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Judicial Bias Against LGBT Parents in Custody Disputes

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JUDICIAL BIAS AGAINST LGBT[1] PARENTS IN CUSTODY[2] DISPUTES

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Abstract

Custody disputes between a heterosexual parent and a lesbian, gay, bisexual, or transgender ("LGBT") parent may trigger bias against the non-heterosexual parent. The following analysis will specifically look at custody disputes between a heterosexual parent and a LGBT parent, focusing on judicial bias against the LGBT parent compared to the heterosexual parent. There is a history of bias against LGBT parents in custody proceedings, and standards that permit the exercise of judicial discretion allow bias to impact the application of the facially neutral nexus test.[3] This Note argues that problems with the fair application of the nexus test, as well as the implications of *Obergefell v. Hodges*,[4] support the argument that the nexus test should be modified or abolished so that sexual orientation can never be allowed as a factor in custody determinations.

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1. I am using the term "LGBT" to generally refer to the entirety of the LGBTQ+ community. Most of the analysis in this Note looks to case laws and recognition of same-sex marriage that considers lesbian and gay individuals only.

2. Legal terminology in some states, including Florida, has changed from custody to "parenting time" and "time sharing" to promote a shared parenting approach. However, I will be using the term "custody" for simplicity.

3. *See* Mark Joseph Stern et al., *A Test to Identify and Remedy Anti-Gay Bias in Child Custody Decisions after Obergefell*, 23 UCLA WOMEN'S L.J. 79, 95 (2016); Christina M. Tenuta, *Can You Really be a Good Role Model to Your Child if You Can't Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations*, 14 CUNY L. REV. 351, 357 (2011). *See generally* Emily Haney-Caron & Kirk Heilbrun, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice*, 1 PSYCHOL. OF SEXUAL ORIENTATION & GENDER DIVERSITY 19, 20 (2014) (providing that the nexus test or the "adverse impact" test is the test commonly used in custody determinations, with one of the factors under consideration the parent's sexual orientation).

4. 135 S. Ct. 2584, 2608 (2015) (stating "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

INTRODUCTION

"A major reason for the intermingling of gender and sexuality in child custody disputes is that child custody laws have traditionally reflected heterosexual assumptions and models of parenthood."[5] Judges have vast discretion when ruling on custody determinations and follow cultural norms and judicial standards which have "allowed judges to empower one parent over the other based solely on gender."[6]

In addition to gender discrimination, this vast judicial discretion "allows judges to quietly inject anti-gay bias into their decisions."[7] Many of these biases are based on myths about LGBT individuals as parents; "for gay and lesbian parents, sexuality takes center stage above all other factors, including their parenting abilities."[8] Rather than allowing this wide discretion, legislatures should amend current custody statutes to specifically prohibit any consideration of the sexual orientation of either parent in custody determinations.

5. Tenuta, *supra* note 3, at 354.
6. Stern et al., *supra* note 3, at 80–81.
7. Stern et al., *supra* note 3, at 95.
8. Tenuta, *supra* note 3, at 369.

I. HISTORY AND EVOLUTION OF CUSTODY LAWS

A. *The Father's Property*

From common law through the eighteenth century, fathers were given the dominant role in their children's lives and had ultimate authority over them.[9] Children were seen as the father's property,[10] similar to coverture laws where "'[t]he legal existence of a woman was suspended by marriage' and the wife's 'legal and economic identity was subsumed by her husband's upon marriage.'"[11] Men, therefore, were assumed better suited to protect and provide for children as compared to women.[12] This property-based presumption held that upon divorce, the custody of children was automatically given to the father, regardless of the personal relationship between the child and father or what would have been in the best interests of the child.[13]

B. *The Tender Years Doctrine*

In the early nineteenth century, American courts shifted from a paternal to maternal custody presumption.[14] The growing emergence of the "separate spheres" ideology between women and men, where men were viewed to "naturally" belong in the workforce and women in the home, resulted in the "tender years doctrine."[15] Under this doctrine, young children, typically younger than seven, were automatically granted custody with their mother, because the mother was viewed as "the softest and safest nurse of infancy."[16] Mothers were assumed to be better suited to fit the "special needs" of young children, and the presumption was later extended to award custody of children of all ages to the mother.[17]

William Blackstone infamously commented that marriage creates a woman and man as one person under the law.[18] A husband was bound to provide for his wife with necessaries by law while the wife's "legal existence . . . is suspended during the marriage."[19] This view of marriage,

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9. Craig Nickerson, *Gender Bias in a Florida Court: "Mr. Mom" v. "The Poster Girl for Working Mothers*," 37 CAL. W. L. REV. 185, 197 (2000); Stern, *supra* note 3, at 81.

10. Nickerson, *supra* note 9, at 197

11. Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1118 (2014); *see* Nickerson, *supra* note 9, at 197–98.

12. Richard A. Warshak, *Gender Bias in Child Custody Decisions*, 34 FAM. & CONCILIATION CTS. REV. 396, 396 (1996).

13. Nickerson, *supra* note 9, at 197–98.

14. Nickerson, *supra* note 9, at 198.

15. Nickerson, *supra* note 9, at 198–99.

16. Nickerson, *supra* note 9, at 199.

17. Warshak, *supra* note 12, at 397.

18. WILLIAMBLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1992).

19. BLACKSTONE, *supra* note 18, at 430.

while largely outdated, influenced the "body of family law, employment law, and related benefits law . . . [that] assign the husband/father primary responsibility for wage earning and the wife/mother primary responsibility for domestic care."[20] During this time period "[c]ustody trials were thus relatively rare because most of the time the outcome was preordained; few fathers wanted to invest the financial and emotional resources to contest in what was likely to be a losing battle."[21]

The tender years doctrine was the accepted norm in custody determinations in nearly all states for a century, until women increasingly began entering the workforce, at which point the demand for gender-neutral laws grew.[22] The women's liberation movement, against gender stereotypes, clashed with the tender years doctrine and an explicit preference for mothers became increasingly hard for courts to justify.[23] "In an attempt to achieve gender neutrality, state legislatures enacted child custody legislation that specifically forbids gender preferences."[24] State custody laws shifted to focus on the children's best interests rather than their parents' gender in the now-recognized best interests standard.

C. *The Best Interests of the Child Standard*

The best interests of the child standard emerged in the nineteenth century from the tender years doctrine. The assumption that the best interests of children was to remain with their mothers did not change until Congress passed the Uniform Marriage and Divorce Act of 1970 ("the Act").[25] The Act established a model that states could elect to adopt factors for courts to consider when determining the best interests of the child, and states have since enacted their own statutes that usually provide similar factors.[26] The Act includes factors such as: the wishes of the child's parent as to the child's custody; the wishes of the child as to the child's custodian; the interaction and interrelationship of the child with the child's family; the child's adjustment to the child's home, school, and community; and the mental and physical health of all individuals involved.[27] The emergence of these factors, however, gave judges a large amount of discretion when determining which parent would be a better fit for child custody, since many judges "naturally rely on their own

20. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 738 (2012).

21. Andrew Schepard, *The Evolving Judicial Rode in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 402 (2000).

22. Nickerson, *supra* note 9, at 199.

23. Warshak, *supra* note 12, at 397.

24. Nickerson, *supra* note 9, at 201.

25. Nickerson, *supra* note 9, at 202.

26. Nickerson, *supra* note 9, at 202.

27. UNIF. MARRIAGE AND DIVORCE ACT § 402 U.L.A. (amended 1973).

personal biases and beliefs, including any gender bias they may consciously or subconsciously hold, rather than on any carefully defined standards."[28]

While the best interests standard does emphasize the needs of the child over the parents, the application of the standard can be problematic if unchecked due to its allowance of judicial discretion and bias.[29] In addition, the best interests standard is arguably vague and allows for parents to attack the other parent's worth in custody hearings.[30] The imprecise application of the best interests standard leads to inconsistent rulings and unpredictable holdings across the courts, leaving many parents concerned about how their custody case will stand.[31]

Due to the large amount of judicial discretion allowed in custody determinations, there is a long history of LGBT parents being discriminated against.[32] "Starting in the 1960's when courts first began hearing lesbian and gay custody disputes, courts categorically discriminated against gay and lesbian parents."[33] Still to this day, judges often apply the best interests of the child standard according to their own perceptions of gender and sexuality.[34] Although the best interests of the child standard is intended to be neutral, "the judge, as a human being, will apply his or her own standards and prejudices when deciding which parent gets custody."[35]

As a safeguard, to combat such possible discrimination against LGBT parents in custody determinations, a majority of states have adopted the "nexus test."[36] "The 'nexus test' is an attempt at a more neutral approach to the application of the parent's sexuality as a factor in the best interest of the child test in custody disputes."[37] In order for sexual orientation to be considered as a factor, the nexus test requires a nexus between the LGBT parent's sexual orientation and a negative harm to the child.[38] The burden to prove the harm to the child is supposed to fall on the heterosexual parent, but "despite the more evenhanded intent of the nexus

28. Nickerson, *supra* note 9, at 203.

29. *See* Nickerson *supra* note 9, at 203 (explaining that "judges need not articulate any reasons for their decisions [in awarding custody] . . . 'thus open[ing] the door for the court to interject gender bias . . . .'").

30. Warshak, *supra* note 12, at 398.

31. *See* Warshak, *supra* note 12, at 399.

32. Tenuta, *supra* note 3, at 357.

33. Tenuta, *supra* note 3, at 357.

34. Tenuta *supra* note 3, at 361.

35. Stern et al., *supra* note 3, at 89 (quoting Frederick Hertz, *How Living Together Affects Custody of Children from a Prior Marriage*, NOLO, http://www.nolo.com/legal-encyclopedia/free-books/living-together-book/chapter8-e.html (last visited Jan. 18, 2016)).

36. *See, e.g.*, Haney-Caron & Heilbrun, *supra* note 3, at 20.

37. Tenuta, *supra* note 3, at 365.

38. Haney-Caron & Heilbrun, *supra* note 3, at 20.

test, some courts still find it appropriate to apply the test in such a way that requires the homosexual parents to prove an absence of harm to the children."[39] It is then up to the judge's discretion to determine what qualifies as "harm."[40]

Courts have justified "harms" that LGBT parents have caused their children under the nexus test to include the social stigma from being raised in a LGBT lifestyle, being exposed to an "immoral lifestyle," fear that the child will subsequently "become" LGBT themselves, and anxiety of accepting the LGBT parent's sexual orientation.[41] All of these "harms," however, come from a biased view that a heterosexual lifestyle is normal and ideal for raising a child, and completely disregards research showing a lack of nexus between a LGBT parent's sexual orientation and harm to their children.[42]

II. MOVEMENT TOWARDS LGBT EQUALITY

A. *Legal History of LGBT Rights*

Founded on the nature of procreation, the orientation of the legal institution of marriage has always been heterosexual.[43] This orientation has taken a sweeping change in recent years, possibly destabilizing the gendered division of marriage.[44]

It was not until 1996 that the Supreme Court recognized constitutional protections for LGBT individuals in *Romer v. Evans*.[45] In *Romer*, Colorado's state constitutional amendment barred municipalities from protecting LGBT individuals against discrimination.[46] The Court held that the amendment was "inexplicable by anything but animus" and "lack[ed] a rational relationship to legitimate state interests" under a rational basis analysis.[47] Seven years after the Court's holding in *Romer*, the Court significantly expanded the scope of LGBT constitutional rights in *Lawrence v. Texas*.[48] In *Lawrence*, the Court invalidated Texas's same-sex sodomy ban for violating the liberty guaranteed by the Fourteenth Amendment's Due Process Clause.[49] "Taken together, *Romer* and *Lawrence* made clear that neither the state nor its agents may demean,

39. Tenuta, *supra* note 3, at 366.

40. *See* Haney-Caron & Heilbrun, *supra* note 3, at 20.

41. Haney-Caron & Heilbrun, *supra* note 3, at 20.

42. *See* Haney-Caron & Heilbrun, *supra* note 3, at 20–21.

43. *See* Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 ALB. GOV'T L. REV. 552, 579 (2012).

44. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

45. 517 U.S. 620, 624 (1996).

46. *Id.* at 632.

47. *Id.*

48. 539 U.S. 558 (2003).

49. *Id.* at 578.

disadvantage, or stigmatize gay people simply because of their sexual orientation."[50]

In 2004, Massachusetts became the first state to allow LGBT couples to marry.[51] Thereafter, various states throughout the country began to recognize LGBT marriages, however, the federal government refused to accept that LGBT couples had a fundamental right to marry because it was not a right "deeply rooted in this Nation's history and tradition."[52] In 1996, Congress enacted the Defense of Marriage Act ("DOMA"),[53] which stated that, for purposes of federal benefits, marriage was defined as a union between a man and a woman.[54] DOMA also gave states the authority to refuse to recognize a marriage between LGBT couples, even if the marriage was valid in other states.[55]

In *United States v. Windsor*,[56] the Supreme Court first addressed whether same-sex couples have a right to marriage, challenging DOMA's restriction on marriage.[57] While the Court was not explicit in which level of scrutiny it used, it invalidated DOMA's federal restriction on recognizing LGBT marriages and held that "DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."[58]

B. *Impact and Interpretation of* Obergefell v. Hodges

The battle for recognition of LGBT marriages by all states came to a climax in the 2015 landmark decision, *Obergefell v. Hodges*.[59] *Obergefell* included four cases from different states that all defined marriage as a union between one man and one woman.[60] The petitioners in the case, all of whom were LGBT, claimed that their Fourteenth Amendment right was violated when they were denied the right to marriage.[61] The Supreme Court held that the state constitutions denying LGBT couples the right to marry were unconstitutional under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[62]

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50. Stern et al., *supra* note 3, at 91.
51. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941, 948 (Mass. 2004).
52. *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 331 (D.C. 1995).
53. 28 U.S.C. § 1738C (1996).
54. *Id.*
55. *Id.*
56. 570 U.S. 744 (2013).
57. *Id.* at 755.
58. *Id.* at 772.
59. *See generally* 135 S. Ct. 2584 (2015).
60. *Id.* at 2593.
61. *Id.*
62. *Id.* at 2608.

Rejecting the history and tradition argument against legalizing LGBT marriages, the Court recognized that "[t]he history of marriage is one of both continuity and change."[63] The right to personal choice regarding marriage is inherent in the concept of individual autonomy and is central to individual dignity and authority, personal identity, and beliefs.[64] The Court extended the fundamental right to marry to LGBT couples in its analysis:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . [These men and women] ask for equal dignity in the eyes of the law. The Constitution grants them that right.[65]

One central issue that the Court did not touch upon in *Obergefell* was whether classifications based on sexual orientation warranted a heightened scrutiny.[66] Classifications based on gender are typically analyzed under intermediate scrutiny,[67] while classifications based on race are analyzed under strict scrutiny.[68] *Romer*, *Lawrence*, *Windsor*, and *Obergefell* all fail to specify a standard of review for laws that disadvantage LGBT individuals.[69] Both *Windsor* and *Obergefell*, however, seem to imply a heightened standard of judicial scrutiny.[70] "By their plain text, these two cases may pertain only to same-sex marriages. Their holdings, however, also state that gay people have a constitutional right to birth, adopt, and raise children—and that children of gay parents hold dignitary rights as well."[71]

Despite the ambiguous holding in *Obergefell*, many scholars agree that "[w]hen the Supreme Court decided *Obergefell v. Hodges* in 2015, expanding the rights of same-sex couples by recognizing their fundamental right to marry, the case also expanded the parental rights of gay and lesbian parents nationally."[72] The Court in *Obergefell* touched upon the issue of children of LGBT parents:

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63. *Id.* at 2595.
64. *Id.* at 2598.
65. *Id.* at 2608.
66. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 108 (4th ed. 2015).
67. United States v. Virginia, 518 U.S. 515, 531 (1996).
68. Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny[.]").
69. Stern et al., *supra* note 3, at 92.
70. Stern et al., *supra* note 3, at 92.
71. Stern et al., *supra* note 3, at 93.
72. Stern et al., *supra* note 3, at 79.

> Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[73]

The Court's decision highlighted the relationship of LGBT marriage rights to LGBT parental rights, stating that a "basis for protecting the right to marry is that it safeguards children and families."[74] In fact, the Court recognized that the fundamental rights to "marry, establish a home and bring up children" are a unified whole rather than mutually exclusive.[75] "[I]f the Constitution protects gay people's right to raise children, it also forbids courts from diminishing these rights on account of a parent's sexual orientation."[76] Some conservative politicians, judges, and members of the public, however, have cited *Obergefell*'s narrow margin as a reason to refuse to expand its holding past the right to marry.[77]

III. PERCEIVED HARMS JUSTIFIED UNDER THE NEXUS TEST

A. *Immorality*

Today, the best interests of the child standard is applied to custody cases involving LGBT parents by weighing the parents' sexual orientation as one factor among many in custody hearings.[78] Many states allow judges to consider a parent's sexual orientation under the "moral fitness of the parents" factor of the custody statute when determining the best interests of the child.[79] "When applied to custody disputes between gay parents, some applications of the best interests of the child standard include an inquiry into the 'morality' of homosexuality."[80] Despite the appearance of neutrality, a decision that even considers the possibility of homosexuality being immoral clearly biases the heterosexual parent and leads to unfair rulings.

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73. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).
74. *Id.*
75. *Id.*
76. Stern et al., *supra* note 3, at 94.
77. Stern et al., *supra* note 3, at 88.
78. Tenuta, *supra* note 3, at 362.
79. *See, e.g.*, Maradie v. Maradie, 680 So. 2d 538, 542 (Fla. Dist. Ct. App. 1996) ("By reversing here, we do not mean to suggest that trial courts may not consider the parent's sexual conduct in judging that parent's moral fitness under section 61.13(3)(f) or that trial courts are required to have expert evidence of actual harm to the child.").
80. Tenuta, *supra* note 3, at 362.

In 2002, the Alabama Supreme Court affirmed a trial court ruling that denied custody to a mother because her homosexuality was "an inherent evil against which children must be protected[, and] . . . an act so heinous that it defies one's ability to describe it."[81] The Supreme Court of Virginia denied custody to a lesbian mother and awarded custody to the maternal grandmother because the mother's conduct was "illegal" and "immoral."[82] Her felonious sexual conduct "inherent in lesbianism" was found to be an important consideration in determining the custody of the child.[83] Mississippi courts have gone as far to hold that sexual orientation can be a considered factor even without a nexus showing of harm from a LGBT parent's sexual orientation, so long as it is not the sole factor considered.[84]

An assumption that homosexuality should, or even could, fall under a moral analysis ignores the fact that American society has not accepted a universal standard of "morality" that declares homosexuality immoral.[85] No single religious body binds all Americans, and even among the most common religious bodies, there is no consensus that homosexuality is immoral.[86] "The Episcopal Church, for example, allows the ordination of openly gay clergy."[87] Reform Judaism includes LGBT individuals in the rabbinate and cantorate.[88] Even Pope Francis, today's leader of the Catholic Church, has shown acceptance and openness to LGBT individuals within the Catholic Church.[89] The tide of the traditional Catholic Church and view of the immorality of homosexuality is changing, as Bishop John Stowe stated: "In a church that has not always valued or welcomed your presence, we need to hear your voices and take seriously your experiences."[90]

Courts that rely on the assumption that homosexuality is immoral disregard their role of ensuring liberty for all and are instead determining a moral code to live by based on their own biased beliefs and prejudices.[91] Sexual orientation is not an immoral act or status and should, therefore,

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81. *Ex parte* H.H., 830 So. 2d 21, 26, 37 (Ala. 2002).

82. *See* Bottoms v. Bottoms, 457 S.E.2d 107, 108 (Va. 1995).

83. *Id.* at 108.

84. *See* Haney-Caron & Heilbrun, *supra* note 3, at 21.

85. Andrea Lehman, *Inappropriate Injury: The Case for Barring Consideration of a Parent's Homosexuality in Custody Actions*, 44 FAM. L.Q. 115, 128 (2010).

86. *Id.*

87. *Id.*

88. *Id.*

89. John Gehring, Opinion, *Can the Catholic Church 'Evolve' on L.G.B.T. Rights?*, N.Y. TIMES (July 5, 2018) https://www.nytimes.com/2018/07/05/opinion/pope-francis-catholic-church-lgbt.html.

90. *Id.*

91. *See* Lehman, *supra* note 85, at 129.

not be allowed as a consideration under the "moral fitness" of a LGBT parent in custody decisions.

B. *Social Stigma*

A different "harm" that courts have used to justify a finding of the LGBT parent's sexual orientation as a "harm" to the child is the social stigma and peer harassment associated with living in a LGBT household.[92] However, in *Palmore v. Sidoti*,[93] the Court has already addressed this concern over social stigma that the child may face due to a custody decision.[94]

The *Palmore* case originated in Florida and involved a white mother who was denied custody of her daughter due to her cohabitation with a black man.[95] The lower court's primary rationale for placing the child with her father rather than her mother was because the child would suffer from peer pressures and social stigmatization if she lived with her mother in a multi-racial household.[96] The Supreme Court of the United States reversed the Florida court because the custody determination was based solely on race and did not survive strict scrutiny.[97] While the Court did recognize that social pressures may arise, the "reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother."[98]

A few courts have extended the holding in *Palmore* beyond race, to apply to discrimination based on a LGBT parent's sexual orientation.[99] Others, such as Missouri, reject the expansion of *Palmore*, distinguishing that race falls under a suspect classification and therefore has greater constitutional protections from discrimination, while homosexuality is not entitled to such a heightened level of scrutiny.[100] New York courts have adopted the nexus test and require a showing a harm in order for sexual orientation to be considered.[101] In 1967, the California Court of Appeal remanded a trial court's ruling that a lesbian mother was presumptively unfit, and held that "the trial court failed in its duty to exercise the very discretion with which it is vested by holding as a matter

92. Lehman, *supra* note 85, at 121.
93. 466 U.S. 429 (1984).
94. *Id.* at 430–31.
95. *Id.*
96. *Id.* at 431.
97. *Id.* at 432–33.
98. *Id.* at 433.
99. Haney-Caron & Heilbrun, *supra* note 3, at 21.
100. Lehman, *supra* note 85, at 123.
101. *See, e.g.*, Paul C. v. Tracy C., 622 N.Y.S.2d 159, 160 (N.Y. App. Div. 1994).

of law that petitioner was an unfit mother on the basis that she is a homosexual."[102]

In 2003, the Arkansas Supreme Court similarly reversed a trial court's ruling that had removed custody from a mother based on her being a lesbian.[103] The trial court based its finding of "harm" on concern about the public's assumptions of young children living in a lesbian household, which "'would subject the children to ridicule and embarrassment and could very well be harmful to them.'"[104] Following the nexus test structure, the Arkansas Supreme Court held that the father failed to show any actual harm or adverse effect to the children because there was no showing that the two women living together were engaged in a lesbian relationship.[105] What this case does not address, however, is how the ruling would have differed if the women *were* found to have been in a lesbian relationship, regardless of the children being in a "thriving" living environment with the two women.[106]

The Superior Court of New Jersey reversed a trial court's decision denying custody to a lesbian mother due to the trial court's concern of embarrassment that her variant sexual orientation might cause to the children in the eyes of their peers.[107] The Superior Court found that denying custody to LGBT parents "diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others."[108] Other courts have rejected this approach and continue to view the social discomfort of a LGBT household as a "harm" to the child under the nexus test.[109]

In addition to custody determinations, courts also have a history of restricting the visitation rights of LGBT parents because of their sexual orientation.[110] Arkansas and Wyoming courts have required a LGBT parent to hide their sexual orientation from their children, and Georgia and Indiana courts have required visitation with a LGBT parent to be supervised.[111] California courts, on the other hand, have taken a more

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102. Nadler v. Superior Court of Sacramento Cty, 63 Cal. Rptr. 352, 354 (Cal. Ct. App. 1967).

103. Taylor v. Taylor, 110 S.W.3d 731, 739–40 (Ark. 2003).

104. *Id.* at 734.

105. *Id.* at 739.

106. *Id.*

107. M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979).

108. *Id.*

109. *See, e.g.*, Taylor v. Taylor, 110 S.W.3d 731, 739–40 (Ark. 2003).

110. *See* Haney-Caron & Heilbrun, *supra* note 3, at 22.

111. *See* Larson v. Larson, 902 S.W.2d 254, 256 (Ark. Ct. App. 1995); in the Interest of R.E.W., 471 S.E. 2d 6, 7 (Ga. Ct. App. 1996); Marlow v. Marlow, 702 N.E.2d 733, 736 (Ind. Ct. App. 1998); Hertzler v. Hertzler, 908 P.2d 946, 952 (Wyo. 1995); Haney-Caron & Heilbrun, *supra* note 3, at 22.

liberal view and have found visitation orders, prohibiting overnight visits in the presence of any third person known to be homosexual, unreasonable since 1988.[112] An Ohio court refused to deny overnight visitation to a homosexual father despite the mother's argument that the children would be subject to the "slings and arrows of a disapproving society."[113] The court held that the question of whether disapproval of a certain lifestyle could impact custody decisions had already been decided against in *Palmore*.[114] Courts also have a history of restricting activities that LGBT parents may participate in with their children, such as bringing children to LGBT political gatherings, LGBT organizations, or LGBT affirming churches.[115]

C. *"Becoming" LGBT*

A third way courts have justified finding an LGBT parent's sexual orientation as "harm" to the child is through the idea that a child raised by an LGBT parent will become LBGT themselves.[116] While many courts have discredited this view, and recognize that LGBT parents do not "cause" their children to become LGBT themselves, a federal court in 2004 emphasized the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[117]

An Ohio appellate court affirmed a trial court's judgment granting a LGBT father overnight visitation with his sons as long he did not exercise his visitation in the presence of any non-related males.[118] The mother had appealed the trial court's judgment, fearing that her sons' "visitation with their father may trigger homosexual tendencies in them" and that "during visitation with their father they may contract AIDS."[119] The appellate court held that there must be a showing of harm to the children for them to intervene in the parent-child relationship and that no evidence had been presented to support that the LGBT father would "trigger homosexual tendencies in the two boys."[120] In addition, no evidence was presented that the LGBT father even had AIDS or that AIDS would be contracted

112. *See In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 291 (Cal. Ct. App. 1988).

113. Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987).

114. *Id.*

115. *See, e.g.*, Marlow v. Marlow, 702 N.E.2d 733, 736–38 (Ind. Ct. App. 1998).

116. Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); *see also* Lehman, *supra* note 85, at 125.

117. Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); *see also* Lehman, *supra* note 85, at 122.

118. Conkel v. Conkel, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987).

119. *Id.*

120. *Id.* at 986.

by casual household contact.[121] Therefore, the appellate court found no reason to reverse the trial court's judgment allowing visitation.[122]

An Illinois appellate court similarly reversed a trial court's custody decision that restricted visitation based on the LGBT mother being in a relationship with another woman.[123] After the trial judge heard that the LGBT mother and her girlfriend had slept in the same bed as each other, had publicly showed affection toward each other, and had taken her son to a gay and lesbian pride parade, he suspended visitation because he was concerned about "this lesbian stuff," which "is not in the best interests of the child."[124] The trial court limited the LGBT mother's custody to supervised visitation out of fear that the child had a "gender identity problem."[125] The appellate court reversed this visitation order, and found that there was no evidence of a gender identity problem and that the trial judge had "improperly relied on his belief that homosexuality creates serious endangerment."[126]

IV. LGBT CUSTODY LAWS IN FLORIDA

A. *LGBT Legal History in Florida*

The ban against LGBT marriage was found to be unconstitutional in Florida in 2014, one year before *Obergefell* was decided.[127] Before the district court's ruling, Florida laws had a history of banning LGBT individuals from marrying or adopting children.[128] The district court in *Brenner*, however, ruled that the right to marry was fundamental and no justification against LGBT marriage offered by the state withstood strict scrutiny.[129]

In *Brenner*, the plaintiffs included a group of LGBT spouses lawfully married in other states that legally recognized LGBT marriage and a LGBT couple in Florida who wished to legally marry.[130] At the time, the

121. *Id.* at 987.

122. *Id.*

123. Pleasant v. Pleasant, 628 N.E.2d 633, 635 (Ill. App. Ct. 1993) ("The fact that respondent is openly involved in a lesbian relationship is not grounds to restrict respondent's visitation with her son.").

124. *Id.* at 636.

125. *Id.* at 638.

126. *Id.* at 641–42.

127. *See* Brenner v. Scott, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014) ("The Florida provisions that prohibit the recognition of same-sex marriages lawfully entered elsewhere, like the federal provision, are unconstitutional. So is the Florida ban on entering same-sex marriages.").

128. *See* Sara Qureshi, *Utilizing Florida's Stance on Domestic Violence Laws Regarding Same-Sex Couples as an Effective Model for National Uniformity*, 28 U. FLA. J.L. & PUB. POL'Y 143, 151 (2017).

129. *See Brenner*, 999 F. Supp. 2d at 1289.

130. *Id.* at 1282–83.

Florida Constitution and state statutes defined marriage as "the legal union of only one man and one woman as husband and wife," and did not recognize LGBT marriages entered into in other states.[131] The plaintiffs claimed that these provisions violated the Fourteenth Amendment's Due Process and Equal Protection Clauses.[132] The district court applied a fundamental rights analysis, and found that: (1) the right to marry was fundamental; and (2) the government encroachment was unwarranted.[133]

> So the right to marry is just as important when the proposed spouse is a person of the same race and different sex (as in the most common marriages, those that have been approved without controversy for the longest period), or a person of a different race (as in *Loving*), or a person with unpaid child-support obligations (as in *Zablocki*), or a prisoner (as in *Turner*), or a person of the same sex (as in the cases at bar).[134]

The defendants argued that the institution of marriage is founded on the concept of procreation, and since LGBT couples cannot procreate marriage does not apply to them.[135] The district court disagreed with this rationale, finding that marriage has never been conditioned on the desire or capacity to procreate.[136] People who are medically unable to have children, who are beyond childbearing age to have children, or who voluntarily choose not to procreate are not barred from marriage.[137] "The undeniable truth is that the Florida ban on same-sex marriage stems entirely, or almost entirely, from moral disapproval of the practice."[138] Therefore, no justification from the state could withstand strict scrutiny, and the ban on entering LGBT marriages in Florida and recognizing LGBT marriages from other states was thereby unconstitutional.[139]

B. *Application of the Nexus Test in Florida*

While Florida was somewhat progressive in allowing LGBT marriage before *Obergefell*, the child custody procedure still used today leaves opportunity for discrimination. The standard for child custody in Florida requires the court to "order that the parental responsibility for a minor

131. *Id.* at 1284.
132. *Id.*
133. *Id.* at 1288–89.
134. *Id.*
135. *Id.* at 1289.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1293.

child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."[140]

The Florida statute lists factors to consider in custody determinations, including the anticipated division of parental responsibilities, a stable environment, and the morality of the parents.[141] Judges are not limited to these factors and may consider other issues when determining the best interests of the child.[142] "Florida does not require family court judges to make specific findings of fact for the record when determining custody."[143] "In fact, judges need not articulate any reasons for their decisions, which 'makes it highly difficult to prove exactly what motivated the judge's decision, and thus opens the door for the court to interject gender biases . . . .'"[144]

In the past, Florida courts have analyzed sexual orientation under the "moral fitness" factor within the statute.[145] Florida courts have shown an awareness of discrimination against LGBT parents and have attempted to decrease the chance of bias by adopting the nexus test.[146] The First District Court of Appeal ("DCA") of Florida held in 1996 that a trial court erred when it granted custody to the father after it took judicial notice of the mother's sexual orientation under the moral fitness factor within the Florida custody statute.[147] The First DCA found that there was no evidence that the mother's sexual orientation harmed her child and found that the trial court erred when it recognized that "a homosexual environment is not a traditional home environment, and can adversely affect a child."[148] In the following year, the same court reaffirmed this holding, stating that a "trial court may consider a parent's sexual conduct in determining the parent's moral fitness under section 61.13(3)(f), but that in such consideration 'the trial court should focus on whether the parent's behavior has a direct impact on the welfare of the child.'"[149]

In 2000, the Second DCA addressed the nexus test in relation to a parent's sexual orientation.[150] The facts of that case involved a mother and father who had two daughters and had separated after the mother

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140. FLA. STAT. § 61.13(2)(c)(2) (2017).

141. FLA. STAT. §§ 61.13(3)(b), 61.13(3)(d), 61.13(3)(f) (2017).

142. FLA. STAT. § 61.13(3) (2017).

143. Nickerson, *supra* note 9, at 203.

144. Nickerson, *supra* note 9, at 203.

145. FLA. STAT. § 61.13(3)(f) (2017); NCLR, CHILD CUSTODY AND VISITATION ISSUES FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARENTS IN FLORIDA 1, 3 (2009), http://www.nclrights.org/wp-content/uploads/2013/07/2007_10_02_FLCustodyPub.pdf.

146. Maradie v. Maradie, 680 So. 2d 538, 542–43 (Fla. Dist. Ct. App. 1996).

147. *Id.* at 543.

148. *Id.* at 541.

149. Packard v. Packard, 697 So. 2d 1292, 1293 (Fla. Dist. Ct. App. 1997) (quoting *Maradie*, 680 So. 2d at 542).

150. *See* Jacoby v. Jacoby, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000).

came out as a lesbian.[151] Both parents wanted primary residential custody of the two girls, and the father attacked the mother's sexual orientation in court to show she was an unfit parent.[152] The trial court gave the father primary physical custody of the girls, and the mother appealed due to the court's discrimination based on her sexual orientation.[153]

The Second DCA held that "[f]or a court to properly consider conduct such as Mrs. Jacoby's sexual orientation on the issue of custody, the conduct must have a direct effect or impact upon the children."[154] The trial court's discriminatory final judgment had stated that "there is no doubt that the husband feels the current living arrangement of the wife is immoral and an inappropriate place in which to rear their children . . . . Obviously, this opinion is shared by others in the community."[155]

The Second DCA refuted this claim and found a lack of evidence that the community disapproves of the morality of homosexuality, and extended the holding of *Palmore* to recognize that "even if the court's comments about the community's beliefs and possible reactions were correct and supported by the evidence in this record, the law cannot give effect to private biases."[156] The Second DCA remanded the case and required a neutral application of the nexus test and found that the trial court "penalized the mother for her sexual orientation without evidence that it harmed the children."[157] While multiple Florida DCA courts have analyzed LGBT custody laws, the Florida Supreme Court has yet to address the issue of LGBT discrimination in custody determinations, so there is no universal binding law over all lower courts in Florida.

V. PROPOSAL

A. *Constitutional Protections*

The Supreme Court has yet to formally extend *Obergefell*'s holding, granting LGBT couples the fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, into other areas of family law concerning parenthood, like custody and child support.[158] The Court has also failed to find that LGBT individuals are a suspect class in need of heightened protection, even though some Circuit Courts of Appeals have recognized this right.[159] *Obergefell*'s holding,

151. *Id.* at 412.
152. *Id.*
153. *Id.* at 412–13.
154. *Id.* at 413.
155. *Id.*
156. *Id.*
157. *Id.* at 415.
158. *See* Stern et al., *supra* note 3, at 93.
159. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480 (9th Cir. 2014).

however, arguably suggests that LGBT individuals not only have the fundamental right to marry, but also the constitutional right to birth, adopt, and raise children.[160] "As *Obergefell* prompts a larger cultural conversation about the meaning of marriage, this leads to increased examination of the link between marriage and parenthood . . . ."[161]

The Supreme Court has long recognized the fundamental right to raise a family and the parent's right to direct the upbringing and education of their children.[162] The family is within the private realm, and the state cannot unreasonably interfere, but the family is not beyond regulation under the state's *parens patriae* authority.[163] "[T]he right to 'bring up children' is, as a component of the right to marry, 'a central part of the liberty protected by the Due Process Clause.'"[164] In recognizing the right of LGBT couples to marry, the courts validated a parenthood model focusing on chosen, functional families, as opposed to biological, dual-gender families.[165] A logical step some courts have taken is holding that LGBT individuals have a constitutional right to raise their children and be free of discrimination in parenting decisions.[166] Since *Obergefell*'s passing, the Seventh Circuit has rejected biological and gendered limitations on the model of parenting served by marriage.[167] Judge Posner wrote for the court that "family is about raising children and not just about producing them."[168] Through this reasoning, "[t]he court elevated functional parenting over procreative sex, gender, and biology[]" and the rights to marry are seen as interrelated to the rights of parenthood.[169]

While the Supreme Court of the United States has yet to explicitly expand *Obergefell* beyond the right to marry, the Florida Supreme Court may be more responsive. On February 1, 2018, the Florida Supreme Court amended the child support guidelines and stated that "in response to the United States Supreme Court's decision in *Obergefell*, we amend multiple forms to replace gendered terms with gender-neutral terms, so that the same forms are appropriate for use in the context of both

160. Stern et al., *supra* note 3, at 93–94.

161. June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 673 (2016).

162. ABRAMS ET AL., *supra* note 66, at 22–23 (citing Pierce v. Society of Sisters, 268 U.S. 510, (1925)).

163. ABRAMS ET AL., *supra* note 66, at 22–23 (citing Pierce v. Society of Sisters, 268 U.S. 510, (1925)).

164. Stern et al., *supra* note 3, at 94 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

165. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1237 (2016).

166. Stern et al., *supra* note 3, at 94.

167. Baskin v. Bogan, 766 F. 3d 648, 663 (7th Cir. 2014).

168. *Id.*

169. NeJaime, *supra* note 165, at 1238.

opposite-sex and same-sex marriages."[170] While there has yet to be a Florida Supreme Court case that expands *Obergefell*'s holding, the amendment in the child support guidelines is indicative that LGBT rights expand farther than the altar.

B. *Research*

Even though the nexus test is intended as a safeguard against discrimination towards LGBT parents, it is still open to judicial discretion and personal opinion of what constitutes "harm." Under *Maradie* and *Jacoby*, Florida courts require a finding of harm that has an evidentiary basis; "[t]he mere possibility of negative impact on the child is not enough."[171] This strong and protective language places a heavy burden on the heterosexual parent to show a true finding of harm to the child. Not every state, however, has accepted this practice and instead some states enforce the nexus test more broadly than Florida's narrow view.[172]

Even with Florida's requirement of evidentiary harm, however, the allowance for consideration of sexual orientation at all as a factor in custody determinations should be questioned. "[P]ermitting the presentation of evidence that indicates that homosexuality could cause harm to the child shows a lingering bias and homophobia."[173] Allowing sexual orientation to be considered under the nexus test still assumes that sexual orientation could *possibly* be immoral and there is a *possible* harm to the child from the LGBT parent's sexual orientation. This assumption does not withstand current research that has continuously shown that being raised by a LGBT parent is not harmful to the child.[174]

Children raised by LGBT parents are similarly situated as children raised by heterosexual parents, and "[s]ome studies have even suggested that children of lesbian or gay parents are psychologically healthier and better-adjusted than their peers raised by heterosexual parents."[175] There is little evidence that children of LGBT parents face increased social stigma; instead, these children have reported positive peer relationships.[176] Recent research has analyzed whether children benefit from being raised by a mother and a father versus a LGBT couple.[177] The

170. In re: Amendments to the Florida Supreme Court Approved Family Law Forms—Nomenclature, 235 So. 3d 357, 357 (Fla. 2018).

171. Jacoby v. Jacoby, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000) (quoting Maradie v. Maradie, 680 So. 2d 538, 543 (Fla. Dist. Ct. App 1996).

172. *See, e.g.*, Conkel v. Conkel, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987).

173. Susan M. Moss, McGriff v. McGriff: *Consideration of a Parent's Sexual Orientation in Child Custody Disputes*, 41 IDAHO L. REV. 593, 619 (2005).

174. Haney-Caron & Heilbrun, *supra* note 3, at 20.

175. Haney-Caron & Heilbrun, *supra* note 3, at 20.

176. Haney-Caron & Heilbrun, *supra* note 3, at 21.

177. Rachel H. Farr, *Does Parental Sexual Orientation Matter? A Longitudinal Follow-Up of Adoptive Families with School-Age Children*, 53 DEVELOPMENTAL PSYCHOL. 252, 254 (2017).

research showed that children of LGBT parents "develop on par with children of heterosexual parents" and are "equally well-adjusted, on average, across development from preschool-age to middle childhood."[178]

While the research did recognize that LGBT adults "may face challenges with discrimination and stigma not only as individuals, but also as couples and families," the research data found that no "outcome variable was distinguishable by parental sexual orientation."[179] In addition, research has shown that LGBT parents are more likely to equally share parenting tasks and responsibilities and "[a] burgeoning body of social science suggests that same-sex couples divide responsibilities for income-producing work and domestic care more equally and more equitably than different-sex couples."[180]

Some courts have denied custody to a LGBT parent out of fear that the child will "become" LGBT itself.[181]

> [W]hatever causes a person to become a homosexual, it is clear that the state cannot know the sexual preferences that a child will exhibit as an adult. Statistically, the state does not know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex . . . . It is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood.[182]

Research has shown, however, that parents cannot "teach" or "transmit" homosexuality to their children, and children of LGBT families appear to be homosexual about 10% of the time; the same amount as the general population.[183] The idea that being LGBT is a choice and caused by external factors, like being raised by LGBT parents, is a bigoted concept that research has long reputed, and promotes a homophobic mindset that something is "wrong" with LGBT individuals.[184] "[S]tudies have indicated that homosexuality is

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178. *Id.* at 252, 259.

179. *Id.* at 260, 262.

180. Widiss, *supra* note 20, at 726.

181. Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 822 (11th Cir. 2004); Lehman, *supra* note 85, at 126.

182. *Lofton*, 358 F.3d at 822 (quoting Fla. Dep't of Health & Rehab. Servs. v. Cox, 627 So.2d 1210, 1220 (Fla. Dist. Ct. App. 1993).

183. Lehman, *supra* note 85, at 126.

184. *See* Lehman, *supra* note 85, at 126.

biologically determined and is largely unaffected by environmental factors."[185]

Regardless of this research, however, many courts are still expressing concern over placing a child within the custody of a LGBT parent.[186] The "harms" that many courts cite to as a nexus between a LGBT parent's sexual orientation and a negative impact on their child do not stand up to current research.[187] On the other hand, "[p]arent stress, family conflict, parent-child relationship quality, and family structure are better predictors of child adjustment than is parental sexual orientation."[188]

C. *Solution*

Taking this research into consideration, judges in custody determinations should not be allowed to consider sexual orientation at all, for there is no harm to the child from being raised by a LGBT parent. Gender and sexuality should be removed from the equation, and a consideration for what is actually in the best interests of the child should be the sole focus. "Custody and visitation rights 'must be determined with reference to the needs of the child rather than the sexual preferences of the parent.'"[189] In order for the morality of a parent's sexual orientation to be a valid consideration in court, the court would also have to equally determine if the *heterosexual* parent's sexual orientation has a negative impact on the child, solely on the basis of them being heterosexual; a bizarre concept that shows the irrationality behind questioning the morality of a parent's homosexual orientation.

The nexus test, while intended to safeguard against discrimination, still allows too much judicial discretion and motivates a heterosexual parent to attempt to find "harms" associated with homosexuality. Legislation and state statutes should be amended to prohibit any type of consideration of either parent's sexual orientation, regardless of any claimed "harms" to the child. The allowance of these harms being considered under the nexus test incentivizes parents to attack one another and invades the privacy of the parents' personal lives, rather than focusing on the best interests of the child. "[A] parent's private relationship with another consenting adult, or a judge's personal opinion about what is best for society, has no place in a child custody determination, especially when such an inquiry overcomes the best-

185. Lehman, *supra* note 85, at 126.

186. Haney-Caron & Heilbrun, *supra* note 3, at 20.

187. Haney-Caron & Heilbrun, *supra* note 3, at 21.

188. Haney-Caron & Heilbrun, *supra* note 3, at 20.

189. *In re* Marriage of Black, 392 P.3d 1041, 1048 (Wash. 2017) (quoting *In re* Marriage of Cabalaquinto, 669 P.2d 886, 888 (Wash. 1983).

interests-of-the-child analysis. A parent's sexual identity, in and of itself, does not cause harm."[190]

Currently, the Florida Civil Rights Act prohibits a state statute to discriminate on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status, but does not protect against sexual orientation discrimination.[191] Hopefully one day "sexual orientation" will be added as a protected group under all Florida statutes, but presently that is an unlikely amendment. Instead, I would recommend that the legislature amend Florida Statute § 61.13(3) to include the following sentence: "The sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall be prohibited as a consideration when determining the best interest of the child."

CONCLUSION

LGBT individuals have fought long and hard to have their rights and protections recognized by the American legal system. Until the Supreme Court has recognized LGBT individuals as a protected class that explicitly deserves protections of a higher scrutiny, however, members of the LGBT community are vulnerable to discrimination. Lawyers representing LGBT parents must remain vigilant. In the meantime, state lawmakers should take the next step in protecting LGBT parents from discrimination by forbidding consideration of sexual orientation as a factor in custody decisions, regardless of the nexus test. Florida is on the correct path, but there are still steps to be taken to reduce potential bias.

190. Lehman, *supra* note 85, at 132.

191. *See* FLA. STAT. § 760.01 (2018).