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Understanding Intersectionality between the Law, Gender, Sexuality and Children

By Thomas A. Mayes*

Children who are lesbian, gay, bisexual, transgender, or questioning (hereinafter “LGBTQ”)¹ are at a greater risk of negative life outcomes than their straight counterparts, including substance abuse, perpetration of violence, victimization, school failure, suicide attempts, and suicide.² LGBTQ children are overrepresented in the foster care system,³ and the poor results for LGBTQ children and youth in foster care include assault, harassment, running away, and school failure.⁴

To address the needs of LGBTQ youth in and out of state care, adults must attend to the needs arising from their LGBTQ identity. These needs are real and cannot be masked by the social construct that sexual orientation and gender identity exists only after the age of majority and therefore children cannot be LGBTQ.⁵ This is an obligation imposed by professional codes

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¹ For useful definitions of these terms, see CHILD WELFARE LEAGUE OF AMERICA & LAMBDA LEGAL DEFENSE AND EDUC. FUND, GETTING DOWN TO BASICS: TOOLS TO SUPPORT LGBTQ YOUTH IN CARE 3 (2010) [hereinafter GETTING DOWN TO BASICS].

² *Id.* at 45. See also CHILD WELFARE LEAGUE OF AMERICA, RECOMMENDED PRACTICES TO PROMOTE THE SAFETY AND WELL-BEING OF LESBIAN, GAY BISEXUAL, TRANSGENDER, AND QUESTIONING (LGBTQ) YOUTH AND YOUTH AT RISK OF OR LIVING WITH HIV IN CHILD WELFARE SETTINGS 2–3 (2012) (discussing increased risks for LGBTQ youth); Ann M. Haralambie, *Child Development and the Impact of Maltreatment*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 61, 77 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) (discussing increased risks for LGBTQ youth); Maurice R. Dyson, *Safe Rules or Gays’ Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 187 (2004) (discussing increased risks for LGBTQ youth); Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L. J. 611, 613–14 (2001) (discussing increased risks for LGBTQ youth); Catherine A. Lugg, *Sissies, Faggots, Lezzies, and Dykes: Gender, Sexual Orientation and a New Politics for Education?*, 39 EDUC. ADMIN. Q. 95, 114 (2003) (discussing increased risks for LGBTQ youth); Gerald P. Mallon et al., *There’s No Place Like Home: Safety, Permanency and Well-Being for Lesbian and Gay Adolescents in Out-of-Home Care*, 81 CHILD WELFARE 407, 410 (2000) (discussing increased risks for LGBTQ youth); Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L. J. 641, 655 (2001) (discussing increased risks for LGBTQ youth); Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 270–73 (1996) (discussing increased risks for LGBTQ youth); Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009) (discussing increased risks for LGBTQ youth). See also Sarah E. Valentine, *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 19 YALE J.L. & FEMINISM 449, 471–74 (2008).

³ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 2; GETTING DOWN TO BASICS, *supra* note 1, at 15.

⁴ See, e.g., Donald N. Duquette & Ann Haralambie, *Representing Children and Youth*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 617, 637 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) (citing MIMI LAVER & ANDREA KHOURY, OPENING DOORS FOR LGBTQ YOUTH IN FOSTER CARE: A GUIDE FOR LAWYERS AND JUDGES 1,1 (2008)).

⁵ See generally Ruskola, *supra* note 2 (providing an extensive treatment of the notion that minors cannot have an LGBTQ identity).

of conduct and standards,⁶ as well as antidiscrimination laws⁷ and the obligations imposed by child welfare laws to ensure safety and permanency.⁸ Unfortunately, many professionals do not meet this obligation.⁹ For example, in one case an LGBTQ youth in group care stated, “I got jumped by a bunch of guys in my group home, and when I told the Director, he said, ‘Well, if you weren’t a faggot, they wouldn’t beat you up.’”¹⁰ This should never happen. Youth who are LGBTQ are entitled to the same physical and emotional safety as other youth especially when they are in state care.

That said, advocates and policy-makers must not limit their attention to issues and needs primarily associated with sexual orientation and gender identity. LGBTQ children cannot be reduced to their LGBTQ identity,¹¹ and their LGBTQ identity should not be reduced to their sex acts.¹² LGBTQ children “are not a monolith”¹³ and “the diversity of society in general is represented within LGBTQ communities.”¹⁴ Not all LGBTQ children and youth experience or respond to heterosexist society in the same way.¹⁵ LGBTQ children and youth have different degrees of resilience¹⁶ and do not necessarily “have similar life experiences or share a common sense of community.”¹⁷ In fact, a majority of LGBTQ children and youth do not have negative life outcomes.¹⁸ For example, while LGBTQ children and youth have a higher suicide rate than their non-LGBTQ peers, the vast majority do not commit suicide.¹⁹

⁶ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 4–5; GETTING DOWN TO BASICS, *supra* note 1, at 31–34; Mayes, *supra* note 2, at 674.

⁷ See, e.g., Mayes, *supra* note 2 (discussing various federal antidiscrimination statutes that address same-sex harassment in schools and the workplace).

⁸ See, e.g., Frank E. Vandervort, *Federal Child Welfare Legislation*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 199, 201–03 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) (discussing federal child welfare legislation).

⁹ See, e.g., Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual, and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 451–52 (1994) (describing “the neglect of public authority figures”); Dyson, *supra* note 2, at 188–89 (discussing inaction by educators); Hirschfeld, *supra* note 2, at 612–13 (discussing inaction by educators); Mayes, *supra* note 2, at 657, 660–63 (discussing inaction by educators).

¹⁰ GETTING DOWN TO BASICS, *supra* note 1, at 14.

¹¹ See, e.g., Duquette & Haralambie, *supra* note 4, at 637 (“The youth’s sexual orientation does not define him or her as a person or frame the needs the child may have in the foster care system. Other areas of the child’s life may take priority.”). For a discussion of essentialism, gender and sexual orientation, see generally Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL’Y & L. 43 (1994) (discussing essentialism, gender, and sexual orientation). See also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN’S L. J. 181 (1991) (broad discussion of the hazards of essentialism).

¹² Mayes, *supra* note 2, at 669–70.

¹³ *Id.* at 667.

¹⁴ GETTING DOWN TO BASICS, *supra* note 1, at 9.

¹⁵ Mayes, *supra* note 2, at 658 (noting that not all LGBTQ students have negative outcomes). See also Thomas A. Mayes, *Separate Public High Schools for Sexual Minority Students and the Limits of the Brown Analogy*, 35 J.L. & EDUC. 339, 342 & n.16 (2006) (noting other outcomes for LGBTQ students).

¹⁶ GETTING DOWN TO BASICS, *supra* note 1, at 9.

¹⁷ *Id.*

¹⁸ Brian Mustanski et al., *Mental Health of Lesbian, Gay and Bisexual Youths: A Developmental Resiliency Perspective*, 23 J. GAY & LESBIAN SOC. SERVS. 204 (2011). See, e.g., GETTING DOWN TO BASICS, *supra* note 1, at 4.

¹⁹ See *supra* note 2.

Second, each child's sexual orientation and gender identity, whether or not that child identifies as LGBTQ, is uniquely related to the other attributes that make the child who she is.²⁰ According to one authority, some "LGBTQ youth are very outspoken about their identities and feel that this is a defining part of who they are, while others might not give it much thought at all."²¹ Moreover, and regardless of the weight they are given, a child's sexual orientation and gender identity may interact in different ways with other ways of lived reality, including but not limited to, race, ethnicity, religion, class, sex, or presence or absence of a disability.²² This Article explores how four of these various differences intersect with sexual orientation and gender identity²³ and considers in Part II how these intersections may inform child welfare law.²⁴ Understanding intersectionality is essential to minimally adequate programming for LGBTQ youth in care. As the Author wrote in another context, "Any program design must adequately account for the diversity of experiences and world-views among" LGBTQ youth.²⁵ Any service provider who adopts a strategy to address the needs of LGBTQ children and youth, but who does not analyze the strategy to see how it may reinforce other ways of dominance, risks (1) inadequately addressing the needs of LGBTQ children and youth and (2) furthering future difference-based oppression.

I. SEXUAL ORIENTATION, GENDER IDENTITY: DIFFERENCE AND INTERSECTIONALITY

This Article now turns to a brief survey of four ways of difference and how they intersect with sexual orientation and gender identity: sex and gender, race, ability and disability, and class. If one focuses on a single attribute, one errs. The various attributes form the multiple dimensions of a society of oppression.²⁶ When there is focus on a single attribute, the "dichotomous, hierarchical," us-versus-them mindset inherent therein, is "used to support and reinforce domination."²⁷ Marilyn Frey uses the cage as a metaphor to explain this phenomenon.²⁸ If the bird had only one wire to fly around, the bird could easily go free; however, the bird is surrounded by an interlocking network of restraints—engaged and subject to the whim and the will of its

²⁰ Cf. Wing, *supra* note 11 (discussing the importance of intersectionality to personal identity).

²¹ GETTING DOWN TO BASICS, *supra* note 1, at 12.

²² Mayes, *supra* note 2, at 667. See also Karen Aileen Howze, *Cultural Context in Abuse and Neglect Practice: Tips for Attorneys*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 139, 158-59 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

²³ See *infra* notes 26–94 and accompanying text.

²⁴ See *infra* notes 95–147 and accompanying text.

²⁵ Mayes, *supra* note 2, at 667.

²⁶ In the words of Balos and Fellows, these are interlocking "systems of oppression." BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 45 (1994).

²⁷ *Id.*

²⁸ *Id.* at 49 (quoting MARILYN FRYE, *Oppression*, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 1, 2–14 (1983)). Marilyn Frey was, until her retirement, University Distinguished Professor of Philosophy at Michigan State University. Marilyn Frey, MICHIGAN STATE UNIVERSITY, <http://www.philosophy.msu.edu/people/faculty/marilynfrye/>.

master. Please note the four differences that this Article discusses are not an exhaustive list. Other differences and sources of discrimination include religion²⁹ and region.³⁰

A. Sex and Gender

Sexism and heterosexism are closely connected and mutually reinforcing.³¹ According to Catherine MacKinnon, “Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission.”³² Anything that transgresses gender norms, through self-realizations rather than socially imposed expressions of sexual orientation or gender identity, challenges male dominance and all privileges that flow from that dominance.³³ That dominance must be maintained and threats to it countered.³⁴ Verbal and physical violence against LGBTQ persons enforces “compulsory heterosexuality,”³⁵ which is the key to male domination.

Bisexual, transgender, and questioning individuals similarly challenge sexist society in complex ways. Bisexuals challenge sexism by stepping beyond the false binary construct of sexuality as gay-or-straight,³⁶ which is essential to the “us-versus-them” mindset required to maintain sexism. They also challenge sexism by denying the need to be identified as heterosexual.³⁷ Transgender individuals challenge sexism by stepping out of confines of the social construction of sex and by asserting through the process of self-realization and public identification as trans. Gender and gender expression are imposed by society and subject to social regulation, rather than realized and expressed from within as a personal declaration of existence

²⁹ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 16; GETTING DOWN TO BASICS, *supra* note 1, at 25–27.

³⁰ See generally WILL FELLOWS, FARM BOYS: LIVES OF GAY MEN FROM THE RURAL MIDWEST (1996) (collecting personal narratives of gay men growing up in a rural environment); Colleen S. Poon & Elizabeth M. Saewyc, *Out Yonder: Sexual-Minority Adolescents in Rural Communities in British Columbia*, 99 AM. J. PUB. HEALTH 118 (2009) (discussing challenges of rural LGBTQ youth).

³¹ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing the idea that sex stereotyping, including comments that a female partnership candidate was too “macho” and needed to take “a course at charm school” may violate Title VII’s ban against sex discrimination). For an insightful discussion of this case, see Ronald Turner, *The Unenvisaged Case, Interpretative Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL’Y 57 (2000).

³² Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 533 (1982). For a critique of MacKinnon’s work, see Harris, *supra* note 11. Harris asserts MacKinnon and Robin West engage in “gender essentialism – the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.” *Id.* at 585.

³³ MacKinnon, *supra* note 32, at 542–43.

³⁴ See, e.g., Mayes, *supra* note 2, at 649.

³⁵ Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

³⁶ See, e.g., Shane Town, *Is It Safe To Come Out Yet?* Paper Presented at the 77th Annual Meeting of the American Educational Research Association 3 (April 8–12, 1996) (discussing the false gay-straight binary).

³⁷ See, e.g., NANCY FRIDAY, *MEN IN LOVE* 364 (1980).

and identity.³⁸ Questioning individuals, by daring even to question – publicly or privately—their sexual orientation, call into doubt society's assignment of identity and status.³⁹

The LGBTQ community must guard against falling into the trap of validating sexism by clinging to sexism's symbols of power. Some elements of the LGBTQ community do so by enforcing a norm of “compulsory heteronormativity” by appropriating for itself—and commanding adherence to—all of the communal trappings of heterosexuality.⁴⁰ This is seen by seemingly benign comments in personal ads, such as “straight-acting only” or “no femmes.” It is seen in public discourse that excludes the more “flamboyant” individuals who “flaunt” their difference: the seeming willingness to disassociate from the drag queens on the Pride Parade float as casting “the community” in a “negative light.”⁴¹ It is seen in “erasure” of bisexuals⁴² and the marginalization of trans individuals.⁴³ If compulsory adherence to gender norms is sex discrimination,⁴⁴ then it is equally so if compelled by dominant society or by dominant society's deputy. A marginalized group cannot seek “acceptance” by dominant society without in some manner conceding to the legitimacy of the dominant society's authority and—by necessary implication—its oppression. If one moves from “them” to “us,” the oppressive us-versus-them binary still remains.

B. Race

The American Dilemma⁴⁵ and heterosexism are interrelated. Myths and horror stories regarding black male sexuality were used to oppress African-Americans and to exercise paternalistic, sexist control over all women.⁴⁶ The African-American male as predator and the [white] woman as prey,⁴⁷ as well as the “Jezebel image” of the African-American woman as a hypersexualized “sexual temptress”⁴⁸ were crucial justifications to deny rational choice and

³⁸ See, e.g., Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-discrimination Law*, 75 DENV. U.L. REV. 1321 (1998) (discussing experience of trans individuals).

³⁹ Cf. MacKinnon, *supra* note 32, at 529–32 (stating that “feminist inquiry” unmasks the “learned quality” of gender). As to the relationship between gender and sexual orientation, MacKinnon writes, “Lesbians so violate the sexuality implicit in female gender stereotypes as not to be considered women at all.” *Id.* at 530.

⁴⁰ See, e.g., Porscha Yount, *Denying Queer Realities: Scripting the Normative Homo* (2009) (unpublished M.A. thesis, East Tennessee State University), <http://dc.etsu.edu/cgi/viewcontent.cgi?article=3244&context=etd> (discussing compulsory heteronormativity in the LGBTQ community).

⁴¹ *Id.*

⁴² Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 395–99 (2000); Sari H. Dworkin, *Identifying as Lesbian vs. Bisexual: The Dilemma For Women*, Paper Presented at the Annual Convention of the American Psychological Association (Aug. 1991). This is often reflected in the notion that a bisexual “was ‘really’ a homosexual trying to disguise his aberrant tastes.” FRIDAY, *supra* note 37, at 364. In the words of a common expression: “bi now, gay later.” For some, bisexuality is a transfer point, but for other it is the final destination.

⁴³ See, e.g., Cain, *supra* note 38, at 1336–51.

⁴⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴⁵ See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944) (exploring race relations in the United States).

⁴⁶ See BALOS & FELLOWS, *supra* note 26, at 378–93.

⁴⁷ *Id.*; Deirdre Davis, *The Harm that Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133, 164–66 (1994).

⁴⁸ Davis, *supra* note 47, at 166.

freedom to both African-Americans and women of all races and ethnicities.⁴⁹ This racist justification for sexism leads to the conclusion that attacking the legitimacy of sexism exposes the fraud in its justifications. Racism is used to justify sexism⁵⁰ just as sexism is used to justify heterosexism. Destabilizing and destroying sexism and heterosexism also destabilizes and destroys all variants of racism, which further destabilizes and destroys sexism and other axes of oppression.⁵¹ Carla Trujillo, a Chicana theorist and award-winning novelist, makes this point quite clearly:

The collective liberation of people begins with the collective liberation of half its constituency – namely women. The view that our hierarchical society places Chicanos at a lower point, and they in turn must place Chicanas lower still, is outmoded and politically destructive . . . Chicanas, both lesbian and heterosexual, have a dual purpose ahead of us. We must fight for our own voices as women, since this will ultimately serve to uplift us as a people.⁵²

This logic is straightforward but the reality is more complex.⁵³ The ideal about which Trujillo writes is far from being attained: for example, evidence of heterosexism exists in elements of some African-American,⁵⁴ Latino,⁵⁵ and Asian-Pacific Islander⁵⁶ communities. However, intersectionality of race and sexual orientation is not universally negative to LGBTQ individuals.⁵⁷ Cheryl Clarke explains, in the context of the working class Black community, “Though lesbians and gay men were exotic subjects of curiosity, they were accepted as part of

⁴⁹ BALOS & FELLOWS, *supra* note 26, at 378–93; Davis, *supra* note 47, at 164–66. The intersection of racism and sexism is not unique to racism against African-Americans. See, e.g., Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER, RACE & JUST. 177 (1997).

⁵⁰ See *supra* notes 45–48 and accompanying text. See also Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (discussing intersection of race, gender, and sexual orientation).

⁵¹ Hutchinson, *supra* note 50 (discussing the relationship between race, gender, and sexual orientation).

⁵² Carla Trujillo, *Chicana Lesbians: Fear and Loathing in the Chicano Community*, in CHICANA LESBIANS: THE GIRLS OUR MOTHERS WARNED US ABOUT 186, 193 (Carla Trujillo, ed., 1991).

⁵³ See Mayes, *supra* note 15.

⁵⁴ See, e.g., Cheryl Clarke, *The Failure to Transform: Homophobia in the Black Community*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 197 (Barbara Smith ed., 1983) (discussing heterosexism in African-American communities). See also ERIC MARCUS, MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS 220–22, 231, 272–73, 360–61 (2002) (providing transcript of an interview with Barbara Smith, a Black feminist scholar).

⁵⁵ See, e.g., Rafael M. Diaz et al., *The Impact of Homophobia, Poverty, and Racism on the Mental Health of Gay and Bisexual Latino Men: Findings from 3 U.S. Cities*, 91 AM. J. PUB. HEALTH 927 (2001).

⁵⁶ See, e.g., Raddhi Sandil et al., *Negotiating Multiple Marginalizations: Experiences of South Asian LBGQ Individuals*, 21 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 76 (2015) (discussing stresses, including cultural heteronormativity); Dawn M. Szymanski & Ma Ru Sung, *Asian Cultural Values, Internalized Heterosexism, and Sexual Orientation Disclosure Among Asian American Sexual Minority Persons*, 7 J. LGBT ISSUES IN COUNSELING 257 (2013) (discussing stresses including cultural heteronormativity).

⁵⁷ See, e.g., Clarke, *supra* note 54, at 206; Isabelle R. Gunning, *Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L & WOMEN'S STUD. 143 (1995) (providing examples of support for LGBTQ persons in an African-American Community). See also Dajenya, *Sisterhood Crosses Gender Preference Lines*, in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT 247–251 (Loraine Hutchins & Kani Kaahumanu eds., 1990) (providing a similar narrative).

the community (neighborhood)—or at least, there were no manifestos calling for their exclusion from the community.”⁵⁸ The record is ambivalent, including the support that the LGBTQ community has received from members of various non-Anglo communities, both gay and straight.⁵⁹ Nevertheless, the actual or perceived gulf between non-Anglo communities and the dominant culture appears to have manifested itself in an LGBTQ advocacy agenda that is largely constructed by whites,⁶⁰ as well as racism within some facets of the LGBTQ community.⁶¹ This results in a support system that often overlooks the needs of LGBTQ persons of color.⁶²

C. Class

The LGBTQ advocacy agenda focuses largely on the concerns of persons of affluence and secure means.⁶³ This is ironic because LGBTQ individuals are more likely to live in poverty than straight individuals, with greater income inequality among LGBTQ persons of color,⁶⁴ contrary to the myth of LGBTQ affluence⁶⁵, which is often characterized as a community with supposedly large amounts of discretionary income.⁶⁶ The advocacy agenda is disconnected from a whole representation of the LGBTQ community.

Consider *United States v. Windsor*, in which the Supreme Court held that Section Three of the Defense of Marriage Act was unconstitutional.⁶⁷ The case involved the question of a surviving same-sex spouse's \$363,053 in estate taxes that would not have been owed had the surviving spouse been in an opposite-sex marriage.⁶⁸ Estate tax considerations are of little importance to couples with no estate to tax. The factual circumstances that brought *Windsor* to the Court are not applicable or relevant to LGBTQ persons of low-income, however, it resonated with persons of affluence, both gay and straight. While the justifications in favor of the right to

⁵⁸ Clarke, *supra* note 54, at 206.

⁵⁹ *Id.* See also Angela Gilmore, *They're Just Funny That Way: Lesbian, Gay Men and African-American Community as Viewed through the Privacy Prism*, 38 HOW. L.J. 231 (1994).

⁶⁰ Janet H. Fontaine & Nancy L. Hammond, *Counseling Issues with Gay and Lesbian Adolescents*, 31 ADOLESCENCE 817, 826 (1996). Cf. Harris, *supra* note 11, at 588 (“And in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us.”).

⁶¹ See generally KEITH BOYKIN, *ONE MORE RIVER TO CROSS* (1996) (sophisticated discussion of the myths and realities of racism in the GLBTQ community and heterosexism in the black community); Patrick S. Cheng, *Gay Asian Masculinities and Christian Theologies*, 61 CROSS CURRENTS 540 (2011) (an in-depth discussion of the nature and extent of anti-Asian racism in the gay community and heterosexism in the Asian-American communities). See also MARCUS, *supra* note 54, at 191–92, 291.

⁶² See, e.g., Fontaine & Hammond, *supra* note 60, at 826.

⁶³ *Id.* For three comprehensive discussions of poverty-based discrimination in America, see generally BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001); RICHARD SENNETT & JONATHAN COBB, *THE HIDDEN INJURIES OF CLASS* (1972); DAVID ZUCCHINO, *THE MYTH OF THE WELFARE QUEEN* (1997). By focusing on the concerns of the LGBTQ community of affluence, the LGBTQ advocacy agenda plays a part in perpetuating poverty-based discrimination.

⁶⁴ M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, THE WILLIAMS INST. (2013), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-poverty-update-june-2013/#sthash.4zJLWT6F.dpuf>.

⁶⁵ Nathan McDermott, *The Myth of Gay Affluence*, THE ATLANTIC (Mar. 21, 2014), <http://www.theatlantic.com/business/archive/2014/03/the-myth-of-gay-affluence/284570/>.

⁶⁶ *Id.* (citing Justice Scalia's dissent in *Romer v. Evans*, 517 U.S. 620, 636, 645 (1996)).

⁶⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

⁶⁸ *Id.* at 2683. For a discussion of the irrationality of applying then-existing tax law to same-sex couples, see Patricia A. Cain, *Taxing Lesbians*, 6 S. CALIF. REV. L. & WOMEN'S STUD. 471 (1997).

marriage and the rationality of marriage equality are both economic and noneconomic,⁶⁹ one wonders whether the Court would have been moved to reach the same result if the right at issue were not an economic right (e.g., hospital visitation rights) or if the right at issue had less absolute economic value (e.g., Social Security survivor benefits).

D. Disability

Discrimination against LGBTQ youth and youth with disability have remarkable similarities. First, both groups are overrepresented in the foster care system.⁷⁰ Second, both groups are more likely to be crime victims.⁷¹ Third, their sexuality is repressed and denied because persons with disability are often culturally and legally rendered as nonsexual, especially those with significant disabilities.⁷² Likewise, LGBTQ youth face a culture in which ‘no child can be gay’ is still a commonly-held belief.⁷³ Fourth, disability and sexual orientation/gender identity are often viewed as illnesses subject to treatment and recovery notwithstanding that homosexuality is no longer considered a mental disorder.⁷⁴ Some parts of society still consider being LGBTQ as akin to being a person with a disability, resulting in some LGBTQ being referred to special education for “treatment,”⁷⁵ committed to hospitals or mental institutions⁷⁶ (including electroconvulsive therapy⁷⁷) or subjected to disproved and harmful reparative therapies.⁷⁸ The anger of some in the autism self-advocacy community toward methods to “cure” autism⁷⁹ is similar to the anger in the LGBTQ community among those who have survived

⁶⁹ See, e.g., Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

⁷⁰ Compare CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 2 (discussing LGBTQ youth), with Patricia M. Sullivan & John F. Knutson, *Maltreatment and Disabilities: A Population-Based Epidemiological Study*, 24 CHILD ABUSE & NEGLECT 1257 (2000) (discussing children and youth with disabilities).

⁷¹ Compare Sullivan & Knutson, *supra* note 70, at 1265–66 (stating children with disabilities are more than three times more likely than children without disabilities to be physically or sexually abused), and Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. POSITIVE BEHAV. INTERVENTIONS 92 (2003) (discussing higher risks of victimization of persons with autism), with Emily F. Rothman et al., *The Prevalence of Sexual Assault Against People Who Identify As Gay, Lesbian, or Bisexual in the United States: A Systematic Review*, 12 TRAUMA VIOLENCE & ABUSE 55 (2011) (based on a review of seventy-one peer-reviewed studies, concluding that sexual assault against LGB persons is prevalent and likely higher than that rate of sexual assault against straight individuals), and DOUG MEYER, *VIOLENCE AGAINST QUEER PEOPLE: RACE, CLASS, GENDER, AND THE PERSISTENCE OF ANTI-LGBT DISCRIMINATION* (2015) (discussing anti-queer violence through the multiple lenses of race, class, and gender).

⁷² Holly Ann Wade, *Discrimination, Sexuality and People with Significant Disabilities: Issues of Access and the Right to Sexual Expression in the United States*, 22 DISABILITY STUD. Q. 9 (2002).

⁷³ See generally Ruskola, *supra* note 2 (discussing the social construct that persons under the age of majority cannot be GLBTQ).

⁷⁴ DUDLEY CLENDINEN & ADAM NAGORNY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 199–217* (1999) (discussing the successful effort to remove “homosexuality” from the *Diagnostic and Statistical Manual*, the American Psychiatric Association’s catalogue of “mental disorders”).

⁷⁵ Mayes, *supra* note 2, at 663.

⁷⁶ *Id.* See also Miye A. Goishe, *Unlocking the Closet Door: Protecting Children from Involuntary Civil Commitment Because of their Sexual Orientation*, 48 HASTINGS L.J. 1137, 1138 (1997).

⁷⁷ Catherine A. Lugg, *No Trespassing: U.S. Public Schools and the Border of Institutional Homophobia*, at 14, Paper Presented at the Annual Convention of the University Council for Educational Administration (Oct. 26–28, 1997).

⁷⁸ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 4; GETTING DOWN TO BASICS, *supra* note 1, at 32–33.

⁷⁹ See, e.g., Amy Harmon, *How About Not “Curing” Us, Some Autistics Are Pleading*, N.Y. TIMES (Dec. 20, 2004), http://www.nytimes.com/2004/12/20/health/how-about-not-curing-us-some-autistics-are-pleading.html?_r=1. See

reparative therapy:⁸⁰ How dare you try to ‘repair’ me! Am I not fine the way I am?⁸¹ Fifth, LGBTQ individuals and individuals with disabilities face legal barriers in becoming and remaining parents. LGBTQ individuals face legal barriers to adoption, foster care, and child custody,⁸² and persons with disabilities must also confront limits on child-rearing, including involuntary sterilization⁸³ and termination of parental rights.⁸⁴

The barriers faced by persons with disabilities and LGBTQ persons are so similar that, when one is both, the force required to overcome those barriers is multiplied. If a gay male with a disability overcomes all of the social forces aligned against his sexuality, he still must overcome all of the social forces aligned against his disability. Although the communities should be natural allies, that is not the case. Ableism exists in the LGBTQ community and heterosexism exists among persons with disabilities. Yvon Appleby explains this in concrete terms, in ways that are both practical and attitudinal:

Lack of access to information, ramps, signers and braille material, together with a lack of awareness of the needs of women deemed to have mental illness or learning difficulties are some of the factors that work to exclude disabled lesbians. Unfortunately able-bodied lesbians are not free from the privileged dominant ideas that disabled women are somehow “other” and nothing to do with them.

generally Kristin Bumiller, *Quirky Citizens: Autism and the Anti-Normalization of Politics*, 33 *SIGNS* 967 (2008) (discussing goals and challenges of autism self-advocates and other advocates).

⁸⁰ Karolyn Ann Hicks, Comment, “Reparative” Therapy: Why Parental Attempts to Change a Child’s Sexual Orientation Can Legally Constitute Child Abuse, 49 *AM. U. L. REV.* 505, 513–19 (1999).

⁸¹ See Wade, *supra* note 72. For a probing discussion of the similarities of the attempts to “cure” children from autism and “cure” them from homosexuality, including a common intellectual ancestor – Ivar Lovaas – see Michelle Dawson, *The Misbehavior of Behaviourists: Ethical Challenges to the Autism-ABA Industry* (2004), http://www.sentex.net/~nexus23/naa_aba.html; George A. Rekers & O. Ivar Lovaas, *Behavioral Treatment of Deviant Sex-Role Behaviors in a Male Child*, 7 *J. APPLIED BEHAV. ANALYSIS* 173 (1974); George A. Rekers et al., *The Behavioral Treatment of a “Transsexual” Preadolescent Boy*, 2 *J. ABNORMAL CHILD PSYCHOL.* 99 (1974).

⁸² CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 11 (stating that “Child welfare agencies should not discriminate against prospective or present foster and adoptive parents based on their sexual orientation or gender identity.”); GETTING DOWN TO BASICS, *supra* note 1, at 41–44 (discussing efforts to combat misguided efforts to ban lesbian and gay adults as foster and adoptive parents). See PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 144–52, 156–67, 244–75 (2000); GIGI KAESER & PEGGY GILLESPIE, *LOVE MAKES A FAMILY: PORTRAITS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARENTS AND THEIR FAMILIES* (1999) (personal narratives and portraits of LGBTQ parents and their children). See generally PHYLLIS BURKE, *FAMILY VALUES: A LESBIAN MOTHER’S FIGHT FOR HER SON* (1993) (personal narrative of a custody challenge involving a lesbian mother).

⁸³ See, e.g., *In re Guardianship & Conservatorship of Kennedy*, 845 N.W.2d 707, 708 (Iowa 2014) (collecting cases from other jurisdictions and allowing involuntary sterilization of persons under guardianship with court approval). For the most notorious case on this topic, see *Buck v. Bell*, 274 U.S. 200 (1927) (repudiation is recognized by *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996)). For a discussion of this infamous case, see Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 *IOWA L. REV.* 833 (1986).

⁸⁴ See, e.g., Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 *FAM. L.Q.* 253 (1991). See also Yvon Appleby, *Disability and “Compulsory Heterosexuality,”* in *HETEROSEXUALITY: A FEMINISM & PSYCHOL. READER* 266 (Sue Wilkinson & Celia Kitzinger eds., 1993), reprinted in part in BALOS & FELLOWS, *supra* note 26, at 76 (“Indeed for many disabled women the right to bear and raise their children is denied them and if they do then it is monitored and controlled by external forces.”).

Organizations “for” disabled people tend to provide insufficient information about lesbianism, and lesbian groups are ill prepared to deal with disability issues.⁸⁵

E. How Does This Relate to Children?

The concepts illustrated in the preceding sections do not apply solely to adults. Oppression is learned and transmitted from one generation to the next. Children of color learn their race and the role assigned to them because of it.⁸⁶ Children learn acceptable gender roles, as well as the privilege associated with maleness.⁸⁷ Children learn about poverty and what is expected of children with and without financial security.⁸⁸ Children learn about ableism at a young age, including roles that society assigns to persons with disabilities.⁸⁹ Children learn about heterosexism and compulsory heterosexuality at an early age.⁹⁰ Children learn about how these ways of difference intersect with each other and where they fall in the matrix of oppression. The cage is made ready for the hatchling.⁹¹

These considerations influence how children relate to each other, to adults, and to society.⁹² Also, these considerations influence how children mature into adulthood and how they, in turn, parent.⁹³ The intervention of oppression directed at children strikes at the root of oppression and makes its transmission to future generations more difficult.⁹⁴

II. TAKING ACTION: SAFETY, PLACEMENT, REUNIFICATION, AND PERMANENCE

The four differences are not guarantees of living life in a certain way. They are, at most, predictors, albeit powerful predictors. Though not all youth with similar attributes will have identical life experiences, similar attributes make similar experiences more likely. Professionals who work with LGBTQ youth in state care—who face greater challenges than their non-LGBTQ peers⁹⁵—must attend to different backgrounds of those youth. Those different backgrounds provide the basis for asking questions about how to best match services with strengths and threats at all stages of a child welfare case’s life cycle (but do not provide the basis for drawing before-the-fact conclusions).

⁸⁵ Appleby, *supra* note 84, at 77.

⁸⁶ BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 31–74 (1997).

⁸⁷ See, e.g., Mayes, *supra* note 2, at 645–47 (discussing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)).

⁸⁸ See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991) (discussing multiple income-based inequities in American education); JAY MACLEOD, *AIN’T NO MAKIN’ IT: ASPIRATIONS & ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD* (2d ed. 1995) (longitudinal study of youth in a low-income neighborhood, finding limited opportunities and low social expectations).

⁸⁹ See generally BETTY B. OSMAN & HENRIETTE BLINDER, *NO ONE TO PLAY WITH: THE SOCIAL SIDE OF LEARNING DISABILITIES* (1982) (discussing the social difficulties associated with being a child with a disability).

⁹⁰ Mayes, *supra* note 2, at 668.

⁹¹ MARILYN FRYE, *Oppression*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 1, 2–14 (1983).

⁹² See *supra* notes 86–91.

⁹³ MACLEOD, *supra* note 88 (describing the social reproduction of class roles and expectations in poor-to-working class neighborhood).

⁹⁴ Hirschfeld, *supra* note 2, at 637–38.

⁹⁵ See *supra* notes 3–4.

A. Prerequisites to Action

One of the first steps for adults working with and advocating for LGBTQ children and youth in state care is to understand the related concepts of objectification and presumption. The dominant culture maintains its dominant position with these two tools, which are the wires that hold the cage⁹⁶ together.

Objectification refers to the notion that subjugated groups are acted-upon, not actors in their own right.⁹⁷ As objects, they are subject to control and manipulation. Women are subjected to male domination through multiple indicia of male power and privilege.⁹⁸ This objectification of women by men is also perpetrated by boys against girls.⁹⁹ The ultimate expression of objectification is the lethal assault committed by a batterer against his object/victim at separation,¹⁰⁰ the moment in which the object asserts her status as subject: the author of her own destiny. Persons of color are objectified in multiple ways, from the cultural colonialism of extracting and appropriating African-American cultural innovations while consigning African-Americans to remain outside of the dominant culture,¹⁰¹ to lynching¹⁰² and other lethal means of maintaining control and privilege. Persons with disabilities are much more likely to be victims of crime and exploitation.¹⁰³ A subtle but insidious and controversial way that persons with disabilities are objectified is so-called “inspiration porn”: video clips of persons with disabilities “overcoming” their disabilities to do ordinary things.¹⁰⁴ The logic of inspiration porn, and why it is objectionable to many persons with disabilities, is that persons with disabilities do not exist to do ordinary things in their own right – they exist to do those ordinary things to inspire and warm the hearts and souls of persons without disabilities.¹⁰⁵ Persons with low incomes have long been political punching bags,¹⁰⁶ such as the politicization and shaming of welfare recipients and the

⁹⁶ Frye, *supra* note 91.

⁹⁷ MacKinnon, *supra* note 32, at 536–42.

⁹⁸ BALOS & FELLOWS, *supra* note 26. As Catherine MacKinnon perceptively and directly states, “Man [obscene verb] woman; subject verb object.” MacKinnon, *supra* note 32, at 541 (original altered out of deference to journal editorial policy).

⁹⁹ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). In *Davis*, the plaintiff was repeatedly harassed in a physical and verbal manner by an elementary school classmate. In one instance, the classmate allegedly “placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward [the plaintiff] during physical education class.” *Id.* at 634. The classmate targeted other girls as well. *Id.* at 635.

¹⁰⁰ Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 7 (1991). See also Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciates Trifles*, 33 AM. CRIM. L. REV. 229, 286 & nn.440-43 (1996); Karen H. Rosen & Sandra M. Stith, *Women Terminating Abusive Dating Relationships: A Qualitative Study*, 12 J. SOC. PERS. RELATIONSHIPS 154 (1995).

¹⁰¹ EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE 3 (Greg Tate ed., 2003).

¹⁰² STEPHEN WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMITT TILL* 3 (1988).

¹⁰³ See, e.g., Mayes, *supra* note 71, at 93.

¹⁰⁴ Stella Young, *I'm Not Your Inspiration, Thank You Very Much*, TED TALKS (June 2014), http://www.ted.com/talks/stella_young_i_m_not_your_inspiration_thank_you_very_much/transcript.

¹⁰⁵ *Id.*

¹⁰⁶ See generally ZUCCHINO, *supra* note 63 (discussing the politically constructed “myth of the welfare queen”).

adoption of welfare “reform” policies that are not evidence-based.¹⁰⁷ LGBTQ individuals have been objectified through stereotypes and to the point of death.¹⁰⁸ Understanding objectification is necessary to avoid participation in objectification.¹⁰⁹ Understanding objectification is necessary to enable LGBTQ children and youth to lay claim to self-governance and self-ownership.

Presumption refers to the notion that members of the dominant society move through that society with little thought to difference.¹¹⁰ The larger society is presumptively white, male, straight, affluent, and not disabled.¹¹¹ When you construct the dominant society, it is about you, and you need no special reminder that it was constructed for you.¹¹² Furthermore, assertions of “white power,” “straight pride,” or “men’s rights,” as the author has observed them, do not exist in a vacuum and in their own right: rather, they are counteraggressions against “black power,” “gay pride,” or “women’s rights.” If, in fact, #alllivesmatter, why was it not necessary to proclaim that fact until after the assertion that #blacklivesmatter? Dominant culture only asserts itself when its underlying tenets are challenged: until that happens, it perceives that there is no need.

This concept also operates to explain why persons who are marginalized will often participate in the oppression of others.¹¹³ If I am a person of color who is a male, I am able to access male privilege. If I am a lesbian without disability, I am able to participate, intentionally or unintentionally, in the otherization of persons with disability.¹¹⁴ One task for persons who work with and for LGBTQ youth is “to acknowledge the advantages they enjoy as members of the dominant culture, and take ownership of the role they play in sustaining” oppression.¹¹⁵ Another task is to understand how one variety of oppression promotes and sustains other, related forms of oppression.¹¹⁶ A final related task is to demonstrate to LGBTQ youth that they are

¹⁰⁷ *Id.* See also LYNNELL HANCOCK, *HANDS TO WORK: THE STORIES OF THREE FAMILIES RACING THE WELFARE CLOCK* 276 (2002) (“Unfortunately, most every policymaker’s assumptions on the root causes of poverty have proved misguided in one fashion or another.”).

¹⁰⁸ Kris Franklin, *Homophobia and the “Mathew Shepard Effect” in Lawrence v. Texas*, 48 N.Y.L. SCH. L. REV. 657, 690 (2004). See generally Kristin Kelly & Jeff Gruenewald, *Accomplishing Masculinity through Anti-Lesbian, Gay, Bisexual, and Transgender Homicide: A Comparative Case Study Approach*, 18 MEN & MASCULINITIES 3 (2015) (discussing the role that demonstrating masculinity plays in anti-LGBTQ homicide).

¹⁰⁹ MacKinnon, *supra* note 32, at 542.

¹¹⁰ See, e.g., Hirschfeld, *supra* note 2, at 636 (“[M]ost of us have not been taught to recognize embedded forms of oppression.”).

¹¹¹ Angela Harris describes presumption in the context of feminist legal scholarship:

And in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us. Not surprisingly, the story they tell about “women,” despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socioeconomically privileged—a phenomenon Adrienne Rich terms “white solipsism.”

Harris, *supra* note 11, at 588 (citations omitted).

¹¹² *Id.*

¹¹³ See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (discussing dominance within an oppressed group by “otherwise-privileged members of the group”).

¹¹⁴ Appleby, *supra* note 84, at 76–77.

¹¹⁵ Hirschfeld, *supra* note 2, at 636.

¹¹⁶ *Id.*; Hutchinson, *supra* note 50, at 7 (stating “anti-racist scholars ... often perpetuate heterosexism and marginalize gay, lesbian, bisexual and transgendered people of color in their work”).

responsible for the continued oppression of others when they engage in oppressive acts or inaction.¹¹⁷

B. Safety

One core purpose of child welfare law is to encourage child safety.¹¹⁸ That purpose relates directly to a child's public identification as LGBTQ—the decision to come out.¹¹⁹ While not coming out and remaining closeted perpetuates heterosexism,¹²⁰ the decision to come out also brings a certain amount of risk.¹²¹ This is a decision that each LGBTQ person must make in light of individual circumstances.¹²² For LGBTQ youth in state care, those risks must be understood in light of the other safety risks in the child's life.¹²³ Coming out may make the child safer or it may make the child less safe. This personal judgment, which is the child's alone to make,¹²⁴ must be informed by the child's internal strengths and weaknesses and the external threats and protective capacities surrounding the child.¹²⁵ In turn, those strengths, weaknesses, threats, and protective capacities are informed by other unique attributes of a child. In some circumstances, for example, a child's race or ethnicity might make it easier to be out and safe. In other circumstances, the opposite is true. The decision to come out must be made by the child, and the child alone, and differing children may make different decisions about coming out—and to whom—in seemingly identical situations.

Safety for LGBTQ children and youth also needs to be addressed in the decision to remove a child from home.¹²⁶ In assessing the home safety of an LGBTQ child, the child welfare system must intentionally address the role that the child's LGBTQ identity plays in making the

¹¹⁷ Hirschfeld, *supra* note 2, at 640.

¹¹⁸ Theresa Roe Lund & Jennifer Renne, *Child Safety: What Judges and Lawyers Need to Know*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 291–92 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

¹¹⁹ GETTING DOWN TO BASICS, *supra* note 1, at 12 (discussing safety risks in coming out). For a broad discussion of coming out, see generally IT GETS BETTER: COMING OUT, OVERCOMING BULLYING, AND CREATING A LIFE WORTH LIVING (Dan Savage & Terry Miller eds., 2012) (personal narratives of LGBTQ individuals who were bullied as youth).

¹²⁰ MICHELANGELO SIGNORILE, QUEER IN AMERICA: SEX, MEDIA, AND THE CLOSETS OF POWER xiii (1993) (“There exists in America what appears to be a brilliantly orchestrated, massive conspiracy to keep all homosexuals locked in the closet. This conspiracy forces many of us to live in shame and tremble in fear.”); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 50–73 (2006) (discussing the harms of remaining hidden or “in the closet”). See also CAIN, *supra* note 82, at 285 (“We couldn't complain about public discrimination against gays and lesbians and at the same time ask to keep our sexual identities private.”).

¹²¹ See, e.g., Amy C. Orecchia, *Working with Lesbian, Gay, Bisexual, Transgender, and Questioning Youth: Role and Function of the Community Counselor*, GRADUATE J. COUNSELING PSYCH., Spring 2008, at 66, 68–69, 71–73 (discussing various risks of coming out).

¹²² *Id.* at 71. See also YOSHINO, *supra* note 120, at 186 (“In my adolescence, this False Self protected the True Self until its survival was assured.”) (emphasis added).

¹²³ See, e.g., Lund & Renne, *supra* note 118. See also GETTING DOWN TO BASICS, *supra* note 1, at 11–12 (discussing safety risks in coming out).

¹²⁴ See, e.g., Orecchia, *supra* note 121, at 71 (stating that coming out is a personal decision).

¹²⁵ See, e.g., Lund & Renne, *supra* note 118 (discussing considerations of safety in child welfare practice).

¹²⁶ See, e.g., Susan Badeau, *A Child's Journey Through the Child Welfare System*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 341, 350–51 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) (discussing factors in decision remove a child from home).

child more or less safe, including how that identity interacts with other child and family attributes.¹²⁷ For example, a child with a disability may be at greater risk for abuse if the child is also LGBTQ on the basis of LGBTQ-motivated hatred and because of the child's disability, the child has less ability to self-protect and be a self-advocate. Any safety decision that focuses on the child's disability without accounting for the fact that the child is also LGBTQ risks leaving the child in an unsafe environment.

In providing services to LGBTQ children and youth, it is absolutely critical for safety that adults do not unilaterally reveal the child's sexual orientation or gender identity.¹²⁸ If a child is outed in such a fashion, the child's safety may be compromised. Involuntarily revealing the sexual orientation or gender identity of a child involved in the child welfare system is only, and rarely, justified by compelling considerations of safety.¹²⁹ Additionally, these considerations must be consistent with governing law and professional standards¹³⁰ and after informing the child of the individual's intent to do so.

If a child has made a decision to reveal her or his sexual orientation, safety cannot be an excuse for forcing the child back into the closet. If a child is physically assaulted, for example, because the child is open about being LGBTQ, the fault lies with the assailant, not the child.¹³¹ While the child's safety is a legitimate concern, the proper approach is to address the threats to the child's safety and not force the child to falsely be something she is not.¹³² This is victim-blaming of the highest order. It is a second assault on the child's dignity because it validates the heterosexism of the assailant. It also enforces sexism and, by extension, all other ways of systematic oppression.¹³³

I suggest that safety-related concerns for LGBTQ youth require attention at the initial contact or intake level and must be applied to all children. This might be accomplished by asking "Would an LGBTQ child be safe in your home?" to all children and parents.¹³⁴ By asking this of

¹²⁷ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 2–5, 9–16 (discussing safety of LGBTQ youth in the home and in out-of-home placements). GETTING DOWN TO BASICS, *supra* note 1, at 7–14 (discussing safety of LGBTQ youth in the home and in out-of-home placements); Orecchia, *supra* note 121, at 71.

¹²⁸ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 16; GETTING DOWN TO BASICS, *supra* note 1, at 12, 16. Author's Note: I leave open the possibility of the merits of involuntarily disclosing a child's sexual orientation in emergency situations. In my view, a decision to involuntarily reveal the sexual orientation or gender identity of someone involved in the child welfare system is only and rarely justified by compelling considerations of safety (substantial risk to life or substantial risk of serious bodily injury), only when consistent with governing law and professional standards (*see, e.g.*, Model Rule of Professional Conduct 1.6(b)(1) (2003)), only when no other means of protecting safety is available, and only after informing the child of the individual's intent to do so. I understand the view of advocates who believe outing a child should never be permissible.

¹²⁹ As an example, a child may be engaging in unsafe same-sex sexual activity and adult intervention may be necessary to address child safety. For a discussion of these issues, see Kym R. Ahrens, *Psychosocial Pathways to Sexually Transmitted Infection Risk Among Youth Transitioning Out of Foster Care: Evidence From a Longitudinal Cohort Study*, 53 J. ADOLESCENT HEALTH 478 (2013).

¹³⁰ *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 2003).

¹³¹ GETTING DOWN TO BASICS, *supra* note 1, at 12 ("My foster family took away my clothes, called me a 'dyke,' and tried to remake me.").

¹³² *See generally* YOSHINO, *supra* note 120 (discussing the harms of "covering").

¹³³ *See supra* notes 25–94.

¹³⁴ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 9. The Child Welfare League of America recommends answering this question, gathered for demographic purposes, be voluntary. *Id.* Due to issues of safety, *see supra* note 128, the author agrees. The Child Welfare League also recommends that this information be kept private and not shared without express consent. CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 9. The author concurs,

all children and parents, that information is gathered regardless of stereotype or whether the child “appears” to be LGBTQ. This avoids the notion that this question is only asked because the child is, or is thought to be, LGBTQ. Asking this question declares that LGBTQ children are entitled to be as safe as their non-LGBTQ peers. It demonstrates that #LGBTQlivesmatter. While experience and data may ultimately show otherwise, by making this a universal focus of routine screening, child welfare agencies and others may gather useful information about safety with relatively low risk to the safety of LGBTQ children and youth. To the extent that this is not currently being done, this may be a reflection of a lack of awareness rather than a lack of need.¹³⁵

There are other ways of improving safety. A child’s attorney promotes the safety of children when the attorney conveys that her office is a safe space for LGBTQ children and youth, such as by displaying literature and providing information about LGBTQ issues and resources.¹³⁶ This is beneficial to all children, including LGBTQ children who are not out or whose sexual orientation or gender identity is still being formed or discovered. The safety of an LGBTQ child is also improved when a parent who holds heterosexist beliefs or takes heterosexist actions receives support on safe and supportive parenting.¹³⁷

C. Removal, Placement, Reunification, and Permanence

Similar considerations apply to the related decision about where to place a child who is LGBTQ,¹³⁸ whether and when to reunify the child with the child’s family,¹³⁹ and whether to pursue other permanency arrangements.¹⁴⁰ Once an LGBTQ child has been removed from the child’s home, placing the child in an environment that is heterosexist—including returning to the home the child was removed from if that home is heterosexist¹⁴¹—is likely to further harm the child. This is so even if the environment would otherwise be a good fit for the child’s other strengths and needs.

Reunification and permanency must also address the needs of LGBTQ youth, including how sexual orientation and gender identity intersect with other factors in each youth’s life. If services toward reunification are not culturally competent and reasonably responsive to all of the child’s circumstances, including sexual orientation and gender identity and their intersections, then those services may not constitute the required “reasonable efforts” to prevent removal or to

except in emergent and extreme cases where revealing this information is necessary to protect child safety. *See supra* note 129.

¹³⁵ It could also be that state or local law or policy precludes discussions of LGBTQ issues by service providers. *See* Mayes, *supra* note 2, at 670–71. If that is the case, state and local policy surely must yield to overall federal considerations of child safety. *See* Lund & Renne, *supra* note 118.

¹³⁶ Duquette & Haralambie, *supra* note 4, at 637.

¹³⁷ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 11; GETTING DOWN TO BASICS, *supra* note 1, at 7–8.

¹³⁸ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 10; GETTING DOWN TO BASICS, *supra* note 1, at 10, 27–28.

¹³⁹ CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2, at 10 (discussing the need to address “family rejection” and “help reunification”); Orecchia, *supra* note 121, at 71. *See generally* Lund & Renne, *supra* note 118, at 312–13 (discussing safety as the sole proper consideration in reunification decisions).

¹⁴⁰ Donald N. Duquette, *Establishing Legal Permanence for the Child*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 525 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

¹⁴¹ Ryan et al., *supra* note 2 (discussing generally how family rejection is associated with poorer health outcomes).

facilitate reunification.¹⁴² The whole child, not simply the facets of the child's life that are easily addressed, is entitled to reasonable efforts toward reunification and to timely permanency.

To avoid removal and promote reunification when possible, and to ensure appropriate placement and permanency when it is not possible, advocates for LGBTQ children and youth have a professional obligation to ensure that a broad constellation of services is provided to meet the needs of these children. This could include training attorneys and guardians *ad litem* about the needs of LGBTQ children and youth,¹⁴³ including how the needs of those children and youth may vary based on other attributes of their identity. Caseworkers and service providers must be appropriately trained and resourced to respond to the needs of LGBTQ children and youth in care.¹⁴⁴ Courts must be aware of these issues, both generally and how they relate to individual cases, such as how they may occur in the context of a "reasonable efforts" finding. Advocates must become aware of community resources available to LGBTQ children and youth? If there are none, what is being done to fill that gap? Are those community resources aware of the needs that LGBTQ children and youth require in state care? Are they aware of the differing needs arising from the intersection between sexual orientation and gender identity with sex and gender, race, class, and disability? If not, what is being done to build that awareness and capacity? There is a rich and emerging array of resources to guide courts, agencies, advocates, families, and children and youth in answering these questions and providing these supports.¹⁴⁵

The following four examples illustrate the need for the preceding assertions and questions. They show the mission-critical nature of considering intersections and providing reasoned responses to lived experiences. First, an LGBTQ child with a physical disability is placed in a family foster home that is physically accessible; however, the family foster home does not have the resources to address the needs arising from the child's sexual orientation or gender identity. Second, an LGBTQ child is set to be placed in an adoptive home of the child's same race based on the child's close identification with her heritage,¹⁴⁶ however, the prospective adoptive family holds heterosexist views. Third, a gay youth is battered by his boyfriend; however, local resources for targets of intimate partner violence, including teen dating violence,¹⁴⁷ are only available to women. Fourth, a social worker seeks services for an LGBTQ youth in poverty from an LGBTQ community center; however, all of the services focus on the needs and interests of LGBTQ youth of affluence.

¹⁴² Lund & Renne, *supra* note 118, at 297–98, 307–08 (discussing the "reasonable efforts" requirements); Vandervort, *supra* note 8, at 206–10 (discussing "reasonable efforts" requirements). See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2012), <https://www.childwelfare.gov/pubPDFs/reunify.pdf> (compiling state "reasonable efforts" laws).

¹⁴³ GETTING DOWN TO BASICS, *supra* note 1, at 15–17.

¹⁴⁴ *Id.* at 10.

¹⁴⁵ See generally CHILD WELFARE LEAGUE OF AMERICA, *supra* note 2 (discussing resources to support LGBTQ children in care); GETTING DOWN TO BASICS, *supra* note 1 (discussing resources to support LGBTQ children in care).

¹⁴⁶ Cf. Vandervort, *supra* note 8, at 211–16 (discussing the Multi-Ethnic Placement Act, and summarizing the controversies surrounding race and adoption/placement). See also Frank E. Vandervort, *The Indian Child Welfare Act*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 257 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

¹⁴⁷ See, e.g., Thomas A. Mayes, *Students with No-Contact Orders Against Abusive Classmates: Recommendations for Educators*, PREVENTING SCH. FAILURE, Summer 2008, at 37 (discussing teen dating violence).

At the end of the day, which of these four children's needs are met and which needs go unmet? Who answers this question? Fundamentally, why is this even a permissible question to ask?

III. CONCLUSION

Meeting the needs of all children in state care includes meeting the needs of children and youth who identify as LGBTQ. Meeting the needs of all LGBTQ children and youth requires a nuanced and sophisticated approach that acknowledges that the needs of the LGBTQ community are not limited to the needs of LGBTQ individuals who are white, heteronormative, affluent, and with no disability. Developing services to provide for the needs of the LGBTQ population that is diverse as society at large requires the willingness to ask tough questions and probe underlying assumptions about privilege.

Only when this is done will all of the needs of all LGBTQ children and youth in state care be addressed. Only then will the child welfare system be able to say that it is meeting its core mission and statutory requirements.