-19 pandemic. Postponing and canceling trials has put many children in limbo, often separated from one or more parents.<sup>68</sup> Restrictions on visitation and in-person visitation have delayed, impeded, or prevented reunification of separated parents or children.<sup>69</sup>

Additionally, even before the pandemic, in my experience, LGBTQ nonbiological parents tended to be separated from their children for significant periods of time in custody disputes and child welfare proceedings, and many are never reunited. Courts may be reluctant to order even temporary visitation pending a parentage determination, and cases that present complex or novel questions of law simply take longer. Unrepresented parents may not even know that they can seek a determination of parentage. Nonbiological parents whose children are in child welfare proceedings may not even have a right to participate in the proceedings or an opportunity to attempt to prove parentage. Court delays caused by the pandemic worsen these existing problems.

Both nonprofit advocacy organizations and individual attorneys have a role to play in shaping the future of LGBTQ family law for low-income families. As the law continues to adapt to serve all families, it is vital that the specific needs of low-income LGBTQ families be addressed because all children deserve not only safety and security but also the opportunity to maintain their existing family relationships whenever possible.

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<sup>68</sup> Susan Bittenwieser, *Closed Courts Create Anguish for Families Separated by Child Welfare System*, WOMEN'S MEDIA CENTER (Apr. 23, 2020), <https://womensmediacenter.com/news-features/closed-courts-create-anguish-for-families-separated-by-child-welfare-system>.

<sup>69</sup> *Id.*

