Religious Exemptions and LGBTQ Child Welfare

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ABSTRACT. In the wake of marriage equality, legal attention is increasingly shifting to resolving conflicts between religious liberty and LGBTQ equality. The current terms of the debate largely center on same-sex marriage, and much less attention is being paid to how religious exemptions affect LGBTQ people in situations that do not involve marriage. LGBTQ youth in the child welfare system are one example of a group that is overshadowed in this debate. Several states have recently enacted broad religious exemption laws that allow the religious or moral views of child welfare actors (for instance, child welfare agencies, caseworkers, or foster parents) to guide the nature of the services they provide, even if those views denounce LGBTQ people. The growing push for these broad religious exemptions has high stakes for LGBTQ youth, who are overrepresented, face pervasive inequality, and are more likely to experience negative outcomes, in the child welfare system.

This Article explains why we should view the experiences of LGBTQ youth in the child welfare system as an essential part of the debate over religious liberty and LGBTQ equality. It further describes why it is necessary to include eliminating LGBTQ-based child welfare inequality within a broader vision of a fully inclusive LGBTQ antidiscrimination regime. To accomplish these goals, this Article recasts religious exemptions involving LGBTQ child welfare through the lens of historical theories of sexual deviance in the fields of criminology, psychology, and sociology.

This new historical and theoretical framing reveals how the current push for religious exemptions involving LGBTQ child welfare is the latest point on a much longer historical trajectory of child welfare interventions that subordinate LGBTQ youth based on sexual deviance concepts. This recasting further illustrates how broad religious exemptions enable antiquated theories of sexual deviance to thrive in the child welfare system today, and protect instances of religiously motivated discrimination that undermine LGBTQ equality both inside and outside of the

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child welfare system. Accordingly, broad religious exemptions involving LGBTQ child welfare do much more than mediate conflicts between religious liberty and LGBTQ equality in the wake of marriage equality. Rather, these exemptions facilitate and recreate LGBTQ-based structural and cultural inequalities within the child welfare system and in society at large. Law and doctrine should recognize these points when determining whether and how to accommodate religion in LGBTQ child welfare contexts.
INTRODUCTION

In 2016, the Mississippi legislature passed the “Protecting Freedom of Conscience from Government Discrimination Act,” better known as HB 1523. In what LGBT advocates have described as one of the most sweeping anti-LGBT laws in the nation, HB 1523 includes several religious exemptions that permit religiously-affiliated organizations and individuals to deny services or benefits to same-sex couples and LGBT individuals in a variety of domains, including employment, public accommodations, housing, adoption, and marriage solemnization. A less discussed part of the Mississippi law affects a largely overlooked and vulnerable segment of the LGBT population: lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth in the child welfare system.

Now in effect, HB 1523 prohibits state actors from taking adverse action against any religious organization that provides or declines to provide foster care or adoption services consistent with its religious or moral views. LGBT advocates warn that child welfare providers may not work with LGBTQ youth in need of support, including those who have been kicked out of their families because of their sexual orientations or gender identities. Some providers may outright reject LGBTQ youth from receiving support, leaving those youth with little choice but to live on their own in homelessness. Other providers might force LGBTQ youth to stay closeted in order to receive support, and place them with parents who hold hostile attitudes toward LGBTQ people.

With regard to parenting, HB 1523 also prohibits state actors from taking adverse action against foster parents who “guide, instruct, or raise” a child consistent with their religious views. As a result, LGBTQ youth could be forced to stay in foster homes that denounce their sexual orientations or gender identities. In addition, foster parents could force transgender youth to dress in...
ways that are inconsistent with their gender identities, or discipline LGBTQ youth for age-appropriate conduct and expressions related to their sexual orientations or gender identities. In more extreme cases, foster parents could pressure LGBTQ youth to undergo damaging conversion therapies that try to change a person’s sexual orientation or gender identity.

A robust and growing body of legal scholarship is addressing how to resolve conflicts between religious liberty and LGBTQ equality, especially in the same-sex marriage context. Several courts have joined in this debate, which endures after the U.S. Supreme Court’s decision in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission left many questions unresolved about how to mediate these conflicts. As scholars and judges flesh out whether bakers, photographers, florists, and others can invoke their religious views to deny services and benefits to same-sex couples who are married or intend to marry, far less attention is being paid to conflicts between religious liberty and LGBTQ equality in situations that do not involve marriage, including those that affect LGBTQ youth. The lack of attention to LGBTQ youth in this debate is consistent with critiques of mainstream

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14 Movement Advancement Project, et al., supra note 8, at 2. Scholars have described how conversion therapy practices themselves have religious roots. See e.g., Marie-Amélie George, Expressive Ends: Understanding Conversion Therapy Bans, 68 ALA. L. REV. 793, 801-21 (2017) (detailing historical and current connections between religion and conversion therapy practices).
17 137 S. Ct. 2290 (2018); Adam Liptak, In Narrow Decision, Supreme Court Sidesteps Baker Who Turned Away Gay Couple, N.Y. Times, June 4, 2018, at A1 (noting that the Court’s decision was “narrow, and it left open the larger question of whether a business can discriminate against gay men and lesbians based on rights protected by the First Amendment”). Although Masterpiece Cakeshop left many questions unresolved about conflicts between religious liberty and LGBTQ equality, it is important to recognize that some scholars posit that the Court’s decision upheld approaches to public accommodations law that limit religious exemptions in order to prevent harm to others who do not hold an objector’s religious or moral views. See generally Douglas NeJaime & Reva Siegel, Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop, 128 YALE L.J. F. 201 (2018).
18 See infra Part IV.
mobilization around LGBT rights for primarily benefiting LGBT adults and neglecting LGBTQ youth.\textsuperscript{19}

Recently, several states have enacted laws like Mississippi’s HB 1523 that allow the religious or moral views of key actors in the child welfare system (for example, private child welfare providers, caseworkers, or foster or adoptive parents) to guide the nature of the child welfare services they provide, even if their views denounce LGBTQ people.\textsuperscript{20} Currently, ten states have broad religious exemption laws involving LGBTQ child welfare and more states could introduce new measures.\textsuperscript{21} Similar federal legislation has also been introduced in Congress.\textsuperscript{22} Proponents of these bills have argued that protecting the ability of private faith-based organizations to provide child welfare services in accordance with their religious views “takes nothing away from anyone.”\textsuperscript{23} They assert that public child welfare agencies and other private organizations can still accept prospective unmarried or same-sex parents.\textsuperscript{24}

\textsuperscript{19} Julie A. Nice, \textit{The Responsibility of Victory: Confronting the Systemic Subordination of LGBT Youth and Considering a Positive Role for the State}, 23 TEMP. POL. & CIV. RTS. L. REV. 373, 375 (2014) (noting that “it appears that most of the progress of the LGBT rights movement to date has primarily been for the benefit of LGBT adults, with far fewer protections for LGBT youth”).


\textsuperscript{22} See, e.g., Amendment to Labor, HHS, Education Appropriations Bill, 2019, https://appropriations.house.gov/news/documentsingle.aspx?DocumentID=305373 (amending a draft of the Labor, Health, and Human services, and Education (LHHS) funding bill to allow child welfare service providers to provide services in ways that are consistent with their “sincerely held religious beliefs or moral convictions” and to withhold federal funds from state or local governments that violate that mandate). This amendment was defeated and eventually removed from the house appropriations bill when it reached its final vote. Ryan Thoreson (Human Rights Watch), \textit{U.S. Congress Rejects Anti-LGBT Adoption Amendment}, HRW.com, (Sept 28, 2018, 1:16 PM), https://www.hrw.org/news/2018/09/28/us-congress-rejects-anti-lgbt-adoption-amendment.; see also Child Welfare Provider Inclusion Act, S. 811, 115th Cong. (2017); H.R. 1881, 115th Cong. (2017).


\textsuperscript{24} Id. at 8. For instance, in a recent federal lawsuit challenging Michigan’s practice of using taxpayer funds to contract with private faith-based child placement agencies, the director of a defendant-intervenor faith-based organization described that “if [prospective parents] let us know that they’re unmarried, or they’re gay or lesbian, we immediately recommend, make a referral to another agency.” Dumont v. Lyon, No. 17-cv-13080, 2018 WL 4385667, (E.D. Mich. Sept. 14, 2018), at *3.
In focusing on the sexualities of prospective foster and adoptive parents, this framing ignores LGBTQ youth in the child welfare system. As this Article explains, it is critical to include the experiences of LGBTQ youth at the center of the debate over conflicts between religious liberty and LGBTQ equality in child welfare contexts. A distinct yet largely overlooked aspect of religious exemptions involving LGBTQ child welfare is that these measures intervene against the backdrop of a public welfare system that is already fraught with LGBTQ-based inequalities and commonly fails LGBTQ youth in need of help from the state—an especially vulnerable segment of the LGBTQ population.

LGBTQ youth, and in particular LGBTQ youth of color, are overrepresented in the child welfare system. Yet, LGBTQ youth are more frequently rejected or unwanted by foster families, adoptive parents, and group homes. Many LGBTQ youth also experience discrimination from child welfare providers and frontline caseworkers, which can negatively affect their placement and treatment in the child welfare system. In addition, LGBTQ youth suffer higher rates of physical, sexual, and verbal abuse in foster families and group homes. These challenges cause many LGBTQ youth to leave or be kicked out of child welfare placements only to wind up homeless, funneled into the juvenile justice system, or both.

This Article analyzes conflicts between religious liberty and child welfare issues pertaining to LGBTQ youth. It seeks to examine connections between religious exemptions in the LGBTQ child welfare context and the preservation of traditional norms of sex, sexuality, and gender in the child welfare system. It further seeks to understand how subordinating the LGBTQ identities of youth to the religious or moral views of child

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25 See infra Part III.B.


27 Anne Gallegos et al., Exploring the Experiences of Lesbian, Gay, Bisexual, and Questioning Adolescents in Foster Care, 14 J. FAM. SOC. WORK 226, 228 (2011); Bianca Wilson, et al., supra note 26, at 5, 11.


29 Wilson, et al., supra note 26, at 5.

welfare actors implicates normative commitments to equality both inside and outside of the child welfare system.

To accomplish these goals, this Article recasts the contemporary push for religious exemptions in the LGBTQ child welfare context through the lens of historical theories of sexual deviance in the fields of criminology, psychology, and sociology. Before sodomy decriminalization started in the late-1960s, theories of sexual deviance offered an ideological framework to justify criminalizing private consensual same-sex sex and gender non-conforming conduct. Scholars and courts have described how both before and after sodomy decriminalization, the stigma of sexual deviance against LGBTQ people extended beyond the criminal realm to also place LGBTQ people at risk for discrimination in the civil realm (for instance, in family, employment, and education).

This Article illustrates how current religious exemptions involving LGBTQ child welfare are part of a much longer trajectory of child welfare interventions into family life that rely on sexual deviance concepts to subordinate LGBTQ youth. This framing illuminates how religious exemptions involving LGBTQ child welfare encourage antiquated theories of sexual deviance to thrive in the child welfare system today, and permit religiously motivated discrimination against LGBTQ youth who are already vulnerable when they come into contact with or enter the system. As this Article discusses, these religious exemptions sustain and propagate sexual deviance concepts by substituting and equating the religious or moral views of child welfare actors with the best interests of youth regarding appropriate sexual orientation and gender identity development and expression. Critically, difficulties in the child welfare system are precursors to difficulties in achieving independence after becoming emancipated (or “aging out”) of the system. Therefore, in addition to harming LGBTQ youth and undermining LGBTQ equality inside of the child welfare system, these forms of religiously motivated discrimination have short-term

31 See infra Part I. This Article focuses specifically on historical theories of sexual deviance developed in the twentieth century.
34 See e.g., Lawrence v. Texas, 539 U.S. 559, 575 (2003) (discussing how sodomy laws enabled discrimination against lesbians and gay men in both the public and private spheres); Courtney G. Joslin, The Gay Rights Canon and the Right to Nonmarriage, 97 B.U. L. REV. 425, 435 (2017) (stressing that “[i]n the years between Bowers and Lawrence v. Texas, LGBT parents lost custody of their children, were fired from their jobs, and were made targets of private discrimination solely because of their sexual orientation”); Melissa Murray, Rights and Regulation: The Evolution of Sexual Regulation, 116 COLUM. L. REV. 573, 584-98 (2016) (discussing the regulation of sexual conduct in the civil domain post-Lawrence); see also sources cited infra note 256 and accompanying text.
35 See infra Part II.
36 See infra Part III.B.
37 Movement Advancement Project, et al., supra note 8, at 5 (noting that under religious exemptions, “[a]gencies would no longer need to make placement decisions based on the best interest of the child”).
and long-term spillover effects that undermine LGBTQ equality in society at large.\textsuperscript{39}

In providing this different take on the conflict between religious liberty and LGBTQ child welfare, this Article urges against narrowly viewing the proliferation of broad religious exemptions involving LGBTQ child welfare as mere backlash against the legalization of same-sex marriage.\textsuperscript{40} Rather, the intellectual history that this Article excavates calls attention to a much deeper and darker history of religion and morality shaping laws and public institutions in ways that subordinate LGBTQ youth in need of help from the state. This richer context helps to provide a more nuanced and comprehensive account of the normative and practical consequences of subordinating LGBTQ equality to religion in the child welfare domain.\textsuperscript{41} It also reveals why it is important to include eliminating LGBTQ inequality in the child welfare system as part of a fully inclusive LGBTQ antidiscrimination regime.\textsuperscript{42}

My view of the child welfare system as an institution of social control\textsuperscript{43} informs these arguments. I view the child welfare system as a social institution that regulates, socializes, and controls youth in the most fundamental aspects of their lives, including their personal identities. The regulating, socializing, and controlling forces of the child welfare system can harm youth in certain instances and protect them in others. Consistent with this idea, this Article illustrates how religious exemptions involving LGBTQ child welfare enable spaces that regulate and control the sexual orientations and gender identities of LGBTQ youth in stigmatizing and subordinating ways.\textsuperscript{44}

Scholars have taken a social control perspective to examine connections between inequality in the child welfare system and structural and cultural inequalities in broader society. For instance, some scholars view the child welfare system as an institution of class control by which more powerful economic classes intervene in the family lives of working class and poor families in order to maintain economic dominance.\textsuperscript{45} Providing a different intersectional perspective, Professor Dorothy Roberts’ work powerfully describes the ways in which the child welfare system disciplines and controls low-income and poor mothers of color by keeping them under intense supervision and blaming them for family problems that are

\textsuperscript{39} See infra Parts III and IV.
\textsuperscript{40} For instance, in a recent federal lawsuit challenging Michigan’s practice of using taxpayer funds to contract with private faith-based child placement agencies that rejected same-sex couples or individuals based on same-sex status, the plaintiffs alleged that Michigan’s broad religious exemption law involving LGBTQ child welfare “is animated by disapproval of, or opposition to, same-sex marriage.” Dumont v. Lyon, No. 17-cv-13080, 2018 WL 4385667, (E.D. Mich. Sept. 14, 2018), at *23.
\textsuperscript{41} See infra Part IV.
\textsuperscript{42} See infra Part IV.
\textsuperscript{43} RONALD L. AKERS, DEViant BEHAViOR: A SOCIAL LEARNING APpROACH 8 (2nd ed. 1977) (defining social control as “formal and informal ways society has developed to help ensure conformity to [social] norms”).
\textsuperscript{44} See infra Part III.
\textsuperscript{45} See, e.g., JACQUES DONZELot, THE POLICING OF FAMILIES (1979); CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD (1977).
rooted in broader structural inequalities connected to race, gender, and class.\textsuperscript{46} This Article contributes to this body of scholarship by illustrating how subordinating the LGBTQ identities of youth to religion and morality in the child welfare system facilitates and recreates broader LGBTQ-based structural and cultural inequalities both inside and outside of the child welfare system.\textsuperscript{47}

At the onset, one caveat is in order. I fully recognize the importance of religious liberty and the significant role of faith-based organizations in providing child welfare services to families, youth, and children.\textsuperscript{48} My point is that regardless of where one falls in the debate between religious liberty and LGBTQ equality, it is crucial to consider the contextual history surrounding these exemptions as well as the institutional settings in which these exemptions apply. In failing to do so, we are left with a distorted picture of the work that religious exemptions perform inside and outside of those institutions, and a limited understanding of the ways in which religious exemptions may jeopardize LGBTQ equality in the current moment and moving ahead. In this regard, this Article lends support to Douglas NeJaime and Reva Siegel’s theory on the need for law and doctrine to consider the material and dignitary harms that religious exemptions inflict on third parties.\textsuperscript{49} Applying their third-party theory in this context, when determining whether to accommodate religion, law and doctrine should take into account the significant harms that broad religious exemptions involving LGBTQ child welfare would impose on LGBTQ youth who need help from the state.\textsuperscript{50}

This Article proceeds as follows. Part I synthesizes and presents three major themes from historical theories of sexual deviance. Parts II then draws on those themes to recast current religious exemptions involving LGBTQ child welfare along a much longer historical trajectory of child welfare interventions that subordinate LGBTQ youth based on sexual deviance concepts. Part III explains how broad religious exemptions in the LGBTQ child welfare context harm LGBTQ youth by sustaining and propagating sexual deviance concepts. Finally, Part IV discusses the implications of my historical and theoretical analysis for


\textsuperscript{47} See infra Part IV.


\textsuperscript{50} See infra Conclusion.
broader debates about religious liberty and LGBTQ equality, and for positioning the elimination of LGBTQ-based child welfare inequality in wider efforts to achieve a fully inclusive LGBTQ antidiscrimination regime.

I. THREE THEMES OF SEXUAL DEVIANCE

The debate over religious exemptions is largely framed in terms of the conflict between religious liberty and LGBT equality (and in particular, marriage equality). In the LGBTQ child welfare context, however, religious exemptions are really a vehicle for enduring anxiety about sexual deviance and attempts to shape and control the sexual orientations and gender identities of youth. This type of agenda has been renounced when articulated explicitly to sustain criminal sodomy prohibitions or same-sex marriage restrictions. In less obvious ways (namely, behind the veil of religious liberty), broad religious exemptions in the LGBTQ child welfare context enable outmoded sexual deviance concepts to thrive in the child welfare system today.

This Part develops a theoretical foundation for these points. To do so, it synthesizes three major themes from historical theories of sexual deviance in the fields of criminology, psychology, and sociology. In Section A, I discuss how these theories characterized the family as a vital institution in shaping sexual orientation and gender identity development. In Section B, I explain how these theories assumed that the sexual orientations and gender identities of youth were not yet fully developed, and thus amenable to change. In Section C, I describe how these theories depicted LGBTQ adults as sexual predators and threats to youth. As will become clearer later in this Article, these themes had a role in justifying child welfare interventions in the past that subordinated LGBTQ youth, and continue to have a role in the more recent push for broad religious exemptions involving LGBTQ child welfare.

Before discussing these themes in greater detail, it is necessary to explain that these themes appear in two separate camps of sexual deviance theory: (1) psychological theories of deviance, and (2) sociological theories of deviance. The psychological theories explain homosexuality and gender nonconformity in terms of individual personality traits and psychological factors. Unlike the

51 See NeJaime, supra note 15, at 1180-95 (describing the current debate over religious liberty and marriage equality for same-sex couples).
52 Lending further support to this point is Cliff Rosky’s work documenting how the concept of “fear of the queer child” historically emerged and still functions as a key justification for anti-LGBT laws and policies. Clifford J. Rosky, Fear of the Queer Child, 61 BUFF. L. REV. 607, 618-59 (2013).
54 See infra Part I.A.
55 See infra Part I.B.
56 See infra Part I.C.
57 Woods, supra note 33, at 690.
psychological theories which look to individual-level factors, the sociological theories of sexual deviance explain homosexuality and gender nonconformity in terms of environmental factors.58

To understand the differences between these camps, a brief background on each is instructive. The psychological theories of deviance emerged in two waves. In the first wave, criminologists in the 1920s started to apply Sigmund Freud's theory of psychoanalysis to study crime. These scholars accepted Freud’s position that adult homosexuality was a non-harmful aberration of sexual development and extended his view to challenge criminal sodomy laws against private consensual same-sex sex.59 Nonetheless, as explained in this Part, these thinkers also adopted Freud’s position on the malleability of childhood sexual development to advocate using psychotherapy on LGBTQ youth to change their sexual orientations and gender identities.60

The introduction of “psychopathy” as a concept in the 1940s gave way to a second wave of psychological theories of sexual deviance.61 These theories defined homosexuality and gender nonconformity as mental diseases, and forms of sexual psychopathy more specifically.62 The writings of Sandor Rado, Edmund Bergler, Irving Bieber, and Charles Socarides were especially influential in pushing these pathological concepts,63 and their research soon shaped a consensus within the U.S. psychiatric and mental health professions that homosexuality was a mental disease.64 Reflecting this consensus, the American Psychiatric Association included homosexuality as a disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1952, where it remained until 1973.65

Sociological theories of sexual deviance emerged after “symbolic interactionism” gained popularity in the 1950s as the leading sociological framework to study questions of deviance.66 From this perspective, scholars started to examine how people’s interactions within families, peer groups, and society

58 Id. at 693.
59 Id. at 683-87 (discussing psychoanalytic theories of sexual deviance).
60 See infra Part I.B.
62 Woods, supra note 33, at 688.
65 Id. at 39.
66 Woods, supra note 33, at 693. Symbolic interactionism focuses on how an individual’s interactions with the environment shape that individual’s self-perception as well as their perception of society. HERBERT BLUMER, SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD 2-3 (1969).
shaped homosexuality and gender nonconformity. Although sociological theories of deviance fall into many camps, theories that rely on B.F. Skinner's concept of operant conditioning were the most relevant for the purposes of this Article. As this Part discusses, these theories characterized homosexuality and gender nonconformity as forms of sexual deviance rooted in improper socialization patterns, including within families.

This Article will later show that understanding the differences between these two camps helps to theorize what exactly is at stake in the debate over religious exemptions and LGBTQ child welfare. The historical analysis to follow will demonstrate that themes consistent with both camps have animated child welfare interventions in the past that subordinated LGBTQ youth. Understanding these differences also assists in theorizing the multiple levels on which broad religious exemptions subordinate LGBTQ youth in the current moment. At the individual level, I argue these exemptions stigmatize LGBTQ youth by constructing them as “sexual deviants” on the basis of their sexual orientations and gender identities. At the environmental level, I contend that these exemptions shape institutional spaces and living environments inside the child welfare system that adhere to and propagate traditional norms of sex, sexuality, and gender. In so doing, religious exemptions discourage LGBTQ youth inside the system from developing or expressing their sexual orientations and gender identities.

A. SPECIAL ROLE OF THE FAMILY

The first major theme that emerges from historical theories of sexual deviance is emphasis on the family as a vital institution in shaping sexual orientation and gender identity development. As explained below, this emphasis on the family rationalized intervening in parent-child relationships to ensure that youth adhered to traditional norms of sex, sexuality, and gender. Some scholars even went as far as to argue that parents were the “primary makers of social deviates,” which in their view included LGBTQ people.

Given their different ideological assumptions, it is important to separate how psychological and sociological theories of sexual deviance characterized the role of the family in sexual orientation and gender identity development. Freudian theory largely shaped how scholars who studied deviance from a psychological perspective

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67 Woods, supra note 33, at 693.
68 See Akers, supra note 43, at 21-38 (providing a summary of different sociological theories of deviance).
70 Woods, supra note 33, at 693.
71 See infra Part III.
72 See infra Part IV.
73 Merl E. Bonney, Parents as the Makers of Social Deviates, 20 Social Forces 77, 77 (1941).
viewed the family in this regard.\textsuperscript{74} Freud viewed homosexuality as a non-harmful aberration of sexual development.\textsuperscript{75} He characterized homosexuality in both adult males and adult females as the product of arrested psychosexual development caused by an unresolved Oedipal conflict (commonly referred to as the “Oedipus complex”).\textsuperscript{76}

Importantly, the family had a central role in Freud’s conception of the Oedipus complex. Consider his description of the Oedipus complex in boys.\textsuperscript{77} Freud emphasized that during the Oedipal phase of sexual development (which occurred between three to six years old), a boy developed intense erotic and emotional attachments to his mother and began to harbor hostile feelings toward his father for interfering with that attachment.\textsuperscript{78} The boy began to fear that the father would retaliate, and that this retaliation would take the form of castration.\textsuperscript{79} Fearing castration, the boy unconsciously abandoned the attachment to his mother, began to identify with his father, and sought sexual intimacy from other females.\textsuperscript{80} In Freud’s view, male homosexuality was a manifestation of a boy’s unresolved Oedipus conflict.\textsuperscript{81} He contended that fear of castration resulted in disgust toward female genitalia,\textsuperscript{82} and that the boy unconsciously associated any female love object with his erotic attachment to his mother.\textsuperscript{83}

In the 1920s, criminologists started to apply Freud’s theory of human sexuality to study criminal behavior, including private consensual same-sex sex. These scholars adopted Freud’s position that adult homosexuality was a non-harmful form of sexual deviance,\textsuperscript{84} and extended this idea to criticize criminal laws against


\textsuperscript{75} SIGMUND FREUD, THREE ESSAYS ON SEXUALITY 4-5 (James Strachey trans., 1962).

\textsuperscript{76} SIGMUND FREUD, SOME NEUROTIC MECHANISMS IN JEALOUSY, PARANOID AND HOMOSEXUALITY (1922), reprinted in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 221, 230-32 [James Strachey ed., 1981] [hereinafter THE STANDARD EDITION].

\textsuperscript{77} SIGMUND FREUD, The Ego and the Id (1923), in 19 THE STANDARD EDITION, supra note 76, at 31-32.

\textsuperscript{78} FREUD, The Ego and the Id, supra note 77, at 31.

\textsuperscript{79} 19 SIGMUND FREUD, The Dissolution of the Oedipus Complex (1924), in THE STANDARD EDITION, supra note 76, at 173, 175-179 (describing the Oedipus complex in girls).

\textsuperscript{80} FREUD, The Ego and the Id, supra note 77, at 31.

\textsuperscript{81} 19 SIGMUND FREUD, The Dissolution of the Oedipus Complex, supra note 76, at 175.

\textsuperscript{82} 19 SIGMUND FREUD, The Infantile Genital Organization, supra note 76, at 145.

\textsuperscript{83} FREUD, supra note 76, at 230-32.

\textsuperscript{84} 12. 19 Id., at 230.

\textsuperscript{85} Id.

\textsuperscript{86} ALEXANDER AND STAUB, supra note 74, at 114 (characterizing homosexuality as a “perversion”) and 115 (noting that “homosexuality . . . does not threaten anybody’s rights”).
private consensual same-sex sex. In spite of advocating for tolerance of adult homosexuality, however, these scholars took a very different position with regard to youth.

As an example, consider the work of influential criminologists Franz Alexander and Hugo Staub. Alexander and Staub adopted Freud’s position on the non-harmful nature of adult homosexuality to criticize the legitimacy and effectiveness of criminal punishment as a societal response to adult homosexuality. At the same time, they relied on Freud’s concept of the Oedipus complex to conceptualize homosexuality as a problem of “child education.” They argued that changing “the sexual atmosphere” of the family and the use of psychoanalysis was the best way to prevent homosexuality (which at the time was conceptualized to include gender nonconformity). In this regard, sexual deviance concepts informed their favorable outlook toward public and private actors intervening in the family life of LGBTQ youth and using invasive psychological techniques to change their sexual orientations and gender identities.

Scholars who drew on concepts of psychopathy to argue that homosexuality and gender nonconformity were mental diseases also emphasized the central role of the family in shaping sexual orientation and gender identity development. Consider Irving Bieber’s theory on male homosexuality. In the early 1950s, Bieber and his colleagues started a multi-year study of 106 gay men and 100 heterosexual men who were undergoing psychoanalytic treatment. They reported that twenty-nine of the 106 gay men (or twenty-seven percent) became exclusively heterosexual after psychoanalysis. The researchers reported strong histories of family dysfunction for the gay male subjects, and concluded that the “foundations of personality and psychopathology are set within the nuclear family.”

Illustrating the central role of the family in their theory, Bieber and his colleagues advanced a
model of disturbed parent-child relations that in their view promoted homosexuality.96

Under this model, gay men were more likely to have a “close-binding-intimate” mother97 and a “detached-hostile” father.98 For instance, many of the gay male subjects were their mother’s favorite child or closest confidant, and the two had a closeness that the researchers described as sexually provocative.99 Many of the gay male subjects also expressed open fear and hatred of their fathers, whose behaviors ranged from neglectful to abusive.100 Bieber and his colleagues concluded that these disturbed parent-child relations promoted a fear of heterosexuality in youth, and in turn, promoted homosexuality.101

Scholars who advanced sociological theories of deviance also stressed the role of the family in promoting homosexuality and gender nonconformity in youth. Looking to environmental factors, these theories examined how socialization patterns within the family contributed to homosexuality and gender nonconformity. Consider early articulations of Ronald Akers’ social learning theory of crime. Akers applied his influential theory in the early 1970s to explain deviant behaviors, including homosexual conduct.102 Akers hypothesized that a person’s sex drive had biological origins, but social regulations and institutions (for example, gender roles, marriage, and family) guided its strength and direction.103 He viewed “homosexual” and “heterosexual” as social roles constructed on the basis of specific sexual behaviors and gendered expectations.104

Importantly, Akers posited that socialization patterns within the family could promote homosexuality in youth in two ways. First, parents might socialize their children in ways that directly reinforced sexually “deviant” behaviors.105 Second, and more commonly in his view, parents might socialize children in ways that rendered them unprepared to engage in heterosexual sexual behaviors.106 Akers argued that these socialization processes caused a person to progress from “an isolated act of deviant sexual behavior to a stable pattern of sexual deviancy.”107 In

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96 Id. at 172.
97 Id. at 47.
98 Id. at 85.
99 Id. at 47.
100 Id. at 213.
101 Id. at 303.
102 AKERS, supra note 43, at 189-200. In the early articulation of his social learning theory, Akers dedicated an entire chapter in the first and second editions of his key work that articulated the theory, Deviant Behavior: A Social Learning Approach, to the topic of homosexuality. See RONALD L. AKERS, DEVIANNT BEHAVIOR: A SOCIAL LEARNING APPROACH (1973); AKERS, supra note 43. Later editions of the work after sodomy lost force in the 1970s no longer include this chapter on homosexuality, reflecting a broader societal shift away from viewing homosexuality as a form of sexual deviance. See, e.g., RONALD L. AKERS, SOCIAL LEARNING AND SOCIAL STRUCTURE: A GENERAL THEORY OF CRIME AND DEVIANCE (2008).
103 Id. at 174.
104 Id. at 189.
105 Id. at 183.
106 Id.
107 Id. at 200.
this regard, the regulating and socializing dynamics of the parent-child relationship shaped the construction of LGBTQ identities.

In short, both psychological and sociological theories of sexual deviance stressed the central role of the family in shaping sexual orientation and gender identity development. Related to this idea is the notion that the sexual orientations and gender identities of youth are not yet fully developed, and thus subject to change. The next Section discusses this theme in more depth.

B. MALLEABILITY OF SEXUAL ORIENTATION AND GENDER IDENTITY DEVELOPMENT

The second major theme that emerges from historical theories of sexual deviance is the idea that the sexual orientations and gender identities of youth are not yet fully developed and thus subject to change. With regard to psychological theories of sexual deviance, scholarly perspectives on this issue can be traced again to Freud’s views. Freud identified five stages of psychosexual development: the oral stage (zero to eighteen months old), the anal stage (eighteen months to three years old), the phallic stage (three to six years old), the latency stage (six to twelve years old) and the genital stage (twelve years old and older). Freud viewed homosexuality in adults as a non-harmful product of an arrested psychosexual development during the third, phallic (also called Oedipal) stage.

As discussed previously, some scholars of deviance applied Freudian theory to advocate using psychotherapy on LGBTQ youth in attempts to change their sexual orientations or gender identities. Revisit criminologists Alexander and Staub, who viewed homosexuality as a problem of “child education” and recommended using psychoanalytic techniques to alter the course of a LGBTQ youth or child’s sexual development. Freud’s position that youth were still progressing through the stages of psychosexual development informed Alexander and Staub’s recommendation.

Scholars who disagreed with Freud to define homosexuality and gender nonconformity as mental diseases also emphasized the malleability of adolescent and childhood sexual development. On this point, revisit the research of Bieber and his colleagues from the 1950s. In reporting their findings, the researchers stressed that the period between sixteen and twenty-one years old was characterized

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109 See supra notes 147-153 and accompanying text.

110 See supra Part I.A and I.B.

111 ALEXANDER AND STAUB, supra note 74, at 117.

112 Id. (applying Freud’s idea of the Oedipus complex to advocate for using psychotherapy on youth to prevent homosexuality).

113 To recap, Bieber and his colleagues reported that out of the 106 gay men in their study who underwent psychoanalysis, twenty-nine of them (or 27 percent) became exclusively heterosexual. BIEBER, supra note 63, at 282.
by an increase in heterosexual drive. Based on this idea, they concluded that the optimal period to redirect a person’s sexual orientation or gender identity development through psychoanalysis fell between late adolescence and young adulthood.

Sociologists who studied deviance also emphasized the malleability of adolescent and childhood sexual orientation and gender identity development, but in different ways. Rather than conceptualizing homosexuality as a feature of individual psychology or personality, sociologists viewed “homosexual” and “heterosexual” as social roles rooted in gendered expectations of appropriate sexual behavior. Scholars who applied operant conditioning concepts examined how reinforcing and punishing stimuli toward homosexual conduct motivated individuals to progress from an isolated same-sex sexual experience toward cohesive forms of LGBTQ identity.

To illustrate this point, revisit Akers’ social learning theory of crime. Akers posited that sexual conditioning starts very early in life. In his view, people’s first same-sex sexual experience usually occurs during pre-adolescent years in the setting of innocent play between boys and between girls. He argued that the sex training given to children, especially from their parents, could lead to deviance. In his view, although sexual conditioning continues throughout one’s life, after “habit sets in” the individual tends not to experiment or change. This, in combination with a person’s immersion in “homosexual subcultures” (for instance, gay bars or gay and lesbian advocacy organizations), set a process into motion in which Akers argued a person progresses from an isolated same-sex experience to a “stable pattern of deviant sexuality.”

C. Sexual Predator Stereotypes

The two evaluated themes so far are inward looking in the sense that they focus on the internal dynamics of families to ensure that youth adhere to traditional norms pertaining to sex, sexuality, and gender. The third and final relevant theme—the stereotyping of LGBTQ adults (and in particular, adult gay men) as sexual predators—is outward looking. It works by stigmatizing and preventing “deviant” actors from interfering with the “appropriate” sexual orientation and gender

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114 Id.
115 Id.
118 Id. at 180.
119 Id.
120 Id. at 184.
121 Id. at 181.
122 Id. at 193.
identity development of youth. Scholars have described how these stereotypes date back to premodern times and have motivated a range of anti-LGBT laws and policies over time.123 This Article will later explain that these stereotypes have facilitated laws and policies that excluded LGBTQ adults from providing supportive foster and adoptive homes for unwanted LGBTQ youth in the child welfare system.124

With regard to the deviance literature, stereotypes of LGBTQ adults as sexual predators are especially prominent in psychological theories of deviance.125 Even scholars who embraced Freud’s views about the non-harmful nature of adult homosexuality included these stereotypes in their theories. Consider the work of criminologist Kate Friedlander.126 In applying Freudian theory to examine juvenile delinquency and crime, Friedlander criticized the notion that homosexuality in adults posed an inherent threat to society.127 Friedlander, however, distinguished “active homosexuals” from “passive homosexuals.”128 In her view, active homosexuals included adult men who desired to have sex with young boys and assumed the “male role” (namely, the “top”) during those encounters.129 Conversely, passive homosexuals included adult men who desired the love of another man because of unloving relationships with their fathers, and assumed the “female role” (namely, the “bottom”) during those encounters.130 In evaluating the clinical history of an “active homosexual,” Friedlander stressed that “people with a disturbance of this kind” would pose a “danger of seducing young boys.”131

Scholars who disagreed with Freud’s conclusion that homosexuality was a non-harmful aberration of sexual development applied concepts of psychopathy to demonize lesbian and gay adults as sexual predators and threats to children. For instance, J. Paul De River, a prominent forensic psychiatrist during the 1960s, characterized gay men and lesbians as psychopaths.132 De River argued that homosexuality was the result of “early seduction into the practice,”133 illustrating the central role of sexual predator stereotypes in his explanation of homosexuality. He further claimed the “psychic trauma” of boys who are seduced into homosexuality is so severe that it leaves an “indelible imprint” on their minds.134 Based on this idea, De River recommended invasive and harmful electric shock

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124 See infra Part III.C.
125 Woods, supra note 33, at 688.
126 FRIEDLANDER, supra note 144, at 151-78 (discussing sexual perversions and offenses).
127 Id. at 152 (noting that “homosexuals . . . show no other sign of inferiority and are often useful members of the community”).
128 Id. at 159.
129 Id.
130 Id.
131 Id. at 162.
133 Id. at 276.
134 Id.
therapy for homosexuals (at least two shocks per week), which in his experience could purportedly “change their mode of thought.”

* * *

In sum, this Part synthesized three major themes from historical theories of sexual deviance: the central role of the family in shaping sexual orientation and gender identity development, the purported malleability of sexual orientation and gender identity development, and the demonization of LGBTQ adults as sexual predators and threats to youth. This Article now draws on these themes to recast broad religious exemptions involving LGBTQ child welfare along a much longer historical trajectory of child welfare interventions that rest on sexual deviance concepts to subordinate LGBTQ youth. This theoretical recasting reveals how religious exemptions in the LGBTQ child welfare context enable outmoded sexual deviance concepts to thrive in the child welfare system today.

II. THE PATH TO RELIGIOUS EXEMPTIONS IN LGBTQ CHILD WELFARE

With sodomy decriminalization starting in the late 1960s, and more recent advances in LGBT rights, one might assume that historical theories of sexual deviance no longer shape laws that affect LGBTQ people. Challenging this idea, this Part excavates a historical trajectory of child welfare interventions that rest on sexual deviance concepts to subordinate LGBTQ youth. In developing this trajectory, the analysis lays the groundwork for a new theoretical frame to understand the current push for religious exemptions involving LGBTQ child welfare. I argue that we should understand the current push for these exemptions as the latest point on this trajectory.

The historical trajectory is divided into four periods that center on different controversies and developments surrounding the treatment of LGBTQ youth in the child welfare system. Section A looks at the time period before the 1970s when private consensual same-sex sex was criminalized. Section B dives into coordinated efforts to match unwanted LGBTQ youth who could not find homes with gay and lesbian foster parents during the 1970s. Section C discusses the backlash following this time period and considers agency policies and legislation banning gay and lesbian foster parents between the 1980s and 1990s. Finally, Section D analyzes the more recent litigation and nonlitigation strategies of LGBT advocacy organizations during the 2000s and early 2010s intended to improve the treatment of LGBTQ youth in the child welfare system.

At the outset, it is important to recognize that family law scholars have looked to some of these periods in order to historicize and theorize legal developments

135 Id.
136 ESKRIDGE, supra note 32, at 136-94 (discussing sodomy law reform starting in the 1960s).
surrounding parental recognition for lesbians and gay men. Although there is overlap with those issues, the trajectory below has a different focus in that it places LGBTQ youth in the child welfare system at the center of the analysis. As will become clear, some child welfare responses to LGBTQ youth embraced sexual deviance concepts whereas others challenged them. This back and forth reveals the nonlinear and multifaceted ways in which sexual deviance concepts have informed child welfare interventions over time in order to pressure LGBTQ youth to conform to traditional norms of sex, sexuality, and gender.

A. BEFORE THE 1970S: THE CRIMINALIZATION ERA

Until the early 1970s, criminal laws against private consensual sex and gender nonconforming conduct stigmatized LGBTQ people as criminals, and left them vulnerable to arrest and incarceration in almost every state. In addition, the growing professional consensus between the 1940s and 1960s that homosexuality was a mental disease justified “sexual psychopath” laws. These laws constructed LGBTQ people (gay men in particular) as psychopaths, and allowed for their confinement, perhaps indefinitely, in mental health or correctional facilities. Interactions between these two areas of legislation put many LGBTQ people who came to the attention of the state into a bind: either accept being stigmatized as criminals and potentially face incarceration, or assume the label of being mentally ill and undergo invasive and harmful psychotherapy and psychiatric interventions.

Published studies during the criminalization era illustrate how this interplay between criminal and medical norms—which critically, rested on sexual deviance concepts—affected LGBTQ youth who came into contact with the state. Consider psychiatrist Lewis J. Doshay’s acclaimed study on male juvenile sex offenders, published in 1943. The study sample consisted of 256 males between the ages of seven- and sixteen-years-old who were adjudicated delinquent for sex offenses, and then referred to the New York City Children Court’s clinics for treatment. Subjects were separated into two groups: (1) young males who had

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139 Id. at 132.
140 Bayer, supra note 64, at 28.
141 See, e.g., Lewis J. Doshay, The Boy Sex Offender and His Later Career (1943); Oscar B. Markey, A Study of Aggressive Sex Misbehavior in Adolescents Brought to Juvenile Court, 20 AM. J. ORTHOPSYCHIATRY 719, 723 (1950) (presenting the findings of one psychological study of juvenile sex delinquency in which most of the male subjects were charged with homosexuality); Patricia O’Neal, et al., A Psychiatric Evaluation of Adults Who Had Sexual Problems as Children: A Thirty-Year Follow-Up Study, 19 HUM. ORG. 32, 33 (1960) (same).
142 Doshay, supra note 141.
143 Id. at 1. The male juvenile sex delinquents were treated between the years of 1928 and 1933, and the investigators followed up with the subjects a minimum of six years after their treatment with the clinic. Id.
committed only sex-related offenses, and (2) young males who had committed a mix of both sex-related and non-sex-related offenses. As explained below, detailed case histories in the former group revealed how youth had been adjudicated delinquent and funneled into the treatment clinics for simply engaging same-sex sexual conduct.

Doshay’s study found that the young males who had only committed sex-related offenses had much lower rates of recidivism than the mixed-offense group. Based on these findings, Doshay concluded that juvenile male sex delinquency was “self-curing,” assuming that state responses resulted in proper shame and guilt. This conclusion, in combination with the fact that the delinquent subjects were funneled into treatment clinics, reflected the assumption that sexual orientation and gender identity development during adolescence and childhood was subject to change. Further illustrating how the family was viewed as a site for state intervention, Doshay recommended shaming boys by bringing their families into juvenile court or clinic hearings and revealing their illicit sexual conduct to family members.

Literature dedicated to LGBTQ youth in the child welfare system during the criminalization era is sparse. A closer look at the available published studies, however, reveals that some child welfare agencies during this period refused to serve LGBTQ youth. LGBTQ youth were also commonly kicked out of foster families and group homes when family members or staff discovered their LGBTQ identities. Other LGBTQ youth who lived in foster families or group homes were

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144 Id. at 1-3.
145 Id. at 75 (listing sodomy as an offense). See also, e.g., id. at 96-97 (Case of G.T., an eleven-year-old subject, who committed the offense of perversions with adults and adolescents); id. at 97-98 (Case of A.G., a fifteen-year-old subject, who had been adjudicated delinquent for “engaging in homosexual practices as a means of livelihood”); id. at 98-99 (Case of C.S., a fifteen-year-old subject, who had committed the offense of sodomy on younger siblings and other children); id. at 139-40 (Case of J.P., a nine-year-old subject, who was adjudicated delinquent for engaging in various “perverted practices with an elderly degenerate” as well as with older boys in the neighborhood).
146 Id. at 153-54.
147 Id. at 168. Notably, Doshay argued that psychoanalytic treatment was not an effective way to treat juvenile delinquency, and advocated for better sex education instead. Id. at 175.
148 This assumption is consistent with the second major theme of sexual deviance discussed supra Part I.B. Further illustrating this relationship, Doshay served as a psychiatrist at the New York City Children’s Court. See id. at cover page.
149 This assumption is consistent with the first major theme of sexual deviance discussed supra Part I.A.
150 Id. at 168.
151 Lucinda Franks, Homosexuals as Foster Parents: Is New Program on Advance or Peril?, N.Y. TIMES, May 7, 1974, at 55 (quoting an office director for a state social welfare agency that state child-care agencies “generally refused to deal with homosexual adolescents”); Bruce Voeller & James Walters, Gay Fathers, FAMILY COORDINATOR 149, 154 (1978) (discussing how gay youth in the foster care system were often viewed as “problem” children and that many prospective foster parents did not want them).
152 See, e.g., Franks, supra note 151, at 47 (discussing the creation of a new program to place homeless youth who identified as “homosexuals” and had been rejected by their parents and group homes with gay male adults); Robert Joffee & John Mintz, N.J. Officials Find Gay Foster Parents for Gay Teenagers, TRENTO TIMES, Nov. 26, 1979, https://www.washingtonpost.com/archive/politics/1979/11/26/nj-officials-find-gay-foster-parents-for-gay-teen-agers/778037-643-49c4-0a6a-a7a08e9581a5/?utm_term=.26c3e0115ca (quoting a representative from the N.J. Department of Human Services who stressed that some heterosexual foster
forced to undergo psychotherapy to change their sexual orientations or gender identities.153 These youth were often considered more appropriately handled within training schools, mental health institutions, and secure detention facilities, as opposed to the child welfare system.154 Thus, the picture of care that emerges from these studies is to the extent that LGBTQ youth were able to receive help from the child welfare system, they had to subordinate their sexual orientations and gender identities to do so.

To illustrate these points more concretely, consider a 1937 study of 250 male adolescents who were admitted to a training school for juvenile delinquents.155 One of the subjects, R.W., was a black gay male youth who had bounced in and out of foster care since the age of two. When he turned fourteen, his foster parents started to suspect that he was engaging in same-sex sex—which the study described as his behavioral “problem.”156 R.W. sought the company of older men, was effeminate in his speech and manners, avoided athletics, and enjoyed dramatics and choir singing.157 The study described that his foster parents tried “kindly argument and persuasion without avail to direct him sexually.”158 R.W. ran away several times from his foster family until he was eventually committed to the training school. The researchers looked to the role of the family in sexual orientation development to account for his “sexual inversions.”159 Specifically, the study stressed connections between his complicated family history and behavioral “problem.”160

Barriers to parental recognition for lesbians and gay men during the criminalization era compounded the problems for LGBTQ youth in the child welfare system. With sodomy and sexual psychopath laws in effect, it was outside the realm of possibility for lesbians or gay men to openly foster or adopt.161 These exclusions were consistent with broader challenges that lesbian and gay parents

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153 See, e.g., Lauretta Bender & Samuel Paster, Homosexual Trends in Children, 11 AM. J. ORTHOPSYCHIATRY 730, 742 (1941) (discussing the results a study that examined the use of psychotherapy on gay youth who lived in foster care).
154 John M. Flackett & Gail Flackett, Criswell House: An Alternative to Institutional Commitment for Juvenile Offender, 34 FED. PROBATION 30, 34 (1970) (noting that one training school regularly housed “youths with homosexual problems”); Sidney Tarachow, The Disclosure of Foster-Parentage to a Boy, 94 AM. J. PSYCHIATRY 401, 403-04 (1937) (discussing a gay male foster youth who had been confined in juvenile detention for engaging in same-sex conduct).
155 Tarachow, supra note 154. The study examined connections between boys’ behavioral problems and disclosure that their parents were foster, and not their biological, parents. Id. at 401.
156 Id. at 403.
157 Id.
158 Id. This is consistent with the first and second major themes of sexual deviance described in supra Parts I.A. and I.B.
160 Id. at 404. This is consistent with the first major theme of sexual deviance described in supra Part I.A.
161 Id.
162 David S. Chambers & Nancy D. Polikoff, Family Law and Gay and Lesbian Family Issues in the Twentieth Century, 33 FAM. L.Q. 523, 535 (1999) (noting that issues of lesbian and gay adoption and foster parenting first surfaced in the 1970s); Wendell Ricketts, Lesbians and Gay Men as Foster Parents 6 (2008) (noting that open lesbian and gay foster homes have existed since the early- to mid-1970s); Voeller & Walters, supra note 151, at 153 (noting that “[s]creening out homosexuals is commonplace in foster care and adoption cases”).
faced in family courts involving custody disputes. Judges regularly embraced stereotypes of lesbian and gay adults as sexual predators and threats to children in order to deem them unfit parents, and often relied on sodomy statutes to do so. Importantly, these barriers to parental recognition limited LGBTQ youth’s access to out-of-home child welfare placements that were supportive of their sexual orientations and gender identities. As discussed in Section B, legal developments in the early 1970s that eased restrictions on lesbian and gay foster parenting helped to increase some LGBTQ youth’s access to supportive placements.

B. The 1970s: Early Sexual Orientation Matching

In the early 1970s, private non-profit organizations and public child welfare agencies started to place LGBTQ teenagers whose families no longer wanted them, and who had no other viable placement options in the child welfare system, with openly lesbian and gay foster parents. "These new practices of sexual orientation matching emerged alongside other calls to match parents with youth in the child welfare system on the basis of race, ethnicity, and religion." As this Section

163 Nan D. Hunter & Nancy D. Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 BUFF. L. REV. 691 (1976) (discussing legal challenges surrounding custody for lesbian mothers); Joslin, supra note 34, at 435 (noting that LGBT parents lost custody of their children between the U.S. Supreme Court’s decision in Bowers v. Hardwick and Lawrence v. Texas). Brian Miller, Gay Fathers and Their Children, 28 FAM. COORDINATOR 544, 546 (1979) (discussing custody cases in which gay fathers lost custody over their children, and especially sons, because courts feared that the fathers would turn their children gay); D. Kelly Weisberg, Alternative Family Structures and the Law, 24 FAM. COORDINATOR 549, 552 (1975) (discussing cases in which courts awarded custody to fathers over lesbian mothers who lived with their same-sex partners).

explains, new pressures on the foster care system and contested norms of sexual deviance framed the scholarly and public discourse over these new child welfare approaches.

The early 1970s was a critical period in the history of the U.S. foster care system. During the 1960s and 1970s, the number of youth in foster care nearly doubled to almost 500,000.170 As foster care placements surged, legal scholars and commentators lodged wholesale critiques of the foster care system.171 Experts attributed this growth to significant changes in federal funding for child welfare programs, which in their view provided financial incentives for states to remove children from their biological families and place them in foster care.172 Overburdened child welfare agencies started to look for alternative approaches to handle the crisis, especially for youth who were difficult to place through foster care or adoption.173

In addition to these new pressures on the foster care system, the first open practices of sexual orientation matching in the 1970s emerged in the context of shifting ideas surrounding LGBTQ people and deviance in the criminal and medical domains. In the early 1970s, a wave of states started to decriminalize private consensual same-sex sex and repeal their sexual psychopath laws.174 The dominant view that homosexuality was a mental disease also began to lose force,175 as illustrated by the American Psychiatric Association’s removal of homosexuality from the DSM in 1973.176

This shifting terrain opened discursive space to conceive of LGBTQ youth as worthy of support in child welfare settings, and not juvenile delinquents or mentally

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172 Martin Guggenheim, The Foster Care Dilemma and What to Do About It, 2 J. CONST. L. 141, 142-43 (1999). Specifically, critics argued that the revisions allocated ample funds that followed youth into foster care placements, but little funds for services to prevent foster care placements or to reunite children with their biological families after being placed in foster care. Id. at 142.

173 See, e.g., Franks, supra note 151, at 55 (quoting a state social worker describing that gay teenagers usually cannot be placed in the child welfare system).

174 Bayer, supra note 64, at 40 (discussing repeal of sexual psychopath laws); Eskridge, supra note 32, at 136-194 (2008) (discussing sodomy law reform).

175 Growing empirical research discounting the idea that homosexuality was a mental disease as well as mobilization within early lesbian and gay social movements contributed to this shifting legal terrain. Woods, supra note 33, at 699-700.

176 Bayer, supra note 64, at 40.
ill sexual deviants who deserved medical treatment and social exclusion. These shifting norms of deviance also created room for psychology and mental health professionals to conceive of lesbian and gay adults as suitable foster and adoptive parents, and not sexual predators. Illustrating this point, the American Psychological Association adopted a resolution in 1976 that took the position that sexual orientation should not be the “sole or primary variable considered in custody or placement cases.”

In 1973, the National Gay and Lesbian Task Force (NGLTF) started the first coordinated effort to place vulnerable LGBTQ youth between the ages of twelve and seventeen with lesbian and gay foster parents. Most of the placed youth were unwanted by their families, shunned by child welfare agencies, and rejected by heterosexual foster parents. After the creation of the NGLTF program, the director of the New York State Board of Welfare publicly acknowledged that child welfare agencies in the state generally refused services to lesbian and gay youth. At least thirty youth were placed with lesbian and gay foster parents within the first year of the creation of the program.

Scholars who advanced psychological theories of sexual deviance to define homosexuality and gender nonconformity as mental diseases publicly denounced the NGLTF program. They specifically emphasized the malleability of sexual development during adolescence and childhood, and warned against the dangers of labeling youth as lesbian or gay too quickly in light of this malleability. For instance, Charles Socarides, whose research contributed to the dominant consensus in the psychology and mental health profession between the 1950s and 1970s that homosexuality was a mental disease, publicly critiqued the program. In stressing the malleability of adolescent sexual development, Socarides referenced his research finding a fifty percent success rate for gay youth who underwent psychotherapy and purportedly returned to heterosexuality.

Soon after the NGLTF program began, several public child welfare agencies started to place unwanted LGBTQ youth with lesbian and gay foster parents. For

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177 See, e.g., Franks, supra note 151, at 47 (noting that some psychotherapists called early gay foster homes “a spectacular advance” in “understanding homosexuality as a sexual preference rather than as a disease”); id. (quoting a social worker describing that gay youth in the child welfare system are usually treated like criminals and that nobody wants them).


179 Franks, supra note 151, at 47.

180 Id.

181 Id. at 55.

182 Id.

183 Id.

184 This is consistent with the second major theme of deviance discussed supra in Part I.B.

185 Franks, supra note 151, at 55.

186 BAYER, supra note 64, at 34.

187 Franks, supra note 151, at 55.

188 Id.

189 CARLOS BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 145 (2012) (noting that in the early 1970s, gay organizations in several cities, including Chicago,
instance, in 1975, the New Jersey Department of Human Services set up the first “gay foster home” in the state. Notably, this approach emerged in the context of broader debates about criminalizing private consensual sex within the state. In 1973, the New Jersey Supreme Court held that its state sodomy law was unconstitutionally vague as applied to married couples, but not unmarried intimate partners. Five years later, however, the state legislature repealed its sodomy law, which lifted prohibitions against private consensual same-sex sex.

In the same year of the legislative repeal, a local newspaper published a story on new “gay foster homes” in the state. Challenging deviant stereotypes of lesbian and gay adults as sexual predators, a spokesperson for the New Jersey Department of Human Services stressed that there was “no indication that a gay foster parent is more likely to sexually abuse a child than a heterosexual foster parent.” At the same time, the story revealed how acceptance of gay foster homes hinged on the idea that the sexual orientations of the placed youth had already crystallized, and thus were not malleable. In this regard, the acceptance of gay foster homes occurred in the broader context of cabining how far the second theme of sexual deviance—the malleability of sexual orientation and gender identity development—applied. For instance, in commenting on the new program, prominent child psychiatrist Aaron H. Esman noted that for “young adolescents, the pattern of sexual orientation might not be fixed, and that kind of placement might tend to fix it as a homosexual.” Esman acknowledged, however, that the new approach made sense for the youth who had already been placed in light of their “established homosexual orientation.”

Some judges rejected placing LGBTQ youth with lesbian or gay foster parents in areas where sexual orientation matching was a possible option. One well-publicized case from Washington in 1975 illustrates how sexual deviance concepts shaped the rationales of judges at the time. The Washington case involved a sixteen-year-old gay male teenager named Pat who had bounced between several child welfare placements, and was eventually sent to juvenile detention for behavioral and “sexual problems” (specifically, engaging in same-sex sexual conduct). While in juvenile detention, Pat was forced to undergo psychotherapy

Los Angeles, and Minneapolis, started to work with child welfare officials to place gay youth in the homes of gay men).

190 Joffee & Mintz, supra note 152.
193 Joffee & Mintz, supra note 152.
194 To reiterate, this is the third major theme of deviance discussed supra Part I.C.
195 Id.
196 For instance, the story reported that the placed youth “had a well-established homosexual orientation” and were “experienced sexually.” Id.
197 Id.
198 Id.
200 Id. at 2846.
to change his sexual orientation.\textsuperscript{201} When it became clear that juvenile detention was not leading to successful outcomes, staff at the detention center began a search to place Pat in a gay foster home.\textsuperscript{202} Two gay men in a committed relationship agreed to serve as Pat’s foster parents.\textsuperscript{203}

Two juvenile parole officers, a social worker, a psychiatrist, and a psychologist all testified before the court in favor of the placement.\textsuperscript{204} Pat also preferred to live with the gay couple.\textsuperscript{205} Pat’s father, however, objected to the placement.\textsuperscript{206} He rooted his objections in the second major theme of deviance, arguing before the court that there would not be “much chance [Pat would] come out as ‘straight’” if he was placed with the gay couple.\textsuperscript{207}

In denying the placement, the judge accepted the father’s argument about the malleability of adolescent sexual development.\textsuperscript{208} The judge further stressed that the state’s child welfare laws and policies embraced “historical and traditional concepts of parent models and the family role.”\textsuperscript{209} Based on these ideas, the judge concluded that substituting the gay couple for the traditional family model did “violence not only to the literal definition of who are parents but offends the traditional concept of what a family is.”\textsuperscript{210}

The judge’s reasoning also showcased inconsistencies between sodomy decriminalization and the treatment of LGBTQ youth in the child welfare domain.\textsuperscript{211} Washington had repealed its sodomy law earlier that year.\textsuperscript{212} Nonetheless, the judge emphasized that it was not the state’s role to “encourage and foster deviant behavior in its wards.”\textsuperscript{213} Illustrating how sexual deviance concepts facilitated the subordination of LGBTQ youth in the child welfare domain, the judge concluded that Pat “should be encouraged to behave normally regardless of his sexual orientation.”\textsuperscript{214} The judge further denounced the use of state institutions “to foster or promote personal and highly questionable philosophies and life-styles that do not have general acceptance in the community.”\textsuperscript{215}

Thus, the first coordinated practices of sexual orientation matching in foster care challenged deviant conceptions of LGBTQ identity in order to provide

\footnotesize\textsuperscript{201} Id.
\footnotescript{202} Id.
\footnotescript{203} Id.
\footnotescript{204} Id.
\footnotescript{205} Id.
\footnotescript{206} Id.
\footnotescript{207} Id.
\footnotescript{208} Specifically, the judge concluded that Pat had “more than a casual interest in the ‘gay’ lifestyle,” but that his sexual orientation was “not fixed” at that point. Id.
\footnotescript{209} Id.
\footnotescript{210} Id.
\footnotescript{211} The judge stressed that “[l]egal acceptance or social tolerance does not equate with the state sanctioning such relationships in every facet of human existence,” especially when the welfare of children was involved. Id. at 2847.
\footnotescript{212} WASH. REV. CODE ANN. § 9A.92.010 (repealed 1976).
\footnotescript{213} In re Davis, 1 Fam. L. Rep. (BNA) at 2847.
\footnotescript{214} Id.
\footnotescript{215} Id.
unwanted LGBTQ youth safe and stable homes. As Section C discusses, however, a wave of legal restrictions on lesbian and gay foster and adoptive parenting soon emerged in response to this greater acceptance of LGBTQ identity in the child welfare domain.


Scholars describe the 1980s and 1990s as a significant period for litigation surrounding parental recognition for same-sex couples. During this period, LGBT advocates pursued new litigation strategies in order to persuade courts to recognize the parenting rights of lesbians and gay men. In what scholars refer to as the “lesbian baby boom,” same-sex couples started to have children through donor insemination and adoption, and many same-sex couples continued to raise children from prior opposite-sex relationships. By the late 1980s, there were approximately three million lesbian and gay parents in the United States, and between eight and ten million children being raised in households with lesbian or gay parents.

Alongside this litigation for parental recognition emerged another set of legal disputes involving lesbian and gay parenting rights that directly implicated LGBTQ youth in the child welfare system. By the 1980s, child welfare agencies in several states had made arrangements for LGBTQ youth whose families did not want them and had no viable placement options in the child welfare system to live in foster homes with lesbian and gay parents. These new foster arrangements paved the way for child welfare agencies to expand placements with lesbian and gay parents to include non-LGBTQ youth. As explained below, backlash against this expansion centered on sexual deviance concepts and engendered new state laws and policies that restricted lesbians and gays from parenting through foster care and adoption.

In 1985, the Massachusetts Department of Social Services (DSS) adopted a new policy that significantly limited the ability of lesbians and gay men to become foster

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216 Douglas NeJaime, Marriage Equality and the New Parenthood, 129 Harv. L. Rev. 1185, 1200 (2016); see also Chambers & Polikoff, supra note 162, at 536-42 (describing litigation during the 1980s and 1990s involving lesbian and gay parental rights).

217 NeJaime, supra note 216, at 1200. These litigation strategies gave rise to the new concept of second-parent adoption, which created a legal parent-child relationship for a non-biological parent in an intact same-sex relationship to adopt her partner’s biological child. Id; Ball, supra note 189, at 161.


219 NeJaime, supra note 216, at 1200; Ball, supra note 189, at 161.


221 Ball, supra note 189, at 145.

222 George, supra note 168, at 378.

223 Ball, supra note 189, at 148-50.
or adoptive parents.\textsuperscript{224} The impetus for the new restriction grew out of a public controversy surrounding two young brothers, ages two- and three-years-old, who had been placed and then removed from the care of a gay foster couple.\textsuperscript{225} DSS had granted the gay couple a foster license after eleven months of evaluation and six weeks in training.\textsuperscript{226} The brothers had been physically abused, and their birth mother approved the placement.\textsuperscript{227} Two weeks after the placement, a local newspaper printed a story that included criticisms from neighbors and community members.\textsuperscript{228} Soon after the story was published, DSS removed the brothers from the gay couple’s home and placed them with another foster family.\textsuperscript{229}

To understand the connections between sexual deviance concepts and the new DSS policy, it is important to first consider introduced legislation that preceded the DSS policy. Initially, the Massachusetts House of Representatives passed a bill by a 112 to 28 vote that prohibited placing any child in the care of another through adoption, guardianship, or foster care whose “sexual preference threatens the psychological or physical well-being of the child.”\textsuperscript{230} Notably, “homosexual preference” was the only sexual preference defined as such a threat in the bill.\textsuperscript{231} Critics argued that in characterizing lesbians and gays as threats to children, the law entrenched stereotypes of prospective lesbian and gay parents as child molesters into law,\textsuperscript{232} illustrating connections between the law and sexual deviance concepts.

Before the state senate voted on the bill, however, DSS modified its placement policy. The new policy created a hierarchy that prioritized placing youth who came into contact with DSS in “traditional family settings.”\textsuperscript{233} Although not a categorical ban, critics argued that the new policy would, in effect, prevent lesbians and gay men from parenting through foster care or adoption.\textsuperscript{234} Those concerns soon materialized. After the policy took effect, reports surfaced of DSS administrators and supervisors discouraging social workers from placing youth in foster homes

\textsuperscript{224} At the time, only Florida and North Dakota had such restrictions. \textit{Wendell Ricketts, Lesbian and Gay Men as Foster Parents} 42 (2008).
\textsuperscript{225} Kay Longcope, \textit{Gay Couple Express Anger, Grief and Hope; Media, Politics Blamed in Loss of Boys, Boston Globe}, May 16, 1985, at 1.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{231} Line Item Amendment No. 4800-001 to Administrative Budget, Massachusetts House of Representatives, H.R. 6000, 174th Leg., 1st Sess. (1985).
\textsuperscript{232} Clendinen, \textit{supra} note 230, at 24 (quoting Boston City Councilman David Scondras).
with lesbian or gay parents. DSS administrators also publicly admitted that the new policy was commonly understood to ban lesbian and gay foster parenting.

A less discussed aspect of the new policy was its effect on unwanted LGBTQ youth with no viable placement options in the child welfare system. LGBT advocates expressed this concern in their public criticisms of the policy, both with regard to LGBTQ youth who were already placed in “gay foster homes” as well as future LGBTQ youth who would benefit from those placements. When asked about these issues, then-governor Michael Dukakis publicly responded that the state would create new group homes to serve unwanted LGBTQ youth.

Although the state never built these group homes, the governor’s suggestion itself has meaningful ties to sexual deviance concepts. As discussed previously, group homes and other forms of congregate care were typically reserved for youth who had behavioral problems and could not be successfully placed into families through foster care or adoption. Perceptions of LGBTQ youth as sexual deviants contributed to them being driven out of their homes, rejected by foster families, and funneled into group homes and other forms of congregate care. The failures of institutionalization in addressing the needs of displaced LGBTQ adolescents was a key factor that influenced private organizations and public child welfare agencies to experiment with “gay foster homes.” To the extent that these group homes were to be built after the new DSS policy took effect, however, it was unclear how the state would address the previously acknowledged shortcomings of institutionalizing LGBTQ youth who needed help from the state.

In 1987, two years after the Massachusetts DSS issued its new policy, New Hampshire became the first state to pass a statute that banned lesbians and gay men from both foster and adoptive parenting. Similar to the situation in Massachusetts, the impetus for the ban related to a local news story that reported that the state’s child welfare agency had licensed a gay man as a foster parent. The new law created an irrebuttable presumption that lesbians and gay men were unfit to serve as foster parents, adoptive parents, or to receive licenses to operate day care centers. In this regard, the third major theme of deviance involving the

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235 George, supra note 168, at 386.
236 Id.
237 Black, supra note 233, at 24.
238 Id.
239 See supra Part II.A.
240 See sources supra note 154 and accompanying text.
241 See supra Part II.A.
243 George, supra note 168, at 398. Paul R. Lessard, Sexuality Issue Raised in Foster Child Care Case, Union Leader, June 19, 1985, at 1 (original article).
demonization of lesbian and gay adults as threats to children came to define the best interests of children under the law.245

Notably, the statutory ban applied to adolescents, including unwanted LGBTQ youth whose only viable placement option was with lesbian or gay foster parents. Representative Mildred Ingram, who was the driving force behind the law, stated publicly that a gay foster parent in New Hampshire had been found with a teenager in his care, and that she “wouldn’t allow that in the state . . . as long as [she had] breath.”246 After the ban took effect, it was unclear how LGBTQ youth—and in particular LGBTQ youth who could not be successfully placed into families through foster care or adoption—would receive help from the state.

Moreover, the New Hampshire ban offers additional insight into the ways in which sexual deviance concepts shaped the reasoning of courts that tackled sexual orientation issues in child welfare at the time. After passing its version of the ban, the state House of Representatives asked the Supreme Court of New Hampshire to issue an advisory opinion on the constitutionality of the ban.247 The New Hampshire high court upheld the ban on both equal protection and substantive due process grounds.248 As explained below, sexual deviance concepts informed the court’s reasoning on both claims.

With regard to its equal protection analysis, the state high court stressed that sexual orientation was not a suspect classification, and in applying rational basis review, concluded that providing appropriate role models for youth was a legitimate state interest.249 The high court emphasized that environmental influences—and in particular, dynamics within parent-child relationships—could promote homosexuality in youth.250 In this regard, the high court’s conclusion rested on the first and second major themes in sociological theories of sexual deviance that homosexuality was a product of one’s environment, and socialization patterns within the family in particular.

The high court’s substantive due process analysis rested on different sexual deviance concepts. In 1986, one year before the state legislature passed the statutory

246 Milne, supra note 234, at 13.
247 Opinion of the Justices, 530 A.2d at 21.
248 Id. at 26, 27.
249 Id. at 24-25.
250 Id. at 25.
251 See supra Parts I.A. and I.B.
ban on lesbian and gay foster and adoptive parenting, the U.S. Supreme Court decided *Bowers v. Hardwick*. Hardwick upheld the constitutionality of Georgia’s sodomy law insofar as it criminalized private consensual same-sex sex. The Court reasoned that there was no fundamental right to homosexual sodomy because there was no “connection between family, marriage, and procreation on one hand and homosexual activity on the other.” In so doing, the Court defined intimacy between same-sex partners as outside the scope of the “traditional family” concept. Applying rational basis review, the Court reasoned that public morality provided a sufficient basis for criminalizing sodomy, including private consensual same-sex sex.

Scholars have described how *Hardwick* paved the way for legislators and judges to reference the constitutionality of criminalizing private consensual same-sex sex to rationalize and justify discrimination against LGBTQ people in several civil law domains, including family law. The New Hampshire high court’s decision illustrates this very point. The court relied on *Hardwick* to uphold the foster and adoption parenting ban on substantive due process grounds.

As these states adopted laws and policies that rested on sexual deviance concepts and stigmatized LGBTQ people in the child welfare domain, a few states took the opposite path by enacting the first child welfare policies that afforded antidiscrimination protection on the basis of sexual orientation. In 1982, New York issued the first statewide agency policy that prohibited denying prospective parents for adoption solely on the basis of their sexual orientation.

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253 478 U.S at 196.

254 Id at 189-90, 191.

255 Id. at 196.


258 Id.


260 Uhl, *supra* note 233, at 583 n 33.
Although these early antidiscrimination policies focused on parenting, the challenges of unwanted LGBTQ youth in the child welfare system had a central role in animating and justifying these measures. Consider the early New York antidiscrimination policy mentioned above. The agency guidelines explicitly recognized that LGBTQ teenagers were among the youth waiting for adoption in the state, and further discussed the difficulties in placing those teenagers through adoption. The guidelines stressed that lesbian and gay parents offer these youth the best opportunity for a supportive home life and long term bonds, and referenced the recent success with gay foster homes in New Jersey to support this point. In this regard, protecting lesbian and gay parents from discrimination in foster care and adoption served a means to ensure that LGBTQ youth had better access to supportive homes in the child welfare system.

As legal battles over lesbian and gay parenting continued into the 1990s, grassroots organizations took the lead in systematically studying and documenting the challenges that LGBTQ youth faced in the child welfare system. In 1994, a joint task force consisting of New York City’s Child Welfare Administration and the Council of Family and Child Caring Agencies conducted the first-ever comprehensive survey of LGBTQ youth in a major child welfare system. The study found that 100 percent of the youth respondents had been verbally harassed, and seventy percent had been physically assaulted, for being LGBTQ inside the child welfare system. Moreover, seventy-eight percent were removed or ran away from foster placements after experiencing hostility or mistreatment for being LGBTQ. More than half (fifty-six percent) reported living on the street at some point because they felt safer living in homelessness than in out-of-home placements.

Although the study did not inspire immediate reforms, it helped to build an early body of empirical knowledge on the systemic challenges that LGBTQ youth faced in the child welfare system.

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261 N.Y. Dep’t of Soc. Servs., supra note 259, at 17 (noting that “placement resources likely to prove successful are very limited” for openly gay youth).
262 Id.
263 Id.
265 Id. at 16 (citing The New York Task Force Report).
266 Id.
RELIGIOUS EXEMPTIONS AND LGBTQ CHILD WELFARE

faced in the child welfare system. Further contributions to this body of research set the stage in the 2000s for national LGBT advocacy organizations to push for comprehensive LGBTQ child welfare reform, which Section D turns to discuss.

D. 2000s-Early 2010s: Beyond Sexual Orientation Matching

In the early 2000s, comprehensive child welfare reform emerged as a priority among national LGBT advocacy organizations. This Section focuses on two aspects of these new mobilization efforts. First, it discusses how calls for child welfare reform went beyond embracing sexual orientation matching to address the deeper structural and cultural challenges that LGBTQ youth faced in the child welfare system. Advocates specifically critiqued the ways in which LGBTQ youth were stigmatized and treated as sexual deviants. Second, this Section discusses how these new mobilization efforts facilitated a wave of LGBT-related antidiscrimination laws, regulations, and policies in child welfare. Many of these measures addressed discrimination beyond the same-sex parenting context to prohibit sexual orientation and gender identity discrimination against LGBTQ youth. Importantly, many religious exemption laws involving LGBTQ child welfare operate against the backdrop of these antidiscrimination measures (as Part III will discuss).

In 2001, Lambda Legal (the nation’s largest LGBT legal rights organization) coordinated with youth advocates to conduct a fourteen state survey of policies and practices surrounding LGBTQ youth in foster care. The study reported that none of the fourteen states had agency policies prohibiting discrimination on the basis of sexual orientation or required training for caseworkers, foster care staff, or foster parents on the sensitive and appropriate handling of LGBTQ youth in the child welfare system. In addition, only Los Angeles and New York City had group facilities specifically designed for LGBTQ youth.

The study report made several LGBTQ-youth-centered recommendations for reform that cut much deeper into the child welfare system than providing for sexual orientation matching in foster care. First and foremost, the report recommended that states adopt statewide antidiscrimination policies that prohibited sexual orientation discrimination in the child welfare system. It further recommended that states mandate and provide training for caseworkers, foster care staff, and

269 Future studies on LGBTQ youth in the child welfare system cited the findings of the joint task force in their efforts. See, e.g., Lambda Legal, supra note 268, at 10; Shannan Wilber, et al., CWLA Best Practice Guidelines 6 (2006), http://www.f2f.ca.gov/res/2798_BP_LGBTQ.pdf.
271 Lambda Legal, supra note 268, at 7.
272 Id.
273 Id.
274 Id. at 22.
foster parents to sensitively and adequately address the needs of LGBTQ foster youth. Moreover, it recommended that states offer programs and services that specifically address the needs of LGBTQ foster youth (for instance, LGBT-specific group homes, designating caseworkers or child welfare staff as LGBT liaisons, etc.).

That same year, a commission sponsored by the Lesbian and Gay Youth Project of the Urban Justice Center conducted the first comprehensive study of LGBTQ youth in the juvenile justice system. The study findings revealed connections between the problems that LGBTQ youth faced in the child welfare and the juvenile justice systems. Specifically, the study found that rejection from foster homes contributed to LGBTQ youth homelessness, and that survival crimes while homeless (such as, sex work and theft) fueled the entry of LGBTQ youth into the juvenile justice system.

This emerging body of empirical research—and in particular, the connections that it drew between the child welfare and the juvenile justice systems—informed both litigation and non-litigation reform strategies of attorneys and LGBT advocacy organizations. Critically, the focus on both systems in their reform strategies illustrated that advocates conceptualized the need for comprehensive LGBTQ-related child welfare reform as part of a broader need to address how public systems were failing and further stigmatizing LGBTQ youth as “deviants.”

With regard to litigation, attorneys in the early 2000s brought several lawsuits on behalf of LGBTQ youth in the child welfare and the juvenile justice systems. Attorneys who filed these lawsuits advanced constitutional and statutory claims, including the constitutional right to safety, equal protection, freedom of speech, and access to non-discrimination protections. Although cases were met with mixed success, these litigation strategies occurred during a significant historical moment surrounding the treatment of LGBTQ people under criminal law.

In 2003, the U.S. Supreme Court decided Lawrence v. Texas, which invalidated criminal laws against private consensual sex between adults, including adult same-sex partners. Both Justice Kennedy’s majority and Justice O’Connor’s concurring opinions emphasized that the stigma of sodomy laws extended beyond the criminal domain and encouraged discrimination against lesbians and gay men in the civil domain. The Court in Lawrence, however, stressed that its decision did not apply

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275 Id. at 24-25.
276 Id. at 26-27.
277 Urban Justice Center, supra note 264.
278 Id. at 17-20.
279 Estrada & Marksamer, supra note 270, at 421-38 (documenting litigation and non-litigation strategies in the 2000s).
280 Id. at 421-34 (documenting litigation strategies in the 2000s).
281 Id.
282 Lambda Legal, supra note 268, at 17 n.9.
284 Woods, supra note 33, at 706-07.
to cases involving minors. This limiting principle left open questions about how Lawrence applied to LGBTQ minors, including how the decision might apply to address the discrimination that sodomy prohibitions facilitated against LGBTQ youth in the civil child welfare domain.

Given the limitations of Lawrence and litigation strategies more generally to achieve systemic change for LGBTQ youth in the child welfare system, national advocates also pursued non-litigation strategies. Two nationally collaborative projects, both launched in 2002, laid the groundwork for these non-litigation approaches.

The first project, entitled “Fostering Transitions,” was a joint initiative of the Child Welfare League of America (the nation’s largest child welfare organization) and Lambda Legal. The initiative sought to improve outcomes for LGBTQ youth in the child welfare and the juvenile justice systems by spreading awareness about the challenges that they faced in those systems. The initiative had several components, including offering expertise and guidance to state and local officials, creating local task forces, supporting legislative reform, assembling a national advisory network of child welfare professionals, conducting workshops and presentations at national and regional conferences, and offering toolkits to assist social workers to support LBGTQ youth and families. Illustrating the relationship between the initiative’s work and pushback against sexual deviance concepts, the initiative stressed that condemning or pathologizing LGBTQ youth in the child welfare system for appropriately exploring or expressing their sexual orientations and gender identities sends the message to those youth that they are “deviant, immoral, or mentally ill.”

The second national collaboration, entitled the “Model Standards Project,” was a joint initiative of Legal Services for Children and the National Center for Lesbian Rights. Also created in 2002, the Model Standards Project sought to develop model agency policies and best practices to improve outcomes for LGBTQ youth in the child welfare and the juvenile justice systems. In underscoring the need for reform, the project stressed that many LGBTQ youth enter the child welfare system

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285 Lawrence, 539 U.S. at 560.
286 See Comment, Anna K. Christensen, Equality with Exceptions? Recovering Lawrence’s Central Holding, 102 CAL. L. REV. 1337, 1351 (2014) (noting that “courts have looked to Lawrence to justify regulation of sex involving minors”). Several courts have also stressed that Lawrence does not apply to minors. See, e.g., In re R.L.C., 643 S.E.2d 920, 925 (N.C. 2007); Macdonald v. Commonwealth, 645 S.Ed.2d 918, 924 (Va. 2007).
287 Estrada & Markamer, supra note 270, at 435.
288 Id. at 435.
289 Id., supra note 269, at x.
290 Id. at x-xi.
291 Id. at xii.
292 Id. at 30-31.
294 Id.
simply because they are perceived as “deviant or perverse.” With regard to child welfare reforms, the project placed primary emphasis on creating an inclusive organizational culture in which LGBTQ youth are accepted and treated equally.

To accomplish this goal, the project advanced several LGBTQ-youth-centered recommendations: (1) that child welfare agencies, departments, and institutions adopt written policies prohibiting harassment and discrimination on the basis of sexual orientation and gender identity; and (2) that staff, caregivers, and service providers be required to undergo cultural competency training on meeting the needs of LGBTQ youth in the child welfare system. The project also stressed the need to promote healthy adolescent development in LGBTQ youth. It recommended that: (1) agencies adopt policies and practices that supported and encouraged healthy, safe, and age-appropriate sexual and gender exploration and expression; (2) child welfare actors allow gender nonconforming youth to dress in accordance with their gender identity and to be addressed by their preferred names and pronouns; and (3) LGBTQ youth be actively involved in selecting their out-of-home placements, and that child welfare actors who shape placement decisions be aware of the needs of specific LGBTQ youth before making those decisions.

In 2003, one year after the Model Standards Project convened, California passed the first state law that prohibited discrimination against LGBTQ youth in the foster care system—The California Foster Care Nondiscrimination Act. The California law imposed sexual orientation and gender identity antidiscrimination mandates on a range of child welfare actors (for example, child welfare agencies, providers, staff, and foster parents) and required that information about those mandates be included in child welfare trainings. Model Standards Project staff worked with communities in California to implement an early draft of its proposed standards. These early reform efforts helped to create a blueprint to implement those strategies nationwide when the Model Standards Project released the final standards in 2006.

Both collaborative projects continued their efforts on a national scale during the mid-2000s and early 2010s. During this period, the landscape of state laws, regulations, and policies addressing LGBTQ child welfare changed dramatically.

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295 Id. at 1.
296 Id. at 2.
297 Id. at 3.
298 Id.
299 Id. at 3-4.
300 Id. at 3.
301 Id. at 4.
302 Id. at 5.
303 Foster Care Nondiscrimination Act of 2003, CAL. WELF. & INST. CODE § 16001.9(a)(22) (2003); Estrada & Marksamer, supra note 270, at 417 (noting that the California Foster Care Nondiscrimination Act was the “first of its kind in the country”).
304 CAL. WELF. & INST. CODE § 16001.9(a)(22).
305 Wilber, supra note 293, at 7.
306 Id.
Between 2003 and 2015, over twenty-five states passed or revised laws, regulations, or agency policies that prohibited discrimination on the basis of sexual orientation or gender identity against youth in the child welfare system. Many of these policies addressed the treatment of LGBTQ youth beyond sexual orientation matching to ensure that child welfare actors did not discriminate against, intimidate, or degrade LGBTQ youth. As Part III discusses, the recent proliferation of religious exemptions involving LGBTQ child welfare emerged in the context of these growing antidiscrimination measures.

III. THE TURN TO RELIGIOUS EXEMPTIONS IN LGBTQ CHILD WELFARE

So far, this Article has described a historical trend (and pushback against this trend) of child welfare interventions into family life that rest on sexual deviance concepts to control the sexual orientation and gender identity development and expression of LGBTQ youth. Recently, several states have enacted broad religious exemption laws that allow the religious or moral views of key actors in the child welfare system to guide the nature of the services they provide, even if their views denounce LGBTQ people. Because most of these laws emerged after Obergefell, one might narrowly interpret this proliferation as a direct response to marriage

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308 See statutes cited in supra 20.

equality. Advocates on both sides of the religious liberty and LGBTQ equality debate have advanced this view.\textsuperscript{310}

The analysis in this Part, however, offers an LGBTQ-child-centered analysis of the issue and explains why we should also understand the push for these exemptions as the latest point on the historical trajectory described above. From this perspective, recent religious exemptions involving LGBTQ child welfare are a vehicle for long-enduring anxieties about sexual “deviance” and youth who veer from traditional norms of sex, sexuality, and gender. Section A analyzes how broad religious exemptions viewed in the frame of social control and sexual deviance function to subordinate LGBTQ youth in the child welfare system. Section B explores the harms that these exemptions create for LGBTQ youth, and the implications for “crossover youth”\textsuperscript{311} within the juvenile and criminal justice systems in particular.

A. RELIGION, SOCIAL CONTROL, AND SEXUAL DEVIANCE

A useful starting point to illustrate the connections between religion, social control, and sexual deviance concepts is the long history of criminal sodomy laws.\textsuperscript{312} In medieval England, the Church and ecclesiastical courts enforced prohibitions against sodomy.\textsuperscript{313} The Church viewed homosexual acts as a sin punishable by torture or by death.\textsuperscript{314} The power of the Church declined during the English Reformation, after King Henry VIII transferred the powers of the ecclesiastical courts to the crown courts.\textsuperscript{315} In 1533, the Reformation Parliament temporarily enacted the 1533 Act of Henry VIII, which made the crime of “buggery” punishable by death.\textsuperscript{316} The 1533 Act later served as a model for sodomy prohibitions in the U.S. colonies during the seventeenth and eighteenth centuries.\textsuperscript{317}

\textsuperscript{310} As explained \textit{infra}, legislative sponsors of bills that included religious exemptions involving LGBTQ child welfare stressed this framing. Moreover, some advocates have challenged broad religious exemption laws involving LGBTQ child welfare as responses to marriage equality. \textit{See}, e.g., Dumont v. Lyon, No. 17-cv-13080, 2018 WL 4385667, (E.D. Mich. Sept. 14, 2018), at *23 (noting that Michigan’s broad religious exemption law allowing faith-based organizations to deny foster or adoptive services to prospective same-sex couples as well as individuals based on same-sex status “is animated by disapproval of, or opposition to, same-sex marriage”).


\textsuperscript{315} \textit{See generally} Ralph Houlbrooke, \textit{Church Courts and the People During the English Reformation}, 1520-1570 (1979) (providing a study of ecclesiastical courts during the English Reformation).

\textsuperscript{316} Jeffrey Weeks, \textit{Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present 12} (1977). As written, the 1533 Act applied to a much broader range of sexual conduct than same-sex sex. \textit{Id}.

\textsuperscript{317} Barbee \& Barbee, \textit{supra} note 313, at 36-40.
In its sodomy law jurisprudence, the U.S. Supreme Court has recognized the role of religion in shaping criminal laws against private consensual same-sex sex, and the effects of those criminal prohibitions on lesbians and gay men. Revisit Bowers v. Hardwick, the 1986 decision which upheld the constitutionality of Georgia’s criminal sodomy law. 318 In applying rational basis review, the Court concluded that morality was a sufficient justification for the sodomy ban. 319 On one hand, Justice White’s majority opinion framed the morality interest in majoritarian, not religious, terms—namely the presumed belief that a majority of Georgia voters viewed homosexuality as “immoral and unacceptable.” 320 On the other hand, appeals to religion appeared at several noteworthy points of the case.

For instance, in its brief before the Court, the state emphasized that traditional Judeo-Christian values proscribed same-sex sex. 321 The state’s position formed the basis of Chief Justice Burger’s concurrence, which stressed that the condemnation of same-sex sex “is firmly rooted in Judeo-Christian moral and ethical standards.” 322 Justice Blackmun’s dissent critiqued the state’s reliance on religion, stressing that the state’s argument that traditional Judeo-Christian values proscribe same-sex sex cannot provide an adequate justification for the law. 323 Justice Blackmun further stressed that the fact that some religious groups condemn a behavior does not give the state a license to “impose their judgments on the entire citizenry.” 324

When the Court revisited sodomy prohibitions seventeen years later in Lawrence v. Texas, the role of religion in justifying sodomy laws came to the fore again. 325 The Court in Lawrence overruled Hardwick and invalidated Texas’ law criminalizing consensual and private “homosexual conduct.” 326 Justice Kennedy’s majority opinion in Lawrence emphasized the stigmatizing effects of criminal sodomy laws against lesbians and gay men in both the public and the private realms. 327

With regard to religion, Justice Kennedy criticized Chief Justice Burger’s “sweeping references” to Judeo-Christian moral and ethical values in his Hardwick concurrence. 328 Justice Kennedy further stressed that the Chief Justice had ignored opposing authorities that did not condemn same-sex sex. 329 Justice Kennedy’s firm rejection of upholding the constitutionally of sodomy laws on religious grounds has even led some scholars and commentators to view Lawrence as an implied Establishment Clause case, and not purely a substantive due process case. 330

319 Id.
320 Id.
323 478 U.S. 186, 211 (J. Blackmun, dissenting).
324 Id.
326 Id. at 578-79.
327 Id. at 575.
328 Id. at 572.
329 Id.
From a social control perspective, criminal sodomy laws are a useful comparator to reveal connections between religion and sexual deviance concepts in the context of LGBTQ child welfare. Many scholars conceptualize the criminal law as a tool of social control that regulates individual behavior in society. From this perspective, the relationship between religion, sexual deviance concepts, and criminal sodomy laws is not exceptional. Rather, this relationship is consistent with a broader pattern of religion shaping institutions of social control in ways that define particular conduct or individuals who do not fit traditional norms of sex, sexuality, and gender as “deviant.”

Conceptualizing the child welfare system as an institution of social control allows us to see similarities between the controlling functions of criminal sodomy laws and child welfare laws that subordinate LGBTQ youth. Broad religious exemptions involving LGBTQ child welfare function as tools of social control by substituting and equating the religious or moral views of child welfare actors with the best interests of youth regarding “appropriate” sexual orientation and gender identity development. In so doing, these exemptions facilitate and sustain child welfare spaces that denounce LGBTQ youth and pressure them to conform to traditional norms of sex, sexuality, and gender. As discussed previously, Justice Kennedy’s majority opinion in Lawrence stressed how the stigmatizing effects of criminal sodomy laws encouraged discrimination against lesbians and gay men in both the public and private realms. In allowing religiously-motivated discrimination based on antiquated sexual deviance concepts to thrive in child welfare settings today, religious exemptions enable the exact type of discrimination that Lawrence rebuked.

To make these points more concrete, consider the debate over the California Foster Care Nondiscrimination Act. The California law took effect in 2004 and was the first state law to prohibit discrimination against LGBTQ youth in the foster care system on the basis of sexual orientation or gender identity. Opponents critiqued the law on religious liberty grounds. In this regard, the debate over the

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332 Movement Advancement Project, et al, supra note 8, at 5 (noting that under religious exemptions, “[a]gencies would no longer need to make placement decisions based on the best interest of the child”).
335 Estrada & Marksamer, supra note 270, at 417.
336 See infra notes 338-343 and accompanying text.
California law foreshadowed conflicts in the current moment between religious liberty and LGBTQ child welfare. One important difference, however, is that the law took effect years before marriage equality first came to California. With married same-sex couples not at the center of attention, the debate over the law provides a clear picture of how religious exemptions are connected to anxieties about LGBTQ identity and youth.

Two entities led the opposition to the California law. First, the Committee on Moral Concerns raised religious conscientious objections, which explicitly relied on sexual deviance concepts. The Committee characterized LGBTQ identity as “sexual orientation and gender identity difficulties,” and argued that the law required foster parents and group home staff to agree that those “difficulties are ‘rights’ never to be questioned.” It further stressed that the law would force foster parents and group home staff “to aid and abet dangerous, illegal homosexual and bisexual conduct with any foster youth who is sexually confused.” Finally, the Committee claimed that the law would “guarantee” that the futures of LGBTQ youth would be “abnormal, unhealthy, and probably short.” These statements illustrate how the Committee’s religious liberty arguments embodied anxieties about sexual deviance, and sought to control the sexual orientations and gender identities of youth.

Second, the Concerned Women for America—the nation’s largest conservative Christian women’s political action group—also raised religious objections. The organization specifically argued that the California law would force foster parents to support sexual behaviors and expressions among foster children that were contrary to those parents’ sincerely held religious beliefs. Although not explicitly framed in terms of deviance, the organization’s critique shows how religious exemptions implicate the composition of the public child welfare system in ways that affect LGBTQ youth’s access to supportive living environments.

Mississippi’s HB 1523 is a more recent example in the post-Obergefell era that offers insight into the connections between sexual deviance concepts, religious exemptions, and the social control of LGBTQ youth in the child welfare system. To fully grasp these insights, consider the terrain of child welfare in Mississippi. In 2013, the Mississippi Division of Family and Children’s Services adopted a


339 Id.

340 Id.

341 Id.


343 Hearing on A.B. 458, supra note 338, at 6.

344 HB 1523, 2016 Reg. Sess. § 3(2)–(4) (Miss. 2016).
statewide policy that grants youth the right to fair treatment in foster care on the basis of their sexual orientation or gender identity.\textsuperscript{345} At the same time, a recent study of state child welfare systems ranked Mississippi last in terms of overall child well-being.\textsuperscript{346}

With a shortage of foster families, the state of Mississippi has turned to private faith-based organizations to help recruit new foster parents.\textsuperscript{347} Importantly, the state’s largest collaborator has denounced same-sex relationships and stated publicly that its religious views reject placing children with same-sex parents.\textsuperscript{349} Thus, in spite of its LGBT-protective child welfare antidiscrimination policy, Mississippi is increasingly relying on private faith-based organizations that denounce LGBTQ people in order to provide child welfare services throughout the state.

Mississippi, however, is not alone. Increasingly, states are choosing to contract out public foster care and adoption services to private faith-based organizations.\textsuperscript{350} For instance, in a current federal case in Michigan, two same-sex couples who sought to adopt were turned away on religious grounds by a taxpayer-funded private faith-based child placing agency,\textsuperscript{351} in spite of the fact that the Michigan Department of Health and Human Services has a statewide nondiscrimination policy that prohibits discrimination on the basis of sexual orientation or gender

\textsuperscript{345} Mississippi Division of Family and Children’s Services, DFSC Policy Manual, Section 3, Appendix L § 6 & M, § 17, policy adopted 2013, http://www.sos.ms.gov/acproposed/00019917b.pdf


\textsuperscript{347} In 2016, the State of Mississippi coordinated with 200 Million Flowers, a Christian-affiliated private non-profit organization that promotes adoption, foster care, and social services, and other churches throughout the state to begin an initiative called Rescue 100. Through the initiative, the religious organization recruits prospective foster parents in local communities, and the state works with those parents to significantly expedite the process to become foster parents. See 200 Million Flowers, July 11, 2011, http://www.robertson.ms/mississippi-family-law/200-million-flowers; Wesley Muller, Want to be a foster parent? How to get trained quickly on Coast, SunHerald, April 14, 2017, http://www.sunherald.com/news/local/article144718274.html.

\textsuperscript{349} The founder of 200 Million Flowers, Craig Robinson, has publicly stated, “We are a Christian organization, and I think that the Bible is very clear as it talks about the morality associated with same-sex relationships.” Hadas Brown, Same-sex couples fight Mississippi adoption ban, 16 WAPT News, Aug. 13, 2015, http://www.wapt.com/article/same-sex-couples-fight-mississippi-adoption-ban/2094903.


\textsuperscript{351} Dumont v. Lyon, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018), at *1. The plaintiffs specifically challenge Michigan’s practice of permitting state-contracted and taxpayer-funded child placing agencies to use religious criteria that exclude same-sex couples as well as individuals based on same-sex status. Id.
identity.\textsuperscript{352} The litigation revealed that Catholic agencies handle approximately 20 percent of foster care and adoption cases in Michigan.\textsuperscript{353}

At the same time, LGBTQ adults are a major subgroup of prospective foster and adoptive parents.\textsuperscript{354} According to recent data, 114,000 same-sex couples are currently raising children in the United States, and many of those couples became parents through adoption or foster care.\textsuperscript{355} In addition, same-sex couples are significantly more likely than different-sex couples to be raising children through adoption or foster care.\textsuperscript{356} When recruited and welcomed, LGBTQ adults can comprise a sizable segment of a state’s available pool of prospective foster or adoptive parents. For instance, in Massachusetts between 15 and 28 percent of adoptions of foster children in the past 10 years have involved same-sex parents.\textsuperscript{357}

Broad religious exemption laws like Mississippi’s HB 1523 intervene against this backdrop. Now in effect, HB 1523 grants protection to three religious views involving marriage, sex, and gender: (1) that marriage “is or should be recognized as the union of one man and one woman;” (2) that “[s]exual relations are properly reserved to such marriage;” and (3) that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at the time of birth.”\textsuperscript{358} In challenging the constitutionality of HB 1523, advocates argued that elevating these beliefs for special protection under state law demeaned and targeted LGBTQ people.\textsuperscript{359} In a recent decision, the Fifth Circuit held that the LGBTQ plaintiffs did not have standing to challenge HB 1523.\textsuperscript{360} The district court below and one appellate court judge, however, concluded that the law

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\item \textsuperscript{352} Mich. Dept. of Health & Hum. Servs., Nondiscrimination Statement, https://www.michigan.gov/mdhhs/0,5885,7-339-73970_7701_76675-77286--,00.html. The state legislature had also recently enacted a broad religious exemption law that prohibits the state from taking action against any child placing agency that declines to provide services if doing so would conflict with its religious beliefs. Mich. Dept. of Health & Hum. Servs., Nondiscrimination Statement, https://www.michigan.gov/mdhhs/0,5885,7-339-73970_7701_76675-77286--,00.html.
\item \textsuperscript{354} See Bewkes, et al., supra note 26, at 2 (stressing that “LGBTQ people represent an important subgroup of potential parents”); see also Cynthia Godsoe, Adopting the Gay Family, 90 Tul. L. Rev. 311, 315 (2015) (discussing the “neglected trajectory of LGB foster and adoptive parenting”).
\item \textsuperscript{356} Id. at 1 (reporting that just over 1 in 5 same-sex couples (21.4%) are raising adopted children compared to just 3% of different-sex couples, and 29% of same-sex couples are fostering children compared to 0.4% of different-sex couples).
\item \textsuperscript{358} HB 1523, 2016 Reg. Sess. at § (3)(a)-(c).
\item \textsuperscript{359} See, e.g., Brief of Scholars Who Study the LGBT Population as Amici Curiae in Support of Appellees, at *2-3, Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017), Nos. 16-60477, 16-60478, 2016 WL 7438561.
\item \textsuperscript{360} Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017).
created stigmatic harm on the LGBTQ plaintiffs by making them feel marginalized and excluded in their own communities.361

Other provisions in HB 1523 include religious exemptions that specifically apply to child welfare. To begin, the exemptions forbid the state from taking any discriminatory action against a religious organization that provides or refuses to offer services in foster care or adoption in a matter consistent with the three religious views mentioned above.362 As a result, religiously affiliated child welfare providers could refuse to work with LGBTQ youth, including those who have been kicked out of their families for being LGBTQ.363 Some providers may outright reject LGBTQ youth from receiving support, leaving those youth with little choice but to live on their own in homelessness.364 Other providers might force LGBTQ youth to stay closeted in order to receive support, and place them with parents who hold hostile attitudes toward LGBTQ people.365

The broad exemptions in HB 1523 further prohibit the state from taking adverse action against foster or adoptive parents who “guide, instruct, or raise” a child consistent with any of the three views.366 This exemption justifies keeping LGBTQ youth in foster homes that denounce their sexual orientations or gender identities. Finally, the exemptions prohibit the state from taking adverse action against any person who declines to participate in the provision of medical treatments, counseling, and surgery related to the gender affirmation process.367 This increases possibilities to deny transgender and gender non-conforming youth in the child welfare system necessary transition-related medical services.

HB 1523 further enables faith-based organizations to reject LGBTQ adults from parenting through foster care and adoption.368 These exclusions embrace the idea that LGBTQ adults are unfit parents—a view that is rooted in the third major theme of deviance369 that demonizes LGBTQ adults as threats to children.370 Of course, these restrictions have important consequences for the parenting rights of

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361 Barber v. Bryant, 872 F.3d 671 (2017) (mem) (J. Dennis, dissenting from denial to rehear the case en banc); Barber v. Bryant, 860 193 F.Supp.3d 677, 700 (S.D. Miss. 2016). In the pending federal district court case from Michigan, the court recognized these harms in order to conclude that prospective same-sex adoptive parents who were turned away by faith-based child placement agencies had standing to bring forth their constitutional claims. Dumont v. Lyon, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018), at *6-11.

362 Id.

363 Movement Advancement Project, et al, supra note 8, at 6 (stressing that under religious exemptions, child welfare agencies could refuse to assist a family with a transgender child).

364 See infra Part III.B.

365 Movement Advancement Project, et al., supra note 8, at 5-6.

366 HB 1523, 2016 Reg. Sess. at § 3(3).


368 HB 1523, 2016 Reg. Sess. at § 3(2).

369 See supra Part I.C.

370 See supra Part I.C (discussing sexual predator stereotypes).
LGBTQ adults.\textsuperscript{371} However, they also limit the ability of LGBTQ youth who need help from the state to access living environments that are supportive of their sexual orientations and gender identities.\textsuperscript{372} Therefore, sexual deviance concepts are a double-edged sword in the context of religious exemptions involving LGBTQ child welfare: they work to exclude LGBTQ adults from parenting through foster care and adoption, which in turn, increases opportunities to subordinate LGBTQ youth in the child welfare system and control their sexual orientation and gender identity development and expression.

In more extreme cases, broad religious exemptions like those in HB 1523 permit foster parents to pressure LGBTQ youth to undergo damaging conversion therapies that try to change a person’s sexual orientation or gender identity.\textsuperscript{373} Pressuring LGBTQ youth to undergo these psychiatric interventions relates to the major theme of sexual deviance involving the assumed malleability of sexual orientation and gender identity development during adolescence and childhood.\textsuperscript{374} When criminal sodomy and sexual psychopath laws were in force decades ago, the criminal law was the main social control that enabled public and private actors to subject youth to these harmful medical interventions.\textsuperscript{375} Child welfare law replaces this social control function of the criminal law when religious exemptions permit child welfare actors to subject LGBTQ youth to the same harmful interventions.

\section*{B. Religious Exemptions and the Entrenchment of LGBTQ-Based Child Welfare Inequality}

As this Section explains, the harms of allowing antiquated theories of sexual deviance to thrive through broad religious exemptions in the child welfare system are especially salient given that LGBTQ youth are already marginalized in the child welfare system. These youth face common challenges—many of which are rooted in discrimination against their sexual orientations and gender identities. For these reasons, it necessary to understand the harms of broad religious exemptions involving LGBTQ child welfare in terms of how they intervene against the backdrop of a public welfare system that is already an uneven playing field for LGBTQ youth.

Currently, over 400,000 youth under the age of eighteen live in foster homes, and many more come into contact with the child welfare system each year.\textsuperscript{376} It is

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\textsuperscript{371} LGBT advocates stressed this point in legal challenges to HB 1523. Brief of GLBTQ Advocates & Defenders (GLAD) and National Center for Lesbian Rights as Amici Curiae in Support of Petitioners, Barber v. Bryant, No. 17-547, 2017 WL 5433195 (5th Cir. Nov. 13, 2017), at *11 (noting that “HB 1523 thus severely inhibits LGBT persons and couples’ abilities to start families).

\textsuperscript{372} See supra Part III.B.

\textsuperscript{373} Movement Advancement Project, supra note 8, at 2.

\textsuperscript{374} See supra Part I.B. As noted previously, scholars have described how conversion therapy practices have deep religious roots. George, supra note 14, at 801-21.

\textsuperscript{375} See supra Part III.A.

impossible to determine exactly how many of these youth identify as LGBTQ because child welfare providers are not legally required to track demographic information related to sexual orientation or gender identity. The limited available statistics, however, suggest that LGBTQ youth, and especially LGBTQ youth of color, are overrepresented in the child welfare system. These trends are troubling given that LGBTQ individuals are now “coming out” (or disclosing their sexual orientations or gender identities to others) in greater numbers and at earlier ages than in prior decades. Critically, many LGBTQ youth come out during childhood and adolescence, which are life periods when they may enter the child welfare system.

Two recent studies offer a better snapshot of the problem. The first study, based on a nationally representative sample from the National Survey of Child Adolescent Well-Being–II, estimated that about 22.8 percent of youth who live in out-of-home child welfare placements nationwide identify as lesbian, gay, bisexual, or questioning. Approximately fifty-seven percent of those sexual minority youth also identify as youth or children of color.

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378 Martin, et al., supra note 26, at 8; Wilson, et al., supra note 26, at 6.

379 Gary Gates, Marriage and Family: LGBT Individuals and Same-Sex Couples, 25 THE FUTURE OF CHILDREN 67, 67 (2015) (noting that “[r]educed social stigma means that more people are coming out earlier in life”); Christian Grov, et al., Birth Cohort Differences in Sexual Identity Development Milestones Among HIV-Negative Gay and Bisexual Men in the United States, 55 J. SEX RESEARCH 984, 984 (2018) (reporting findings of a study reporting that the average age in which gay and bisexual men reported first feeling attracted to someone of the same sex was between 11 and 12 years old); Gary W. Harper, et al., The Internet’s Multiple Roles in Facilitating the Sexual Orientation Identity Development of Gay and Bisexual Male Adults, 10 AM. J. MEN’S HEALTH 359, 360-61 (2016) (discussing sexual orientation identity development among adolescents); Kristina R. Olson & Selin Gulgoz, Early Findings from the TransYouth Project: Gender Development in Transgender Children, 12 CHILD. DEV. PERSPECTIVES 93 (2018).

380 See sources cited in supra note 379. Many LGBTQ youth already identify as LGBTQ before entering foster care whereas others begin to identify as LGBTQ after being placed in out-of-home care. Wilber, et al., supra note 269, at 37.

382 Martin, et al., supra note 26, at 9. The study did not include transgender or gender nonconforming youth.

383 Id.
The second study, the Los Angeles Foster Youth Study, focused on all LGBTQ youth between twelve- and twenty-one-years-old in the Los Angeles County foster care system.\(^{384}\) Notably, the L.A. County child welfare system is one of the largest in the country.\(^{385}\) The study found that nineteen percent of foster youth in L.A. County identified as LGBTQ—almost double the estimated percentage of LGBTQ youth in L.A. County.\(^{386}\) Approximately eighty-six percent of the LGBTQ youth in the study also identified as Latino, Black, or Asian Pacific Islander.\(^{387}\)

Many LGBTQ youth enter the child welfare system for the same reasons that non-LGBTQ youth do.\(^{388}\) Examples include parental divorce, parental drug or alcohol dependency, poverty, family dissolution, or maltreatment and abuse.\(^{389}\) LGBTQ youth, however, are more vulnerable to entering the child welfare system after facing family rejection or being kicked out of their homes for being LGBTQ.\(^{390}\) In light of these risks, the need for safe and supportive environments for LGBTQ youth is especially great.

Nonetheless, LGBTQ youth experience several challenges inside the child welfare system that contribute to their further victimization and lack of stability within the system. At the highest level, child welfare administrators and frontline caseworkers often lack training and cultural competency to handle the challenges that LGBTQ youth face before and after entering the system.\(^{391}\) Currently, there is a dearth of child welfare laws or policies that require such training.\(^{392}\) Lack of cultural competency, as well as implicit and explicit biases of administrators and frontline caseworkers, can negatively affect placements and contribute to LGBTQ youth being housed in living environments where they face discrimination or mistreatment on the basis of their sexual orientations or gender identities.\(^{393}\)

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\(^{384}\) Wilson, et al., *supra* note 26, at 21.


\(^{386}\) Wilson, et al., *supra* note 26, at 6.


\(^{389}\) Id.


\(^{391}\) Gallegos, et al., *supra* note 27, at 228.

\(^{392}\) Currently, only nine states require LGBT-inclusive competency training for child welfare staff or foster parents. Movement Advancement Project, “Foster and Adoption Laws,” (last visited Dec. 31, 2017), http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

\(^{393}\) Gallegos, et al., *supra* note 27, at 228; Wilson, et al., *supra* note 26, at 11.
Moreover, in spite of being overrepresented in the child welfare system, LGBTQ youth are harder to place in foster homes and adoptive families compared to non-LGBTQ youth. This is especially the case for LGBTQ adolescents given that it is overall easier to place children and infants through foster care or adoption. Many LGBTQ youth never find suitable foster or adoptive homes before they emancipate (or “age out”) from the child welfare system upon reaching adulthood. In addition, many prospective parents decide not to foster or adopt LGBTQ youth or children because of their own anti-LGBT biases or because they feel unequipped to do so. For these reasons, LGBTQ youth are more likely to bounce between multiple foster homes and are often considered “unadoptable.” They are also more likely, simply on the basis of their sexual orientations or gender identities, to be funneled into group homes and other restrictive forms of congregate care that are primarily intended to house youth with behavioral problems.

In both foster care and group homes, LGBTQ youth are at much greater risk for maltreatment and abuse (sexual, physical, and verbal) compared to non-LGBTQ youth. Child welfare actors are also more likely to discipline LGBTQ youth for age-appropriate sexual conduct or gender nonconforming expressions that would likely go unpunished if they had involved non-LGBTQ youth. These forms of rejection can have serious consequences for LGBTQ youth in the child welfare system. For instance, LGBTQ youth who face family rejection (whether in their biological families or in child welfare placements) are at greater risk for drug and alcohol dependency, high-risk sexual behaviors, depression, and suicide.

These various challenges contribute to LGBTQ youth leaving or being kicked out of child welfare placements with no place to live. Recent studies have found that as high as twenty to forty percent of the homeless youth population in the United States identifies as LGBTQ. Although the exact percentage of homeless youth who identify as LGBTQ remains uncertain, these studies suggest that LGBTQ youth are disproportionately represented in the homeless population. Studies have shown that LGBTQ youth are more likely to face discrimination and harassment in shelters and transitional housing programs, which can lead to a higher risk of violence and abuse.

Moreover, LGBTQ youth are less likely to receive the support and resources they need to successfully transition out of the child welfare system. They may face barriers such as discrimination by child welfare agency workers, limited access to affordable housing, and difficulty finding employment. These factors can make it even more challenging for LGBTQ youth to find stable and supportive living arrangements.

Furthermore, LGBTQ youth may experience additional stressors due to their sexual identity or orientation. For example, they may face discrimination or stigma from family members or community members who do not understand or accept their sexual orientation or gender identity.

In conclusion, LGBTQ youth face significant challenges in the child welfare system. They are disproportionately represented in the system, face discrimination and bias, and are more likely to experience maltreatment and abuse. These challenges can have serious long-term impacts on their health and well-being. It is imperative that child welfare systems and other organizations work to address these issues and provide support for LGBTQ youth in need.
LGBTQ youth who had previous contact with the child welfare system is unknown, some studies estimate that it may be as high as sixty percent in certain regions.405 While homeless, LGBTQ youth face increased risk for further physical, sexual, and verbal victimization.406

With no stable means of income or housing, many homeless LGBTQ youth engage in sex work and other forms of criminality to survive.407 As a result, homelessness places LGBTQ youth at risk for being funneled into the juvenile and criminal justice systems,408 where LGBTQ youth (and especially LGBTQ youth of color) are also overrepresented.409 Illustrating the relationship between challenges in the child welfare system and involvement in the juvenile justice system, LGBTQ youth are overrepresented among “dually-involved” or “crossover youth,” meaning youth in the juvenile justice system who have had prior involvement with the child welfare system.410 Importantly, many dually-involved or crossover LGBTQ youth have experienced homelessness after being rejected from their biological families or the child welfare system.411 Difficulties upon release from juvenile or criminal
detention put LGBTQ youth at risk for homelessness again, upon which they may cycle back into the juvenile or criminal justice system.\textsuperscript{412}

In short, the child welfare system is fraught with LGBTQ inequality. Many LGBTQ youth in the child welfare domain have to negotiate their LGBTQ identities as well as other aspects of their identities upon which they may face further marginalization because of race, ethnicity, and gender inequalities.\textsuperscript{413} Broad religious exemption laws involving LGBTQ child welfare intervene against the backdrop of this uneven playing field, and further exacerbate the problems for LGBTQ youth in the child welfare system.

IV. \hspace{1em} EQUALITY CONSIDERATIONS

The previous Parts have demonstrated why we should understand the recent push for broad religious exemptions involving LGBTQ child welfare as the latest point on a historical trajectory of child welfare interventions that rest on sexual deviance concepts to control and subordinate LGBTQ youth. This Part discusses the broader implications of this Article’s theoretical and historical analysis for LGBTQ equality. First, it explains why we should consider the experiences of LGBTQ youth in the child welfare system as an essential part of the debate over religious liberty and LGBTQ equality. Second, it describes why it is necessary to include remedying LGBTQ-based inequality in the child welfare system as part of a broader vision for a fully inclusive LGBTQ antidiscrimination regime.

The debate over religious liberty and LGBTQ equality has largely centered on LGBTQ adults, and in particular, same-sex couples who are married or wish to get married.\textsuperscript{414} Proponents of broad religious exemptions that include many of the objections in the LGBT context argue that baking a cake or taking photos for a same-sex wedding “facilitates” same-sex marriage in violation of the sincerely held religious beliefs of organizations and individuals.\textsuperscript{415} They argue that marriage is an

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\textsuperscript{412} See, e.g., Heather Berberet, \textit{Putting the Pieces Together for Queer Youth: A Model of Integrated Assessment of Need and Program Planning}, 85 \textit{CHILD WELFARE} 361, 373 (2006) (reporting the findings of one study that found that 45 percent of LGBTQ homeless youth reported involvement with the juvenile justice system); Center for American Progress, \textit{Urgent: How The Broken Juvenile and Criminal Justice Systems Fail LGBTQ Youth} 23 (2016), http://www.lgbtmap.org/file/lgbt-criminal-justice-youth.pdf (noting that “without appropriate support, many LGBTQ young people released from the system face substantial barriers to successful re-entry”).


\textsuperscript{414} See NeJaime, supra note 15, at 1180-95 (describing that the current debate over religious liberty and LGBT equality largely centers on marriage for same-sex couples); Sepper, supra note 15, at 711-12 (describing the positions of proponents who advocate for broad religious exemptions that include the objections to marriage equality).

\textsuperscript{415} See Douglas Laycock, \textit{Afterword}, in \textit{SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY} 195 (Douglas Laycock, et al., eds. 2008); see also NeJaime & Siegel, \textit{Conscience Wars}, supra note 49, at 2565 n.200 (discussing “marriage conscience protection”); Oleske, supra note 15, at 102; Sepper, supra note 15, at 711-12 (describing the positions of proponents who advocate for broad religious exemptions that include the objections to
exceptional act, and in so doing, frame religious liberty claims as responding to conduct (namely, same-sex marriage) rather than targeting LGBTQ status in violation of antidiscrimination principles.\textsuperscript{416}

Conversely, scholars arguing for limits on religious accommodation that would have the effect of blocking many of the exemption claims in the LGBT context argue that these claims do not involve issues that are exceptional to same-sex marriage.\textsuperscript{417} In rejecting the conduct and status distinctions underlying religious liberty claims, these scholars stress that broad religious exemptions undermine LGBTQ antidiscrimination protections and permit discrimination against LGBTQ individuals and same-sex couples in a variety of domains (for instance, employment, housing, public accommodations, education, and businesses serving the public).\textsuperscript{418}

Based on these ideas, scholars who argue for limits on religious accommodation contend that these exemptions should be addressed under the legal framework of antidiscrimination law, and not through the narrow lens of marriage law.\textsuperscript{419}

The theoretical and historical analysis of this Article bolsters these scholarly critiques. By narrowly focusing on same-sex marriage, proponents of broad religious exemptions have largely overshadowed LGBTQ youth in the child welfare system—even when those exemptions would directly affect this highly vulnerable population. The debates surrounding HB 1523 in the Mississippi legislature illustrate this very point. When presenting HB 1523 in both the state Senate and House of Representatives, legislative sponsors of the bill stressed that the legislation responded to the legalization of same-sex marriage after Obergefell.\textsuperscript{420} LGBTQ youth in the child welfare system were never mentioned during the hours of legislative debate,\textsuperscript{421} even though HB 1523 includes several religious exemptions that potentially shape their everyday living environment.\textsuperscript{422} The few references to child

\textsuperscript{416} See \textit{SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY}, supra note 15 (discussing the unique relationship between same-sex marriage and threats to religious liberty); see also NeJaime, \textit{supra} note 15, at 1185-88 (discussing “marriage conscience protection” proposals); Sepper, \textit{supra} note 15, at 714 (noting that proponents who advocate for broad religious exemptions that include many of the objections in the LGBT context “adopt the position that marriage is an exceptional act”).

\textsuperscript{417} See, e.g., NeJaime, \textit{supra} note 15, at 1178 (arguing that “the current debate misidentifies same-sex marriage as central to the conflict between sexual orientation nondiscrimination and religious freedom”).


\textsuperscript{421} Videos of the legislative debates on HB 1523 in the Mississippi Senate and House of Representatives are available at http://law.mc.edu/legislature/bill_details.php?id=4621&session=2016.

\textsuperscript{422} HB 1523, 2016 Reg. Sess. § 3(2)-(4) (Miss. 2016).
welfare issues centered on marriage—namely, protecting the ability of religiously affiliated organizations to refuse to place children with married same-sex couples through foster care or adoption.  

Scholars who argue for limits on religious accommodation have engaged with fundamental questions about how we should conceptualize LGBTQ identity in the debate over religious liberty and LGBTQ equality, including the constitutive role of conduct in shaping LGBTQ identity (for instance, getting married). In one leading view, Douglas NeJaime argues that religious exemptions target the enactment of sexual orientation through same-sex relationships, and thus have the potential to undermine sexual orientation antidiscrimination protections both inside and outside of marriage contexts. Underlying NeJaime’s argument is a theoretical conception of sexual orientation as a public and conduct-based relational identity. NeJaime argues that lesbians and gay men enact their sexual orientation through same-sex relationships, and thus marriage equality is only one way in which lesbians and gay men achieve relationship-based sexual orientation equality.

This theoretical conception of sexual orientation identity can be extended even further to illuminate the importance of considering child welfare issues concerning LGBTQ youth in the debate over religious liberty and LGBTQ equality. Specifically, this conception assists in mapping how religious exemptions permit discrimination against LGBTQ youth in the child welfare system in ways that match and differ from discrimination against adults in same-sex relationships. As discussed below, this mapping provides additional support for calls in legal scholarship to address religious exemptions under antidiscrimination legal frameworks, and underscores a need to devote greater attention to the specific experiences of LGBTQ youth in fleshing out the meaning of LGBTQ antidiscrimination principles.

In some situations, religious exemptions involving LGBTQ child welfare protect instances of religiously motivated discrimination against age-appropriate, relationship-based conduct through which LGBTQ youth enact their sexual orientations. To illustrate this point, consider Annette Thomas’ story. When Annette was seventeen years old and in high school, she was dating another teenage girl. One day, Annette’s foster mother overheard a phone conversation between her and her best friend about a girl that Annette was dating. After the call ended, Annette’s foster mother pulled out the Bible, told her that she was going to Hell if she continued down that path, and demanded that she cut off all ties with her girlfriend as well as her best friend (who also identified as a lesbian). Isolated from

423 See legislative debates, supra note 421.
424 NeJaime, supra note 15, at 1177.
425 Id. at 1196-97.
426 Id. at 1178.
427 Id. at 1196.
her friends, Annette became severely depressed and attempted suicide, after which she was committed to a psychiatric hospital. Her foster parents then sent her to a Christian counselor who specialized in conversion therapy. When Annette refused to reject her lesbian identity, her foster parents kicked her out of the house. She was then sent to live in a group home where she was the only gay youth and faced harassment.

Although not a focus in the debate over religious liberty and LGBTQ equality, these forms of relationship-based discrimination have special meaning for LGBTQ identity construction. Adolescence is a sensitive period of sexual identity formation. Many youth begin to explore their sexual identities during adolescence, and often do so through dating. With the stigma that still attaches to homosexuality in certain segments of society, non-heterosexual youth may fear judgment, seclusion, or victimization when they enact their sexual identities through dating. This is especially the case for many non-heterosexual youth in the child welfare system who have already experienced rejection based on their sexual orientations from biological or foster family members, child welfare administrators or frontline caseworkers, or group home staff.

In other situations, religious exemptions protect instances of religiously motivated discrimination against non-relationship-based conduct or expression through which LGBTQ youth enact their sexual orientations or gender identities. For instance, foster parents or group home staff may invoke their religious views in order to pressure LGBTQ youth to express themselves through dress, jewelry, or hairstyles that adhere to traditional gender norms. Transgender and gender non-conforming youth in particular may be forced to dress and present their genders in ways that are inconsistent with their gender identities. These forms of gender identity subordination can severely damage a transgender or gender non-conforming youth’s sense of self, and result in several negative outcomes including depression and suicide.

Moreover, foster parents or group home staff may invoke their religious views to forbid LGBTQ youth from participating or belonging to community-based or school-based organizations geared to support LGBTQ youth (for instance, an LGBTQ youth group or a gay-straight alliance). Especially for LGBTQ youth in the child welfare system who have suffered rejection on the basis of their sexual orientations or gender identities, and continue to face discrimination and rejection

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429 See Shelley L. Craig & Ashley Austin, Childhood and Adolescence, in TRAUMA, RESILIENCE, AND HEALTH PROMOTION IN LGBT PATIENTS 47, 57 (Kristen L. Eckstrand & Jennifer Potter eds. 2017).
430 DeHaan, supra note 429, at 422.
431 Id.
432 See supra Part I.
434 Id.
at school, these organizations can offer additional networks of support, role models, resources, and safe spaces. Studies show that involvement in LGBTQ youth organizations is correlated with many immediate and long-term positive outcomes for LGBTQ youth, including greater self-esteem and comfort with expressing their sexual orientations or gender identities.

Beyond undermining LGBTQ equality inside the child welfare system, these forms of religiously motivated discrimination also have consequences outside of the child welfare domain that threaten LGBTQ equality in society at large. Homelessness is one category of potential spillover effects. Many LGBTQ youth experience homelessness after running away or being kicked out of child welfare placements that reject or mistreat them on the basis of their sexual orientations or gender identities. In protecting religiously motivated discrimination against LGBTQ youth, broad religious exemptions encourage child welfare environments that are hostile toward them and diminish the availability of placements that are supportive of their sexual orientations and gender identities.

With regard to LGBTQ identity construction, homelessness can negatively shape the subjectivities of LGBTQ youth. Studies show that many homeless youth internalize the idea that they are to blame for their difficult living situations, which in turn, damages their self-esteem and sense of self-worth. If broad religious exemptions protect instances of religiously motivated anti-LGBTQ discrimination in the child welfare system that contribute to the homelessness of LGBTQ youth, then those youth may internalize the stigmatizing idea that their LGBTQ identities are to blame for their homelessness.

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440 Bewkes, et al., supra note 26, at 7-8; cf. Polikoff, Resisting “Don’t Ask, Don’t Tell” in the Licensing of Lesbian and Gay Foster Parents, supra note 168, at 1184, (noting that “[t]he most obvious connection between lesbian and gay youth and foster parents is the importance of the availability of gay and lesbian foster parents to provide homes for gay teenagers who need acceptance and support for their journey into adulthood”).


442 Nicholas Newton, Gay Youths at Risk: Homelessness, Hustling, and Gay Youth Shelters, 75, 81 in LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS AT RISK: PROBLEMS AND SOLUTIONS (Chuck Stewart ed.,
Homelessness can also result in problems that inhibit LGBTQ youth from achieving positive outcomes later in life. These problems include financial instability, food insecurity, unemployment, lack of education, and poor health. While homeless, LGBTQ youth are at greater risk for experiencing further sexual, physical, and verbal victimization. Participation in survival crimes (for instance, theft or sex work) also increases possibilities for homeless LGBTQ youth to be funneled into the juvenile or criminal justice systems and experience further marginalization on the basis of their sexual orientations or gender identities. This is especially the case for LGBTQ youth of color, who face the additional burden of being marginalized on the basis of their races and ethnicities in these systems. Difficulties upon release from juvenile or criminal detention put LGBTQ youth at risk for homelessness again, upon which they may cycle back into the juvenile or criminal justice system.

Another category of potential spillover effects involves emancipation (or “aging out”) from the child welfare system. Given that it is impossible for many LGBTQ youth to reunite with their biological families, numerous LGBTQ youth remain in foster care until they reach adulthood. A robust body of research documents the difficulties of youth in achieving self-sufficiency after aging out of the child welfare system (for instance, LGBTQ youth struggle with unemployment, poor health outcomes, and homelessness). Critically, difficulties in the child welfare system (such as, placement instability) are precursors to difficulties in achieving livelihood and independence after aging out of the system. Therefore, challenges surrounding sexual orientation in the child welfare system are connected to the stability and well-being of LGBTQ youth after they age out of the system.

To date, there is a dearth of research on the specific obstacles of LGBTQ youth who emancipate from the child welfare system. The limited knowledge that exists, however, suggests that aging out of foster care is a major factor that
contributes to LGBTQ homelessness for young adults. In addition, LGBTQ youth—and especially LGBTQ youth of color—fare worse than non-LGBTQ youth during the transition period to adulthood after emancipating from the child welfare system. In permitting religiously motivated discrimination against LGBTQ youth, broad religious exemptions can exacerbate these problems.

For instance, one recent study compared data from the federally mandated Multi-Site Evaluation of Foster Youth Programs on the outcomes of nineteen-year-old sexual minority and heterosexual youth who had recently transitioned out of foster care. The study found that the sexual minority youth (most of whom also identified as African American or Hispanic) fared worse than the heterosexual youth across four key outcomes (educational attainment, employment, economic wellbeing, and homelessness). Specifically, sexual minority youth were less likely to obtain a high school diploma or GED; have employment experience between the ages of seventeen and nineteen; achieve financial stability; or have a checking account, a savings account, or a vehicle. The sexual minority youth were also more likely to experience homelessness and to receive financial assistance. After controlling for other relevant variables, the study also found that sexual orientation was associated with each category of outcomes. Based on these results, the researchers attributed greater negative outcomes for sexual minority youth to challenges associated with sexual orientation in child welfare placements.

Accordingly, broad religious exemptions involving LGBTQ child welfare afford protection to instances of religiously motivated discrimination that stigmatize LGBTQ youth based on their sexual orientations and gender identities, and jeopardize their stability in the system. In addition, these instances of discrimination have potential long-term consequences that reach beyond the child welfare system to jeopardize LGBTQ equality in society at large. For these reasons, broad religious exemptions involving LGBTQ child welfare do much more work than simply mediate conflicts between religious liberty and marriage equality. Rather, these religious exemptions have a larger role in facilitating and perpetuating structural and cultural LGBTQ-based inequality both inside and outside of the child welfare system.

In her work, Professor Dorothy Roberts urges us to approach inequality in the child welfare system as a civil rights issue. Focusing on race, Roberts explains that

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454 See, e.g., Durso & Gates, supra note 404, at 4; Keuroghlian, supra note 439, at 67.
455 See e.g., Shpiegel & Simmel, supra note 453, at 101.
456 Id. at 103. The Multi-Site Evaluation of Foster Youth Programs (MEFYP) is a randomized-controlled study intended to evaluate the effectiveness of four independent living programs in California and Massachusetts. Id.
457 Id.
458 Id. at 104-05.
459 Id. at 105.
460 Id.
461 Id. at 106.
462 Id.
racial inequality in child welfare ultimately stems from broader systemic racial injustices. In conceptualizing racial inequality in the child welfare system as a group and race-based civil rights violation, she argues that efforts to eliminate this inequality must extend beyond individual child welfare grievances to broader societal action.

These insights apply to the LGBTQ child welfare context as well. The analysis above illustrates that the subordination of LGBTQ identity in the child welfare domain is not simply a child welfare problem. Rather, LGBTQ-based inequality in the child welfare system has deeper roots in structural and cultural LGBTQ-based inequality in society at large. In affording protection to religiously motivated discrimination against LGBTQ youth, broad religious exemptions involving LGBTQ child welfare perpetuate and recreate LGBTQ-based inequality both inside and outside of the child welfare system.

Accordingly, LGBTQ-based inequality in the child welfare domain should be viewed as pertinent to the fight for LGBT civil rights, including progress toward a fully inclusive LGBTQ antidiscrimination regime. Such a regime must not only protect LGBT adults (and particularly those in same-sex relationships), but rather protect all LGBTQ people who are vulnerable to marginalization within major social institutions, including LGBTQ youth in the child welfare system. It is impossible to move in this direction, however, when the debate over religious liberty and LGBTQ equality centers on same-sex marriage and overlooks LGBTQ youth in the child welfare system.

CONCLUSION

The theoretical and historical analysis in this Article has demonstrated why it is essential to not neglect the experiences of LGBTQ youth in the child welfare system in the debate over conflicts between religious liberty and LGBTQ equality. In recasting broad religious exemptions involving LGBTQ child welfare through the lens of historical theories of sexual deviance, this Article has demonstrated that the push for these exemptions is the latest point on a much longer historical trajectory of child welfare interventions that subordinate LGBTQ youth based on sexual deviance concepts. Examining these religious exemptions through this new theoretical frame helps to excavate their full normative and practical consequences both inside and outside of the child welfare domain.

To reiterate, I fully recognize the importance of religious liberty, and acknowledge that balancing religious liberty with LGBTQ equality in the child welfare domain requires drawing lines that are inherently difficult. The proper balance may ultimately weigh in favor of limited religious exemptions in specific contexts. Drawing these lines requires deeper analysis into the proper use of taxpayer funds for child welfare services and the extent to which child welfare is

\[464 \text{ Id. at 178.} \]

\[465 \text{ Id. at 182.} \]
conceptualized as a public function for the benefit of the state.\textsuperscript{466} Although this Article does not advocate for drawing lines in a particular way, its analysis illustrates the importance of not losing sight of the historical and institutional context in which these lines will be drawn when accommodating religion in situations involving LGBTQ child welfare.

Douglas NeJaime and Reva Siegel’s proposed theory of recognizing third party harm in religious accommodation is one possible approach to recognize the harms that broad religious exemptions impose on LGBTQ youth in the child welfare system while also recognizing religious liberty.\textsuperscript{467} NeJaime and Siegel’s proposal emphasizes the need for law and doctrine to consider the material and dignitary harms that religious exemptions inflict on third parties when deciding whether and how to accommodate religious objections.\textsuperscript{468} Specifically, NeJaime and Siegel argue that religious accommodations should be structured in ways that both ensure that individuals are not denied access to goods and services (material harms), as well as protect them from stigmatizing encounters (dignitary harms).\textsuperscript{469} When this structuring is not feasible, they contend that third party harm may be a justification to deny religious accommodation.\textsuperscript{470}

Applying NeJaime and Siegel’s proposal to the LGBTQ child welfare context would demand that law and doctrine take into account the material and dignitary harms that broad religious exemptions impose on LGBTQ youth in the child welfare system. Structuring religious accommodations would require that the state ensure that LGBTQ youth have access to supportive living environments in the child welfare system, and protect them from stigmatizing encounters that are rooted in religiously motivated discrimination against their sexual orientations and gender identities. If it is not feasible for states to do so when accommodating religion, then the harms that broad religious exemptions impose on LGBTQ youth in the child welfare domain would justify denying religious accommodation in this specific institutional context.

There are other important insights that NeJaime and Siegel’s proposal has for the LGBTQ child welfare context. Pluralism is the underlying value that animates NeJaime and Siegel’s proposed theory of third-party harm.\textsuperscript{471} They argue that only when religious accommodations are structured in ways that mediate third party harms can those accommodations genuinely further pluralist ends and protect the different interests of a heterogeneous and diverse society.\textsuperscript{472} In their view, when

\textsuperscript{466} Two federal district courts are already diving into this question in pending litigation involving same-sex couples who were denied foster or adoptive services by a taxpayer-funded faith-based child placing agency. \textit{See} Dumont v. Lyon, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018); Marouf v. Azar, No. 1:18-cv-378 (D.D.C. Feb. 20, 2018) (complaint for declaratory and injunctive relief and monetary damages).


\textsuperscript{468} NeJaime & Siegel, \textit{Conscience Wars in Transnational Perspective}, supra note 49, at 22.


\textsuperscript{470} NeJaime & Siegel, \textit{Conscience Wars in Transnational Perspective}, supra note 49, at 22.


religious accommodation ignores the impact of broad exemptions on third parties, those exemptions simply promote the interests of the objectors and do not promote pluralism.⁴⁷³ They further emphasize that religious claimants may frame themselves as a minority, but advance claims that are rooted in normative views that have long been used by the majority against third parties “whose rights the law has only recently and fragilely come to protect.”⁴⁷⁴

Drawing on these insights, the sexual deviance frame reveals how broad religious exemptions involving LGBTQ child welfare are really a vehicle for enduring anxiety about sexual deviance and attempts to shape and control the sexual orientations and gender identities of youth to conform to traditional norms of sex, sexuality, and gender. Religious objectors invoke a type of agenda rooted in sexual deviance that the law and doctrine has renounced when articulated explicitly to sustain criminal sodomy prohibitions or same-sex marriage restrictions. In the LGBTQ child welfare context, however, proponents of broad religious exemptions invoke religious liberty arguments in ways that undermine protections for LGBTQ youth and allow outdated sexual deviance concepts to thrive in hidden and less obvious ways. NeJaime and Siegel’s analysis tells us that this result not only harms a highly vulnerable segment of the LGBTQ population, but also threatens pluralism itself in a diverse society.

Regardless of how these lines are ultimately drawn, this Article has shown that religious exemptions involving LGBTQ child welfare intervene against the backdrop of a public welfare system that is already fraught with LGBTQ-based inequalities and that commonly fails LGBTQ youth in need of help from the state. Considering how broad religious exemptions involving LGBTQ child welfare may exacerbate problems for this already vulnerable segment of the LGBTQ population is essential in evaluating whether these exemptions resolve conflicts between religious liberty and LGBTQ equality in a fair and balanced way.

⁴⁷⁴ Id.