

# Unaccompanied Youth and Private-Public Order Failures\*

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## ABSTRACT

*Each year, approximately 1.7 million “unaccompanied youth” under the age of 18 live on their own in homelessness or in other unstable living conditions. Many of these youth ran away or were kicked out of their families or child welfare placements. Others became homeless upon or soon after being released from juvenile detention.*

*As this Article describes, the government responds to unaccompanied youth through a complex web of family-centered interventions in both the child welfare and the juvenile justice systems. Child welfare responses adopt a view of unaccompanied youth as victims of negative family circumstances and respond by altering their family environments—first through attempting to repair the biological family relationship, and when that is not possible, by providing youth substitute families through foster care and adoption. When those family-centered approaches are not working, juvenile justice laws and law enforcement policies and practices pressure unaccompanied youth to reunite with their families (whether*

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biological, foster, or adoptive) and allow for their arrest and detention. In this regard, the government adopts a very different view of unaccompanied youth as delinquent offenders when they do not fit into family systems.

This Article shows that unaccompanied youth whose needs are not served under family-centered child welfare responses are ultimately left vulnerable to entering a destructive cycle of homelessness and involvement in the juvenile and criminal justice systems. It further argues that the experiences of unaccompanied youth, and unaccompanied LGBTQ youth in particular, demonstrate the limits of the family-centered approach as a wholesale or comprehensive solution to the child welfare needs of adolescent youth. The shortcomings of this approach illustrate a need for a paradigm shift in child welfare law and policy (and relatedly, juvenile justice law and policy) that places greater emphasis on non-family centered approaches to serve vulnerable youth in need of help from the state, especially late-adolescent youth. Under this new framework, child welfare law and policy responses would conceptualize the agency and autonomy of unaccompanied youth in positive and empowering terms, and provide greater space for support systems, skills, and resources outside of family systems to help them achieve self-reliance and self-actualization as adults.

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## INTRODUCTION

Consider the story of a teenager named Jack.<sup>1</sup> During his senior year of high school, Jack told his family that he was gay.<sup>2</sup> At the time, Jack was living with his mother and her new boyfriend, who became abusive and did not accept Jack's sexuality.<sup>3</sup> Jack's mom was not ready to end the relationship, but wanted to find a safe home for him.<sup>4</sup> She discovered a transitional living program, which provided a supervised community living environment to youth between the ages of 16 and 22 who were homeless or at risk of becoming homeless.<sup>5</sup> The program also helped youth build necessary life skills to live independently as adults.<sup>6</sup> Jack entered the program, stayed in school, maintained a GPA in the top ten percent of his graduating class, and got accepted to college.<sup>7</sup>

Jack's success story, however, is rare. A teenager in Jack's situation is more likely to follow a path like Tracey's.<sup>8</sup> After Tracey told his family that he was gay, he was sent to live in a group home.<sup>9</sup> He bounced between four group homes in six months.<sup>10</sup> At each group home, he was teased, tormented, and harassed because he was gay.<sup>11</sup> After he could

1. This story is adapted from real-life events. See *Success Stories*, STOPOVER, <http://stopoverinc.org/services> (last visited Mar. 14, 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See GERALD P. MALLON, WE DON'T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN CHILD WELFARE SYSTEMS 111 (1998).

9. *Id.*

10. *Id.*

11. *Id.*

no longer take the abuse, Tracey left his last group home to live on the streets.<sup>12</sup> He lived with friends, slept on people's sofas, and sold his body for sex to survive.<sup>13</sup> At one point, he "lived in an abandoned trailer truck with ten other people, [and] slept in railroad tunnels."<sup>14</sup> As bad as it got on the streets, Tracey found the group homes to be much worse.<sup>15</sup>

Although Jack and Tracey's stories follow very different trajectories, their shared separation from their families is not uncommon. Each year, approximately 1.7 million youth under the age of 18 live on their own in homelessness or other unstable living arrangements for some amount of time.<sup>16</sup> Over 130,000 "unaccompanied youth"<sup>17</sup> endure these inadequate living conditions for one month or longer,<sup>18</sup> and many never return home.<sup>19</sup> Many of these unaccompanied youth were kicked out of their homes or ran away from abusive families.<sup>20</sup> Others left or were pushed out of foster homes, or became homeless upon or soon after being released from juvenile detention.<sup>21</sup>

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *An Emerging Framework for Ending Unaccompanied Youth Homelessness*, NAT'L ALLIANCE TO END HOMELESSNESS (Mar. 6, 2012), <https://endhomelessness.org/resource/an-emerging-framework-for-ending-unaccompanied-youth-homelessness>. These figures likely underestimate the actual number of unaccompanied youth. Different definitions of "youth" and what it means to be "unaccompanied," coupled with the fact that unaccompanied youth are a transitory and difficult population to identify, frustrate the ability to obtain a true estimate. Abigail English, *Youth Leaving Foster Care and Homeless Youth: Ensuring Access to Health Care*, 79 TEMP. L. REV. 439, 442–43 (2006); see Yvonne Vissing, *Homeless Children and Youth: An Examination of Legal Challenges and Directions*, 13 J.L. SOC'Y 455, 458 (2012).

17. In this Article, the term "unaccompanied youth" refers to youth who are not in the physical custody of a parent or legal guardian and live on their own in homelessness or other unstable living arrangements. It does not include youth who live in homelessness or other unstable living conditions with their parents, legal guardians, or an adult relative. *E.g.*, 34 U.S.C.A. § 11279(3)(B)–(C) (West 2018) (formerly 42 U.S.C. § 5732a(3)(B)–(C) (2012)) (defining "[h]omeless [y]outh" as youth "for whom it is not possible to live in a safe environment with a relative" and "who ha[ve] no other safe alternative living arrangement"). For a discussion on theories of homelessness involving children in homeless families, see generally Jessica Dixon Weaver, *Beyond Child Welfare—Theories on Child Homelessness*, 21 WASH. & LEE J.C.R. & SOC. JUST. 17 (2014) (discussing connections between family poverty and child homelessness).

18. *An Emerging Framework for Ending Unaccompanied Youth Homelessness*, *supra* note 16.

19. See Marya Viorst Gwadz et al., *Understanding Organizations for Runaway and Homeless Youth: A Multi-Setting Quantitative Study of Their Characteristics and Effects*, 73 CHILD. & YOUTH SERVICES REV. 398, 398 (2017).

20. See Susan M. Snyder et al., *Homeless Youth, Strain, and Justice System Involvement: An Application of General Strain Theory*, 62 CHILD. & YOUTH SERVICES REV. 90, 90–91 (2016) (describing different pathways to youth homelessness).

21. *See id.*

Existing scholarship on unaccompanied youth is fairly limited in scope. Two issues largely shape this literature: (1) the reasons why youth leave or are driven out of their families, and (2) the experiences of unaccompanied youth while they are living on the streets or in other unstable living arrangements.<sup>22</sup> Less attention has been paid to the broader theoretical and conceptual issues that the experiences of unaccompanied youth reveal about the structure, foundation, and functioning of the U.S. child welfare system.<sup>23</sup>

This Article is part of a larger project that examines how the government approaches child welfare issues concerning adolescent youth. As this Article explains, the current child welfare framework is oriented toward families.<sup>24</sup> This framework places primacy on how swiftly the government can repair existing biological families, and when that is not possible, how quickly it can provide youth and children temporary or permanent substitute families (often, that match the traditional family model).<sup>25</sup> My scholarship leads me to be increasingly skeptical of this family-centered approach as a wholesale or comprehensive solution to the child welfare needs of adolescent youth. The research underlying this Article leads me further in this direction.

In this Article, I argue that the common challenges of unaccompanied youth illustrate the limits of family-centered models of child welfare. I further contend that when family-centered approaches define the scope of responses in the child welfare system, then unaccompanied youth whose needs are not served by those responses are left vulnerable to entering a destructive cycle of homelessness and involvement in the juvenile and criminal justice systems. This cycle implicates both youth who are at risk of becoming unaccompanied as well as youth who are already unaccompanied.

In light of these shortcomings, I contend that there is a need for a paradigm shift in child welfare law and policy (and relatedly, juvenile justice law and policy) that places greater normative and practical emphasis

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22. See JOHN HAGAN & BILL MCCARTHY, *MEAN STREETS: YOUTH CRIME AND HOMELESSNESS* 8–9 (1997) (describing the focus of empirical studies on homeless youth who live on their own). See generally Jennifer P. Edidin et al., *The Mental and Physical Health of Homeless Youth: A Literature Review*, 43 *CHILD PSYCHIATRY & HUM. DEV.* 354 (2012) (providing a literature review of studies on the causes of youth homelessness and the mental and physical health of homeless youth); Kate J. Hodgson et al., *Psychopathology in Young People Experiencing Homelessness: A Systematic Review*, *AM. J. PUB. HEALTH*, June 2013, at e24 (providing a systematic review of published studies examining the prevalence of mental health problems among homeless youth).

23. Casey Holtschneider, *A Part of Something: The Importance of Transitional Living Programs Within a Housing First Framework for Youth Experiencing Homelessness*, 65 *CHILD. & YOUTH SERVICES REV.* 204, 204 (2016) (“This focus has resulted in a knowledge base almost entirely dedicated to understanding the characteristics of homeless youth rather than the service sector’s efforts to respond to their needs.”).

24. See *infra* Part II.A.2.

25. See *infra* Part II.A.2..

on non-family centered approaches, especially for late-adolescent youth.<sup>26</sup> Unlike the current regime, these alternative approaches would conceptualize unaccompanied youth's agency and autonomy in positive and empowering terms, and provide support systems, skills, and resources outside of family systems to help them achieve self-reliance and self-actualization as adults.<sup>27</sup> Moreover, the government would recognize that family-centered approaches do not serve all youth who seek or need help from the state, and soften its reliance on criminalization measures when family-centered approaches cannot reach, or fail, vulnerable youth.<sup>28</sup>

My analysis in this Article draws largely, although not exclusively, on the experiences of unaccompanied lesbian, gay, bisexual, transgender, and queer (LGBTQ) youth. Unaccompanied LGBTQ youth are positioned in ways that make their experiences a promising lens to examine the limits of the current family-centered approach in the child welfare system. To begin, LGBTQ youth (and LGBTQ youth of color in particular) are a large and identifiable segment of the unaccompanied youth population.<sup>29</sup> Recent studies have found that LGBTQ youth account for as high as 20–40 percent of the U.S. homeless youth population.<sup>30</sup>

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26. For possible ideas of how this nonfamily-centered approach might take shape, see *infra* Part IV.

27. Self-actualization is defined in different ways, but as Abraham Maslow described, it generally involves “acceptance and expression of the inner core or self.” A.H. Maslow, *Some Basic Propositions of a Growth and Self-Actualization Psychology*, in PERCEIVING, BEHAVING, BECOMING: A NEW FOCUS FOR EDUCATION 34, 36 (Arthur W. Combs ed., 1962). I include self-actualization here because youth may need more to live successfully as adults than simply achieving financial and housing stability. Scholars in the field of social work have recognized this very point and have advocated for evaluating the success of government interventions for unaccompanied youth based on additional criteria than simply whether those programs help unaccompanied youth achieve self-reliance. See, e.g., Casey Holtschneider, *From Independence to Interdependence: Redefining Outcomes for Transitional Living Programs for Youth Experiencing Homelessness*, 97 FAMILIES SOC'Y: J. CONTEMP. SOC. SERVICES 160, 166 (2016).

28. See *infra* Part IV.

29. See ANDREW CRAY ET AL., CTR. FOR AM. PROGRESS, SEEKING SHELTER: THE EXPERIENCES AND UNMET NEEDS OF LGBT HOMELESS YOUTH 6 (2013), <https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf> (“Few studies explore the racial diversity of LGBT homeless youth, but those that have suggest that LGBT homeless youth are disproportionately people of color.”). See generally Michelle Page, Comment, *Forgotten Youth: Homeless LGBT Youth of Color and the Runaway and Homeless Youth Act*, 12 Nw. J.L. & Soc. POL'Y 17 (2017) (discussing the causes and effects of homelessness on LGBT youth of color).

30. See, e.g., LANCE FREEMAN & DARRICK HAMILTON, N.Y.C. COAL. ON THE CONTINUUM OF CARE, A COUNT OF UNACCOMPANIED HOMELESS YOUTHS IN NEW YORK CITY 2 (2013), [http://www.nyhomeless.com/downloads/pdf/2013\\_NYC\\_Homeless\\_Youth\\_Report.pdf](http://www.nyhomeless.com/downloads/pdf/2013_NYC_Homeless_Youth_Report.pdf) (finding that 34 percent of a systematic count of homeless youth in New York City identified as lesbian, gay, or bisexual); NICO SIFRA QUINTANA ET AL., CTR. FOR AM. PROGRESS, ON THE STREETS: THE FEDERAL RESPONSE TO GAY AND TRANSGENDER HOMELESS YOUTH 6 tbl.1 (2010), <https://cdn.americanprogress.org/wpcontent/uploads/issues/2010/06/pdf/lgbtyouthhomelessness.pdf> (presenting the results of a sample of

As this Article will discuss, LGBTQ youth leave or are forced out of their families for both LGBTQ-specific and nonLGBTQ-specific reasons.<sup>31</sup> This range of reasons allows me to draw conclusions from the LGBTQ youth context that are relevant at times to unaccompanied youth more generally. At the same time, the most prevalent reason why LGBTQ youth leave or are forced out of their homes is because their families reject them on the basis of their sexual orientation or gender identity.<sup>32</sup> Therefore, I recognize and discuss more specifically in different parts of this Article that some experiences of unaccompanied LGBTQ youth might not map neatly onto the experiences of unaccompanied nonLGBTQ youth.

Moreover, LGBTQ youth (and LGBTQ youth of color in particular) are a hidden, yet overrepresented, population in both the child welfare and the juvenile justice systems.<sup>33</sup> Importantly, LGBTQ youth are also overrepresented among “dually involved” or “crossover youth”—i.e., youth in the juvenile justice system who have had prior involvement with the child welfare system.<sup>34</sup> As this Article will discuss, LGBTQ youth face widespread discrimination and abuse in foster families, adoptive families, group homes, and homeless shelters.<sup>35</sup> For these reasons, LGBTQ youth are a salient example of an especially marginalized

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studies among homeless gay and transgender youth between 2000 and 2008). Moreover, a national study of homeless youth service providers found that “LGBT youth represent between 30% and 43% of [the youth] served by drop-in centers, street outreach programs, and housing programs.” LAURA E. DURSO & GARY J. GATES, THE WILLIAMS INST., *SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 3* (2012), <https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

31. SOON KYU CHOI ET AL., THE WILLIAMS INST., *SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS 5* (2015), <https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Serving-Our-Youth-June-2015.pdf>.

32. *Id.*

33. KATAYOON MAJD ET AL., *HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 2*, 94 (2009), [http://www.ncrights.org/wp-content/uploads/2014/06/hidden\\_injustice.pdf](http://www.ncrights.org/wp-content/uploads/2014/06/hidden_injustice.pdf) (noting an estimate that 13 percent of youth in juvenile custody are LGBT); BIANCA D.M. WILSON ET AL., THE WILLIAMS INST., *SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES 6–8* (2014), [http://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS\\_report\\_final-aug-2014.pdf](http://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS_report_final-aug-2014.pdf) (estimating that 19 percent of Los Angeles County’s foster youth identify as LGBT and almost 86 percent of those LGBT youth identified as Latino, Black, or Asian-Pacific Islander); Angela Irvine & Aisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population*, 24 AM. U. J. GENDER SOC. POL’Y & L. 243, 248 (2016) (estimating that 15 percent of youth in juvenile detention identify as LGBTQ).

34. Irvine & Canfield, *supra* note 33, at 244.

35. *See infra* Parts II.A.2, II.B.

group that the child welfare system leaves behind, both before and after they have had contact with the juvenile justice system.

This Article proceeds as follows. Part I draws on historical and current perspectives from multiple disciplines (including law, social work, criminology, sociology, and psychology) to sketch two major categories of theories that attempt to explain how youth become unaccompanied.<sup>36</sup> The first category is structural theories, which focus on environmental causes for why youth leave or are forced out of their families only to find themselves homeless or living in other unstable conditions. Examples include family conflict, poverty, lack of affordable housing, and discrimination.<sup>37</sup> The second category is deficient-agency theories, which explain unaccompanied youth status in terms of individual-level factors, such as the irresponsible decisions, personal failures, or personal inadequacies of unaccompanied youth.<sup>38</sup> In blaming youth for their unaccompanied status, deficient-agency theories conceptualize the agency of unaccompanied youth in negative terms—a view that I later critique.<sup>39</sup>

I then draw on this theoretical foundation to critique government responses to unaccompanied youth. I show how the government has responded to unaccompanied youth through a complex web of family-centered public reordering<sup>40</sup> in both the child welfare and the juvenile justice systems.<sup>41</sup> I conceptualize responses in the child welfare system

36. As discussed *infra* Part I, these theories also shape the literature and public and political discourse on the causes of homelessness more generally. See, e.g., Joanne Neale, *Homelessness and Theory Reconsidered*, 12 HOUSING STUD. 47, 49 (1997) (discussing how two theoretical explanations—agency and structural explanations—have shaped debates on the causes of homelessness); Suzanne Speak, *Degrees of Destitution: A Typology of Homelessness in Developing Countries*, 19 HOUSING STUD. 465, 468 (2004) (discussing how the causes of homelessness have been associated with either individual or structural factors).

37. See *infra* Part I.A.

38. See *infra* Part I.B.

39. See *infra* Part III.B.

40. In this Article, I use the term “private-order failures” to refer to failures with roots in the individual actions or capacities of unaccompanied youth, or in private family disagreements. In addition, I use the term “public-order failures” to refer to failures with roots in public systems, such as lack of access to public assistance programs that help individuals and families obtain basic necessities (for example, affordable housing, food, and income). It is important to stress that my arguments in this Article do not rest on a strict division between the private and the public order. See generally Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL’Y REV. 3 (2010) (noting exaggerated distinctions between the public and private in family law).

41. In this regard, my analysis fits into a broader body of legal scholarship that examines important intersections between family law and criminal law. See, e.g., Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 290 (2017) (“[C]riminal law has rewritten family law and family life, especially for Black families.”); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2009) (discussing “the relationship between criminal law and family law in the regulation of marriage, sex,

as more in line with structural theories, and responses in the juvenile justice system as more in line with deficient-agency theories, outlined above.

Part II focuses on family-centered public reordering in the child welfare system. Consistent with structural theories, I discuss how dominant child welfare responses view unaccompanied youth as victims of negative family circumstances and respond by altering their family environments.<sup>42</sup> Organized around the concept of permanency planning,<sup>43</sup> child welfare responses assume that families are necessary and optimal environments for a child's growth and development.<sup>44</sup> Permanency goals require the government to act swiftly and decisively to keep youth and children within their own families, and when that is not possible, to place youth and children in temporary or permanent substitute families through foster care and adoption.<sup>45</sup>

I then advance two criticisms of these family-centered responses based on how they apply to unaccompanied youth. First, I contend that these responses rest on assumptions about youth agency and autonomy that are often out of touch with the realities of unaccompanied youth status.<sup>46</sup> Many unaccompanied youth—out of necessity—have had to learn to survive on their own. Research suggests that unaccompanied youth commonly reject narratives that portray them as powerless victims of negative family circumstances, and are hesitant to seek social services that may jeopardize their agency and control.<sup>47</sup> Critically, in order to receive government support, the child welfare framework leaves unaccompanied youth with little option but to revert back to a state of dependence on family systems—whether on biological parents who may

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and intimate life”); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 2 (2006) (discussing the growing reach of the criminal law “into the home to punish domestic violence”).

42. See Justeen Hyde, *From Home to Street: Understanding Young People's Transitions into Homelessness*, 28 J. ADOLESCENCE 171, 172 (2005) (“Service providers and child welfare advocates often depict homeless young people as victims, emphasizing complex histories of child abuse and neglect, domestic violence, substance abuse and poverty.”); *infra* Part II.A.

43. Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113, 1113 (“Permanency lies at the heart of child-protection policy.”).

44. PETER J. PECORA ET AL., *THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH* 44 (1992) (describing how permanency planning assumes that families provide children “the maximum opportunity for growth and development”); David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 238–39 (1995) (justifying permanency planning on the grounds that “[t]he state arguably denies children not raised in a private family setting the opportunity to develop the basic associational skills necessary for the proper functioning of a pluralistic democracy”).

45. PECORA ET AL., *supra* note 44, at 44–45.

46. See *infra* Part II.B.1.

47. See Hyde, *supra* note 42, at 173 (presenting the findings of one study which showed that many unaccompanied youth participants recalled leaving home “in a way that allowed them to feel empowered”); *infra* Part II.B.1.

not care for them or on foster or adoptive parents who unaccompanied youth may not trust.<sup>48</sup> For many unaccompanied youth in late adolescence, this transition might be impossible or take longer than the amount of time that they have left before aging out of the child welfare system.<sup>49</sup>

Second, I argue that tensions between prevailing normative conceptions of “family” and youth agency and autonomy can not only harm youth, but ultimately facilitate their exclusion from the child welfare system.<sup>50</sup> These tensions and exclusions are acutely visible in the LGBTQ youth context. Heteronormative conceptions of “family” can encourage LGBTQ youth who come into contact with the child welfare system to experience rejection or mistreatment on the basis of their sexual orientation or gender identity—features that may very well lie at the core of their agency.<sup>51</sup> As scholars and advocates have described, LGBTQ youth are commonly rejected from or abused in foster families and group homes, are more likely to experience multiple out-of-home placements, and are often unfairly deemed “unadoptable,” because of their sexual orientation or gender identity.<sup>52</sup> These challenges cause many LGBTQ youth to run away from or be kicked out of child welfare placements and take to the streets,<sup>53</sup> and inhibit them from accessing government support once they are living on their own.<sup>54</sup>

Part III then shifts gears to examine public reordering in the juvenile justice system. I show that these responses reflect inconsistent views of unaccompanied youth as both delinquent offenders and crime victims. On one hand, consistent with deficient-agency theories, juvenile justice laws and law enforcement practices have historically pressured and still compel unaccompanied youth to reunite or stay within their families.<sup>55</sup>

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48. See *infra* Part II.B.1.

49. See *infra* Part II.B.1.

50. See *infra* Part II.B.2.

51. See *infra* Part II.B.2.

52. WILSON ET AL., *supra* note 33, at 11, 40 (indicating that LGBTQ youth are often deemed “unadoptable”); Anne Gallegos et al., *Exploring the Experiences of Lesbian, Gay, Bisexual, and Questioning Adolescents in Foster Care*, 14 J. FAM. SOC. WORK 226, 228 (2011) (identifying “low placement stability” and “violence in group homes” as LGBTQ youth-specific issues); *Overview*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/outofhome/overview> (last visited Mar. 14, 2018) (noting that out-of-home care can “include kinship or relatives’ homes, family foster homes, treatment foster homes, or group or residential care”); see also generally Ariel Love, *A Room of One’s Own: Safe Placement for Transgender Youth in Foster Care*, 89 N.Y.U. L. REV. 2265 (2014) (discussing the challenges that transgender youth face in the foster care system).

53. See JEROME HUNT & AISHA MOODIE-MILLS, *THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH: AN OVERVIEW OF THE EXPERIENCES OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM 2* (2012), [https://www.americanprogress.org/wpcontent/uploads/issues/2012/06/pdf/juvenile\\_justice.pdf](https://www.americanprogress.org/wpcontent/uploads/issues/2012/06/pdf/juvenile_justice.pdf).

54. CRAY ET AL., *supra* note 29, at 14.

55. See *infra* Part III.A.1.

When youth do not, juvenile justice laws and policies allow for them to be arrested, charged, and confined in juvenile detention or correctional facilities.<sup>56</sup> On the other hand, public funding for programs and services specifically targeting unaccompanied youth is largely channeled through juvenile justice laws and policies that are primarily concerned with their criminal victimization.<sup>57</sup> As explained, those programs and services are mostly geared toward addressing immediate and short-term needs so that unaccompanied youth can get off the street before becoming victims of crime.<sup>58</sup>

I then critique these juvenile justice responses.<sup>59</sup> Specifically, I argue that the short-term outlook of these responses leaves the responsibility for meeting the long-term needs of unaccompanied youth to family systems that have likely already failed them, making it doubtful whether those long-term needs are ever met.<sup>60</sup> I further explain that the crime-control orientation of these responses does little to foster the long-term living stability of unaccompanied youth, and ultimately leaves them vulnerable to a destructive cycle of homelessness (or other unstable living arrangements) and involvement in the juvenile and criminal justice systems.<sup>61</sup> Unaccompanied youth whose needs cannot be served by the family-centered approach of the child welfare system are especially vulnerable to entering or continuing in the cycle.

Finally, Part IV discusses the broader implications of my analysis and preliminary insights for reform. My analysis shows how the combined public reordering in the child welfare and the juvenile justice systems adopts a view of unaccompanied youth as victims insofar as they are able to fit into families (whether biological, foster, or adoptive), but then shifts to treat unaccompanied youth as delinquent offenders when they cannot fit into family systems.<sup>62</sup> I discuss how these shifting constructions rest on oversimplified victimization and offending narratives of unaccompanied youth. Specifically, these constructions neglect unaccompanied youth's multiple layers of victimization—and especially victimization within families, which my analysis suggests can render family-centered government responses to their situations unworkable and ineffective.

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56. See *infra* Part III.A.1.

57. See *infra* Part III.A.2.

58. See *infra* Part III.A.2.

59. See *infra* Part III.B.

60. See *infra* Part III.A.2.

61. See CRAY ET AL., *supra* note 29, at 13 (noting the cyclical relationship between homelessness and interactions with the juvenile justice system); see also *infra* Part III.B.

62. Cf. Suzanne McKenzie-Mohr et al., *Responding to the Needs of Youth Who Are Homeless: Calling for Politicized Trauma-Informed Intervention*, 34 CHILD. & YOUTH SERVICES REV. 136, 137 (2012) (“[T]here has often been an implicit assumption that youth who are homeless are somehow to blame for their situations . . .”).

I then describe how this Article's analysis illustrates a need for a paradigm shift in child welfare law and policy, and relatedly, juvenile justice law and policy. As a normative matter, this shift would embrace a child welfare regime that is not so strictly organized around family-centered permanency goals and that adopts a positive and empowering conception of unaccompanied youth's agency and autonomy. As a practical matter, this shift would inspire greater investment in alternative approaches that provide unaccompanied youth with support systems, skills, and resources outside of family systems to achieve self-reliance and self-actualization.<sup>63</sup> Under this new public ordering, the government would recognize that family-centered responses do not serve all youth who seek or need help from the state, and soften its reliance on criminalization measures when those family-centered responses are failing to serve vulnerable youth. In support of these points, I reference an emerging body of empirical research on a very limited number of existing programs that house and help unaccompanied youth to achieve self-reliance and self-actualization outside of the family setting.

At the outset, two caveats are in order. First, to be clear, I am not arguing that family-centered child welfare approaches should be abandoned, and I am not advancing a wholesale critique of these approaches. I fully recognize that there is ample room to improve family-centered responses in the child welfare system and that these approaches are successful for many youth and children, whether they identify as LGBTQ or not. Rather, this Article challenges the dominant assumption that child welfare law and policy interventions based on family models (and in particular, the traditional model of the nuclear family)<sup>64</sup> are nec-

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63. It is important to recognize here that these skills are also important for youth who are successfully living in the foster care system and are transitioning to adulthood. See generally CHILD WELFARE INFO. GATEWAY, HELPING YOUTH TRANSITION TO ADULTHOOD: GUIDANCE FOR FOSTER PARENTS (2013), [https://www.childwelfare.gov/pubPDFs/youth\\_transition.pdf](https://www.childwelfare.gov/pubPDFs/youth_transition.pdf) (discussing the challenges for youth exiting foster care and available laws and programs to support transitioning youth).

64. Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 390 (describing "the idealized nuclear family form" as "husband/father, wife/mother, and child"). Here, it is important to acknowledge the important work of family law scholars who for decades have pushed for expanding the legal conception of "family" beyond biological and traditional family models. See, e.g., Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y. L. SCH. J. HUM. RTS. 513, 548-49 (1993) (advocating for a functional approach to parenthood for the law to recognize the "functional lesbian parent"); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2268 (2017) ("urg[ing] greater emphasis on parenthood's social dimensions"); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990) ("[C]ourts should redefine parenthood to include anyone in a functional parental relationship that a legally recognized parent created with the intent that an additional parent-child relationship exist.").

essary and optimal for youth in need of help from the state. Drawing on the experiences of unaccompanied youth, especially in late-adolescence, this Article urges greater investment in a more pluralistic vision of child welfare that can serve youth whose needs may not be met under a family-centered approach.

Second, the term “youth” is inconsistently understood and open for debate. There are different takes in scholarship, law, and legislation on the age range that the word “youth” describes.<sup>65</sup> Although this Article does not resolve this definitional debate, my analysis below is especially concerned with late-adolescent youth between the ages of 15 and 17 who are unaccompanied or at risk of becoming unaccompanied. Late-adolescent youth who are removed from their homes are generally much less likely to be reunited with their families than are young teenagers or children in the child welfare system.<sup>66</sup> Late-adolescent youth are also below the age of majority in most jurisdictions, and therefore must rely on the child welfare system to receive government support.<sup>67</sup>

## I. THEORIES OF UNACCOMPANIED YOUTH STATUS

This Part draws on historical and current perspectives from multiple disciplines, including law, social work, criminology, sociology, and psychology, to briefly outline two categories of theories that attempt to explain why youth become unaccompanied. Subpart A discusses structural theories, which largely account for unaccompanied youth status in terms of environmental factors that influence youth to leave or be forced

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65. This definitional issue has sparked debate in the child welfare domain because many youth “age out” of the child welfare system (often at the age of 18) without completing school, with no place to live, and without a job or other means of support. See generally Kimberly Bender et al., *Experiences and Needs of Homeless Youth with a History of Foster Care*, 55 CHILD. & YOUTH SERVICES REV. 222, 222 (2015) (“[Y]outh exiting care . . . by aging out of care at the age of 18 . . . are often unprepared to enter adulthood.”).

66. Betty Boyle-Duke, *Black Adolescent Girls in Foster Care*, in BLACK GIRLS AND ADOLESCENTS: FACING THE CHALLENGES 183, 193 (Catherine Fisher Collins ed., 2015) (“In general, teens in [foster] care are less likely to reach permanency goals of reuniting with birth parents as compared to younger children.”).

67. Although not a per se rule, I also acknowledge that the younger that youth are below this range, the less likely that they will achieve self-reliance and self-actualization on their own outside of families. Although I focus on youth between the ages of fifteen and seventeen in this Article, I am also concerned with youth between the ages of eighteen and twenty-four who have aged out of the child welfare system without proper means of support to live on their own. “[B]etween 750,000 and 2 million young adults between the ages of 18 and 24 experience homelessness each year.” CRAY ET AL., *supra* note 29, at 3. Notably, the U.S. Department of Housing and Urban Development distinguishes between unaccompanied youth under the age of eighteen and unaccompanied youth between the ages of eighteen and twenty-four. See U.S. DEP’T OF HOUS. & URBAN DEV., THE 2016 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 44 (2016), <https://www.hudexchange.info/resources/documents/2016-AHAR-Part-1.pdf>.

out of their families. Subpart B then describes deficient-agency theories, which explain unaccompanied youth status in terms of individual-level factors. As will be discussed later, government responses to unaccompanied youth rest on assumptions that appear in both categories of theories.

### A. *Structural Theories*

Structural theories of unaccompanied youth status primarily focus on environmental factors that contribute to youth leaving or being forced out of their families. As explained below, these theories largely view unaccompanied youth as victims of environmental circumstances that are beyond their individual control. Three major types of environmental factors are discussed in the literature: (1) family factors; (2) economic factors; and (3) social or cultural factors.<sup>68</sup>

#### 1. Family Factors

Scholars identify family conflict as one of the most common reasons why youth leave or are forced out of their homes.<sup>69</sup> Family conflict can take several forms. For instance, there is a high prevalence of both family rejection and family neglect among unaccompanied youth, which contributes to separation from home.<sup>70</sup> Abuse—whether physical, sexual, or emotional—is also common.<sup>71</sup> Other types of family conflict may include frequent arguments between family members (including exposure to intimate partner violence between parents) and parent-youth disagreements about parental control.<sup>72</sup> In addition, substance abuse can spur family disagreements that result in youth leaving or being kicked out of their homes.<sup>73</sup>

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68. Factors under more than one category may contribute to unaccompanied youth status.

69. STEPHEN J. MOREWITZ, *RUNAWAY AND HOMELESS YOUTH: NEW RESEARCH AND CLINICAL PERSPECTIVES* 11–12 (2016) (discussing studies examining homeless youth's prior experiences of family abuse, neglect, and dysfunction); Sanna J. Thompson et al., *Homeless Youth: Characteristics, Contributing Factors, and Service Options*, 20 J. HUM. BEHAV. SOC. ENV'T 193, 201–04 (2010) (discussing family issues that contribute to youth homelessness).

70. See MOREWITZ, *supra* note 69, at 11 (discussing studies examining homeless youth's prior experiences of family abuse and neglect).

71. Edidin et al., *supra* note 22, at 356 (“Homeless youth experience high rates of trauma and abuse prior to their experience of homelessness. . . . Abuse may be verbal, emotional, physical, or sexual in nature.”).

72. MOREWITZ, *supra* note 69, at 12; Sara M. Walsh & Robin E. Donaldson, *Invited Commentary: National Safe Place: Meeting the Immediate Needs of Runaway and Homeless Youth*, 39 J. YOUTH & ADOLESCENCE 437, 438 (2010) (identifying domestic violence and disharmony among parents as primary reasons that youth leave home).

73. MOREWITZ, *supra* note 69, at 12.

## 2. Economic Factors

Unaccompanied youth are more likely to come from poor and low-income families and communities.<sup>74</sup> Parental unemployment, low wages, and poverty place stress on family relationships, which in turn contributes to youth leaving or being kicked out of the home.<sup>75</sup> This stress may encourage family conflicts discussed above that ultimately result in family separation; youth may run away to escape the stress associated with family poverty; or parents who cannot provide adequate financial support may expect youth to live on their own.<sup>76</sup> Many of these economic challenges also result in youth being placed into foster families or group homes<sup>77</sup> where discrimination and mistreatment can cause youth to leave or be forced out of child welfare placements, after which they have no place to live.<sup>78</sup>

These economic challenges are discussed in more detail later and are described by scholars and advocates as connected to a broader weakening of the welfare state in the past several decades.<sup>79</sup> Declines in public assistance, affordable housing, and social service programs have resulted in a large increase in the number of individuals and families who experience homelessness.<sup>80</sup> These declines have had significant racialized consequences, especially for poor and low-income single mothers of color and their children.<sup>81</sup> This rollback of the welfare state relates

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74. *Id.* at 2–3; Edidin et al., *supra* note 22, at 356; Marie Robert et al., *Factors Associated with Homelessness of Adolescents Under Supervision of the Youth Protection System*, 28 J. ADOLESCENCE 215, 218 (2005).

75. MOREWITZ, *supra* note 69, at 2–3 (discussing studies on the connection between low socioeconomic status and future unaccompanied youth status).

76. *Id.* at 2 (discussing studies finding that a majority of runaways are from lower socioeconomic groups and that attribute this trend to youth attempting to escape their families' problems).

77. *Street Kids—Homeless and Runaway Youth: Hearing Before the S. Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Res.*, 101st Cong. 28 (1990) (statement of Della M. Hughes, Executive Director, National Network of Runaway and Youth Services, Inc.) (“Many young people . . . may be forced from their homes when their parents cannot deal with their own economic situations . . .”); LENNETTE AZZI-LESSING, *BEHIND FROM THE START: HOW AMERICA’S WAR ON THE POOR IS HARMING OUR MOST VULNERABLE CHILDREN* 91 (2017) (“[T]he majority of the children placed into foster care come from poor families . . .”).

78. *See infra* notes 94–96 and accompanying text.

79. *See generally* Bender et al., *supra* note 65. Discrimination and maltreatment will be discussed in more detail *infra* Part I.A.3.

80. *See generally* William T. Armaline, *(Re)Conceptualizing Adolescent Homelessness: Misdirection of the State and Child Welfare*, in 4 *CHILD POVERTY IN AMERICA TODAY* 1, 2–3 (Barbara A. Arrighi & David J. Maume eds., 2007) (discussing connections between the weakening of social welfare programs in the United States and the rise in homelessness among families and children).

81. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1485 (2012) (“As neoliberal policies strip poor African American neighborhoods of needed services, poor and low-income black

to demography and challenges of unaccompanied youth because many unaccompanied youth separate from families that cannot financially support them.<sup>82</sup>

Residential instability is another relevant economic factor. For many unaccompanied youth, homelessness is part of a broader pattern of unstable living arrangements over the course of their lives. Many unaccompanied youth have experienced multiple prior residential moves with their biological parents or relatives.<sup>83</sup> They are also more likely to have had repeated contacts with child welfare placements, mental health institutions, and juvenile detention and correctional facilities.<sup>84</sup> Data suggests that “as many as 70 percent of homeless [youth] have spent time in . . . foster [care], [a] group home, or [an]other residential facility . . . .”<sup>85</sup> Youth homelessness is also commonly preceded by living in “doubled-up” housing, where youth are temporarily taken in by others when they have no other place to go.<sup>86</sup>

School-related difficulty is a final relevant factor. Prior to running away or becoming homeless, many unaccompanied youth have interrupted school histories.<sup>87</sup> These interruptions are often due to housing instability which causes youth to move between schools.<sup>88</sup> Data lends support to the notion that excessive school mobility is a risk factor for academic failure.<sup>89</sup> Other potential school-related challenges involve

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mothers tend to receive child welfare support only when they have been charged with child maltreatment.”).

82. See *Street Kids*, *supra* note 77.

83. PAUL A. TORO ET AL., HOMELESS YOUTH IN THE UNITED STATES: RECENT RESEARCH FINDINGS AND INTERVENTION APPROACHES 6–5 (2007), <https://aspe.hhs.gov/system/files/pdf/180406/report.pdf>.

84. JAN MOORE, NAT’L CTR. FOR HOMELESS EDUC., UNACCOMPANIED AND HOMELESS YOUTH REVIEW OF LITERATURE (1995–2005), at 8 (2005), <https://files.eric.ed.gov/fulltext/ED489998.pdf> (“An increasing number of homeless youths have spent time in foster care or treatment facilities.”); Thompson et al., *supra* note 69, at 200 (“Homeless youths are more likely to have spent time in juvenile detention centers . . .”).

85. MOORE, *supra* note 84, at 8.

86. See generally Bradley R. Entner Wright et al., *Factors Associated with Doubled-Up Housing—A Common Precursor to Homelessness*, 72 SOC. SERV. REV. 92 (1998) (noting that doubled-up housing often paves the way for homelessness and potentially raises the probability of homelessness).

87. See Yvonne Rafferty et al., *Academic Achievement Among Formerly Homeless Adolescents and Their Continuously Housed Peers*, 42 J. SCH. PSYCHOL. 179, 180–81 (2004).

88. *Id.*

89. Jelena Obradović et al., *Academic Achievement of Homeless and Highly Mobile Children in an Urban School District: Longitudinal Evidence on Risk, Growth, and Resilience*, 21 DEV. & PSYCHOPATHOLOGY 493, 512–15 (2009) (noting that achievement gaps between highly mobile students and nonmobile students can manifest as early as the second grade).

bullying and learning disabilities that school administrators and teachers ignore or mishandle.<sup>90</sup>

### 3. Social and Cultural Factors

Discrimination on the basis of race, ethnicity, and gender contributes to youth leaving or being forced out of their homes. For instance, criminal and family law scholars have documented how the government has scaled back its welfare institutions over the past several decades and replaced them with measures that rely on surveillance and criminalization to control members of marginalized communities.<sup>91</sup> In the child welfare context, this shift has inspired laws and policies that monitor and blame parents for not being able to provide for their children and remove their children from the home.<sup>92</sup> Scholars have discussed how these laws and policies are rooted in structural racial inequality and recreate racial disparities that especially harm poor and low-income single mothers of color.<sup>93</sup>

One major consequence of these surveillance and criminalization measures is the influx of youth and children of color into out-of-home child welfare placements.<sup>94</sup> After entering the child welfare system, racial inequality and discrimination in the system can pose difficulties for them. Youth of color are more likely to experience multiple placement moves and less likely to be adopted or find permanent families<sup>95</sup>—instabili-

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90. See MOREWITZ, *supra* note 69, at 47–55 (discussing school issues facing runaway and homeless youth). See generally Jenna M. Armstrong et al., *Mental Health of Homeless Youth: Moderation by Peer Victimization and Teacher Support*, 49 CHILD PSYCHIATRY & HUM. DEV. (forthcoming 2018) (discussing connections between peer victimization and teacher support for mental health outcomes of homeless youth). LGBTQ youth experience discrimination and bullying in school at especially high rates. HUMAN RIGHTS WATCH, “LIKE WALKING THROUGH A HAILSTORM”: DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS 19 (2016), [https://www.hrw.org/sites/default/files/report\\_pdf/uslgbt1216web\\_2.pdf](https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf); Kris Varjas et al., *Bullying in Schools Towards Sexual Minority Youth*, 7 J. SCH. VIOLENCE 59, 68–70 (2008).

91. KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011) (“Welfare rules assume the criminality of the poor.”); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY xvi (2009); Roberts, *supra* note 81, at 1477–78.

92. See, e.g., Roberts, *supra* note 81, at 1484.

93. See *id.*

94. See *id.*

95. WENDY B. SMITH, YOUTH LEAVING FOSTER CARE: A DEVELOPMENTAL, RELATIONSHIP-BASED APPROACH TO PRACTICE 13 (2011) (noting that children of color in the child welfare system “are less likely to be returned home to their families, less likely to be adopted, and more likely to leave care without a permanent connection to a caring adult” (citation omitted)); Reiko Boyd, *African American Disproportionality and Disparity in Child Welfare: Toward a Comprehensive Conceptual Framework*, 37 CHILD. & YOUTH SERVICES REV. 15, 23 (2014) (“Compared to children of other backgrounds . . . African American children . . . are far less likely to be adopted.” (citations omitted)); E. Michael Foster et al., *Explaining the Disparity in Placement Instability Among African-American and White Children in Child Welfare: A Blinder—Oaxaca*

ties that can destabilize and put them at greater risk of homelessness.<sup>96</sup> Youth of color are also aging out of the child welfare system at increasing frequencies without adequate resources to survive on their own, which increases the risk of adult homelessness.<sup>97</sup>

In addition, a growing body of literature describes how discrimination on the basis of sexual orientation and gender identity places LGBTQ youth at greater risk for homelessness. As noted previously, studies have found that LGBTQ youth (and LGBTQ youth of color in particular) are highly overrepresented among unaccompanied youth, and may account for as high as 20–40 percent of homeless youth nationwide.<sup>98</sup> Many of these youth were kicked out of their homes or ran away after suffering family rejection or abuse because of their sexual orientation or gender identity.<sup>99</sup> As will be discussed later, research suggests that the current epidemic<sup>100</sup> of LGBTQ youth homelessness is connected to anti-LGBTQ discrimination and mistreatment in the child welfare system as well as homeless youth shelters.<sup>101</sup>

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Although structural theories of unaccompanied youth status may focus on one or more of these environmental factors, an important commonality is that they account for unaccompanied youth status in terms of different failures in the private and the public order. To clarify this point, we can place private and public order failures along a spectrum. At one end, private-order failures have roots in private system breakdowns (such as the family) or an individual youth's actions or capacities. Closer to this end of the spectrum are structural theories of unaccompanied youth status that place primacy on private family disagreements to account for why youth leave, or are forced out of their homes, only to

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*Decomposition*, 33 CHILD. & YOUTH SERVICES REV. 118, 118 (2011) (“African Americans in foster care experience more frequent placement changes.” (citations omitted)).

96. See, e.g., CARRIE LIPPY ET AL., KING COUNTY YOUTH OF COLOR NEEDS ASSESSMENT: THE EXPERIENCES, STRENGTHS, AND NEEDS OF HOMELESS & UNSTABLY HOUSED YOUTH OF COLOR 16 (2017), [https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/597fd3ed893fc098807bb872/1501549553222/Youth+of+Color+Needs+Assessment\\_Final+Report.pdf](https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/597fd3ed893fc098807bb872/1501549553222/Youth+of+Color+Needs+Assessment_Final+Report.pdf) (discussing the destabilizing nature of repeated moves in the foster care system for youth of color that the youth perceived “set them on a path towards homelessness”).

97. ORONDE MILLER ET AL., CHANGING COURSE: IMPROVING OUTCOMES FOR AFRICAN AMERICAN MALES INVOLVED WITH CHILD WELFARE SYSTEMS 6–7 (2014), [https://www.cssp.org/publications/child-welfare/alliance/Changing-Course\\_Improving-Outcomes-for-African-American-Males-Involved-with-Child-Welfare-Systems.pdf](https://www.cssp.org/publications/child-welfare/alliance/Changing-Course_Improving-Outcomes-for-African-American-Males-Involved-with-Child-Welfare-Systems.pdf).

98. See *supra* note 33.

99. QUINTANA ET AL., *supra* note 30, at 9.

100. CRAY ET AL., *supra* note 29, at 1 (describing the state of LGBT youth homelessness as an “epidemic”); NICHOLAS RAY, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006), [http://www.thetaskforce.org/static\\_html/downloads/HomelessYouth.pdf](http://www.thetaskforce.org/static_html/downloads/HomelessYouth.pdf) (same).

101. See *infra* Part II.B.

wind up homeless or living in other unstable arrangements. On the other end of the spectrum are public-order failures which have their roots in breakdowns in societal structures or public systems. Closer to this end of the spectrum are structural theories of unaccompanied youth status that stress inadequacies in the public welfare system (for instance, lack of access to affordable housing, income, or food) as the major reasons why youth leave, or are kicked out of their homes, only to find themselves on the streets or living in other unstable arrangements.

To be clear, this is not to imply that structural accounts or specific environmental factors can be neatly placed at either end of this spectrum.<sup>102</sup> Consider the example of parental abuse. On one hand, parental abuse can be conceptualized as a private-order failure in the sense that the abuse embodies a parent's personal failure that erodes the parent-child relationship. On the other hand, studies show that parental abuse can be linked to social and economic marginalization, which places stress on family relationships and facilitates conditions that trigger parental abuse.<sup>103</sup>

Therefore, the purpose of thinking about structural theories in these terms is to consider how the range of potential causes of unaccompanied youth status may involve different failures in the private and the public order. This sets the stage to evaluate how government responses to unaccompanied youth in the child welfare and the juvenile justice systems address those failures. The same logic applies to deficient-agency theories of unaccompanied youth status.

### B. *Deficient-Agency Theories*

Unlike structural theories, which largely stress environmental factors, deficient-agency theories focus on individual-level factors that result in unaccompanied youth leaving or being forced out of their homes. Deficient-agency theories presume that youth have a role in shaping their life

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102. As noted previously, scholars have criticized exaggerated distinctions between the public and private order in family law. See, e.g., Alstott, *supra* note 40, at 3.

103. See, e.g., John Eckenrode et al., *Income Inequality and Child Maltreatment in the United States*, 133 *PEDIATRICS* 454, 454 (2014) (concluding that greater income inequality across U.S. counties was significantly associated with higher county-level rates of child maltreatment); Emily J. Warren & Sarah A. Font, *Housing Insecurity, Maternal Stress, and Child Maltreatment: An Application of the Family Stress Model*, 89 *SOC. SERV. REV.* 9, 34 (2015) ("Housing insecurity is directly associated with neglect risk, as well as indirectly associated with both neglect and abuse risk through maternal stress."); see also ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 6 (1999) ("The starting point for honest and meaningful debate has to be the recognition that racial and social injustice is at the core of child abuse and neglect."); Clare Huntington, *Rights Myopia in Child Welfare*, 53 *UCLA L. REV.* 637, 639 (2006) (critiquing rights-based models in the child welfare system and stressing that "rights obscure the role of poverty in abuse and neglect").

circumstances<sup>104</sup> and thus explain unaccompanied youth status in terms of the irresponsible decisions, personal failures, or personal incapacities of unaccompanied youth.<sup>105</sup> By placing the blame on unaccompanied youth, deficient-agency theories conceptualize their agency and autonomy in negative terms—a view that I will later critique and argue that government responses to unaccompanied youth should avoid.<sup>106</sup>

Granted, many scholarly accounts in line with deficient-agency theories have lost popularity in recent decades. Nonetheless, it is important to describe these accounts because contemporary government responses to unaccompanied youth often rest on assumptions that are consistent with deficient-agency theories—a point I will argue in more detail later. As discussed below, deficient-agency theories can be divided into three strands. Although these strands are not mutually exclusive, each strand is tailored to a specific narrative of unaccompanied youth—namely, that they are “bad kids,” “carefree kids,” or “sick kids.”

### 1. “Bad Kids”

The first strand of deficient-agency theories depicts unaccompanied youth as “bad kids.” These accounts tend to assume that unaccompanied youth are runaways who voluntarily chose to leave home without their parents’ permission, usually for insignificant reasons. They further characterize running away in ways that negatively define the agency and autonomy of unaccompanied youth. For instance, some accounts define runaway activity as a behavioral problem or deviant act.<sup>107</sup> Others consider running away an early warning sign that youth may be on a path to more serious delinquency or criminal behavior.<sup>108</sup>

Scholars have described how this “bad kids” narrative places the blame on unaccompanied youth for their family separation and unstable living conditions, rather than blaming the youth’s home environment.<sup>109</sup> They have further argued that this victimblaming narrative fosters stereotypes of unaccompanied youth as delinquents or deviants.<sup>110</sup> In

104. Rosanna Scutella & Guy Johnson, *Locating and Designing ‘Journeys Home’: A Literature Review* 8 (Melbourne Inst., Working Paper No. 11/12, 2012), [http://melbourneinstitute.unimelb.edu.au/downloads/working\\_paper\\_series/wp2012n11.pdf](http://melbourneinstitute.unimelb.edu.au/downloads/working_paper_series/wp2012n11.pdf).

105. See generally David Farrugia, *The Symbolic Burden of Homelessness: Towards a Theory of Youth Homelessness as Embodied Subjectivity*, 47 *J. Soc.* 71 (2010) (discussing how agency theory and irresponsibility are the primary lenses through which youth homelessness is understood and that this framework shapes young people’s subjective experiences of homelessness).

106. See *infra* Parts III.A.1, IV.

107. See, e.g., TIM BRENNAN ET AL., *THE SOCIAL PSYCHOLOGY OF RUNAWAYS* 20–23 (1978) (describing “[s]ociopathic and [c]riminological [p]erspectives” on runaway youth).

108. *Id.* at 21.

109. McKenzie-Mohr et al., *supra* note 62, at 137.

110. David Farrugia, *Youth Homelessness and Individualised Subjectivity*, 14 *J.*

turn, these stereotypes encourage law enforcement, juvenile justice, and criminal justice responses that treat unaccompanied youth as threats to public order and security.<sup>111</sup>

Scholars have also discussed how this victimblaming narrative can negatively affect how unaccompanied youth construct their identities and view themselves.<sup>112</sup> Research shows that some unaccompanied youth internalize ideas that they are homeless because of their own personal failures, which damages their self-esteem and self-worth.<sup>113</sup> This is one of many problems flowing from government responses that rely on negative conceptions of unaccompanied youth's agency and autonomy—a point that I will discuss later in more detail in the conclusion.

## 2. “Carefree Kids”

The second strand of deficient-agency theories depicts unaccompanied youth as “carefree kids.” These accounts usually assume that unaccompanied youth run away from home without their parents' permission in order to gain independence, pleasure, or adventure.<sup>114</sup> They further conceptualize unaccompanied youth status as a product of youth's immature and irresponsible choices to leave home.<sup>115</sup>

Depictions of unaccompanied youth as “irresponsible” and “care-free” have deep historical roots. For instance, such depictions are prominent in popular historical fiction characters, such as Mark Twain's Huck Finn.<sup>116</sup> They are also associated with youth counterculture movements of the 1960s, during which youth across different economic classes

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YOUTH STUD. 761, 763 (2011) (“Popular representations often construct ‘the homeless’ as morally suspect, irresponsible, dangerous or passive, and young people experiencing homelessness are aware of these representations.” (citations omitted)). Scholars have also discussed how stereotypes of deviancy are associated with deficient agency explanations of homelessness more generally. See, e.g., Joanne Neale, *Theorising Homelessness: Contemporary Sociological and Feminist Perspectives*, in HOMELESSNESS AND SOCIAL POLICY 35, 36–37 (Roger Burrows et al. eds., 1997).

111. See *infra* Part III.A (describing those responses).

112. See, e.g., Farrugia, *supra* note 105, at 84–85; Farrugia, *supra* note 110, at 771–72.

113. See, e.g., Farrugia, *supra* note 105, at 84–85; Sue-Ann MacDonald, *The Paradox of Being Young and Homeless: Resiliency in the Face of Constraints*, 4 INT'L J. CHILD, YOUTH & FAM. STUD. 425, 436 (2013).

114. See, e.g., R. BARRI FLOWERS, STREET KIDS: THE LIVES OF RUNAWAY AND THROWAWAY TEENS 55 (2010); Jongserl Chun & David W. Springer, *Stress and Coping Strategies in Runaway Youths: An Application of Concept Mapping*, 5 BRIEF TREATMENT & CRISIS INTERVENTION 57, 57 (2005).

115. JAN VAN DER PLOEG & EVERT SCHOLTE, HOMELESS YOUTH 66 (1997).

116. Debbie B. Riley et al., *Common Themes and Treatment Approaches in Working with Families of Runaway Youths*, 32 AM. J. FAM. THERAPY 139, 140 (2004) (noting how runaway “youth are usually not fortune or thrill seekers who were once glamorized in fiction writing”).

left or ran away from home to pursue “hippie” lifestyles as alternatives to living under the strict rules of their parents.<sup>117</sup>

Similar to the “bad kids” narrative, scholars have characterized this “carefree kids” narrative as victim blaming.<sup>118</sup> They have further described the ways in which this victimblaming narrative has negatively shaped popular perceptions of unaccompanied youth<sup>119</sup> and fostered stereotypes of unaccompanied youth as lazy and irresponsible.<sup>120</sup> Studies have found that many unaccompanied youth internalize these stereotypes, which negatively affects their self-esteem and self-confidence.<sup>121</sup>

### 3. “Sick Kids”

The third strand of deficient-agency theories depicts unaccompanied youth as “sick kids.” Early empirical studies of runaway youth came from clinical mental health research, causing runaway behavior to be viewed and defined through a medical lens.<sup>122</sup> Specifically, mental health professionals characterized running away as a reflection of deeper psychological problems, including impulsivity, low self-esteem, and depression.<sup>123</sup>

The historical acceptance of this pathological view is illustrated by the prior inclusion of “runaway reaction” as a behavioral disorder in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM-II) between 1968 and 1980.<sup>124</sup> According to the DSM-II, children and adolescents with this disorder were typically timid, reclusive, immature, felt rejected at home, lacked self-confidence,

117. Ken Libertoff, *The Runaway Child in America: A Social History*, 1 J. FAM. ISSUES 151, 161 (1980).

118. See *infra* note 120.

119. See *infra* note 120.

120. See, e.g., MOREWITZ, *supra* note 69, at 43; Theresa Rogers et al., *Public Pedagogies of Street-Entrenched Youth: New Literacies, Identity and Social Critique*, in 1 EVERYDAY YOUTH LITERACIES: CRITICAL PERSPECTIVES FOR NEW TIMES 47, 57 (Kathy Sanford et al. eds., 2014); Charis Romilly, *Services for Street Youth: Do They Reproduce, Contribute to, and Perpetuate Oppression?*, in EMERGING PERSPECTIVES ON ANTI-OPPRESSIVE PRACTICE 121, 135 (Wes Shera ed., 2003).

121. See, e.g., Farrugia, *supra* note 105, at 84–85; Sean A. Kidd et al., *Stories of Working with Homeless Youth: On Being “Mind-Boggling,”* 29 CHILD. & YOUTH SERVICES REV. 16, 24–25 (2007). I will further revisit these points *infra* Part IV.

122. BRENDA K. MELSON, RUNAWAY ADOLESCENTS: A FAMILY SYSTEMS PERSPECTIVE 24 (1995) (“The early research on runaway youth came primarily from the psychiatric literature . . .”); Gerald R. Adams & Gordon Munro, *Portrait of the North American Runaway: A Critical Review*, 8 J. YOUTH & ADOLESCENCE 359, 360 (1979) (“Running away has been defined, historically, as a behavioral manifestation of psychopathology.” (citation omitted)).

123. Adams & Munro, *supra* note 122, at 360–61; Helm Stierlin, *A Family Perspective on Adolescent Runaways*, 29 ARCHIVES GEN. PSYCHIATRY 56, 56 (1973) (describing running away as a “surface manifestation[] of complex psychosocial conditions and developments”).

124. MELSON, *supra* note 122, at 24.

and were inclined toward stealing.<sup>125</sup> Medical professionals at the time advanced the idea that effective treatment required either changing the conditions within adolescents' and children's home environments or removing adolescents and children from their homes, followed by a substantial period of socialization "in an accepting but firm environment."<sup>126</sup>

Although this pathological view has lost popularity over time,<sup>127</sup> more recent studies have identified connections between mental illness and running away. Studies have found that unstable and abusive family environments can trigger or accelerate the development of various psychological problems before youth run away from home.<sup>128</sup> Examples include trauma, depression, anxiety, and emotional reactivity.<sup>129</sup> As will be discussed later, the multiple layers of potential family victimization that unaccompanied youth experience can undermine the utility and effectiveness of family-centered child welfare responses.<sup>130</sup> Studies have also found that depression is a predictive factor for running away from home,<sup>131</sup> and that runaway behavior is correlated with a greater likelihood of suicide attempts and suicidal thoughts.<sup>132</sup>

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In sum, deficient-agency theories of unaccompanied youth status stress individual-level factors that contribute to youth leaving or being forced out of their families, only to end up without a home or stable living arrangement. Given their focus on individualized explanations, deficient-agency theories mostly account for unaccompanied youth status in terms of private order failures. Private order failures may involve unaccompanied youth's alleged personal failures (for instance, youth's bad or irresponsible decisions to leave home without permission) or their alleged personal incapacities (such as mental health problems).

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125. Craig Edelbrock, *Running Away from Home: Incidence and Correlates Among Children and Youth Referred for Mental Health Services*, 1 J. FAM. ISSUES 210, 225 (1980); Richard L. Jenkins, *The Runaway Reaction*, 128 AM. J. PSYCHIATRY 168, 169 (1971).

126. Jenkins, *supra* note 125, at 173.

127. "Runaway reaction" was removed from the DSM-III, released in 1980. MELSON, *supra* note 122, at 24.

128. Michael D. McCarthy & Sanna J. Thompson, *Predictors of Trauma-Related Symptoms Among Runaway Adolescents*, 15 J. LOSS & TRAUMA 212, 213 (2010).

129. *Id.*

130. *See infra* Conclusion.

131. Joan S. Tucker et al., *Running Away from Home: A Longitudinal Study of Adolescent Risk Factors and Young Adult Outcomes*, 40 J. YOUTH & ADOLESCENCE 507, 508 (2011).

132. JENNIFER BENOIT-BRYAN, THE RUNAWAY YOUTH LONGITUDINAL STUDY 23 (2011), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.648.882&rep=rep1&-type=pdf>; Howard Meltzer et al., *Children Who Run Away from Home: Risks for Suicidal Behavior and Substance Misuse*, 51 J. ADOLESCENT HEALTH 415, 418, 419 tbl.3 (2012).

The analysis now turns to examine how government responses to unaccompanied youth address the private and public order failures described above. As discussed below, the government has responded to unaccompanied youth through a complex web of family-centered public reordering in both the child welfare and the juvenile justice systems. The analysis shows that whether unaccompanied youth can successfully fit into family systems largely guides when government responses to unaccompanied youth embrace or reject the victimblaming assumptions within these bodies of theory.

## II. CHILD WELFARE SYSTEM RESPONSES TO UNACCOMPANIED YOUTH

This Part examines family-centered government responses to unaccompanied youth in the child welfare system. Subpart A explains how, in line with structural theories of unaccompanied youth status, child welfare responses view unaccompanied youth as victims of negative family circumstances and are geared toward altering their family environments. Those changes may take the form of reuniting and improving the relationship between unaccompanied youth and their biological parents or adult relatives, or, when that is not possible, providing unaccompanied youth with substitute families through foster care and adoption.

Subpart B then advances two related criticisms of this family-centered approach. First, I explain how this approach rests on assumptions about the agency and autonomy of unaccompanied youth that are often inconsistent with the realities of unaccompanied youth status. Second, I discuss how tensions between prevailing normative conceptions of “family” (i.e., the traditional model of the nuclear family) and youth’s agency and autonomy can harm youth, and ultimately facilitate their exclusion from the child welfare system. These tensions and exclusions are acutely visible in the LGBTQ youth context, where traditional family concepts can facilitate the rejection or mistreatment of LGBTQ youth on the basis of their sexual orientation or gender identity in the child welfare system.

As a preliminary matter, it is important to note that unaccompanied youth can come into contact with the child welfare system at multiple different points. For instance, unaccompanied youth can come into contact with the child welfare system for the first time while they are homeless, after their parents kicked them out of their homes.<sup>133</sup> Other times, unaccompanied youth who had prior involvement with the child

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133. Many state laws require homeless youth shelters to refer youth to child welfare services if their parents cannot be reached. *See, e.g.*, N.H. REV. STAT. ANN. § 170-E:27-a (2017) (noting that if a youth’s guardian cannot be reached, the shelter must notify the New Hampshire Department of Health and Human Services within 30 days).

welfare system can come into contact with the system again after leaving or being kicked out of foster families or group homes, or upon release from juvenile detention.<sup>134</sup>

### A. *Family-Centered Public Reordering in the Child Welfare System*

This Subpart begins with historical background on the child welfare system's role in handling unaccompanied youth.<sup>135</sup> This background provides necessary context for more recent family-centered practices and trends in the child welfare system, which the analysis turns to next.<sup>136</sup> That analysis shows how prevailing methods of child welfare interventions assume that families are necessary and optimal environments for youth to succeed as adults, and based on this assumption, are geared toward improving youth's family settings (consistent with structural theories of unaccompanied youth status). This orientation leaves little space for child welfare responses that provide unaccompanied youth support systems outside of family systems to help them achieve self-reliance and self-actualization as adults.

#### 1. Historical Background

Until the late 19th century, to the extent that legislatures and courts regulated family life, they protected the authority of husbands and fathers to govern the household.<sup>137</sup> Based on the idea that the household was a private domain, the law rarely became involved with issues concerning child abuse and neglect.<sup>138</sup> No public regulatory framework served dependent or neglected youth, including unaccompanied youth.<sup>139</sup> Rather, private entities and philanthropic organizations assumed the role of assisting those youth.<sup>140</sup>

Outside of child labor laws, the federal government's first major activity in the area of child welfare occurred in 1935 with the enactment of the Social Security Act.<sup>141</sup> This federal law created the Aid to Depen-

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134. Kimberly A. Tyler & Rachel M. Schmitz, *Family Histories and Multiple Transitions Among Homeless Young Adults: Pathways to Homelessness*, 35 CHILD. & YOUTH SERVICES REV. 1719, 1734–42 (2013).

135. See *infra* Part II.A.1.

136. See *infra* Part II.A.2.

137. Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 309 (2002).

138. JUDITH SEALANDER, *THE FAILED CENTURY OF THE CHILD: GOVERNING AMERICA'S YOUNG IN THE TWENTIETH CENTURY* 55 (2003) (“Before the late nineteenth century, public officials rarely interfered with a family's right to discipline resident children.”).

139. Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1301 (1999).

140. *Id.* at 1301–02.

141. Social Security Act, Pub. L. No. 74–271, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.); Barbara Bennett Woodhouse, *Child Abuse, The Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 479 (2001) (“The first federal involvement in the child welfare system dates to the New

dent Children (ADC) program, which was modeled after states' existing mothers' pension programs.<sup>142</sup> The ADC program provided financial assistance to certain widows and single mothers ("primarily . . . white mothers, who were not expected to work")<sup>143</sup> so that they could care for their children without sacrificing caregiver roles by seeking or holding a job.<sup>144</sup> The goal of the ADC program was to prevent youth and children from being pressured to leave their homes for an orphanage because of poverty.<sup>145</sup> In grounding eligibility for public assistance on the circumstances of parents (and single mothers in particular),<sup>146</sup> this early reform neither recognized nor provided help to unaccompanied youth who were living on their own.

The ADC program, and subsequent amendments to that program, shaped the extent of the federal government's involvement in the child welfare domain<sup>147</sup> until Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.<sup>148</sup> Proponents of CAPTA stressed

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Deal and the Social Security Act of 1935 . . ."). For the purpose of the historical analysis in this Subpart, I am primarily focusing on developments in federal child welfare law, which are critical to understanding existing child welfare responses to unaccompanied youth at both the federal and state levels today. *See infra* Part II.A.2.

142. Hasday, *supra* note 137, at 357–58.

143. Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *YALE L.J.* 1563, 1571 (1996) (book review). Scholars have discussed how the federal ADC program and states' mothers' pension programs were designed for white mothers and excluded Black mothers and other mothers of color. *See, e.g.*, WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 34–35 (1965); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 48 (1994).

144. Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 *CONN. L. REV.* 817, 823 n.33 (1994).

145. C. TRUETT BAKER, *WELCOMING THE CHILDREN: HISTORY AND PROGRAMS OF ARIZONA BAPTIST CHILDREN'S SERVICES 1960–2002*, at 11 (2010); Mangold, *supra* note 139, at 1306–07.

146. As explained later, this changed in 1961 when Congress expanded the ADC program to pay for the maintenance of children in foster care who were eligible for ADC. An Act to Amend Title IV of the Social Security Act to Authorize Federal Financial Participation in Aid to Dependent Children of Unemployed Parents, and for Other Purposes, Pub. L. No. 87–31, 75 Stat. 75 (1961) (codified in scattered sections of 42 U.S.C.).

147. *See* KASIA O'NEILL MURRAY & SARAH GESIRIECH, *A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM* 2–3 (2004), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster\\_care\\_reform/legislativehistory2004pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/legislativehistory2004pdf.pdf).

148. Child Abuse Prevention and Treatment Act, Pub. L. No. 93–247, 88 Stat. 4 (1974) (codified in scattered sections of 42 U.S.C.). Scholars have discussed that a major impetus to CAPTA was growing concern among medical professionals in the 1960s about a surge of cases involving physical injuries to children that were inflicted by parents—a phenomenon coined as “battered-child syndrome.” *See generally* C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 *J. AM. MED. ASS'N* 17 (1962) (introducing the term “battered-child syndrome”). Until that time, child abuse was not the subject of serious study. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 *FAM. L.Q.* 449, 454 (2008). Public and media attention started

that state and local efforts to combat child abuse and neglect were inadequate.<sup>149</sup> CAPTA made a number of significant changes that dramatically increased the federal government's role in the area of child welfare.<sup>150</sup> CAPTA instituted a minimum definition of child abuse, mandated the development of infrastructure to compile nationwide data on child abuse, created a federal office responsible for administering the federal law, and authorized research into the frequency, causes, and treatment of child abuse.<sup>151</sup> CAPTA also allocated funds to help states respond to child abuse, and conditioned receipt of federal funds on the enforcement of CAPTA's investigation and reporting mandates.<sup>152</sup> These funding conditions helped to create substantial uniformity in state legislation that addressed child abuse.<sup>153</sup>

In the same period that Congress tackled child abuse, it also turned its attention to an emerging crisis in the foster care system. Between the 1960s and 1970s, the number of youth and children in the foster care system nearly doubled to almost 500,000.<sup>154</sup> Experts at the time attributed this surge to significant changes that Congress made to the ADC program in the early 1960s. They argued that these changes provided financial incentives for states to remove children from their homes and place them in foster care.<sup>155</sup> Specifically, the revised ADC program allocated ample federal funds that followed youth and children into foster care placements, but allocated significantly less funds for services

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to focus on the child abuse, and state legislatures responded swiftly. *Id.* at 455–56. By 1967, every state had enacted a law requiring the reporting of suspected child abuse to appropriate authorities (mostly physicians and other health care professionals). *Id.* at 456.

149. THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFE-GUARDING AMERICA'S CHILDREN 5–6 (2014), [https://www.acf.hhs.gov/sites/default/files/cb/capta\\_40yrs.pdf](https://www.acf.hhs.gov/sites/default/files/cb/capta_40yrs.pdf) (“[S]tate and local efforts in both the public and private sectors to combat child abuse and neglect were widely deficient.”).

150. *See* Myers, *supra* note 148, at 456 (“Prior to 1974, the federal government played a useful but minor role in child protection.”); *id.* at 457 (outlining the changes that CAPTA authorized resulting in Congress assuming a leadership role in child welfare).

151. Child Abuse Prevention and Treatment Act §§ 2–3, 88 Stat. at 5.

152. *Id.* § 4, 88 Stat. at 5–7.

153. Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 194–95 (1998).

154. NORA S. GUSTAVSSON & ELIZABETH A. SEGAL, CRITICAL ISSUES IN CHILD WELFARE 92 (1994); Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479, 1487–88 (1999).

155. Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 142–43 (1999). With those changes to the ADC program in the early 1960s, Congress also renamed the program Aid to Families with Dependent Children (“AFDC”). Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1337 n.124 (2012).

to prevent foster care placements or to reunite children with their biological families after being placed in foster care.<sup>156</sup>

With new pressures on the foster care system, child welfare agencies and private organizations in the 1970s started to explore different options to tackle the foster care crisis—including the treatment of LGBTQ youth who were difficult to place or had no viable placement options in the child welfare system.<sup>157</sup> A select number of private organizations and state-based child welfare agencies started to openly place lesbian and gay homeless youth who had been rejected from their biological families, foster families, or group homes with openly lesbian and gay foster parents.<sup>158</sup> These placements, however, were not always welcome. Some parents opposed them,<sup>159</sup> some judges denied them,<sup>160</sup> and backlash against lesbian and gay foster parenting motivated a wave of legislation and child welfare agency policies that prohibited or restricted lesbian and gay adults from becoming foster or adoptive parents.<sup>161</sup>

156. Guggenheim, *supra* note 155, at 142.

157. See, e.g., Lucinda Franks, *Homosexuals as Foster Parents: Is New Program an Advance or Peril?*, N.Y. TIMES, May 7, 1974, at 47 (discussing early efforts to match homeless gay teenagers with no other viable options in the child welfare system with openly gay and lesbian foster parents).

158. For instance, in the Fall of 1973, the National Gay Task Force started a program to place lesbian and gay youth whose parents no longer wanted them with openly lesbian and gay parents. Franks, *supra* note 157; see also CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 146 (2012) (“[T]he placement of foster children in lesbian and gay households continued through the late 1970s and 1980s.”); Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363, 375–78 (2016) (discussing early placements of lesbian and gay teenagers in foster care with openly lesbian and gay foster parents between the 1970s and 1980s). As Professor Nancy Polikoff has described, the creation of “gay foster homes” in the 1970s had a central role in early legal battles over foster and adoptive parenting by lesbians and gay men. Nancy D. Polikoff, *Lesbian and Gay Couples Raising Children: The Law in the United States*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 153, 157 (Robert Wintemute & Mads Andenæs eds., 2001). It is important to note that these practices of matching LGBTQ youth with openly lesbian and gay parents continue today. See, e.g., *NYC Seeks More Gay and Lesbian Foster Parents*, CBS N.Y. (June 3, 2013, 3:09 PM), <http://newyork.cbslocal.com/2013/06/03/nyc-seeks-more-gay-and-lesbian-foster-parents> (discussing a campaign of the New York City Administration for Children’s Services to match LGBTQ youth with newly recruited openly lesbian and gay foster parents).

159. See, e.g., Nancy D. Polikoff, *Resisting “Don’t Ask, Don’t Tell” in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth*, 48 HASTINGS L.J. 1183, 1183–84 (1997) (describing a case from 1976 in which parents opposed the placement of a gay teenager who had been kicked out of his home and placed into foster care with an openly gay foster parent).

160. See, e.g., George, *supra* note 158, at 377–78 (describing a case from 1975 in which a Washington state judge removed a gay teenager from the foster care of a gay couple, even though the teenager had been rejected from multiple group homes because of his sexual orientation).

161. *Id.* at 384–95 (describing early bans on lesbian and gay adoption through

As foster care placements surged, legal scholars and commentators in the 1970s also advanced a full-throated critique of the foster care system.<sup>162</sup> In particular, these critics challenged the vast discretion that the law afforded judges to remove children from their parents and place them in foster care.<sup>163</sup> Critics further stressed that such vast discretion opened doors for judges to impose their own personal and moral judgments over parents' values in deciding what was best for their children.<sup>164</sup>

In response to these concerns, Congress held several hearings on how to manage the foster care crisis in the late 1970s.<sup>165</sup> Experts and witnesses testified that youth and children were being unnecessarily placed into foster care, and that those youth and children could have remained in their homes if there had been greater government investment in programs and services to keep families together.<sup>166</sup> Critics further stressed that the substantial amount of federal funding to help states pay for foster care created a heavy financial incentive for states to rely on foster care as the first response rather than as a last resort when intervening in family life.<sup>167</sup>

Congress responded to the hearings by enacting the Adoption Assistance and Child Welfare Act of 1980 (AACWA).<sup>168</sup> AACWA was

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law and agency policies during the 1980s and early 1990s).

162. Guggenheim, *supra* note 155, at 141. See generally Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973) (proposing new standards to limit removing children from their homes and placing them into foster care); Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) (advocating for a narrowing of neglect jurisdiction of juvenile courts); Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976) [hereinafter Wald, *Standards for Removal*] (discussing the inadequacies of laws regarding the removal of children from their homes).

163. See, e.g., Mnookin, *supra* note 162, at 630 (noting that “the court’s wide discretion” is “the fundamental fault in the system”); Wald, *Standards for Removal*, *supra* note 162, at 641 (“If I am correct that judges frequently apply broader standards unwisely, the interests of most children will be protected by limiting, rather than promoting, the decisionmaker’s discretion.”).

164. See, e.g., Mnookin, *supra* note 162, at 618 (“By necessity, a judge is forced to rely upon personal values to determine a child’s best interests.”).

165. Guggenheim, *supra* note 155, at 141–42 (“Beginning in 1977, Congress started paying serious attention to these criticisms.”).

166. DEBRA RATTERMAN ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION 3–4 (1987).

167. Guggenheim, *supra* note 155, at 142.

168. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500, amended by Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). Here, it is important to recognize that the AACWA was not the first legislative response that Congress made to growing concerns in the 1970s surrounding foster care and adoption. In the mid-1970s, evidence mounted supporting allegations of abusive practices in child welfare agencies that resulted in high rates of unwarranted separation of Native American

intended to reduce public spending on foster care by increasing federal investment in programs and services to keep families together, and to find permanent homes for youth and children who were removed from their homes for neglect and abuse.<sup>169</sup> As discussed below, this emphasis on permanency shapes the current child welfare framework and how it responds to unaccompanied youth today.<sup>170</sup>

## 2. Contemporary Child Welfare Responses to Unaccompanied Youth

Since the 1980s, two major pieces of federal legislation have molded the child welfare framework across states.<sup>171</sup> The AACWA, introduced above, was the first major federal legislation. AACWA conditioned federal funds for states' child welfare programs on compliance with the federal law.<sup>172</sup> In so doing, AACWA came to shape philosophy and practice in child welfare agencies nationwide.<sup>173</sup>

A key feature of AACWA was that it embraced the concept of permanency planning.<sup>174</sup> The permanency planning movement emerged in the 1970s as a response to the criticisms discussed above that the child welfare system was too quick to remove children from their homes, and that too many children were drifting between foster care placements

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children from their families through foster care and adoption. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 506 (2017). Typically, those children were placed with non-Native American (typically white) couples. Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. U. L. REV. 239, 243 (2008) [hereinafter Atwood, *Achieving Permanency*]. Several experts and tribal members testified before Congress in the 1970s about these abusive practices. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 601 (2002). In 1978, Congress enacted the Indian Child Welfare Act (ICWA), which created federal standards for child custody proceedings in state courts involving Native American children. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-63). Among other requirements, ICWA imposes a preference for the adoptive placement of a Native American child under state law with: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (2012).

169. See Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 352 ("The AACWA required state child welfare systems to make 'reasonable efforts' to prevent children from coming into foster care and to provide services and assistance to children and parents in order to end foster care drift and ensure permanency for children through reunification with their parents or, when appropriate, adoption by another family.").

170. Guggenheim, *supra* note 155, at 142, 149.

171. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 13 (2015).

172. PECORA ET AL., *supra* note 44, at 319.

173. Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 LAW & CONTEMP. PROBS. 221, 226-27 (2014).

174. Spinak, *supra* note 169, 356-58.

without finding stability in the system.<sup>175</sup> As a concept, permanency planning rests on the premise that families are necessary and optimal environments for a child's growth and development.<sup>176</sup> Based on this idea, disrupting the biological family "is a major decision" and "must be based on evidence that" leaving the child in the home will cause the child serious harm.<sup>177</sup>

Permanency goals further demand that if children are removed from their biological families, then the government must provide children with the least detrimental family-centered alternative to separation from the biological family.<sup>178</sup> This alternative initially takes the form of placing youth and children in a short-term substitute family while the government simultaneously attempts to repair the relationship with the biological parents.<sup>179</sup> If those attempts are unsuccessful, then the government has a duty to place youth and children in long-term or permanent substitute families so that they can develop new parental ties.<sup>180</sup>

AACWA implemented permanency goals by allocating federal funds to states' child welfare programs along the following hierarchy of options: (1) preventing out-of-home child welfare placements through services geared to keep families together; (2) reuniting children with their biological parents or legal guardians as soon as possible after a short time in foster care; and (3) encouraging adoption or long-term foster care placements for children who cannot return to their biological families.<sup>181</sup> By stressing permanency goals, the success of this framework was then, and still is, measured by how swiftly and decisively the government can intervene to help keep children within their own families, and when that is not possible, place them in long-term substitute families.<sup>182</sup>

Until the late 1990s, this menu of family-centered options under AACWA largely defined child welfare responses to youth and children. In 1997, however, Congress made significant changes to AACWA by enacting the Adoption and Safe Families Act (ASFA)—the second major piece of federal child welfare legislation. The ASFA responded to the high level of bureaucracy in the child welfare system and funding

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175. Anthony N. Maluccio & Edith Fein, *Family Preservation in Perspective*, 6 J. FAM. STRENGTHS 1, 1 (2002).

176. PECORA ET AL., *supra* note 44, at 43–44.

177. William Meezan, *Child Welfare: An Overview of the Issues*, in CHILD WELFARE: CURRENT DILEMMAS, FUTURE DIRECTIONS 5, 12 (Brenda G. McGowan & William Meezan eds., 1983).

178. *Id.*

179. *Id.*

180. *Id.*

181. PECORA ET AL., *supra* note 44, at 318 (describing the hierarchy under AACWA based on permanency goals).

182. Godsoe, *supra* note 43, at 1126 (noting that the current permanency "framework follows a strict hierarchy").

obstacles that stood in the way of executing AACWA's reforms.<sup>183</sup> The ASFA's proponents further stressed ongoing problems surrounding "foster care drift."<sup>184</sup> Although the foster care population dropped in the early 1980s after AACWA passed, it began to increase again in the late 1980s, and eventually hit record levels in 1996.<sup>185</sup> "The median stay in foster care had also grown from fifteen months in 1987 to more than two years in 1994."<sup>186</sup>

Scholars and commentators attributed this growth to a rolling back of the welfare state and to broader structural problems involving homelessness, poverty, unemployment, and lack of affordable housing.<sup>187</sup> In the 1960s and 1970s, there was a vast decrease in government spending on low-income housing.<sup>188</sup> In the 1980s, Congress slashed or capped federal funding for an array of social programs (including public housing subsidies).<sup>189</sup> These reforms contributed to "the highest rate of homelessness among families since the Great Depression."<sup>190</sup> Between 1982 and 1987, the homeless population in the United States doubled.<sup>191</sup> Families and children were "[t]he fastest growing group[s] [within] the homeless" population.<sup>192</sup> Poverty, unemployment, lack of affordable housing, and law and order crime-control policies left marginalized families (and in particular low-income single mothers of color) with no choice other than

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183. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 649 (1999) (noting concerns of Congress that "notwithstanding the mandatory processes under the Child Welfare Act, the child welfare system continued to move at a 'glacial pace'"); Maluccio & Fein, *supra* note 175, at 2 (noting that "the resources required to implement [the AACWA] never became available at the federal level").

184. Godsoe, *supra* note 43, at 1115–16; Gordon, *supra* note 183, at 648; Johan Strijker et al., *Placement History of Foster Children: A Study of Placement History and Outcomes in Long-Term Family Foster Care*, 87 CHILD WELFARE 107, 108 (2008) (defining "foster care drift" as "when a child moves from one placement to the other without the prospect of a permanent residence (i.e., return home, adoption or in kinship foster care)").

185. See GUSTAVSSON & SEGAL, *supra* note 154, at 92 (noting that the foster care population "dropped in the early 1980s and began climbing again in the late 1980s"); Gordon, *supra* note 183, at 648 (noting that caseloads "reach[ed] a record of 502,000 in 1996").

186. See Gordon, *supra* note 183, at 648.

187. NAMKEE G. CHOI & LIDIA J. SNYDER, HOMELESS FAMILIES WITH CHILDREN: A SUBJECTIVE EXPERIENCE OF HOMELESSNESS 6 (1999).

188. RALPH DA COSTA NUNEZ, THE NEW POVERTY: HOMELESS FAMILIES IN AMERICA 8 (1996).

189. Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 422–23 (2001) (discussing welfare "cutbacks under the Reagan Administration").

190. GUSTAVSSON & SEGAL, *supra* note 154, at 125 (citation omitted).

191. DA COSTA NUNEZ, *supra* note 188, at 18.

192. GUSTAVSSON & SEGAL, *supra* note 154, at 125.

to comply with government orders removing their children and placing them in foster care.<sup>193</sup>

In this political and social context, ASFA pushed at least two major reforms which further strengthened the child welfare system's emphasis on permanency goals.<sup>194</sup> First, ASFA attempted to reduce foster care drift by enabling children to return to their homes or move to other permanent placements more quickly.<sup>195</sup> To accomplish this task, ASFA sped up permanency hearings by requiring them "to be held no later than 12 months after a child entered foster care (6 months earlier than . . . under the [previous] law)."<sup>196</sup> Moreover, ASFA required states to initiate proceedings to terminate parental rights when a child had been a ward of the state "for 15 of the previous 22 months."<sup>197</sup>

Second, ASFA provided new financial incentives for states to promote adoption over reuniting foster youth and children with their biological families.<sup>198</sup> Specifically, "[s]tates that increase[d] their adoptions over an established baseline [were] eligible for \$4,000 for each child . . . adopted from foster care and \$6,000 for each child with special needs . . . adopted from foster care."<sup>199</sup> In 2003 and 2008, Congress revised and extended these incentives.<sup>200</sup>

193. See Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1010–15 (2001) (discussing how the criminal justice system works in tandem with the child welfare system to take custody of Black children); Dorothy Roberts, *Under-Intervention Versus Over-Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 371, 371 (2005).

194. Godsoe, *supra* note 43, at 1115–19; Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 112 (1999). In addition to these two reforms, proponents of ASFA testified that in attempting to comply with federal law, child welfare agencies were sending foster children back to abusive and threatening family environments. Gordon, *supra* note 183, at 646–47. Accordingly, "ASFA codified th[e] policy . . . that a child's health and safety [was] paramount in any decision" about child placement "and provided examples of when efforts to . . . reunify families [would] be 'unreasonable'" (for example, returning foster children to dangerous households). MaryLee Allen & Mary Bissell, *Safety and Stability for Foster Children: The Policy Context*, 14 CHILD. FAMS. & FOSTER CARE 49, 62 (2004). ASFA also "require[d] states to develop standards to protect the health and safety of children in foster care and . . . [to] check the criminal records of both foster and adoptive parents as a condition of federal funding." *Id.* at 53.

195. Gordon, *supra* note 183, at 650.

196. Allen & Bissell, *supra* note 194, at 52; Gordon, *supra* note 183, at 650–51.

197. Allen & Bissell, *supra* note 194, at 52–53. Scholars have critiqued this length-of-time standard on the grounds that it can apply to potentially terminate parental rights and harm youth and children in cases when parents are responding to child welfare services. Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1201–02 (1999).

198. Allen & Bissell, *supra* note 194, at 54; Gordon, *supra* note 183, at 651–52.

199. Allen & Bissell, *supra* note 194, at 54; Gordon, *supra* note 183, at 651–52.

200. EMILIE STOLTZBUS, CONG. RESEARCH SERV., R43025, CHILD WELFARE: STRUCTURE AND FUNDING OF THE ADOPTION INCENTIVES PROGRAM ALONG WITH REAUTHORIZATION ISSUES 5 (2013), <https://fas.org/sfp/crs/misc/R43025.pdf> (explaining that the

Since ASFA was enacted in 1997, the annual rate of children adopted from foster care has doubled,<sup>201</sup> and the number of youth and children adopted from foster care each year has increased from approximately 30,000 to more than 50,000.<sup>202</sup> The average length of time it takes to adopt a child in the foster system has also decreased from four years to less than three years.<sup>203</sup>

At the same time, it is important to recognize that some scholars do not view ASFA as an unequivocal success in fostering adoption. Professor Elizabeth Bartholet, for instance, argues that ASFA's goal to place children in adoptive families promptly "if they cannot safely stay" within their biological families is undercut "by a series of [statutory] exceptions and loopholes."<sup>204</sup> In particular, she stresses that ASFA's focus on a child's safety as opposed to a child's wellbeing leaves the many cases involving child neglect—including severe, chronic neglect—beyond ASFA's purview.<sup>205</sup>

Nonetheless, today the federal government spends almost \$7 billion each year on family-centered child welfare programs (for example, foster care, adoption, and guardianship)—a figure expected to rise "to \$8.5 billion by 2023."<sup>206</sup> These programs largely define the menu of available options for unaccompanied youth seeking help under the child welfare framework. As discussed later, this multibillion-dollar figure far exceeds the amount of federal funding allocated for programs and services that specifically target unaccompanied youth, such as homeless youth shelters.<sup>207</sup> Notably, the funding for those programs is largely channeled through juvenile justice laws—illustrating the government's tendency to frame unaccompanied youth and their challenges as criminal concerns, rather than child welfare issues.<sup>208</sup>

## B. *Criticisms of Family-Centered Public Reordering in the Child Welfare System*

The analysis below advances two related criticisms of the family-centered public reordering in the child welfare system based on its

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Adoption Promotion Act of 2003 and the Fostering Connections to Success and Increasing Adoptions Act of 2008 amended and extended ASFA's adoption incentives). For a more detailed description of adoption incentives under federal law see *id.* at 4–13.

201. *Id.* at 2.

202. *Id.* at 3.

203. *Id.* at 4.

204. BARTHOLET, *supra* note 103, at 27.

205. *Id.*

206. Jonathan Morancy, *Snapshot of Foster Care, Adoption Assistance, and Guardianship Assistance*, CONG. BUDGET OFF. (Apr. 18, 2013), <https://www.cbo.gov/publication/44082>.

207. *See infra* Part III.A.2.

208. *See infra* Part III.A.2.

application to unaccompanied youth (and in particular, unaccompanied LGBTQ youth). First, I argue that this family-centered approach rests on assumptions about the agency and autonomy of unaccompanied youth that are often inconsistent with the realities of unaccompanied youth status. Second, I discuss how tensions between normative conceptions of “family” (i.e., the traditional model of the nuclear family) and youth agency and autonomy can harm youth, and ultimately facilitate their exclusion from the child welfare system.

As a preliminary matter, it is necessary to explain how these criticisms relate to existing critiques of permanency planning. At least two lines of critique appear in legal scholarship. The first line focuses on families of origin, and explains how permanency planning disadvantages certain families in the child welfare system on the basis of race, gender, and class.<sup>209</sup> As Professor Dorothy Roberts has powerfully demonstrated, permanency goals have encouraged laws and policies that make it easier to terminate the parental rights of poor and low-income single mothers of color and place their children in adoptive families.<sup>210</sup> She has further documented how family substitution often serves as an improper response to deeper problems of racism, poverty, and sexism that place marginalized families at risk for state intervention in the first place.<sup>211</sup> Scholars attribute these child welfare inequalities at the intersection<sup>212</sup> of race, class, and gender to several structural problems, including: (1) structural discrimination in the labor and housing markets that result in poor and low-income families of color, and especially poor and low-income single mothers of color, having disproportionate child welfare needs; and

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209. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 161 (2002) (“Black children’s lives are frequently disrupted in the name of permanency.”); Atwood, *Achieving Permanency*, *supra* note 168, at 269–75 (2008) (discussing discrepancies between the family arrangement priorities under permanency planning and preferred family arrangements within tribes); Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 *CHILD WELFARE* 99, 116 (1996) (“[P]revailing models of family preservation may not be suitable for many families of color . . . .”); Roberts, *supra* note 194, at 132 (“The passage of ASFA corresponded with the growing disparagement of mothers receiving public assistance and welfare reform’s retraction of the federal safety net for poor children.”).

210. Roberts, *supra* note 194, at 119–20. Paradoxically, however, youth and children of color are less likely to be adopted and more likely to remain in foster care when taken from their parents’ custody. *Id.* at 120; *see also* Roberts, *supra* note 81, at 1477 (“About one-third of children in foster care are black, and most have been removed from black mothers who are their primary caretakers.”).

211. Roberts, *supra* note 81, at 1476–78; Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 *WM. & MARY L. REV.* 881, 882 (2007); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 *U. ILL. L. REV.* 171, 178 (“Family disruption has historically served as a chief tool of group oppression.”).

212. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1243–44 (1991) (developing “intersectionality” to evaluate the race and gender dimensions of violence against women of color).

(2) discrimination by child welfare professionals and agencies on the basis of race, class, and gender.<sup>213</sup>

The second line of criticism focuses on new or reworked family arrangements. These perspectives argue that permanency goals rest on rigid and narrow definitions of “family,” which encourage child welfare laws and policies that prioritize certain family forms that are more in line with the traditional family model over others.<sup>214</sup> As Professor Cynthia Godsoe has thoroughly documented, the types of family arrangements that permanency goals recognize and prioritize are not necessarily the family relationships that provide youth and children psychological permanency and stability.<sup>215</sup> For instance, a foster child may have connections to multiple adults<sup>216</sup> and not simply two biological or adoptive parents. Scholars have also called attention to how permanency goals have shaped laws and policies that only allow for traditional adoption that severs a child’s legal relationship to their biological parents, even when evidence suggests that nonexclusive adoptions<sup>217</sup> may provide a more viable path for many youth and children to leave foster care through adoption.<sup>218</sup> Scholars have further documented how permanency goals encourage laws and policies that prioritize adoption over guardianship and push families to choose adoption when they prefer guardianship.<sup>219</sup>

Both lines of criticism raise important challenges to how permanency goals are currently defined and executed in the child welfare system. I am not discounting these critiques, and I fully recognize that opening space for child welfare responses that avoid these family-centered harms and adopt more flexible definitions of “family” can benefit many parents, youth, and children. At the same time, these accounts still maintain a focus on families in the sense that they call attention to which families permanency goals advantage and to which families they disadvantage and harm. My analysis illustrates how family-centered approaches—even improved ones—may not serve the needs of certain vulnerable youth who seek or need help from the state. Accordingly,

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213. See generally John Fluke et al., *A Research Synthesis on Child Welfare Disproportionality and Disparities*, in *DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH* 1, 1–93 (2011) (synthesizing research on racial disparities in child protection and child welfare).

214. Godsoe, *supra* note 43, at 1113–14.

215. *Id.* at 1123–26; Randi Mandelbaum, *Re-Examining and Re-Defining Permanency from a Youth’s Perspective*, 43 *CAP. U. L. REV.* 259, 278 (2015).

216. Godsoe, *supra* note 43, at 1126.

217. Nonexclusive adoptions recognize a third-person as a child’s parent “without terminating the child’s relationship with [the] biological parents.” See Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 *ALA. L. REV.* 715, 719 (2015).

218. See *id.* at 720–21 (proposing that child welfare law should permit the nonexclusive adoption of foster children who cannot reunify with their parents).

219. Godsoe, *supra* note 43, at 1114; Gupta-Kagan, *supra* note 217, at 734–35; Mandelbaum, *supra* note 215, at 271–72.

my analysis broadens the scholarly conversation beyond marginalized families to scrutinize permanency goals from the more individualized perspectives of unaccompanied youth.

### 1. Assumptions About the Agency and Autonomy of Unaccompanied Youth

My first criticism of the family-centered public reordering in the child welfare system is that it rests on assumptions about the agency and autonomy of unaccompanied youth that are often inconsistent with the realities of unaccompanied youth status. Permanency goals assume that families (whether biological, foster, or adoptive) are necessary and optimal environments for youth and children to achieve self-reliance and self-actualization as adults.<sup>220</sup> In emphasizing permanency goals, child welfare responses treat unaccompanied youth as victims of negative family circumstances (consistent with structural theories of unaccompanied youth status) and, as argued below, respond by altering their family environments.<sup>221</sup>

This victimization mindset overlooks important contextual differences with regard to how unaccompanied youth develop and exercise their agency and autonomy compared to other youth.<sup>222</sup> Although more research is necessary, existing studies describe how victimization narratives are often inconsistent with how many unaccompanied youth who decided to leave home in light of family problems perceive their family separation.<sup>223</sup> For instance, many unaccompanied youth recount leaving home as an affirmative act of self-protection and a positive decision in which they took control over their negative family situations.<sup>224</sup>

For many unaccompanied youth, this sense of agency and independence becomes stronger once they separate from their families. After being kicked out, pushed out, or running away from home, many unaccompanied youth—out of necessity—have had to exercise control over their lives by learning how to survive on their own.<sup>225</sup> While doing so, many unaccompanied youth develop a sense of pride in becoming

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220. See PECORA ET AL., *supra* note 44, at 44–45.

221. Hyde, *supra* note 42, at 172–73.

222. See, e.g., Bender et al., *supra* note 65, at 225; Hyde, *supra* note 42, at 172–73; Eric Rice et al., *Homelessness and Sexual Identity Among Middle School Students*, 85 J. SCH. HEALTH 552, 556 (2015) (“The experience of multiple living situations and the lack of a permanent residence put homeless youth on a trajectory toward early independence.”).

223. See, e.g., Sanna J. Thompson et al., *Insights from the Street: Perceptions of Services and Providers by Homeless Young Adults*, 29 EVALUATION & PROGRAM PLAN. 34, 41 (2006).

224. Hyde, *supra* note 42, at 175.

225. *Id.* at 180–81.

resilient and self-reliant in spite of the hardships that they may endure while living on the streets or in other unstable living arrangements.<sup>226</sup>

Based on these insights, child welfare researchers and social workers warn that adopting a one-dimensional narrative of unaccompanied youth as powerless victims ignores many of their strengths, skills, and capacities.<sup>227</sup> For example, researchers have stressed the personal strengths and problem-solving skills that unaccompanied youth develop to survive on their own can become assets for these youth in adulthood.<sup>228</sup> Those skills include the ability to identify and avoid dangerous situations, and to navigate formal and informal systems for resources.<sup>229</sup> Other important skills include knowing when and how to develop relationships with others who can provide support, as well as knowing how to avoid developing relationships with exploitative people.<sup>230</sup>

Of course, these points do not discount the fact that the harsh realities of street life lead many unaccompanied youth to gain life skills through unsafe or illegal means.<sup>231</sup> Some unaccompanied youth protect themselves by carrying weapons<sup>232</sup> or by associating with criminally involved adults and youth who can offer resources and protection.<sup>233</sup> Many unaccompanied youth also resort to illegal behaviors, such as sex work and theft, to survive.<sup>234</sup> My point is that despite these challenges, the reality of unaccompanied youth status is more complex than dominant victimization narratives suggest.

Another important set of issues surrounding agency and autonomy involves potential cultural differences between unaccompanied youth in urban and rural areas.<sup>235</sup> Scholars have described how the public discourse on homelessness is infused with urban stereotypes and

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226. DON SCHWEITZER ET AL., ASKING FOR DIRECTIONS: PARTNERING WITH YOUTH TO BUILD THE EVIDENCE BASE FOR RUNAWAY AND HOMELESS YOUTH SERVICES 12 (2013), <http://commons.pacificu.edu/cgi/viewcontent.cgi?article=1053&context=casfac>; Sean A. Kidd, *Street Youth: Coping and Interventions*, 20 CHILD & ADOLESCENT SOC. WORK J. 235, 255 (2003); Thompson et al., *supra* note 223, at 37.

227. Kimberly Bender et al., *Capacity for Survival: Exploring Strengths of Homeless Street Youth*, 36 CHILD YOUTH CARE F. 25, 39 (2007).

228. *See, e.g., id.* at 38.

229. *Id.* at 32.

230. *Id.* at 30 & tbl.2.

231. Kristin M. Ferguson et al., *Predicting Illegal Income Generation Among Homeless Male and Female Young Adults: Understanding Strains and Responses to Strains*, 63 CHILD. & YOUTH SERVICES REV. 101, 103 (2016).

232. *Id.* at 107.

233. *Id.*

234. *Id.* at 101.

235. *See, e.g.,* Mark Evan Edwards et al., *Paradoxes of Providing Rural Social Services: The Case of Homeless Youth*, 74 RURAL SOC. 330, 336–37 (2009) (discussing how the “individuation of social problems” in rural places influences the cultural dimensions in how rural communities respond to youth homelessness).

experiences that do not necessarily apply in rural contexts.<sup>236</sup> Consistent with this idea, existing studies on unaccompanied youth largely focus on youth in cities and urban neighborhoods.<sup>237</sup> A major reason for this urban focus is that unaccompanied youth in rural areas are more dispersed and difficult to reach.<sup>238</sup>

Although more research is needed, scholars have examined how there is a greater cultural emphasis on individualism, self-sufficiency, and privacy in rural communities.<sup>239</sup> In those communities, cultural values may lead members to view homelessness as the product of a person's idleness and laziness.<sup>240</sup> Consistent with this idea, research shows that unaccompanied youth in rural areas are often hesitant to admit that they need help—and often refuse to seek help—from the government or private organizations for fear of being perceived as lazy or idle.<sup>241</sup> In addition, because many rural communities are small, unaccompanied youth in rural areas are often reluctant to let others know about their situation by seeking or receiving services.<sup>242</sup> Rather than face potential judgment and ostracism within their communities, many of these youth prefer to remain invisible.<sup>243</sup>

A limited body of research has also called attention to special considerations surrounding the agency and autonomy of unaccompanied LGBTQ youth. Today, LGBTQ youth in the United States “come out” (meaning they disclose their sexual orientation or gender identity to others) at earlier ages than did previous generations.<sup>244</sup> Recent survey data suggests that the median age at which individuals begin to self-identify as lesbian, gay, bisexual, or transgender falls squarely in late adolescence.<sup>245</sup> Taking control over one's life circumstances can be linked

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236. See YVONNE M. VISSING, *OUT OF SIGHT, OUT OF MIND: HOMELESS CHILDREN AND FAMILIES IN SMALL-TOWN AMERICA* 12 (1996). Here, it is important to note that sexuality scholars have also called attention to problems involving urban bias and the treatment of sexual minorities in rural communities under the law. See generally Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 *UCLA L. REV.* 562 (2013) (describing how public opinion of sexual minorities is shaped by urban biases and how the legal system perpetuates these biases). This point also fits into a broader critique in legal scholarship involving misunderstandings of rurality and livelihood in the law and legal institutions. See generally, e.g., Lisa R. Pruitt, *Rural Rhetoric*, 39 *CONN. L. REV.* 159 (2006) (investigating the law's constitutive rhetoric about rural people, places, and livelihoods).

237. Edwards et al., *supra* note 235, at 332.

238. *Id.* at 344–45.

239. *Id.* at 336.

240. *Id.* at 336–37.

241. See, e.g., *id.* at 345–46.

242. See, e.g., *id.*

243. See *id.* at 346–47.

244. Rice et al., *supra* note 222, at 553.

245. PEW RESEARCH CTR., *A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 2* (2013), [http://www.pewsocialtrends.org/files/2013/06/SDT\\_LGBT-Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf).

to an important process in which unaccompanied LGBTQ youth are defining and exploring their sexual orientation or gender identity. This process may be an especially formative and sensitive period for unaccompanied LGBTQ youth who suffered rejection because of their sexual orientation or gender identity by their families, communities, or other institutions, such as schools and places of worship.

To illustrate these points, consider one study of homeless LGBTQ youth of color who lived on the streets of the Castro District in San Francisco.<sup>246</sup> In spite of the harsh realities of being homeless, LGBTQ youth participants viewed public spaces in the Castro (such as the subway station) as places where they felt safe to be themselves and to express their LGBTQ identities, especially as LGBTQ youth of color.<sup>247</sup> Youth participants perceived the Castro as a neighborhood in which they could seek safety, community, and resources when needed.<sup>248</sup> Conversely, they reported feeling unsafe to express their sexual orientation or gender identity in other public and private spaces, as well as in family and community settings.<sup>249</sup>

Given these different sets of issues, it is not surprising that many unaccompanied youth place primacy on their autonomy<sup>250</sup> and are hesitant to seek social services that may jeopardize their independence and control.<sup>251</sup> In order to receive long-term support, however, the child welfare framework leaves those youth with little option but to revert back to a state of dependence on family systems—whether on biological adult family members who may not want to care for them, or foster or adoptive parents who they may not trust. For unaccompanied youth in late adolescence, this transition might be impossible or take longer than the amount of time they have left before aging out of the child welfare system.

Lending support to these ideas, research describes how unaccompanied youth are often distrustful of adults—including their adult family members, adults in out-of-home child welfare placements, and adult

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246. See generally Jen Reck, *Homeless Gay and Transgender Youth of Color in San Francisco: "No One Likes Street Kids"—Even in the Castro*, 6 J. LGBT YOUTH 223 (2009) (showing the extent of the societal and economic problems faced by LGBT youth of color). The Castro has had a large concentration of LGBT residents and has been a hub of LGBT activism and social life for decades. See generally WINSTON LEYLAND, *OUT IN THE CASTRO: DESIRE, PROMISE, ACTIVISM* (2002) (detailing the history of the Castro and its role as an LGBT neighborhood). It is important to recognize, however, that scholars have called attention to the ways in which race, gender, and class biases pervade mainstream gay neighborhoods and communities. See, e.g., Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1038–39 (2014).

247. Reck, *supra* note 246, at 232–35, 239.

248. *Id.* at 231, 234–35.

249. *Id.* at 229–32.

250. See Thompson et al., *supra* note 223, at 41.

251. See *id.*; Hyde, *supra* note 42, at 173.

caseworkers and staff in the child welfare system.<sup>252</sup> As explained later in this Article,<sup>253</sup> this tension has led some child welfare researchers to challenge the appropriateness and effectiveness of government responses that are modeled after traditional parent-child relationships in which agency providers or caretakers act as “parents” or “quasi-parents” for unaccompanied youth.<sup>254</sup> Critically, those models largely define available child welfare responses to unaccompanied youth.

## 2. The “Traditional” Family and Child Welfare Exclusions

My second criticism is that tensions between traditional conceptions of “family” and the realities of unaccompanied youth status can harm and ultimately facilitate the exclusion of unaccompanied youth from the child welfare system. As explained previously, unaccompanied youth can come into contact with the child welfare system at different and multiple points in their lives.<sup>255</sup> Guided by permanency goals, the child welfare system’s first line of defense is to try to reunite unaccompanied youth with their families.

We learn from the experiences of unaccompanied LGBTQ youth that family reunification is often not a feasible option when youth are kicked out of their homes because of their sexual orientation or gender identity. And even when practically feasible, family reunification might put LGBTQ youth at risk of further violence, harassment, or rejection. Those harmful family conditions—which initially drove LGBTQ youth out of their homes—then push LGBTQ youth back into homelessness or other unstable living arrangements.

These barriers to family reunification, however, are not unique to the LGBTQ context. Some studies have reported that nearly half of homeless youth are “throwaway youth”<sup>256</sup>—meaning youth who are thrown out of their homes and not welcome back.<sup>257</sup> Although different factors contribute to youth being kicked out of their homes, studies have found that throwaway youth experience greater levels of prior family conflict and family violence compared to other unaccompanied youth.<sup>258</sup>

When family reunification fails, the child welfare system’s next line of defense is to provide unaccompanied youth with a substitute family through foster care or adoption. Family rejection for being LGBTQ is a common reason why LGBTQ youth enter out-of-home child welfare

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252. Thompson et al., *supra* note 223, at 35.

253. *See infra* Part IV.

254. Bender et al., *supra* note 227, at 39.

255. *See supra* notes 133–34 and accompanying text.

256. Thompson et al., *supra* note 69, at 194.

257. Katherine L. Montgomery et al., *Individual and Relationship Factors Associated with Delinquency Among Throwaway Adolescents*, 33 CHILD. & YOUTH SERVICES REV. 1127, 1127 (2011) (providing the Office of Juvenile Justice and Delinquency Prevention’s definition of throwaway youth).

258. MOORE, *supra* note 84, at 9.

placements.<sup>259</sup> Other LGBTQ youth enter the child welfare system when the state discovers that they have been kicked out of their homes with nowhere to go, or when the state removes them from their homes after reports of suffering family abuse for being LGBTQ.<sup>260</sup>

Once they enter the child welfare system, LGBTQ youth face several systemic challenges, which contrary to permanency goals, result in low placement stability and multiple out-of-home placements.<sup>261</sup> For instance, child welfare agencies often have few or no staff with adequate training on the specific challenges and needs of LGBTQ youth.<sup>262</sup> Currently, only nine states require LGBT-inclusive competency training for child welfare staff or foster parents.<sup>263</sup> Lack of cultural competence can shape caseworkers' placement decisions as well as the extent of resources available to help foster and adoptive parents sensitively handle the needs and concerns of LGBTQ youth.<sup>264</sup> In addition, LGBTQ youth commonly face discrimination by caseworkers, which can negatively affect placement decisions and how key actors (i.e., child welfare placement agencies or frontline caseworkers) in the child welfare system treat them.<sup>265</sup>

LGBTQ youth are difficult to place through foster care and adoption because they are often unwanted by foster and adoptive families and are therefore more quickly sent to group homes and other congregate care facilities used to house youth with behavioral problems or multiple failed foster care placements.<sup>266</sup> Many LGBTQ youth are rejected by foster families or group home staff on the basis of their sexual orientation or gender identity, and as a result, leave or are kicked out of foster placements for the streets.<sup>267</sup> In addition, LGBTQ youth are at much

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259. See CRAY ET AL., *supra* note 29, at 12; WILSON ET AL., *supra* note 33, at 11.

260. See CRAY ET AL., *supra* note 29, at 12; WILSON ET AL., *supra* note 33, at 11.

261. See WILSON ET AL., *supra* note 33, at 11–12; Gallegos et al., *supra* note 52, at 228.

262. Gallegos et al., *supra* note 52, at 227–28.

263. *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws) (last visited Mar. 14, 2018) (click the “LGBT Youth in Child Welfare” tab).

264. Gallegos et al., *supra* note 52, at 228.

265. See WILSON ET AL., *supra* note 33, at 11–12; Love, *supra* note 52, at 2275–80.

266. See AMY DWORSKY, *THE ECONOMIC WELL-BEING OF LESBIAN, GAY, AND BISEXUAL YOUTH TRANSITIONING OUT OF FOSTER CARE 2* (2013), [https://www.acf.hhs.gov/sites/default/files/opre/opre\\_lgbt\\_brief\\_01\\_04\\_2013.pdf](https://www.acf.hhs.gov/sites/default/files/opre/opre_lgbt_brief_01_04_2013.pdf) (“A shortage of LGB-friendly foster homes also means that many youth who identify as LGB are placed in more restrictive group care settings rather than with families . . .”); MALLON, *supra* note 8, at 53 (noting that some youth who enter group homes “are troubled, others are delinquent, and many simply have no families available to care for them”); WILSON ET AL., *supra* note 33, at 6 (noting that “LGBTQ youth have a higher average number of foster care placements and are more likely to be living in a group home”); Love, *supra* note 52, at 2274–75 (discussing how transgender youth are often placed in congregate care facilities for reasons that are rooted in transphobia).

267. MALLON, *supra* note 8, at 110–11 (discussing the results of a study on LGBT youth in the foster care system and noting that “[y]oung people who fled to

greater risk for mistreatment and physical, sexual, and verbal abuse than are nonLGBTQ youth in foster families and group homes.<sup>268</sup> Caretakers are also more likely to discipline LGBTQ youth for age-appropriate conduct that would likely go unpunished if it occurred between opposite-sex youth.<sup>269</sup> These challenges and rejections can exacerbate LGBTQ youth's housing instability in the child welfare system and contribute to their homelessness.

Moreover, many LGBTQ youth who come into contact with the child welfare system and have experienced prior family rejection for being LGBTQ prefer to be placed in child welfare settings that are supportive of their sexual orientations and gender identities (i.e., foster homes with LGBTQ caretakers or LGBTQ-affirming group homes or transitional living programs).<sup>270</sup> These preferences, however, can go ignored when out-of-home placements adhere to rigid and traditional conceptions of family—a practice documented in existing critiques of permanency planning.<sup>271</sup> For instance, Nebraska courts only recently decided that the state's policy of excluding “persons who identify themselves as homosexuals” from being foster parents or from adopting a child in foster care was unconstitutional.<sup>272</sup> In addition, many state adoption and foster care laws allow officials to give preference to married couples, which can disadvantage single individuals and unmarried cohabitants during the adoption and foster care process.<sup>273</sup> Although marriage equality raises new questions about how adoption and foster care laws apply to same-sex married couples,<sup>274</sup> these preferences and restrictions

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the streets . . . were those who were no longer willing to tolerate the poor fit that was manifest in [their group home or foster home]”); Shelley L. Craig & Ashley Austin, *Childhood and Adolescence, in* TRAUMA, RESILIENCE, AND HEALTH PROMOTION IN LGBT PATIENTS: WHAT EVERY HEALTHCARE PROVIDER SHOULD KNOW 57, 60 (Kristen L. Eckstrand & Jennifer Potter eds., 2017) (noting connections between the challenges that LGBTQ youth face in the child welfare system as a result of their sexual orientation or gender identity and the increased risk of “being kicked out of foster homes or becoming homeless”).

268. WILSON ET AL., *supra* note 33, at 11–12.

269. *Id.*

270. *See, e.g.*, Gallegos et al., *supra* note 52, at 231. Here, I am not arguing that all LGBTQ youth in the child welfare system prefer placements with LGBTQ caretakers. In fact, studies have found that many LGBTQ youth in the child welfare system do not have a preference regarding the sexual identities of their caretakers. *Id.*

271. Godsoe, *supra* note 43, at 1113–14.

272. *Stewart v. Heineman*, 892 N.W.2d 542, 547, 568 (Neb. 2017) (citation omitted) (holding that it was not an abuse of discretion for a trial judge to enjoin the state from enforcing a memorandum banning lesbian and gay couples and individuals from being licensed as foster parents or to adopt a ward of the state).

273. CHILD WELFARE INFO. GATEWAY, ADOPTING AS A SINGLE PARENT 2 (2013), [https://www.childwelfare.gov/pubPDFs/single\\_parent.pdf](https://www.childwelfare.gov/pubPDFs/single_parent.pdf); Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1408 (2015) (“[A]doption officials’ inherent discretion allows them to prefer a couple over a single parent.”).

274. These questions are especially pertinent in states that have adopted laws or

have disadvantaged and continue to disadvantage many suitable prospective LGBTQ parents during the foster care and adoption process.<sup>275</sup>

The recent proliferation of religious exemption laws that attempt to mediate conflicts between religious liberty and LGBTQ equality adds another layer of challenges to LGBTQ identity in the child welfare system.<sup>276</sup> Several states have recently enacted religious exemption laws that allow the religious views of child welfare actors (for instance, private child placement agencies or foster parents) to guide the nature of the services they provide, even if those views denounce LGBTQ people.<sup>277</sup> Critics contend that these broad religious exemption laws permit religiously motivated discrimination against LGBTQ youth who come into contact with those agencies.<sup>278</sup> Child welfare providers may turn away

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introduced bills providing religious exceptions that allow private and public entities involved in foster care, as well as prospective foster and adoptive parents, to discriminate on the basis of sexual orientation and gender identity when such discrimination is grounded in a sincerely held religious belief or moral conviction. See *infra* notes 275–77.

275. See Gary Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States 3* (Cal. Ctr. for Population Research On-Line Working Paper Series, CCPR-065-07, 2007) (“Although states might not have formal policies forbidding adoption or foster care by GLB parents, some adoption agencies or social workers might discriminate against GLB applicants.”). But see Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1201–02 (2016) (discussing how some caseworkers and courts continued to grant adoptions to same-sex couples in spite of a policy against adoption by unmarried couples adopted by the California Department of Social Services between 1987 and 1994). See generally George, *supra* note 158 (analyzing how social workers undermined bans on gay and lesbian foster and adoptive parenting in three states in the mid-1980s and early 1990s). For a more detailed discussion of the history of gay and lesbian foster and adoptive parenting, see generally Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311 (2015).

276. In a forthcoming article entitled *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. (forthcoming 2019), I discuss in more detail how the recent push for broad religious exemptions involving LGBTQ child welfare affects the treatment of LGBTQ youth in the child welfare system. For a more comprehensive discussion of complicity-based conscience claims in the context of religious exceptions from laws concerning sex, reproduction, and marriage, see generally Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

277. Those states are: Alabama, Alabama Child Placing Agency Inclusion Act, H.B. 24, 2017 Reg. Sess. (Ala. 2017); Michigan, MICH. COMP. LAWS ANN. § 722.124e (West 2018); Mississippi, Protecting Freedom of Conscience From Government Discrimination Act, H.B. 1523, 2016 Reg. Sess. (Miss. 2016); North Dakota, N.D. CENT. CODE ANN. § 50-12-07.1 (West 2017); South Dakota, An Act to Provide Certain Protections to Faith-Based or Religious Child-Placement Agencies, S.B. 149, 2017 Leg., 92d Sess. (S.D. 2017); Texas, An Act Relating to the Conscience Rights of Certain Religious Organizations and Individuals, H.B. 3859, 85th Leg. (Tex. 2017); and Virginia, VA. CODE ANN. § 63.2–1709.3 (West 2017).

278. MOVEMENT ADVANCEMENT PROJECT, KIDS PAY THE PRICE: HOW RELIGIOUS EXEMPTIONS FOR CHILD WELFARE AGENCIES HARM CHILDREN 6 (2017), <http://www.lgbt-map.org/file/Kids%20Pay%20the%20Price%20FINAL.pdf>.

LGBTQ youth and children in need of support, including those who have been kicked out of their families because of their sexual orientations or gender identities.<sup>279</sup> Alternatively, LGBTQ youth and children could be forced to stay in foster homes that denounce their sexual orientations or gender identities and be forced to act in ways that are inconsistent with their LGBTQ identities.<sup>280</sup> In more extreme cases, foster parents could pressure LGBTQ youth and children to undergo damaging conversion therapies that try to change a person's sexual orientation or gender identity.<sup>281</sup>

These challenges surrounding sexual orientation and gender identity in the child welfare system result in many LGBTQ youth leaving or being forced out of child welfare placements, after which they find themselves living on the streets or in other unstable living arrangements.<sup>282</sup> Unaccompanied LGBTQ youth, however, face additional challenges when they seek help from shelters and other service providers to get off the streets. Many youth shelters are unequipped and lack staff with adequate cultural competence to handle the specific needs of unaccompanied LGBTQ youth.<sup>283</sup> Moreover, in many localities, lack of public funding for homeless and runaway youth services results in private faith-based entities providing the bulk of available services to unaccompanied youth.<sup>284</sup> LGBTQ youth may feel unwelcome, be turned away, or face discrimination when those entities openly denounce or are hostile toward LGBTQ people.<sup>285</sup>

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279. *Id.*

280. *Id.*

281. *Id.* at 2.

282. MEREDITH DANK ET AL., URBAN INST., LOCKED IN: INTERACTIONS WITH THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS FOR LGBTQ YOUTH, YMSM, AND YWSW WHO ENGAGE IN SURVIVAL SEX 79 (2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf>; HUNT & MOODIE-MILLS, *supra* note 53, at 2; Craig & Austin, *supra* note 267, at 60 (noting connections between the challenges that LGBTQ youth face in the child welfare system as a result of their sexual orientation or gender identity and the increased risk of “being kicked out of foster homes or becoming homeless”). Some studies have found that LGBTQ foster youth spend some “time on the streets because they felt safer there than in” child welfare placements. WILSON ET AL., *supra* note 33, at 12.

283. CRAY ET AL., *supra* note 29, at 12.

284. The specific funding schemes for programs and services available to unaccompanied youth will be discussed *infra* Part III.A.2.

285. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 278, at 5–6 (discussing the harms of religiously motivated discrimination against LGBTQ youth in the child welfare system and the harms of protecting those instances of religiously motivated discrimination through religious exemption laws); Deborah Lolai, “*You’re Going to be Straight or You’re Not Going to Live Here*”: Child Support for LGBT Homeless Youth, 24 TUL. J.L. & SEXUALITY 35, 53 (2015) (noting that many homeless youth shelters “are run by religious organizations that are openly hostile to LGBT youth generally

These issues, however, are not limited to purely privately funded entities. Studies document how unaccompanied LGBTQ youth commonly face discrimination, harassment, and abuse when they seek or obtain services from programs that receive public funds to assist homeless and runaway youth.<sup>286</sup> Many LGBTQ youth hide, or feel pressure to hide, that they identify as LGBTQ when receiving services.<sup>287</sup> Faced with these obstacles, unaccompanied LGBTQ youth may be deterred from seeking services, which prolongs their unaccompanied youth status.<sup>288</sup>

These points illustrate how tensions between maintaining traditional family models and the realities of unaccompanied youth status can harm unaccompanied youth and facilitate their exclusion from the child welfare system. My analysis now turns to how these child welfare harms and exclusions interact with responses to unaccompanied youth in the juvenile justice system.

### III. JUVENILE JUSTICE SYSTEM RESPONSES TO UNACCOMPANIED YOUTH

This Part examines government responses to unaccompanied youth in the juvenile justice system. Subpart A describes the ways in which the public reordering in the juvenile justice system is not only family-focused but also adopts inconsistent views of unaccompanied youth as both delinquent offenders and crime victims. Subpart B then critiques this public reordering. I argue that family-centered juvenile justice responses

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and transgender youth specifically”); *see also* QUINTANA ET AL., *supra* note 30, at 18 (discussing the lack of faith-based homeless shelters that are supportive of LGBTQ youth).

286. LAMBDA LEGAL, NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH 2 (2009), [https://www.lambdalegal.org/sites/default/files/publications/downloads/bkl\\_national-recommended-best-practices-for-lgbt-homeless-youth\\_0.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/bkl_national-recommended-best-practices-for-lgbt-homeless-youth_0.pdf) (“Unfortunately, some LGBT homeless youth have experienced discriminatory practices and policies when trying to access homeless youth services.”); Elaine M. Maccio & Kristin M. Ferguson, *Services to LGBTQ Runaway and Homeless Youth: Gaps and Recommendations*, 63 CHILD. & YOUTH SERVICES REV. 47, 50 (2016).

287. *See* RAY, *supra* note 100, at 94 (discussing the challenges that LGBT youth face in homeless shelters and noting that “[y]outh continue to hide in the system by denying their sexual orientation or gender identity, and as a result do not get the help they need”).

288. QUINTANA ET AL., *supra* note 30, at 18 (“Studies have found that many homeless gay and transgender youth choose to sleep on the streets rather than go to a service provider that is perceived to be homophobic or transphobic.”); RAY, *supra* note 100, at 94 (“If an LGBT youth receives the message—implicit or explicit—that he or she is not welcome because of his or her sexual orientation or gender identity, the youth will be less likely to use the agency’s services.”); Maccio & Ferguson, *supra* note 286, at 50 (noting the results of one study in which interviewed staff from organizations that offered services to LGBTQ homeless and runaway youth commented that “the discrimination, harassment, and violence that occur in general shelters often contribute to LGBTQ [runaway and homeless youths’] desire to remain on the streets or in precarious housing situations”).

facilitate a destructive cycle in which unaccompanied youth bounce between homelessness (or other unstable living arrangements) and the juvenile and criminal justice systems. Youth who have been harmed by, or excluded from, the child welfare system for the reasons discussed in the previous Part are especially at risk of entering this cycle.

A. *Family-Centered Public Reordering in the Juvenile Justice System*

This Subpart examines two types of family-centered public reordering in the juvenile justice system. The first type is juvenile justice laws and law enforcement policies and practices that allow for unaccompanied youth to be arrested, charged, and confined in secure detention facilities when they leave or fail to stay within families (whether biological, foster, or adoptive).<sup>289</sup> I explain that these measures adopt a view of unaccompanied youth as delinquent offenders and place the blame on them for their family separation, consistent with deficient-agency theories of unaccompanied youth status. The second type is public funding for programs and services that specifically target unaccompanied youth.<sup>290</sup> I explain that this funding is largely channeled through juvenile justice laws and primarily concerned with unaccompanied youth's criminal victimization. I argue that as a result of their victimization focus, these programs and services assume a short-term outlook by granting just enough resources for unaccompanied youth to get off the streets before they become victims of crime, leaving the responsibility to provide for their long-term needs to family systems that likely have already failed them.

1. Unaccompanied Youth as Delinquent Offenders: Arrest, Institutionalization, and Other Sanctions

The history of handling unaccompanied youth in the juvenile justice system through arrest and institutionalization dates back to the creation of the first juvenile court in 1899.<sup>291</sup> An understanding of this history provides meaningful context for the ways in which the government has historically portrayed unaccompanied youth as delinquent offenders, and why many unaccompanied youth are funneled into the juvenile and criminal justice systems today.<sup>292</sup>

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289. See *infra* Part III.A.1. "Examples of institutional settings [for youth] include . . . correctional facilities and inpatient psychiatric drug and alcohol rehabilitation centers." SARA V. JARVIS & ROBERT M. ROBERTSON, JR., *TRANSITIONAL LIVING PROGRAMS FOR HOMELESS ADOLESCENTS* 6 (1993), <http://files.eric.ed.gov/fulltext/ED364618.pdf>.

290. See *infra* Part III.A.2.

291. See Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 131, 131–37 (repealed 1965). "By 1925, forty-six states had created separate juvenile justice courts." Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 FLA. ST. U. L. REV. 471, 473–74 (2001) (indicating that the first juvenile court began in Illinois).

292. See FLOWERS, *supra* note 114, at 66.

*i. Historical Background*

Professor Barry Feld has described how the juvenile court emerged at a time of great social change in the late-nineteenth and early-twentieth centuries.<sup>293</sup> Modernization inspired massive industrialization, urbanization, and immigration.<sup>294</sup> The transition from an agricultural to an industrial society reshaped the family as women moved into the new industrial work force.<sup>295</sup> These changes helped to cement a cultural view of childhood<sup>296</sup> that idealized children as innocent and fragile persons in need of protection.<sup>297</sup>

The Progressive social reformers who created the juvenile court intended for it to have a nonadversarial and therapeutic mission, unlike courts in the criminal justice system.<sup>298</sup> These reformers further intended for the juvenile court to reach a broad range of youth who faced trouble in their social and family lives and not just youth who violated the law.<sup>299</sup> The idea that youth pauperism, if left unattended, could “ripen into criminality” motivated this convergence between “dependency” and “delinquency” concepts.<sup>300</sup> Thus, the broad mission of the juvenile court enabled the government to act as *parens patriae* with the dual purposes of reforming youth and protecting society.<sup>301</sup>

Even the earliest juvenile courts placed primacy on families when handling dependent and neglected youth, including unaccompanied youth.<sup>302</sup> The Illinois Juvenile Court Act of 1899, which created the first juvenile court, reflects this emphasis. This statute provided

[t]hat the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an

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293. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1453 (2003).

294. *Id.*

295. Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century,* 92 IOWA L. REV. 1835, 1856 n.104 (2007).

296. Feld, *supra* note 293, at 1454.

297. *Id.*; see Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court,* 69 N.C. L. REV. 1083, 1097 (1991).

298. Feld, *supra* note 293, at 1458–59.

299. SEALANDER, *supra* note 138, at 21.

300. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 STAN. L. REV. 1187, 1193, 1199 (1970). Generally speaking, juvenile delinquency involves cases in which a child violates a law or commits a status offense. Marygold S. Melli, *Introduction: Juvenile Justice Reform in Context,* 1996 WIS. L. REV. 375, 381 n.20. Juvenile dependency typically involves cases in which children are abandoned, abused, or neglected by their parents, legal guardians, or custodians. Huntington, *supra* note 103, at 644 n.30.

301. *Kent v. United States,* 383 U.S. 541, 554–55 (1966).

302. Fox, *supra* note 310, at 1211–12.

improved family home and become a member of the family by legal adoption or otherwise.<sup>303</sup>

Put simply, government intervention on behalf of dependent and neglected youth was supposed to model traditional family life.

At this point in time, the law differentiated between youth who needed help from the government and youth who violated the law. This gap narrowed as expanding legal definitions of “delinquent child” appeared in juvenile justice laws soon after the earliest juvenile courts appeared. The initial definition of “delinquent child” under the Illinois Juvenile Court Act of 1899 was fairly narrow in the sense that it was limited to any child who violated a state law or local ordinance.<sup>304</sup> In the early 1900s, however, the legislature amended this definition to include “status offenses”<sup>305</sup>—acts considered illegal only because nonadults committed them.<sup>306</sup> Critically, status offenses included the very behaviors that unaccompanied youth were likely to engage in due to their unaccompanied status, such as running away, being incorrigible, truancy, and violating curfew.<sup>307</sup>

This expanded definition soon appeared in the juvenile justice laws of other states,<sup>308</sup> making dependency and delinquency concepts virtually

303. Illinois Juvenile Court Act of 1899, § 21, 1899 Ill. Laws 131, 137 (1899) (repealed 1965). At the time, most adoptions took place through private agreements rather than public or nonprofit agencies. D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 859 (1992). Until the 1850s, there were no state statutes “requir[ing] judicial supervision over the adoption process.” *Id.*

304. Illinois Juvenile Court Act of 1899, § 1 (“The words delinquent child shall include any child under the age of 16 years who violates any law of this State or any city or village ordinance.”).

305. Act of May 11, 1901, § 1, 1901 Ill. Laws 141, 142 (“The words ‘delinquent child’ shall include any child under the age of sixteen (16) years who violates any law of this State or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated.”).

306. Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1528 (2012) (“Status offenses are acts that are not deemed criminal when committed by adults but carry juvenile court sanctions for youth because of their legal status as minors.”).

307. Illinois Juvenile Courts Amendment Act 1907, § 2, 1907 Ill. Laws 70, 71 (defining status offender as a youth who “violates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without that [the] consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime . . . or wanders about the streets in the night time without being on any lawful business or lawful occupation” (alteration in original)).

308. ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (2d ed. 1977) (“The Illinois act was considered a prototype for legislation in other states . . .”); W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, *IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS* 22–23 (1972); *see, e.g.,*

interchangeable across much of the United States.<sup>309</sup> The justification for this expanded definition rested on two ideas. First, the noncriminal behaviors defined as status offenses were likely warning signs of a youth's future criminal involvement.<sup>310</sup> Second, the government had a duty to intervene in the family and social lives of youth who appeared to be on a path to criminal offending.<sup>311</sup> This new role of the government contradicted earlier legal and social norms that safeguarded the family as a private domain free from state interference.<sup>312</sup>

As a consequence of this blurred distinction between dependency and delinquency concepts, unaccompanied youth regularly came into contact with the police simply on the basis of their unaccompanied status.<sup>313</sup> If unaccompanied youth were petitioned to the juvenile court, then judges could institutionalize them in secure detention facilities alongside other juvenile delinquents who committed serious crimes.<sup>314</sup> Historical data shows that juvenile courts institutionalized status offenders (including unaccompanied youth) at high rates in the first half of the 20th century.<sup>315</sup> In addition, indeterminate sentencing allowed for status offenders to be institutionalized for long periods of time.<sup>316</sup> This was possible because remedies in the juvenile justice context were then (and are still intended to be) based on principles of individualized justice that

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1915 W. Va. Acts 410; 1919 W. Va. Acts 404; 1915 S.D. Sess. Laws ch. 119, § 1, 275–76; 1 JAMES G. SWEENEY ET AL., REVISED LAWS OF NEVADA 218 (1912).

309. Lora Lee Pederson, 29 TEX. L. REV. 576, 577 (1951) (reviewing SHELDON & ELEANOR GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950)) (“The philosophy of the juvenile court, as embodied in the statute which established the Juvenile Court of Cook County, Illinois, in 1899, provided that the delinquent child should be treated like the neglected or dependent one.”).

310. Lee Teitelbaum, *Status Offenses and Status Offenders*, in A CENTURY OF JUVENILE JUSTICE 158, 162 (Margaret K. Rosenheim et al. eds., 2002) (“Proponents of the juvenile court viewed deviance as a developmental process, and the central premise of the juvenile court movement was the use of judicial authority to identify and rehabilitate, rather than punish, children whose acts or conditions bespoke the likelihood of future antisocial behavior.”).

311. *Id.* at 162–63.

312. *See supra* Part II.A.1.

313. *See* David Wolcott, “*The Cop Will Get You*”: *The Police and Discretionary Juvenile Justice, 1890–1940*, 35 J. SOC. HIST. 349, 354 (2001).

314. Teitelbaum, *supra* note 310, at 163.

315. *See, e.g.*, Steven Schlossman & Susan Turner, *Status Offenders, Criminal Offenders, and Children “At Risk” in Early Twentieth-Century Juvenile Court*, in CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC POLICY 32, 39 (Roberta Wolons ed., 1993) (reporting that the juvenile court in Los Angeles institutionalized 22 percent of girl and 18.3 percent of boy status offenders in 1930).

316. Jay D. Blitzman, *Gault’s Promise*, 9 BARRY L. REV. 67, 75 (2007) (noting “indeterminate commitments until adulthood for minor offenses and status offenses became publicized” pre-*Gault*); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 700 (1991) (“Historically, juvenile court sentences were discretionary, indeterminate, and nonproportional to achieve the offender’s ‘best interests.’”).

focused on rehabilitation, and not principles of retribution that focused on the reprehensibility of their conduct.<sup>317</sup>

Before describing more recent juvenile justice responses involving unaccompanied youth, it is important to acknowledge that this interlacing of dependency and delinquency concepts had (and still has) a distinct gendered effect, especially on female youth of color.<sup>318</sup> Female youth were (and still are) more likely to be arrested and funneled into juvenile courts for status offenses, whereas male youth were (and still are) more likely to be arrested and funneled into juvenile courts for delinquent conduct.<sup>319</sup> The bulk of status offense arrests and adjudications for female youth involved sexual misconduct, including promiscuity.<sup>320</sup> Scholars argue that this disparity reflected the intent of the juvenile court's creators to use juvenile courts as a means to enforce dominant norms of sexual morality in addition to idealized notions of childhood innocence.<sup>321</sup>

## ii. Contemporary Juvenile Justice Responses to Unaccompanied Youth

In the 1960s, skepticism grew over whether juvenile courts were more beneficial than harmful for youth and children.<sup>322</sup> Scholars and practitioners argued that juvenile courts were arbitrary and punitive,<sup>323</sup> which contradicted their intended purposes of being therapeutic and nonadversarial. In light of these concerns, critics called for extending due process protections to minors in juvenile court.<sup>324</sup> In 1967, these calls culminated in the U.S. Supreme Court's groundbreaking decision in *In re Gault*.<sup>325</sup> *Gault* extended a host of procedural protections into juvenile proceedings that were previously only available to defendants in criminal courts.<sup>326</sup> Those protections included the right to notice of charges,

317. Teitelbaum, *supra* note 310, at 162.

318. MEDA CHESNEY-LIND & RANDALL G. SHELDEN, *GIRLS, DELINQUENCY, AND JUVENILE JUSTICE* 80–83 (4th ed. 2014); Barry C. Feld, *Violent Girls or Relabeled Status Offenders? An Alternative Interpretation of the Data*, 55 *CRIME & DELINQ.* 241, 243–44 (2009); Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 *CARDOZO L. REV.* 1091, 1091–92 (2014).

319. Barry C. Feld, *Questioning Gender: Police Interrogation of Delinquent Girls*, 49 *WAKE FOREST L. REV.* 1059, 1059 (2014); Nanda, *supra* note 306, at 1527–28.

320. Godsoe, *supra* note 318, at 1095–96.

321. Feld, *supra* note 319, at 1064; Godsoe, *supra* note 318, at 1109.

322. Feld, *supra* note 293, at 1448.

323. *Id.*; Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 *VAND. L. REV.* 479, 484 (1995).

324. Feld, *supra* note 293, at 1448 (noting the “[s]ystematic and critical re-examination of the juvenile court’s cultural and legal premises [that] emerged . . . in the 1960s”).

325. *In re Gault*, 387 U.S. 1 (1967).

326. See generally *id.*

the right to counsel, the right to confrontation and cross-examination of witnesses, and the privilege against self-incrimination.<sup>327</sup>

Scholars and practitioners also challenged the legitimacy of institutionalizing status offenders alongside juvenile delinquents, especially those who committed violent crimes. Professor Barry Feld explains that critics raised several concerns, including that the status jurisdiction of the juvenile court ultimately harmed youth, damaged relationships between youth and their families, inundated juvenile courts with high case volumes, and overburdened government agencies and schools which regularly referred status offenders to juvenile courts.<sup>328</sup> Several states revised their delinquency laws in response to these concerns.<sup>329</sup> These reforms created new lines between status offenses and delinquent acts and moved status offenders into newly created *non-delinquent* categories with acronyms like JINS, CHINS, or FINS “(juveniles, children, [or] families in need of supervision).”<sup>330</sup>

This growing skepticism eventually shaped influential legislation at the federal level with the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP A)<sup>331</sup>—which is still the main piece of federal legislation that sets national standards and allocates funds in the area of juvenile justice.<sup>332</sup> When first enacted, the JJDP A required states to deinstitutionalize and divert status offenders from secure detention facilities in order to receive federal funding for their juvenile justice programs.<sup>333</sup> States responded by amending their juvenile justice laws to formally comply with the JJDP A.<sup>334</sup>

Notwithstanding this compliance, several loopholes allow states to circumvent the JJDP A’s deinstitutionalization mandate today. At least

327. See generally *id.*

328. Feld, *supra* note 316, at 696–97.

329. Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 263 (2008).

330. *Id.*

331. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93–415, 88 Stat. 1109 (codified in relevant part at 34 U.S.C.A. § 11133 (West 2017)).

332. See *id.*; see also Alida V. Merlo & Peter J. Benekos, *Reaffirming Juvenile Justice: From Gault to Montgomery* 14–15 (2017) (discussing amendments to the JJDP A since its enactment in 1974). The JJDP A was not the first time that Congress became involved in the area of juvenile justice. In the 1930s, Congress passed federal legislation that attempted to offer juveniles who violated federal law the benefits of rehabilitation programs that existed in state juvenile systems. See Robert B. Mahini, Note, *There’s No Place Like Home: The Availability of Judicial Review Over Certification Decisions Invoking Federal Jurisdiction Under the Juvenile Justice and Delinquency Prevention Act*, 53 VAND. L. REV. 1311, 1315–17 (2000) (discussing federal juvenile justice legislation in the 1930s).

333. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 408 (2007).

334. ANNE L. SCHNEIDER, U.S. DEP’T OF JUSTICE, *THE IMPACT OF DEINSTITUTIONALIZATION ON RECIDIVISM AND SECURE CONFINEMENT OF STATUS OFFENDERS* 1 (1985), <https://www.ncjrs.gov/pdffiles1/Digitization/99808NCJRS.pdf> (“[M]ost States have altered their laws to be in compliance with the [JJDP A] and its amendments.”).

four loopholes are relevant to unaccompanied youth.<sup>335</sup> First, federal regulations implementing the JJDPa include a monitoring policy under which both accused status offenders and nonoffenders can be held in a secure detention facility for up to 24 hours prior to, and for an additional 24 hours after, an initial appearance in juvenile court.<sup>336</sup> This monitoring policy opens opportunities for police officers to arrest and detain unaccompanied youth, even if those youth are not adjudicated delinquent and ultimately returned back to their families. For instance, police officers come into contact with unaccompanied youth either while on patrol or while investigating missing persons reports—often filed by an unaccompanied youth’s parents.<sup>337</sup> In many cases, parents request that police officers find, arrest, and detain unaccompanied youth so that the youth can be brought home.<sup>338</sup> Most states permit police officers to take unaccompanied youth into custody without a warrant, and return them to their parents or legal guardians against their wishes.<sup>339</sup>

The second loophole involves subsequent amendments to the JJDPa that created an exception allowing states to detain youth who violate valid court orders (VCOs).<sup>340</sup> This VCO exception applies to unaccompanied youth as follows: A juvenile court judge can issue an order prohibiting youth from engaging in behaviors associated with unaccompanied youth status (for example, running away, truancy, vagrancy, or violating curfew). When youth engage in those behaviors, a judge can send them to juvenile detention for violating the VCO. “[E]ach year the VCO exception contributes to the [confinement] of thousands of” youth status offenders in secure detention facilities.<sup>341</sup> Gaps in available data make it impossible to tell exactly how many of these youth are unaccompanied youth, although advocates have criticized the use of the

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335. For a general discussion of these four loopholes circumventing the JJDPa’s deinstitutionalization mandate, see Rayna Hardee Bomar, Note, *The Incarceration of the Status Offender*, 18 MEM. ST. U. L. REV. 713, 731–36 (1988) (discussing the four loopholes: relaxed monitoring standards, the valid court order exception, discretion in labelling offenders, and noncorrectional placements).

336. 28 C.F.R. § 31.303(f)(2) (2017).

337. MOREWITZ, *supra* note 69, at 175.

338. *See id.*

339. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *ALONE WITHOUT A HOME: A STATE-BY-STATE REVIEW OF LAWS AFFECTING UNACCOMPANIED YOUTH* 66 (2012), [https://www.nlchp.org/Alone\\_Without\\_A\\_Home](https://www.nlchp.org/Alone_Without_A_Home).

340. 28 C.F.R. § 31.303(f)(3). *See generally* Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555 (2009) (arguing that allowing the detention of status offenders for violating valid court orders undermines the JJDPa).

341. COAL. FOR JUVENILE JUSTICE, *RUNNING AWAY: FINDING SOLUTIONS THAT WORK FOR YOUTH AND THEIR COMMUNITIES* 1, [http://juvjustice.org/sites/default/files/resource-files/Runaway%20Emerging%20Issues%20Brief%20FINAL\\_0.pdf](http://juvjustice.org/sites/default/files/resource-files/Runaway%20Emerging%20Issues%20Brief%20FINAL_0.pdf).

VCO exception to criminalize homeless, runaway, and other unaccompanied youth.<sup>342</sup>

The third loophole involves how key actors in the juvenile justice system exercise their discretion when categorizing youth as status offenders or juvenile delinquents. Scholars have argued that in order to circumvent the JJDPa's deinstitutionalization mandate, law enforcement and juvenile intake officers are more willing to label youth as delinquent offenders who they may have otherwise labeled status offenders.<sup>343</sup> For instance, consider a teenager who takes \$30 from her parents to buy a bus ticket and uses that bus ticket to run away from home. Under this loophole, law enforcement and juvenile intake officers would categorize the teenager as a delinquent offender (a "thief") as opposed to a status offender (a "runaway").

As a consequence of this relabeling process, unaccompanied youth are at greater risk of arrest and confinement. This is especially so given that with few or no legal means to survive, unaccompanied youth often turn to theft, survival sex, and other forms of crime to obtain money, food, and shelter.<sup>344</sup> The next Subpart will explore these connections between unaccompanied youth status and criminality in more detail.<sup>345</sup>

The fourth loophole is that the JJDPa only requires the deinstitutionalization of status offenders from secure detention or correctional facilities.<sup>346</sup> It does not prohibit juvenile courts from referring youth to mental health institutions. Data after the JJDPa took effect shows that the number of youth status offenders referred voluntarily or involuntarily to mental health care facilities surged.<sup>347</sup> Today, civil commitment

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342. For instance, in 2008, the American Bar Association (ABA) wrote a letter to the Committee on the Judiciary of the United States Senate to support legislation banning the confinement of youth status offenders in juvenile facilities. The ABA stressed that "runaway and homeless youth are also criminalized by the VCO exception." Letter from Thomas M. Susman, Dir., Am. Bar Ass'n, to Patrick J. Leahy, Chairman, U.S. Senate Judiciary Comm., and Arlen Specter, Ranking Member, U.S. Senate Judiciary Comm. 3 (July 14, 2008), <http://www.americanbar.org/content/dam/aba/events/aba-day/2008juvjusticeletter.authcheckdam.pdf>.

343. Bomar, *supra* note 335, at 735 ("Some experts think that juvenile justice practitioners are, in fact, circumventing the intent of the Act by using their discretion to label as delinquent many youths who once would have been categorized as status offenders.").

344. HAGAN & MCCARTHY, *supra* note 22, at 89–90; Ferguson et al., *supra* note 231, at 101. Estimates of homeless and runaway youth who engage in survival sex range from 10 percent to 50 percent. See DANK ET AL., *supra* note 282, at 7.

345. See *infra* Part III.B.

346. 28 C.F.R. § 31.303(f)(2) (2017) defines a "secure detention or correctional facility" as "any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or nonoffenders, or used for the lawful custody of accused or convicted adult criminal offenders."

347. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 131 (1989); Feld, *supra* note 316, at 700.

proceedings may intersect with juvenile status offense proceedings,<sup>348</sup> ultimately resulting in the confinement of unaccompanied youth in psychiatric institutions and other mental health facilities.<sup>349</sup> Although many unaccompanied youth have mental health challenges, not all of them have challenges that warrant institutionalization, and many others simply have nowhere else to go.<sup>350</sup>

Beyond arrest and confinement, unaccompanied youth face other harsh sanctions for status offenses that relate to their family separation (for example, running away, being “ungovernable,” and violating curfew). Common sanctions include suspending driver’s licenses, imposing monetary fines, ordering youth to attend counseling or education programs, and placing youth in out-of-home placement programs (for example, group homes).<sup>351</sup> As discussed later, these sanctions can interfere with unaccompanied youth’s employment and school attendance by restricting their mobility.<sup>352</sup> Moreover, unaccompanied youth are at risk for future detention and criminal histories when they cannot afford to pay the fines imposed for status offenses, which further restricts their educational and employment opportunities.<sup>353</sup>

Having sketched the ways in which family-centered public reordering in the juvenile justice system adopts a view of unaccompanied youth as delinquent offenders, the analysis now turns to describe the ways in which this public reordering can adopt a different view of unaccompanied youth as crime victims.

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348. Jana Heyd & Casey Trupin, *How Status Offenses Intersect with Other Civil and Criminal Proceedings*, in REPRESENTING JUVENILE STATUS OFFENDERS 121, 124–25 (Sally Small Inada & Claire S. Chiamulera eds., 2010).

349. Godsoe, *supra* note 318, at 1098 (noting that “[m]any children are removed from their homes for status offenses”—including running away and curfew violations—and placed into psychiatric hospitals, among other out-of-home placements).

350. GARY B. MELTON ET AL., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 82 (1998) (noting that commitment has served and will continue to serve as a public safety net to provide shelter for homeless youth and adults).

351. See generally COAL. FOR JUVENILE JUSTICE, STATUS OFFENSES: A NATIONAL SURVEY (2015), [http://www.njjn.org/uploads/digital-library/CJJ\\_Status-Offenses-ANationalSurvey\\_WEB\\_2015.pdf](http://www.njjn.org/uploads/digital-library/CJJ_Status-Offenses-ANationalSurvey_WEB_2015.pdf) (providing a national survey of status offenses and the penalties attached to them).

352. See *infra* Part III.B.

353. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 290–94 (2014) (outlining the various collateral consequences for juvenile adjudicants who are unable to pay economic sanctions imposed on them); see also Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Adolescent Pro Se Advocacy—Ferguson and Beyond*, 2015 B.Y.U. L. REV. 1247, 1292 (“The practical effect—unpaid fines, court fees, and then arrest warrants—is that such kids are passed over for jobs, turned away from housing, and civilly disabled in other ways as they try to become young adults.”).

## 2. Unaccompanied Youth as Crime Victims: Public Funding for Unaccompanied Youth Programs and Services

The second relevant type of public reordering in the juvenile justice system involves public funding for programs and services that target unaccompanied youth. As explained below, government funding for these programs and services is largely channeled through juvenile justice laws and is thus separated from the multibillion-dollar funding structure that child welfare laws set in place to support adoption, foster care, and guardianship. The analysis shows how this division results in significantly less public funding for programs and services that directly target unaccompanied youth than family-centered child welfare programs. It further shows how this division influences available programs and services to be oriented toward the immediate and short-term needs of unaccompanied youth so that they can get off the street before becoming victims of crime. This short-term outlook leaves the responsibility for the long-term needs of unaccompanied youth to family systems that may have already failed them, raising questions of whether those needs are ever met.

The Runaway and Homeless Youth Act (RHYA) is the primary public, and only federal, funding source for programs that target unaccompanied youth.<sup>354</sup> Importantly, most states do not have laws that allocate funding for programs and services that address the particular needs of unaccompanied youth.<sup>355</sup> Unlike the various financial incentives that child welfare laws create to support foster care and adoption, the RHYA includes no financial incentives for states to allocate funds for programs that target unaccompanied youth. Moreover, the private funding sources for these programs and services are limited.<sup>356</sup> For these reasons, the RHYA has come to shape the philosophy, practice, and availability of programs and services that target unaccompanied youth in many localities.

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354. Runaway and Homeless Youth Act, Pub. L. No. 93–415, 88 Stat. 1129 (2015) (originally enacted as Runaway Youth Act of 1974); Claire Chiamulera, *Homeless and Runaway Youth in the U.S.: A Snapshot*, 33 CHILD L. PRAC. 45, 46 (2014). Some secondary federal laws recognize the issue of youth homelessness in limited contexts. See, e.g., McKinney-Vento Homeless Assistance Act, Pub. L. No. 100–77, 101 Stat. 482 (2017) (originally enacted as Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100–77, 101 Stat. 482 (1987)) (providing federal funding to ensure the immediate enrollment and educational stability of homeless youth and children).

355. THE NAT'L NETWORK FOR YOUTH, RUNAWAY AND HOMELESS YOUTH ACT (RHYA) (P.L.110–378): REAUTHORIZATION 2013, at 1 (2013), <http://www.nn4youth.org/wp-content/uploads/NN4Y-RHYA-Fact-Sheet-2013.pdf>.

356. Richard A. Hooks Wayman, *Homeless Queer Youth: National Perspectives on Research, Best Practices, and Evidence Based Interventions*, 7 SEATTLE J. FOR SOC. JUST. 587, 622 (2008) (“America’s private service systems have an abysmal capacity to support homeless youth . . .”).

The RHYA was originally entitled “The Runaway Youth Act,”<sup>357</sup> and was enacted as part of the Juvenile Justice and Delinquency Prevention Act (JJDP) in 1974.<sup>358</sup> As explained below, Congress enacted the law against the backdrop of several empirical, social, and cultural developments involving runaway youth. These developments provide meaningful context for how the law came to assume a crime-control focus.

In the 1960s and early 1970s, the number of reported runaways surged,<sup>359</sup> which spawned critical conversations about the ability of law enforcement and the juvenile justice system to handle the growing problem.<sup>360</sup> New data from the Federal Bureau of Investigation’s Uniform Crime Reporting (UCR) Program<sup>361</sup> was one development that contributed to these growing public concerns.<sup>362</sup> The 1964 UCR report offered the first aggregate snapshot on the number of runaway youth, reporting 70,517 arrests for runaway activity that year.<sup>363</sup> This figure increased to 149,052 arrests in 1968 and 204,544 arrests in 1971.<sup>364</sup> Researchers at the time estimated that only one in six runaways were ever arrested, meaning that this data likely underestimated the true extent of the problem.<sup>365</sup>

Increasing national press coverage surrounding runaways also inspired the Runaway Youth Act.<sup>366</sup> In particular, media reports called attention to runaways who became victims of violent crime while living on the streets.<sup>367</sup> The “Houston Mass Murders” were perhaps the most notorious example.<sup>368</sup> In 1973 (only a year before Congress enacted the Runaway Youth Act), Houston police officers discovered the graves of 27

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357. Anne B. Moses, *The Runaway Youth Act: Paradoxes of Reform*, 52 SOC. SERV. REV. 227, 231 (1978).

358. Runaway Youth Act, Pub. L. No. 93–415, 88 Stat. 1129 (1974) (codified in scattered sections of 34 U.S.C.A. (West 2018)).

359. Moses, *supra* note 357, at 228.

360. *Id.* at 230.

361. The Federal Bureau of Investigation’s UCR Program began in 1930 and is one of the main sources of official crime data in the United States. LARRY J. SIEGEL & JOHN L. WORRALL, *ESSENTIALS OF CRIMINAL JUSTICE* 31 (8th ed. 2012). The UCR is published every quarter, and is based on data reported from over 18,000 law enforcement agencies across the United States. FBI, *Uniform Crime Reporting*, <https://ucr.fbi.gov> (last visited Mar. 16, 2018).

362. *See* Moses, *supra* note 357, at 228–30.

363. *Id.* at 228.

364. *Id.*

365. Robert Shellow et al., *Suburban Runaways of the 1960’s*, 32 MONOGRAPHS SOC’Y FOR RES. CHILD DEV. 1, 22 (1967); *see* Moses, *supra* note 357, at 228.

366. Moses, *supra* note 357, at 231–32.

367. *Id.* at 232.

368. ALBERT R. ROBERTS, *RUNAWAYS AND NON-RUNAWAYS IN AN AMERICAN SUBURB* 5 (1981) (“The dangers of the runaway problem were gruesomely and emphatically brought to the attention of the entire nation by the mass murders in Houston which were uncovered in August, 1973.” (citation omitted)); *Texas Said to Admit Role in 25 Killings*, N.Y. TIMES, Aug. 10, 1973, at 1.

male youth, the youngest of which was 13 years old.<sup>369</sup> The victims had likely been tortured to death, and many were runaway youth.<sup>370</sup> The mass murders gained national media coverage because it was one of the worst serial killings in the United States up until that point.<sup>371</sup> The murders inspired the Houston Police Department to issue a public statement on the number of estimated runaway youth in the area each year (approximately 5,000 youth at the time).<sup>372</sup>

In light of these broader currents, the Runaway Youth Act of 1974 narrowly conceptualized unaccompanied youth as runaways, as the title of the law reflected.<sup>373</sup> Congressional findings explicitly characterized runaway youth as leaving home without their parents' permission,<sup>374</sup> which overlooked unaccompanied youth who were forced out of their homes against their will.<sup>375</sup> The findings also illustrated the law's early focus on the criminal victimization of unaccompanied youth. For instance, the findings stated that the "alarming" increase in runaways "significantly endanger[ed]" youth who lacked resources to survive on their own and "creat[ed] a substantial law enforcement problem" for communities.<sup>376</sup>

To address these concerns, the Runaway Youth Act created its first major funded program: the Basic Center Grant Program.<sup>377</sup> Basic Centers are designed to address runaway youth's immediate basic needs (shelter, food, etc.) for no more than 15 days so they can get off the streets and return to their families as soon as possible—conceivably before becoming victims of crime and in turn a community crime problem.<sup>378</sup> Congress initially allocated \$10 million to fund Basic Centers.<sup>379</sup> Although this

369. Moses, *supra* note 357, at 232; *Texan Said to Admit Role in 25 Killings*, *supra* note 368, at 44.

370. *Texan Said to Admit Role in 25 Killings*, *supra* note 368, at 44.

371. DAVID HANNA, *HARVEST OF HORROR: MASS MURDER IN HOUSTON* 33 (1975) (describing the Houston Mass Murders as "the worst in United States history").

372. ROBERTS, *supra* note 368, at 5.

373. Runaway Youth Act, Pub. L. No. 93-415, § 301, 88 Stat. 1129, 1129 (1974) (codified at 34 U.S.C.A. § 11201 (West 2018)).

374. *Id.* § 302(1) ("[T]he number of juveniles who leave and remain away from home without parental permission has increased to alarming proportions . . .").

375. The legislative history to the 1977 amendments to the Runaway Youth Act supports this point. That history emphasizes how Congress intended for those amendments to clarify the law's focus on youth "who have no home from which to run, the few who are so abused or neglected that leaving was a rational alternative, or those who leave home involuntarily." S. REP. NO. 95-165, at 65 (1977) (Conf. Rep.), *as reprinted in* 1977 U.S.C.C.A.N. 2556, 2607.

376. Runaway Youth Act § 302, 88 Stat. at 1129-30.

377. DEBORAH BASS, *HELPING VULNERABLE YOUTHS: RUNAWAY & HOMELESS ADOLESCENTS IN THE UNITED STATES* 15 (1992); *40 Years of Serving Runaway and Homeless Youth: A Timeline*, FAM. & YOUTH SERVICES BUREAU, <https://ncfy.acf.hhs.gov/features/celebrating-40-years-rhya/rhy-work-timeline> (last visited Mar. 14, 2018).

378. *See supra* Part III.A.2.

379. Richard David Young, *The Runaways*, 3 *IUSTITIA* 35, 60-61 (1975).

amount is now just under \$50 million,<sup>380</sup> thousands of unaccompanied youth are still turned away from Basic Centers every year.<sup>381</sup>

By design, Basic Centers were not (and still are not) intended to meet the long-term needs of runaway youth. The various ways in which the law placed primacy on family reunification<sup>382</sup> lends support to the idea that Congress viewed families as responsible for runaway youth's long-term care. For instance, to qualify for funding, a local agency had to develop adequate plans for contacting a runaway youth's parents or relatives and for assuring the youth's safe return according to his or her best interests.<sup>383</sup> In addition, the law measured the success of Basic Centers in part by their effectiveness in strengthening family relationships, reuniting runaway youth with their families, and encouraging the resolution of intrafamily problems through counseling and other services.<sup>384</sup> Critically, many of these provisions remain in the current version of the statute,<sup>385</sup> illustrating the law's emphasis on family reunification and the short-term outlook of Basic Centers today.

In 1977, Congress renamed the Runaway Youth Act to its current title, the Runaway and Homeless Youth Act.<sup>386</sup> The new title reflected how Congress expanded the scope of the law to formally include homeless youth.<sup>387</sup> Congress amended the RHYA again in 1988 to create its second federally funded program for unaccompanied youth: the Transitional Living Grant Program.<sup>388</sup> This new program represented an important shift in federal youth homelessness policy in that Congress

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380. *Basic Center Program*, FAM. & YOUTH SERVICES BUREAU 2 (2017), [https://www.acf.hhs.gov/sites/default/files/fysb/bcp\\_facts\\_20170208.pdf](https://www.acf.hhs.gov/sites/default/files/fysb/bcp_facts_20170208.pdf) (“In FY 2016, 291 grantees for the Basic Center Program received \$48,369,00 [sic] total.”).

381. NAT'L ALLIANCE TO END HOMELESSNESS, FY 2016 APPROPRIATIONS: RUNAWAY AND HOMELESS YOUTH ACT 1 (2015), [http://b3cdn.net/naeh/cde1b8c909cc36f3ab\\_wgm6b5ob1.pdf](http://b3cdn.net/naeh/cde1b8c909cc36f3ab_wgm6b5ob1.pdf).

382. Michael Glassman et al., *The Problems and Barriers of RHYA as Social Policy*, 32 CHILD. & YOUTH SERVICES REV. 798, 800 (2010) (noting that the focus of the RHYA was family reunification).

383. Runaway Youth Act, Pub. L. No. 93-415, § 312(b)(3), 88 Stat. 1129, 1130 (1974) (codified at 34 U.S.C.A. § 11212(b)(3) (West 2017)).

384. *Id.* § 315(1)-(3), 88 Stat. at 1131.

385. *See, e.g.*, 34 U.S.C.A. § 5712(b)(3) (West 2017) (noting that providers “shall develop adequate plans for contacting the parents or other relatives of the youth and ensuring the safe return of the youth according to the best interests of the youth”); *id.* § 5712(b)(5) (noting that providers “shall develop an adequate plan for providing counseling and . . . for encouraging the involvement of their parents or legal guardians in counseling”).

386. ADRIENNE L. FERNANDES-ALCANTARA, CONG. RESEARCH SERV., R43766, RUNAWAY AND HOMELESS YOUTH ACT: CURRENT ISSUES FOR REAUTHORIZATION 1 (Oct. 23, 2014), <https://www.hsdl.org/?view&did=759352>.

387. *Id.*

388. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7273-79, 102 Stat. 4454, 4454-59 (codified in scattered sections of 34 U.S.C.A. (West)); Glassman et al., *supra* note 382, at 801.

started to recognize the long-term needs of unaccompanied youth who could not reunite with their families. Congressional supporters stressed that the program was necessary because family reunification was not always a safe or a viable option for unaccompanied youth.<sup>389</sup>

The Transitional Living Grant Program allocates funds and provides technical assistance to both public and private nonprofit organizations to establish and run transitional living programs (TLPs).<sup>390</sup> TLPs were designed to offer long-term shelter (up to 18 months) for a maximum of 20 unaccompanied youth between the ages of 16 and 21 who cannot return home and who have “no other safe alternative living arrangement.”<sup>391</sup> Importantly, TLPs provide resources and skills outside of families to help unaccompanied youth transition to adulthood and achieve self-sufficiency (for example, through “services relating to basic life skills, interpersonal skill building, educational advancement, job attainment skills, mental and physical health care, parenting skills, financial planning, and referral to sources of other needed services”).<sup>392</sup>

In Part IV, I will discuss in more detail how TLPs are a promising alternative to help unaccompanied youth achieve self-reliance and self-actualization outside of families.<sup>393</sup> Here I want to briefly highlight that TLPs face several challenges that compromise their full potential. One major challenge is funding. The average annual cost to operate a TLP is more than three times the maximum available individual grant.<sup>394</sup> Moreover, the total amount of funding that the RHYA authorizes for TLPs is less than one percent of the over \$7 billion that the federal government spends annually on family-focused child welfare programs (for instance, foster care, adoption, and guardianship assistance).<sup>395</sup> Every

389. *See, e.g.*, 134 CONG. REC. 13,077, 1988 WL 1091397 (daily ed. June 1, 1988) (statement of Rep. Leland) (“In an ideal world, adolescents live with their families until they reach adulthood and are able to venture out on their own. In the real world, however, this is not always the case. Many young people do not have access to a safe environment with relatives and have no alternative to life on the streets.”).

390. Anti-Drug Abuse Act § 7273, 102 Stat. at 4455–57; Elissa D. Giffords et al., *A Transitional Living Program for Homeless Adolescents: A Case Study*, 36 CHILD YOUTH CARE F. 141, 142 (2007).

391. Anti-Drug Abuse Act § 7273, 102 Stat. at 4455–56.

392. 34 U.S.C.A. § 11212(d)(1) (West 2017); FAMILY & YOUTH SERVS. BUREAU, TRANSITIONAL LIVING PROGRAM: FACT SHEET 1 (2016), [https://www.acf.hhs.gov/sites/default/files/fysb/tlp\\_facts\\_20160509.pdf](https://www.acf.hhs.gov/sites/default/files/fysb/tlp_facts_20160509.pdf).

393. *See infra* Part IV.

394. Chiamulera, *supra* note 354 (“[T]he cost to operate a . . . (TLP) is \$600,000, but the maximum grant for a TLP [under the RHYA] is [only] \$200,000.”).

395. CONG. BUDGET OFFICE, FOSTER CARE AND PERMANENCY—JUNE 2017 BASELINE 1 (2017), [https://www.cbo.gov/sites/default/files/recurringdata/51299-2017-06-fostercare\\_0.pdf](https://www.cbo.gov/sites/default/files/recurringdata/51299-2017-06-fostercare_0.pdf) (detailing expenses for foster care, adoption assistance, and guardianship in FY 2017 that total \$7.541 billion); FAMILY & YOUTH SERVS. BUREAU, *supra* note 392, at 2 (“In FY 2014, 200 grantees received \$43.6 million [in TLP grants].”).

year, thousands of unaccompanied youth are unable to access TLPs due to lack of available space and funding.<sup>396</sup>

In 1994, Congress further strengthened the RHYA's focus on unaccompanied youth's criminal victimization by creating its third and most recent program called the Street Outreach Program.<sup>397</sup> This new program funds private nonprofit organizations to conduct street outreach and provide services to prevent and address unaccompanied youth's sexual exploitation and abuse.<sup>398</sup> Examples of services include "[s]treet-based education," "[t]rauma-informed treatment and counseling," "[p]revention and education activities," "[i]nformation and referrals," "[c]risis intervention," and "[f]ollow-up support."<sup>399</sup> Initially, Congress authorized \$7 million in federal funds to support the program, which has increased to over \$15 million today.<sup>400</sup> Nonetheless, this third program narrowly focuses on preventing and responding to unaccompanied youth's sexual victimization.<sup>401</sup> As a result, the program does little outside of the sexual victimization context to narrow the RHYA's gap in addressing the long-term needs of unaccompanied youth to achieve self-reliance and self-actualization as adults.

In sum, public funding for programs and services that target unaccompanied youth are largely channeled through juvenile justice laws and concerned with preventing their criminal victimization. As a result, available programs and services are primarily geared toward addressing the immediate and short-term needs of unaccompanied youth so that they can get off the streets before becoming victims of crime.

### B. *Criticisms of Family-Centered Public Reordering in the Juvenile Justice System*

Having sketched these two types of family-centered public reordering in the juvenile justice system—one which adopts a view of unaccompanied youth as delinquent offenders and the other as crime victims—this Subpart draws on the unaccompanied LGBTQ youth context to advance two critiques. First, I argue that this public reordering

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396. FERNANDES-ALCANTRA, *supra* note 386, at 19 & tbl.1; Page, *supra* note 29, at 26–27 (“[M]any youth are routinely denied housing under the Transitional Living Program due to the lack of available housing.”).

397. The Street Outreach Program was first created under the Violence Against Women Act of 1994, which amended the Runaway and Homeless Youth Act to include the program. Violence Against Women Act of 1994, Pub. L. No. 103–322, § 40155, 108 Stat. 1903, 1922.

398. FAMILY & YOUTH SERVS. BUREAU, STREET OUTREACH PROGRAM: FACT SHEET 1–2 (2018), [https://www.acf/hhs.gov/sites/default/files/fysb/street\\_outreach\\_program\\_fact\\_sheet\\_jan\\_2018.pdf](https://www.acf/hhs.gov/sites/default/files/fysb/street_outreach_program_fact_sheet_jan_2018.pdf).

399. *Id.* at 2.

400. Violence Against Women Act § 40155, 108 Stat. at 1922; FAMILY & YOUTH SERVS. BUREAU, *supra* note 398, at 2.

401. *See* FAMILY & YOUTH SERVS. BUREAU, *supra* note 398 (listing services of the Street Outreach Program).

incorrectly places the blame on unaccompanied youth for their living situations when they do not fit into family systems (whether biological, foster, or adoptive). Second, I contend that the short-term outlooks of programs and services that target unaccompanied youth leave them vulnerable to entering a destructive cycle of homelessness and involvement in the juvenile and criminal justice systems.

Before lodging these criticisms, it is important to underscore the significant overlap with involvement in the juvenile justice and the child welfare systems. Studies conclude that running away from foster care is a significant risk factor for entry into both the juvenile and criminal justice systems.<sup>402</sup> These trends apply to both nonLGBTQ and LGBTQ youth. In the LGBTQ context, however, “leaving home as a result of family rejection is the greatest predictor of future involvement with the juvenile justice system.”<sup>403</sup> LGBTQ youth are also more likely than non-LGBTQ youth to enter the juvenile justice system if they ran away from home or from a child welfare placement.<sup>404</sup> Critically, LGBTQ youth are overrepresented among “‘dually involved’ or ‘crossover’ youth”—terms that describe youth in the juvenile justice system who have had prior or current involvement in the child welfare system.<sup>405</sup>

Problems with the family-centered public reordering in the juvenile justice system are especially apparent when considering the different challenges that unaccompanied youth may face while living on their own. One set of challenges involves the range of victimization (sexual, physical, and verbal) that many unaccompanied youth face while living on the streets or in other unstable arrangements.<sup>406</sup> On one hand, the funding conditions in juvenile justice laws result in the bulk of available programs and services that target unaccompanied youth to focus on these victimization concerns.<sup>407</sup> On the other hand, many homeless youth do not report when they are victims of crime to the police.<sup>408</sup> Distrust of authorities and fear of arrest, criminalization, and police mistreatment may deter

402. See Rosemary C. Sarri et al., *Running Away from Child Welfare Placements: Justice System Entry Risk*, 67 CHILD. & YOUTH SERVICES REV. 191, 193–94 (2016).

403. MAJD ET AL., *supra* note 33, at 72; Theresa Glennon, *The Developmental Perspective and Intersectionality*, 88 TEMP. L. REV. 929, 937 (2016).

404. Angela Irvine, “*We’ve Had Three of Them*”: *Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 689, 693 (2010).

405. Irvine & Canfield, *supra* note 33, at 244.

406. Edidin et al., *supra* note 22, at 360–64.

407. See *supra* Part II.A.2.

408. NELL BERNSTEIN & LISA K. FOSTER, CAL. RESEARCH BUREAU, VOICES FROM THE STREET: A SURVEY OF HOMELESS YOUTH BY THEIR PEERS 5 (2008), <http://www.issuelab.org/resources/11579/11579.pdf> (reporting the results of one study involving a survey of 208 currently and formerly homeless youth in California that found that “[d]espite the reality that homeless youth are frequently the victims of crime while on the streets, not a single respondent described turning to police for help or reporting being victimized”).

unaccompanied youth from telling others, including law enforcement, when they are victims of crime.<sup>409</sup>

Although all unaccompanied youth are at risk of victimization, research suggests that unaccompanied LGBTQ youth are at higher risk than are unaccompanied nonLGBTQ youth.<sup>410</sup> The tense historical relationship between law enforcement and LGBTQ communities, as well as the negative treatment of LGBTQ identity under the criminal law,<sup>411</sup> adds another dimension to why unaccompanied LGBTQ youth may fear reporting when they are victims of crime to others, including law enforcement. Thus, for both LGBTQ and nonLGBTQ youth, juvenile justice responses that facilitate the criminalization of unaccompanied youth may undercut the effectiveness of other juvenile justice responses that are intended to address their victimization.

Another set of challenges involves legal restrictions that, while generally appropriate, make it difficult for unaccompanied youth to meet their basic human needs. For instance, minors cannot legally enter into valid contracts in most states, making it impossible for unaccompanied youth to sign residential leases to obtain shelter.<sup>412</sup> Child labor laws also preclude most unaccompanied youth from relying on the formal labor market to make ends meet.<sup>413</sup> These problems are exacerbated by the fact that many unaccompanied youth struggle in school (or drop out or fail out),<sup>414</sup> which further restricts their job prospects. In approximately one-third of the states, there is no explicit statutory process available for unaccompanied youth to become emancipated from their parents.<sup>415</sup> Financial and procedural barriers also make it difficult for unaccompanied

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409. CRAY ET AL., *supra* note 29, at 14 (“In one survey, half of the youth surveyed were afraid to access services because they were uncertain whether they would be turned over to the police, their parents, or to child and family services if they attempted to get help . . . .”); *id.* at 15 (“LGBT youth also experience more frequent, and sometimes more hostile encounters with police, potentially fueling distrust of authorities who are supposed to help them”); Nusrat Ventimiglia, *LGBT Selective Victimization: Unprotected Youth on the Streets*, 13 J.L. & Soc’y 439, 449–50 (2012) (discussing that LGBT homeless youth may not report being victims of crime for reasons that include “fear of prosecution, retaliation, and finally fear of outright victimization”).

410. SHANNAN WILBER, JUVENILE DET. ALTS. INITIATIVE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM 10 (2015).

411. *See generally* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017) (discussing the negative treatment of LGBTQ communities under the criminal law).

412. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 339, at 119 (listing legal restrictions on minors to enter into contracts).

413. *See* Armaline, *supra* note 80, at 1, 4.

414. Yumiko Aratani & Janice L. Cooper, *The Effects of Runaway-Homeless Episodes on High School Dropout*, 47 YOUTH & Soc’y 173, 192 (2015).

415. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 339, at 10.

youth to obtain emancipation in states where the process is at least conceivably available.<sup>416</sup>

To reiterate, loopholes in the JJDPa facilitate the arrest and confinement of unaccompanied youth for various status offenses that relate to them separating from or disobeying their families (for example, running away, being “ungovernable,” and violating curfew).<sup>417</sup> Beyond these status offenses, unaccompanied youth (both LGBTQ and nonLGBTQ) with few or no legal means to survive turn to survival sex, theft, and other forms of criminality to obtain money, food, and shelter.<sup>418</sup> Many also use drugs and other illegal substances in order to cope with their harsh living conditions.<sup>419</sup> Therefore, what begins as a status offense can quickly turn into a serious criminal offense.

As discussed previously, unaccompanied youth are potentially subject to a broad array of sanctions for status offenses and survival crimes. Beyond arrest and confinement, possible sanctions include suspending an unaccompanied youth’s driver’s license, imposing monetary fines, ordering youth to attend counseling or education programs, and placing youth in out-of-home placement facilities (for example, group homes).<sup>420</sup> In restricting their mobility and means of travel, these sanctions can interfere with unaccompanied youth’s work and school. Moreover, when unaccompanied youth cannot afford to pay imposed fines, they are at risk for future detention or criminal records that further restrict their educational and employment opportunities.<sup>421</sup>

In addition, unaccompanied youth are the invisible victims of an expanding set of legal measures that criminalize homelessness generally.<sup>422</sup> An increasing number of municipalities have passed ordinances that prohibit activities that are necessary for homeless people to survive.<sup>423</sup> These “quality of life” offenses include prohibitions on camping, sleeping, and begging in public; loitering; loafing; vagrancy; sitting or lying down in public; living in vehicles; food sharing; and storing personal belongings in public.<sup>424</sup> It is almost impossible for unaccompanied youth who live on their own and have no place to go to avoid violating these ordinances.

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416. *Id.* at 105.

417. *See supra* Part III.A.1.ii.

418. HAGAN & MCCARTHY, *supra* note 22, at 89–90; Ferguson et al., *supra* note 231, at 101.

419. Hyde, *supra* note 42, at 181.

420. *See generally* COAL. FOR JUVENILE JUSTICE, *supra* note 341 (providing a national survey of status offenses and penalties attached to them).

421. Colgan, *supra* note 353, at 292; *see also* Quinn, *supra* note 353, at 1300–02.

422. *See* NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 339, at 7; Alexandra Natapoff, Gideon’s *Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015).

423. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 339, at 7.

424. *Id.*

These criminalization measures facilitate unaccompanied youth's interactions with law enforcement, which contribute to their sense of hypervigilance and perception of danger on the streets.<sup>425</sup> Homeless LGBTQ youth (and in particular homeless LGBTQ youth of color) commonly experience illegitimate practices of police profiling, "indiscriminate stops and searches . . . and arrests for 'quality of life' offenses."<sup>426</sup> These negative experiences of police profiling, however, are by no means specific to the LGBTQ context. Unaccompanied youth generally—and unaccompanied youth of color in particular—commonly experience negative interactions with the police, including police profiling.<sup>427</sup>

These different criminalization measures are major sources of instability for unaccompanied youth.<sup>428</sup> For instance, one study found that a majority of homeless youth participants had been ticketed for quality-of-life offenses, and that most of those youth did not pay the tickets because they could not afford to.<sup>429</sup> Warrants issued and subsequent convictions for inability to pay then led to restrictions on driver's licenses, employment, and the ability to secure housing<sup>430</sup>—all obstacles that make it more difficult for unaccompanied youth to get off the streets or out of other unstable living arrangements.

After being funneled into the juvenile justice system, however, the challenges that unaccompanied LGBTQ youth specifically face may continue.<sup>431</sup> Similar to professionals and staff in the child welfare system, many professionals and staff in the juvenile justice system lack the cultural competence to handle LGBTQ youth fairly and appropriately.<sup>432</sup> Some professionals and staff do not have a basic understanding of sexual orientation or gender identity concepts.<sup>433</sup> Others equate LGBTQ identities, same-sex sexual conduct, and gender nonconforming behavior with deviance or mental illness.<sup>434</sup> Juvenile detention facilities might also lack

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425. BERNSTEIN & FOSTER, *supra* note 408, at 53.

426. WILBER, *supra* note 410, at 11; *see also* DANK ET AL., *supra* note 282, at 32; MAJD ET AL., *supra* note 33, at 61.

427. BERNSTEIN & FOSTER, *supra* note 408, at 53–59; LIPPY ET AL., *supra* note 96, at 20.

428. BERNSTEIN & FOSTER, *supra* note 408, at 53–59.

429. *Id.* at 57.

430. *Id.*

431. WILBER, *supra* note 410, at 12.

432. CHRISTIAN L. RUMMELL & JEFFREY M. POIRIER, THE NAT'L EVALUATION & TECH. ASSISTANCE CTR., IMPROVING SERVICES FOR YOUTH WHO ARE LGBT IN JUVENILE JUSTICE SYSTEMS 3 (2014), [http://www.neglected-delinquent.org/sites/default/files/docs/NDTAC\\_LGBT\\_FS\\_508\\_2014.pdf](http://www.neglected-delinquent.org/sites/default/files/docs/NDTAC_LGBT_FS_508_2014.pdf).

433. *Id.*

434. *Id.*; SHANNAN WILBER ET AL., CWLA BEST PRACTICE GUIDELINES 30–31 (2006), [http://www.f2f.ca.gov/res/2798\\_BP\\_LGBTQ.pdf](http://www.f2f.ca.gov/res/2798_BP_LGBTQ.pdf) (noting that practices in the child welfare and juvenile justice systems that pathologize, punish, or criminalize LGBT youth for appropriately exploring or expressing their sexual orientations and gender identities sends the message to those youth that they are “deviant, immoral, or

mental health and other services with professionals that are aware of the hardships that LGBTQ juvenile justice-involved youth commonly suffer<sup>435</sup>—such as homelessness, family rejection, and school bullying.<sup>436</sup>

While in secure detention, LGBTQ youth (whether unaccompanied or not) are at an increased risk for verbal, physical, and sexual abuse than are nonLGBTQ youth.<sup>437</sup> For instance, recent data from the National Survey of Youth in Custody conducted by the U.S. Bureau of Justice Statistics reported that nonheterosexual youth were almost seven times more likely to suffer sexual assault by another youth than were heterosexual youth (10.3 percent versus 1.5 percent).<sup>438</sup> Nonheterosexual youth also reported higher rates of sexual victimization by both youth and staff (14.3 percent versus 8.9 percent).<sup>439</sup> Studies have also found that custodial staff often ignore, minimize, and even perpetuate these different forms of abuse and mistreatment.<sup>440</sup>

How LGBTQ youth are classified and housed while in juvenile custody is an additional source of stigma and harm. Many juvenile detention facilities house transgender youth according to their birth sex,<sup>441</sup> which discounts their gender identity and increases risks for victimization. In addition, LGBTQ youth (and transgender youth in particular) are more likely to be placed in solitary confinement for their alleged protection.<sup>442</sup> Such isolation greatly increases risks for psychological harm, self-mutilation, and suicide<sup>443</sup>—especially for adolescents who are still in the midst of psychological development.<sup>444</sup>

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mentally ill”). It is important to note here that this conflation between sexual/gender identities and practices and concepts of deviance also occurs in adult correctional facilities. Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 911 (2012).

435. RUMMELL & POIRIER, *supra* note 432, at 3.

436. *See generally* HUMAN RIGHTS WATCH, *supra* note 90 (dedicating specific chapters and sections to various forms of bullying, harassment, and rejection/exclusion suffered by LGBT youth in U.S. schools).

437. MAJD ET AL., *supra* note 33, at 102; WILBER, *supra* note 410, at 11–12.

438. ALLEN J. BECK & DAVID CANTOR, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012, at 20 (2013), <http://www.bjs.gov/content/pub/pdf/svjfry12.pdf>.

439. *Id.*

440. MAJD ET AL., *supra* note 33, at 86, 112; WILBER, *supra* note 410, at 12.

441. MAJD ET AL., *supra* note 33, at 106; RUMMELL & POIRIER, *supra* note 432, at 3; Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 779 (2008).

442. MAJD ET AL., *supra* note 33, at 106; RUMMELL & POIRIER, *supra* note 432, at 3; Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 20 (2015) (“Some facilities place lesbian, gay, bisexual, or transgender teenage inmates in protective solitary confinement as a matter of policy, rather than in response to their own requests.”).

443. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 508 (1997).

444. Birkhead, *supra* note 442, at 10–16 (outlining the psychological, physical,

Many youth who are released from juvenile custody “do not have a stable home to return to,” putting them at risk for homelessness<sup>445</sup> where they are at risk for arrest and criminalization again. To the extent that unaccompanied youth were attending school or had jobs before confinement, juvenile detention interrupts that schooling and employment.<sup>446</sup> Youth who are released from juvenile detention and find themselves homeless or living on their own in other unstable arrangements have difficulties finding employment or community programs to help them reenter society.<sup>447</sup> Thus, the destructive cycle of homelessness and involvement in the juvenile and criminal justice systems continues.

This destructive cycle reveals the limits of family-centered government responses to unaccompanied youth. As discussed in the analysis to follow, this cycle illustrates a need for a paradigm shift in how public systems—and in particular, the child welfare and the juvenile justice systems—respond to unaccompanied youth.

#### IV. IMPLICATIONS AND FUTURE DIRECTIONS

This Part discusses the broader implications of my critical analysis and preliminary insights for reform.

To recap, my analysis shows that family-centered responses to unaccompanied youth in the child welfare and juvenile justice systems rest on shifting and inconsistent views of unaccompanied youth as delinquent offenders and as crime victims. At first, consistent with structural theories, child welfare responses recognize unaccompanied youth as victims of negative family circumstances and attempt to improve their family environments—whether by fixing the relationship with their biological families or by providing substitute families through foster care or adoption. When those family-centered child welfare approaches appear to not be working, the government resorts to arrest and criminalization in order to pressure unaccompanied youth to stay within family systems (whether biological, foster, or adoptive), and punish them when they do not. In

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social, and developmental harms of youth in solitary confinement).

445. See NAT'L CTR. FOR HOMELESS EDUC., BEST PRACTICES IN INTERAGENCY COLLABORATION: YOUTH HOMELESSNESS AND JUVENILE JUSTICE 2 (2011), [https://nche.ed.gov/downloads/briefs/juv\\_just.pdf](https://nche.ed.gov/downloads/briefs/juv_just.pdf) (“Many youth do not have a stable home to return to after leaving a juvenile detention facility.”). See generally COLUMBIA LEGAL SERVS., FALLING THROUGH THE GAPS: HOW A STAY IN DETENTION CAN LEAD TO YOUTH HOMELESSNESS (2015), [http://www.columbialegal.org/sites/default/files/Detention\\_to\\_Homelessness\\_Web.pdf](http://www.columbialegal.org/sites/default/files/Detention_to_Homelessness_Web.pdf) (discussing connections between release from juvenile detention and youth homelessness).

446. Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 331 (2015) (“Detention—even short stays—interrupts school, jobs, counseling programs, and family relationships . . .”).

447. MALIKAH J. KELLY, BROKEN PROMISES BROKEN SYSTEM: 10 REASONS NEW YORK CITY SHOULD CLOSE THE SPOFFORD YOUTH JAIL 4 (2004), [http://www.correctionalassociation.org/wp-content/uploads/2012/05/Broken\\_Promises.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/Broken_Promises.pdf).

this regard, the government abandons the victimization mindset to treat unaccompanied youth as delinquent offenders who threaten public order and security. Consistent with deficient-agency theories, these punitive measures ultimately place the blame on unaccompanied youth for their family separation and inadequate living situations.

These shifting constructions reflect how current child welfare and juvenile justice responses to unaccompanied youth rest on oversimplified narratives of unaccompanied youth both as victims and as offenders. These shifting constructions neglect how unaccompanied youth's multiple layers of victimization—and in particular their prior victimization within families—can undermine the effectiveness of family-centered responses to their situations. The stakes are high for late-adolescent youth who will soon emancipate (or “age out”) from the child welfare system upon reaching adulthood.

Nonetheless, in the absence of a robust nonfamily-centered approach, government responses continue to ignore the complexities of the victimization experiences of unaccompanied youth, and further stigmatize and harm them through child welfare exclusion and criminalization. Critically, these punitive measures embrace a negative conception of unaccompanied youth's agency and autonomy in order to preserve the centrality of family systems in law and policy responses to their situations. The previously evaluated experiences of unaccompanied LGBTQ youth reveal the acute problems of this approach.

Accordingly, there is a need for a paradigm shift in child welfare law and policy, and relatedly juvenile justice law and policy, that moves away from this negative conception of youth agency and autonomy toward a more positive view. Future theorization and research are necessary to work out the details of a child welfare regime that is organized around a more comprehensive positive agency model.<sup>448</sup> In terms of overarching principles, however, this new vision of child welfare would be more pluralistic and broaden the orientation of the child welfare system beyond family-centered approaches. It would also reconstitute the agency and autonomy of unaccompanied youth in an empowering way. Put differently, the system would place less exclusive emphasis on family-centered permanency goals, and invest significantly more in programs that provide unaccompanied youth with support systems, skills, and resources outside of family systems to achieve self-reliance and self-actualization as adults. Unlike the current regime, the government would acknowledge that family-centered approaches do not work for many vulnerable youth, and

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448. In future work, I intend on pursuing this inquiry. To be clear, however, I am not rooting positive conceptions of youth agency and autonomy in a rights-based approach. Clare Huntington has discussed the limitations of a rights-based framing of children's interests and needs, and called attention to the ways in which this framing underserves both children and parents. *See, e.g.,* Huntington, *supra* note 103.

soften its reliance on criminalization measures when those approaches cannot meet their needs.

Some other important questions to consider are *when* should youth have access to a nonfamily-centered program, and *who* should decide whether they should have access. My preliminary intuition is that youth should not be required to suffer the harms of multiple failed foster family or group home placements in order to enter such programs. Moreover, youth should have a say in whether they prefer either nonfamily-centered programs or family-centered approaches. The specific details of a youth's situation might determine how much say a youth should have, and whether that say should be prioritized above any relevant countervailing rights of family members or interests of the state. At the same time, the experiences of unaccompanied LGBTQ youth illustrate that in some situations, the stakes for youth agency are too high to force them to go back to their own families or enter substitute families that may mistreat or exclude them for reasons that are so central to their core identity, such as sexual orientation or gender identity. In these situations, I would argue that positive agency principles should override any (or at the very least most) countervailing considerations, and allow youth to enter nonfamily-centered programs if they prefer.

There might already be support for this position in new mandates surrounding the treatment of LGBTQ youth in the Illinois child welfare system. In June 2017, Illinois adopted statewide agency policies that impose obligations on foster care providers, caseworkers, staff, and foster parents to provide "LGBTQ-affirming" services to LGBTQ youth and children.<sup>449</sup> The policies impose a range of affirmative duties on these key actors, including: (1) requiring that all LGBTQ youth and children be placed in affirming safe housing and receive adequate medical and mental health services; (2) requiring all staff, providers, and foster parents to treat LGBTQ youth and children in an affirming manner and to proactively work to create respectful space for them; and (3) requiring LGBTQ competency training for all staff, providers, and foster parents, including the challenges that LGBTQ youth and children commonly face in the child welfare system.<sup>450</sup> In addition, the Illinois policies acknowledge that the child welfare system has a major role in recognizing and supporting a LGBTQ youth or child's self-determination in developing and expressing their sexual orientations and gender identities.<sup>451</sup> Critically, the policies stress that LGBTQ youth and children's perceptions of where they would feel safest should guide placement decisions.<sup>452</sup>

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449. ILL. DEP'T OF CHILDREN AND FAMILY SERVS., PROCEDURES 302: SERVICES DELIVERED BY THE DEPARTMENT, at app. K (2017), [https://www.illinois.gov/dcf/aboutus/notices/Documents/Procedures\\_302\\_Appendices.pdf](https://www.illinois.gov/dcf/aboutus/notices/Documents/Procedures_302_Appendices.pdf).

450. *Id.* at app. A.

451. *Id.* at app. E.

452. *Id.* at app. H.

Another relevant question is *how* to best execute a paradigm shift in child welfare law and policy toward positive agency principles. One potential approach is to significantly increase investment in TLPs. As explained previously, TLPs house up to twenty youth and are designed to provide unaccompanied youth between the ages of sixteen and twenty-two long-term shelter and life skills outside of families to help them achieve self-reliance as adults.<sup>453</sup> TLPs typically provide housing in supervised settings, but some programs offer unsupervised housing for youth residents who are closer to achieving self-sufficiency.<sup>454</sup>

Although the RHYA authorizes funding for TLPs, these programs have faced, and continue to face, several obstacles. In recent years the federal TLP program has only been able to serve between 3,300 and 4,400 youth annually.<sup>455</sup> Official statistics report that more youth are turned away at TLPs every year than are served.<sup>456</sup>

Funding is one major obstacle. Currently, the amount of annual federal funding allocated to the TLP amounts to less than one percent of the \$7 billion that the federal government spends each year on family-focused child welfare programs (for example, foster care, adoption, and guardianship).<sup>457</sup> In spite of the high demand for TLPs,<sup>458</sup> the maximum available grant award under the RHYA covers only one-third of the average cost to operate a TLP.<sup>459</sup>

The currently lopsided funding scheme leaves several states with only one federally funded TLP,<sup>460</sup> which could be the only TLP in the entire state. The location of TLPs is also clustered in urban and suburban areas, making it difficult for unaccompanied youth in rural areas to access these programs. One recent cross-sectional study of federally funded TLPs found that 66.9 percent of programs were located in urban areas, 31.5 percent were in suburban areas, and only 1.6 percent were located

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453. 34 U.S.C.A. § 11212(b)(2)(A) (West 2018); FAMILY & YOUTH SERVS. BUREAU, *supra* note 392, at 1–2.

454. JARVIS & ROBERTSON, *supra* note 289, at 12–15 (describing the different physical settings for transitional living programs).

455. FERNANDES-ALCANTARA, *supra* note 386, at 19.

456. *Id.* at 19 & tbl.1 (reporting that between fiscal years 2007 and 2013, between 4,466 and 6,720 youth were rejected from TLPs each year).

457. CONG. BUDGET OFFICE, *supra* note 395, at 1 (detailing expenses for foster care, adoption assistance, and guardianship in FY 2017 that total \$7541 billion); FAMILY & YOUTH SERVS. BUREAU, *supra* note 392, at 2 (noting that in federal year 2014, 200 grantees received a total of \$43.6 million in TLP grants).

458. Glassman et al., *supra* note 382, at 802.

459. Chiamulera, *supra* note 354, at 46 (“[T]he cost to operate a transitional living program (TLP) is \$600,000, but the maximum grant for a TLP [under the RHYA] is [only] \$200,000.”).

460. A few examples are Mississippi, Kentucky, and Tennessee. See *Grantees of the Family and Youth Services Bureau*, FAM. & YOUTH SERVICES BUREAU, <http://www.acf.hhs.gov/fysb/grants/fysb-grantees> (last visited Mar. 14, 2018).

in rural areas.<sup>461</sup> As noted previously, most states do not have laws that specifically allocate funding for services or programs that serve homeless and runaway youth.<sup>462</sup> Unlike the various financial incentives that child welfare laws set into place to support foster care and adoption, the RHYA lacks financial incentives for states to allocate funds for programs that target unaccompanied youth.

Moreover, many TLPs are restricted to youth who are 18 or older<sup>463</sup> and thus exclude late-adolescent unaccompanied youth. These exclusions arise from state prohibitions against housing programs that place individuals under the age of 18 in the same structures as individuals over the age of 18.<sup>464</sup> In many states, housing contracts entered into by minors are also legally unenforceable.<sup>465</sup>

Granted, more research is necessary to determine how many and to what extent unaccompanied youth would benefit from TLPs if they had access. Although there is a need for more empirical research on their outcomes and predictors of success, existing studies illustrate the promise of TLPs.<sup>466</sup> For instance, Casey Holtschneider's recent study analyzed the outcomes of 32 youth who previously resided at a TLP in Chicago at some point between the years of 2003 and 2013.<sup>467</sup> Importantly, 97 percent of the youth participants identified as youth of color and 34 percent identified as lesbian, gay, or bisexual.<sup>468</sup> The study found that the TLP had a significant and a positive overall impact on youth participants' lives.<sup>469</sup> When asked about the benefits of the TLP, one of the most commonly identified benefits was the bonds they formed with other staff and youth residents.<sup>470</sup> Many of those relationships persisted years after the youth left the TLP, and several youth responded that they turned to one another for support when they faced challenges after leaving the TLP.<sup>471</sup>

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461. Kristen A. Prock & Angie C. Kennedy, *Federally-Funded Transitional Living Programs and Services for LGBTQ-Identified Homeless Youth: A Profile in Unmet Need*, 83 CHILD. & YOUTH SERVICES REV. 17, 20 (2017).

462. See NAT'L NETWORK FOR YOUTH, *supra* note 355, at 1–24.

463. Glassman et al., *supra* note 382, at 802 (“[F]or a number of [TLP] programs the actual age range is 18 to 21.”).

464. *Id.*

465. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 339, at 10; Glassman et al., *supra* note 382, at 802.

466. Glassman et al., *supra* note 382, at 802 (noting that the structure of TLPs has “the greatest chance for success” for dealing with youth who spend a significant amount of time on the streets because the programs are “geared toward[] independent, responsible living”).

467. Holtschneider, *supra* note 23, at 206. The study was conducted in 2014 to ensure that participants had exited the TLP for at least one year. *Id.*

468. Holtschneider, *supra* note 23, at 206. One male-identified participant also identified as transgender. *Id.*

469. Holtschneider, *supra* note 27, at 162.

470. *Id.* at 163–64.

471. *Id.* at 164.

As discussed previously, many unaccompanied youth are hesitant to seek help from emergency shelters or child welfare services because they fear that their autonomy and independence will be stripped away.<sup>472</sup> Lending support to the promise of nonfamily-centered models, an overwhelming majority of the youth participants in Holtschneider's study "discussed the role of the [TLP] in their journey of personal development."<sup>473</sup> For instance, youth described how the TLP strengthened their empathy by helping them understand the struggles of others in relation to their own circumstances.<sup>474</sup> Youth also explained that the TLP influenced them to change their values and priorities in a productive way, including having less motivation to engage in criminal activity (such as theft and substance abuse) and more motivation to attend school and to make new friends who were positive influences.<sup>475</sup> Moreover, youth participants described connections between the TLP and self-actualization. Many youth stressed that the TLP helped them move closer to the person that they wanted to, and knew they could, be.<sup>476</sup>

Notably, many of these benefits were the result of unaccompanied youth being able to share their experiences with one another in a supportive and a collective living environment. Unaccompanied youth cannot build off of one another in the same way when they are placed into separate foster families, adoptive families, or juvenile detention facilities. Holtschneider's study also found that many youth "described a sense of home and family while [living] in the TLP."<sup>477</sup> This is consistent with a prior 2013 study of a different TLP, which found that youth gained a sense of belonging and referred to other residents as "family."<sup>478</sup> Critically, however, many youth participants in that 2013 study also expressed that they were "not looking for new 'parents.'"<sup>479</sup>

Therefore, the limited research available on TLPs lends support to the idea that many unaccompanied youth welcome and need systems of support, but they are hesitant to seek programs or services modeled on the traditional parent-child relationship. Put another way, many of these youth seek networks and forms of support that look different from what is currently offered under family-centered child welfare models. This disjoint underscores a need for greater investment in alternative nonfamily-centered approaches that meet unaccompanied youth where they actually are as opposed to where society thinks they should be based on idealized notions of the "family."

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472. See *supra* Part I.B.1.

473. Holtschneider, *supra* note 27, at 165.

474. *Id.*

475. *Id.* at 165–66.

476. *Id.* at 166.

477. *Id.*

478. See SCHWEITZER ET AL., *supra* note 226, at 13.

479. *Id.*

Despite these potential benefits, it is important to acknowledge that the limited available research on TLPs has also called attention to various challenges that youth face after leaving TLP. For instance, Holtschneider's study found that one-third of the youth participants were not living in stable housing at the time of the study<sup>480</sup> and that most of the other two-thirds living in stable housing had experienced an unstable living situation since leaving the TLP.<sup>481</sup> Moreover, many youth participants reported financial stress after leaving the TLP, including struggling to find employment and earning low wages.<sup>482</sup> In spite of these challenges, most youth participants still reported being "overwhelmingly grateful for the support they received in the TLP" and expressed wishes for other unaccompanied youth to benefit from the same experience that they had received.<sup>483</sup> Many of the youth participants credited the TLP with saving their lives.<sup>484</sup>

Therefore, there is much room for improving how TLPs operate. Child welfare researchers and social workers have brainstormed some potential ideas. One idea they have discussed is enhancing aftercare support for former TLP residents and reevaluating the role of TLP staff to be a guide both during and after residents are housed in TLPs.<sup>485</sup> Moreover, researchers and social workers have stressed the importance of not losing sight of the fact that many challenges that TLP residents face after leaving the programs are connected to broader structural problems of poverty, discrimination, unemployment, and lack of affordable housing that no single TLP can solve on its own.<sup>486</sup> Those structural problems require a more comprehensive set of law and policy interventions.

## CONCLUSION

This Article has demonstrated that the experiences of unaccompanied youth—and unaccompanied LGBTQ youth in particular—show a need for a new vision of child welfare with a different set of underlying values and assumptions. Unlike the existing regime, a new public reordering must recognize that family systems (especially those based on the traditional model of the nuclear family) do not serve the needs of all youth who need or seek help from the state, and that vulnerable youth should not be punished when family-centered responses cannot address their situations. Many questions about how to best execute this

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480. Holtschneider, *supra* note 27, at 162. As explained *supra* note 467, the study was conducted in 2014 to ensure that participants had exited the TLP for at least one year. Holtschneider, *supra* note 23, at 206.

481. See Holtschneider, *supra* note 27, at 162.

482. *Id.*

483. *Id.* at 165.

484. *Id.* at 162–63.

485. *Id.* at 168.

486. *Id.* at 167.

paradigm shift remain to be explored, and future research is necessary to provide the answers. This Article, however, made the important first step by revealing the problems of family-centered law and policy interventions as a wholesale approach to meet the needs of unaccompanied youth, particularly in late-adolescence. Moving away from this approach could be the difference between whether youth follow Jack's path, and find a supportive living environment and finish college in spite of experiencing family rejection for being LGBTQ,<sup>487</sup> or Tracey's path, and live on the streets and engage in sex work to survive.<sup>488</sup>

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487. See *Success Stories*, *supra* note 1.

488. See MALLON, *supra* note 8, at 111.