

# ADOPTION AND FOSTER CARE

EDITED BY LEANNE ABAN, AMANDA MAZE-SCHULTZ, AMBREANNA ARNEUS,  
KYLE CASEY, ROB HOPKIRK, ADDYSON JACKSON, AND CHUNHUI LI

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## I. INTRODUCTION

The state-regulated system of adoption and foster care raises important questions about the proper role of government intervention in the typically private family realm. Issues of gender, sexual orientation, and race influence the way the law recognizes American families, particularly the respective rights of parents and children through adoption and foster care.

This Article provides an overview of the current law governing adoption and foster care, with a particular emphasis on how gender, sexual orientation, and race impact this system. Part II introduces the doctrinal underpinnings of contemporary adoption and foster care laws, following the overall development of both family law areas. Part III discusses the rights of biological parents in adoption and foster care proceedings. This section also highlights the impact of gender on parental rights in adoption proceedings through a discussion of courts' "biology plus" approach and the development of safe haven laws. The section concludes with a discussion of the rights of biological parents in the foster care system. Part IV addresses the impact of sexual orientation on adoption and foster care placement. Part V explores the systematic impact of adoption and foster care laws on children involved in the processes, including the challenges faced by gay, lesbian, bisexual, and transgendered youth in the system. Part VI discusses developments in adoptions involving individuals with relative ties to the child, including kinship care and second parent adoptions. Part VII examines the role of race in adoptions and the foster care system.

## II. DOCTRINAL UNDERPINNINGS OF THE ADOPTION AND FOSTER CARE SYSTEMS

Laws governing adoption and foster care are based on state and federal statutes.<sup>1</sup> Each state establishes its own standards for adoption and foster care processes, and each state must also comply with federal statutes to be eligible for certain federal funding.<sup>2</sup> There is no constitutional right to adopt or to be adopted<sup>3</sup>—adoption is considered a privilege.<sup>4</sup> Similarly, foster parents do not have a constitutional right to maintain custody of their foster children.<sup>5</sup>

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1. *See, e.g.*, *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 845 (1977) (“[A] foster family . . . has its source in state law and contractual arrangements.”); *Lofton v. Sec’y of the Dep’t of Child. & Fam. Servs.*, 358 F.3d 804, 809 (11th Cir. 2004) (“Under Florida law, ‘adoption is not a right; it is a statutory privilege.’ Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state.”) (citations omitted).

2. *See, e.g.*, 42 U.S.C.A. §§ 670–77 (West, Westlaw through Pub. L. No. 115-90) (stating requirements that states must meet in order to receive funding for foster care and adoption assistance from the federal government).

3. *See, e.g.*, *Lofton*, 358 F.3d at 811–15 (holding that there is no fundamental right to apply for adoption, to adopt, or to be adopted).

4. *See Browder v. Harmeyer*, 453 N.E.2d 301, 306 (Ind. Ct. App. 1983) (“[A]doption is a *privilege*, not a right, governed not by the wishes of the prospective parent(s) but by the state’s determination that a child is best served by a particular disposition.”) (emphasis in original).

5. *See, e.g.*, *Smith*, 431 U.S. at 845–46 (holding that the constitutional liberty interest of foster parents is very limited because it “derives from a knowingly assumed contractual relation with the

### A. HISTORICAL DEVELOPMENT AND CURRENT STATE OF ADOPTION LAW

Although adoption has been practiced since ancient times,<sup>6</sup> the first adoption laws were enacted by states in 1850.<sup>7</sup> Adoption statutes help courts adjudicate disputes between biological and adoptive parents.<sup>8</sup> These statutes either authenticate informal agreements that the parties reach or provide “judicial supervision over adoptions.”<sup>9</sup>

Prior to the early twentieth century, adoptees’ welfare was largely ignored.<sup>10</sup> Today, courts focus on a “child’s best interest” in formulating judicially-based adoption determinations.<sup>11</sup> Courts and legislatures now grapple with how to apply the child’s best interest guideline in restricting eligibility requirements for adoption.<sup>12</sup>

The adoption system is organized into two separate types of adoption: agency adoptions and independent adoptions. Under an agency adoption scheme, a licensed social service agency acts as an intermediary between biological and adopting parents, and the court finalizes the adoption process.<sup>13</sup> In addition, agencies usually supply medical and psychological care to the biological parents.<sup>14</sup> Alternatively, an independent adoption may involve an unlicensed intermediary, such as a lawyer, who works with adoptive and biological parents to form a placement or biological parents directly placing a child in an adoptive home.<sup>15</sup> Independent adoptions often result in financial assistance to the biological parents.<sup>16</sup> In both types of adoption, a court must accept the adoptive parents’

State,” leaving the state to define the rights of the parties); *Crim v. Harrison*, 552 F. Supp. 37, 40, 41 (N. D. Miss. 1982) (holding that the existence of a constitutionally protected interest for foster parents must be determined on a case-by-case basis because a legitimate claim of entitlement can only be established if the state’s laws and the contractual provisions create an expectation that the child will be permanently placed with the foster parents); see also Kristin J. Brandon, *The Liberty Interests of Foster Parents and the Future of Foster Care*, 63 U. CIN. L. REV. 403, 405 n.12 (1994) (explaining that courts frequently deny the position that foster parents have a life or property interest under the Fourteenth Amendment Due Process Clause).

6. See Brandon, *supra* note 5, at 977 n.13 (finding that references to adoption are present from the times of the early church and under Elizabethan law).

7. See Thanda A. Fields, *Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim*, 37 B.C. L. REV. 975, 977 n.12 (1996) (noting that Texas and Vermont were the first states to pass adoption laws in 1850).

8. See *id.* at 977–78.

9. *Id.* at 977.

10. See *id.* at 978–79 (asserting that the court did not need to consider adopting parents’ plans or qualifications).

11. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (“[C]ustody orders characteristically are subject to modification as required by the best interests of the child.”); *In re T.G.R. M.*, 404 S.W.3d 7, 16 (Tex. App. 2013); *Adoption of A.S.*, 151 Cal. Rptr. 3d 15, 25–26 (Cal. Ct. App. 2012); *In re Elizabeth F.*, 696 S.E.2d 296, 300, 303 (W. Va. 2010).

12. See, e.g., *In re Adoption of Baby Girl B.*, 67 P.3d 359, 372–73 (Okla. Civ. App. 2003) (listing factors considered in the best interest of the child test in the Anglo-American legal systems) (citation omitted).

13. See Fields, *supra* note 7, at 980.

14. See *id.* at 981.

15. See *id.* at 980.

16. See *id.* at 981.

petition for adoption, and the biological parents must legally terminate their parental rights.<sup>17</sup>

State and federal statutes govern eligibility to adopt.<sup>18</sup> Basic eligibility

17. *See id.* at 980–81.

18. *See* ALA. CODE § 26-10A-5 (West, Westlaw through Act 2022-44 of the 2022 Reg. & 1st Spec. Sess.); ALASKA STAT. ANN. § 25.23.020(a) (West, Westlaw through 2022 2nd Reg. Sess. of the 32nd Leg.); ARIZ. REV. STAT. ANN. § 8-103 (West, Westlaw through 2nd Reg. Sess. of the 55th Leg. (2022)); ARK. CODE ANN. § 9-9-204 (West, Westlaw through 2022 3rd Extra. Sess. of the 93rd Ark. Gen. Assemb.); CAL. FAM. CODE §§ 8601, 8603 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 19-5-202 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. §§ 45a-732 to 45a-734 (West, Westlaw through 2022 Reg. Sess.); DEL. CODE ANN. tit. 13, § 903 (West, Westlaw through Ch. 424 of the 151st Gen. Assemb. (2021–2022)); D.C. CODE § 16-302 (West, Westlaw through Jan. 30, 2022); FLA. STAT. ANN. § 63.042(2) (West, Westlaw through 2022 2nd Reg. Sess.), invalidated by Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); GA. CODE ANN. § 19-8-3 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); HAW. REV. STAT. ANN. § 578-1 (West, Westlaw through (End) of the 2022 Reg. Sess.); IDAHO CODE ANN. § 16-1501 (West, Westlaw through 2022 2nd Reg. Sess. & the 1st Extra. Sess. of the 66th Idaho Leg.); 750 ILL. COMP. STAT. ANN. 50/2 (West, Westlaw through P.A. 102-1102 of the 2022 Reg. Sess.); IND. CODE ANN. §§ 31-19-2-2 (West, Westlaw through 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); IOWA CODE ANN. § 600.4 (West, Westlaw through 2022 Reg. Sess.); KAN. STAT. ANN. § 59-2113 (West, Westlaw through 2022 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 199.470 (West, Westlaw through 2022 Reg. & Extra. Sess.); LA. CHILD. CODE ANN. arts. 1198, 1221, 1243 (West, Westlaw through 2022 1st Extra. & Reg. Sess.); ME. REV. STAT. tit. 18-C, § 9-303 (West, Westlaw through 2022 2nd Reg. Sess. of the 130th Leg.); MD. CODE ANN., FAM. LAW §§ 5-349, 5-3A-29, 5-3B-13 (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 210, § 1 (West, Westlaw through Ch. 125, 134, 136, 144-147, 149, 158, 174 of the 2022 2nd Ann. Sess.); MICH. COMP. LAWS ANN. § 710.24 (West, Westlaw through P.A. 2022, No. 223, of the 2022 Reg. Sess., 101st Leg.); MINN. STAT. ANN. § 259.22 (West, Westlaw through 2022 Reg. Sess.); MISS. CODE ANN. § 93-17-3 (West, Westlaw through 2022 Reg. Sess.); MO. ANN. STAT. § 453.010 (West, Westlaw through 2022 2nd Reg. Sess. of the 101st Gen. Assemb.); MONT. CODE ANN. §§ 42-1-106, 42-4-302 (West, Westlaw through 2021 Sess. of the Mont. Leg.); NEB. REV. STAT. ANN. § 43-101 (West, Westlaw through 2nd Reg. Sess. of the 107th Leg. (2022)); NEV. REV. STAT. ANN. §§ 127.020, 127.030, 127.090 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)); N.H. REV. STAT. ANN. § 170-B:4 (West, Westlaw through Ch. 345 of the 2022 Reg. Sess.); N.J. STAT. ANN. § 9:3-43 (West, Westlaw through L. 2022, c. 115 & J.R. No. 7); N.M. STAT. ANN. § 32A-5-11 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg. (2022)); N.Y. DOM. REL. LAW § 110 (McKinney, Westlaw through L. 2022, Chs. 1 to 571); N.C. GEN. STAT. ANN. §§ 48-1-103, 48-4-101 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-15-03 (West, Westlaw through the 2021 Reg. & Spec. Sess. of the 67th Leg. Assemb.); OHIO REV. CODE ANN. § 3107.03 (West, Westlaw through File 132 of the 134th Gen. Assemb. (2021–2022)). OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West, Westlaw through 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)); OR. REV. STAT. ANN. § 109.276 (West, Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb.); 23 PA. STAT. & CONS. STAT. ANN. § 2312 (West, Westlaw through 2022 Reg. Sess. Act 97); R.I. GEN. LAWS ANN. § 15-7-4 (West, Westlaw through Ch. 442 of the Jan. 2022 Reg. Sess.); S.C. CODE ANN. §§ 63-9-60, 63-9-1110 (West, Westlaw through 2022 Act No. 268); S.D. CODIFIED LAWS §§ 25-6-2, 25-6-3 (West, Westlaw through 2022 Reg. Sess. & S.C. R. 22-10); Tenn. Code Ann. §§ 36-1-115, 36-1-107 (West, Westlaw through 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); TEX. FAM. CODE ANN. § 162.001 (West, Westlaw through 2021 Reg. & Called Sess. of the 87th Leg.); UTAH CODE ANN. §§ 78B-6-114, 78B-6-116, 78B-6-117 (West, Westlaw through 2022 3rd Spec. Sess.); VT. STAT. ANN. tit. 15A, § 1-102 (West, Westlaw through Ch. 186 (End) & M-19 (End) of the Adjoined Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)); VA. CODE ANN. §§ 63.2-1201, 63.2-1201.1 (West, Westlaw through 2022 Reg. Sess. & 2022 Spec. Sess. I, cc. 1-22); WASH. REV. CODE ANN. § 26.33.140 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.); W. VA. CODE § 48-22-201 (West, Westlaw through

requirements include age<sup>19</sup> and residency.<sup>20</sup> In addition, although all states allow both unmarried people to adopt, many states require married persons to obtain spousal consent in order to adopt,<sup>21</sup> and few states permit unmarried partners

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2023 Reg. Sess.); WIS. STAT. ANN. § 48.82 (West, Westlaw through 2021 Act 267); WYO. STAT. ANN. § 1-22-103 (West, Westlaw through 2022 Budget Sess. of the Wyo. Leg.).

19. See CAL. FAM. CODE § 8601(a) (West, Westlaw through Oct. 15, 2022) (stating the minimum difference in age); COLO. REV. STAT. ANN. § 19-5-202(1) (West, Westlaw through 2nd Reg. Sess. & 1st Extra. Sess. of the 73rd Gen. Assemb. (2022)) (stating the minimum age); DEL. CODE ANN. tit. 13, § 903 (West, Westlaw through 151st Gen. Assemb., Ch. 439) (stating the minimum age); GA. CODE ANN. § 19-8-3(a) (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.) (stating the minimum difference in age and minimum age); IDAHO CODE ANN. § 16-1502 (West, Westlaw through 2022 2nd Reg. Sess. of the 66th Idaho Leg.) (stating the minimum difference in age or minimum age); N.J. STAT. ANN. § 9:3-43(b) (West, Westlaw through L. 2022, c. 118 & J.R. No. 7) (stating the minimum difference in age and minimum age); OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West, Westlaw through 2nd Reg. Sess. & 2nd Extra. Sess. of 58th Leg. (2022)) (stating the minimum age); S.D. CODIFIED L. § 25-6-2 (West, Westlaw through 2022 Reg. Sess. & S.C. R. 22-10) (stating the minimum difference in age); UTAH CODE ANN. § 78B-6-118 (West, Westlaw through 2022 3rd Spec. Sess.) (stating the minimum difference in age).

20. See GA. CODE ANN. § 19-8-3 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); IDAHO CODE ANN §§ 16-1501, 16-1506 (West, Westlaw through Ch. 1 of the 1st Reg. Sess. of the 67th Idaho Leg.); 750 ILL. COMP. STAT. ANN. 50/2 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IND. CODE ANN. § 31-19-2-2 (West, Westlaw through 2022 2nd Reg. Sess. & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); KY. REV. STAT. ANN. § 199.470(1) (West, Westlaw through 2022 Reg. Extra. Sess.); MISS. CODE ANN. § 93-17-3 (West, Westlaw through 2022 Reg. Sess.); OR. REV. STAT. ANN. § 109.276 (West, Westlaw through 2022 Reg. Sess. of 81st Leg. Assemb.); S.C. CODE ANN. § 63-9-60 (West, Westlaw through 2022 Act No. 268); TENN. CODE ANN. § 36-1-115 (West, Westlaw through 2022 Reg. Sess.).

21. See ALA. CODE § 26-10A-5 (West, Westlaw through 2022 Reg. & 1st Spec. Sess.); ALASKA STAT. ANN. § 25.23.020(a) (West, Westlaw through 2022 2nd Reg. Sess. & 2nd Reg. Sess. of the 32nd Leg.); ARIZ. REV. STAT. ANN. § 8-103 (West, Westlaw through 2nd Reg. Sess. of the 55th Leg.); ARK. CODE ANN. § 9-9-204 (West, Westlaw through 2022 3rd Extra. Sess. of the 91st Ark. Gen. Assemb.); CAL. FAM. CODE § 8603 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 19-5-202 (West, Westlaw through 2nd Reg. Sess. of the 71st Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. § 45a-724(a)(1) (West, Westlaw through 2022 Reg. Sess.); D.C. CODE § 16-302 (West, Westlaw through Dec. 28, 2022); Fla. Stat. Ann. § 63.042(c)(3) (West, Westlaw through 2022 2nd Reg. Sess.), invalidated by *Adoption of X.X.G.*, 45 So. 4d at 79; GA. CODE ANN. § 19-8-3 (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. § 578-1 (West, Westlaw through Act 3 of the 2022 Reg. Sess.); IDAHO CODE ANN. § 16-1504 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 66th Idaho Leg.); 750 ILL. COMP. STAT. ANN. 50/2 (West, Westlaw through P.A. 102-1102 of the 2022 Reg. Sess.); IOWA CODE ANN. § 600.4 (West, Westlaw through 2022 Reg. Sess.); KAN. STAT. ANN. § 59-2113 (West, Westlaw through 2022 Reg. Sess.); KY. REV. STAT. ANN. § 199.470 (West, Westlaw through 2022 Reg. & Extra. Sess.); LA. CHILD. CODE ANN. art. 1198 (West, Westlaw through 2022 1st Extra. & Reg. Sess.); ME. REV. STAT. tit. 18-C, § 9-303 (West, Westlaw through 2022 2nd Reg. Sess. of the 130th Leg); MD. CODE ANN., FAM. LAW § 5-349 (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 210, § 1 (West, Westlaw through Ch. 125, 134, 136, 144-147, 149, 158, & 174 of the 2022 2nd Ann. Sess.); MICH. COMP. LAWS ANN. § 710.24 (West, Westlaw through P.A. 2022, No. 223 of the 2022 Reg. Sess. 101st Leg.); MINN. STAT. ANN. § 259.22 (West, Westlaw through 2022 Reg. Sess.); MISS. CODE ANN. § 93-17-3 (West, Westlaw through 2022 Reg. Sess.); MO. ANN. STAT. § 453.010 (West, Westlaw through WID 37 of the 2022 2nd Reg. Sess. of the 101st Gen. Assemb.); MONT. CODE ANN. § 42-1-106 (West, Westlaw through 2021 Sess.); NEB. REV. STAT. ANN. § 43-101 (West, Westlaw through 2nd Reg. Sess. of the 107th Leg.); NEV. REV. STAT. ANN. § 127.030 (West, Westlaw Ch. 2 (End) of the 33rd Spec. Sess. (2021)); N.H. REV. STAT. ANN. § 170-B:4 (West, Westlaw Ch. 345 of the 2022 Reg. Sess.); N.J. STAT. ANN. § 9:3-43 (West, Westlaw through L. 2022, c. 115 & J.R. No. 7); N.M. STAT. ANN. § 32A-5-11 (West, Westlaw 2022 2nd Reg. Sess. & 3rd Spec. Sess.

to petition to adopt jointly.<sup>22</sup> There are two steps to the adoption process. First, an individual or couple must meet threshold eligibility requirements. Next, the court determines whether adoption is in the child's best interest as calculated by judges and social services personnel,<sup>23</sup> and whether the adoption accords with public policy.<sup>24</sup> Although state courts may strictly construe procedural requirements based on a statute's plain language, they may also utilize legislative intent and public policy to effectuate the best interest standard.<sup>25</sup> Because the child's best interest serves as the general public policy behind adoption statutes, these two issues—maintenance of public policy and the child's best interest—often conflate.<sup>26</sup> This permits a liberal construction of an adoption statute with respect to the statute's

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of the 55th Leg. (2022)); N.Y. DOM. REL. LAW § 110 (McKinney, Westlaw through L. 2022, Ch. 1 to 571); N.D. CENT. CODE ANN. § 14-15-03 (West, Westlaw through 2021 Reg. & Spec. Sess. of the 67th Leg. Assemb.); OHIO REV. CODE ANN. § 3107.03 (West, Westlaw through File 132 of the 134th Gen. Assemb. (2021–2022)); OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West, Westlaw through 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)); 23 PA. CONS. STAT. & ANN. § 2312 (West, Westlaw through 2022 Reg. Sess. Act 97); R.I. GEN. LAWS ANN. § 15-7-4 (West, Westlaw through Ch. 442 of the 2022 Reg. Sess.); TENN. CODE ANN. § 36-1-115 (West, Westlaw through 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); TEX. FAM. CODE ANN. § 162.001 (West, Westlaw through 2021 Reg. & Called Sess. of the 87th Leg.); UTAH CODE ANN. § 78B-6-115 (West, Westlaw through 2022 3rd Spec. Sess.); VT. STAT. ANN. tit. 15A, § 1-102 (West, Westlaw through Ch. 186 (End) and M-19 (End) of the Adjourned. Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. §26.33.140 (West, Westlaw through 2022 Reg. Sess.); W. VA. CODE § 48-22-201 (West, Westlaw through 2022 1st Spec. Sess., Reg. Sess., 2nd Spec. Sess., 3rd Spec. Sess., & 4th Spec. Sess.); WIS. STAT. ANN. § 48.82 (West, Westlaw through 2021 Act 267); WYO. STAT. ANN. § 1-22-104 (West, Westlaw through 2022 Budget Sess.).

22. Ann O'Connell, *Unmarried Couples and Adoption*, NOLO, <https://perma.cc/V7BP-Z597> (last visited Jan. 21, 2023).

23. See D.C. CODE § 16-309(b)(3) (West, Westlaw through Dec. 28, 2022); MASS. GEN. LAWS ANN. Ch. 210, § 5B (West, Westlaw through Ch. 286 of the 2022 2nd Ann. Sess.); MO. ANN. STAT. § 453.005 (1) (West, Westlaw through the 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 101st Gen. Assemb.); OHIO REV. CODE ANN. § 3107.14(c) (West, Westlaw through 134th Gen. Assemb. (2021–2022) & 2022 State Issue 1 & 2022 State Issue 2); UTAH CODE ANN. § 78B-6-102 (West, Westlaw through 2022 3rd Spec. Sess.); *In re Adoption of Charles B.*, 552 N.E.2d 884, 886 (Ohio 1990) (“Adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted.”).

24. See *In re Adoption of A.*, 733 N.Y.S.2d 571, 574 (N.Y. Fam. Ct. 2001) (finding that the intent of the legislature behind the adoption statute was to aid in the adoption of more children); *In re Robert Paul P.*, 471 N.E.2d 424, 425–27 (N.Y. 1984) (finding that an adoption of a fifty year-old by a fifty-seven year-old partner would be against public policy despite the fact that the adoption would be consistent with the words of the statute). See also Eleanor Michael, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family.”* 36 CONN. L. REV. 1439, 1453 (2004).

25. See, e.g., *Jenkins v. Jenkins*, 990 So. 2d 807, 812 (Miss. Ct. App. 2008) (noting that the legislative intent is clear in construing Mississippi's adoption statutes); *In re Angel Lace M.*, 516 N. W.2d 678, 688 n.2 (Wis. 1994) (reasoning that liberal construction of adoption statutes is mandated in light of the important public policy of the best interests of the child).

26. See *In re Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995) (“[O]ur primary loyalty must be to the statute's legislative purpose—the child's best interest.”). See also *In re Adoption of Infant K.S.P.*, 804 N.E.2d 1253, 1255–56 (Ind. Ct. App. 2004) (noting that the best interest of the child remains the primary concern in adoption proceedings).

purpose.<sup>27</sup> In determining the best interests of a child, courts consider statutorily outlined factors, including the prospective adoptive parent's personal characteristics,<sup>28</sup> age,<sup>29</sup> religion,<sup>30</sup> marital status,<sup>31</sup> health,<sup>32</sup> and sexual orientation.<sup>33</sup> Although some states take into account the race of a potential foster or adoptive parent and child,<sup>34</sup> states that wish to receive federal funding are prohibited from doing so.<sup>35</sup>

27. See *In re* Adoption of M.A., 930 A.2d 1088, 1096 (Me. 2007).

28. See N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16 (West, Westlaw with amends. in the N.Y. St. Reg., Vol. XLV, Issue 3 dated Jan. 18, 2023); see also VT. STAT. ANN. tit. 15A § 2-203 (West, Westlaw through Ch. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)) (requiring that multiple characteristics of a potential adoptee be taken into account during an evaluation).

29. See *In re* Jennifer A., 650 N.Y.S.2d 691, 693 (N.Y. App. Div. 1996); David B. Harrison, Annotation, *Age of Prospective Adoptive Parent as Factor in Adoption Proceedings*, 84 A.L.R. 3d 665 (1978); see also N.J. STAT. ANN. § 9:3-43(b) (West, Westlaw through L. 2022, c. 142 & J.R. No. 10) (allowing court to waive age requirement for good cause); VT. STAT. ANN. tit. 15A, § 2-203(d) (West, Westlaw through Ch. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)) (stating that age is relevant in an evaluation).

30. See *In re* Adoption of W.A.T., 808 P.2d 1083, 1086 (Utah 1991); Don F. Vaccaro, Annotation, *Religion as Factor in Adoption Proceedings*, 48 A.L.R. 3d 383 (1973); see also VT. STAT. ANN. tit. 15A, § 2-203(d) (West, Westlaw through Ch. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)) (stating that religion is relevant in an evaluation).

31. See UTAH CODE ANN. § 78B-6-117(3) (West, Westlaw through 2022 3rd Spec. Sess.) (“A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”); David B. Harrison, Annotation, *Marital Status of Prospective Adopting Parents as Factor in Adoption Proceedings*, 2 A.L.R. 4th 555 (1980); see also VT. STAT. ANN. tit. 15A, § 2-203(d) (West, Westlaw through Ch. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)) (stating that marriage is relevant in evaluation).

32. See N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(c) (McKinney, Westlaw through with amends. in the N.Y. St. Reg., Vol. XLV, Issue 3 dated Jan. 18, 2023); see also VT. STAT. ANN. tit. 15A, § 2-203(d) (West, Westlaw through Ch. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)) (stating that physical and mental health are relevant in evaluation).

33. See UTAH CODE ANN. § 78B-6-117(3) (West, Westlaw through 2022 3rd Spec. Sess.) (“A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”).

34. See *In re* Adoption/Guardianship No. 2633, 646 A.2d 1036, 1036 (Md. Ct. Spec. App. 1994) (holding that adoption agency's selection of adoptive parents based on race did not violate state statute, which stated that the agency could not withhold consent for adoption for the sole reason of race); Jay M. Zitter, *Race as Factor in Adoption Proceedings*, 34 A.L.R. 4th 167 (1984); see also MO. ANN. STAT. §§ 453.005(2)–(3) (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 101st Gen. Assemb.) (holding that adoptive homes should reflect the racial and ethnic diversity of the children needing adoption, but an adoption may not be delayed for reasons of race or ethnicity); VT. STAT. ANN. tit. 15A, § 2-203(d) (West, Westlaw through Ch. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb.) (holding race relevant in evaluation). *But see* CAL. FAM. CODE § 8708(a)(1) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.) (“[Adoption agency may not] deny to any person the opportunity to become an adoptive parent on the basis of the race, color, or national origin of the person or the child involved.”); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(i) (McKinney, Westlaw through with amends. in the N.Y. St. Reg., Vol. XXL, Issue 5 dated Jan. 31, 2018) (“Race, ethnic group, and religion shall not be a basis for rejecting an adoption applicant.”).

35. See Multi-Ethnic Placement Act, 42 U.S.C.A. § 5057 (West, Westlaw through Pub. L. No. 117-262) (“[I]ndividual[s] with responsibility for the operation of a program that receives assistance under [Chapter 42 of the U.S. Code] shall not discriminate . . . on the basis of race, color, national origin, sex, [or] age.”).

While this Article primarily focuses on the adoption of children, adults may, under certain circumstances, adopt other adults.<sup>36</sup> Generally, adoption of adults is done to provide heir status to adoptees.<sup>37</sup> Additionally, adult adoption often afforded legal status to LGBT partners who were unable to marry prior to the Supreme Court's decision to recognize same-sex marriage in *Obergefell v. Hodges*.<sup>38</sup> State statutes often set explicit age requirements, including minimum ages for adoptive parents or minimum years separating adopting parents and adoptees, and general allowances for adult adoptions.<sup>39</sup> If the state statute does not explicitly restrict or permit the action, courts usually uphold adult adoptions.<sup>40</sup> However, some courts reject the adult adoption of a sexual partner on the policy grounds that the incest implication proves incompatible with the child-parent relationship of adoption.<sup>41</sup>

### B. BEGINNING AND MODERN DEVELOPMENT OF FOSTER CARE LAW

Foster care is a “child welfare service [that] provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible.”<sup>42</sup> Reasons for foster care placement may include the biological parents' inability to care for a child due to “[f]amily disruption, marginal economic circumstances, and poor health,” as well as “neglect, abuse, abandonment, and exploitation of children.”<sup>43</sup> The state may intervene for a variety of reasons in pursuit of the public interest, including abuse and neglect,<sup>44</sup> with allegations of abuse and neglect

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36. See K.M. Potraker, Annotation, *Adoption of Adult*, 21 A.L.R. 3d 1012 (1968).

37. See, e.g., *In re Matter of Trust Created by Belgard*, 829 P.2d 457, 459 (Colo. Ct. App. 1991). *But see* Cross v. Cross, 532 N.E.2d 486, 488–89 (Ill. App. Ct. 1988) (holding that “creating heirs” by adult adoption violates the purpose behind state’s adoption statute and is impermissible).

38. See Kyle S. Schroader, *A Brief History of Pre-Obergefell Same-Sex Estate Planning: Adult Partner Adoption*, 107 KY. L.J. ONLINE (Sept. 27, 2018), <https://perma.cc/BMA4-3ELD>.

39. See, e.g., ARIZ. REV. STAT. ANN. § 8-102 (West, Westlaw through 2022 2nd Reg. Sess. of the 55th Leg.) (stating that a person must be under twenty-one in order to be adopted).

40. See, e.g., *In re Anonymous*, 435 N.Y.S.2d 527, 531 (N.Y. Fam. Ct. 1981) (holding that there are no public policy grounds on which to invalidate the adoption of an LGBT adult based on the adult’s sexual orientation).

41. See, e.g., *In re Robert Paul P.*, 471 N.E.2d 424, 427 (N.Y. 1984) (holding that the legislature would need to change public policy before adoption laws permitted adoption of lovers to gain legal status without marriage).

42. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 823 (1977) (quoting CHILD WELFARE LEAGUE OF AM., STANDARDS FOR FOSTER FAMILY CARE SERVICE 5 (1959)).

43. *Id.* at 824 n.10 (quoting ALFRED KADUSHIN, CHILD WELFARE SERVICES 366 (1967)).

44. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that traditionally, a state may not interfere in the “private realm of family life,” but “the family itself is not beyond regulation”); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (holding that, because the state has cognizable interests in the safety of children in its jurisdiction, neglectful parents may be separated from their children); Tracey B. Harding, *Involuntary Termination of Parental Rights: Reform is Needed*, 39 BRANDEIS L.J. 895, 896–97 (2001) (finding that every state provides for the termination of parental rights on various grounds, including abuse, neglect, and abandonment). *But see Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (holding that parents’ fundamental interest in their children does not evaporate simply because they



being the most commonly cited reason for removing children from parents.<sup>45</sup>

Unlike adoption, which offers permanent placement, foster care offers temporary placement for children until their biological families can improve living conditions at home.<sup>46</sup> Even though state agencies typically secure legal custody of the children they place in foster care, parents will retain guardianship.<sup>47</sup> State “dependency courts” (sometimes called “family courts”) decide issues of entrance into the foster care system and evaluate possible reunification with biological parents.<sup>48</sup> If a child enters foster care by voluntary placement, their biological parent may seek the return of the child without the court’s consent.<sup>49</sup> The overall number of children in foster care has risen dramatically over the past four decades. There were an estimated 407,000 children in foster care in 2020.<sup>50</sup> This is a decrease of over 150,000 children as compared to 1999, but it is still an increase of almost 150,000 children as compared to 1982.<sup>51</sup>

In 1997, Congress enacted the Adoption and Safe Families Act (ASFA), which recognizes that the intended temporary nature of the foster care system does not reflect the reality of long-term enrollment of children in the system.<sup>52</sup> The ASFA encourages states to provide adoption incentives to foster care placements, thus promoting adoption while placing less emphasis on reunification efforts.<sup>53</sup> Additionally, the ASFA further promotes these adoption proceedings by providing an expedited timeline within which states must terminate the rights of

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have not been model parents or have lost temporary custody of their child to the State). A parent can temporarily lose custody of his or her child without having his or her parental rights involuntarily terminated. *See id.* at 747–48.

45. Harding, *supra* note 44, at 896–97.

46. *See Smith*, 431 U.S. at 824.

47. *Id.* at 828 n.20 (quoting ALFRED KADUSHIN, CHILD WELFARE SERVICES 355 (1967)). As a result, neither the foster parent nor agency has the authority that the biological parent does in providing consent to such areas of the child’s life as surgery, marriage, armed forces enlistment, or legal representation. *Id.*

48. Trinity Thorpe-Lubneuski, Madelyn Freundlich, & Gina Russo, *Progress on Court Reforms: Implementation of Recommendations from the Pew Commission on Children in Foster Care*, PEW CHARITABLE TRUST 1 (Oct. 2009), <https://perma.cc/GYV7-LT3J> (“No child enters or leaves foster care except by approval of the court. Courts across the country play a crucial role in determining the path that a child who has been abused or neglected will take—whether it is returning home, joining a new family through adoption, being placed with relatives, or remaining in foster care until they ‘age out.’”).

49. *See Smith*, 431 U.S. at 828.

50. *Children in Foster Care in the United States*, KIDS COUNT DATA CTR. (Apr. 2022), <https://perma.cc/VH8W-8YLM>.

51. Kathy Barbell & Madelyn Freundlich, *Foster Care Today*, CASEY FAM. PROGRAMS 2 (2001), <https://perma.cc/JN3W-38EX>.

52. *See* Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parents Patriae and Parents’ Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL’Y 137, 142–44 (2004); *see also* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C.A. §§ 673b, 678, 679b).

53. *See* Wilkinson-Hagen, *supra* note 52, at 145 (finding that the federal statute was amended to require that “the child’s health and safety shall be the paramount concern” in “determining reasonable efforts to be made with respect to a child”).

biological parents.<sup>54</sup> Although the ASFA ultimately encourages reunification with a biological parent, the ASFA imposes a time limit on reunification efforts. Nonetheless, critics continue to advocate for a primary focus on reunification and a return to temporary foster care placements.<sup>55</sup>

In 2014, Congress addressed these concerns by enacting the Preventing Sex Trafficking and Strengthening Families Act (PSTSFA), which strengthens reunification efforts by requiring ongoing and intensive efforts to return the child to their family.<sup>56</sup> Additionally, the PSTSFA adds several other requirements to the United States Social Security Act in order to ensure the best permanent placement, to promote emotional and developmental growth, and to prevent and address sex trafficking of children in foster care.<sup>57</sup> While the PSTSFA acknowledges the need for a focus on reunification, it also recognizes the need to ensure stability in a healthy environment.<sup>58</sup> In order to promote the emotional and developmental growth of children in foster care, the PSTSFA requires caregivers to utilize the “reasonable and prudent parent standard” in determining whether to allow a child to participate in social and extracurricular activities.<sup>59</sup> Additionally, the PSTSFA created new case plan and case review requirements, including documentation of all placement efforts and efforts to ensure the child’s foster family follows the reasonable and prudent parent standard.<sup>60</sup> Under the PSTSFA, any child at least fourteen years of age must be consulted in developing or changing their case plan, has the option to choose up to two case planning team members, and must be given and have explained to them a list of their rights.<sup>61</sup>

The PSTSFA requires states to develop procedures for “identifying, documenting, and determining appropriate services” for any child who is at risk for trafficking, including “children for whom a State child welfare agency has an open case file but who have not been removed from the home” and “children who have run away from foster care.”<sup>62</sup> States also had the option to expand their procedures to include any individual under the age of twenty-six.<sup>63</sup> The PSTSFA requires states to enact

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54. *See id.* (explaining the statute’s mandate that “permanency hearings,” previously called “dispositional hearings,” should occur twelve months after a child’s entrance in foster care, instead of eighteen months after, and that a separate hearing to terminate parental rights should occur within thirty days of entrance).

55. *See id.* at 145–47, 166.

56. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).

57. *See id.* Documentation must be provided at each permanency hearing detailing the intensive and ongoing efforts for family reunification. Additionally, permanency plans do not automatically result in placement with a new family after a specified amount of time. Permanency plans are developed with the child in an attempt to fulfill the child’s desires for permanency, which can include permanent reunification. *Id.* § 112.

58. *See id.* §§ 111–12.

59. *See id.* § 111.

60. *See id.* § 112.

61. *See id.* § 113.

62. *See id.* § 101.

63. *See id.*

procedures for locating any child missing from foster care, as well as procedures for identifying and responding to any factors contributing to the child's disappearance.<sup>64</sup>

Although states statutorily create and maintain foster care programs,<sup>65</sup> Congress grants funds under Title IV-E of the Social Security Act<sup>66</sup> to foster care programs that comply with congressionally mandated features.<sup>67</sup> The federal foster care statute imposes several requirements, including restrictions on disclosure of information regarding children assisted by the plan.<sup>68</sup> Additionally, as part of the Bipartisan Budget Act of 2018, Congress passed the Family First Prevention Services Act, which sought to keep families intact and “prevent foster care placements” by enabling states to use Title IV-E funds to support “mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services.”<sup>69</sup> Federal foster care statutes also impose mandated reports of abuse;<sup>70</sup> health and safety standards for foster homes;<sup>71</sup> a focus on the health and safety of the child in making all placement decisions;<sup>72</sup> the making of “reasonable efforts” for the preservation or reunification of families;<sup>73</sup> timeliness in permanent placement;<sup>74</sup> exceptions to reunification requirement in cases of egregious abuse, such as sexual abuse, torture, or abandonment;<sup>75</sup> a preference for placement with a relative;<sup>76</sup> criminal record and child abuse checks on prospective foster parents;<sup>77</sup> and the provision of adequate preparation for prospective foster parents.<sup>78</sup> The federal Secretary of the Department of Health and Human Services (HHS) must approve state foster care plans.<sup>79</sup> However, individual states may create their own qualifications for becoming a foster parent.<sup>80</sup> Currently, the federal government will reimburse approved state programs for spending on childcare, foster care payments, and adoption assistance payments, all at a rate of 75%.<sup>81</sup>

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64. *See id.* §§ 104–05.

65. *See Title IV-E Foster Care*, U.S. DEP'T OF HEALTH & HUM. SERVS. (May 17, 2012), <https://perma.cc/D9WX-HBP2>.

66. *See id.*

67. 42 U.S.C.A. §§ 670–71 (West, Westlaw through Pub. L. No. 117-214).

68. *See id.* § 671(a)(8).

69. *See id.* § 671(a)(37); *Family First Prevention Services Act*, CHILD WELFARE INFO. GATEWAY, <https://perma.cc/4QH7-ZNMY> (last visited Nov. 5, 2022).

70. *See id.* § 671(a)(9).

71. *See id.* § 671(a)(10).

72. *See id.* § 671(a)(15)(A).

73. *See id.* § 671(a)(15)(B).

74. *See id.* § 671(a)(15)(C).

75. *See id.* § 671(a)(15)(D)(i).

76. *See id.* § 671(a)(19).

77. *See id.* § 671(a)(20).

78. *See id.* § 671(a)(24).

79. *See id.* § 671(b).

80. *How Do I Become a Foster Parent?*, U.S. DEP'T OF HEALTH & HUM. SERVS. (July 15, 2021), <https://perma.cc/CB2J-GVB7> (“Each state provides its own criteria and licensing requirements for foster parents.”).

81. *See* 42 U.S.C.A. § 624 (West, Westlaw through Pub. L. No. 117-214).

States often place a variety of their own requirements on prospective foster parents, including criminal record checks<sup>82</sup> and age limitations.<sup>83</sup> However, states may not deny or delay placement because the prospective foster parents live outside of the jurisdiction handling the child's case.<sup>84</sup> Additionally, states may not qualify for federal funds if they deny foster parent eligibility or delay or deny placement of a child into foster care based on race, color, or national origin.<sup>85</sup> Although some states have nonetheless allowed the race of the child or of the prospective foster parents to play a role in determining placement, states are forbidden from utilizing race as the sole criterion.<sup>86</sup> Critics have expressed concern about using criteria such as race to limit potential placements for foster children.<sup>87</sup> There are no federal protections for prospective parents against discrimination on the basis of sexual orientation or gender identity, but several states have enacted them.<sup>88</sup>

In 2017, the Brookings Institution released a comprehensive report on a national campaign to improve the foster care system.<sup>89</sup> These improvements included:

Reforming state policies, including changes to statutes, administrative codes, and regulations, to increase public and private agency capacity to support, engage, recruit, and retain foster parents . . . [S]teps to promote quality caregiving, ensure accountability and oversight, and create more effective partnerships between parents and agencies.

Promoting stronger federal policies that firmly embed the principle that children do best in families . . . [including] fiscal incentives and greater state accountability measures to ensure the availability of trained and qualified foster parents to meet the needs of children and communities. Changing the public narrative about foster parents to emphasize the vital role that they play in a child's life. By leveraging survey data, as well as the voices of foster parents, youth who have

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82. See, e.g., ARIZ. REV. STAT. ANN. § 8-112(B)(6) (West, Westlaw through 2022 2nd Reg. Sess. of the 55th Leg.).

83. See, e.g., ALA. CODE. § 38-12-2(c)(2) (West, Westlaw through Act 2022-442 of the 2022 Reg. Sess. & 1st Spec. Sess.) (stating that a foster parent must be at least twenty-one years old).

84. See 42 U.S.C.A. § 671(a)(23).

85. See *id.* § 671(a)(18).

86. See, e.g., *J.H.H. v. O'Hara*, 878 F.2d 240, 245 (8th Cir. 1989) (holding that race may be considered in determining the best interest of the child, but may not be the only factor in determining placement); *McLaughlin v. Pernsley*, 693 F. Supp. 318, 324 (E.D. Pa. 1988) (holding that race may be a factor in agency's decision regarding placement of children in foster homes, but may not be the "sole criterion" used).

87. See, e.g., RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION* 402 (2003).

88. See *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/2T5E-K8RL> (last visited Feb. 22, 2023).

89. See Ron Haskins, *A National Campaign to Improve Foster Care*, BROOKINGS INST. (June 2017), <https://perma.cc/2E5K-FXQW>.

experienced foster care, and other community leaders, the public will gain greater understanding and appreciation of foster parents.<sup>90</sup>

In another report, the child welfare organization Fostering Results encouraged greater flexibility in the use of federal funds.<sup>91</sup> Many states have enjoyed success when using flexible funding strategies for reducing the number of children in out-of-home care, achieving permanency through reunification or adoption, increasing child safety and well-being, and reducing administrative costs associated with providing community-based child welfare services.<sup>92</sup> In 1994, Congress passed a law authorizing the Secretary of the Department of HHS to approve state demonstration projects and waive certain provisions of Titles IV-E and IV-B of the Social Security Act.<sup>93</sup> The waivers grant states flexibility in the use of federal funds, particularly funds for Title IV-E foster care.<sup>94</sup> The project was then extended by the Adoption and Safe Families Act of 1997, expanding HSS authority to use waivers for child welfare programs.<sup>95</sup> Although the authority eventually expired in 2006, the passage of the Child and Family Services Improvement and Innovation Act, which was signed into law on September 30, 2011, reauthorized HHS to approve up to ten new waiver demonstrations in each of Federal Fiscal Years 2012 through 2014.<sup>96</sup> The law included a new provision specifying that all waiver demonstrations need to terminate operations by September 30, 2019.<sup>97</sup> Prior to this deadline, many demonstration projects were completed.<sup>98</sup> Through their participation, twenty-five states, the District of Columbia, and the Port Gamble S’Klallam Tribe all “expanded the child welfare knowledge base regarding what works to improve safety, permanency, and well-being for children and their families.”<sup>99</sup>

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90. *Id.* at 5.

91. Jess McDonald, Nancy Salyers, & Michael Shaver, *The Foster Care Straight Jacket: Innovation, Federal Financing & Accountability in State Foster Care Reform*, FOSTERING RESULTS 2 (Mar. 2004), <https://perma.cc/R2D6-CFUZ> (“Illinois used a federal funding waiver to subsidize private guardianship and provide more than 6,800 children with stable, permanent homes. The state then reinvested the more than twenty-eight million dollars in ‘savings’ created by the waiver into other services.”).

92. *See, e.g., Flex Funds*, EMBRELLA (Apr. 2019), <https://perma.cc/97U6-YLXS>; *Flexible Funding to be Used to Help Children Reduce Length of Stay in Foster Care*, N.Y. STATE OFF. OF CHILD. & FAM. SERVS. (Oct. 17, 2013), <https://perma.cc/7GPB-NQJR>; *A Case Study: California and Flexible Funding*, CASEY FAM. PROGRAMS, <https://perma.cc/4NCH-HQ7K> (last visited Feb. 23, 2023).

93. JAMES BELL ASSOCS., SUMMARY OF THE TITLE IV-E CHILD WELFARE WAIVER DEMONSTRATIONS 1 (2013), <https://perma.cc/A2YP-G9VF>.

94. *See id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* ADMIN. FOR CHILD. & FAM., U.S. DEP’T. OF HEALTH AND HUM. SERVS., SUMMARY OF CHILD WELFARE WAIVER DEMONSTRATIONS BY JURISDICTION (2021), <https://perma.cc/L4U2-V2AZ>.

99. *See id.* at 1, 13.

### III. RIGHTS OF BIOLOGICAL PARENTS

Parental rights for biological parents have long been recognized due to the biological parents' psychological bond to their child.<sup>100</sup> A child can only be adopted if the child's biological parents consent to the adoption or the parental rights of the biological parents are terminated.<sup>101</sup> Traditionally, a mother's right to consent to her child's adoption has always been recognized, irrespective of the mother's marital status.<sup>102</sup> In contrast, men previously had no rights toward or responsibility for children born out of wedlock, but they have gained some rights in the last few decades.<sup>103</sup> However, a lack of nation-wide parity and the distinctions between mothers and fathers in state legitimacy and adoption laws have led some critics to believe sex bias permeates the system.<sup>104</sup>

#### A. "BIOLOGY PLUS" APPROACH AND THE RIGHTS OF BIOLOGICAL FATHERS

In the past, whether the father was married to the mother of his biological children largely determined his rights and obligations.<sup>105</sup> Although modern adoption and custodial laws maintain a focus on the best interests of the child, defining that concept proves complicated.<sup>106</sup> Changes in the law over time have expanded the group of people considered suitable as custodial or adoptive parents, which now includes unmarried biological fathers as well as the partner of the biological parent.<sup>107</sup>

100. Erin Bajackson, *Best Interests of the Child*, 25 J. AM. ACAD. MATRIM. L. 311, 316 (2013).

101. Deborah E. Crum, *Uniform Adoption Laws: A Public Health Perspective*, 7 PITT. J. ENVTL. PUB. HEALTH L. 127, 138 n.44 (2012).

102. See OR. REV. STAT. ANN. § 109.092(3) (West, Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb.).

103. See Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R. 5th 151 (1998) (citing *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510 (1925)) ("Historically, the rights of unwed fathers to make any determination regarding their children have been curtailed by state laws justified by stated considerations of public policy and the best interest of children. These restraints have been applicable particularly to the adoption of illegitimate children, decrees which permanently terminate the relationship between a biological parent and child. This premise prevailed until the 1970s even though the rights and privileges of parenthood have been granted fundamental constitutional protection since the 1920s."); *Meyer v. Nebraska* 262 U.S. 390, 400 (1923); *infra* Part III.A.

104. See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 88–89 (2003); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67–69 (1995) (explaining the law's bias in favor of granting custody to women is actually the result of a sex bias in favor of men, stemming from the patriarchal roots of family law).

105. Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 132–33 (2003); *cf.* *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956–57 (Mass. 2003) (noting that the State has a strong public policy to eliminate the distinctions between "marital and nonmarital children" when providing for the children's support and care).

106. See Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 106 (2011) ("[C]entral criticisms of the best-interest standard all relate to its discretionary quality and the lack of objective and scientifically valid rules to guide courts in determining best interests.").

107. See Dayna R. Cooper, *Fathers are Parents Too: Challenging Safe Haven Laws with Procedural Due Process*, 31 HOFSTRA L. REV. 877, 885–86 (2003) (referencing *Stanley*, 405 U.S. at 49); *see also* CAL. FAM. CODE §§ 9000(b), 297(a)–(b) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.)

Prior to the 1970s, a married father possessed responsibilities and rights regarding his biological children, but an unmarried father did not.<sup>108</sup> In the 1970s, the Supreme Court expanded the scope of an unmarried father's rights, finding biological fathers were entitled to equal protection under the Fourteenth Amendment.<sup>109</sup> The seminal case expanding the rights of unmarried biological fathers was *Stanley v. Illinois*, decided by the Supreme Court in 1972.<sup>110</sup> Peter Stanley, an unmarried father, lived intermittently with his three biological children and their biological mother for eighteen years.<sup>111</sup> When the children's mother died, the State of Illinois declared the children wards of the state and placed them with court-appointed guardians without a hearing to determine the father's fitness to take custody of the children, per state law.<sup>112</sup> The Supreme Court held the Illinois law unconstitutional under the Fourteenth Amendment (1) on equal protection grounds because the statute treated Stanley differently from married fathers and unmarried mothers, and (2) on due process grounds because the statute deprived Stanley of a liberty interest without a hearing.<sup>113</sup> The Court later clarified its holding, stating that constitutional protection only exists when a biological father has demonstrated some minimal interest in, or connection with, his child.<sup>114</sup> Unmarried fathers were not entitled to a parental relationship, but merely the opportunity to pursue one.<sup>115</sup> In other words, simple biology was not enough.

Evidence that establishes a father's minimal interest includes acknowledgment of paternity,<sup>116</sup> contact,<sup>117</sup> monetary support,<sup>118</sup> presence of the father's name on

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(addressing adoption by stepparents and domestic partners); VT. STAT. ANN. tit. 15A, § 1-102(b) (West, Westlaw through Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb.) (“[I]f a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent.”).

108. See generally Cooper, *supra* note 107; Robin Cheryl Miller, Annotation, *Right of Putative Father to Visitation with Child Born Out of Wedlock*, 58 A.L.R. 5th 669 (1998).

109. *Stanley*, 405 U.S. at 649.

110. *Id.*

111. *Id.* at 646.

112. *Id.*

113. *Id.* at 645.

114. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392–93 (1979).

115. See *Lehr*, 463 U.S. at 262.

116. See *B.E.B. v. H.M.*, 822 So. 2d 429, 431 (Ala. Civ. App. 2001) (“A father’s mere acknowledgement of paternity, alone, does not nullify the presumption in favor of awarding custody of a child born out of wedlock to his or her mother.”); *Carpenter v. Hawley*, 281 S.E.2d 783, 786 (N.C. Ct. App. 1981) (“The term ‘acknowledgment’ generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted.”); see generally *Acknowledgement*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “acknowledgment” as: “A father’s public recognition of a child as his own.”); see also ALA. CODE § 26-11-2 (West, Westlaw through 2022 Reg. Sess. & 1st Spec. Sess.) (stating the statutory procedures for paternal acknowledgment); ALA. CODE § 26-17-601 (West, Westlaw through 2022 Reg. Sess. & 1st Spec. Sess.) (enacting procedures for bringing action to determine paternity).

the child's birth certificate<sup>119</sup> or in a putative father registry,<sup>120</sup> court action to establish paternity,<sup>121</sup> and the immediacy and persistence of the father in demonstrating an interest in the child.<sup>122</sup> In practice, this standard proves largely fact-driven.<sup>123</sup>

This "biology plus" Supreme Court doctrine is still followed to some extent today.<sup>124</sup> However, critics argue that the approach grants unwed mothers more rights than unwed fathers.<sup>125</sup> Courts in Alabama,<sup>126</sup>

117. See *M.V.S. v. V.M.D.*, 776 So. 2d 142, 146–48 (Ala. Civ. App. 1999) (finding that five visits over the course of eight and one-half months, most lasting only a few minutes, were not enough to establish contact with child).

118. See *State v. Bean*, 851 P.2d 843, 845 (Ariz. 1992) (finding that father gave "minimal financial support" to mother and child).

119. See *M.V.S.*, 776 So. 2d at 148 (noting that father failed to add his name to the child's birth certificate).

120. See *Lehr*, 463 U.S. at 264; see also MASS. GEN. LAWS ANN. Ch. 210, § 4A (West, Westlaw through Ch. 230 of the 2022 2nd Ann. Sess.) (declaring that a person that "file[s] a declaration seeking to assert the responsibilities of fatherhood" has a "parental responsibility claim"); MINN. STAT. ANN. § 259.52 (West, Westlaw through 2022 Reg. Sess.) (establishing and defining a "fathers' adoption registry"); see generally Jennifer E. Burns, *Should Marriage Matter?: Evaluating the Rights of Legal Absentee Fathers*, 68 FORDHAM L. REV. 2299, 2333 n.301 (2000) (noting that twenty-six states have paternity registries). A putative father registry allows a male to register if he believes he may have fathered a child in order to preserve his right for notice and consent in the event of an adoption. *Id.*

121. See IND. CODE ANN. § 31-19-9-15 (West, Westlaw through 2022 2nd Reg. Sess. of the 122th Gen. Assemb.); *In re Paternity of M.G.S.*, 756 N.E.2d 990, 999–1000 (Ind. Ct. App. 2001) (upholding § 31-19-9-15, which provides that putative father's consent is implied if father does not file paternity action within thirty days of receiving notice of adoption, despite inequitable result in this case where father demonstrated intent to develop and maintain relationship with child).

122. See *Quilloin v. Walcott*, 98 S. Ct. 549, 554–55 (1978) (indicating that a natural father's knowing failure to petition to legitimize his relationship with his daughter for over eleven years would be relevant to determining his rights to stop the adoption of this daughter), *In re Appeal in Pima County Juvenile Severance Action No. S-114487*, 876 P.2d 1121, 1132 (Ariz. 1994) ("The message, put simply, is this: do something because conduct speaks louder than words or subjective intent.").

123. See *In re Appeal in Pima County Juvenile Severance Action*, 876 P.2d at 1132.

124. Alison S. Pally, *Fatherhood by Newspaper Ad: The Impact of In re the Adoption of a Minor Child on the Definition of Fatherhood*, 13 COLUM. J. GENDER & L. 169, 170 (2004); see also *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 638 (2013) (holding that biology was not enough because the biological father was absent in Baby Girl's life); *K.D.T.J. v. Madison Cnty. Dep't. of Hum. Res.*, 867 So. 2d 1136, 1144 (Ala. Civ. App. 2003). *But see* *Murphy v. Suddeth*, 375 S.E.2d 254, 256 (Ga. Ct. App. 1988) (permitting a biological father to legitimize his child and gain visitation rights after denying paternity of child, having no contact with the child, and providing no support for two and one-half years, as he did not relinquish his "opportunity interest" in the child); cf. *Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001) (upholding provision, in 8 U.S.C.A. § 1409(a), which placed additional relationship burdens on fathers because "fathers and mothers are not similarly situated with regard to the proof of biological parenthood").

125. Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 294 (2012) ("Strict application of the marital presumption . . . highlights the chaos of paternity jurisprudence: some men are given full parental rights merely because of their biological connection, even if they do not want to be declared parents. Yet some loving fathers who have willingly assumed parental responsibility and seek formal recognition of their fatherhood will be denied formal status because of a legal fiction: preservation of the marital family.").

126. See *B.E.B. v. H.M.*, 822 So. 2d 429, 430 (Ala. Civ. App. 2001) (noting the strong presumption in Alabama that the mother of a child born out of wedlock has a "superior" right of custody over all other persons, including the biological father).



Arizona,<sup>127</sup> Nebraska,<sup>128</sup> and New Jersey<sup>129</sup> have interpreted the rule as not requiring unwed mothers to demonstrate the same commitment to parenting that unwed fathers must demonstrate to assert parental rights.<sup>130</sup>

In fact, some states do not require consent from an unwed biological father before considering his child eligible for adoption.<sup>131</sup> A biological parent has a constitutional entitlement to a hearing regarding a pending adoption.<sup>132</sup> However, a father maintains no due process right to receive special notice of his child's pending adoption if state law adequately affords him the opportunity to establish a relationship with the child and provides him the procedural requirements to receive notice of the adoption.<sup>133</sup> If an unmarried biological father fails to meet these requirements, then he is not entitled to notice.<sup>134</sup> The Supreme Court has held that biology alone is not enough to grant constitutional protection to biological parents against unwanted adoption.<sup>135</sup>

Some states require consent of the biological father if his parental rights remain intact before the adoption of his child.<sup>136</sup> Other states expanded the due process notice requirement, holding that a biological father must exert some effort to establish a relationship with his child to receive the constitutional due process protection of required consent before the adoption of his child.<sup>137</sup> However, states in this latter category differ in terms of the effort required to achieve parental

127. *See* *State v. Bean*, 851 P.2d 843, 845–46 (Ariz. Ct. App. 1992) (upholding Arizona statute making mother of child born out of wedlock the legal custodian until paternity is established).

128. *See State ex rel. Pathammavong v. Pathammavong*, 679 N.W.2d 749, 756 (Neb. 2004) (noting that an unwed mother is initially entitled to custody of the child).

129. *See Banach v. Cannon*, 812 A.2d 435, 440 (N.J. Super. Ct. Ch. Div. 2002) (noting the mother's biological link places her in a far superior position than the father as to the immediate course of the child's interests and relationships).

130. *See id.*; ARIZ. REV. STAT. ANN. § 13-1302(B) (West, Westlaw through 2022 2nd Reg. Sess. of the 55th Leg.); *Pathammavong*, 679 N.W.2d at 756, *B.E.B.*, 822 So. 2d at 430; *Bean*, 851 P.2d at 845; Tracy Cashman, *When is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959, 971 (1997) (“[S]tate statutes generally entitle mothers of illegitimate children to always block a proposed adoption, but afford fathers of illegitimate children this opportunity only upon a showing of a substantial relationship between the father and the child.”).

131. Shanley, *supra* note 104, at 75.

132. *See Stanley*, 405 U.S. at 658 (finding that constitutional due process and equal protection rights include granting an unwed father a hearing on fitness before his child is removed from his custody).

133. *See Lehr v. Robertson*, 463 U.S. 248, 264–65 (1983).

134. *See id.* at 261, 264–65.

135. *See id.* at 261.

136. *See, e.g.*, DEL. CODE ANN. tit. 13, §§ 1103, 1106 (West, Westlaw through 2021–2022 of the 151st Gen. Assemb., Ch. 412) (requiring father's consent to adoption unless criteria for exception are met).

137. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 210, § 4 (West, Westlaw through Ch. 125 of the 2022 2nd Ann. Sess.) (enacting provisions for sufficient notice); *In re Paternity of M.G.S.*, 756 N.E.2d 990, 1005 (Ind. Ct. App. 2001) (“[W]hile the biological link between a putative father and his child alone does not warrant significant constitutional protection, an unwed father nevertheless has a constitutionally protected [interest] to form a relationship with his child. . . . Once the father has grasped this opportunity by demonstrating a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his paternal rights with respect to that child ripen into an interest which is entitled to substantial protection under the Due Process Clause.”).

due process status. Overall, despite that a biological father's parental rights are regarded as secondary to the biological mother's, a biological father's parental rights are presumed superior to the parental rights of a third party.<sup>138</sup> Courts consider the natural relationship between a parent and a child presumptively to be in the best interest of the child, even if the child is born out of wedlock.<sup>139</sup>

Critics who find sex bias in adoption laws highlight that these differences derive from the idea "that men generally abandon their illegitimate children and must prove otherwise if they have not, and that unmarried women never do, thus, no proof [of a relationship between parent and child] is required of them."<sup>140</sup> Critics claim that statutes and case law perpetuate gender-based roles by adopting these assumptions.<sup>141</sup> In these roles, men are "the masters of their own fates" and choose whether or not to exercise their rights to non-marital children, but women are assumed to be involved with and responsible for their children.<sup>142</sup> One out of four, or 18.4 million, children in America live in a home without their biological, step, or adoptive fathers.<sup>143</sup> Despite these current problems, the laws have progressed significantly since the nineteenth century, when men had no legal responsibility for or relationship with their illegitimate children.<sup>144</sup>

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138. See *Blackshire v. Washington*, 880 So. 2d 988, 991 (La. Ct. App. 2004) ("In a conflict between a parent and a nonparent, the parent enjoys the paramount right to custody of a child and may be deprived of such a right only for compelling reasons."); *David N. v. Jason N.*, 608 S.E.2d 751, 753–54 (N.C. Ct. App. 2004); *Chavez v. Chavez*, 148 S.W.3d 449, 457–59 (Tex. Ct. App. 2004); Thomas J. Goger, *Right of Putative Father to Custody of Illegitimate Child*, 45 A.L.R. 3d 216 (2004) (explaining that presumption is subject to the qualification that the father is competent to care for the child and that awarding custody to the biological father is in the best interests of the child); see also *Vinson v. Sorrell*, 136 S.W.3d 465, 468 (Ky. 2004) (finding that parents have a constitutional right to custody over their own children and an attack on this right by a nonparent must be supported by clear and convincing evidence of unfitness and waiver of right); *In re Guardianship of D.J.*, 682 N.W.2d 238, 244 (Neb. 2004) (holding that a biological or adoptive parent has a superior right to custody of the child against other parties); *Watkins v. Nelson*, 748 A.2d 558, 564–69 (N.J. 2000) (finding that when a custody dispute is between a fit parent and a third party, the fit parent is entitled to a rebuttable finding of custody); *Campbell v. Brewster*, 9 A.D.3d 620, 621 (N.Y. App. Div. 2004) ("A parent has a superior right to custody over a nonparent unless the nonparent meets the burden of proving 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances.'") (citation omitted); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 545 (N.Y. 1976) (holding that the "extraordinary circumstances" necessary to "make significant decisions concerning the custody of children" are narrowly construed).

139. See, e.g., *In re Adoption of N.L.B. v. Lentz*, 212 S.W.3d 123, 128 (Mo. 2007) (noting a presumption that maintaining the biological parent-child relationship remains in the best interests of the child).

140. *Davis*, *supra* note 104, at 104.

141. *See id.*

142. *Id.* at 104–05.

143. *The Statistics Don't Lie: Fathers Matter*, NAT'L FATHERHOOD INITIATIVE, [perma.cc/EX3Q-8WJV](https://perma.cc/EX3Q-8WJV) (last visited Feb. 22, 2023).

144. See *Shanley*, *supra* note 104, at 68–69.

## B. IMPACT OF SAFE HAVEN LAWS ON THE RIGHTS OF BIOLOGICAL FATHERS

Safe Haven laws demonstrate an expanding area of adoption law that may significantly impact a father's rights to his biological children. Beginning with Texas in 1999,<sup>145</sup> almost every state has enacted Safe Haven laws.<sup>146</sup> These laws aim to prevent the abandonment and death of hundreds of newborns whose

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145. TEX. FAM. CODE ANN. §§ 262.301–09 (West, Westlaw through 2021 Reg. & Called Sess. of the 87th Leg.).

146. ALA. CODE §§ 26-25-1 to -5 (West, Westlaw through Act 2022-442 of the 2022 Reg. & 1st Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-3623.01 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); ARK. CODE ANN. §§ 9-34-201 to -202 (West, Westlaw through the 2022 Extra. Sess. of the 93rd Ark. Gen. Assemb.); CAL. PENAL CODE § 271.5 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); CAL. HEALTH & SAFETY CODE § 1255.7 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); CONN. GEN. STAT. ANN. §§ 17a-57 to -61 (West, Westlaw through 2022 Reg. Sess.); DEL. CODE ANN. tit. 16, § 907A (West, Westlaw through Ch. 424 of the 152nd Gen. Assemb. (2021–2022)); FLA. STAT. ANN. § 383.50 (West, Westlaw through July 1, 2022, in effect from the 2022 2nd Reg. Sess.); GA. CODE ANN. §§ 19-10A-1 to -7 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); IDAHO CODE §§ 39-8201 to 8207 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 66th Idaho Leg.); 325 ILL. COMP. STAT. ANN. 2/5 (West, Westlaw through P.A. 101-1102 of the 2022 Reg. Sess.); IND. CODE ANN. §§ 31-34-2.5-1 to 4, 35-46-1-4(c) (West, Westlaw through 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); IOWA CODE ANN. §§ 233.1 to 233.5, 726.3, 726.6(2) (West, Westlaw through 2022 Reg. Sess.); KAN. STAT. ANN. § 38-2282 (West, Westlaw through 2022 Reg. Sess.); KY. REV. STAT. ANN. §§ 620.350, 405.075 (West, Westlaw through 2022 Reg. & Extra. Sess.); LA. CHILD. CODE arts. 1149–1160 (West, Westlaw through 2022 1st Extra. & Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 553(3) & tit. 22, § 4018 (West, Westlaw through 2022 2nd Reg. Sess. of the 130th Leg.); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. Ch. 119 § 39 1/2 (West, Westlaw through Ch. 125, 134, 136, 144–47, 149, 158, & 174 of the 2022 2nd Ann. Sess.); MICH. COMP. LAWS ANN. §§ 712.3, 750.135(2) (West, Westlaw through P.A. 2022, No. 223, of the 2022 Reg. Sess., 101st Leg.); MO. ANN. STAT. § 210.950 (West, Westlaw through WID 27 of the 2022 2nd Reg. Sess. of the 101st Gen. Assemb.); MONT. CODE ANN. §§ 40-6-402 (West, Westlaw through 2021 Sess. of the Mont. Leg.); NEV. REV. STAT. ANN. §§ 432B.020(2)(a), 432B.630 (West, Westlaw through Ch. 2 of the 33rd Spec. Sess. (2021)); N.H. REV. STAT. ANN. §§ 132-A:1 to :5 (West, Westlaw through Ch. 345 of the 2022 Reg. Sess.); N.J. STAT. ANN. §§ 30:4C-15.5 to 15.10 (West, Westlaw through L. 2022, c. 115 and J.R. No. 7); N.M. STAT. ANN. §§ 24-22-1.1, 24-22-2 (West, Westlaw through 2022 2nd Reg. Sess. & 3d Spec. Sess. of the 55th Leg. (2022)); N.Y. PENAL LAW § 260.10 (McKinney, Westlaw through L. 2022, Ch. 1-571); N.C. GEN. STAT. §§ 7B-500 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); OHIO REV. CODE ANN. §§ 2151.3516, 2151.3517 (West, Westlaw through File 132 of the 134th Gen. Assemb. (2021–2022)); OKLA. STAT. ANN. tit. 10A, § 1-2-109 (West, Westlaw through 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)); OR. REV. STAT. ANN. § 418.017 (West, Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb. effective through Dec. 31, 2022); 18 PA. STAT. AND CONS. STAT. ANN. §§ 4306 (West, Westlaw through 2022 Reg. Sess. Act 166); S.C. CODE ANN. § 63-7-40 (West, Westlaw through 2022 Act No. 268); S.D. CODIFIED LAWS §§ 25-5A-27 to 35 (Westlaw through 2022 Reg. Sess. & S. Ct. Rule 22-10); TENN. CODE ANN. §§ 36-1-142, 68-11-255 (West, Westlaw through 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); UTAH CODE ANN. §§ 80-4-501, 502 (West, Westlaw through 2022 3rd Spec. Sess.); VA. CODE ANN. §§ 18.2-371, 18.2-371.1, 40.1-103, 63.2-910.1 (West, Westlaw through 2022 Reg. Sess.); WASH. REV. CODE ANN. § 13.34.360 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.); W. VA. CODE §49-4-201 to -206 (West, Westlaw through 2022 1st Spec. Sess., Reg. Sess., 2nd Spec. Sess., 3rd Spec. Sess., & 4th Spec. Sess.); WIS. STAT. ANN. § 48.195 (West, Westlaw through 2021 Act 267, published April 16, 2022); WYO. STAT. ANN. §§ 14-11-101 -109 (West, Westlaw through 2022 Budget Sess. of the Wyo. Leg.).

biological parents, because of “an overwhelming shame, panic, or fear of [parent-hood],” cannot acknowledge or care for them.<sup>147</sup>

These laws allow biological parents to leave babies at a designated location or with a designated representative shortly after the child’s birth.<sup>148</sup> Some states limit the designated location to a hospital or a medical service provider,<sup>149</sup> while other states provide for additional Safe Haven locations, including police and fire stations.<sup>150</sup>

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147. Karen Vassilian, *A Band-Aid or a Solution? Child Abandonment Laws in California*, 32 MCGEORGE L. REV. 752, 752–53 (2001).

148. See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., INFANT SAFE HAVEN LAWS 1–2 (2021), <https://perma.cc/N8RC-3QS9>.

149. See ALA. CODE § 26-25-2 (West, Westlaw through Act 2022-442 of the 2022 Reg. & 1st Spec. Sess.); CONN. GEN. STAT. ANN. §§ 17a-57 to -58 (West, Westlaw through 2022 Reg. Sess.); TEX. FAM. CODE ANN. §§ 262.301-302 (West, Westlaw through 2021 Reg. & Called Sess. of the 87th Leg.); UTAH CODE ANN. §§ 80-4-501, 502 (West, Westlaw through 2022 3rd Spec. Sess.); VA. CODE ANN. § 18.2-371.1 (West, Westlaw through 2022 Reg. Sess.).

150. See ARIZ. REV. STAT. ANN. § 13-3623.01(G)(2) (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); ARK. CODE ANN. §§ 9-34-201 to -202 (West, Westlaw through the 2022 Extra. Sess. of the 93rd Ark. Gen. Assemb.); CAL. HEALTH & SAFETY CODE § 1255.7 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 19-3-304.5(1) (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. §§ 17a-57 to -61 (West, Westlaw through 2022 Reg. Sess.); DEL. CODE ANN. tit. 16, § 907A(b) (West, Westlaw through Ch. 424 of the 152nd Gen. Assemb. (2021–2022)); FLA. STAT. ANN. § 383.50 (West, Westlaw through July 1, 2022, in effect from the 2022 2nd Reg. Sess.); GA. CODE ANN. §§ 19-10A-2, 4 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); IDAHO CODE §§ 39-8202 to -8203 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 66th Idaho Leg.); 325 ILL. COMP. STAT. ANN. 2/25 (West, Westlaw through P.A. 101-1102 of the 2022 Reg. Sess.); IND. CODE ANN. § 31-34-2.5-1(b) (West, Westlaw through 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); IOWA CODE ANN. § 233.2(1) (West, Westlaw through 2022 Reg. Sess.); KAN. STAT. ANN. § 38-2282 (West, Westlaw through 2022 Reg. Sess.); KY. REV. STAT. ANN. § 405.075(2) (West, Westlaw through 2022 Reg. & Extra. Sess.); LA. CHILD. CODE arts. 1150, 1151 (West, Westlaw through 2022 1st Extra. & Reg. Sess.); ME. REV. STAT. ANN. tit. 22, § 4018 (West, Westlaw through 2022 2nd Reg. Sess. of the 130th Leg.); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 119 § 39 1/2 (West, Westlaw through Ch. 125, 134, 136, 144-47, 149, 158, & 174 of the 2022 2nd Ann. Sess.); MICH. COMP. LAWS ANN. § 712.3 (West, Westlaw through P.A. 2022, No. 223, of the 2022 Reg. Sess., 101st Leg.); MO. ANN. STAT. § 210.950(1) (West, Westlaw through 2017 1st Reg. Sess. & 2nd Extra. Sess. of the 99th Gen. Assemb.); MONT. CODE ANN. §§ 40-6-402 (West, Westlaw through WID of the 2022 2nd Reg. Sess. of the 101st Gen. Assemb.); NEV. REV. STAT. ANN. § 432B.630 (West, Westlaw through Ch. 2 of the 33rd Spec. Sess. (2021)); N.H. REV. STAT. ANN. §§ 132-A:1-2 (West, Westlaw through Ch. 345 of the 2022 Reg. Sess.); N.J. STAT. ANN. §§ 30:4C-15.7 (West, Westlaw through L. 2022, Ch. 115 & J.R. No. 7); N.M. STAT. ANN. § 24-22-2 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg. (2022)); N.C. GEN. STAT. § 7B-500 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); OHIO REV. CODE ANN. §§ 2151.3516, 2151.3517 (West, Westlaw through File 132 of the 134th Gen. Assemb. (2021–2022)); OKLA. STAT. ANN. tit. 10A, § 1-2-109 (West, Westlaw through 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)); OR. REV. STAT. ANN. § 418.017(1) (West, Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb. effective through Dec. 31, 2022); 23 PA. STAT. & CONS. STAT. ANN. §§ 6504.1–6504.2 (West, Westlaw through 2022 Reg. Sess. Act 166); S.C. CODE ANN. § 63-7-40 (a) (West, Westlaw through 2022 Act No. 268); S.D. CODIFIED LAWS § 25-5A-27 (Westlaw through 2022 Reg. Sess. & Sup. Ct. Rule 22-10); TENN. CODE ANN. § 68-11-255 (West, Westlaw through 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); WASH. REV. CODE ANN. § 13.34.360 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.); W.VA. CODE §49-4-201 to -206 (West, Westlaw through 2022 1st Spec. Sess., Reg. Sess., 2nd Spec. Sess., 3rd Spec. Sess., & 4th Spec. Sess.); WIS. STAT. ANN. § 48.195(1) (West,

In most states, only biological parents may leave the baby.<sup>151</sup> However, several states allow someone other than a parent to leave the baby if they act with the parents' consent.<sup>152</sup> The flexibility and anonymity permitted by these Safe Haven laws raise concerns that individuals not legally entitled to the possession of the child may abuse the law.<sup>153</sup>

While most Safe Haven laws provide immunity from prosecution to the abandoning parent,<sup>154</sup> some laws only permit an affirmative defense to prosecution.<sup>155</sup>

Westlaw through 2021 Act 267, published Apr. 16, 2022); WYO. STAT. ANN. § 14-11-102 (West, Westlaw through 2022 Budget Sess. of the Wyo. Leg.).

151. See Cooper, *supra* note 107, at 881.

152. See CAL. HEALTH & SAFETY CODE § 1255.7 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); CONN. GEN. STAT. ANN. § 17a-58 (West, Westlaw through 2022 Reg. Sess. & 2022 Nov. Spec. Sess.); DEL. CODE ANN. tit. 16, § 907A(b) (Westlaw through Ch. 535 of the 151st Gen. Assemb. (2021–2022)); S.C. CODE ANN. § 20-7-85 (West, Westlaw through 2022 Act. No. 268).

153. See Cooper, *supra* note 107, at 881; Michael S. Raum, *Encouraging Abandonment: The Trend Towards Allowing Parents to Drop off Unwanted Newborns*, 76 N.D. L. REV. 511, 521–23 (2000).

154. ARIZ. REV. STAT. ANN. § 13-3623.01 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); CAL. PENAL CODE § 271.5(a) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); CONN. GEN. STAT. ANN. § 53-23(b) (West, Westlaw through 2022 Reg. Sess. & 2022 Nov. Spec. Sess.); FLA. STAT. ANN. § 383.50(10) (West, Westlaw through 2022 2nd Reg. Sess. & Spec. C & D Sess. of the 27th Leg.); GA. CODE ANN. § 19-10A-4 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); IDAHO CODE § 39-8203 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 66th Idaho Leg.); 325 ILL. COMP. STAT. ANN. 2/25 (West, Westlaw through P.A. 102-1114 of the 2022 Reg. Sess.); IOWA CODE ANN. § 726.6(2) (West, Westlaw through 2022 Reg. Sess.); KY. REV. STAT. ANN. § 405.075(2) (West, Westlaw through laws effective Jan. 6, 2023 & the Nov. 8, 2022 election); LA. CHILD. CODE art. 1151(B) (Westlaw through 2022 1st Extra., Veto, Reg., & 2nd Extra. Sess.); MD. CODE ANN. CTS. & JUD. PROC. § 5-641(a)(1) (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 119, § 39 1/2 (West, Westlaw through Ch. 230 of the 2022 2nd Ann. Sess.); MONT. CODE ANN. § 40-6-417 (West, Westlaw through 2021 Sess. of the Mont. Leg.); NEB. REV. STAT. ANN. § 29-121 (West, Westlaw through 2nd Reg. Sess. of the 107th Leg. (2022)); NEV. REV. STAT. ANN. § 432B.020(2)(a) (West, Westlaw through Ch. 2 of the 22nd Spec. Sess. (2021)); N.H. REV. STAT. ANN. § 639:3(VI) (Westlaw through Ch. 345 of the 2022 Reg. Sess.); N.M. STAT. ANN. § 24-22-3(A) (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg.); N.C. GEN. STAT. § 7B-500, (West, Westlaw through 2022 Reg. Sess.); N.D. CENT. CODE ANN. § 50-25.1-15(2) (West, Westlaw through 2022 Reg. Sess.); OHIO REV. CODE ANN. § 2151.3516 (West, Westlaw through File 135 of the 134th Gen. Assemb. (2021–2022)); OKLA. STAT. ANN. tit. 10A, § 1-2-109(A) (West, Westlaw through 2022 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg.); 23 PA. CONS. STAT. ANN. § 6503 (West, Westlaw through 2022 Reg. Sess. Act 166); S.D. CODIFIED LAWS § 25-5A-28 (Westlaw through 2022 Reg. Sess.); TENN. CODE ANN. § 68-11-255(g) (West, Westlaw through 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); UTAH CODE ANN. § 62A-4a-802(a)(b) (West, Westlaw through 2022 3rd Spec. Sess.); WASH. REV. CODE ANN. § 13.34.360(2) (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.); WIS. STAT. ANN. § 48.195(4)(a) (West, Westlaw through 2021 Act 267); WYO. STAT. ANN. §§ 14-11-103(b), 14-3-202(a)(ii) (West, Westlaw through 2022 Budget Sess. of the Wyo. Leg.).

155. ALA. CODE § 26-25-3 (West, Westlaw through 2022 Reg. & 1st Spec. Sess.) (stating that a parent can invoke the Alabama Safe Haven provision as an affirmative defense in the event of prosecution for nonsupport, abandonment, or endangering the welfare of a child); ARK. CODE ANN. § 5-27-205(c)(1) (West, Westlaw through 2022 3rd Extra. Sess. of the 93rd Ark. Gen. Assemb.); DEL. CODE ANN. tit. 11, § 1102A (West, Westlaw through Ch. 535 of the 151st Gen. Assemb. (2021–2022)); IND. CODE ANN. § 35-46-1-4(c)(1) (West, Westlaw through 2022 2nd Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 553(3) (West, Westlaw through 2022 2nd Reg. Sess. of the 130th Leg.); MICH. COMP. LAWS ANN. § 750.135(2) (West, Westlaw through P.A. 2022, No. 278, of the 2022 Reg. Sess., 101st Leg.); MISS. CODE ANN. § 43-15-205 (West, Westlaw through 2022 Reg. Sess.); N.J. STAT. ANN. § 30:4C-15.7 (e) (West, Westlaw through L. 2022, Ch. 120 and J.R. No. 10); OR. REV. STAT. ANN. § 163.535 (West,

Safe Haven laws that provide only a defense from prosecution spur criticism from opponents who claim the laws will not effectuate the purpose that they were intended to serve.<sup>156</sup> These critics warn that mothers will be too afraid of prosecution and sacrificing their privacy to risk proceeding with Safe Haven abandonment.<sup>157</sup>

Additionally, Safe Haven laws face criticism for potentially damaging the rights of biological fathers.<sup>158</sup> Critics caution that a mother can prevent her baby's father from asserting his rights, or even learning of his child's birth, by leaving the baby at a Safe Haven location.<sup>159</sup> Biological fathers may never even realize what their constitutionally protected parental rights are because the Supreme Court has not directly addressed the constitutional rights of fathers who are unable to establish a relationship with their child for reasons outside of their control.<sup>160</sup> In all of the Supreme Court's decisions, the fathers knew of the children's existence and the children were not newborns.<sup>161</sup> Therefore, unlike potential Safe Haven situations, these fathers possessed knowledge of their child's birth and also had time to develop a relationship.

Circuit courts in Michigan and Florida addressed this issue in cases arising under Safe Haven laws. Both courts involved found the fathers entitled to protection.<sup>162</sup> In *In re Anonymous* in 2001, a Michigan court held that terminating the father's rights would violate due process because, after receiving the baby, the emergency services provider failed to follow proper procedures to protect the non-surrendering parent's rights.<sup>163</sup> In a separate case, a Florida court held that when a mother anonymously abandoned her baby, the Department of Children and Family Services had a constitutional due process obligation to search for both the child's mother and father before terminating parental rights.<sup>164</sup> This obligation to find the father stemmed from concerns that a father may have no knowledge of the mother's pregnancy.<sup>165</sup>

State courts have also encountered questions regarding a biological father's rights in similar non-Safe Haven situations.<sup>166</sup> In these "thwarted father" cases, the biological fathers were unable to establish a relationship with their newborns

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Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb.); VA. CODE ANN. §§ 18.2-371, 18.2-371.1, 40.1-103 (West, Westlaw through 2022 Reg. Sess.).

156. See Vassilian, *supra* note 147, at 763.

157. See *id.*

158. See *id.* at 760.

159. See *id.*

160. See Cooper, *supra* note 107, at 888.

161. See *id.*

162. See *id.* at 893-94.

163. See *id.* at 893.

164. See *id.* at 894; Steven N. Levine, *Concerns Increase for 'Baby Doe's' Mother*, LEDGER (June 17, 2009, 1:49 PM), <https://perma.cc/HWK5-UZFU>.

165. Levine, *supra* note 164.

166. Cooper, *supra* note 107, at 889-90; see, e.g., *In re Adoption of Lathrop*, 575 P.2d 894, 898 (Kan. Ct. App. 1978) (holding that the parental rights of an unwed father who is prevented from performing parental responsibilities cannot be lessened by a court).

because the mothers hid their pregnancies from the fathers.<sup>167</sup> State courts found the father entitled to parental rights because “the mother’s bad deeds, and not the father’s inaction” prevented a relationship between father and child.<sup>168</sup>

Proponents of Safe Haven laws counter concerns about fathers’ rights by noting that a mother can secretly abandon her baby or give her child up for adoption without correctly identifying the father even without Safe Haven protection.<sup>169</sup> Further, while Safe Haven laws may not provide ideal protection for biological fathers’ rights, critics provide no alternate method to implement the important policy rationale motivating these laws.<sup>170</sup> Until critics identify a better solution, proponents believe that the Safe Haven laws’ objectives of saving the lives of newborns greatly outweighs the rights of fathers in these situations, thus necessitating support of Safe Haven laws.<sup>171</sup>

### C. ASSIGNED RIGHTS OF BIOLOGICAL PARENTS AND FOSTER CARE PROVIDERS UNDER THE COMMON LAW

Biological and foster parents each possess assignable rights under the foster care system.<sup>172</sup> However, courts have trouble deciphering the term “family” when allocating a constitutional due process right.<sup>173</sup> In recognizing a foster parent’s constitutional due process right to the liberty interest in family unit protection, the Supreme Court has held that “biological relationships are not [the] exclusive determination of the existence of a family.”<sup>174</sup> However, courts struggle to determine when an attachment between child and foster parent results in the creation of a family entitling the foster parent to a Fourteenth Amendment liberty interest in such a family’s survival.<sup>175</sup> The Supreme Court has held that no “precise point” transforms a foster parent and child relationship into a “family” relationship by means of emotional attachment, but a minimum time frame may help define such a familial relationship.<sup>176</sup> Some courts apply the doctrine of equitable adoption, allowing foster children to inherit from foster parents who died

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167. Cooper, *supra* note 107, at 889–90.

168. *Id.* at 890.

169. See Vassilian, *supra* note 147, at 760.

170. See *id.* at 764.

171. See *id.*

172. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents.”).

173. See Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 842–43 (1977).

174. *Id.* at 843–44 (“[W]e cannot dismiss the foster family as a mere collection of unrelated individuals.”).

175. *Id.* at 839, 854 (holding that the psychological tie to the child after living with foster parents for over one year qualifies foster parents as the “psychological family” entitling them to “liberty interest” of family protection under the Fourteenth Amendment).

176. *Id.* at 854 (accepting an eighteen-month minimum period before allowing a foster parent an administrative hearing, which constitutionally protects the foster parent’s liberty interest, despite recognizing that the emotional attachment that entitles a family to such constitutional protection may develop earlier).

intestate.<sup>177</sup> This doctrine generally applies when the foster parent intended to adopt the foster child and had taken affirmative steps in the contractual process.<sup>178</sup>

Jurisdictions differ in treatment of foster parents' liberty interest in family protection. On one end, the Seventh Circuit has held that the state retains the "power to terminate" foster care placements, even after extended periods of placement with the foster care family.<sup>179</sup> On the other, some states refuse to reunify biological parents and children after extensive periods in a foster home.<sup>180</sup> In making a determination, most state and circuit courts utilize the parental rights doctrine, reasoning that "a child's best interests lie in being raised by a fit biological parent."<sup>181</sup> While a few state jurisdictions, such as Maryland, treat this theory as a rebuttable presumption, most treat the parental rights doctrine as a conclusive presumption.<sup>182</sup>

The rights granted to foster parents impact the rights of biological parents with children in the foster care system. Some states allow foster parents to terminate the rights of biological parents by petitioning courts for adoption.<sup>183</sup> In addition, some courts have granted foster parents' petitions to adopt even when they contractually agreed not to adopt.<sup>184</sup> On the other hand, some courts have held that foster parents may not petition for adoption, lessening the potential impact on the rights of biological parents.<sup>185</sup>

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177. See *Lankford v. Wright*, 489 S.E.2d 604, 606 (N.C. 1997) ("[Equitable adoption] confers rights of inheritance upon the foster child in the event of intestacy of the foster parents.").

178. See *id.* at 606–07.

179. *Procopio v. Johnson*, 994 F.2d 325, 330 (7th Cir. 1993) (noting that the foster family's existence is subject to the state's determination and the state law cannot create an expectation of a constitutionally protected liberty interest).

180. See, e.g., *In re Jasmon O.*, 8 Cal. 4th 398, 418–19 (Cal. 1994) (denying the return of a child to the biological father after seven years of foster parent care where such return would cause "serious, long-term emotional damage" to the child).

181. Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379, 379 (1996); see, e.g., *Brito v. Brito*, 794 P.2d 1205, 1208 (N.M. Ct. App. 1990) ("[Parental rights doctrine is] a presumption that it is in the child's best interests to be in the custody of the natural parents, and casts the burden of proving the contrary on a non-parent requesting custody.").

182. See Lowe, *supra* note 181, at 393; MD. CODE ANN., FAM. LAW § 5-3B-22 (West, Westlaw through 2022 Reg. Sess.).

183. See, e.g., *Hyman v. Stanley*, 257 S.W.2d 388, 391 (Mo. Ct. App. 1953) (finding that foster parents have standing to petition for adoption as long as the biological parents' neglect in care is still valid at the time when the action is brought); see also *I.B. v. Dep't. of Child. & Families*, 876 So. 2d 581, 584 (Fla. Dist. Ct. App. 2004) (finding that foster parents have standing to intervene in adoption proceeding of a child who had lived with them for sixteen months).

184. See, e.g., *In re Alexander*, 206 So. 2d 452, 452–54 (Fla. Dist. Ct. App. 1968) (stating that adoption is based on the best interests of the child, regardless of other contract); see also *Hammond v. Dep't of Pub. Assistance of Doddridge Cnty.*, 95 S.E.2d 345, 349 (W. Va. 1956) (holding that removal of a child from foster parents ended the foster parents' contractual obligation with the foster parent agency where the foster parents had agreed not to adopt).

185. See, e.g., *Cabinet for Hum. Res. of Ky. v. McKeehan*, 672 S.W.2d 934, 936 (Ky. Ct. App. 1984) (finding foster parents lack standing to adopt and terminate biological parental rights to neglected child); *Oxendine v. Catawba Cnty. Dep't of Soc. Servs.*, 281 S.E.2d 370, 375 (N.C. 1981) (finding foster parent lacks standing to seek adoption of five-week-old baby of whom she had custody).



#### IV. SEXUAL ORIENTATION OF PARENTS AND THE ADOPTION AND FOSTER CARE SYSTEMS

##### A. SEXUAL ORIENTATION AND ADOPTION LAW

State courts frequently denied adoption rights to LGB<sup>186</sup> individuals until the American Psychological Association removed “homosexuality” from its list of mental disorders in 1973.<sup>187</sup> Adoption rights for LGB individuals remain an evolving and controversial topic.

##### 1. Policy Reasons for Banning Adoptions Based on Sexual Orientation

The best interest of the adopted child is one of the most common rationales advanced for barring same-sex couples from adopting.<sup>188</sup> While there is a general acceptance of LGB adoption rights in the U.S.,<sup>189</sup> religious condemnation of homosexuality and moral concerns regarding families that do not consist of a “traditional” household (that of one married mother and one father) still contribute to blocking adoption rights of LGB individuals.<sup>190</sup>

Various studies challenge concerns that same-sex adoptive parents cannot serve a child’s best interest. A technical report published in 2013 by the American Academy of Pediatrics revealed that “data available from more than 30 years of research . . . [shows that] children raised by gay and lesbian parents have demonstrated resilience with regard to social, psychological, and sexual health despite economic and legal disparities and social stigma.”<sup>191</sup> International studies have found similar results.<sup>192</sup>

186. LGB is used here as an umbrella term to cover all non-heterosexual couples.

187. Michael, *supra* note 24, at 1453.

188. See Christina M. Tenuta, *Can You Really Be A Good Role Model to Your Child If You Can't Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations*, 14 CUNY L. REV. 351, 358–60 (2011) (discussing the best interest test used by judges in the determination of child custody, with some states factoring in parent sexuality and gender identity).

189. See Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J.L. & FAM. STUD. 59, 61 (2004); see also Art Swift, *Most Americans Say Same-Sex Couples Entitled to Adopt*, GALLUP (May 30, 2014), <https://perma.cc/H6GZ-YTZJ> (showing that 63% of those polled were in favor of adoption rights for gays and lesbians); Daniel Cox & Robert P. Jones, *Slim Majority of Americans Support Same-sex Marriage*, PRRI (May 19, 2011), <https://perma.cc/QJ9T-REN5> (finding 56% of Americans favor gay and lesbian couples’ ability to adopt children, compared to 35% opposing their ability to adopt).

190. See, e.g., *Lofton*, 358 F.3d at 818-20 (finding that the state had legitimate interest in encouraging “optimal family structure” of a married mother and a father on the premise that being placed in a home with both a mother and a father promotes social structure for “educating, socializing, and preparing . . . future citizens”).

191. Ellen C. Perrin, Benjamin S. Siegel, James G. Pawelski, Mary I. Dobbins, Arthur Lavin, Gerri Mattson, John Pascoe, & Michael Yogman, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, 131 AM. ACAD. OF PEDIATRICS 1374 (Apr. 1, 2013), <https://perma.cc/8BBC-YPG2>.

192. See, e.g., Norman Anderssen, Christine Amlie, & Erling André Ytterøy, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. PSYCH. 335, 335–36 (2002).

Opposition to adoption by same sex couples also stems from fear of subjecting children to pedophilia and the concern that the children of LGB parents are more likely to be LGB themselves.<sup>193</sup> However, studies have suggested that this fear is unfounded.<sup>194</sup> While some consider the data to be proof that fears of adoption by LGB individuals are “imaginary harms,” others find the studies to be inconclusive because of flawed methods of analysis and small sample sizes, maintaining that gays and lesbians should be precluded from adoption as a cautionary measure.<sup>195</sup> In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit held that the Florida legislature acted rationally in rejecting studies that found no distinction between children raised by same-sex and opposite-sex couples, given the current “nascent stages” of such scientific study.<sup>196</sup> The court further held Florida’s prohibition of adoption by same-sex couples as rational despite the state’s seemingly contradictory acceptance of LGB people as foster parents.<sup>197</sup> However, the District Court of Appeals of Florida in 2010 affirmed a trial court’s holding that the Florida statute’s ban on adoptions by LGB parents violated the equal protection rights of the adoptive parent, essentially overturning *Lofton*.<sup>198</sup>

## 2. The Impact of *Obergefell* on Same-Sex Adoption

The *Obergefell* decision has had a great impact on the adoption rights for same-sex couples. Prior to the *Obergefell* case, the most burdensome requirement for joint adoption<sup>199</sup> by same-sex couples was the marriage requirement.<sup>200</sup> For

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193. See Heather Fann Latham, *Desperately Clinging to the Cleavers: What Family Law Courts are Doing About Homosexual Parents, and What Some are Refusing to See*, 29 LAW & PSYCH. REV. 223, 227–29 (2005).

194. *Id.* at 227 (noting that most child molesters are heterosexual males and only 14% are gay men); *id.* at 229 (92% of children in households of two lesbians grew up heterosexually defined); *id.* (90% of adult sons with gay fathers identified themselves as heterosexual). These studies are compatible with the 10% of the general population defining themselves as LGB. *Id.* at 237. See also Wardle, *supra* note 189, at 99 (“The data . . . do not tell us anything about same-sex parenting. There is a basic rule of prudence that should apply as a result: When in doubt, don’t.”).

195. See *Lofton*, 358 F.3d at 826.

196. *Id.*

197. *Id.* at 824. The court held that because the executive branch determines the placement of children in foster care, the choice of the legislature to treat adoption differently is not irrational. *Id.* The court also stated that treating LGBT individuals differently than heterosexual individuals was rational considering that heterosexual individuals are more likely to establish dual-gender households and to provide better guidance about sexual development. *Id.*

198. See *Adoption of X.X.G.*, 45 So. 3d at 91.

199. Joint adoption refers to “a couple adopting a child from the child’s biological parent(s) or adopting a child who is in the custody of the state.” Karel Raba, *Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates*, 15 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 293, 311 (2013).

200. See e.g., UTAH CODE ANN. § 78B-6-117(3) (West, Westlaw through 2022 3rd Spec. Sess.) (“A child may not be adopted by an individual who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state . . .”).

some jurisdictions with the marriage requirement, state constitutional prohibition of same-sex parents indirectly prohibited adoption by same-sex couples.<sup>201</sup> The movement towards same-sex marriage gained traction after *United States v. Windsor*, in which the Supreme Court decided that restricting U.S. federal interpretation of “marriage” and “spouse” to apply only to opposite-sex unions, under Section 3 of the Defense of Marriage Act (DOMA), was unconstitutional because it violated the Due Process Clause of the Fifth Amendment.<sup>202</sup> *Obergefell* established the right for same-sex couples in all states, thus eliminating the indirect prohibition on adoption by these couples.<sup>203</sup> Under the Full Faith and Credit Clause, states must recognize same-sex adoption rights from other states, which eradicates another barrier between same-sex couples and adoption rights.<sup>204</sup>

After *Obergefell*, the explicit statutory prohibition of same-sex adoption is likely illegal.<sup>205</sup> The District Court of Appeals of Florida deemed a Florida statute explicitly prohibiting same-sex adoptions unconstitutional on appeal.<sup>206</sup> After the Supreme Court denied certiorari for states attempting to appeal circuit court decisions invalidating prohibitions on gay marriage in a number of states, effectively legalizing gay marriage in those states and others in the same circuit, the tactic is no longer effective. Indeed, just a few days after the Court’s denial, the Virginia Department of Social Services sent a bulletin to all offices stating that adoptions by same-sex couples should be permitted in light of the Court’s decision.<sup>207</sup> Similarly, Utah lifted its previous ban on adoption by both same sex couples and unmarried heterosexual couples shortly after the decision.<sup>208</sup> In 2016, a Mississippi statute barring adoption “by couples of the same gender” was overturned.<sup>209</sup> Previously, a state statute barred same-sex adoption by permitting only

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201. See e.g., LA. CHILD. CODE ANN. art. 1221 (West, Westlaw through 2022 1st Extra., Veto, Reg., & 2nd Extra. Sess.) (“A single person, eighteen years or older, or a married couple jointly may petition to privately adopt a child.”). The Louisiana State Constitution banned same-sex marriage until 2015. LA. CONST. ANN. art. XII, § 15 (West, Westlaw through Jan. 1, 2023, with amendments), *invalidated by Robicheaux v. Caldwell*, No. CIV.A. 13-5090, 2015 WL 4090353 (E.D. La. 2015).

202. *U.S. v. Windsor*, 570 U.S. 744, 752 (2013) (DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment).

203. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (same-sex couples have a fundamental right to marry based on due process and equal protection rights).

204. *V.L. v. E.L.*, 577 U.S. 404, 409–10 (2016).

205. See *Obergefell*, 576 U.S. at 675.

206. *Adoption of X.X.G.*, 45 So. 3d at 79. see also *Lofton*, 358 F.3d at 818-19 (upholding the Florida statute in 2005).

207. Gary Robertson, *Virginia tells agencies to clear way for adoptions by gay couples*, REUTERS (Oct. 10, 2014, 3:48 PM), <https://perma.cc/JG8E-FJFJ>.

208. See Mollie Reilly, *Utah Supreme Court Lifts Hold on Same-Sex Adoption*, HUFFPOST (Oct. 23, 2014, 5:52 PM), <https://perma.cc/UD4U-GS9N>.

209. See *Campaign for S. Equal. v. Miss. Dep’t of Human Servs.*, 175 F. Supp. 3d 691, 704–05, 711 (S.D. Miss. 2016).

“married individuals” or a “husband and wife” to adopt.<sup>210</sup> However, this strategy adopted by states was rejected based on similar reasoning under *Obergefell*.<sup>211</sup> In *Pavan v. Smith*, the birth certificate of a child only included the names of “mothers” and “fathers.”<sup>212</sup> The Supreme Court found that Arkansas’ refusal to include the names of both same-sex parents on their child’s birth certificate was unconstitutional as it denied same-sex couples access to the benefits that states attach to marriage.<sup>213</sup> The Supreme Court’s decision in *Obergefell* has made the previous methods used by states to deny same-sex couples the privileges conferred upon heterosexual couples highly unlikely to continue.<sup>214</sup>

### 3. Full Faith and Credit Analysis of Sexual Orientation Bans on Adoption

The Full Faith and Credit Clause of the Constitution requires states to uphold other states’ laws—both statutory and common law.<sup>215</sup> In 2007, the Tenth Circuit struck down Oklahoma’s statute refusing to recognize the validity of adoptions by same-sex couples in other states.<sup>216</sup> While adoption decisions constitute final court judgments, DOMA permitted states to refuse to recognize the legislative and judicial decrees of other states concerning same-sex relationships.<sup>217</sup> Thus, despite valid adoptions by LGB individuals resulting from marriage unions in one state (and, if the law is read broadly, civil unions and domestic partnerships), states could refuse to recognize those unions, and by consequence, adoptions as

210. See, e.g., ALA. CODE § 26-10A-5 (West, Westlaw through Act 2022-442 of the 2022 Reg. & 1st Spec. Sess.) (“Any adult person or husband and wife jointly [may adopt].”); ALASKA STAT. ANN. § 25.23.020(a)(1) (West, Westlaw through the 2022 2nd Reg. Sess. of the 32nd Leg.) (“[A] husband and wife together [may adopt].”); ARIZ. REV. STAT. ANN. § 8-103 (West, Westlaw through of the 2nd Reg. Sess. of the 55th Leg.) (stating “[a] husband and wife may jointly adopt” and marital status of prospective parents may be considered in selection of an adoptive home); ARK. CODE ANN. § 9-9-204(a) (West, Westlaw through the 2022 3rd Extra. Sess. of the 93rd Ark. Gen. Assemb.); but see *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/2TEU-882X> (last visited Feb. 24, 2023) (finding that same-sex couples may jointly adopt in all fifty states) [hereinafter Equality Map].

211. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (relying on *Obergefell*, the Court found that it was unlawful to prevent same-sex couples from having both parents on the birth certificate of their child).

212. *Id.*

213. *Id.* at 2078–79.

214. See *Campaign for S. Equal.*, 175 F. Supp. 3d at 710 (“It also seems highly unlikely that the same court that held a state cannot ban gay marriage because it would deny benefits—expressly including the right to adopt—would then conclude that married gay couples can be denied that very same benefit.”); see also Equality Map, *supra* note 210.

215. U.S. CONST. art. IV, § 1.

216. OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (“[T]his state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”), *invalidated by* *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (finding that the statute refusing to recognize the validity of adoptions by more than one person of the same sex violated the Full Faith and Credit Clause of the U.S. Constitution); see also Robert G. Spector, *The Unconstitutionality of Oklahoma’s Statute Denying Recognition to Adoptions By Same-Sex Couples From Other States*, 40 TULSA L. REV. 467, 467 n.2 (2005).

217. 28 U.S.C.A. § 1738C (West, Westlaw through Pub. L. No. 117–214) (no state shall be required to give effect to any other state’s recognition of marriage between persons of the same sex).

well.<sup>218</sup> However, in *Windsor*, the Supreme Court declared that Section 3 of DOMA, the section that prevented the federal government from recognizing marriages between gay or lesbian couples for the purpose of federal laws, violated the Fifth Amendment.<sup>219</sup> Furthermore, *V.L. v. E.L.* held that states must recognize same-sex adoption rights from other states based on the Full Faith and Credit Clause.<sup>220</sup>

#### B. THE EMERGING USE OF RELIGIOUS FREEDOM TO JUSTIFY DISCRIMINATION AGAINST SAME-SEX COUPLES

Although states no longer explicitly prohibit same-sex couples from becoming foster parents or from adopting, twelve states still allow child placement organizations to screen prospective families and adults based on religious criteria.<sup>221</sup> This effectively permits an organization to deny adoptive or foster parent eligibility to anyone who does not comport with their religious ideologies. In 2017 in Michigan, where the state outsources foster and adoptive care services to private faith-based organizations, two same-sex couples brought a lawsuit arguing that by allowing these state-contracted agencies to discriminate against otherwise capable families, taxpayer dollars were being used to fund agencies that make it harder for children to be adopted.<sup>222</sup> The lawsuit was settled in 2019 when Michigan announced that state-contracted agencies will no longer be permitted to deny same-sex couples based on the agencies' religious beliefs.<sup>223</sup> On the contrary, in 2017, Texas passed a bill that prohibits the sanctioning of private child placement organizations for discriminating against potential foster families based on religious belief.<sup>224</sup> Those opposed to state outsourcing of child care services to faith-based agencies contend that contracting these restrictive organizations may contribute to the scarcity of placements for children.<sup>225</sup>

In 2017, the Supreme Court heard a case involving a claim of religious freedom as a justification to discriminate against same-sex individuals; this case gave insight into the durability of religious freedom exemptions to anti-discrimination

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218. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966 (1997); Lisa S. Chen, Comment, *Second-Parent Adoptions: Are They Entitled To Full Faith And Credit?*, 46 SANTA CLARA L. REV. 171, 172, 190–91 (2005).

219. *United States v. Windsor*, 570 U.S. 744, 775 (2013).

220. *V.L. v. E.L.*, 577 U.S. 404, 409–10 (2016).

221. See *Equality Map*, *supra* note 210.

222. Complaint at 1, *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018), <https://perma.cc/Z3J5-H5BW>.

223. Leslie Cooper, *Same-Sex Couples Are Being Turned Away From Becoming Foster and Adoptive Parents in Michigan. So We're Suing*, AM. C.L. UNION (Sept. 20, 2017), <https://perma.cc/J4EY-H86K>.

224. See *Texas Senate Passes Damaging Child Welfare Bill: Lambda Legal Urges Governor to Veto*, LAMBDA LEGAL (May 22, 2017), <https://perma.cc/J7CW-W9MQ>.

225. Leslie Cooper, *The Supreme Court Could Allow the Use of a Religious Litmus Test for Foster Parents*, AM. C.L. UNION (Oct. 15, 2019), <https://perma.cc/39BQ-TJGU>.

provisions meant to protect same-sex individuals.<sup>226</sup> In *Masterpiece Cakeshop*, a baker refused his services to a gay couple because of his “sincerely-held religious beliefs.”<sup>227</sup> The Colorado Court of Appeals affirmed the Colorado Civil Rights Commission’s ruling and held that the petitioner’s refusal to create a wedding cake celebrating the marriage of the same-sex couple violated the state’s public accommodation law, which prohibits public businesses from discriminating on the basis of sexual orientation.<sup>228</sup> The Colorado Supreme Court denied certiorari.<sup>229</sup> The petitioner argued to the U.S. Supreme Court that Colorado’s accommodation law violated his constitutional rights by compelling him to create an expression that is contrary to his religious beliefs.<sup>230</sup> First, the petitioner contended that his cakes are an artistic expression that qualify for protection under the Free Speech clause.<sup>231</sup> Second, the petitioner argued that applying the Colorado state public accommodation law to compel him to create a same-sex wedding cake violates the Free Exercise clause by “order[ing] Phillips to make art for and participate in events that have deep religious meaning to him.”<sup>232</sup> The stakes in this case were high. On one hand, those like the American Civil Liberties Union, which sided with the respondents, raised concerns of equal protection for the LGBT community at large and warned against a decision that might diminish protection against discrimination in places of public accommodation.<sup>233</sup> On the other hand, those who stood with the petitioner disagreed that this is a case about discrimination. Instead, they contended this was about First Amendment rights and argued that speech compulsion is the same as speech restriction.<sup>234</sup> Legal scholars, such as Martin Lederman, Associate Professor at Georgetown Law and former Deputy Assistant Attorney General, speculated that the Justices would unanimously agree this form of artistic expression is protected by the First Amendment.<sup>235</sup> However, the Supreme Court did not reach the issue of free speech when it reversed 7-2 for the petitioner.<sup>236</sup> The Court instead

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226. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 466 (2017).

227. See Mark K. Matthews, *Supreme Court Will Hear Colorado Gay Wedding Cake Case*, DENV. POST (June 26, 2017, 7:47 AM), <https://perma.cc/67QX-56MA>.

228. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (Colo. App. 2015).

229. *Masterpiece Cakeshop, Inc. v. Colo. C.R. Comm’n*, No. 15SC738, 2016 WL 1645027, at \*1 (Colo. Apr. 25, 2016).

230. Brief for Petitioner at 16, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 466 (2017) (No. 16-111), 2017 WL 3913762, at \*16.

231. *Id.* at \*18.

232. *Id.* at \*32.

233. See Chase Strangio, *The Masterpiece Cakeshop Supreme Court Case Is One Piece of a Much Larger Attack on LGBTQ Lives*, AM. C.L. UNION (Sept. 22, 2017, 11:00 AM), <https://perma.cc/26MV-KYYM>.

234. Brief for the Cato Inst., Reason Found., & Individual Rts. Found. as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 466 (2017) (No. 16-111) 2017 WL 4004528 at \*3.

235. Lydia Wheeler, *Supreme Court to weigh free speech, discrimination in wedding cake case*, THE HILL (Sept. 23, 2017, 4:58 PM), <https://perma.cc/D4KG-BE49>.

236. See *Free Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

narrowly focused its holding on finding that the Commission exhibited “impermissible hostility toward the [petitioner’s] sincere religious beliefs” in violation of the Free Exercise Clause’s requirement for neutrality.<sup>237</sup> As such, *Masterpiece Cakeshop* left unresolved the question of whether or not forcing businesses to provide services to same-sex couples violates the freedom of expression or free speech rights of such business owners.<sup>238</sup>

#### V. SYSTEMATIC IMPACTS ON CHILDREN IN FOSTER CARE

The problems that plague the foster care system are numerous and widespread.<sup>239</sup> Foster care aims to provide temporary, short-term care for children while their natural parents take necessary steps to regain responsibility for their care in the future.<sup>240</sup> Courts have gone so far as to refer to the foster care system as a business, making foster care seem more akin to a day-care system than a home.<sup>241</sup> However, many children remain in the system for years and never establish a permanent home with natural or adoptive parents.<sup>242</sup> Some states and counties have enacted programs referred to as “another planned permanent living arrangement,” serving as a long-term foster program with the goal of finding children homes until they reach the age of majority.<sup>243</sup> Still, on average, children in the foster care system are placed in three different homes before adulthood.<sup>244</sup> This turbulent lifestyle can have profoundly negative effects on a child’s development, and children who leave the foster care system are more likely to experience homelessness, unemployment, substance abuse, and other problems.<sup>245</sup> The system is ill-equipped to assist young adults who leave never having found a permanent home.<sup>246</sup>

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237. *Id.* at 1729–31.

238. Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court’s Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, AM. BAR ASS’N (2018), <https://perma.cc/L8V4-XP4F>.

239. See generally JANET R. HUTCHINSON & CECELIA E. SUDIA, *FAILED CHILD WELFARE POLICY: FAMILY PRESERVATION & THE ORPHANING OF CHILD WELFARE* (2002).

240. Talia Cohen, Note, *Protecting or Dismantling the Family: A Look at Foster Families and Homosexual Parents After Lofton v. Kearney*, 13 TEMP. POL. & C.R. L. REV. 227, 228 (2003).

241. See e.g., *In re LaDeaux*, 373 B.R. 48, 52–53 (Bankr. S.D. Ohio 2007) (vehicle purchased to accommodate many foster children, “from whose care debtors earned roughly 20% of their income,” was a business, not personal, expense).

242. *Id.* (noting that over half of all foster children are in foster care for three years or longer).

243. R.C. *ex rel.* Ala. Disabilities Advoc. Program v. Walley, 475 F. Supp. 2d 1118, 1171 (M.D. Ala. 2007).

244. See *Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care*, PEW COMM’N ON CHILD. IN FOSTER CARE 11 (2004), <https://perma.cc/W872-2ARG>.

245. *Id.*

246. Betsy Krebs & Paul Pitcoff, *Reversing the Failure of the Foster Care System*, 27 HARV. WOMEN’S L.J. 357, 357–58 (2004); Monica Davey, *Youths Leaving Foster Care Are Found Facing Obstacles*, N.Y. TIMES, Feb. 24, 2004, at A14.

## A. CURRENT PROBLEMS

The children in foster care are primarily from poor families and are disproportionately Black.<sup>247</sup> Despite a dramatic drop in the number of Black children in foster care from 206,235 children in 2000 to 92,237 in 2020,<sup>248</sup> Black children are still overrepresented in foster care relative to the general child population.<sup>249</sup> There is considerable criticism from those who believe that children are more easily taken away from poor and minority families.<sup>250</sup> Additional problems include a shortage of individuals willing to be foster parents, a high turnover rate among those who administer state programs, and the lower likelihood of adoption for older children and children with disabilities.<sup>251</sup>

These problems have been identified and are starting to be addressed by the Biden Administration.<sup>252</sup> President Joe Biden's budget proposal included a plan to increase reimbursement rates in foster care and guardianship programs for children placed with family members.<sup>253</sup> Along with this budgetary increase, Biden plans to prohibit state agencies from "discriminating against current or prospective foster or adoptive parents, or a child in foster care or being considered for adoption on the basis of their religious beliefs, sexual orientation, gender identity, gender expression, or sex."<sup>254</sup>

Alleged class and race-based disparities remain unresolved. Critics of the foster care system argue that it "neither prepares [participants] for a successful future nor even allows them to prepare themselves."<sup>255</sup> Foster children are usually released from care at the age of majority "with a small stipend and an exit interview."<sup>256</sup> While the foster care system is intended to temporarily provide "positive, nurturing family relationships and normal family life in a permanent home," ideally before reunification with biological parents, the reality is that many participants are never adopted or reunited.<sup>257</sup> Many former foster children who have

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247. Wilkinson-Hagen, *supra* note 52, at 138.

248. *Children in foster care by race and Hispanic origin in the United States*, KIDS COUNT DATA CTR., <https://perma.cc/H74Q-8FFX> (last visited Feb. 24, 2023).

249. *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010-2020)*, NAT'L CTR. FOR JUV. JUST., <https://perma.cc/T29L-DBKR> (last visited Feb. 24, 2023).

250. See Hina Naveed, "If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System, HUM. RTS. WATCH (Nov. 17, 2022, 4:06 PM), <https://perma.cc/2DM7-FDBW>.

251. See *Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care*, *supra* note 244, at 11.

252. John Kelly, *Biden Proposes Major Spending Shifts to Prioritize Kin, Foster Care Prevention*, IMPRINT (Mar. 28, 2022, 12:56 PM), <https://perma.cc/MT6D-5RFG>.

253. *Id.*

254. *Id.*

255. Krebs & Pitcoff, *supra* note 246, at 357.

256. *Id.*

257. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 823 (1977); *51 Useful Aging Out of Foster Care Statistics*, NAT'L FOSTER YOUTH INST. (May 25, 2017), <https://perma.cc/7V7G-DHA4>.



“aged out” of the system become incarcerated<sup>258</sup> and experience homelessness<sup>259</sup> and unemployment within one year of leaving the system.<sup>260</sup> Critics argue for greater education and preparation within the foster care system to better prepare children to function and depend on themselves once they have left the foster care system.<sup>261</sup>

#### B. GAY, LESBIAN, BISEXUAL, AND TRANSGENDER YOUTH IN FOSTER CARE

Despite the fact that LGBT youth are overrepresented in foster care systems,<sup>262</sup> the majority of foster care systems do not provide specialized support and protection for gay, lesbian, and transgender children.<sup>263</sup> LGBT youth in foster care often feel that the system is unresponsive to their needs and are more likely to have problems with foster home placements.<sup>264</sup> This section explores the statutory provisions, consequences of these restrictions, and recent changes to foster care limitations.

LGBT youth frequently enter into the foster care system because their parents disapprove of their sexual orientation.<sup>265</sup> The National Network of Runaway and Youth Services estimates that between 20% and 50% of homeless youths each year are LGBT adolescents, despite the estimate that only 5% to 10% of the general population is LGBT.<sup>266</sup>

LGBT youth may be abused because of their sexual orientation and need to be removed from their homes,<sup>267</sup> or they may enter the system pursuant to a Person

258. Mark E. Courtney, Amy Dworsky, Gretchen Ruth Cusick, Judy Havlicek, Alfred Perez, & Tom Keller, *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 21*, CHAPIN HALL, at 66 (Dec. 2007), <https://perma.cc/8D8S-LG8C> (asking former foster children at age twenty-one whether they have spent time in jail); *The AFCARS Report*, CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS. (2016), <https://perma.cc/255Z-68JJ> (last visited Feb. 17, 2023) (finding about 20,000 children per year “age out” of the foster care system).

259. See Nan P. Roman & Phyllis Wolfe, *Web of Failure: The Relationship Between Foster Care and Homelessness*, NAT'L ALL. TO END HOMELESSNESS, at 8–9 (Apr. 1995), <https://perma.cc/T33J-3JUK>.

260. Mark E. Courtney, Amy Dworsky, Gretchen Ruth, Judy Havlicek, Tom Keller, Judy Havlicek, & Noel Bost, *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 19*, CHAPIN HALL, at 23–24 (May 2005), <https://perma.cc/XKU9-2A7H>.

261. Krebs & Pitcoff, *supra* note 246, at 363–64.

262. *LGBTQ Youth in the Foster Care System*, HUM. RTS. CAMPAIGN, <https://perma.cc/6WBA-73MY> (last visited Feb. 24, 2023).

263. See *id.*; Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 915, 936 (2001).

264. See, e.g., Hailey Branson-Potts, *Gay Youths More Likely to Report Trouble in Foster Care*, L.A. TIMES (Aug. 27, 2014, 12:30 AM), <https://perma.cc/4SUL-CXP3>.

265. See Robson, *supra* note 263, at 935–37 (discussing gay and lesbian youth entering foster care because of parental intolerance of their sexual orientation); Colleen A. Sullivan, *Kids, Courts, and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 TUL. J.L. & SEXUALITY 31, 41–46 (1996) (noting that parents abuse or neglect their children after finding out about their sexuality, forcing them into the foster care system).

266. ROB WORONOFF, RUDY ESTRADA & SUSAN SOMMER, CHILDREN WELFARE LEAGUE OF AMERICA & LAMBDA LEGAL, *OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE 35* (2006), <https://perma.cc/43AT-GSUS> [hereinafter *OUT OF THE MARGINS*].

267. See, e.g., *In re Shane T.*, 453 N.Y.S.2d 590, 591 (Fam. Ct. 1982) (removing a gay son from his father's care when the father was verbally abusive regarding his son's sexual orientation); see also

in Need of Supervision (P.I.N.S.) petition.<sup>268</sup> Children are often subject to abuse once they enter foster homes, and evidence suggests that the foster care system proves particularly unsuccessful in protecting LGBT youth from this abuse.<sup>269</sup> In addition, LGBT youth face risks such as assault and attempted sexual orientation conversion while in the foster care system.<sup>270</sup> LGBT youth often never find stability in the foster care system because of adverse reactions to their sexual orientation by foster parents.<sup>271</sup>

Foster parents sometimes refuse to take in LGBT youth, and LGBT youth may try to hide their sexuality to avoid being rejected.<sup>272</sup> In response to these problems, residential programs have been created for LGBT foster youth. In addition to creating residential programs, one study shows allowing LGBT adults to raise LGBT youth could be beneficial; this study showed that 50% of LGBT youth who reported a good coming out experience were raised by LGBT adults.<sup>273</sup> However, the majority of child welfare placement systems refrain from consideration of a child's sexual orientation when assigning foster parents.<sup>274</sup> Some proponents of changing the system to promote the best interests of LGBT youth suggest placing LGBT youth in homes with LGBT role models to reduce the current high trends of such children running away from foster care and committing suicide.<sup>275</sup> Lambda Legal created a comprehensive training and discrimination

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Sullivan, *supra* note 265, at 45 (finding that LGBT youth “often are physically abused by their parents upon revealing their homosexuality” and, as a result, LGBT youth end up in foster care “because abuse or neglect proceedings have been brought against their parents”).

268. A P.I.N.S. petition allows a parent to ask the court to step in and provide state supervision of a child. *See* Sullivan, *supra* note 265, at 36, 41–42 (“Gay and lesbian youths are more likely to enter the foster care system through the filing of P.I.N.S. petitions because of the nature of the problems they face within the family unit.”); *see, e.g.,* N.Y. FAM. CT. ACT § 712(a) (McKinney, Westlaw through L. 2018 Ch. 1) (defining “person in need of supervision” as one who is “incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other lawful authority”). However, a parent cannot file a P.I.N.S. requesting state supervision of a gay or lesbian child based solely on that child's orientation. *See, e.g., In re Lori M.*, 496 N.Y.S.2d 940, 940, 942 (N.Y. Fam. Ct. 1985) (“[S]ince the right being asserted by [the bisexual child] falls within the constitutionally protected zone of privacy, her mother may not invoke the power of the state to intervene.”).

269. *See* CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE OUTCOMES 2008–2011: REPORT TO CONGRESS (2012), <https://perma.cc/D7LP-R5FJ> (last visited Feb. 24, 2023); *see also* OUT OF THE MARGINS, *supra* note 266, at xii; Robson, *supra* note 263, at 936–37.

270. James W. Gilliam, Jr., *Toward Providing A Welcoming Home for All: Enacting A New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System*, 37 LOY. L.A. L. REV. 1037, 1039 (2004); *see also* Anne Tamar-Mattis, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 LAW & SEXUALITY 149, 150 (2005) (“LGBTQ youth in foster care often face harassment, discrimination, inadequate care, and even violence within a system that is supposed to be protecting them from abusive or neglectful parental care. Inadequately trained staff often responds to incidents of harassment or discrimination by focusing on the victim rather than on changing the behavior of the perpetrator.”).

271. OUT OF THE MARGINS, *supra* note 266, at xxi.

272. *Id.* at 9.

273. Sullivan, *supra* note 265, at 34.

274. *See* Gilliam, *supra* note 270, at 1044.

275. *See id.* at 1048, 1054.

protection plan for LGBT youth in the foster care system and proposed it for adoption by individual states.<sup>276</sup>

Despite the development of these solutions, LGBT youth are still at risk in some systems. At least twelve states allow agencies to discriminate against same-sex couples on the basis of religious beliefs.<sup>277</sup> The Trump Administration had been vocal in supporting religious freedom.<sup>278</sup> This could impact LGBT youth in foster care by limiting the number of welcome homes that exist for these children. The Biden administration has been working to rectify some of the rules put in place under the Trump Administration that would have adversely impacted LGBT youth in foster care, such as the 2021 HHS Grants Regulation that eliminated the nondiscrimination protections for HHS grant beneficiaries and participants except for what was required by federal statute.<sup>279</sup>

At least twenty-nine states and the District of Columbia have instituted non-discrimination foster care policies that include sexual orientation and gender identity.<sup>280</sup> Another six states have non-discrimination policies that include only sexual orientation.<sup>281</sup>

## VI. ADOPTION BY INDIVIDUALS WITH TIES TO A CHILD

Adoptions may involve non-related individuals, but they may also occur if the parent already possesses a connection to the child through kinship care and second-parent adoption.

### A. KINSHIP CARE

Recently, more states have started promoting and prioritizing kinship care, defined by the U.S. Department of HHS as “the care of children by relatives or, in some jurisdictions, close family friends (often referred to as fictive kin).”<sup>282</sup> Despite many state governments’ original reluctance to place children with relatives,<sup>283</sup> there is a growing belief that kinship care actually proves more advantageous for children in foster care.<sup>284</sup> A recent study found that kinship care

276. OUT OF THE MARGINS, *supra* note 266, at 12.

277. Breanna Diaz, *National Foster Care Month: States Choose Discrimination Over Best Interests of Children*, HUM. RTS. CAMPAIGN (May 10, 2017), <https://perma.cc/K6KR-VE83>; see Equality Map, *supra* note 210.

278. See The DC Shorts, *President Trump Delivers Remarks to the 2017 Values Voter Summit*, YOUTUBE (Oct. 13, 2017), <https://perma.cc/WJS4-RXCB>.

279. *Foster Youth and LGBTQ Advocacy Groups Celebrate Biden Administration’s Agreement to Halt Discriminatory HHS Rule Change In Response to Legal Challenge*, LAMBDA LEGAL (Feb. 10, 2021), <https://perma.cc/P8QR-Z6HK>.

280. Equality Map, *supra* note 210.

281. *Id.*

282. *Kinship Care*, CHILD WELFARE INFO. GATEWAY, U.S. DEP’T. OF HEALTH & HUM. SERVS., <https://perma.cc/HQL8-LXHQ>.

283. Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 FUTURE OF CHILD. 72 (1998).

284. David Rubin, Amanda L. R. O’Reilly, Xianqun Luan, Dingwei Dai, A. Russell Localio, & Cindy W. Christian, *Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home*

provides more stability and permanency for children, and reduces the magnitude of behavioral problems often associated with foster care.<sup>285</sup> Some states have established Kinship Care Programs to encourage the placement of children with biological relatives.<sup>286</sup> In states such as Maryland,<sup>287</sup> Washington,<sup>288</sup> and California,<sup>289</sup> kinship care receives priority and state agencies must attempt to place the child with relatives before examining other alternatives. The Biden administration is also putting an emphasis on kinship care, as evidenced by his 2022 budget proposal to increase reimbursements for the states' foster care costs for children placed with kin.<sup>290</sup>

## B. SECOND PARENT ADOPTION

“Second parent adoption is a modification of stepparent adoption that allows an unmarried partner to adopt the legal or biological child of the other partner.”<sup>291</sup> The jurisdictions that permit second parent adoptions claim that they serve the best interests of the child and promote justice.<sup>292</sup> However, some critics of second parent adoptions argue that the idea actually pursues the best interests of parents over the best interests of the child.<sup>293</sup> If the established legal parent decides to waive the statutory requirement of termination of the biological parent's rights upon adoption, then some courts will not interpret the statute as requiring such revocation prior to permitting the second parent adoption.<sup>294</sup> Some states have

*Care*, 162 ARCHIVES PEDIATRICS & ADOLESCENT MED. 550, 550–56 (2008) (discussing the effects and benefits of kinship care on children in foster care).

285. *Id.*

286. ALA. CODE § 38-12-2 (West, Westlaw through 2022 Reg. Sess.); ARIZ. REV. STAT. ANN. § 8-514.04 (West, Westlaw through 2022 2nd Reg. Sess. of the 55th Leg.); CONN. GEN. STAT ANN. § 17a-98a (West, Westlaw through 2022 Nov. Reg. Sess.); DEL. CODE ANN. tit. 31, § 356 (Westlaw through 2021–2022); LA. REV. STAT. ANN. § 46:286.1 (West, Westlaw through 2022 1st Extra. Sess.); MD. CODE ANN., FAM. LAW § 5-534 (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); S.C. CODE ANN. § 63-7-2320 (West, Westlaw through 2022 Sess.); TENN. CODE ANN. § 37-2-414 (West, Westlaw through 2022 2nd Reg. Sess.); VA. CODE ANN. § 63.2-900.1 (West, Westlaw through 2022 Reg. Sess.); WASH. REV. CODE ANN. § 74.13.600 (West, Westlaw through 2022 Reg. Sess.).

287. MD. CODE ANN., FAM. LAW § 5-534 (West, Westlaw through 2022 Reg. Sess. of Gen. Assemb.) (noting that the kinship care program gives priority to placing a child with relatives).

288. WASH. REV. CODE ANN. § 74.13.600 (West, Westlaw through 2022 Reg. Sess.) (indicating that the department and supervising agencies shall plan and implement strategies to prioritize the placement of children with kin).

289. CAL. FAM. CODE § 7950 (West, Westlaw through 2022 Reg. Sess.).

290. *See Kelly, supra* note 252.

291. Casey Martin, Comment, *Equal Opportunity Adoption & Declaratory Judgments: Acting in a Child's Best Interest*, 43 SANTA CLARA L. REV. 569, 572 (2003).

292. *See, e.g., Sharon S. v. Superior Court*, 73 P.3d 554, 580 (quoting Dep't of Soc. Welfare v. Superior Court, 459 P.2d 897, 899 (Cal. 1969)) (“[Adoption statutes are to be] liberally construed . . . to promote justice.”); *see also In re Jacob*, 660 N.E.2d 397, 404–06 (N.Y. App. Div. 1995) (noting that if it is in the child's best interest, a court may allow the unmarried partner to adopt the child without termination of a biological parent's parental rights).

293. *See Wardle, supra* note 189, at 71 (refuting the court's ruling in *Sharon S.*).

294. *See Sharon S.*, 73 P.3d at 561.

codified the second parent adoption exception to the termination of biological parental rights.<sup>295</sup>

Prior to *Obergefell*, state courts used to interpret second parent adoption statutes to exclude same-sex adoptions, reasoning that the inability to marry makes same-sex partners ineligible for adoption under the statutory interpretation exception granted to stepparents.<sup>296</sup> After *Obergefell*, same-sex couples are now able to jointly adopt in all fifty states, eliminating the need for them to adopt through second parent adoption laws.<sup>297</sup>

## VII. RACE IN THE ADOPTION AND FOSTER CARE SYSTEMS

The passage of the Multi-Ethnic Placement Act (MEPA) in 1994, prohibiting child placement agencies from receiving federal funding if using the race, color, or national origin of the adoptive or foster parents or of the child to delay or deny placements, ended the practice of “race-matching,” or placing children with prospective adoptive parents based on the race of the child and parent to promote same-race placements.<sup>298</sup> This legislation was later replaced with the Interethnic Placement Act, which strengthened and clarified MEPA’s objectives.<sup>299</sup> However, policies advocating for same-race placement persist due to concerns that “transracial adoption does not offer optimal placements for African American children.”<sup>300</sup> On the other hand, race-matching has previously been found to be a causal factor in “foster care drift,” where children remain in the foster care system for a long period of time through multiple home placements.<sup>301</sup> It also contributed to the increasing number of children in the foster care system throughout the 1980s and 1990s.<sup>302</sup>

Concerns have been expressed regarding the prohibition on using race as a consideration in adoptive placements.<sup>303</sup> Such concerns have been rooted in a general disfavor of transracial adoption, promulgated by groups such as the National

295. See, e.g., CAL. FAM. CODE § 9000(b) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.). In 2002, the California legislature codified the court’s decision in *Sharon S.* allowing a domestic partner to adopt a child. *Id.* The statute requires participants to register as domestic partners in California to be eligible for second-parent adoption. See Martin, *supra* note 291, at 588.

296. See, e.g., *In re Adoption of Luke*, 640 N.W.2d 374, 378 (Neb. 2002); *In re Adoption of T.K.J.*, 931 P.2d 488, 491 (Colo. Ct. App. 1996); see also *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 822 (Ky. Ct. App. 2008) (denying “stepparent-like” adoption rights of same-sex domestic partner); *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994) (no finding of the stepparent exception for same-sex partner of biological mother to pursue adoption without termination of biological mother’s parental rights).

297. Equality Map, *supra* note 210.

298. Cynthia G. Hawkins-Leon & Carla Bradley, *Race and Transracial Adoption: The Answer Is Neither Simply Black or White nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1242–43 (2002).

299. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755.

300. Hawkins-Leon & Bradley, *supra* note 298, at 1242.

301. See Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL’Y 1031, 1034–35 (2002).

302. See Berrick, *supra* note 283 (“The substitute care population increased from 276,000 children in 1985 to approximately 494,000 children a decade later.”).

303. See Michalle Thompson, *Transracial Adoption: Confronting Criticisms and Offering Solutions*, 6 WHITTIER J. CHILD & FAM. ADVOC. 243, 247 (2006).

Association of Black Social Workers.<sup>304</sup> These groups cite “psychological maladjustment, poor racial identity, the inability to cope with racism and discrimination, and ‘cultural genocide’” as arguments against transracial adoption, which primarily occurs when white families adopt black children.<sup>305</sup>

Other critics attack MEPA itself, noting that it discourages social workers and state agencies from discussing race with adoptive couples and, consequently, prevents families from receiving much-needed counseling on race and the adoptive process.<sup>306</sup> Further, states often ignore an aspect of MEPA requiring diligence in the recruitment of Black parents.<sup>307</sup> Supporters of the statute push back by arguing that there are large numbers of black and minority children in the adoption system but not enough black and minority adoptive parents to accommodate race-matching.<sup>308</sup>

Apart from MEPA, special attention is given to the status of Native American children under the Indian Child Welfare Act of 1978 (ICWA).<sup>309</sup> Although ICWA has reduced the number of Indian children removed from their homes, advocates argue that inequalities in both public and private adoption systems still result in a disproportionate removal rate and other abuses.<sup>310</sup>

### VIII. CONCLUSION

The adoption and foster care systems both address the needs of unwanted or uncared-for children. While both have made great strides to protect these children, problems still exist within each system. Often, children placed in foster care move through the system for years, going through multiple placements before finding a permanent home, or failing to find a permanent home altogether.<sup>311</sup> Growing up in a chronically unstable environment negatively impacts youth development in multiple ways, resulting in harmful consequences beyond young adulthood.<sup>312</sup> Failing adoption systems lead to the abandonment, and sometimes the death, of unwanted newborns. While most states have made significant progress in dealing with these issues through the passage of Safe Haven laws, the effectiveness of these laws, particularly as regards the rights of birth fathers, remains unclear.

Gender divides become clear in the adoption and foster care systems in determining the rights provided to each parent. An individual’s rights are impacted by their sex. Although unmarried fathers have gained additional parental rights in

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304. *Id.* at 253.

305. *Id.*; see also Hawkins-Leon & Bradley, *supra* note 298, at 1255–59.

306. Ron Nixon, *De-emphasis on Race in Adoption is Criticized*, N.Y. TIMES (May 27, 2008), <https://perma.cc/BAY8-8D5T>.

307. See *id.*

308. See Thompson, *supra* note 303, at 248.

309. Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (West, Westlaw through Pub. L. No. 113-185).

310. See *id.*

311. See Thompson, *supra* note 303 at 245; *supra* Section V.A.

312. See Thompson, *supra* note 303, at 262–63; *supra* Section V.A.

the past few decades,<sup>313</sup> there is not yet parity between the sexes on parental rights issues.

*Obergefell* and its progeny give same-sex couples more protection against discrimination in the adoption and foster care systems. For example, no state has a statute that explicitly bars same-sex adoption or fostering after *Obergefell*.<sup>314</sup> However, some states have passed statutes with religious freedom exemptions that allow foster and adoption agencies to discriminate against same-sex couples based on sincerely-held religious beliefs.<sup>315</sup> It remains to be seen how courts will resolve new efforts by states to justify discrimination by citing religious freedom.

Although both the foster care and adoption systems make genuine efforts to find parental care for children who cannot live with or are unwanted by their families, these systems are confronting complex eligibility issues related to the gender and sexual orientation of adoptive and foster parents. There has been a strong trend toward expanding both systems to include same-sex couples, but many states still consider the sexual orientation of prospective parents a controversial issue.<sup>316</sup> Sexuality of the adopted children can be an issue as well. The foster care system includes a disproportionate number of LGBT children, as compared to the proportion in the general population. These children are subject to abuse not only from their biological families, but also from their foster families.

In addition to these challenges, foster care and adoption systems are emphasizing adoption by individuals with previous ties to the child.<sup>317</sup> Either through kinship care or second-parent adoption, these systems may act in the best interest of the child by refraining from introducing another adult into the child's hectic life. Additionally, modern concerns about adoption and foster care systems address the controversial concept of race-matching.<sup>318</sup> The role of race in adoption and foster care remains a topic of debate.

Despite reform efforts to address gender and sexuality issues within the foster care and adoption systems, substantial issues remain to be addressed before children and parents can be best served by the systems.

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313. *Supra* Section III.A.

314. *See* Equality Map, *supra* note 210.

315. *See id.*

316. *Supra* Section IV.A.2.

317. *Supra* Part VI.

318. *Supra* Part VII.