

# THE IDENTITY FACTOR

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*Identity development is one of the most important processes that occur during childhood. For certain populations of children, such as those who are LGBTQ+ or multiracial, the path to healthy identity development is substantially more complicated. These children must navigate the development of their identities while existing in a world in which they will frequently encounter a lack of societal understanding and acceptance. Children within these populations face elevated risks of short- and long-term harms, including suicidal ideation, depression, substance abuse, and low self-esteem. As a result, it is critically important that LGBTQ+ and multiracial youth receive support in developing a healthy identity with respect to their sexual orientation, gender, and race. Social science research indicates that the type of identity support that has the greatest protective effect for LGBTQ+ and multiracial youth is the support provided by a child's parents. Children who are LGBTQ+ or multiracial generally fare significantly better when they are raised by parents who support and encourage their identity development. Despite this reality, under current state laws governing child custody, there is no requirement that courts consider each party's support (or lack thereof) for a child's identity development in determining which party should receive custody of a child. This Article argues for legal reform to ensure that, when relevant, courts consider support for a child's identity development as a factor when making custody determinations. It sets forth detailed proposals addressing*

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*how states can integrate identity support into existing laws governing child custody.*

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## INTRODUCTION

The development of a healthy identity is critical to an individual's long-term emotional, mental, and physical well-being. Childhood is a time during which key aspects of

identity development occur.<sup>1</sup> For certain populations of children, however, the development of a healthy identity poses significant and unique challenges. LGBTQ+<sup>2</sup> and multiracial youth represent two populations of children for whom healthy identity development is both particularly complex and of core importance. For these populations of children, parental support plays an essential role in the development of a healthy identity. Yet, despite their uniform goal of protecting and promoting children's well-being, current legal standards governing child custody disputes have not effectively integrated considerations relating to each party's support for the child's identity development.

LGBTQ+ youth commonly experience disapproval, discrimination, and lack of understanding by family members as well as peers and other individuals with whom they must interact on a regular basis while attending school, participating in extracurricular activities, and in society at large.<sup>3</sup> In addition, in recent years, a growing number of states have enshrined discrimination against LGBTQ+ youth within their laws and legal systems.<sup>4</sup> The day-to-day realities of growing up as a member of the LGBTQ+ community take a significant toll on many LGBTQ+ youth. Notably, research indicates that children who identify as LGBTQ+ are at substantially higher risk than their non-LGBTQ+ counterparts of suicide, depression, substance abuse, and homelessness.<sup>5</sup>

Multiracial youth face their own unique challenges. These children must navigate the development of a racial identity that

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1. See *infra* Part II (describing the identity development that occurs during childhood in the areas of race, gender, and sexual orientation).

2. *Glossary of Terms: LGBTQ*, GLAAD, <https://glaad.org/reference/terms> [<https://perma.cc/6KD6-4DH3>] (providing a definition of the term LGBTQ).

3. See *infra* Sections II.A–B.

4. See *infra* Sections II.A–B.

5. *Facts About Suicide Among LGBTQ+ Young People*, TREVOR PROJECT, <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide> [<https://perma.cc/WM67-6YAC>] (last updated Jan. 2024) (discussing the increased risk of suicide, suicide attempts, and depression for LGBTQ+ youth); *Homelessness and Housing Instability Among LGBTQ Youth*, TREVOR PROJECT (Feb. 3, 2022), <https://www.thetrevorproject.org/research-briefs/homelessness-and-housing-instability-among-lgbtq-youth-feb-2022> [<https://perma.cc/3ESQ-D7M8>] (discussing the increased risk of homelessness for LGBTQ+ youth); *Substance Use and Suicide Risk Among LGBTQ Youth*, TREVOR PROJECT (Jan. 27, 2022), <https://www.thetrevorproject.org/research-briefs/substance-use-and-suicide-risk-among-lgbtq-youth-jan-2022> [<https://perma.cc/FR8D-6RNU>] (discussing the increased risk of substance abuse for LGBTQ+ youth).

includes multiple components and often differs from that of either of their parents. Multiracial youth commonly face pressure from family members, their communities, and society to identify as one race over another and to suppress aspects of their racial identity.<sup>6</sup> However, the ability of multiracial children to identify positively with the different components of their racial heritage can be critical to their mental and emotional well-being.<sup>7</sup> Multiracial youth who are unable to develop a racial identity that encompasses the various components of their racial makeup face an increased risk of internalized self-oppression, low self-esteem, and feelings of disloyalty and guilt.<sup>8</sup>

Parental support plays a critical role for both LGBTQ+ and multiracial youth. Notably, there is a substantial body of social science research indicating that for LGBTQ+ youth, parental support is the most significant factor influencing the development of a healthy identity.<sup>9</sup> LGBTQ+ youth whose parents are supportive of their identity development not only are at significantly lower risk of suicide, depression, and substance abuse, but they also enjoy greater overall well-being and better health as they enter adulthood.<sup>10</sup> Similarly, research focusing on multiracial children and other categories of children whose race differs from that of their parent(s) has highlighted the crucial role of parental support in a child's development of a healthy racial identity.<sup>11</sup> Multiracial children whose parents recognize racial differences and foster the child's ability to explore their racial identity in an open and supportive environment tend to have higher emotional well being, greater pride in their racial

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6. Gayle Pollack, *The Role of Race in Child Custody Decisions Between Natural Parents over Biracial Children*, 23 N.Y.U. REV. L. & SOC. CHANGE 603, 620 (1997); see also Sarah E. Gaither, "Mixed" Results: *Multiracial Research and Identity Explorations*, 24 CURRENT DIR. PSYCH. SCI. 114, 114 (2015) ("[M]ultiracials also report that the constant social pressure of having to 'choose' one of their racial groups—whether due to social context or societal pressures to conform to a monoracial category—is a source of tension."); Marie-Amélie George, *Exploring Identity*, 55 FAM. L.Q. 1, 40 (2021) ("Multiracial individuals report a constant social pressure to 'choose' one of their racial groups, rather than identify as multiracial.").

7. Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1267–68 (2014); Pollack, *supra* note 6, at 619.

8. Lucas, *supra* note 7.

9. See *infra* Sections II.A–B.

10. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEPT OF HEALTH & HUM. SERVS., HHS NO. PEP14-LGBTKIDS, A PRACTITIONER'S RESOURCE GUIDE: HELPING FAMILIES TO SUPPORT THEIR LGBT CHILDREN (2014) [hereinafter PRACTITIONER'S RESOURCE GUIDE].

11. See *infra* Section II.C.

background, a stronger sense of belonging, and fewer challenges with their racial identity.<sup>12</sup>

Importantly, despite the clear and significant body of social science research indicating that parental support for a child's identity development is critical to the health and overall well-being of LGBTQ+ and multiracial youth, current child custody laws lack any requirement that courts consider this factor in determining which party should receive custody of a child. As a result, the decision of whether and to what extent to consider each party's support or lack thereof for a child's identity development is left completely within the judge's discretion. This is extremely problematic given that protecting and promoting the best interests of a child is supposed to be the core focus of child custody determinations.

This Article builds on the work of other scholars, including Professor Marie-Amélie George, whose scholarship has highlighted the need for changes to custody laws and procedures to ensure that courts do not overlook the importance of parental support for a child's identity exploration.<sup>13</sup> Specifically, this Article argues for reform to current child custody laws to more effectively integrate considerations relating to each party's willingness and ability to support a child's development of a healthy identity. Integrating support for a child's identity development into existing child custody standards would not be unrealistic or unprecedented when considering legislation and regulations that already exist in related areas of the law. For example, a number of states have enacted legislation governing the treatment of children in the foster care system that explicitly aims to support and protect youth identity development relating to race, gender, and sexual orientation.<sup>14</sup> Extending identity support considerations from the foster care context to a child custody context is a natural progression—both areas of the law are focused on protecting the well-being and best interests of children.

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12. Jamie Weaver & Azadeh Masalehdan Block, Identity Development in Biracial Children: Contextual Factors from Social Work, 7 KEYSTONE J. UNDERGRADUATE RSCH. 13, 17–19 (2020) (authored by an undergraduate student with a supervising professor); Theresa L. LaBarrie, Multiracial Identity Development: Illuminating Influential Factors, FAM. INST. AT NW. U. 2–3, 5–6 (2017), [https://www.family-institute.org/sites/default/files/pdfs/multiracial\\_identity\\_development.pdf](https://www.family-institute.org/sites/default/files/pdfs/multiracial_identity_development.pdf) [https://perma.cc/S4FF-7PTM]; Pollack, *supra* note 6, at 621.

13. *See generally* George, *supra* note 6.

14. *See infra* notes 243–246 and accompanying text.

Although reform to more effectively integrate identity support considerations into existing child custody standards is both necessary and feasible, states will have to grapple with a number of significant and complex questions when structuring these new standards. For example, states will need to identify how to most effectively frame the factor of parental support for a child's identity development, including whether to require a showing of harm to a child in order for this factor to weigh against a party. States will also need to determine whether to explicitly identify the categories of identity development encompassed within the factor or to instead adopt a broader standard that includes consideration of parental support for identity development that is unrelated to race, gender, or sexual orientation. Determining the best approach to these types of core questions will involve not only weighing the merits of each potential option but also the likelihood of success for each of the options when considering the political makeup of the state's legislature.

Regardless of the nuances of how states choose to structure their reform, adding parental support for a child's identity development to standards governing child custody disputes will have a number of important effects. As an initial matter, it will provide much-needed guidance to judges and others who play a significant role in child custody determinations regarding the validity and importance of considering parental support for a child's identity development when determining what custody arrangement will most effectively protect and promote the well-being of a child. It will also make it significantly more difficult for judges to exclude from child custody proceedings the introduction of key research-based evidence relating to youth identity development and the importance of parental support during the process. Finally, integrating identity support into child custody standards will send a clear message to society and, perhaps more importantly, parents, regarding the importance of parental support to the development of healthy identities in children. Each of these effects will further the critical goal of protecting the well-being of children who face unique and significant challenges in developing healthy identities.

The Article proceeds as follows: Part I traces the history and development of the legal standards governing child custody disputes. Part II sets forth and discusses the significant bodies of social science research regarding identity development for LGBTQ+ and multiracial children. In analyzing this research,

this Part highlights findings regarding the role of parental support in developing a healthy identity for children within these populations. Part III begins by surveying a range of cases that highlight the vastly differing approaches courts currently take when considering parental support for a child's identity development in child custody cases. It then identifies and sets forth detailed analyses of several potential methods through which existing child custody standards (both those governing disputes between parents and those governing disputes involving third parties) could be restructured to effectively integrate considerations relating to a child's development of a healthy identity. Finally, Part IV addresses two areas of likely pushback to legal reform aimed at integrating support for identity development into existing child custody standards. Specifically, it addresses concerns about the explicit consideration of race within child custody laws and the substantial barriers in conservative states to enacting any type of reform that promotes support for a child's identity development relating to race, gender, or sexual orientation.

## I. THE LEGAL STANDARDS GOVERNING CHILD CUSTODY DISPUTES

### A. *Disputes Between Legal Parents*

Most child custody disputes occur between legal parents. These disputes commonly arise between marital parents going through the process of divorcing or non-marital parents who no longer share an intact relationship. The legal standards governing child custody disputes between parents have evolved significantly over the years. In the eighteenth and early nineteenth centuries, custody law generally did not focus on the best interests of a child, instead providing fathers with an almost absolute right to custody based on the notion, derived from English common law, that children should be considered the property of their fathers.<sup>15</sup> In the nineteenth century, the view of children as the property of their fathers started to change as women took on greater responsibility for the domestic sphere

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15. Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L.J. 403, 409 (2018).

and men increasingly worked outside of the home.<sup>16</sup> Courts began to focus their child custody analyses on determining which custody arrangement would best promote the well-being of the child(ren) involved in the case. A number of standards emerged to guide courts in their decision-making.<sup>17</sup>

One of the earliest standards to be widely applied in custody disputes between legal parents was the *tender years doctrine*. This doctrine set forth a presumption that custody of infants and young children should be granted to a child's mother unless she was unfit, while custody of older children should be given to the parent of the same sex.<sup>18</sup> The tender years doctrine was based upon gendered stereotypes and beliefs that mothers are more nurturing toward their children and more important to children's early development than fathers.<sup>19</sup> In 1830, Maryland became the first state to adopt the tender years doctrine.<sup>20</sup> By the end of the nineteenth century, the tender years doctrine had emerged as the "new orthodoxy" in child custody disputes.<sup>21</sup> The tender years doctrine had a long lifespan, maintaining widespread acceptance until the 1970s.<sup>22</sup> However, state courts began to strike down the tender years doctrine in the mid- to late 1970s, holding that it "violated emerging constitutional law concerning gender equality."<sup>23</sup>

Following the decline of the tender years doctrine, the view that custody determinations should be made based upon an individualized assessment of what custody arrangement would further the best interests of the particular child in question gained increasing acceptance.<sup>24</sup> Legislatures began to identify a variety of factors to help guide courts when determining what custody arrangement would promote the best interests of a child. These factors related to, inter alia, the disposition and ability of

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16. *Id.* at 410; J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

17. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 793 (5th ed. 2019).

18. *Id.*

19. *Id.* at 794; Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 295 (1992).

20. Raymon Zapata, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR 197, 200 (2003).

21. ABRAMS ET AL., *supra* note 17, at 793.

22. *Id.*

23. *Id.*

24. Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN'S L.J. 173, 185 (2000).



each parent to care for a child and meet a child's needs; the bonds between each parent and a child; a child's adjustment to their home, school, and community; each parent's health, moral fitness, and home environment; and the wishes of the parents and child.<sup>25</sup>

Presumptions in favor of one parent over the other continued to play a core role when courts determined which custody arrangement would promote a child's best interests. Specifically, in determining which custody arrangement would further the best interests of a child, courts relied heavily on considerations relating to which party served as a child's primary caretaker prior to dissolution.<sup>26</sup> Some states enacted a presumption that the primary caretaker should receive custody, while other states relied on primary caretaking considerations as key factors in the best-interests analysis.<sup>27</sup>

The historical custody approaches—the view of children as the property of their fathers, the tender years doctrine, and the primary caretaker presumption—each focused on identifying the one parent who should receive custodial rights. These standards “signaled the law’s conviction that, after a marital breakup, children could properly be raised only by a sole custodial parent.”<sup>28</sup> At the time, there was a prevalent belief that joint custody arrangements were contrary to children’s best interests.<sup>29</sup> This was based on fears that joint custody arrangements would create instability for children, result in increased conflict between parents, and weaken the critical bond

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25. See, e.g., KY. REV. STAT. ANN. § 403.270 (West 1979); UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 197–98 (1979).

26. Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption*, 30 NOTRE DAME J.L., ETHICS & PUB. POL’Y 321, 324–25 (2016); Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J.L. & FAM. STUD. 1, 2 (1999).

27. Karmely, *supra* note 26.

28. Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 156 (2014); see also Karmely, *supra* note 26, at 325.

29. See *infra* note 30 and accompanying text.

between a child and preferred caretaker.<sup>30</sup> As a result, courts historically disfavored joint custody arrangements.<sup>31</sup>

Judicial resistance to joint custody started to lessen in the latter part of the twentieth century.<sup>32</sup> As society's view of gender roles shifted, there became increasing support for moving away from the "winner/loser" model of custody determinations and toward a joint custody model that promoted both parents playing an active role in a child's life.<sup>33</sup> The emergence of social science research indicating that fathers remained more involved in their children's lives in joint custody arrangements and that children benefited from the continued involvement of their fathers in their lives provided further support for joint custody as a viable option.<sup>34</sup> By 1984, thirty-two states had enacted laws explicitly recognizing the ability of courts to order joint custody.<sup>35</sup>

Today, every state employs some version of the best interests of the child standard to govern custody disputes between two fit legal parents.<sup>36</sup> States' custody standards generally instruct courts to weigh a variety of factors when determining which arrangement will most effectively promote a child's well-being. Although the factors differ by state, common factors include:

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30. *DeForest v. DeForest*, 228 N.W.2d 919, 925 (N.D. 1975); *Mixson v. Mixson*, 171 S.E.2d 581, 586 (S.C. 1969); *In re Levsen*, 510 N.W.2d 892, 892 (Iowa Ct. App. 1993); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 43–44 (2008); June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 11 (2017); J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003, 1008–09 (2015).

31. Caulley, *supra* note 15, at 419; Karmely, *supra* note 26, at 325.

32. Caulley, *supra* note 15, at 422.

33. *Id.* at 422–23.

34. Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1544 (2016).

35. Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 122 (2016).

36. IRA MARK ELLMAN, AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION FOREWORD 2 (2002); Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 355 (2016); Matthew Knez, Note, *Best Interest of the Child: The Quarterback Parent Who Goes the Distance and Maintains the Ties*, 36 U. LA VERNE L. REV. 75, 78 (2014); Alexa R. Schwartz, Note, *Too Many Chips on the Table: A Call for the Bifurcation of Money and Custody in Divorce*, 49 HOFSTRA L. REV. 865, 873 (2021).

- (1) the bonds that exist between the child and their parents, siblings, and other family or household members;
- (2) each parent's prior caretaking and demonstrated ability and willingness to effectively care for the child;
- (3) continuity of caretaking;
- (4) the mental, physical, and emotional health of each parent and the child;
- (5) the home environment of each parent;
- (6) the child's adjustment to their home, school, and community;
- (7) the wishes of a child who is of sufficient age and maturity;
- (8) parental conduct that harms the child (some states consider parental conduct or morality without any qualification that it affect the child);
- (9) the "friendly parent" factor, which considers each parent's willingness to foster a healthy relationship between the other parent and the child;<sup>37</sup>
- (10) any history of a parent engaging in domestic or child abuse;
- (11) any parental history of substance abuse, and;

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37. Pruett & DiFonzo, *supra* note 28, at 157. There is increasingly recognition that the friendly parent factor should not be applied in cases involving domestic violence. *Id.* ("Some statutes attempt to address these concerns by declaring that the friendly parent provision does not apply in cases involving domestic violence.").

- (12) any other factor the court deems relevant (the “catchall” factor).<sup>38</sup>

Along with providing the best-interests factors, many custody statutes also specify the jurisdiction’s approach to joint custody arrangements. While the majority of state statutes do not expressly set forth a presumption in favor of any form of custody,<sup>39</sup> a substantial minority of jurisdictions employ some form of a presumption in favor of joint custody.<sup>40</sup> Common factors that courts consider in determining whether a joint custody award is appropriate include:

- (1) whether the parents can communicate effectively regarding the child;
- (2) whether each parent will support the other parent’s relationship with the child, cooperate with the other parent on issues relating to the child, and show the other parent respect;

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38. See ALASKA STAT. ANN. § 25.24.150(c) (West 2022); COLO. REV. STAT. ANN. § 14-10-124 (West 2022); CONN. GEN. STAT. § 46b-56(c) (2022); FLA. STAT. ANN. § 61.13(3) (West 2022); LA. CIV. CODE ANN. art. 134(A) (2022); ME. REV. STAT. tit. 19-A, § 1653(3) (West 2022); MICH. COMP. LAWS ANN. § 722.23 (2022); N.D. CENT. CODE § 14-09-06.2(1) (2022); VA. CODE ANN. § 20-124.3 (West 2022); see also UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 197–98 (1970); Rebecca E. Hatch, *Gender Bias as Factor in Child Custody Cases*, 131 AM. JUR. PROOF OF FACTS 3D 457 (2022); *Determining the Best Interests of the Child*, CHILD.’S BUREAU, ADMIN. FOR CHILD. & FAMS., <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/determining-best-interests-child.pdf?VersionId=R1oX898e52Rk5qjeXhua3VD7ZCySHMFq> [https://perma.cc/8BJ3-SB2M] (last updated Sept. 2023).

39. Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More than Semantics When Parents Share Parenting Responsibilities*, 26 BYU J. PUB. L. 229, 230 (2012). Some states go further than simply omitting a presumption and specify that there is no presumption in favor of any form of custody. See GA. CODE ANN. § 19-9-3(a)(1) (West 2022); MASS. GEN. LAWS ch. 208, § 31 (2022).

40. See ARK. CODE ANN. § 9-13-101 (West 2022); CAL. FAM. CODE § 3080 (West 2022); CONN. GEN. STAT. § 46b-56a(b) (2022); D.C. CODE ANN. § 16-914(2) (West 2022); FLA. STAT. ANN. § 61.13(c)(2) (West 2022); IDAHO CODE ANN. § 32-717B (West 2022); LA. CIV. CODE ANN. art. 132 (2022); MINN. STAT. § 518.17(b)(9) (2022); MISS. CODE ANN. § 93-5-24(4) (West 2022); NEV. REV. STAT. § 125C.002–.0025 (2022); N.M. STAT. ANN. § 40-4-9.1(A) (West 2022); UTAH CODE ANN. § 30-3-10(3) (West 2022); W. VA. CODE ANN. §§ 48-1-241a, 48-9-206 (West 2022); WIS. STAT. § 767.41(2), (4) (2022); see also IOWA CODE § 598.41(2)(b) (2022) (“If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child.”).

- (3) whether each parent has actively cared for the child prior to separation and is capable of providing the child with adequate care;
- (4) whether each parent has established a close relationship with the child;
- (5) the extent to which one or both parents oppose joint custody;
- (6) a sufficiently mature child's wishes regarding joint custody;
- (7) the geographic locations of the parents;
- (8) the potential for disruption of the child's life in terms of school, social activities, and community, and;
- (9) any history of domestic violence between the parties.<sup>41</sup>

With regard to the last factor, many states go beyond simply listing domestic violence as a factor and instead employ a presumption against joint custody in cases involving domestic violence.<sup>42</sup> Finally, although most states do not employ a presumption in favor of joint custody, a growing number of state statutes contain language indicating that it is the state's policy to promote "frequent and continuing" contact between the child and each parent and/or to "encourage parents to share the rights and responsibilities of child rearing."<sup>43</sup>

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41. See IOWA CODE § 598.41(3) (2023) (listing factors to be considered in joint custody arrangement determinations); N.M. STAT. ANN. § 40-4-9.1(B) (West 2023) (listing factors to be considered in joint custody arrangement determinations); see also Caulley, *supra* note 15, at 427–28 (discussing specific examples of factor-based custody determinations and stating this approach, in practice, "resemble[s] traditional best-interest decision making"); ANN M. HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4:23, Westlaw (database updated Dec. 2024) (identifying factors courts commonly consider in determining whether to award shared physical custody).

42. See, e.g., WIS. STAT. § 767.31 (2022).

43. See, e.g., ALA. CODE § 30-3-150 (2024); CAL. FAM. CODE § 3020 (West 2024); FLA. STAT. ANN. § 61.13(2)(c)(1) (West 2024); GA. CODE ANN. § 19-9-1 (West 2024); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2023); MO. ANN. STAT. § 452.375(4) (West 2024); N.H. REV. STAT. ANN. § 461-A:2(I) (2023); N.J. STAT. ANN. § 9:2-4

### *B. Disputes Involving Third Parties*

With limited exceptions,<sup>44</sup> the legal standards governing custody disputes between legal parents differ significantly from

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(West 2024); OKLA. STAT. tit. 43, § 110.1 (2024); OR. REV. STAT. ANN. § 107.149 (West 2024); TEX. FAM. CODE ANN. § 153.001(a) (West 2023); VA. CODE ANN. § 20-124.2(B) (West 2024); W. VA. CODE ANN. § 48-9-101(b) (West 2024); IOWA CODE ANN. § 598.41(1)(a) (West 2024); MONT. CODE ANN. § 40-4-212(I) (West 2023); OHIO REV. CODE ANN. § 3109.04 (West 2024).

44. The major exception to the application of a parent-protective standard for disputes between legal parents and third parties arises in the context of equitable parenthood doctrines. Equitable parenthood doctrines—commonly referred to as de facto, psychological, or functional parenthood doctrines—developed as a method of providing rights relating to child custody and visitation to individuals who had functioned in a parental role to a child but had not attained formal legal parent status. Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 56 (2017). The most widely adopted test for determining whether an individual qualifies as an equitable parent requires the petitioner to prove that: (1) the legal parent consented to the formation of a parent-like relationship between the petitioner and child; (2) the petitioner lived in a household with the child; (3) the petitioner “assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing toward the child’s support, without expectation of financial compensation”; and (4) the petitioner served in the role of a parent for long enough “to have established with the child a bonded, dependent relationship parental in nature.” *Id.* at 69 n.83 (quoting *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995)). While in recent years a handful of jurisdictions have passed laws providing that satisfaction of the state’s equitable parenthood doctrine is a basis for establishing full legal parentage, in most jurisdictions an individual who qualifies as an equitable parent is entitled to only certain rights relating to child custody or visitation and is not recognized as a legal parent. *Id.* at 67. In some of these jurisdictions, the equitable parent is treated as equivalent to a legal parent for purposes of the child custody determination, meaning that a pure best-interests standard applies even though the equitable parent has not established full legal parentage and is still technically a third party. *Id.* Courts have upheld as constitutional the use of a best-interests standard in custody disputes between a legal parent and an equitable parent despite the fact that the equitable parent is not a full legal parent. *See Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000); *In re Custody of H.S.H.-K.*, 533 N.W.2d at 436; *V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000). The justification set forth to allow use of the best-interests standard in such disputes is that the element of equitable parenthood doctrines requiring the legal parent’s consent to the formation of the relationship between the child and petitioner adequately recognizes the constitutional rights of legal parents. *Rubano*, 759 A.2d at 974; *In re Custody of H.S.H.-K.*, 533 N.W.2d at 436; *V.C.*, 748 A.2d at 552. It does so by leaving to the legal parent the decision of whether to allow the petitioner to form a parent-like relationship with the child. *Rubano*, 759 A.2d at 974; *V.C.*, 748 A.2d at 552. If a legal parent chooses to exercise their fundamental parental rights by consenting to the formation of a parental relationship between another party and the child, the legal parent cannot subsequently argue that providing that individual with parent-equivalent custody rights violates their constitutional rights. *V.C.*, 748 A.2d at 552.

those governing disputes between legal parents and third parties. This is because fit legal parents have a fundamental constitutional right to direct the care, custody, and control of their child;<sup>45</sup> a right that individuals who are not legal parents (i.e., third parties) lack.<sup>46</sup> When a legal parent is involved in a custody dispute with another legal parent, “each fit parent’s constitutional right neutralizes the other parent’s constitutional right,” allowing for the application of the best interests of the child standard.<sup>47</sup> When a legal parent is involved in a custody dispute with a third party, however, the standard applied must reflect the legal parent’s superior constitutional rights.<sup>48</sup> In most jurisdictions, in order for a third party to prevail in a custody dispute against a legal parent, the third party first must prove, usually by clear and convincing evidence, either that the parent is unfit or that extraordinary circumstances exist such that granting custody to the legal parent would result in substantial harm or detriment to the child’s well-being.<sup>49</sup> If the third party cannot meet this standard, they will not prevail in their custody dispute against the legal parent. If the third party is able to meet this standard, then the court can award custody to the third party, but only if doing so would further the best interests of the child.<sup>50</sup>

While this standard sets a high bar for third parties involved in custody disputes with legal parents, it does provide for the possibility of third parties obtaining custody in compelling situations. Proving parental unfitness usually requires demonstrating that the parent has engaged in serious abuse or neglect or is unable to adequately care for the child.<sup>51</sup>

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45. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *see also* *Meyer v. Nebraska*, 262 U.S. 390, 401–03 (1923); *ABRAMS ET AL.*, *supra* note 17, at 776.

46. *E.N. v. T.R.*, 255 A.3d 1, 15 (Md. 2021) (quoting *McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005)) (“A private third party has no fundamental constitutional right to raise the children of others.”).

47. *Basciano v. Foster*, 284 A.3d 1116, 1130 (Md. Ct. Spec. App. 2022); *Rico v. Rodriguez*, 120 P.3d 812, 818 (Nev. 2005).

48. *H.S. v. N.S.*, 173 Cal. App. 4th 1131, 1142–24 (Ct. App. 2009).

49. *RESTATEMENT OF THE L., CHILD. & THE L.* § 1.81 (AM. L. INST., Tentative Draft No. 2, 2019).

50. *McDermott*, 869 A.2d at 772; 59 AM. JUR. 2D *Parent and Child* § 37 (2024).

51. ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 10:5, Westlaw (database updated Dec. 2024) (“Unfitness may include abuse, neglect, or simply an inability to provide proper care for the child.”); Jade Yeban, *What Is an Unfit Parent?*, FINDLAW (May 25, 2023), <https://www.findlaw.com/family/child-custody/what-is-an-unfit-parent.html> [https://

If the third party cannot prove that the parent is unfit, the remaining route to obtain custody requires demonstrating the existence of extraordinary circumstances that make it likely that parental custody would be significantly detrimental to the child's well-being.<sup>52</sup> The extraordinary-circumstances standard may encompass a broader range of situations. For example, in some cases, courts have determined that the extraordinary-circumstances standard was satisfied where the parent, for unjustifiable or non-compelling reasons, left the child with the third party for a substantial period, and during that time the child had limited or no contact with the parent and formed a significant bond with the third party.<sup>53</sup> In other instances, the considerations underlying claims of parental unfitness and extraordinary circumstances overlap—for instance, extraordinary circumstances have been found to exist in situations when a parent is unable or unwilling to adequately care for a child or meet a child's physical, mental, or emotional needs.<sup>54</sup>

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perma.cc/LUB5-E5JX] (describing standards for determining parental unfitness in custody disputes).

52. RESTATEMENT OF THE L., CHILD. & THE L., *supra* note 49.

53. *Id.*; see also Robert XX. v. Susan YY., 164 N.Y.S.3d 257, 257 (App. Div. 2022) (awarding custody to the parent's former partner who had cared for child while the parent was incarcerated); Karen D. v. Florence D., 620 N.Y.S.2d 358, 358 (App. Div. 1994) (granting custody to the child's grandmother, with whom the three-year-old child had lived since birth, where the child's mother had not made provisions for the child's care and had visited him only sporadically); West v. Turner, 832 N.Y.S.2d 78, 79 (App. Div. 2007) (granting custody to a third party who had cared for the child for the past six years, during which time the parent did not provide any support and had only sporadic contact with the child); Trenton v. Christ, 140 A.2d 660, 662 (Md. 1958) (awarding custody to the grandparents with whom the ten-year-old child had lived since birth and the child was experiencing emotional upset about the prospect of a change in custody and had never visited her father or his new family at their recent homes); Dietrich v. Anderson, 43 A.2d 186, 191, 193 (Md. 1945) (maintaining custody with the four-year-old child's aunt and uncle who had raised the child since birth due to the mother's return to her home state and the father's four-year absence to attend college).

54. RESTATEMENT OF L., CHILD. & THE L., *supra* note 49; See *In re Guardianship of D.R.G.*, 62 P.3d 1127, 1131–33 (Nev. 2003) (appointing aunt of a child with cerebral palsy and cystic fibrosis as the child's guardian where the father could not adequately provide for the child's medical or emotional needs); William L. v. Betty T., 663 N.Y.S.2d 324, 324–26 (App. Div. 1997) (awarding custody to aunt due to the father's lack of ability to address the children's attention deficit disorder and other special needs); *In re Custody of RRB*, 31 P.3d 1212, 1219 (Wash. Ct. App. 2001) (awarding a third-party custody of a child who had attempted suicide and required treatment and stability that the legal parents could not provide); *In re Custody of Stell*, 783 P.2d 615, 622 (Wash. Ct. App. 1989) (awarding custody to



Overall, regardless of whether the case is between legal parents or involves a third party, the well-being of the child is the core focus of legal standards governing custody disputes. Consequently, “scientific conclusions regarding what promotes children’s health and welfare are integral to courts’ custody decisions.”<sup>55</sup>

## II. SOCIAL SCIENCE RESEARCH REGARDING CHILDREN’S IDENTITY DEVELOPMENT AND THE IMPORTANCE OF PARENTAL SUPPORT

There exists a significant body of social science research regarding the importance of healthy identity development during childhood and the important role of parental support in this process.<sup>56</sup> A substantial portion of this research has focused on identity development for LGBTQ+ youth and how parental support (or lack thereof) during childhood and adolescence affects this population. The relatively high degree of focus on identity development within the LGBTQ+ population likely is due, at least in part, to the well-documented challenges faced by LGBTQ+ individuals. It remains common for LGBTQ+ children to experience harmful familial and societal disapproval of their identity and to encounter significant discrimination in their daily lives. Sadly, though perhaps unsurprisingly given this reality, LGBTQ+ youth are at a substantially higher risk than their non-LGBTQ+ counterparts of attempting or committing suicide, depression, substance abuse, and homelessness.<sup>57</sup>

In addition to the social science research regarding LGBTQ+ identity development, there also exists a significant body of research regarding racial identity development during childhood and the role parental support plays in the development of a healthy racial identity.<sup>58</sup> An important subset of this research has focused on the development of healthy racial identities in multiracial children.<sup>59</sup> Children whose biological

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the child’s aunt, who was involved in the child’s mental health treatment and had demonstrated the ability and willingness to address the child’s mental health issues, where the father lacked such ability or commitment); *In re Marriage of Allen*, 626 P.2d 16, 23 (Wash. Ct. App. 1981) (granting custody of a deaf child to a third party where father made no effort to learn sign language).

55. George, *supra* note 6, at 6.

56. See, e.g., Weaver & Block, *supra* note 12.

57. See sources cited *supra* note 5.

58. See *infra* Section II.C.

59. See *infra* Section II.C.

parents are not the same race as each other face unique challenges. These children often must navigate the development of a racial identity that includes multiple components and differs from that of either parent. The ability of multiracial children to identify positively with the different components of their racial heritage can be critical to their mental and emotional well-being.<sup>60</sup> Multiracial youth who are unable to develop a racial identity that encompasses the various components of their racial makeup face an increased risk of internalized self-oppression, low self-esteem, and feelings of disloyalty and guilt.<sup>61</sup> Similarly, other categories of children whose race differs from that of their parent(s), such as children adopted by parents of another race, face unique and significant barriers to developing a healthy racial identity and are at increased risk of emotional distress, low self-esteem, and feelings of isolation, lack of belonging, and rejection.<sup>62</sup>

Notably, “even though people may be born with a particular racial phenotype or a predisposition for same-sex attraction, developing a sense of identity related to those biological traits is still a process—one that involves learning about, relating to, and committing to, socially constructed meanings associated with the biological status.”<sup>63</sup> This Part will examine the existing body of social science research regarding the childhood development of identities relating to sexual orientation, gender, and race. It will highlight, in particular, the findings that have emerged regarding the role of parental support in fostering the healthy development of such identities.

It is important to note that although a person’s sexual orientation exists independently of their gender identity and vice versa,<sup>64</sup> some studies have focused on the LGBTQ+ population as a singular group that includes both lesbian, gay, or bisexual (LGB) individuals and transgender and gender nonconforming (TGNC) individuals.<sup>65</sup> More recently,

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60. Lucas, *supra* note 7; Pollack, *supra* note 6, at 619.

61. Lucas, *supra* note 7.

62. Marcia Zug, *ICWA’s Irony*, 45 AM. INDIAN L. REV. 1, 53–54 (2021).

63. Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 331 (2007).

64. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [<https://perma.cc/TA23-E4ZT>].

65. See, e.g., Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. CHILD & ADOLESCENT PSYCH. NURSING 205 (2010).

recognizing that these two forms of identity differ from each other in important ways and that TGNC youth often experience unique challenges and vulnerabilities, additional research has focused more narrowly on the development of gender identity and the importance of parental support in that context.<sup>66</sup> As a result, in discussing the existing body of social science research on LGBTQ+ children, the first Section will address both research that focuses solely on LGB youth and research that focuses more broadly on the LGBTQ+ youth population as a whole. The subsequent Section discusses the more narrow emerging body of social science research focused specifically on TGNC children.

### A. *Sexual Orientation*

Over the past several decades, there has been a significant increase in the number of youth who identify as LGB,<sup>67</sup> with recent research indicating that over 9 percent of adolescents now identify as LGB.<sup>68</sup> This is likely due to the rapid increase in visibility, societal acceptance, and legal protection of LGB individuals and families.<sup>69</sup> The vastly greater availability of information and resources relating to sexual orientation “has contributed to significant changes in how children and adolescents learn about LGBT people and their lives. And . . . this has helped young people come out at much earlier ages than prior generations of LGBT adults.”<sup>70</sup>

The average point at which youth, regardless of their sexual orientation, first report experiencing sexual or romantic attraction is around ten years old.<sup>71</sup> However, sexual orientation is about more than just sex—it is also “about human relationships and connectedness, including social and emotional relatedness,” and recent research indicates that it is

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66. See *infra* Section II.B.

67. PRACTITIONER’S RESOURCE GUIDE, *supra* note 10, at 2.

68. KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 3 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf> [<https://perma.cc/VB8N-JX9D>].

69. See PRACTITIONER’S RESOURCE GUIDE, *supra* note 10, at 2.

70. *Id.*; see also Caitlin Ryan, *Supportive Families, Healthy Children*, FAM. ACCEPTANCE PROJECT 1 (2009), [https://familyproject.sfsu.edu/sites/default/files/documents/FAP\\_English%20Booklet\\_pst.pdf](https://familyproject.sfsu.edu/sites/default/files/documents/FAP_English%20Booklet_pst.pdf) [<https://perma.cc/GUQ4-GWUN>] (“As more information has become available about homosexuality, it has been easier for many children and adolescents to realize that they are gay at younger ages.”).

71. Ryan, *supra* note 70; see also PRACTITIONER’S RESOURCE GUIDE, *supra* note 10, at 3.

increasingly common for LGB children to identify their sexual orientation sometime between the ages of seven and twelve.<sup>72</sup> Importantly, coming out is an ongoing process that occurs gradually over time for LGB people.<sup>73</sup> While the critical identity formation that occurs during adolescence is often difficult regardless of an individual's sexual orientation, "it can be markedly more so for LGBT youth who are confronted daily by a heteronormative society that explicitly and implicitly reinforces sexual and gender expectations that are incongruent with their emerging LGBT identities."<sup>74</sup>

When a parent learns that their child identifies as LGB or is exploring their sexuality, a wide range of reactions may occur.<sup>75</sup> Unfortunately for LGBTQ+ children, studies have found that at least half of such children face negative reactions from their families upon coming out.<sup>76</sup> In addition, a disturbingly high proportion of these children—approximately one-third—endure physical abuse at the hands of their families.<sup>77</sup> LGBTQ+ youth also are at disproportionate risk of being forced out of their homes by a family member.<sup>78</sup> Specifically, LGBTQ+ youth are 120 percent more likely to experience homelessness than non-LGBTQ+ youth.<sup>79</sup> Notably, "[f]amily conflict is the primary cause of homelessness for LGBTQ+ youth, which is

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72. Caitlin Ryan, *Generating a Revolution in Prevention, Wellness & Care for LGBT Children & Youth*, 23 TEMP. POL. & C.R. L. REV. 331, 335 (2014).

73. See generally Nicholas A. Guittar & Rachel L. Rayburn, *Coming Out: The Career Management of One's Sexuality*, 20 SEXUALITY & CULTURE 336 (2016) (explaining the study's findings showing the continual process of coming out).

74. W. Roger Mills-Koonce et al., *The Significance of Parenting and Parent-Child Relationships for Sexual and Gender Minority Adolescents*, 28 J. RSCH. ADOLESCENCE 637, 640 (2018).

75. See generally Sabra L. Katz-Wise et al., *Lesbian, Gay, Bisexual, and Transgender Youth and Family Acceptance*, 63 PEDIATRIC CLINICS N. AM. 1011 (2016) (describing the range of parental responses and linking such responses to the form of attachment shared by the parent and child).

76. See, e.g., Brian E. J. Richter et al., *Examining Ethnic Differences in Parental Rejection of LGB Youth Sexual Identity*, 31 J. FAM. PSYCH. 244 (2017).

77. NICHOLAS RAY, NAT'L GAY & LESBIAN TASK FORCE POL'Y INST., AN EPIDEMIC OF HOMELESSNESS 18 (2006); *LGBT+ Experiences of Abuse from Family Members*, GALOP 4 (2022), <https://galop.org.uk/wp-content/uploads/2022/04/Galop-LGBT-Experiences-of-Abuse-from-Family-Members.pdf> [<https://perma.cc/FE8T-P8E2>].

78. *LGBTQ+ Youth Homelessness*, NAT'L NETWORK FOR YOUTH, <https://nn4youth.org/lgbtq-homeless-youth> [<https://perma.cc/7EG9-R68E>].

79. *Id.*

disproportionately due to a lack of acceptance by family members of a youth's sexual orientation or gender identity.”<sup>80</sup>

It is well established that the way in which parents choose to respond to their child's LGB identity can have serious implications for a child. Social science research demonstrates that parental support, or lack thereof, is a key factor affecting the well-being of LGB children and adolescents.<sup>81</sup> Children's perceptions of themselves are influenced to a significant extent by how they believe their parents view them.<sup>82</sup> As a result, parental rejection tends to have significantly negative effects on the psychosocial adjustment of LGB youth.<sup>83</sup>

Studies of LGB youth indicate that parental behavior demonstrating a rejection of an LGB child's identity can be extremely detrimental in a number of critical ways to the physical, mental, and emotional well-being of such children.<sup>84</sup> For example, one oft-cited study found that LGB individuals “who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, [and] 3.4 times more likely to use illegal drugs . . . compared with peers from families that reported no or

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80. *Id.*; see also *Homelessness and Housing Instability Among LGBTQ Youth*, *supra* note 5 (explaining how family conflict specifically related to youth's LGBTQ identities factors into homelessness).

81. Katz-Wise et al., *supra* note 75, at 1019 (“[F]amily rejection may have serious consequences for LGBT youth's physical and mental health.”); Mills-Koonce et al., *supra* note 74, at 647 (citation omitted) (“[I]n a study of sexuality-specific social supports from parents, peers, and the community, researchers reported that parental support exerted the strongest positive impact on LGBT youth adjustment.”); Ryan, *supra* note 70, at 4 (“Our research shows that families, parents, foster parents, caregivers and guardians can have a very dramatic impact on their LGBT children.”); *Parents' Influence on LGBTQ Teens*, CDC (Nov. 22, 2024), <https://www.cdc.gov/healthy-youth-parent-resources/positive-parental-practices/parents-influence-lgbt.html> [<https://perma.cc/7CHC-XVDY>] (“Studies found that parents play an important role in shaping the health of their lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ+) teen.”).

82. Diana D. van Bergen et al., *Parental Responses to Coming out by Lesbian, Gay, Bisexual, Queer, Pansexual, or Two-Spirited People Across Three Age Cohorts*, 83 J. MARRIAGE & FAM. 1116, 1117 (2021); see also Katz-Wise et al., *supra* note 75 (“Results indicated that less parental rejection was associated with a greater likelihood of having an affirmed identity than struggling with one's identity.”).

83. van Bergen et al., *supra* note 82; see also Mills-Koonce et al., *supra* note 74, at 637 (citations omitted) (“[P]sychological control, rejection, and fear of coming out increase risk for psychopathological development.”).

84. *Parents' Influence on LGBTQ Teens*, *supra* note 81.

low levels of family rejection.”<sup>85</sup> Importantly, rejecting behaviors do not have to involve physical abuse in order to be harmful. The same study found that “rejecting behaviors—such as blocking access to gay friends and resources or preventing a gay youth from attending family events—were just as harmful as physically beating a gay or transgender child.”<sup>86</sup>

Conversely, “research shows that when LGBTQ+ youth have a positive coming out experience with their parents, it helps them to feel whole and experience a sense of coherence.”<sup>87</sup> LGB adolescents whose parents are supportive of their identity not only have significantly lower risks of suicide, depression, and substance abuse, but they also enjoy greater overall well-being and better health as they enter adulthood.<sup>88</sup> LGB youth with highly accepting parents have higher self-esteem and more social support when they become young adults.<sup>89</sup> In addition, LGBTQ+ youth who have accepting families are much more likely to be satisfied with their lives, believe that they will go on to have good lives, and share strong relationships with their families.<sup>90</sup> Interestingly, research indicates that “even small acts of acceptance on the part of parents significantly improves LGBTQ children’s mental health and reduces the risk of suicide and harmful risk-taking behaviors.”<sup>91</sup> Such acts may include, for example, simply talking to a child about their LGBTQ+ identity or being welcoming toward a child’s LGBTQ+ friends.<sup>92</sup> Overall, the way in which parents respond to their child’s identity is a critically important factor affecting a child’s well-being; in fact,

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85. Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, PEDIATRICS, Jan. 2009, at 346, 346; see also Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, 58 J. HOMOSEXUALITY 10, 22 (2011) (citations omitted) (“Several nonrandom studies have found an association between parental rejection because of sexual orientation and higher risk of suicide attempts among LGB youth.”).

86. Ryan, *supra* note 70, at 8.

87. van Bergen et al., *supra* note 82; see also *Parents’ Influence on LGBTQ Teens*, *supra* note 81 (noting that “a positive family environment, with high levels of parental support and low levels of conflict” is “associated with LGBTQ+ youth who experience healthy emotional adjustment”).

88. PRACTITIONER’S RESOURCE GUIDE, *supra* note 10.

89. Aisha Schafer, *Quiet Sabotage of the Queer Child: Why the Law Must Be Reframed to Appreciate the Dangers of Outing Queer Youth*, 58 HOW. L.J. 597, 624 (2015).

90. Ryan, *supra* note 70, at 12.

91. Catherine P. Sakimura, *Beyond the Myth of Affluence: The Intersection of LGBTQ Family Law and Poverty*, 33 J. AM. ACAD. MATRIM. L. 137, 150 (2020).

92. Ryan et al., *supra* note 65, at 211 tbl.4.

research indicates that parental support has the greatest overall impact on the healthy adjustment of LGBTQ+ youth.<sup>93</sup>

### *B. Gender Identity*

Gender identity has been described as a person's "innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves."<sup>94</sup> A person's gender identity may or may not align with the sex that the person was assigned at birth.<sup>95</sup> As of 2022, it is estimated that 1.4 percent of youth between ages thirteen and seventeen, or approximately three hundred thousand youth, identify as transgender—a number which has increased significantly in recent years.<sup>96</sup> As with sexual orientation, the vastly greater availability of information and resources relating to gender identity in recent years has led to a growing awareness of the diversity of gender identities and the unique challenges that transgender and gender nonconforming (TGNC) individuals face.<sup>97</sup>

Gender identity usually develops in stages.<sup>98</sup> For example, children tend to become aware of physical differences between the sexes around age two.<sup>99</sup> By age three, most children are able to label themselves as a boy or a girl.<sup>100</sup> Many children have a stable conception of their gender identity by age four.<sup>101</sup> For other children, the way in which they identify their gender may change over time.<sup>102</sup> Around the age of six or seven, children who

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93. Mills-Koonce et al., *supra* note 74, at 643.

94. *Sexual Orientation and Gender Identity Definitions*, *supra* note 64.

95. *Id.*

96. Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states> [https://perma.cc/9ZWZ-EUYL].

97. *See, e.g.*, PRACTITIONER'S RESOURCE GUIDE, *supra* note 10 (discussing the amount of resources now available for families with LGBT+ children and practitioners who interact with these families).

98. Jason Rafferty, *Gender Identity Development in Children*, HEALTHYCHILDREN.ORG, <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx> [https://perma.cc/625V-HH6Y] (last updated May 7, 2024).

99. *Gender Identity*, CAN. PAEDIATRIC SOC'Y, <https://caringforkids.cps.ca/handouts/behavior-and-development/gender-identity> [https://perma.cc/J9S9-G8SG] (last updated June 2023).

100. *Id.*

101. *Id.*

102. *Id.*

feel that their gender identity does not match the sex assigned to them at birth may begin to develop social anxiety as they discover that they feel differently about their gender identity than their cisgender peers.<sup>103</sup>

TGNC individuals may experience gender dysphoria.<sup>104</sup> Gender dysphoria often begins in childhood and generally is defined as the clinically significant psychological distress or discomfort that may occur when an individual's gender identity does not match the sex they were assigned at birth.<sup>105</sup> The distress associated with gender dysphoria can manifest in different ways, including social withdrawal, depression, and suicidal ideation.<sup>106</sup> It is important to note that the process of gender identity development is not uniform; for example, some children do not begin to experience the feeling that their gender identity does not match the sex they were assigned at birth until puberty.<sup>107</sup>

Only relatively recently has a substantial body of research emerged regarding appropriate methods of support for TGNC youth.<sup>108</sup> In terms of best practices for the care of TGNC youth, significant consensus has developed in the scientific and medical communities regarding the undesirability, serious harms, and ineffectiveness of efforts to change a child's gender identity.<sup>109</sup> Organizations such as the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the Endocrine Society, and the World Professional Association for Transgender Health have made clear that approaches affirming a child's gender identity are the healthiest,

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103. *Id.*

104. *What Is Gender Dysphoria?*, AM. PSYCH. ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [https://perma.cc/9395-D34Q] ("Not all transgender or gender diverse people experience gender dysphoria.").

105. *Id.*; Stephen McLoughlin, *Toxic Privacy: How the Right to Privacy Within the Transgender Student Parental Notification Debate Threatens the Safety of Students and Compromises the Rights of Parents*, 15 DREXEL L. REV. 327, 357 (2023).

106. McLoughlin, *supra* note 105.

107. *See Gender Identity*, *supra* note 99.

108. Laura Edwards-Leeper et al., *Affirmative Practice with Transgender and Gender Nonconforming Youth: Expanding the Model*, 3 PSYCH. GENDER IDENTITY & SEXUAL ORIENTATION 165, 165 (2016).

109. *See* George, *supra* note 6, at 21–22; Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 4.



most child-protective methods of interaction with TGNC youth.<sup>110</sup> The gender-affirming approach is not a one-size-fits-all model—the range of actions that may be involved in this type of approach depends on both the age of a child and the characteristics and particular situation of a child.<sup>111</sup>

For prepubescent children, a gender-affirming approach does not involve any type of medical intervention. Instead, it focuses on allowing a child to explore and express their gender identity. This may include, for example, social gender transitions, such as allowing a child to change their pronouns, name, clothing, or hairstyle to better align with their gender identity.<sup>112</sup> A gender-affirming approach also may involve working with a therapist trained in gender-affirming care, which can be “an asset in helping children and their families build skills for dealing with gender-based stigma, address symptoms of anxiety or depression, and reinforce the child’s overall resiliency.”<sup>113</sup> Research indicates that prepubescent children who socially transition have significantly lower rates of anxiety and depression both as compared to their own rates prior to socially transitioning and the broader population of prepubescent children with gender dysphoria.<sup>114</sup>

For TGNC children who have begun puberty, a gender-affirming approach may involve the use of medications to delay the physical changes caused by puberty.<sup>115</sup> This treatment is reversible, meaning if it is stopped, puberty will

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110. Colt Meier & Julie Harris, *Gender Diversity and Transgender Identity in Children*, AM. PSYCH. ASS’N, <https://www.apadivisions.org/division-44/resources/advocacy/transgender-children.pdf> [<https://perma.cc/7RH8-9PCU>]; Rafferty et al., *supra* note 109; *Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth*, AM. PSYCHIATRIC ASS’N (2020), <https://www.psychiatry.org/getattachment/8665a2f2-0b73-4477-8f60-79015ba9f815/Position-Treatment-of-Transgender-Gender-Diverse-Youth.pdf> [<https://perma.cc/P5N5-Q4MJ>]; *Gender Dysphoria/Gender Incongruence Guideline Resources*, ENDOCRINE SOC’Y (Oct. 25, 2024), <https://www.endocrine.org/clinical-practice-guidelines/gender-dysphoria-gender-incongruence> [<https://perma.cc/VP4N-QXD9>]; Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, INT’L J. TRANSGENDERISM 165, 167 (2012).

111. See Rafferty et al., *supra* note 109.

112. Meier & Harris, *supra* note 110.

113. Rafferty et al., *supra* note 109.

114. Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, PEDIATRICS, Mar. 2016, at 1, 5.

115. *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 14, 2023), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075> [<https://perma.cc/GN38-5P4S>].

resume.<sup>116</sup> For youth with gender dysphoria, undergoing the puberty changes associated with the sex they were assigned at birth can be unbearable.<sup>117</sup> Puberty-blocking medications provide adolescents experiencing gender dysphoria with a number of critical benefits by “prevent[ing] development of secondary sex characteristics and provid[ing] time up until 16 years of age for the individual and the family to explore gender identity, access psychosocial supports, develop coping skills, and further define appropriate treatment goals.”<sup>118</sup> Delaying puberty for TGNC youth experiencing gender dysphoria has been shown to improve overall well-being; mitigate anxiety, depression and suicidal thoughts; aid with the ability to engage in positive social interactions; and reduce the need for future surgeries.<sup>119</sup>

When a TGNC individual reaches age sixteen, gender-affirming care may involve the use of cross-sex hormone treatments that allow the individual to experience the puberty changes associated with the sex with which they identify.<sup>120</sup> Some of the changes that result from this treatment are reversible—while others, such as voice changes, breast development, Adam’s apple protrusion, and male pattern baldness—are not.<sup>121</sup> Additional research is needed to reach a clearer understanding regarding the reversibility of other types of changes, such as those relating to fertility.<sup>122</sup> Finally, while gender-affirming care may eventually involve surgical interventions,<sup>123</sup> gender-affirming surgeries typically cannot be undertaken until an individual reaches adulthood.<sup>124</sup>

Unfortunately for TGNC youth, as awareness and discussion of gender diversity have increased in recent years, there also has been significant backlash to gender

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116. *Id.*

117. George, *supra* note 6, at 20.

118. Rafferty et al., *supra* note 109, at 5.

119. *Puberty Blockers for Transgender and Gender-Diverse Youth*, *supra* note 115.

120. Rafferty et al., *supra* note 109, at 6.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* There are, however, occasional exceptions. “Although current protocols typically reserve surgical interventions for adults, they are occasionally pursued during adolescence on a case-by-case basis, considering the necessity and benefit to the adolescent’s overall health and often including multidisciplinary input from medical, mental health, and surgical providers as well as from the adolescent and family.” *Id.* at 7 (footnotes omitted).

nonconformity. One way in which the backlash has manifested is the increasing number of laws passed in conservative states aimed at disaffirming the identities of TGNC children. Between 2021 and 2023, more than twenty states passed laws targeting TGNC youth.<sup>125</sup> These laws differ by state but generally aim to restrict TGNC youth's access to gender-affirming care, bathrooms, or participation in sports.<sup>126</sup> With regard to the seventeen states that passed laws specifically aimed at restricting youth access to gender-affirming care, most included either bans or significant restrictions on youth access to puberty blockers, cross-sex hormones, and surgeries (even though, as discussed above, gender-affirming surgeries generally cannot be undertaken until adulthood).<sup>127</sup> While most of these laws aim to punish healthcare providers who provide gender-affirming care, a recently enacted Florida law goes even further, allowing the state to take "temporary emergency jurisdiction over a child present in this state if a child has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures," including puberty blockers and cross-sex hormones.<sup>128</sup>

In addition to the laws targeting youth access to gender-affirming care, nine states have enacted laws that prohibit TGNC youth from using bathrooms that do not align with the sex they were assigned at birth,<sup>129</sup> and over twenty states have passed laws that restrict the ability of TGNC youth, particularly transgender girls, to join sports teams that match their gender identity.<sup>130</sup> Other examples of recent anti-TGNC laws include restrictions on the ability of schools to acknowledge diverse gender identities and bans on drag performances in the presence of children.<sup>131</sup> Although cases challenging the

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125. Francesca Paris, *See the States That Have Passed Laws Directed at Young Trans People*, N.Y. TIMES (June 5, 2023), <https://www.nytimes.com/2023/06/05/upshot/trans-laws-republicans-states.html> [https://perma.cc/M8YF-8FFG].

126. *Id.*

127. *Id.*

128. S.B. 254, 2023 Reg. Sess. (Fla. 2023).

129. Paris, *supra* note 125.

130. *Id.*

131. C Mandler, *Teaching About Sexuality and Gender Identity Is Now Banned in Florida Public Schools*, CBS NEWS, <https://www.cbsnews.com/news/florida-public-schools-ban-teach-gender-identity-sexuality> [https://perma.cc/23FA-A4A4] (last updated Apr. 20, 2023, 5:27 PM); Manuela López Restrepo, *The Anti-Drag Bills Sweeping the U.S. Are Straight from History's Playbook*, NPR (Mar. 6, 2023, 5:44 PM), <https://www.npr.org/2023/03/06/1161452175/anti-drag-show-bill-tennessee-trans-rights-minor-care-anti-lgbtq-laws> [https://perma.cc/QGD4-U8PH].

constitutionality of anti-TGNC laws are currently making their way through the court system and have achieved some success thus far,<sup>132</sup> the fight over these issues likely will not be resolved anytime soon. Republican legislators introduced approximately one hundred bills aimed at restricting youth access to gender-affirming care in 2022–2023.<sup>133</sup> Perhaps unsurprisingly given the political landscape, TGNC youth are significantly more likely to experience violence and bullying than their cisgender counterparts.<sup>134</sup>

The emerging research on TGNC children reflects the disturbing reality of the grave psychological, emotional, and physical dangers faced by these children as they move through a world in which they face serious and persistent discrimination and expressions of hate. Studies indicate that a shockingly high percentage of TGNC youth will attempt suicide at some point during their childhood.<sup>135</sup> In a 2018 study conducted by the American Academy of Pediatrics, approximately 50 percent of adolescent transgender women, 30 percent of adolescent transgender men, and 40 percent of non-binary adolescents reported having attempted suicide at least once.<sup>136</sup> Another study found that 42 percent of TGNC youth have a history of self-harm.<sup>137</sup> Notably, the status of TGNC youth is startling, even when compared to other categories of youth within the

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132. See Daniel Breen, *First in the Nation Gender-Affirming Care Ban Struck Down in Arkansas*, NPR, <https://www.npr.org/2023/06/20/1183344228/arkansas-2021-gender-affirming-care-ban-transgender-blocked> [https://perma.cc/6L3S-R74Y] (last updated June 20, 2023, 9:58 PM); Brenden Farrington, *US Judge Blocks Florida Ban on Trans Minor Care in Narrow Ruling*, WPTV (June 6, 2023, 6:55 PM), <https://www.wptv.com/news/state/us-judge-blocks-florida-ban-on-trans-minor-care-in-narrow-ruling> [https://perma.cc/N8AT-G6SE]; *A Federal Judge Has Blocked Much of Indiana's Ban on Gender-Affirming Care for Minors*, NPR (June 16, 2023, 11:28 PM), <https://www.npr.org/2023/06/16/1182931422/judge-blocks-indiana-ban-gender-affirming-care-minors> [https://perma.cc/757V-2KDH].

133. William Brangham & Dorothy Hastings, *Parents Concerned as New State Laws Restrict Rights of Transgender Children*, PBS (Mar. 1, 2023, 6:45 PM), <https://www.pbs.org/newshour/show/parents-concerned-as-new-state-laws-restrict-rights-of-transgender-children> [https://perma.cc/2TFE-FN25].

134. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students*, 68 CDC MORBIDITY & MORTALITY WKLY. REP. 67 (2019).

135. See Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, PEDIATRICS, Oct. 2018, at 4; *Facts About Suicide Among LGBTQ+ Young People*, *supra* note 5.

136. Toomey et al., *supra* note 135, at 1.

137. Claire M. Peterson et al., *Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria*, 47 AM. ASS'N SUICIDOLOGY 475, 475 (2017).

LGBTQ+ community—TGNC children are two to two-and-a-half times more likely to experience depression, seriously contemplate suicide, and attempt suicide than their cisgender LGBQ counterparts.<sup>138</sup>

The choices parents make regarding how they react to a child's expression of their gender identity has critical implications for the well-being of TGNC children.<sup>139</sup> As is the case with LGB children, social science research has identified parental support as an extremely significant protective factor for TGNC children.<sup>140</sup> Unfortunately, a significant proportion of parents react negatively to their child's TGNC gender identity.<sup>141</sup> Research indicates that TGNC youth experience familial rejection at even higher rates than LGBQ youth.<sup>142</sup> It is estimated that at least one-third of transgender children are physically abused.<sup>143</sup> Other common parental-rejecting behaviors include efforts to change a child's gender identity, denigrating or teasing a child about their gender identity, refusing to use a child's preferred names or pronouns, prohibiting a child from wearing clothing or styling their hair in a way that aligns with their gender identity, and isolating a child from their LGBTQ+ friends.<sup>144</sup> Moreover, as discussed above,

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138. *Facts About Suicide Among LGBTQ+ Young People*, *supra* note 5.

139. Katherine A. Kuvalanka et al., *An Exploratory Study of Custody Challenges Experienced by Affirming Mothers of Transgender and Gender-Nonconforming Children*, 57 FAM. CT. REV. 54, 54 (2019) (citation omitted) ("One factor that has emerged as critically important to the well-being of TGNC children and youth is family acceptance.").

140. Robin Fretwell Wilson, *Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off*, 8 U.C. IRVINE L. REV. 583, 615 (2018).

141. Jack Andrzejewski et al., *Perspectives of Transgender Youth on Parental Support: Qualitative Findings from the Resilience and Transgender Youth Study*, 48 HEALTH EDUC. & BEHAV. 74, 75 (2021) ("[M]any [TGNC youth] face parental rejection related to their gender identity."); Kasia Szczerbinski, *I Am Whoever You Say I Am: How the Custodial Decisions of Parents Can Affect and Limit a Transgender Child's Freedom and State of Mind*, 36 CHILD.'S LEGAL RTS. J. 177, 188 (2016) ("At least half of all transgender youth face negative reactions after coming out to their families.").

142. Soon Kyu Choi et al., *Serving Our Youth*, WILLIAMS INST. (June 2015), <https://williamsinstitute.law.ucla.edu/publications/serving-our-youth-lgbtq> [<https://perma.cc/X4RC-B2XJ>].

143. Brian C. Thoma et al., *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, PEDIATRICS (Aug. 2021), at 1, 2; Szczerbinski, *supra* note 141.

144. David Alan Perkiss, *Boy or Girl: Who Gets to Decide? Gender-Nonconforming Children in Child Custody Cases*, 25 HASTINGS WOMEN'S L.J. 57, 62 (2014).

LGBTQ+ youth are significantly more likely than their non-LGBTQ+ counterparts to be forced out of their homes, and family rejection is the primary cause of homelessness for this population.<sup>145</sup>

TGNC youth whose parents engage in rejecting behaviors face substantially increased risks of emotional, mental, and physical harms.<sup>146</sup> Specifically, “high levels of parental pressure to try to change [the child’s] gender expression to enforce gender conformity is related to . . . a nearly four times greater likelihood of attempted suicide.”<sup>147</sup> This means, as the authors of one study aptly noted, the way in which parents respond to their child’s gender identity might be “the difference between life and death” for TGNC youth.<sup>148</sup> Parental rejection is correlated with significantly higher levels of depression in TGNC youth.<sup>149</sup> In another study, depressive symptoms were reported in 75 percent of TGNC youth whose parents were not supportive as compared to only 23 percent of TGNC youth who had supportive parents.<sup>150</sup> In addition to increased rates of attempted suicide and depression, parental rejection is linked to significantly greater levels of substance abuse and risky sexual behavior for TGNC youth.<sup>151</sup>

At the other end of the spectrum, TGNC adolescents whose parents support their gender identity reported significantly higher levels of satisfaction with life, stronger mental health, and greater self-esteem as compared to TGNC adolescents whose parents do not support their gender identity.<sup>152</sup> Parental acceptance “is theorized to serve as a buffer against the stigma, discrimination, and rejection that TGNC individuals may face in schools and other community settings.”<sup>153</sup> Indeed, for TGNC

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145. See *supra* notes 78–80 and accompanying text; Ryan et al., *supra* note 85.

146. Perkiss, *supra* note 144, at 61.

147. Ryan, *supra* note 72, at 338; see also ROBB TRAVERS ET AL., TRANS PULSE, IMPACTS OF STRONG PARENTAL SUPPORT FOR TRANS YOUTH, (2012), <https://transpulseproject.ca/wp-content/uploads/2012/10/Impacts-of-Strong-Parental-Support-for-Trans-Youth-vFINAL.pdf> [<https://perma.cc/BXN7-WHNK>].

148. Mills-Koonce et al., *supra* note 74, at 8.

149. Ryan et al., *supra* note 85; see also Andrzejewski et al., *supra* note 141; TRAVERS ET AL., *supra* note 147, at 2.

150. TRAVERS ET AL., *supra* note 147, at 3.

151. Andrzejewski et al., *supra* note 141; Ryan, *supra* note 70, at 5.

152. TRAVERS ET AL., *supra* note 147, at 2; Katz-Wise et al., *supra* note 75; Daliah Silver, *Transforming America’s Perspective: How Recognizing the Rights of Transgender Youth Will Empower the Next Generation*, 39 CHILD. LEGAL RTS. J. 233, 245 (2019).

153. Kuvalanka et al., *supra* note 139.

youth, parental support substantially reduces the burden that such children feel as a result of their status as TGNC individuals.<sup>154</sup>

### C. Racial Identity

While parental support for the development of a child's racial identity is important across a broad range of situations, in the custody context, consideration of this factor is most likely to arise in situations where a child's race differs from that of their parent(s). A common scenario in which this occurs is when a child's biological parents are not the same race.<sup>155</sup> Children whose biological parents are of different races have a multiracial makeup that does not precisely match the racial makeup of either parent, and thus a child's racial identity often differs from that of their parents.<sup>156</sup> The multiracial population has increased substantially over the past several decades, rising 32 percent between 2000 and 2010.<sup>157</sup> By 2050, the multiracial population is expected to grow by 180 percent.<sup>158</sup>

Like other forms of identity, a person's racial identity is something that develops gradually and does not necessarily remain static.<sup>159</sup> "[R]ace is both a matter of personal identification and social attribution, and thus racial identity is a trait that children explore and embody over time."<sup>160</sup> For multiracial youth, the process of determining their racial identity can be complicated—"not only do they have two

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154. Andrzejewski et al., *supra* note 141, at 74–75.

155. This may, of course, occur in other situations as well—such as, when a child is adopted by a parent or parents who are not the same race as the child.

156. George, *supra* note 6, at 38.

157. Weaver & Block, *supra* note 12, at 13.

158. LaBarrie, *supra* note 12, at 6.

159. See, e.g., Weaver & Block, *supra* note 12, at 14 ("Terry and Winston (2010), found that biracial adolescents' racial self-identification was fluid. These findings supported other research that racial identification can change over time and that it is a complex process."); David R. Harris & Jeremiah Joseph Sim, *Who Is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC'Y REV. 614, 618–20 (2002) (reporting that 10.3 percent of youth in the study provided inconsistent responses to questions regarding racial identity when asked at school and at home and that the percentage of youth who identified as multiracial varied from 3.6 percent to 6.8 percent).

160. George, *supra* note 6, at 38; see also Julia Steggerda-Corey, *Altering the Legal Framework to Serve Historically-Underserved Transracial Adoptees*, 54 TEX. TECH L. REV. 537, 548–49 (2022) (footnote omitted) ("Racial identity is both externally imposed and internally constructed. It requires an individual to ask how others perceive them racially and how they identify themselves racially.").

different racial groups as part of their identity, but also they have external forces that influence their racial identity, such as peers, family, and society.”<sup>161</sup> Multiracial youth often feel pressured to identify as one race or the other.<sup>162</sup> This may involve, for example, pressure to reject the White part of one’s identity because of the oppression minorities have faced at the hands of the White majority or to reject the racial minority part of one’s identity in order to better fit in with the dominant majority.<sup>163</sup> When a child’s racial makeup includes a marginalized minority, the process of creating a healthy racial identity is particularly challenging because it involves both a child’s identification as someone who is part of a historically oppressed and stigmatized group and the formation of a positive racial identity nonetheless.<sup>164</sup> The ability of multiracial children to identify positively with the different components of their racial heritage is key to their emotional health and the development of a healthy self-image.<sup>165</sup> Rejecting parts of one’s racial identity in favor of a monoracial identity can be emotionally damaging for multiracial youth, resulting in internalized self-oppression, lower self-esteem, and feelings of disloyalty and guilt.<sup>166</sup>

Parental support plays a significant role in the development of a healthy racial identity for multiracial children.<sup>167</sup> A child’s family “is viewed as the primary institution responsible for answering questions about racial identity.”<sup>168</sup> Experts believe that in order to foster a positive racial identity for a multiracial child, parents should communicate openly about race,

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161. Weaver & Block, *supra* note 12, at 14; *see also* Pollack, *supra* note 6 (footnote omitted) (“Developing comfortable racial identities may be more difficult for biracial children than for children whose parents are both the same race because of the special challenges biracial children face in ‘consolidating their identities.’”).

162. Pollack, *supra* note 6; *see also* Gaither, *supra* note 6 (“[M]ultiracials also report . . . constant social pressure of having to ‘choose’ one of their racial groups.”); George, *supra* note 6 (“Multiracial individuals report a constant social pressure to ‘choose’ one of their racial groups, rather than identify as multiracial.”).

163. Pollack, *supra* note 6.

164. Steggerda-Corey, *supra* note 160, at 548–49.

165. Lucas, *supra* note 7; Pollack, *supra* note 6, at 619.

166. Lucas, *supra* note 7.

167. LaBarrie, *supra* note 12, at 3 (citation omitted) (“Strong, supportive relationships between caregivers and multiracial children can foster a healthy identity development process.”).

168. *Id.* at 2; *see also* Patrick F. Linehan, *Thinking Outside of the Box: The Multiracial Category and Its Implications for Race Identity Development*, 44 *HOW. L.J.* 43, 60 (2000).



acknowledge cultural differences relating to race, and encourage and support a child in making sense of their lived racial experiences.<sup>169</sup> In addition, parents should make meaningful efforts to expose a child to the culture, traditions, and social activities of each of the races that make up a child's racial composition and connect a child to role models and peers who represent the different components of a child's racial identity.<sup>170</sup> Research indicates that taking an approach that allows a multiracial child to explore their racial identity in an open and supportive environment results in such children having greater pride in their racial background and fewer challenges with their racial identity.<sup>171</sup> At the other end of the spectrum, parental approaches that ignore racial differences and racialized experiences or permit racial discrimination or slights within the family have a negative impact on the emotional well-being and sense of belonging of multiracial youth.<sup>172</sup>

Another common child custody situation in which the issue of parental support for a child's racial identity may arise is when the dispute involves a child who was adopted by a parent or parents of another race (transracial adoption). It is estimated that over 40 percent of adoptions undertaken by parents who live in the United States are transracial adoptions.<sup>173</sup> Parental support for a child's development of a healthy racial identity is also crucial in this context.<sup>174</sup> Like for multiracial children, it is essential to the mental and emotional well-being of transracial adoptees that their parents take meaningful steps to promote a child's development of a positive racial identity. This includes, at the most basic level, becoming culturally competent about a child's race.<sup>175</sup> It also includes fostering discussion of race, acknowledging racial differences, helping prepare a child to confront and cope with racism and discrimination, exposing a

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169. Jacqueline Countryman & Raushanah Hud-Aleem, *Biracial Identity Development and Recommendations in Therapy*, 5 PSYCHIATRY 37 (2008); Linehan, *supra* note 168; Pollack, *supra* note 6, at 621.

170. Countryman & Hud-Aleem, *supra* note 169; Pollack, *supra* note 6, at 621.

171. See Weaver & Block, *supra* note 12, at 17; Pollack, *supra* note 6, at 621.

172. LaBarrie, *supra* note 12, at 3.

173. Karen Valby, *The Realities of Raising a Kid of a Different Race*, TIME, <https://time.com/the-realities-of-raising-a-kid-of-a-different-race> [<https://perma.cc/88DU-Q8KT>].

174. HARALAMBIE, *supra* note 51, § 14:19.

175. *Id.*; Annette R. Appell, Book Review, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 451 (2004); Nicole M. Callahan, *Race and Identity in Transracial Adoption: Suggestions for Adoptive Parents*, ADOPTION ADVOC., Aug. 2011, at 1, 5–6; Zug, *supra* note 62.

child to their racial heritage and cultural customs, and connecting a child with peers and role models within a child's racial group.<sup>176</sup> Failure on the part of a child's parents to take these types of actions can lead to a child experiencing emotional distress, isolation, low self-esteem, and feelings of lack of belonging and rejection.<sup>177</sup>

Overall, a compelling body of social science research demonstrates that parents play a core role in the development of a healthy identity for their children, regardless of whether that identity relates to sexual orientation, gender, or race. As a result, in determining which custody configuration will promote the best interests of a child, each parent's approach to supporting a child's identity development should be something judges consider carefully. The Part that follows explores how to most effectively integrate this important consideration into current child custody standards.

### III. INTEGRATING IDENTITY SUPPORT AS A CONSIDERATION IN CHILD CUSTODY DETERMINATIONS

As discussed above, when a child custody dispute is between two legal parents, the best interests of a child standard applies.<sup>178</sup> While current custody statutes set forth a wide range of factors to guide the court in determining which custody arrangement will most effectively further the best interests of a child, parental support for a child's identity development has not yet been added as a statutory factor in any jurisdiction.<sup>179</sup> The

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176. HARALAMBIE, *supra* note 51, § 14:19 (footnote omitted) (“The success of a transracial adoption is directly related to the adoptive parents’ ‘realistic recognition, understanding and comfort with race and color.’ The prospective adoptive parents must appreciate that society may be more racist than they are and must be prepared to deal with the impact of such racism. Finally, they must be willing and able to give the child positive exposure to the child’s cultural heritage.”); *see also* Appell, *supra* note 175; Callahan, *supra* note 175; Zug, *supra* note 62.

177. Zug, *supra* note 62.

178. *See supra* Section I.A.

179. *See supra* notes 35–37. Minnesota’s approach is arguably the closest a jurisdiction has come to adding considerations explicitly tied to identity support to the best interests of the child standard. Minnesota’s custody statute includes as factors to consider in determining the best interest of the child “a child’s physical, emotional, cultural, spiritual, and other needs” and “the willingness and ability of each parent . . . to meet the child’s ongoing developmental, emotional, spiritual, and cultural needs.” MINN. STAT. ANN. § 518.17(1), (7) (West 2024); *see also* CT STAT. § 46b-56(c)(14) (2024) (listing as a best interests factor “the child’s cultural background”).

current state of the law leaves the decision of when and how to consider this crucial factor entirely to a judge's discretion. This is extremely problematic given that (1) children's interests are supposed to be the core focus of custody determinations; and (2) it is clear from the social science research that parental support for identity development relating to race, gender, and sexual orientation is vital to children's overall well-being.<sup>180</sup>

A similar lack of direction regarding consideration of parental support for a child's identity development exists in the context of custody disputes between parents and third parties. As detailed above, in order for a third party to prevail in a custody dispute with a legal parent, generally the third party first must prove either that the parent is unfit or that extraordinary circumstances exist such that granting custody to the legal parent would result in substantial harm or detriment to a child's well-being.<sup>181</sup> If the third party meets this standard, then the court can award custody to the third party if doing so would further the best interests of the child.<sup>182</sup> The standards governing fitness determinations generally focus on abuse or neglect and do not mention identity support.<sup>183</sup>

The extraordinary circumstances standard is even less defined.<sup>184</sup> In addition, as discussed above in the context of interparent disputes, identity support is not expressly included as a factor in states' best interests of the child standards.<sup>185</sup>

This Part will first survey a number of cases that involve issues relating to a child's identity development to highlight the vastly differing approaches courts currently take when considering parental support for a child's identity development in child custody disputes. It will then explore potential methods through which existing child custody standards (both those governing disputes between parents and those governing disputes involving third parties) could be reformed to more effectively integrate considerations relating to a child's development of a healthy identity.

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180. See George, *supra* note 6, at 6 ("Regardless of which approach to the best interests standard any given state uses, one of the primary considerations that shapes courts' decisions is the child's physical and mental health. As a result, scientific conclusions regarding what promotes children's health and welfare are integral to courts' custody decisions more generally.").

181. See *supra* Section I.B.

182. See *supra* Section I.B.

183. See *supra* note 50 and accompanying text.

184. See *supra* notes 51–53 and accompanying text.

185. See *supra* notes 51–53 and accompanying text.

A. *Judicial Approaches to Consideration of Identity Support in Child Custody Disputes*

1. Problematic Judicial Treatment of Identity Support Considerations

The lack of guidance regarding whether and how courts should consider parental support for a child's identity development in making custody determinations has led to disturbing results in some cases.<sup>186</sup> For example, in a study of seven custody dispute cases that went to trial involving one parent who was affirming of a child's gender identity and one parent who was not, custody was awarded to the non-affirming parent in four of the cases, joint custody was awarded in two of the cases, and sole custody to the affirming parent was awarded in only one case.<sup>187</sup> In addition, in two of the cases, the custody order went so far as to mandate that the affirming parent not use a child's preferred pronouns or let a child wear clothing that aligned with a child's gender identity when spending time with a child.<sup>188</sup>

*Smith v. Smith* illustrates the problematic ways in which courts may approach child custody disputes that involve children's identity development issues in the absence of any statutory direction.<sup>189</sup> In *Smith*, the mother was initially granted primary physical custody of the child, who was assigned the sex of male at birth and was six years old at the time the parents divorced.<sup>190</sup> After the child, who had been demonstrating feminine behavior and showing interest in feminine clothing since the age of two, repeatedly made statements indicating that she identified as a girl, the mother began to research gender identity and how to best approach the parenting of TGNC children.<sup>191</sup> When the child was nine years old, the mother supported the child's gender identity by allowing the child to use her preferred name when enrolling in a new school.<sup>192</sup> The mother also allowed the child to participate in

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186. George, *supra* note 6, at 26–28 (surveying cases).

187. Kuvalanka et al., *supra* note 139, at 65–66.

188. *Id.* at 63.

189. *Smith v. Smith*, No. 05-JE-42, 2007 Ohio App. LEXIS 1282 (Ohio Ct. App. 2007).

190. *Id.* at \*1.

191. *Id.* at \*4–5.

192. *Id.* at \*1.

transgender support groups.<sup>193</sup> The father, who had maintained very little contact with the child since the divorce, learned about these developments and asked the court to modify the custody order.<sup>194</sup> After the court issued an emergency order granting custody to the father, the parties agreed to a temporary order in which they would share custody.<sup>195</sup> Included in the latter order was a mandate that the mother stop all gender-affirming behavior and not allow the child to undergo counseling for gender dysphoria.<sup>196</sup>

Subsequently, an incident occurred in which the mother allowed the child to go swimming while wearing a traditionally feminine-style swimsuit, which was covertly recorded by either the father or someone who had been hired by the father.<sup>197</sup> After learning that her father had her recorded, the child sent her father a video message in which she expressed numerous times that she was a girl, despite the body in which she was born, and that she wanted to live a normal life as a girl.<sup>198</sup> The child further stated that, while she was upset at her father's response to the situation, it did not change her desire to live as a girl.<sup>199</sup> The father then sought to terminate the temporary shared custody order and attain sole custody of the child.<sup>200</sup>

The matter proceeded to trial, during which there was conflicting testimony from each party's experts regarding whether the child met the criteria for a diagnosis of gender identity disorder.<sup>201</sup> There was also evidence introduced indicating that the child had considered suicide.<sup>202</sup> The trial court judge interviewed the child, during which the child expressed her female identity.<sup>203</sup> The judge, however, focused on the fact that, in his view, the child did not exhibit feminine mannerisms during the interview, enjoyed masculine activities, had male friends, and, in an apparent conflation by the judge of gender identity and sexual orientation, had a crush on a girl.<sup>204</sup>

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193. *Id.*

194. *Id.* at \*3.

195. *Id.*

196. *Id.* at \*3–4.

197. *Id.* at \*8.

198. *Id.* at \*6–7.

199. *Id.*

200. *Id.* at \*4.

201. *Id.* at \*10–13.

202. *Id.* at \*25–36.

203. *Id.* at \*13.

204. *Id.*

The judge then appointed another expert “to determine, among other things, whether the Mother is pushing [the child] toward a feminine identity or if Father simply fails to see that which is plainly there to be seen.”<sup>205</sup> This expert opined that, while the mother had made a mistake in initially diagnosing the child without professional assistance, the mother had always acted in the child’s best interests.<sup>206</sup> Nonetheless, the trial court judge concluded that custody should be awarded to the father.<sup>207</sup> The judge further opined that the mother’s conduct when the temporary order was in place (allowing the child to wear the feminine swimsuit and referring to the child by she/her pronouns sometimes before correcting herself) demonstrated that she was unlikely to abide by future court orders requiring her to avoid affirming the child’s gender identity.<sup>208</sup>

The appellate court upheld the trial court’s decision, concluding that “[a]lthough this case reveals some of the severe limitations in using the judicial system to resolve complex and possibly controversial childrearing and childhood mental health issues,” the trial court had not committed any reversible error.<sup>209</sup> The state’s best interests of the child statute, like the custody statutes of other jurisdictions, makes no mention of parental support for a child’s identity.<sup>210</sup> This case demonstrates the dangers of this lack of statutory guidance. The mother’s affirming behavior—the type of behavior recognized by social science research and leading medical organizations as critical to promoting TGNC children’s well-being—was the reason she lost custody of her child.

Judicial discretion when considering identity support has also led to problematic results in the context of racial identity development. The approach of the trial court judge in *Raysor v. Gabbey* is illustrative.<sup>211</sup> *Raysor* involved a multiracial child whose White maternal grandparents were awarded custody over the wishes of the child’s Black father after the child’s mother unexpectedly passed away.<sup>212</sup> In reversing the custody award and describing the trial court judge’s

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205. *Id.* at \*11.

206. *Id.* at \*17.

207. *Id.* at \*4, \*15, \*26.

208. *Id.* at \*15 (quoting the record).

209. *Id.* at \*35.

210. OHIO REV. CODE ANN. § 3109.04(F) (West 2024).

211. *Raysor v. Gabbey*, 395 N.Y.S.2d 290 (App. Div. 1977).

212. *Id.* at 292–93.

approach to the issue of the child's racial identity development, the appellate court noted that the trial court judge "seemed not much interested in these sociological considerations."<sup>213</sup> Despite the father's efforts to introduce evidence regarding the importance of the development of a healthy racial identity in multiracial children, the trial court judge refused to consider "which prospective custodian is best able to guide the child, not only for the present, but when she confronts [racial issues] in the future."<sup>214</sup> In addition, the trial court judge appeared to ignore evidence—such as the grandparents' exclusion of the father from their home without justification and their refusal to allow the father to see the child—that indicated the grandparents likely would not support the child's development of a healthy racial identity.<sup>215</sup>

## 2. Effective Judicial Treatment of Identity Support Considerations

At the other end of the spectrum, some courts have exercised their discretion to consider parental support of a child's identity development as a factor in the custody analysis in an effective, child-protective manner despite the lack of explicit statutory guidance. In *Laura E. v. John D.*, "[t]he child's gender identity . . . [was] also a point of major contention between the parties," who shared legal and physical custody of the child.<sup>216</sup> The father had consistently refused to use the child's preferred name and pronouns, claiming that doing so would be contrary to his religious beliefs.<sup>217</sup> The father had gone so far as to storm out of a family counseling session after he "took issue" with the counselor's use of the child's preferred pronouns.<sup>218</sup> The counselor testified at trial regarding the increased risk of suicide for TGNC children when their preferred pronouns are not respected as well as the distress experienced by the child in question as a result of the father's conduct.<sup>219</sup> Notably, the child had been hospitalized twice as a result of experiencing suicidal

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213. *Id.* at 294.

214. *Id.*

215. *Id.* at 295 ("[T]heir attitude is hardly conducive to the healthy growth and development of this racially-mixed [B]lack girl.").

216. *Laura E. v. John D.*, 188 N.Y.S.3d 794, 796 (App. Div. 2023).

217. *Id.*

218. *Id.*

219. *Id.*

ideation.<sup>220</sup> In affirming the lower court's decision to modify the existing order and grant the mother sole legal and physical custody of the child, the New York appellate court highlighted, *inter alia*, the mother's support of the child and her "superior ability to provide for the child's mental health and overall well-being."<sup>221</sup>

In 2018, an Ohio court awarded custody of a transgender seventeen-year-old to his grandparents.<sup>222</sup> The child's legal parents were not supportive of the child's gender identity. The parents refused to call the child by his preferred name, would not allow him to see a therapist unless it was Christian-based therapy, and prohibited him from pursuing hormone treatment.<sup>223</sup> At one point, the father encouraged the child to kill himself, which led to the child contacting a suicide crisis hotline.<sup>224</sup> Evidence was introduced at trial indicating that the child experienced depression, anxiety, and suicidal ideation.<sup>225</sup> In addition, medical professionals testified that, in order to lower the risk of suicide, the child should begin gender-affirming care as soon as possible.<sup>226</sup> The parents argued that the child was not ready to make such a life-altering decision.<sup>227</sup> The court determined that legal and physical custody should be awarded to the grandparents, who were affirming of the child's gender identity, reasoning that the grandparents were suitable caregivers who were better able to meet the child's needs.<sup>228</sup>

In another case, *In re Shane T.*, a mother and father lost custody of their child after the court determined that their actions relating to the child's sexual identity rose to the level of abuse.<sup>229</sup> The child's father continually, over the course of

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220. *Id.* at n.5.

221. *Id.* at 797.

222. *In re JNS*, No. F17-334X (Hamilton Cnty. Juv. Ct. Feb. 16, 2018); Jen Christensen, *Judge Gives Grandparents Custody of Ohio Transgender Teen*, CNN, <https://www.cnn.com/2018/02/16/health/ohio-transgender-teen-hearing-judge-decision/index.html> [<https://perma.cc/ZE63-378R>] (last updated Feb. 16, 2018, 8:24 PM).

223. Kevin Grasha, *Prosecutor: Parents' Refusal of Transgender Treatment Made Teen Suicidal*, CINCINNATI ENQUIRER, <https://www.cincinnati.com/story/news/2018/01/26/prosecutor-parent-told-transgender-teen-he-going-hell/1071010001> [<https://perma.cc/4GMX-K2P9>] (last updated Jan. 26, 2018, 6:17 PM).

224. *Id.*

225. Christensen, *supra* note 222; Grasha, *supra* note 223.

226. Christensen, *supra* note 222.

227. *Id.*; Grasha, *supra* note 223.

228. *In re JNS*, No. F17-334X (Hamilton Cnty. Juv. Ct. Feb. 16, 2018).

229. *In re Shane T.*, 453 N.Y.S.2d 590, 594 (Fam. Ct. 1982).



several years, engaged in a pattern of behavior in which he referred to the child using slurs relating to what the father perceived to be the child's sexual orientation and taunted the child by telling him that he should have been a girl.<sup>230</sup> Despite the child's pleading, the mother failed to intervene in any meaningful manner.<sup>231</sup> The child testified that the father's behavior made him cry and caused him to experience significant pain in his stomach.<sup>232</sup> The father, on the other hand, described his behavior as justifiable parental discipline aimed at curing the child of his "girlie" behavior and stated that he would be embarrassed if his son was "queer."<sup>233</sup> In explaining its decision to remove the child from the custody of the parents, the court described the father's behavior as an "insidious type of abuse" that "constitutes a grave and imminent threat to [the child's] future psychological development."<sup>234</sup> While the mother did not participate in the abuse, she failed to shield the child from it, choosing to keep the marital peace over protecting the welfare of the child.<sup>235</sup> As a result, the court determined that removing the child from the custody of his parents was necessary for the child's emotional well-being and healthy development.<sup>236</sup>

Courts also have exercised their discretion to consider, in a meaningful and effective manner, parental support for a child's identity in the context of racial identity development. *Henggeler v. Hanson* involved a custody dispute between the adoptive parents of two children of Korean descent.<sup>237</sup> In maintaining primary custody of the mother, the trial court noted that the mother had demonstrated awareness of the children's heritage, "displayed sensitivity to the children's need to develop an understanding of their Korean heritage," and sought to expose the children to a culturally diverse environment.<sup>238</sup> In contrast, the father appeared to be "oblivious to [the children's Korean heritage] and in fact seems to deny its existence."<sup>239</sup> On appeal, the father argued that the trial court erred in considering the children's Korean heritage in determining which

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230. *Id.* at 591.

231. *Id.* at 592.

232. *Id.* at 593.

233. *Id.*

234. *Id.* at 593–94.

235. *Id.* at 594.

236. *Id.* at 593–94.

237. *Henggeler v. Hanson*, 510 S.E.2d 722 (S.C. Ct. App. 1998).

238. *Id.* at 725.

239. *Id.*

custody arrangement would promote the children's best interests.<sup>240</sup> In upholding the trial court's decision, the appellate court explained that a parent's sensitivity to a child's racial heritage can be an appropriate consideration in custody cases.<sup>241</sup> The court stressed that it was not the race of the parents that was the relevant consideration, but rather each parent's approach, regardless of their race, to the development of the child's healthy racial identity.<sup>242</sup>

### *B. Integrating Identity Support into Custody Standards*

The range of approaches taken by the courts in the cases described above clearly demonstrates the need for legislatures to provide courts with guidance regarding the proper role of parental support for a child's identity development in custody disputes. States will need to determine how to effectively integrate this consideration into both the standards governing custody disputes between legal parents and the standards governing custody disputes between legal parents and third parties.

#### 1. Integrating Identity Development into Standards Governing Custody Disputes Between Parents

While no state law currently includes explicit language within the best interests of the child standard for parental support for a child's identity development, adding such a factor would not be unrealistic or unprecedented when considering legislation and regulations that already exist in related areas of the law. Specifically, a number of states have enacted legislation governing the treatment of children in the foster care system that explicitly aims to support and protect children's identity development relating to race, gender, and sexual orientation. For example, Connecticut's statute provides that a child placed in out-of-home care by the state has the right to "[d]evelop and maintain the child's own . . . identity, including, but not limited to, racial, sexual and gender identity, in a safe and caring environment."<sup>243</sup> The policies set forth by the Connecticut

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240. *Id.*

241. *Id.*

242. *Id.*

243. CONN. GEN. STAT. ANN. § 17a-10e (West 2024).

Department of Children & Families further instruct case workers and foster parents to use children's preferred names and pronouns and to "[p]rovide support for and affirmation of a youth's gender identity and not punish, shame or ridicule a youth for wearing clothing, behaving or appearing physically in ways consistent with his or her gender identity."<sup>244</sup>

Similarly, the Massachusetts state regulations governing foster parents provide that in order to be licensed, a potential foster parent must demonstrate the ability "to promote the physical, mental, and emotional well-being of a child placed in his or her care, including supporting and respecting a child's sexual orientation or gender identity."<sup>245</sup> The Maine Youth in Care Bill of Rights provides that youth who are in the care of the state "[s]hall be allowed to discover and express their gender and sexual identity" and will have "the right to learn about their sexuality in a safe and supportive environment."<sup>246</sup> A number of other states have similar identity development protections in place for children in the foster care system.<sup>247</sup>

Extending considerations relating to children's healthy identity development from the foster care context to the child custody context is a natural progression—both areas of the law are focused on protecting the well-being and best interests of children. There are, however, a number of important decisions states will need to make when integrating parental support for a child's identity development as a consideration within the best interests of the child standard. One such decision will be whether to frame the factor of parental support for a child's identity development in negative terms, such that engaging in the conduct encompassed by the factor would weigh against a party, or positive terms, such that engaging in the specified conduct would weigh in favor of a party. For example, states that want to express the factor in negative terms could frame it as a

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244. CONN. DEP'T OF CHILD. & FAMS., WORKING WITH TRANSGENDER YOUTH AND CAREGIVERS PRACTICE GUIDE (2018), <https://portal.ct.gov/-/media/DCF/Policy/BPGuides/21-16PG-Transgender.pdf> [<https://perma.cc/86ZR-ENW2>].

245. 110 MASS. CODE REGS. § 7.104 (2024).

246. ME. DEP'T OF HEALTH & HUM. SERVS., THE MAINE YOUTH IN CARE BILL OF RIGHTS (2016), <https://www.maine.gov/future/sites/maine.gov/dhhs/files/documents/ocfs/documents/MaineYouthInCareBillofRights.pdf> [<https://perma.cc/D5ZM-YCND>].

247. Thomas Barrymore Murtland, Note, *California's Foster Youth Bill of Rights as a Roadmap for Expanding Rights of LGBTQ2S+ Foster Youth in America: A Fifty-State Survey*, 55 LOY. L.A. L. REV. 313, 350–67 (2022) (providing each state's approach).

party's "unwillingness to support the child's identity in a manner that has resulted in, or likely will result in, harm to the child" or something similar that focuses on the notion of parental behavior that harms a child's physical, mental, or emotional well-being.<sup>248</sup> States that wish to set forth the factor in positive terms could phrase the factor as a party's "support of, and respect for, the child's identity development," that is, as parental behavior that promotes a child's well-being.<sup>249</sup>

Either approach would be consistent with states' existing best interests of the child standards. Under current articulations of the standard, some factors—such as a parent's demonstrated ability to effectively care for a child or a parent's willingness to foster a healthy relationship between a child and other parent—are set forth in positive terms.<sup>250</sup> Other factors, however, are set forth in negative terms, such as parental conduct that has had or is likely to have a detrimental effect on a child's well-being or a parent's history of domestic violence or substance abuse.<sup>251</sup> In states in which the composition of the legislature leans liberal, the chances of legislative approval for adding this factor in the positive form will be significantly higher. In these states, which likely already have substantial legal protections in place relating to race, gender, and sexual orientation,<sup>252</sup> the importance of youth identity development in these areas and the positive impact of parental support on a child's identity development will be more universally recognized and accepted. It is unlikely that the factor would need to be explicitly tied to harm in order to convince legislators in more liberal states to

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248. See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1281 (2004) ("[I]n the child custody context, courts have increasingly shifted toward a nexus test that requires a showing of actual harm to a child rather than presuming harm based on parental conduct or identities traditionally viewed as immoral").

249. See, e.g., Pollack, *supra* note 6, at 626 (suggesting as a best interests factor "whether a parent is willing and able to expose to and educate children on their [racial] heritage").

250. See *supra* note 38 and accompanying text.

251. See *supra* note 38 and accompanying text.

252. See, e.g., *State Scorecards*, HUM. RTS. CAMPAIGN (2023), <https://www.hrc.org/resources/state-scorecards> [<https://perma.cc/S8XX-VJ38>] (providing "an annual comprehensive state-by-state report that provides a review of statewide laws and policies that affect LGBTQ+ people and their families"); *These States Wanted to Keep Communities of Color from Voting, but the Courts Said No, That's Discriminatory*, ACLU (Aug. 10, 2016), <https://www.aclu.org/news/voting-rights/these-states-wanted-keep-communities-color-voting> [<https://perma.cc/B7UW-W8FD>] (discussing states' voting rights legislation and the impact on racial minorities).

vote in favor of amending best interests standards to include this consideration.

In jurisdictions where the legislature leans more moderate to conservative or is politically fractured, however, articulating the factor in negative terms that tie lack of parental support for identity development to harm to a child's physical, mental, or emotional well-being will likely be the better strategy.<sup>253</sup> This is because preventing harm to children is a state interest and legislative goal that has well-established, longstanding roots and is widely recognized as critically important.<sup>254</sup> It will be much more difficult for legislators to argue against adding a factor that explicitly encapsulates the prevention of harm to children.<sup>255</sup>

States will also need to determine whether to specify the types of identity development the factor seeks to protect. For example, at one end of the spectrum, states could set forth the factor in broad terms as "parental support for the child's identity development," without explicitly identifying the specific forms of identity encompassed. A middle-ground approach would be to add the word "immutable" to modify identity, meaning the factor would be set forth as "parental support for the child's development of their immutable identity." While the precise scope of the term immutable is subject to debate, it is generally considered to encompass characteristics that cannot be changed as well as characteristics that are so essential to a person's fundamental sense of identity that they should not be forced to

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253. See George, *supra* note 6, at 51 ("Courts' line-drawing at harm to children has particular resonance in the gender expansive child custody context because of the high potential for harm in those cases.").

254. *In re D.C.*, 4 A.3d 1004, 1018 (N.J. 2010) (quoting *Fawzy v. Fawzy*, 973 A.2d 347, 358–59 (2009)) ("Indeed, the state has an obligation, under the *parens patriae* doctrine, to intervene where it is necessary to prevent harm to a child."); 43 C.J.S. *Infants* § 4 n.10 (2023) ("The *parens patriae* exception to the deeply embedded right of fit parents, biological or adoptive, to raise their children without outside interference is narrowly tailored to avoid harm to the child."); Sandra E. Lundy, *Magazu and the Expansion of Agency Power*, 60 BOS. BAR J. 20, 21 (2016) (referring to "the State's 'first and paramount duty,' rooted in its ancient *parens patriae* authority, to protect children from actual or potential harm").

255. See Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1440 (2014) (arguing that in the context of state intervention, "[a] standard of reasonable harm or substantial likelihood of harm balances the child's strong interest in limiting parents' assimilation demands [relating to gender identity and sexual orientation] and protecting her identity interests but also accounts for the fact that mildly assimilationist parental conduct might not create significant harm and that parents' fundamental rights should be protected, as well").

change them.<sup>256</sup> The concept of immutability is commonly recognized to include the types of identities that are the focus of this Article—race (as well as national origin and ethnicity), gender,<sup>257</sup> and sexual orientation.<sup>258</sup> The third option is for states to explicitly specify which forms of identity the factor encompasses. For states that choose this option, the factor could be set forth as “parental support for the child’s identity development relating to race, gender, or sexual orientation” (or some similar articulation).

This decision, too, likely will be a strategic one that depends in significant part on the political composition of the specific state’s legislature. For example, in more conservative states, the factor probably will have a substantially greater chance of legislative approval if it does not explicitly identify the categories of identities encompassed. As discussed above, in recent years, conservative states have passed a variety of laws targeting TGNC individuals.<sup>259</sup> These laws restrict the rights and disaffirm the identities of TGNC youth and adults.<sup>260</sup> In these states, specifying that the factor includes parental support for gender identity in particular would likely halt the discussion before it begins for a significant number of legislators. The same is likely true for the protection of identity relating to sexual orientation in these states. There are also states that have long experienced high levels of racial tension or have legislatures that

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256. See Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 887–88 (2016); Nicholas Serafin, *In Defense of Immutability*, 2020 BYU L. REV. 275, 275 (“According to current doctrine, a trait is immutable if it is beyond the power of an individual to change or if it is fundamental to personal identity.”).

257. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (stating that “sex, like race and national origin, is an immutable characteristic”).

258. George, *supra* note 6, at 38 (“Like sexual orientation and gender identity, race is constitutionally protected as an immutable characteristic.”); Serafin, *supra* note 256, at 285–88. Religion may be considered to fall within the latter part of the definition of immutability described above, i.e., as a characteristic that is so essential to a person’s sense of fundamental identity that they should not be forced to change it. Courtney A. Waggoner, Note, *Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion*, 36 LOY. U. CHI. L.J. 285, 295, 295 n.71 (2004) (stating that “some courts have even gone so far as to deem religion an immutable characteristic” and that “[i]n some instances, the legislature has provided by statute that religion is immutable”).

259. See *supra* notes 125–133 and accompanying text.

260. See *supra* notes 126–133 and accompanying text.

are resistant to acknowledging and addressing racial issues.<sup>261</sup> In these states, explicitly including racial identity development as deserving of protection would likely present a problematic hurdle.

While, as will be discussed below, adding parental support for a child's identity development as a best-interest factor is unlikely to occur in ultra-conservative states regardless of whether the factor specifies the particular types of identities encompassed, passage of a broader version of the factor is a realistic possibility in the more moderately conservative states. Everyone has certain characteristics that are core to their identity, and framing the factor in a way that does not limit protections to certain identities will increase the chances that more legislators in these states will be able to identify with and recognize the importance of protecting youth identity development as a broad concept.<sup>262</sup> In liberal states, however, which likely already will have significant laws in place protecting race, gender identity, and sexual orientation, explicitly setting forth these identities as the types encompassed by the factor will be far less problematic.<sup>263</sup> In these states, specifying that the factor encompasses these categories of identity may actually increase the chances of passage, as legislators will be more acutely aware of the grave and unique challenges faced by youth who are TGNC, LGBTQ+, or multiracial.

Regardless of the nuances of how states choose to frame the factor, adding parental support for a child's identity development to states' best interests of the child standard will have a number of important benefits. The most obvious benefit is that it will provide much-needed guidance to judges regarding the validity and importance of considering parental support for a child's identity development in determining what custody arrangement will promote the best interests of a child. This will be essential not only in the context of judges who otherwise would have resisted considering identity support in determining a child's best interests, but also for judges who would have

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261. See, e.g., Char Adams et al., *Map: See Which States Have Passed Critical Race Theory Bills*, NBC NEWS (June 17, 2021, 12:54 PM), <https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215> [<https://perma.cc/HM3M-3SFV>].

262. See *Identity*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/identity> [<https://perma.cc/Z3NF-NU78>].

263. See *supra* note 244 and accompanying text.

wanted to give this factor significant weight but may have been hesitant to do so because of the lack of explicit permission within the relevant statute. Adding this factor to states' best-interests standard will provide similar guidance regarding the importance of parental support for children's identity development to guardians ad litem. Guardians ad litem play a significant role in custody disputes by investigating, gathering information, and ultimately filing a report with the court setting forth recommendations regarding what custody arrangement will promote the best interests of the child.<sup>264</sup>

Another important benefit of adding identity support to states' best interests of the child standard is that it will make it much more difficult for judges to exclude, on relevance grounds, evidence relating to youth identity development and the importance of parental support during the process, which is what the trial court judge did in the *Raysor* case discussed above.<sup>265</sup> With parental support for a child's identity development clearly set forth as a consideration within the legal framework governing custody, attorneys will be able to more easily introduce social science research and expert testimony relating to the development of identity during childhood, the role of parental support, best practices for supporting a child's identity, and the effects on children who do not receive such support. Finally, adding this factor to the best interests of the child standard will send a clear message to society and, perhaps more importantly, parents, regarding the critical importance of parental support to children's healthy identity development.

## 2. Integrating Identity Development into Third-Party Custody Standards

As discussed above, in order for a third party to prevail in obtaining custody over a legal parent, the third party must prove either that the parent is unfit or that extraordinary circumstances exist such that granting custody to the parent would result in substantial harm or detriment to a child's well-being.<sup>266</sup> When a third party is able to meet this standard,

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264. *Guardian ad Litem (GALs)*, STATE OF ME. JUD. BRANCH, <https://www.courts.maine.gov/courts/family/gal.html> [https://perma.cc/JF96-NMC3]; *Guardian ad Litem*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/guardian\\_ad\\_litem](https://www.law.cornell.edu/wex/guardian_ad_litem) [https://perma.cc/X9B7-KNK7] (last updated Jan. 2023).

265. See *supra* notes 211–215 and accompanying text.

266. See *supra* notes 48–49 and accompanying text.



the court can award custody to the third party, but only if doing so would further the best interests of the child.<sup>267</sup> If, as advocated in the previous Section, parental support for a child's identity development was added as a factor under states' best interests of the child standards, then this consideration necessarily would be integrated into the final step of the third-party custody standard. However, the best-interests prong of the third-party custody standard is only reached if the petitioner first proves a lack of fitness on the part of the parent(s) or that extraordinary circumstances exist such that the child would be harmed significantly if placed in the custody of the parent(s). Consequently, it is important to consider how identity support considerations could be integrated into the first, gatekeeping step of the third-party custody standard.

Integrating identity support considerations into the custody concepts of parental unfitness and extraordinary circumstances is less straightforward than integrating them into the best interests of the child standard. Integration into the best-interests standard simply requires adding identity support to the list of factors that are already set forth under such standards. The concepts of extraordinary circumstances and parental unfitness within the context of custody determinations (as opposed to termination of parental rights determinations), however, are more amorphous and much less clearly defined statutorily.<sup>268</sup> Generally, there is no list of statutory factors set forth to guide courts in determining whether a parent is unfit for purposes of a custody determination or whether extraordinary circumstances exist such that the child would likely suffer substantial harm if the parent received custody.<sup>269</sup> Instead, the concept of parental unfitness for child custody purposes generally is broadly considered to encompass situations in which

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267. See *supra* note 50 and accompanying text.

268. See *supra* notes 51–54 and accompanying text. In terms of parental unfitness, the concept generally is more defined in statutes and standards governing dependency and termination of parent rights than in statutes and standards governing custody. See 750 ILL. COMP. STAT. ANN. 50/1(1)(D) (West 2024); KAN. STAT. ANN. § 38-2269(b) (West 2024); OR. REV. STAT. ANN. § 419B.504 (West 2024). There is a significant difference between termination of a parent's rights and loss of custody—in the latter, the parent retains their status as the child's legal parent along with all the myriad rights and obligations that accompany that status. *Angelica C. v. Jonathan C.*, 459 P.3d 1148, 1159 (Alaska 2020) (“Custody orders, unlike orders terminating parental rights, ‘typically do not sever one party’s constitutionally protected parental rights.’”).

269. See *supra* notes 51–54 and accompanying text.

a parent has engaged in substantial abuse or neglect or is unable to adequately care for a child.<sup>270</sup> “Extraordinary circumstances” is a concept that is even less clearly defined—at the most, it can be said to more commonly include situations in which the parent: (1) has unjustifiably left a child with a third party with whom a child has bonded, or (2) is unable or unwilling to adequately care for a child or meet a child’s physical, mental, or emotional needs.<sup>271</sup>

As an initial matter, adding parental support for a child’s identity development to states’ best interests of the child standard as advocated above will likely, even standing alone, have a tangible effect on third-party custody disputes. Even though the best-interests analysis technically does not arise under the third-party custody standard unless the petitioner can first prove either parental unfitness or extraordinary circumstances that would render parental custody harmful to a child, these two concepts, at their core, indisputably speak to the protection of children’s well-being. The message sent to judges by including identity support as a best-interests factor is that this consideration is important to children’s overall health and welfare. As a result, conveying this type of clear message through the best-interests standard will increase the chances that judges take this consideration seriously when analyzing the related child-protective concepts of parental unfitness and the existence of extraordinary circumstances. Relatedly, including identity support within the best-interests standard will help to ensure that judges in third-party custody cases do not bar parties from introducing crucial evidence regarding the importance of parental support for a child’s identity (as occurred in the *Raysor* case described above).<sup>272</sup> It would be very difficult for a judge to determine that such evidence is not relevant to the concepts of parental unfitness or extraordinary circumstances if the statutory framework governing custody explicitly acknowledges, through the best-interests standard, that identity-related considerations are directly tied to children’s health and well-being.

Additional methods of integrating support for a child’s identity development into the gatekeeping prong of the third-party custody standard could include tying identity

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270. See *supra* note 51 and accompanying text.

271. See *supra* notes 53–54 and accompanying text.

272. See *supra* notes 211–215 and accompanying text.

support to concepts that commonly underlie findings of parental unfitness or extraordinary circumstances, such as a parent's inability to meet a child's needs or emotional abuse. The notion that third-party custody may be warranted in circumstances in which a parent is unable to meet a child's mental or emotional needs is well established. For example, third parties have been awarded custody in situations where: the third party could better meet the emotional needs of a child who had attempted suicide;<sup>273</sup> the third party demonstrated a greater willingness and ability than the parent to address a child's mental health issues;<sup>274</sup> or the third party learned sign language in order to communicate with a deaf child whose parent made no such effort.<sup>275</sup> Attorneys representing third parties who support a child's identity development should use the compelling body of social science research described above to demonstrate why cases that involve identity support may fit into the broader, well-recognized line of cases involving parents who cannot meet a child's mental or emotional needs.

Serious emotional abuse is also a relatively common basis for judicial determinations of parental unfitness or extraordinary circumstances in the third-party custody context. In terms of tying parental rejection of a child's identity development to the concept of emotional abuse, states could more clearly, through either statute or caselaw, define emotional abuse to include harmful behavior that detracts significantly from a child's ability to develop a healthy identity. Indeed, some judges are already tying rejection of a child's identity to emotional abuse, as demonstrated by the *In re Shane T.* case described above.<sup>276</sup> There, the judge recognized a father's disparagement of a child's gender identity and perceived sexual orientation as serious emotional abuse that warranted removal of custody from the parents.<sup>277</sup> Overall, regardless of whether identity-rejecting conduct is classified as a failure to meet a child's needs or emotional abuse, tying identity support considerations to these concepts would aid significantly in ensuring that such considerations play a meaningful role in the application of the parental unfitness/extraordinary

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273. *In re Custody of RRB*, 31 P.3d 1212 (Wash. Ct. App. 2001).

274. *See In re Custody of Stell*, 783 P.2d 615, 622 (Wash. Ct. App. 1989).

275. *In re Marriage of Allen*, 626 P.2d 16 (Wash. Ct. App. 1981).

276. *See supra* notes 229–236 and accompanying text.

277. *See supra* notes 229–236 and accompanying text.

circumstances gatekeeping prong of third-party custody standards.

#### IV. PUSHBACK

This Part discusses two areas of likely pushback to legal reform aimed at integrating support for identity development into existing child custody standards. It first addresses concerns about the explicit consideration of race within child custody laws. It then addresses the substantial barriers in conservative states to enacting any type of reform that promotes support for a child's identity development relating to race, gender, or sexual orientation.

##### *A. The Status of Race-Related Considerations in Custody Determinations*

Across areas of the law, there tends to be significant pushback to proposed legal standards that involve considerations relating to race. In the custody context, opponents of amending current custody standards to integrate consideration of each party's support for a child's development of a healthy racial identity will likely argue that such reforms involve racial classifications and fail to pass constitutional scrutiny under the exacting standard of review applicable to laws that make such classifications. This argument, however, will ultimately prove unpersuasive. Although the proposed reforms require judges to consider a child's development of a healthy racial identity and the parties' support thereof in relevant circumstances, they do not involve racial classifications. In fact, the proposed reforms do not require any consideration of the races of the parties who are seeking custody of a child. Instead, the focus is on each party's support of a child's development of a healthy racial identity without regard to the parties' races.

In arguing that the proposed reforms involve improper racial classifications, opponents likely will rely on the seminal Supreme Court case involving racial considerations within child custody determinations: *Palmore v. Sidoti*.<sup>278</sup> In *Palmore*, the child's father sought a change in custody on the grounds that the mother was cohabitating with, and later married, a Black

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278. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

man.<sup>279</sup> The father argued that due to the race of the mother's husband, the child would suffer harmful "social stigmatization" if she continued to reside in the mother's household.<sup>280</sup> The lower court ordered that custody of the child be transferred to the father.<sup>281</sup> In reviewing the lower court's decision, the Supreme Court explained that because the lower court "made no effort to place its holding on any ground other than race" and it was clear that the case would have been decided differently if the mother's husband was White, the decision relied upon a racial classification and was therefore subject to strict scrutiny review under the Equal Protection Clause.<sup>282</sup> In overturning the lower court's decision, the Supreme Court held that "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody" and further that "[p]ublic officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice."<sup>283</sup>

Scholars, commentators, and courts long have debated the exact contours of the *Palmore* decision with regard to the permissible consideration of race in child custody proceedings.<sup>284</sup> Nonetheless, "[v]olumes of cases . . . have

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279. *Id.* at 430.

280. *Id.* at 431.

281. *Id.*

282. *Id.* at 432; *see also* *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 307–08 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)) ("Any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'").

283. *Palmore*, 466 U.S. at 433–34 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260–61 (1971) (White, J., dissenting)).

284. *See* Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 542 (2014) ("Thus, although the Court in *Palmore v. Sidoti* did take up one contemporary instantiation of the use of race in family law (the practice of depriving a parent of custody based on a post-divorce interracial marriage), it acted carefully in crafting its opinion to ensure that it would not inhibit other continuing uses of race in the family."); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 587–88 (2011) ("Many commentators have cited *Palmore* as an example of race not being a permissible factor in child custody determinations because the state is prohibited from 'insist[ing] that race count as a factor in the ordering of people's most private lives.'"); David D. Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL'Y 183, 185 (2007) ("*Palmore's* intervention, however, plainly did not end the debate over whether race may be considered in matters of custody and adoption. In the more

interpreted *Palmore* as not prohibiting the consideration of race in matters of child custody.”<sup>285</sup> This is because although *Palmore* clearly prohibits the use of racial classification as the sole factor in custody determinations, there is no language in the case indicating that all race-related considerations in child custody determinations are constitutionally impermissible. Given the significant body of social science research regarding the importance of developing a healthy racial identity during childhood and the narrowness of the Court’s ruling in *Palmore*, it makes sense that most courts would decline to adopt an approach prohibiting the use of all race-related considerations in child custody disputes.

Moreover, the use of race under the proposed reforms differs in legally significant ways from the use of race in the lower court’s decision in *Palmore*. In *Palmore*, the lower court relied upon a racial classification as the basis for modification of the custody order.<sup>286</sup> The proposed reforms, however, do not employ racial classifications. As one scholar has explained, “consideration of race in child custody decisions that d[oes] not assign placements on the basis of race, but merely consider[s] which parent would expose the child to . . . her racial heritages, would not be drawing distinctions between people on the basis of their races” and thus would not raise Equal Protection Clause concerns.<sup>287</sup> Indeed, this was the view expressed by the court in the *Henggeler* case described above, wherein the court stated that “a parent’s sensitivity to a child’s ethnic heritage may be a factor that has an impact on the child’s best interest” and distinguished this type of consideration from the problematic racial classification that the lower court relied upon in *Palmore*.<sup>288</sup>

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than two decades since *Palmore*, courts . . . have continued to struggle, often heatedly, to define the appropriate role for race in the placement of children.”); Colin Schlueter, Note, *Color Conscious: The Unconstitutionality of Adoptive Parents’ Expression of Racial Preferences in the Adoption Process*, 19 WM. & MARY BILL RTS. J. 263, 273 (2010) (“Although the language in *Palmore* seemed to be clear enough with respect to its stance on the consideration of race in child custody decisions by citing *Strauder v. West Virginia* for the proposition that ‘[a] core purpose of the *Fourteenth Amendment* was to do away with governmentally imposed discrimination based on race,’ some lower courts have nonetheless adopted a questionably narrow reading of *Palmore*.”).

285. *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847, 869 (Ill. App. Ct. 2006).

286. *Palmore*, 466 U.S. at 432.

287. Pollack, *supra* note 6, at 624.

288. *Henggeler v. Hanson*, 510 S.E.2d 722, 725 (S.C. Ct. App. 1998).

Despite the lack of racial classifications in the proposed reforms, it is likely that many state legislators, at least initially, will be concerned with the potential constitutional issues or political pushback from explicitly including race-related considerations within the state's child custody statute. Fortunately, there are additional steps that states can take to address such concerns and to further ensure that the proposed reforms do not involve problematic racial classifications. Most directly, states could simply include within the language of the proposed identity support provision a directive that the court may not make any assumptions based upon a party's race, gender, or sexual orientation when evaluating the party's willingness or ability to support a child's identity development. Notably, a couple of jurisdictions already include similar language within their broader child custody standards limiting courts from making assumptions based on a party's race, gender, sexual orientation, and other protected characteristics.<sup>289</sup> Additionally, states could go beyond this initial step and identify the specific types of considerations that courts should weigh pursuant to the identity support factor. This may include, for example, each party's willingness and ability to: (1) educate a child about a child's racial heritage, (2) provide a child with opportunities to engage with members of their racial and cultural communities, (3) expose a child to cultural practices relating to their racial heritage, and (4) help a child to acquire the skills necessary to successfully navigate the challenges they may face relating to their racial identity.<sup>290</sup>

*B. The Difficulty of Integrating the Identity Factor in Conservative States*

Another likely criticism of the proposals set forth in this Article is that, given the current political climate, it is highly unrealistic to think that ultra-conservative states will pass any version of the proposed reforms. Addressing this criticism is more straightforward. As demonstrated by the bevy of laws in

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289. D.C. CODE ANN. § 16-914 (West 2024) ("The race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration."); WIS. STAT. ANN. § 767.41(5) (West 2024) ("The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian.").

290. See *supra* notes 171–173 and accompanying text.

ultra-conservative states disaffirming youth gender identity development,<sup>291</sup> the belief that the proposed reform will not occur any time soon in such states is almost certainly correct. This reality, however, does not take away from the validity or importance of the proposed reforms, or the potential impact that these types of changes to the law could have on the lives of vulnerable children.

There are many children living in liberal states who, at some point, will be the subject of a child custody dispute. The passage of the proposed reforms in liberal states will play an essential role in protecting these children from the substantial harm that can occur when child custody is granted to a parent who does not support a child's identity development. Moreover, passing these types of reforms in liberal states will pave the way for their eventual passage in more moderate states. Moderate states will be more likely to pass such reforms as it becomes clear that courts can effectively weigh parental identity support considerations in child custody disputes and as the compelling social science research supporting the importance of parental support becomes more widely known. Finally, even if such reforms are never passed in ultra-conservative states, their passage in other states will send a strong message to society regarding the critical nature of parental support for a child's identity development. This will likely result in more parents, even in conservative states, making the choice to be supportive of their child's identity development. This, in turn, will lead to the most important outcome—the protection and promotion of children's emotional, mental, and physical well-being.

## CONCLUSION

The core goal of child custody law is to provide children with a caretaking structure that will best protect and promote their physical, mental, and emotional health. Existing legal standards governing child custody, however, fail to address a critical consideration directly tied to the well-being of some of the most vulnerable populations of youth. LGBTQ+ and multiracial children face unique and significant barriers to developing a healthy identity. A compelling body of social science research demonstrates that parental support during the identity development process is of essential importance for these

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291. See *supra* notes 121–130 and accompanying text.



children. As a result, to better protect the health and well-being of children who are the subject of custody disputes, states should reform existing child custody standards to more effectively integrate considerations relating to each party's support for a child's development of a healthy identity.