

**Inappropriate Injury:
The Case for Barring Consideration of a Parent's
Homosexuality in Custody Actions**

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Introduction

Parents have a fundamental right to raise their children.¹ Nevertheless, when irreconcilable differences lead to a divorce, it is often left to the courts to choose between the parents to determine custody and visitation. In general, courts consider each parent's separate abilities and qualifications to ascertain which parent is the more appropriate custodian. This process, however, can be strikingly different during custody disputes in which one parent is homosexual. Well-qualified parents may face an insurmountable burden in their efforts to be judged by the standards by which all other parents are judged— which *parent* can provide best for the child – simply because that party will never just be a “parent.” He or she will always first be a homosexual.

Due to the unique nature of child custody actions, trial courts have wide discretion in their custody determinations.² Courts are generally limited only by the requirement that they base their determinations on the best interests of the child.³ The flexibility is required to adequately address the wide variety of custody issues, however, it also leaves room for judges to implant their own biases and prejudices. This prejudice has manifested itself in many courts restricting custody based on a parent's sexual orientation by citing some presumptive injury or vague vulnerability that a child may be subjected to harm.

There is a wealth of legal scholarship addressing several of the issues that arise when courts address the rights of homosexuals to parent.⁴ I draw from many of these articles in

¹ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

² See Am. Jur. 2d, Divorce and Separation § 979.

³ 24A Am. Jur. 2d Divorce and Separation § 849

⁴ See Amy D. Ronner, *Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 Yale J.L. & Feminism 341 (1995) (addressing the stereotypes that underlie judicial determinations); Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine With the Best Interests of the Children*, 11 Cardozo Women's L.J. 1 (2004) (examining “what judicial language says about gay and lesbian identity [and]... the impact that speculative judicial imaginations have on ... determining the best interests of children”); Ryah Lilith, *Caring for the Ten Percent's 2.4: Lesbian and Gay Parents' Access to Parental Benefits*, 16

analyzing both the legal framework used by courts and how the rhetoric used betrays the true bias driving decisions.⁵ This paper goes further, however, by exploring the framework of the theory of injury itself, ultimately concluding that when the injury to the child is properly framed, it compels a conclusion that the consideration of homosexuality of a parent must be barred completely. Finally, this paper will argue that the current standards assessing the fitness of a gay or lesbian parent are both illegal under the Constitution and do not truly address what is in the best interests of the children at the center of these disputes.

Part One of this paper will discuss the three prevailing approaches courts use in addressing how the sexual orientation of a parent affects the “best interests” analysis. Part Two will discuss the specific types of harm that courts presume correspond with being raised by a homosexual parent. Lastly, in Part Three, I will propose that courts should be barred from considering homosexuality when making a custody determination. In concluding, I will suggest that each test fails because they operate as vehicles for imparting the same underlying questions of injury that cannot be subject of inquiry because of their unconstitutional or unconscionable nature.

I. The Three Prevailing Approaches

The unique nature of child custody disputes requires a flexible standard capable of accommodating a variety of families. States across the nation have responded by legislating the “best interests” analysis, whereby the trial courts take into account a variety of factors in an attempt to determine what arrangement would be in the child’s best interest going forward.⁶

Wis. Women’s L.J. 125 (2001) (focusing on homosexual parents’ access to benefits such as health insurance and family leave and the effect on the workplace).

⁵ See *id.*

⁶ 24A Am. Jur. 2d Divorce and Separation § 849

Factors may include the age and sex of the child, the mental and physical health of the child, the mental and physical health of the parents, which parent can better provide for the child, the lifestyle and conduct of the parents, the relationship between the child and parents, any history of domestic violence, the child's ties to school, home, community, and religious institutions, the child's preference, if the child has reached a requisite level of maturity, and which parent is more likely to encourage frequent and continuing contact with the other parent.⁷ The nature of child custody disputes is such that a determination can never be formulaic. Since so many indefinable qualities of the parties, such as their credibility, witnesses' credibility, and devotion to the children, can and should factor into the court's decision, trial courts are given wide discretion. Accordingly, decisions are reviewed only for abuse of discretion, since appellate courts universally recognize the limitations of only having access to the record where such qualities cannot be easily identified.⁸

Over the past decades, courts have struggled with deciding issues of child custody and visitation when one parent is homosexual. The application of a parent's sexual orientation to the best interests analysis has evolved into three forms: the *per se* approach, in which the court concludes that parents who are homosexual are *per se* unfit to enjoy custody of their children; the presumption approach, in which the court applies a presumption that the homosexual parent is unfit and places the burden on that parent to prove that his or her sexual orientation does not and will not harm the child; and, the nexus approach, in which courts require proof of a clear nexus between the parent's sexual orientation and specific, discernable harm on the child prior to denying the parent custody or visitation.⁹

⁷ See, *id.*

⁸ 59 Am. Jur. 2d Parent and Child § 26

⁹ See generally Eileen P. Huff, The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear, 9 Am. U. J. Gender Soc. Pol'y & L. 695, 699-701 (2001).

A. *The Per Se Approach*

In jurisdictions where the *per se* approach is applied, courts merely require proof¹⁰ that a parent is homosexual in order to deny or restrict that parent's custody. In *Jacobson v. Jacobson*, the Supreme Court of North Dakota reversed the award of custody to a lesbian mother¹¹ who had been the primary caregiver for most of the children's lives.¹² The Court determined that in light of the finding of the trial court that both parents were fit, willing, and able custodians, the mother's sexual orientation was an overriding factor.¹³ The court reasoned that homosexuality was not commonplace or accepted by society, and therefore must be considered determinative when addressing child custody.¹⁴ The *per se* approach, however, does not appear to be officially active in any jurisdiction since *Jacobson* was overruled in 2003.¹⁵

B. *The Presumption Approach*

Many jurisdictions have instead adopted the presumption approach, which allows the court to presume, without evidence, that the parent's sexual orientation will harm the child. The approach places the burden on the homosexual parent to prove that their sexual orientation will not adversely affect the child.¹⁶ This approach differs from the *per se* approach in that it provides a parent the opportunity to prove that their sexual orientation will not harm the child, whereas in the *per se* approach, the fact of homosexuality alone definitively restricts that parent's custody.¹⁷

¹⁰ In one case, a court denied a mother custody because she was accused of being a lesbian and failed to dispute the father's accusations.

¹¹ *Id.* at 79.

¹² 314 N.W.2d 78, 80 (N.D. 1981), *overr'd by* *Damron v. Damron*, 670 N.W.2d 871 (N.D. 2003)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Damron*, 670 N.W.2d 871.

¹⁶ See Huff, *supra* note 9, at 700.

¹⁷ Additionally, in Pennsylvania, the only remaining presumption in governing custody is the presumption that a parent in a homosexual relationship will adversely affect the children.¹⁷ This law remains even though the Pennsylvania Supreme Court has abolished all other presumptions, including that a mother is a better custodian

In *Pulliam v. Smith*,¹⁸ for example, the mother successfully moved for sole custody of the two children because the father's boyfriend moved into his home. The Supreme Court of North Carolina agreed that the findings of fact by the trial court were uncontroverted, and therefore, supportable.¹⁹ The Court stated that it did not affirm the trial court's decision solely because the father is a "practicing homosexual," but each fact that the Court used to support the determination of custody did in fact stem from the father's sexual orientation.²⁰ For example, the court made a finding that the father's "conduct is not fit and proper and will expose the (2) minor male children to unfit and improper influences" even in the absence of domestic abuse or negligence that traditionally makes a parent unfit or improper.²¹ The Court, therefore, must have relied on the belief that homosexuality is by its nature unfit and improper. Furthermore, although there were no allegations that the children had witnessed any sexual contact between the father and his partner, the Court emphasized this fact without conducting any inquiry into the sexual activity between the mother and her new husband.²² The Court was able to restrict his custodial rights solely because it applied a presumption that the father's sexual orientation made him an improper custodian.

Formalistically, this approach presents some improvement over the *per se* approach. Namely, it does not make sexual orientation a determinative factor. The courts, however, do not restrict their finding merely to a parent's self-identification as gay or lesbian; rather, the courts conduct an invasive inquiry into the parent's private and intimate life, each fact compounding on

during the child's early years, that joint custody is preferable to sole custody, and even that "a parent has a prima facie right to custody as against third parties." *Rowles v. Rowles*, 668 A.2d 126 (1995)

¹⁸ 501 S.E.2d 898 (Nor. Car. 1998).

¹⁹ *Id.* at 906.

²⁰ *Id.* at 901-02

²¹ *Id.* at 902.

²² See generally, *id.*

the last, and each providing independent motivation to restrict custody.²³ Although these jurisdictions leave open the possibility that homosexual parents could theoretically retain custody of their children, the burden these parents must overcome is so oppressive as to render the difference between this approach and the *per se* approach negligible.

C. The Clear Nexus Approach

Still other jurisdictions invoke a “clear nexus” test, whereby a trial court can only consider the sexual orientation of a parent if there are demonstrable adverse effects on the well being of the child as a result of the parent’s homosexuality.²⁴ Generally, the mere possibility of future harm is insufficient to deny or restrict a parent’s right to custody.²⁵ This test is invoked primarily in the context of modifying custody.²⁶ In these cases, the rule is simply that there must be a nexus between the changed circumstances and adverse effects on the child.²⁷

In 1994, the South Dakota Supreme Court held in *Van Driel v. Van Driel*²⁸ that the parent’s conduct must affirmatively harm the child prior to removing a child from the parent’s custody.²⁹ There, the father learned that the mother exchanged vows in a commitment ceremony with her partner, and he subsequently moved for a change of custody based on the fact that the mother’s conduct and relationship were immoral and created an environment inappropriate for raising children.³⁰ In addressing this issue of first impression, the Court analogized prior precedent finding that immorality alone will not deprive a parent of otherwise rightful custody.³¹ The Court continued to state in *Van Driel* that “[t]he parent's conduct must be shown to have had

²³ See e.g., Pulliam, 501 S.E.2d at 901-02.

²⁴ See e.g., 24A Am. Jur. 2d Divorce and Separation § 855

²⁵ See e.g., *Berry v. Berry*, 2005 WL 1277847 (Tenn. Ct. App. 2005).

²⁶ The change is usually that the parent either publicly acknowledges their sexual orientation or engages in a significant same-sex relationship

²⁷ See e.g., *McGriff v. McGriff*, 99 P.3d 111 (Idaho 2004).

²⁸ 525 N.W.2d 37 (S.D. 1994).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 39 quoting *Shoop v. Shoop*, 460 N.W.2d 721, 724 (S.D. 1990).

some harmful effect on the children.”³² Here, there were no apparent adverse effects on the children as they wanted to continue living with their mother and there was no evidence that they had been ridiculed in school or the community because of their mother’s sexual orientation.³³ Custody therefore remained with the mother.³⁴

In 2004, the Idaho Supreme Court announced that it would similarly apply a clear nexus approach.³⁵ In that case, the parents shared approximately equal custody of their children when the mother sought modification as a result of the father’s new same-sex relationship and his failure to seek professional assistance in dealing with his homosexuality.³⁶ The Court declared first that “a homosexual parent may not be denied custody of a child unless there is sufficient evidence presented to show that the parent's homosexuality is having a negative effect on the child and that the parent's custody is not in the best interests of the child. Only when there is a nexus between harm to the child and a parent's homosexuality, can that parent's sexual orientation be a factor in determining custody of a child.”³⁷ The Court then upheld the magistrate’s order because the magistrate had not modified custody based on the father’s homosexuality.³⁸

Of the three analyses currently employed in various jurisdictions, the clear nexus approach is undoubtedly preferable because it remains truest both to the formality and the spirit of the best interests analysis. Both the *per se* approach and the presumption approach overemphasize one single factor – the sexual orientation of a parent, which does not even focus on the condition of the child. On the contrary, these approaches focus on the parent’s

³² Id.

³³ Id. at 39-40.

³⁴ Id. at 40.

³⁵ McGriff, 99 P.3d at 117.

³⁶ Id. at 113.

³⁷ Id. at 117.

³⁸ Id.

relationship with others or with society at large rather than the parent's relationship or ability to care for the child.

The nexus approach does not necessarily indicate, however, that the gay or lesbian parent will in fact be judged under the same criteria as the heterosexual parent. For example, in 1997, although Mississippi did not expressly apply the clear nexus test, a court separated two boys, divesting the mother of custody of her younger son because she had not sufficiently dispelled rumors that she was a lesbian.³⁹ In explaining the rationale for splitting the children, the court stated that

The Court believes that the custody, the paramount custody of Jeremy should be awarded to David. The rumors that Jeremy has heard have hurt him. And this Court finds that they have hurt him more than they have hurt Jason. This Court believes that both children are upset about these rumors. ...I can't imagine anything that would hurt a boy more for another child to tell him something like that unless he was to tell him that his father was homosexual. And I don't know which would be worse.⁴⁰

The court specifically did not make a finding that the mother had ever engaged in any sexual conduct with her female friend, stating that "whether the relationship is true or not true, it's still hurting these children."⁴¹ The court held that the mere allegation of being a lesbian and lack of diligence in dispelling the rumor was sufficient to resort to the drastic measure of separating two young boys in reliance on an abstract harm brought by the mother's status as a lesbian.

Shifting the burden to the heterosexual party to prove that the child is suffering actual, demonstrable harm because of the other parent's sexual orientation goes a long way in moving away from judicial homophobia and back towards an actual best interests analysis. By focusing the analysis on the cognizable and demonstrable harmful effects of the parent's sexual orientation on the child, the clear nexus approach properly directs the analysis on the best

³⁹ Bowen v. Bowen, 688 So. 2d 1374, 1381 (Miss. 1997).

⁴⁰ Id.

⁴¹ Id.

interests of the child. As the following sections and the above case demonstrate, however, the theories of injury upon which this approach is based are not only unconstitutional, but also unconscionable to our society's values. This approach therefore, still cannot withstand scrutiny.

II. The Perceived Harm

The majority of jurisdictions will only deny or restrict a gay or lesbian parent's custodial rights upon a showing of some actual or potential injury or harm to the child relating the parent's sexual orientation.⁴² These courts denying or restricting custody have generally cited one or more of following "risks." First, many courts cite their concern that the children will be vulnerable to ridicule by their peers or ostracized from the community as a result of their parent's sexual orientation.⁴³ Second, some courts have cited their concern that children will grow up to be homosexuals themselves as a result of contact with their gay or lesbian parent, on the theory that homosexuality is either contagious or is learned.⁴⁴ Third, courts have stated that homosexuality is generally immoral, with the implication that the children will grow up without a societally recognized sense of morality.⁴⁵ None of these concerns are grounded in fact and each has been disputed by a consensus of child development experts. Moreover, judicial acknowledgment of these unsubstantiated risks harms not only the children who are denied additional time with loving parents, but also perpetuates harmful stereotypes that damage society and give credence to those that harbor such prejudices.⁴⁶

A. Peer Harassment

The courts' concern that children will be ridiculed by their peers or the community at

⁴² See, e.g., 24A Am. Jur. 2d Divorce and Separation § 855

⁴³ See generally 62 A.L.R. 5th 591 (1998)

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See generally Huff, *supra* note 9, at 701-03.

large stems from the prejudices the courts acknowledge come from a disapproving society. Whether vulnerability to peer harassment can properly be considered, however, is subject to doubt. The seminal Supreme Court case, *Palmore v. Sidoti*⁴⁷ ought to be controlling. In that case, a white woman was granted of custody of her daughter.⁴⁸ The father petitioned the court for a modification of custody after the mother began cohabiting with a black man whom she soon married, citing that the mother had not properly cared for their children.⁴⁹ Although the trial court found these accusations baseless, the court did order a change in custody based on a counselor’s recommendations that as a result of the interracial marriage, the “child is, or at school age will be, subject to environmental pressures not of choice.”⁵⁰ The trial court continued that if the child remained in the interracial household, she would be “more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.”⁵¹

The Supreme Court reversed the order divesting the mother of custody of her child.⁵² The Court rejected that a court could deny custody solely on the basis of the race of the parents in consideration of a finding that the mother was qualified to care for the child.⁵³ The Court acknowledged that racial prejudices continue to exist and that there was a possibility that the child would be subject to additional pressures being raised in interracial household than if the mother had instead married another white man.⁵⁴ The Court, however, denounced that a child should be removed from the custody of a qualified and caring parent because of “the reality of private biases and possible injury” arising therefrom.⁵⁵ Rather, the Court unequivocally stated

⁴⁷ *Palmore v. Sidoti*, 466 U.S. 429.

⁴⁸ *Id.* at 430.

⁴⁹ *Id.*

⁵⁰ *Id.* at 431.

⁵¹ *Id.*

⁵² *Id.* at 434.

⁵³ *Id.* at 432.

⁵⁴ *Id.* at 433.

⁵⁵ *Id.*

that “[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”⁵⁶

The Court’s clarity on this issue indicates its unwillingness to allow social stigmatization based on private prejudices to divest parents of their rightful custody. Relying on the authority of *Palmore*, a number of jurisdictions have dismissed that the threat of social stigmatization can be a proper inquiry for a court considering the custodial rights of a homosexual parent.⁵⁷ In *Conkel v. Conkel*, for example, the mother argued that granting the homosexual father overnight visitation would subject the children the “slings and arrows of a disapproving society.”⁵⁸ The court analogized the case at bar to that of *Palmore*, reasoning that the question of whether popular disapproval of a lifestyle could properly be considered in a custody action had already been decided and barred by the Supreme Court.⁵⁹ In doing so, it dismissed the mother’s argument as impermissible and unconstitutional.⁶⁰ The *Conkel* court also noted that the Supreme Court of Alaska had already applied *Palmore* to a similar factual scenario.⁶¹ For these reasons, the court refused to deny overnight visitation to a father based on the possibility that the children may be teased because of his homosexuality.

⁵⁶ *Id.*

⁵⁷ E.g., *Johnston v. Missouri Dept. of Social Services*, 2005 WL 3465711 (Mo.Cir.,2005) (“The agency’s rationale based on “stigmatization” or societal disapproval is also impermissible in light of the Supreme Court’s decision in *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) and its progeny.”); *Jacoby v. Jacoby*, 763 So. 2d 410 (Fl. App. 2 Dist. 2000) (“But 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.”); *Inscoc v. Inscoc*, 700 N.E.2d 70 (Ohio App. 4 Dist. 1997) (“In view of *Palmore*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421, we may not directly or indirectly give effect to the second cause—the prejudices and biases that are generally aimed at persons with sexual orientations that are alternatives to heterosexual orientation.”); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio. App. 1987) (“This court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.”).

⁵⁸ 509 N.E.2d at 987.

⁵⁹ *Conkel*, 509 N.E.2d at 987.

⁶⁰ *Id.*

⁶¹ *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (“[I]t is impermissible to rely on any real or imagined social stigma attaching to [the] Mother’s status as a lesbian.”).

There are a minority of jurisdictions that distinguish *Palmore* on the grounds that race, unlike homosexuality, is a suspect classification and therefore has greater constitutional protection from discrimination.⁶² In *S.E.G. v. R.A.G.*,⁶³ for example, the court rejected the argument that *Palmore* was broad enough to apply to a family in which one parent was homosexual.⁶⁴ The court there noted only that race, as well as national origin, carries special constitutional protections and contended that it was the suspect classification that drove the Court's decision.⁶⁵ Since homosexuality is entitled to no similar heightened scrutiny, the holding and reasoning of *Palmore* is conclusively distinguishable.⁶⁶

The analysis cited in *S.E.G.* requires *Palmore* to be read in its most narrow form. Although the most quoted passage of *Palmore* and arguably its holding makes no mention of race and instead focuses on the Constitution's intolerance of prejudice, the Court does address racial prejudice specifically in various portions of the opinion.⁶⁷ For example, the Court prefaced their acknowledgement that determining custody based on the best interests of the children is a substantial government interest by explaining that racial classifications are subject to the most exacting scrutiny that must be justified by a compelling governmental interest and necessary to the accomplishment of a legitimate purpose.⁶⁸ Furthermore, the Court analogized its holding with other racial classifications it had invalidated because they were based on racial prejudice.⁶⁹ Finally, the holding of *Palmore* was arguably narrowed in its statement that "[t]he

⁶² E.g. *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo.App. E.D. 1987), but see, *Delong v. Delong*, 1998 WL 15536, *6+ (Mo.App. W.D. Jan 20, 1998) (declining to follow *S.E.G.* as using improper considerations and finding the analysis inconsistent with the best interests analysis); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995).

⁶³ 735 S.W.2d 164 (1987).

⁶⁴ *Id.* at 166.

⁶⁵ *Id.*

⁶⁶ See *id.*

⁶⁷ *Palmore*, 466 U.S. at 432-34.

⁶⁸ *Id.* at 432-33.

⁶⁹ *Id.* at 433-34 *citing* *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating a Kentucky law that forbade African-Americans from buying homes in a white neighborhood in order to prevent race conflicts).

effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”⁷⁰

Homosexuality has not been held to be a suspect classification deserving of strict scrutiny in assessing discriminatory legislation.⁷¹ This fact alone, however, does not determine that the Court in *Palmore* did not intend to prevent custodial determinations based solely on the court’s or society’s perceived prejudices. *Palmore*’s insistence that the Constitution cannot encourage private biases should not be self-limiting.

Moreover, even if *Palmore* was intended in 1984 to be narrowly applied to social stigmatization based only on race, it should now be extended to cover the potential social pressures created when one parent is homosexual in light of the subsequent decision in *Romer v. Evans*. Broad, invidious discrimination against gays and lesbians as a class was expressly disapproved in *Romer*.⁷² There, the Supreme Court invalidated a law that prohibited legal recourse arising from the discrimination of gays and lesbians.⁷³ The Court held that the law was “born of animosity toward the class of persons affected” and could not have a discernible rational relationship to a legitimate government purpose.⁷⁴ The statute “impose[d] a broad and undifferentiated disability on a single named group.” As Justice O’Connor stated in her concurrence in *Lawrence v. Texas*⁷⁵ regarding the Court’s decision in *Romer*, “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the

⁷⁰ Id. at 434.

⁷¹ See *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (determining that Amendment 2 of Colorado’s State Constitution which would have precluded all legislative, executive, or judicial action designed to protect the status of persons based on their sexual orientation fails rational basis review)

⁷² Id. at 624.

⁷³ Id.

⁷⁴ Id. at 621.

⁷⁵ *Lawrence v. Texas*, 539 U.S. 558 (2004) quoting *Romer*, 517 U.S. at 633.

group burdened by the law.”⁷⁶

Here, the discrimination against gay and lesbian parents when they are improperly divested of their custodial rights is just as invidious as the discrimination the court invalidated in *Romer* and similarly bares no relation to any legitimate governmental purpose, and therefore, as in *Romer*, should be considered unconstitutional. Giving credence to private prejudice is no less offensive to the principles of the Constitution when directed at homosexuals than when directed at people of color. As such, *Palmore* should be extended to reflect the Constitution’s intolerance of discrimination based on a parent’s sexual orientation, thereby making *any* consideration of injury caused by society’s intolerance an unconstitutional inquiry.

Furthermore, even if there is no suspect classification for gays and lesbians, there is a liberty interest to engage in private sexual conduct under *Lawrence*. In *Lawrence*, a Texas law criminalizing same-sex sexual conduct was struck down as a violation of due process.⁷⁷ The court held, “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”⁷⁸ It is inconsistent then, to deprive parents of the fundamental right to raise their children for enjoying a constitutionally protected liberty interest. This liberty interest is meaningless if severe civil penalties are imposed where minor criminal penalties are patently unconstitutional.

B. Becoming a Gay Adult

One of the primary concerns that courts have addressed is that children become gay or

⁷⁶ *Lawrence*, 539 U.S. at 583, quoting *Romer*, 517 U.S. at 633. For additional discussion of immorality and other illegitimate government concerns, see parts B and C of this section.

⁷⁷ *Id.* at 558.

⁷⁸ *Id.* at 578.

lesbian if a parent who identifies as homosexual raises them. Although a number of courts have summarily dismissed such an assertion because of the consensus among experts that homosexuality is not caused by a parent's sexual orientation,⁷⁹ there are still jurisdictions that have yet to discount the possibility.⁸⁰

For example, one Florida court of appeal engaged in a lengthy discussion about the benefits of heterosexual parents, including the inference that they will be more successful at creating heterosexual children.⁸¹ In emphasizing the state's legitimate interest for denying homosexual adults to adopt children, the court states, "In particular, Florida emphasizes a vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."⁸² This sentence evidences not only the State's preference for heterosexual citizens but also demonstrates its adherence to the presumption that homosexual parents could transmit or teach their sexual orientation to their children.⁸³

The justification proffered by the court has two flaws. First, it is demeaning and offensive to all gay and lesbian people. Second, it relies on no authority to support its contention that homosexuality begets homosexuality; in fact, it runs counter to established principles in the scientific community.

As to the first flaw, the dissent to the denial of rehearing *en banc* points out that

In our democracy ... it is not the province of the State, even if it were able to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities. This approach views homosexuality in and of itself as a social harm that must be discouraged, and so demeans the dignity of homosexuals, something that Lawrence specifically proscribes.⁸⁴

⁷⁹ See Conkel, 509 N.E.2d at 986; Matter of Adoption of Caitlin, 622 N.Y.S.2d 835, 840 (1994); Pleasant v. Pleasant, 628 N.E.2d 633, 641 (Ill.App. 1 Dist., 1993).

⁸⁰ See Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (Fla C.A.11 2004) *rehearing en banc denied* Lofton v. Secretary of Dept. of Children and Family Services, 377 F.3d 1275 (Fla. C.A.11 2004)

⁸¹ Lofton, 358 F.3d at 818.

⁸² *Id.*

⁸³ Lofton v. Secretary of Dept. of Children and Family Services, 377 F.3d 1275, 1300 (Fla. 2004)

⁸⁴ *Id.*

Just as the State does not have the right to constitutionally protect discrimination of homosexuals,⁸⁵ the State cannot have the inherent right to encourage one sexual orientation over another.

Furthermore, there is no basis for the implication that heterosexuals are superior people or citizens to homosexuals. In fact, there is evidence that homosexual people or couples are just as or more happy and committed than their heterosexual counterparts.⁸⁶ As to adherence to the law, there is no evidence that homosexual individuals commit crimes greater than their heterosexual counterparts. In spite of the myth that homosexual parents are more likely than heterosexual parents to molest their children, studies demonstrate that heterosexual males comprise the vast majority of all child molesters.⁸⁷ When researchers reviewed the records in one 1994 study of nearly 400 abused children, they discovered that fewer than 1% of the abusers were gay or lesbian.⁸⁸

Secondly, the scientific community has discredited the theory that parents can transmit or teach homosexuality to their children.⁸⁹ The children of gay and lesbian parents appear to be homosexual at a rate of about 10%, which is the same as the general population.⁹⁰ Furthermore, studies have indicated that homosexuality is biologically determined and is largely unaffected by environmental factors.⁹¹

Reliance on the theory that children become homosexual because of the sexual

⁸⁵ Romer, 517 U.S. at 624.

⁸⁶ <http://gaylife.about.com/b/2008/01/25/gay-couples-are-just-as-committed-as-straight-couples.htm>, last visited 12-6-08

⁸⁷ http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html, last visited 12-6-08.

⁸⁸ Id.

⁸⁹ See, e.g. Patterson, Charlotte. Adoption of Minor Children By Lesbian and Gay Adults: A Social Science Perspective, 199 Duke J. Gender L. & Pol'y 199 (1995).

⁹⁰ Id.

⁹¹ <http://jrscience.wcp.muohio.edu/Research/HNatureProposalsArticles/Homosexuality.biologicall.html>, last visited 12-6-08.

orientation of their parent is misplaced. Even if, *arguendo*, the theory that homosexuality was learned is true, it would still fail to constitute any discernible injury because as a group, gay and lesbian adults are just as law-abiding and enjoy relationships that are at least as equally successful as their heterosexual counterparts. The fact that the theory has been widely discredited further demonstrates that its use can never constitute legal injury.

C. Immorality

Courts restricting custody of a gay or lesbian parent often rely on their right to do so by the inclusion of their right to consider the “moral fitness” of the parent as part of the best interests analysis. But courts often do not elaborate on what precisely brings homosexuality under the umbrella of morality. Rather, courts take for granted that such an understanding is commonly accepted. That contention, however, is hotly disputed.

Some courts propose that if children were allowed to live with a gay or lesbian parent, they would be raised with a standard of morality that is generally unrecognized in society. In one extreme example, the Chief Justice of Alabama wrote, “Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of Nature’s God upon which this Nation and our laws are predicated.... [E]xposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.”⁹² The Chief Justice continues in his condemnation by citing the biblical Levitical Code and the teachings of St. Thomas Aquinas in support of his position.⁹³ He nears conclusion with the proclamation that “Homosexual conduct by its very nature is immoral, and its consequences are inherently

⁹² Ex parte H.H. (in re D.H. v. H.H.), 830 So. 2d 21, 26 (Ala. Sup. Ct. 2002) (C.J. Moore, concurring)

⁹³ Id. at 33-34.

destructive to the natural order of society.”⁹⁴ The Chief Justice seems to assert that the “immorality” of the parent would irreparably skew the exposed child’s entire concept of morality and impose a value system that is unacceptable in the rest of society.

Additionally, in *Van Driel, supra*,⁹⁵ even though the court applied a clear nexus approach the court stated that “immoral conduct by one parent does not automatically render that parent unfit to have custody of the children and require an award of custody to the other parent.”⁹⁶ While the court did not divest the mother of custody, it still subtly equated homosexuality with immorality by its casual reference to the controlling nature of the treatment of immoral conduct in a best interest analysis. Both statements, therefore, perpetuate the harmful stereotype that homosexuality cannot be separated from its inherent immorality. Both also discuss the immorality in terms that imply its nature is potentially both contagious and damaging to the child’s character.

This approach fails to realize that American society has no single prevailing universal standard of “morality” declaring homosexuality immoral. First, there certainly is no single faith that binds all Americans.⁹⁷ Although the majority of Americans are Protestant Christian,⁹⁸ no single religious body boasts even 20% of the Protestant majority and the vast majority of denominations command fewer than 2 million members.⁹⁹ Catholicism, Judaism, Islam, Hinduism, Mormonism, Agnosticism and Atheism similarly command adherents in the millions. Second, Americans are deeply divided on the issue of homosexuality. This division is exemplified by the recent turmoil surrounding Proposition 8 in California, where the vote

⁹⁴ Id. at 37-38.

⁹⁵ See discussion of *Van Driel, supra*, Part I, Section C.

⁹⁶ *Van Driel*, 525 N.W.2d at 39 quoting *Shoop*, 460 N.W.2d at 724.

⁹⁷ There are, additionally, some obvious separation of church and state concerns that are implicated here. This paper, however, could not sufficiently address the depth of these arguments and will not attempt to do so.

⁹⁸ <https://www.cia.gov/library/publications/the-world-factbook/print/us.html>

⁹⁹ Membership Statistics For The National Council of Churches' Member Communions
<http://www.nccusa.org/news/061102updatedstats.htm>

regarding the legality of gay marriage was nearly equally split. In fact, there may be even more support for gays and lesbians than the vote would indicate because some support some gay rights but oppose same-sex marriage.¹⁰⁰

Even among the nation's most common religious organizations, there is not a consensus that homosexuality implicates moral concerns. Homosexuals get varying treatment from governing bodies of major religious organizations. The Episcopal Church, for example, allows the ordination of openly gay clergy.¹⁰¹ Similarly, Reform Judaism includes gays and lesbians in the rabbinate and cantorate.¹⁰² So while some courts may cite to the Bible and religious texts to support its disapproval of homosexuality, even some biblical scholars and religious organizations deny the finding that homosexuality is immoral.

Furthermore, scientific studies suggest that being raised by homosexual parents is not detrimental to the child's sense of morality. In fact, many demonstrate that being raised by gay parents can lend positive attributes. One study, for example, demonstrated that children of gay or lesbian parents are generally more tolerant and open-minded about a variety of issues.¹⁰³ Another study suggested that daughters of lesbians have more self-confidence than their counterparts raised by heterosexuals.¹⁰⁴ The same study showed that the sons are more caring and less aggressive than their counterparts.¹⁰⁵ Attributes such as caring for others and tolerance seem to be, and ought to be, embraced by most commonly accepted definitions of morality.

Those courts that take for granted that homosexuality is immoral rely neither on

¹⁰⁰ See, e.g. http://www.huffingtonpost.com/2008/12/05/newsweek-poll-public-supp_n_148897.html (showing growing support for gay marriage); <http://www.pollingreport.com/civil.htm> (polls demonstrating support for civil unions but not same-sex marriage)

¹⁰¹ <http://www.beyondinclusion.org/>, (website dedicated to celebrating the ministries and commitments of gay and lesbian people in the Episcopal church.)

¹⁰² Religious Action Center of Reform Judaism, <http://rac.org/advocacy/issues/issuegl/>, last visited 12-17-08.

¹⁰³ <http://www.colage.org/resources/facts.htm>, last visited 12-6-08, citing (Harris and Turner, 1985/86)

¹⁰⁴ Id.

¹⁰⁵ Id. citing (Hoeffler, 1981)

indisputable religious tenets nor popular concepts of morality. Those court further ignore that the judiciary's "obligation is to define the liberty of all, not to mandate our own moral code."¹⁰⁶ Although custody disputes should be determined free of hostile prejudice, those courts seem to rely only on the personal biases of the judges rather than the law. Morality concerns are not implicated by the sexual orientation of a parent, and therefore it is improper for courts to continue to casually frame the issue in such a light. Similarly, because any theory of injury based on the presumption that exposure to homosexuality creates questionable values is inherently flawed, it should not constitute a basis upon which to restrict custody.

III. Analysis

The approaches currently taken by the courts improperly direct the inquiry away from what is best for individual children and towards their own, often prejudiced, opinions about what is best for society. In order to focus courts back to the proper best interests analysis, courts should be barred from taking the homosexuality of a parent into consideration when making child custody determinations. The benefits of this solution are threefold: (1) it properly directs the legal analysis in the courts; (2) it prevents the inclusion of injury that is too unsubstantiated, unconstitutional, and unconscionable for a court to consider; and, (3) it encourages tolerance of all lifestyles by acknowledging and not punishing children born into functional families rather than requiring a draconian adherence to formalistic "traditional" families.

As stated in sections above, the presumption and *per se* approaches are the most offensive to the application of a best interests analysis because they merely rely on a parent's homosexuality to justify restricting that person's custodial rights. In denying or limiting the parent's opportunity to prove that their sexual orientation is not detrimental to the child, the court

¹⁰⁶ Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

places an actual or potential relationship of a parent to an unrelated adult above all concerns relating to the child – the person toward whom the best interests analysis is meant to be directed. The clear nexus approach is a dramatic departure from both the presumption and the per se approaches because it properly places the burden on the parent seeking to restrict a gay or lesbian parent’s custodial rights to prove that the parent is actually harming the child. The court must make a finding of fact that *this* child is being harmed *because of* a parent’s sexual orientation. This burden is especially difficult because the court cannot rely on possible future damage nor can it consider the damage supposedly being inflicted on society.

None of these approaches are viable, however, because to different degrees they each rely on an injury that a court should not be able to properly consider. As discussed above, each of the prevailing theories of injury cannot constitute harm because they are either unconstitutional or because they are significantly inconsistent with the values of our society because they promote bigotry and prejudice. Since each approach is merely a vehicle for an inappropriately considered theory, each approach must ultimately fail.

Moreover, what if, *arguendo*, the child was facing excessive discrimination daily as a result of living with two moms or two dads? Is it right to subject a child to such a scenario? Children of Lesbians and Gays Everywhere, (“COLAGE”) an organization dedicated to building community within and advocating for children of homosexual and transgender parents states on their website that “these youth do report facing significantly more prejudice and discrimination, ... that schools are a key place where they face intolerance- from peers, teachers, school administration, and school systems that are affected by the homophobia in our society ... [and that] students who have LGBT parents experience harassment at the same rate as students who themselves are gay.”

The contention that the harassment of children of gay and lesbian parents is at the same level as gay and lesbian youth may be dubious.¹⁰⁷ As Joel Best demonstrated, advocacy organizations have an interest in dramatizing statistics that both prove their point and demonstrate the need for their existence.¹⁰⁸ Social activists, or “claimsmakers”, have various considerations. First, they need to dramatize the problem in order to force the public and policymakers to credit their issue.¹⁰⁹ For example, there is only so much media time, newspaper space, and time before Congress to be divided among social activists for all the different public policy issues. Those advocates who are able to use statistics to demonstrate widespread harm may be more likely to persuade the legislature and the public that their issue is important and must be addressed.¹¹⁰ Second, the claimsmakers need to portray themselves as having unique knowledge of the issue.¹¹¹ This may be done by narrowing an issue, or by typifying a case and widely presenting it.¹¹² For example, where COLAGE is peripherally interested in gay rights, they have become a go-to organization on the more narrow issue of educating about and advocating for problems faced by children of gay, lesbian, bisexual and transgender parents. Third, claimsmakers may consider valence issues.¹¹³ There, the claimmaker may build support on an easily demonstrable issue in order to build support for related issues.¹¹⁴ For example, it may be possible to research the number of children of gay and lesbian parents who have been teased by their peers. COLAGE, then, may put forth these numbers in order to coalesce support for their broader goal of reducing homophobia broadly and specifically reducing courts’ and

¹⁰⁷ See Eliva R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual, and Transgendered Youth*, 1 *J. Gender Race & Just.* 429 (1997-1998).

¹⁰⁸ Joel Best, *Threatened Children: Rhetoric and Concern about Child-Victims*, 12 (1990)

¹⁰⁹ *Id.* at 13.

¹¹⁰ *Id.* at 14.

¹¹¹ *Id.* at 12.

¹¹² E.g., Nan Stein, *Classrooms and Courtrooms: Facing Sexual Harassment in Schools*, 10-27 (1999).

¹¹³ See Best at 12.

¹¹⁴ E.g., Stein at 10-27.

schools' acceptance of society's intolerance of gays and lesbians.¹¹⁵ Essentially, statistics cannot always be credited as absolutely correct, because they often cannot be differentiated from the motives behind their proponents.

Assuming however, that a child is facing excessive discrimination, what should a court do? There is a credible argument that barring consideration of sexual orientation could have the unintended effect of shifting the cost of cultivating tolerance to the children who never wanted to be civil rights advocates first and students second. It may not be appropriate to ask children to bear such a cost. Furthermore, asking them to do so would force courts to commit the same offense that was criticized in the *per se* approach – shifting the focus from what is in the best interests of society in the long term rather than emphasizing what is best for the child who is subject of the dispute.

These concerns can be assuaged because barring consideration of sexual orientation in custody disputes does nothing to place gay and lesbian parents above reproach. By contrast, the rule merely places these parents on the same field as heterosexual parents. As with heterosexual parents, where a situation exists such that one parent is placing their own interests before those of their child, that can properly be considered, particularly where the other parent is placing the child's interests before their own. For example, courts have long considered inappropriate sexual exposure to be an appropriate inquiry in a child custody dispute. Such an inquiry would not be barred for a homosexual couple but allowed for a heterosexual couple. By contrast, if either couple was engaging in sexual intercourse in the living room in full view of the children, the court could appropriately express its concern. The court simply could not, for example, restrict custody merely because the intercourse that occurs silently, behind closed bedroom doors, is between a mother and her girlfriend, partner, or wife, rather than between a father and

¹¹⁵ See *id.*

his new girlfriend or wife.

Similarly, just as affectionate words or limited public displays of affection in the home such as hugging or kissing on the cheek is commonplace for heterosexual couples, it should not then be used as basis for restricting custody when a similarly committed homosexual couple demonstrates the same conduct. Such affection can often signal and encourage committed, stable relationships that improve the quality of life not only of the couple but also those who are close to them, especially children. A homosexual couple and their children should not be punished for the stable home environment they cultivate, while a similarly situated heterosexual couple would be rewarded. The rule barring consideration of sexual orientation would properly focus the inquiry on whether the parents are able to provide a stable, positive, and nurturing home environment, by placing each parent on equal footing.

Additionally, discrimination of the magnitude that would dramatically affect the best interests of the child in the dispute would likely implicate some real concerns over the offending parent's choices or the relationship between the child and parent. By way of example, suppose that a lesbian mother enrolls her child in a religious school that teaches evangelical, anti-gay curriculum. Suppose further that the mother used the materials the child brought home to harass the teachers, principal and board members of the school and soon began picketing in front of the school each day to publicize their anti-gay bias. Although the mother may have the best intentions, it is reasonably foreseeable that the child would then be subject to obvious disdain from his teachers and excessive, never-ending taunting from his peers. Barring consideration of the mother's sexual orientation, however, would not compel the court to ignore her actions. Here, it is evident that the mother placed a political agenda above the well being of her child. The court could properly consider this fact in weighing the child's custody options, even under

this proposed framework. In this scenario, it would not be the mother's sexual orientation that would be at issue, but rather the mother's conduct that the court could properly consider.

Where the parent-child relationship and the situation at home are unhealthy, a court must consider it. I do not propose that gay parents be excepted from this important consideration. By contrast, I simply contend that 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 this inquiry overcomes the best interest *of the child* analysis. The parent's sexual identity in and of itself does not cause harm.

Conclusion

Homosexuals should be entitled to the same human rights as heterosexuals, including the right to have their children's custody decided in a fair manner. This is impossible when the parent's homosexuality is put on trial, detracting from the truly critical analysis – the best interests of the child. The courts that divest a gay or lesbian parent on the basis of their sexual identity or homosexual conduct utilize frameworks that rely on imaginary injuries whose consideration is either constitutional or abhorrent to our values as a society. It is the child, and society at large, that is damaged when courts perpetuate harmful stereotypes and allow improper frameworks of injury to be considered and to cause a restriction of otherwise proper custodial rights.