

Commentary: Recognizing and Respecting the Rights of LGBT Youth in Child Custody Proceedings

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Highlight

Abstract

This Commentary addresses how the legal rights of lesbian, gay, bisexual, and transgender (LGBT) children affect child custody disputes. The legal standard for determining child custody is the "best interests of the child" standard. This standard is subjective and highly discretionary. In cases concerning LGBT youth, judges must ultimately rely upon their own, possibly skewed conception of sexual orientation and gender identity and expression. Absent a strong assertion of the child's rights, a judge could decide that being LGBT is undesirable and place the child with a parent who would discourage the child from growing into an LGBT adult.

To guide judges in their decision, this Commentary argues that, under *Lawrence v. Texas*, an LGBT youth possesses the constitutional right to be treated with respect equal to that afforded straight or cisgender youth in regards to their sexual orientation or gender identity and expression. After *Lawrence*, a judge may not consider becoming an LGBT adult as an undesirable outcome for a child in a child custody determination. Although the LGBT youth's minority permits the state and parents to limit the youth's rights in certain ways, there is no interest of sufficient weight to override the youth's rights under *Lawrence*. In practice, the youth's rights weigh in favor of placing an LGBT youth with the parent most capable of helping the youth develop into a healthy, autonomous LGBT adult.

Text

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Introduction

Christine understood herself to be a girl. ¹ Christine was assigned male at birth, but around age four she wanted to dress in girls' clothes. ² Her parents divorced in 2001 when she was six years old. ³ Pursuant to the couple's stipulation, the court granted Christine's mother Victoria residential custody. ⁴ By age ten, Victoria allowed

¹ *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599, at 1 (Ohio Ct. App. Mar. 23, 2007).

² *Id.* at 2.

³ *Id.* at 1.

⁴ *Id.* at 1.

Christine to be addressed by her feminine name and attend transgender support groups.⁵ Victoria also relocated her family to enroll Christine as a girl in school.⁶ Victoria intended to allow Christine to undergo hormone therapy and possibly sex-reassignment surgery when Christine was older.⁷ This was all too much for Christine's distant father Kevin.⁸

In early 2004, Kevin learned that Victoria was treating Christine as a girl [*173] and secured an emergency court order.⁹ The order modified the custody arrangement to joint physical custody, required Victoria to stop treating Christine as a girl, and also barred Christine from attending transgender support groups.¹⁰ The court also ordered Victoria to re-enroll Christine as a boy and not seek treatment for Christine's Gender Identity Disorder ("GID").¹¹

Later, Kevin alleged that Victoria violated the order and sought sole custody.¹² During these proceedings, Christine sent her father a video in which she pled with him that she was a girl and wanted to stay a girl.¹³ Despite having "very little" contact with Christine prior to the proceeding and a qualified expert's recommendation that Christine be allowed to explore her gender, the lower court granted Kevin's request and awarded him sole residential custody.¹⁴ The court also ordered Victoria to treat Christine as a boy.¹⁵ In *Smith v. Smith*, the Ohio Court of Appeals affirmed the lower court's determination, noting, "although this case reveals some of the severe limitations in using the judicial system to resolve complex and possibly controversial childrearing and childhood mental health issues, we are bound by the law in this matter."¹⁶

The 2007 case of *Smith v. Smith* illustrates a pressing issue in our courts.¹⁷ In 2010, there were over 870,000 divorces in the United States.¹⁸ As lesbian, gay, bisexual, and transgender minors ("LGBT youth") come out at younger and younger ages, courts will increasingly face custody disputes where divorcing parents disagree about the desirability of their child's emerging sexual orientation or gender identity and expression.¹⁹ This Commentary

⁵ Id. at 1.

⁶ Id. at 1.

⁷ *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599, at 2 (Ohio Ct. App. Mar. 23, 2007).

⁸ Id. at 1.

⁹ Id. at 1.

¹⁰ Id. at 1.

¹¹ Id. at 1.

¹² Id. at 2.

¹³ *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599, at 2 (Ohio Ct. App. Mar. 23, 2007).

¹⁴ Id. at 2-6.

¹⁵ Id. at 5.

¹⁶ Id. at 12.

¹⁷ See id. at 12.; see also Shannon Safron Perez, *Is It a Boy or Girl? Not the Baby, the Parent: Transgender Parties in Custody Battles and the Benefit of Promoting a Truer Understanding of Gender*, 9 Whittier J. Child & Family Advoc. 367, 367-93 (2010) (providing a further discussion of *Smith v. Smith* and other custody cases involving transgender parties).

¹⁸ See National Marriage and Divorce Rate Trends, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Apr. 18, 2012).

¹⁹ See Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking the Best Interest for the Queer Child*, [2008 Mich. St. L. Rev. 1053, 1086 \(2008\)](#) ("while there are no statistics suggesting that queer youth are more often the subjects of custody disputes, sexuality and gender-nonconformity can become an issue during custody litigation. Parents often have strong reactions to a child's queerness, and those reactions are exacerbated in custody and visitation disputes...A parent who is

addresses the substantive due process rights an LGBT youth possesses in her sexuality or gender identity/expression in custody proceedings.²⁰

[*174] First, this Commentary explains how courts decide custody issues and focuses specifically on the "best interests of the child" standard. The "best interests" standard is the universal guiding principle for courts when determining custody. It is also famously subjective, leaving LGBT youth uniquely vulnerable in cases where a judge misunderstands or is hostile to the youth's sexuality or gender identity/expression.²¹ To adequately protect these youth, courts must have a more robust and objective understanding of the rights these youth possess.

Second, this Commentary argues that an LGBT youth's sexual orientation or gender identity/expression affords her legal rights, which a court must recognize and respect when determining custody. Relying upon "Enjoyment Theory of Children's Rights"²² and Supreme Court cases concerning the right of a minor to obtain an abortion, this Commentary posits that a minor possesses substantive due process rights and that a parent and the state hold these rights in trust until the minor is mature enough to exercise them.

Ultimately, this Commentary argues that, under *Lawrence v. Texas*,²³ LGBT minors possess the right to be treated with the same respect afforded heterosexual or cisgender children in regards to their sexuality or gendered behavior in child custody proceedings. A court violates this right when it, with the intent of discouraging the child's sexual orientation or gender identity/expression, awards custody to a parent who is also hostile to the orientation or identity/expression.

Finally, this Commentary examines the possible objections of the non-supportive parent. Relying upon *Meyer v. Nebraska*²⁴ and *Prince v. Massachusetts*,²⁵ this Commentary argues that although a parent has the right to raise her child the way she would like, the minor's rights and the state's interest in protecting the minor limit the parent's right. Additionally, the nature of custody determinations precludes the parent from asserting these rights. In the end, the LGBT youth's right to her sexual orientation or gender identity/expression trump parental rights.

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I. LGBT Youth and the Insufficiency of the "Best Interests of the Child" Standard

This Section sets forth why the "best interests of the child" standard, which is the guiding principle in making child custody determinations, is insufficient to protect LGBT youth. Part A explains who LGBT youth are; Part B outlines the general principles governing child custody determinations including the "best interest of the child" standard and

supportive of his or her child's sexual or gender identity risks a custody battle if the other parent disagrees.") [hereinafter Traditional Advocacy].

²⁰ Because transgendered youth may require hormone therapy and surgical procedures, their rights within a family setting are very unique. See, e.g., NPR, Parents Consider Treatment to Delay Son's Puberty, (May 8, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90273278> (last visited April 15, 2012); Hanna Rosin, A Boy's Life, *The Atlantic Monthly* (Nov. 2008), available at <http://www.theatlantic.com/magazine/archive/2008/11/a-boy-apos-s-life/7059/> (last visited April 15, 2012).

²¹ See Unif. Marriage and Divorce Act § 402 (1970, amended 1971, 1973), 9A U.L.A. 156 (1987) [hereinafter UMDA].

²² See Laurence D. Houlgate, Children's Rights, State Intervention, Custody and Divorce: Contradictions in Ethics and Family Law 27-51 (2005).

²³ [*Lawrence v. Texas*, 539 U.S. 558 \(2003\)](#).

²⁴ [*Meyer v. Nebraska*, 262 U.S. 390 \(1923\)](#) (holding that parents have the right to control the education and upbringing of their children).

²⁵ [*Prince v. Massachusetts*, 321 U.S. 158 \(1944\)](#) (holding that the state's interest in protecting children from exploitation overrides a parent's right to control child's religious upbringing).

its constitutional bounds; finally, Part C explains why the traditional "best interests" standard fails to guard the interests of LGBT youth.

A. Who Are LGBT Youth?

Quite simply, this Commentary uses the term "youth" to refer to people under the age of eighteen. States typically consider persons over eighteen as legal adults. In custody proceedings, persons over eighteen may decide for themselves with whom they wish to live.²⁶ These persons are also competent to make major legal and medical decisions and are usually not subject to their parents' consent.²⁷

"LGBT" is an umbrella term that stands for lesbian, gay, bisexual, and transgender.²⁸ Sexual orientation is "a person's emotional and sexual attraction to other people based on the gender of the other person."²⁹ Transgender is an umbrella term used to describe people whose "gender expression is nonconforming and/or whose gender identity is different from their birth-assigned gender."³⁰ Gender identity is a "person's internal, deeply felt sense of being either male, female or something other, or in between."³¹ Gender expression is an individual's "characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine."³²

Today, no major mental health organization regards sexual orientation as a [*176] disorder.³³ Such was not always the case, however. For many years, the American Psychiatric Association ("APA") included homosexuality in its Statistical Manual of Mental Disorders ("DSM").³⁴ The APA reversed its position in 1973.³⁵ In 1975, the American Psychological Association followed suit and declared, "homosexuality per se implies no impairment in

²⁶ For a state-by-state survey of the age of majority and medical decisions, see National Association of Social Workers, Legal Rights of Children, 41 App. A (2010) [hereinafter NASW]; see also, Paul Arshagouni, "But I'm an Adult Now...Sort Of": Adolescent Consent in Health Care Decision-Making and the Adolescent Brain, *9 J. Health Care L. & Pol'y* 315, 331-32 (2006) (stating "the general age of majority in the United States has shifted downwards from twenty-one to eighteen...in most legal contexts, the age of majority is now eighteen years. This is certainly true with respect to matters of health care consent.").

²⁷ See Arshagouni, *supra* note 26, at 331-32.

²⁸ The following paragraph contains definitions crafted by the Transgender Law Center, the National Center for Lesbian Rights, and the Gay-Straight Alliance Network, drawing from the San Francisco Human Rights Commission's Compliance Guidelines to Prohibit Gender Identity Discrimination. See NCLR & TLC, LGBT Issues for School Attorneys, available at <http://transgenderlawcenter.org/pdf/LGBT%20School%20Law%20101%20-%20full%20doc.pdf>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See Am. Psychol. Ass'n, Just the Facts about Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel 6 (2008), available at http://www.nasponline.org/advocacy/docs/Just_the_Facts_012308.pdf ("The American Academy of Pediatrics, the American Counseling Association, the American Psychiatric Association, the American Psychological Association, the American School Counselor Association, the National Association of School Psychologists, and the National Association of Social Workers, together representing more than 480,000 mental health professionals, have all taken the position that homosexuality is not a mental disorder and thus is not something that needs to or can be "cured.") [hereinafter Just the Facts].

³⁴ See American Psychiatric Association, Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II 6th Printing, page 44 1 (1973), available at http://www.torahdec.org/Downloads/DSM-II_Homosexuality_Revision.pdf.

³⁵ American Psychiatric Association, Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies) (May 2000), available at <http://mpipp.org/American-Psychiatric-Assoc-position-statement.pdf>.

judgment, stability, reliability, or general social and vocational capabilities." ³⁶ These organizations and others like them uniformly condemn attempts to alter a person's sexual orientation by means of counseling or therapy. ³⁷

The APA still includes some forms of transgender identities in the DSM under the term Gender Identity Disorder ("GID"). ³⁸ The proposed DSM-V replaces the term GID with Gender Dysphoria and defines the condition as "[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration." ³⁹

The DSM's inclusion of nonconforming gender identity and expression is controversial. Some argue that this label pathologizes variant gender identities/expressions and leads to greater stigmatization. ⁴⁰ Others note that the inclusion **[*177]** may be necessary for transgender people, particularly minors, to secure hormone treatment or surgery. ⁴¹

The Standards of Care for Gender Identity Disorders produced by the Harry Benjamin International Gender Dysphoria Association (HBI-GDA) is the most widely used manual for treating persons with a GID diagnosis. ⁴² The manual provides criteria that must be met for a child to be diagnosed with GID. ⁴³ Diagnosing GID in youth is complex as the outcomes of gender identity disorders in children are more fluid and varied. ⁴⁴ The goal of the treatment for persons with GID is "lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment." ⁴⁵ This may include physically transitioning to the person's understood gender by means of hormone therapy or reassignment surgery. ⁴⁶

³⁶ Discrimination against Homosexuals, Am. Psychol. Ass'n (1975), <http://www.apa.org/about/policy/discrimination.aspx>.

³⁷ See Just the Facts, supra note 33, at 5.

³⁸ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders §§302.6, 302.85 (4th ed. 2000).

³⁹ Gender Dysphoria in Children, American Psychiatric Association (May 4, 2011), <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=192>. The DSM-V lists eight factors, six of which must be present for a Gender Dysphoria diagnosis: 1. a strong desire to be of the other gender or an insistence that he or she is the other gender (or some alternative gender different from one's assigned gender); 2. in boys, a strong preference for cross-dressing or simulating female attire; in girls, a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing; 3. a strong preference for cross-gender roles in make-believe or fantasy play; 4. a strong preference for the toys, games, or activities typical of the other gender; 5. a strong preference for playmates of the other gender; 6. in boys, a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; in girls, a strong rejection of typically feminine toys, games, and activities; 7 a strong dislike of one's sexual anatomy; 8. a strong desire for the primary and/or secondary sex characteristics that match one's experienced gender. Id.

⁴⁰ See Jonathan L. Koenig, Distributive Consequences of the Medical Model, *46 Harv. C.R.-C.L. L. Rev.* 619, 628 (2011).

⁴¹ See id. (reviewing the arguments in support of and against the medical model and describing its pros and cons); see also, J. Lauren Turner, From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care, *47 Fam. Ct. Rev.* 552 (July 2009).

⁴² See Sonja Shield, The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment, *31 N.Y.U. Rev. L. & Soc. Change* 361, 385 (2007) ("Multiple medical standards of care have been developed to guide treatment of people who seek some degree of medical transition of their sex assignment. The most well-known and commonly followed is the Harry Benjamin International Gender Dysphoria Association's Standards of Care (HBI-GDA Standards of Care."); Harry Benjamin Int'l Gender Dysphoria Ass'n, Standards of Care for Gender Identity Disorders (6th ed. Feb. 2001), available at: <http://www.wpath.org/Documents2/socv6.pdf> [hereinafter HBI-GDA].

⁴³ HBI-GDA, supra note 42, at 5.

⁴⁴ Id. at 8-9.

⁴⁵ Id. at 1.

LGBT youth are a vulnerable population in today's society, and they face unique challenges in schools, foster care and juvenile systems, medical contexts, and in their families and communities.⁴⁷ At least half of the LGBT youth who come out to their families face negative reactions, and roughly a third of them are subsequently physically abused.⁴⁸ LGBT youth also suffer from significantly higher rates of suicidal ideation and suicide attempts, the most reliable indicators [*178] of suicide risk.⁴⁹ Transgender youth face additional duress as their bodies develop into a sex with which their understood gender does not conform.⁵⁰ To protect LGBT youth, many legal commentators have advocated a more robust understanding of LGBT youth's rights,⁵¹ and though advances have been made, many LGBT youths' rights remain far from realized.⁵² Having explored the nature of sexuality and gender in LGBT youth, this Commentary turns to the nature of child custody proceedings.

B. Child Custody Proceedings and the "Best Interests of the Child" Standard

Ordinarily, both parents share the rights and responsibilities of raising their child.⁵³ However, when parents divorce, these rights and responsibilities fragment and a judge must determine a custody arrangement for the child.⁵⁴ Most basically, these rights and responsibilities fall into two categories: legal custody and physical custody.⁵⁵ Legal custody carries with it the power to make major legal decisions concerning the child, such as education and healthcare.⁵⁶ Physical custody refers to whom the child will live with. A judge may order any combination of these two types of custody.⁵⁷

⁴⁶ Should a youth be diagnosed as having GID, the HBGDA manual recommends three escalating levels of physical intervention: fully reversible, partially reversible, and irreversible. Fully reversible intervention refers to administering puberty-delaying hormones; partially reversible intervention refers to administering masculinizing or feminizing hormones; and irreversible intervention refers to sex reassignment surgery in which masculine or feminine physical characteristics are surgically constructed. The manual recommends surgery not be undertaken prior to age eighteen. *Id.* at 9-11. For a critique of the manual's three categories, see Shield, *supra* note 42, at 392 (noting "because it imposes a significant series of requirements the transgender person must meet, and places doctors and social workers in a gatekeeper role between the transgender individual and the treatment sought, the HBGDA Standards of Care has been criticized as "unnecessarily restricting access to hormones and surgery.").

⁴⁷ See Sarah E. Valentine, *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, *19 Yale J.L. & Feminism* 449 (2008) [hereinafter LGBT Youth Bibliography].

⁴⁸ See Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, *6 Nev. L.J.* 774, 787 (Spring 2006).

⁴⁹ See Suicide Prevention Res. Ctr., *Suicide Risk and Prevention for Lesbian, Gay, and Transgender Youth* (2008), available at http://www.sprc.org/library/SPRC_LGBT_Youth.pdf.

⁵⁰ See Shield, *supra* note 42, at 383.

⁵¹ See, e.g., Fedders, *supra* note 48, at 798-805.

⁵² See LGBT Youth Bibliography, *supra* note 47, at 452 ("Since the mid-1980s, studies have been funded, articles published, lawsuits brought, schools started, policy reform undertaken, and public education pursued, all with the intent of bettering the situation of queer kids....Still, while gains have been made, queer youth continue to face horrendous obstacles.").

⁵³ Child Custody & Visitation § 10.03[2] (Matthew Bender & Co., Lexis, 2012) ("As long as there is no court directive in effect, both parents continue to have equal rights in the child.").

⁵⁴ *Id.* at § 10.03[1].

⁵⁵ *Id.* at § 10.03[3].

⁵⁶ Homer H. Clark, Jr. & Ann Laquer Estin, *Domestic Relations: Cases & Probs.* 980 (7th ed. 2005).

⁵⁷ Linda Elrod, *Child Custody Prac. & Proc.* § 4:34 (West 2012).

In awarding either type of custody, a judge must decide what arrangement is in the "best interests of the child" and rule accordingly.⁵⁸ The "best interests" standard is the "lodestar principle" in the United States guiding child custody determinations.⁵⁹ This standard reflects the government's traditional power as *parens patriae* - the ultimate protector of a child's welfare.⁶⁰ When determining custody between parents, the child's best interests override practically any other concern.⁶¹

[*179] Determining the "best interests" of the child ultimately consists of two questions: first, what is the desirable long-term goal for the child; and second, what present arrangement is most conducive to the child reaching that goal?⁶² Because judges must rely upon their own understanding of the present situation and possible future outcomes, the inquiry is very fact-intensive and famously subjective.⁶³ One court has gone so far as to describe the "best interests" standard as the fact-finder's "best guess."⁶⁴ Due to the nature of the inquiry, appellate courts generally defer to the trial court's decision and only reverse upon an abuse of discretion.⁶⁵ One scholar places the chances of reversal around sixteen percent.⁶⁶

Oftentimes, codified factors guide the court's considerable discretion. These factors could include the wishes of the parents, the child's preferences, and the mental stability of the parties.⁶⁷ These factors do not typically bind a judge, however, and the judge must rely on her own subjective understanding to make a ruling.⁶⁸

A trial judge's discretion is also limited by constitutional principles.⁶⁹ Since federal and state courts have "constitutionalized" the area of family law, determinations based upon the parties' gender, race, ethnicity, or religion are now subject to constitutional review.⁷⁰ A judge's use of any of the aforementioned factors must be justified by a state interest of sufficient importance.⁷¹

Parties' religion is a highly relevant factor to this Commentary as many parents oppose their LGBT child's sexuality or gender identity/expression for religious reasons. In making custody determinations involving religious claims,

⁵⁸ Child Custody & Visitation, *supra* note 53, at § 1.05[3].

⁵⁹ *Id.*

⁶⁰ *Id.* at § 1.03.

⁶¹ *Id.* at § 10.01[2][b].

⁶² See John Eekelaar, *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, 8 *Int'l J.L., Pol'y & Fam.* 42, 46-49 (1994).

⁶³ See *Child Custody Prac. & Proc.* § 57 (West 2012).

⁶⁴ *Id.*

⁶⁵ *Id.* at § 14:2. In some states, appellate courts will conduct a more searching review. For a discussion of these states and their standards, see *id.* at § 14:32.

⁶⁶ *Id.* at § 14:2.

⁶⁷ UMDA, *supra* note 21, at § 402.

⁶⁸ *Child Custody & Visitation*, *supra* note 53, at § 10.06[2].

⁶⁹ *Id.* at § 1.01[6][c] ("Traditional federal deference to state law and policy on domestic relations issues no longer protects those laws from challenge under the federal constitution. Furthermore, although not necessarily arising in domestic relations contexts, Supreme Court decisions in areas such as religious liberty, equal protection for nonmarital children and their fathers, equal protection for woman and racial minorities, and personal liberties protection under the Due Process Clause of the fourteenth amendment, have had an enormous effect in the area of family law, including child custody and visitation.")

⁷⁰ *Id.*

⁷¹ For a detailed discussion of each factor and its respective level of judicial review, see *id.* at § 1.01[6][c] (gender), § 10.10[2] (race), § 10.10[3] (religion), and § 10.10[4] (ethnicity).

judges must remain neutral, neither favoring religion nor irreligion.⁷² A judge may only consider a party's religious beliefs when the beliefs pose harm to the child.⁷³ Further discussion of this issue is reserved for Section IV, which explores [*180] parental rights.

Additionally, a judge may not consider society's possible negative reaction to gender, race, ethnicity, or religion in making a "best interests" determination after the U.S. Supreme Court's decision in *Palmore v. Sidotti*.⁷⁴ In *Palmore*, a white couple divorced and the trial court granted custody of their daughter to the mother.⁷⁵ Subsequently, the mother started cohabitating with a black man.⁷⁶ The trial court granted the father's petition for custody, reasoning that the child would suffer "from the social stigmatization that is sure to come" if she remained in a mixed-race household.⁷⁷ The Supreme Court reversed the lower courts, holding that they had inappropriately made the custody determination on the basis of race.⁷⁸ The Court acknowledged that the state had an interest in guarding the child's best interests and that a child living in a mixed-race household could be subjected to stigmatization.⁷⁹ Still, the Court found this interest illegitimate, stating, "the 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."⁸⁰

C. LGBT Youth and the Insufficiency of the Traditional "Best Interests" Standard

Because the traditional "best interest" standard is highly subjective, LGBT youth are uniquely vulnerable in custody cases where the deciding judge regards the youth's sexual orientation or gender identity/expression as undesirable.⁸¹ In the past, judges' biases against LGBT parents often resulted in these parents losing custody of their children.⁸² Even after homosexuality or nonconforming gender identity/expression ceased to be per se reasons for finding

⁷² *Id.* at 10.10[3].

⁷³ *Id.*

⁷⁴ [Palmore v. Sidoti, 466 U.S. 429 \(1984\).](#)

⁷⁵ [Id. at 430.](#)

⁷⁶ *Id.*

⁷⁷ [Id. at 431.](#)

⁷⁸ [Id. at 432.](#)

⁷⁹ [Id. at 433.](#)

⁸⁰ [Palmore v. Sidoti, 466 U.S. 429, 433 \(1984\).](#)

⁸¹ See Traditional Advocacy, *supra* note 20, at 1086 ("Parental sexual orientation and gender-nonconformity have long been used as weapons in custody proceedings. It is not surprising that a child's sexual orientation or gender non-conformity would likewise become an issue."); see also Charlotte J. Patterson, Parental Sexual Orientation, Social Science Research, and Child Custody Decisions, in *The Scientific Basis of Child Custody Decisions* 285, 286-87 (Robert M. Galatzer-Levy et al. eds., 2d ed. 2009) (reviewing custody cases in which courts were hostile toward the parent's sexual orientation).

⁸² See Jonathan W. Gould, Conducting Scientifically Crafted Child Custody Evaluations 156-57 (1998); Child Custody & Visitation, *supra* note 53, at § 10.12[2][c]; Hazel Beh & Milton Diamond, Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons from the Family Court of Australia, [15 Health Matrix 239, 278-79 \(Summer 2005\)](#) (stating that "one need only consider the narrow and unscientific concept of gender espoused in *Kantaras v. Kantaras*, *Littleton v. Prange*, *In re Ladrach*, or *In re Estate of Gardiner*, to understand that not all judges can transcend their own construction of gender.").

parents [*181] unfit, judges still often granted custody to the heterosexual or gender normative parent out of fear that a child living with an LGBT parent would develop into an LGBT person.⁸³

Today, most judges have accepted that an LGBT parent cannot dictate her child's sexual orientation or gender identity/expression.⁸⁴ However, the implicit argument still lingers that if an LGBT parent could influence her child to be gay or transgender, then the "best interests" standard would require awarding custody to the heterosexual or cisgender parent.⁸⁵ In short, a child developing into an LGBT person is still seen by some judges as a harm to be avoided.⁸⁶

In situations where a judge is hostile to homosexuality or nonconforming gender identities/expressions, the "best interests of the child" standard ironically fails to protect the LGBT child's best interests. A hostile judge may place an LGBT youth with a non-supportive parent and potentially exposes the child to neglect or mistreatment. Even absent mistreatment, a non-supportive parent would likely inhibit the LGBT youth's ability to develop into a mentally healthy, autonomous LGBT person.⁸⁷

As explained above, constitutional principles restrict judges' discretion when making "best interests" determinations. However, without a more robust understanding and assertion of an LGBT youth's constitutional rights, discrimination in child custody decisions would likely go undetected and unchallenged. The next Section sets forth a legal framework for understanding how an LGBT youth's constitutional rights operate in such a context.

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II. Protecting an LGBT Youth's Rights in Child Custody Proceedings

In order to protect LGBT youth in child custody proceedings, courts and litigants must move away from the traditional "best interests" standard, which allows judges to rely upon their subjective, possibly mistaken understandings of sexuality and gender, and move towards a rights-based approach.⁸⁸ Indeed, such an approach

⁸³ See David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 *Wm. & Mary Bill of Rts. J.* 345, 368 (1994) (noting that "legislators and judges often use this assumption to deny homosexual parents custody, visitation, or other parental rights for fear that children raised by gay parents might themselves become gay in greater proportions. In fact ...judges often consider the possibility of a child's becoming homosexual to be one of the most undesirable and perhaps even "tragic" outcomes of awarding custody to lesbian mothers."); Gould, *supra* note 83, at 156-57; Patterson, *supra* note 81, at 287 (explaining that despite the fall of the *per se* ban against homosexual parents, there still remains in some jurisdictions a "nexus test" that if the parent's sexual orientation distresses the child, the parent may lose custody).

⁸⁴ See Patterson, *supra* note 81, at 290-93.

⁸⁵ See, e.g., Timothy E. Lin, *Social Norms and Judicial Decisionmaking*, 99 *Colum. L. Rev.* 739, 762 (1999) ("The "best interests of the child" standard may easily cloak personal animus, as well as more subtle biases, toward homosexuality under the guise of concern for the welfare of the child. Indeed, courts may seize the opportunity to promote a social ideology that conflicts with what is actually in the best interests of the child.").

⁸⁶ On a personal note, this author has had the privilege of working with several judges and in no way doubts their objectivity and understanding regarding LGBT issues. This Commentary's concern is that such objectivity and understanding is not universal and that, when they are absent, an LGBT youth may be vulnerable to harmful discrimination.

⁸⁷ See Caitlin Ryan, *Helping Families Support Their Lesbian, Gay, Bisexual, and Transgender (LGBT) Children* (Fall/Winter 2009), http://nccc.georgetown.edu/documents/LGBT_Brief.pdf ("LGBT youth who are accepted by their families are much more likely to believe they will have a good life and will become a happy, productive adult. In families that are not at all accepting of their adolescent's gay or transgender identity, only about 1 in 3 young people believes they will have a good life as a gay adult. But in families that are extremely accepting, nearly all LGBT young people believe they can have a happy, productive life as an LGBT adult.").

⁸⁸ See Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 *Fam. L.Q.* 105 (Spring 2002) (reviewing a judicial deskbook often used for making custody determinations and concluding,

is not only prudent but legally required. Part A outlines the substantive due process rights of minors generally and Part B explains the rights an LGBT minor possesses in her sexual orientation or gender identity/expression. Part C then explains how an LGBT youth's rights operate in the child custody context.

A. The Substantive Due Process Rights of an LGBT Youth

The Due Process Clause of the Fourteenth Amendment protects persons from deprivations of liberty without "due process of law."⁸⁹ The term "liberty" within this clause does not refer to just "freedom from bodily restraint"⁹⁰ but includes numerous interests such as the right to privacy, marriage, and many rights generally associated with the original Bill of Rights.⁹¹ Such rights are typically labeled "substantive due process rights."⁹² Depending upon the importance of the right, different state interests can override the right and justify its regulation or even deprivation.⁹³

Despite their youth, minors possess substantive due process rights.⁹⁴ U.S. Supreme Court cases concerning a minor's right to obtain an abortion best illustrate the nature and extent of a minor's constitutional rights.⁹⁵ In upholding a [*183] minor's right to obtain an abortion, the Court famously stated, "constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights."⁹⁶

Even though youth possess rights, "the constitutional rights of children cannot be equated with those of adults."⁹⁷ A state may regulate a minor's right to an abortion only if the regulation serves a "significant state interest ... that is not present in the case of an adult."⁹⁸ The Court has recognized three main differences between adults and minors: minors are (1) "particularly vulnerable," (2) largely unable "to make critical decisions in an informed, mature manner," and (3) dependent upon their parents.⁹⁹ Because of these limitations, the state has a legitimate interest

"while the Deskbook makes many important contributions to the judicial decision-making process, it fails to give adequate weight to the rights of children...Talking about children's rights is one way of making sure that this truth is not forgotten. Judicial decision-making would be more accurate, balanced, and just if children's stake in the resolution of custody disputes could be moved from the periphery to the center of the process and if children were to gain equal protection as a right and not as a mere interest.").

⁸⁹ [U.S. Const. amend. XIV, § 1](#) ("[No state shall] deprive any person of life, liberty, or property without due process of law....").

⁹⁰ [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#).

⁹¹ See Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law*, 413-80 (16th ed. 2007) (surveying relevant case law).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ [In re Gault, 387 U.S. 1 \(1967\)](#).

⁹⁵ These cases include: [Planned Parenthood v. Danforth, 428 U.S. 52 \(1976\)](#); [Bellotti v. Baird \(Bellotti I\) 428 U.S. 132 \(1976\)](#); [Bellotti v. Baird \(Bellotti II\), 443 U.S. 622 \(1979\)](#); and [Hodgson v. Minnesota, 497 U.S. 417 \(1990\)](#).

⁹⁶ [Danforth, 428 U.S. at 74](#).

⁹⁷ [Bellotti II, 443 U.S. at 634](#).

⁹⁸ [Danforth, 428 U.S. at 75](#).

⁹⁹ [Bellotti II, 443 U.S. at 634](#). See also [Ayotte v. Planned Parenthood, 546 U.S. 320, 326 \(2006\)](#) ("States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their "strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.").

in ensuring that its minors make "knowing and intelligent" ¹⁰⁰ decisions. Also, parents have an interest in discussing the "religious and moral implications of the...decision" ¹⁰¹ with the minor and in providing the child with "needed guidance and counsel." ¹⁰²

Despite these valid interests, the Court has held that a parental consent limitation on a minor's right to obtain an abortion without a judicial bypass procedure is invalid. ¹⁰³ Such a regulation goes beyond serving those interests and arms the parent with an "absolute, and possibly arbitrary, veto" against a minor's right. ¹⁰⁴ In subsequent cases, the Court found the following regulations valid: parental consent requirements with a judicial bypass procedure, ¹⁰⁵ parental notice requirements with a judicial bypass procedure, ¹⁰⁶ and a limited waiting period. ¹⁰⁷ These limitations serve the special interests of minors without "vetoing" their right.

In short, a minor has constitutional rights, but these rights cannot be "fully equated" with the rights of an adult. ¹⁰⁸ This classification is a dilemma. If children truly are persons, then they should have the same full constitutional rights as adults. If children are "beings who are always in some form of custody," [*184] then they should not have any constitutional rights. ¹⁰⁹

The "Enjoyment Theory of Children's Rights," as proposed by legal philosopher Lawrence D. Houlgate, resolves this dilemma. According to this theory, a child's rights are not limited in scope or balanced against the rights of the parent or interests of the state. ¹¹⁰ Instead, a child's rights are held in trust by the parent or state. The child possesses the same constitutional rights as adults, but complete enjoyment of the right is postponed until the child reaches legal maturity and can properly exercise the right. ¹¹¹ A minor need not exercise her right to possess it. ¹¹²

Under this theory, the duty of government is to "provide conditions for the child to become an adult who is able freely and in an informed way to make choices, that is, to become autonomous." ¹¹³ Closing off the minor's ability to fully exercise a right in the future violates the minor's right presently. ¹¹⁴ Any limitations on the minor's rights must therefore be tied to the minor's current inability to use the right or the risk that minor might damage her future

¹⁰⁰ [Hodgson v. Minnesota, 497 U.S. 417, 448 \(1990\)](#).

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ [Bellotti v. Baird \(Bellotti II\), 443 U.S. 622, 643 \(1979\)](#).

¹⁰⁴ Id.

¹⁰⁵ See Sullivan & Gunther, *supra* note 91, at 430.

¹⁰⁶ Id.

¹⁰⁷ Compare [Hodgson v. Minnesota, 497 U.S. 417, 448 \(1990\)](#) (upholding a 48 hour waiting period for a minor), with [Akron v. Akron Ctr. for Reproductive Health \(Akron I\), 462 U.S. 416, 450 \(1983\)](#) (striking down a mandatory 24 hour waiting period for an adult).

¹⁰⁸ Houlgate, *supra* note 22, at 47.

¹⁰⁹ Id.

¹¹⁰ Id. at 38-47.

¹¹¹ Id. at 43-44.

¹¹² Id.

¹¹³ Id. at 45.

¹¹⁴ Id. at 43.

ability to exercise her rights if allowed to enjoy them now.¹¹⁵ Otherwise, limitations are illegitimate.¹¹⁶ The state delegates this trusteeship to the parents and grants them wide discretion, presuming that the parent has the child's best interests at heart.¹¹⁷

The Enjoyment Theory finds strong support in case law concerning a minor's right to obtain an abortion and a parent's right to make certain child-rearing decisions. This second set of cases is further discussed in Subsection III.A. In the abortion cases, the Court explained that the state and parents have a strong interest in ensuring minors, who are presumably immature, make informed decisions.¹¹⁸ However, neither the state nor the parent could veto a mentally mature minor's choice.¹¹⁹ In the child-rearing cases, the Court generally deferred to parents' decisions but would step in, as *parens patriae*, if the parent acted beyond the scope of this trusteeship and harmed the child.¹²⁰

B. The Substantive Due Process Rights of an LGBT Minor Specifically

The U.S. Supreme Court has not directly addressed the substantive due [*185] process rights of LGBT minors. This Commentary constructs these rights by reading cases concerning LGBT rights in conjunction with cases concerning minors' rights to an abortion as set forth above.

Lawrence v. Texas is the seminal case protecting rights of LGBT citizens. *Lawrence* expressly overruled *Bowers v. Hardwick*, an earlier Supreme Court case, which found a Georgia anti-sodomy statute constitutional.¹²¹ In upholding this statute, the *Bowers* Court reasoned that the Due Process Clause did not confer "a fundamental right to homosexuals to engage in acts of consensual sodomy."¹²² The *Lawrence* Court found that the *Bowers* Court had framed the issue in that case too narrowly.¹²³ Quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.¹²⁴

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 45.

¹¹⁷ See, e.g., [Troxel v. Granville, 530 U.S. 57, 65-66 \(2000\)](#).

¹¹⁸ See, e.g., [Hodgson v. Minnesota, 497 U.S. 417, 447 \(1990\)](#) (finding the parent has an interest in "discussing the decision's religious and moral implications with the minor and providing needed guidance and counsel as to how the decision will affect her future.").

¹¹⁹ [Bellotti v. Baird \(Bellotti II\), 443 U.S. 622, 643 \(1979\)](#).

¹²⁰ See [Troxel, 530 U.S. at 65](#).

¹²¹ [Bowers v. Hardwick, 478 U.S. 186 \(1986\)](#); [Lawrence v. Texas, 539 U.S. 558, 578 \(2003\)](#) ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

¹²² [Bowers, 478 U.S. at 192](#).

¹²³ [Lawrence, 539 U.S. at 567](#).

¹²⁴ *Id.* at 574 (citing [Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 at 851 \(1992\)](#)).

Finding the state's proffered justifications for the anti-sodomy statute entirely illegitimate, the Court famously proclaimed, "the State cannot demean [homosexuals'] existence or control their destiny." ¹²⁵

Although the facts in *Lawrence* concerned a criminal statute that prohibited same sex couples from engaging in consensual sex acts in private, the right articulated in the case goes well beyond such facts. ¹²⁶ First, the Court expressly denounced attempts to limit this right to only sexual conduct, finding the *Bowers* decision was incorrect for doing just that. ¹²⁷ The protected right is far broader and concerns gay and lesbian peoples' "existence" and "destiny." ¹²⁸ The Court's mode of analysis supports this interpretation. Although the Court based its ruling in substantive due process, the opinion straddles the traditional line between due [*186] process and equal protection. ¹²⁹ Ultimately, the *Lawrence* opinion protects "the right of gay people to equal respect for their life choices." ¹³⁰ The standard of review did not matter as "laws that reflect nothing more than class-based animosity against gay people lack even a legitimate government purpose - a conclusion that, whatever the Court's doctrinal handle, sounds in equal protection." ¹³¹ The protected right is not just to certain conduct, though conduct is protected. The right is to be free from arbitrary state animus against gay and lesbian people. ¹³²

Second, even though *Lawrence* is typically considered a sexual orientation case, the interest it protects - the ability "to define one's concept of existence" - has profound implications for transgender persons. ¹³³ One scholar notes, "[a] person's sexual anatomy, and hence that person's sense of sexual self, is core to an individual's self-definition. Similarly, one's sense of gender is core to one's sense of self." ¹³⁴ According to the *Lawrence* Court, "beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." ¹³⁵

Finally, both minors and adults possess the rights *Lawrence* protects. Concededly, the opinion states, "This case does not involve minors It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle." ¹³⁶ However, this phrase does not create a "minor exception" as

¹²⁵ *Id.* at 578.

¹²⁶ *Id.* at 567.

¹²⁷ [Lawrence v. Texas, 539 U.S. 558, 567 \(2003\)](#) ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences....").

¹²⁸ [Id. at 578.](#)

¹²⁹ See Pamela S. Karlan, The Boundaries of Liberty after *Lawrence v. Texas*, Forward: Loving *Lawrence*, [102 Mich. L. Rev. 1447, 1450 \(2004\)](#) ("By moving away from conceiving of liberty as involving distinct conduct, the Court recast the right as involving not just autonomy but equality as well.").

¹³⁰ [Id. at 1450.](#)

¹³¹ [Id. at 1450-51](#) (footnotes omitted).

¹³² *Id.*

¹³³ See Chai R. Feldblum, The Right to Define One's Own Concept of Existence: What *Lawrence* Can Mean for Intersex and Transgender People, [7 Geo. J. Gender & L. 115 \(2006\)](#).

¹³⁴ [Id. at 124](#) (emphasis added).

¹³⁵ [Lawrence v. Texas, 539 U.S. 558, 574 \(2003\)](#).

¹³⁶ [Id. at 560.](#)

some lower courts initially proposed.¹³⁷ Considered in its context, this phrase addresses situations in which a minor may be sexually exploited and is calculated to shut the door to adults who might claim a "privacy defense" to criminal sexual conduct that harms children.¹³⁸

To date, no federal court has directly addressed the substantive due process rights an LGBT minor possesses under Lawrence. The highest court to have wrestled with the issue is the Kansas Supreme Court in its 2005 decision, Kansas [*187] v. Limon.¹³⁹ There, respondent Matthew Limon, age eighteen, was convicted of statutory rape because he engaged in oral sex with a fourteen-year-old boy.¹⁴⁰ Ordinarily, the Kansas statutory rape statute allowed for a "Romeo and Juliet" exception, which greatly reduced the penalty when the offender and victim were within four years of age.¹⁴¹ However the statute outlining the exception required the offender and victim to be the opposite sex, so Limon did not qualify.¹⁴² Limon argued, pre-Lawrence, that this limitation and his conviction violated his equal protection rights.¹⁴³

The Kansas Court of Appeals and Kansas Supreme Court initially upheld Limon's conviction.¹⁴⁴ While Limon's request for certiorari was pending, the U.S. Supreme Court handed down Lawrence and remanded Limon's case to the Court of Appeals of Kansas to be reconsidered under the new decision.¹⁴⁵ The Court of Appeals again affirmed Limon's conviction.¹⁴⁶ That court concluded that Lawrence did not pertain to minors¹⁴⁷ and that Kansas had legitimate interests in excluding same-sex sexual conduct from the Romeo and Juliet exception, namely preserving "the traditional sexual mores of society" and the "traditional sexual development of children."¹⁴⁸

The Kansas Supreme Court reversed the Court of Appeals and struck the opposite sex requirement from the "Romeo and Juliet" exception.¹⁴⁹ The Court found that Lawrence applied to youth, and that the Court of Appeals's proffered interest - that the statute protected "traditional sexual development of children" - was insufficient.¹⁵⁰ The

¹³⁷ See Joseph J. Wardenski, A Minor Exemption?: The Impact of Lawrence on LGBT Youth, [95 J. Crim. L. & Criminology 1363 \(Summer 2005\)](#) (examining and dismissing a possible "minor exemption" to Lawrence v. Texas). Note that this article was in response to the Kansas Court of Appeals's 2005 affirmation of Limon's conviction in [State v. Limon, 83 P.3d 234 \(Kan. Ct. App. 2004\)](#). To Mr. Wardenski's credit, the Kansas Supreme Court overruled the appellate court's decision using analysis similar to Mr. Wardenski's. See also, Caitlyn Silhan, The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth, 20 Law & Sexuality 97 (2011).

¹³⁸ Wardenski, *supra* note 137, at 1395-98.

¹³⁹ [Kansas v. Limon, 122 P.3d 22 \(Kan. 2005\)](#).

¹⁴⁰ [Id. at 24](#).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ [State v. Limon, 41 P.3d 303 \(Kan. Ct. App. 2002\)](#) (affirming conviction).

¹⁴⁵ [Limon v. Kansas, 539 U.S. 955 \(2003\)](#).

¹⁴⁶ [State v. Limon, 83 P.3d 229, 234-35 \(Kan. Ct. App. 2004\)](#).

¹⁴⁷ *Id.*

¹⁴⁸ [Id. at 236-37](#).

¹⁴⁹ [State v. Limon 122 P.3d 22 \(Kan. 2005\)](#).

¹⁵⁰ [Id. at 34-35](#).

Court based this determination on the grounds that the appellate court's justification was not factually based as "efforts to pressure teens into changing their sexual orientation are not effective" and legally illegitimate as "moral disapproval of a group cannot be a legitimate governmental interest" ¹⁵¹ after Lawrence.

Although the Limon court expressly based its decision on equal protection grounds ¹⁵² and declared that sodomy was not a "fundamental right," ¹⁵³ the court's dependence on Lawrence and its use of Casey implicates the substantive due process rights articulated in those decisions. ¹⁵⁴ More directly, the court's [*188] own statements that the case "involved individual rights" ¹⁵⁵ and Limon possessed a "right to liberty and privacy" ¹⁵⁶ imply that a substantive due process right was at issue. Though Limon is not binding on other states, it is the most authoritative case on the subject of an LGB youth's substantive due process rights under Lawrence.

In summation, LGBT youth, like straight and cisgender youth, possess the substantive due process rights protected by Lawrence: the right to their sexual orientation or gender identity/expression and the right to be free from state action primarily expressing animus against their sexual orientation or gender identity/expression. As explained in Subsection III.A, the state and the youth's parents hold this right in trust and may only limit the youth's exercise of the right to protect the right's future vitality. This Commentary now turns to how these rights affect a court's "best interest" determination in a child custody proceeding and what, if any, interests the state and parents may assert to regulate or curtail the youth's rights.

C. The Substantive Due Process Rights of an LGBT Youth and the "Best Interests of the Child" Standard

When parents divorce, a court deciding custody must determine which parent would continue to serve the child's best interests. ¹⁵⁷ Viewed through the "Enjoyment Theory of Children's Rights," the question becomes: which parent would serve as the best trustee of the rights the minor possesses but cannot yet exercise? As an agent of the state, the judge essentially acts as *parens patriae*, the ultimate trustee, and delegates this duty to the parent most capable of carrying it out.

As discussed in Subsection II.B, this determination consists of two questions the judge must answer. First, what is a desirable long-term goal for the child; and second, which parent would best support the child in attaining that goal? ¹⁵⁸ As shown in the following two Subsections, an LGBT youth's substantive due process rights limit the judge's discretion in answering these questions. Because sexual orientation and gender identity/expression are distinct, this Commentary addresses them separately in the following two Subsections.

In these Subsections, this Commentary often concludes that a court should place the LGBT youth with the supportive parent in order to respect the youth's rights. However, in some cases, countervailing factors might make the non-supportive parent a better choice. For example, the supportive parent might be mentally unstable, and the non-supportive parent may not be aggressively [*189] hostile. This Commentary does not argue that the LGBT youth's rights always require a custody determination in favor of the supportive parent. Rather, this Commentary

¹⁵¹ [Id. at 35.](#)

¹⁵² [Id. at 28.](#)

¹⁵³ [Id. at 29.](#)

¹⁵⁴ [Id. at 34](#) ("In essence the Lawrence decision recognized that the substantive due process analysis at issue in that case and the equal protection analysis necessary in this case are inevitably linked.").

¹⁵⁵ [State v. Limon 122 P.3d 22, 28 \(Kan. 2005\).](#)

¹⁵⁶ [Id. at 36.](#)

¹⁵⁷ See *infra* Section II.B.

¹⁵⁸ *Id.*

argues that the LGBT youth's rights forbid a court from considering the youth's sexuality or expression as an unfavorable result. This holds true in all cases. In many, though not all cases, the youth's rights may impose an affirmative duty upon the court to favor the supportive parent so that the youth may fully realize her sexuality or gender identity/expression. This final statement is especially true for transgender youth, as shown in Subsection III.C.2, below.

1. The Substantive Due Process Rights of a Lesbian, Gay, or Bisexual ("LGB") Youth and the Best Interests Standard

Subsection III.B established the principle that LGB youth possess the right set forth in *Lawrence* and *Limon*, namely the right to respect for their developing sexual orientations equal to that given straight or cisgender children.

In determining custody, there are no state or parental interests sufficient to outweigh the LGB youth's right to equal respect. According to *Limon*, the most authoritative case considering the rights of LGBT youth, enforcing the "traditional sexual development of a child" and preserving the "traditional sexual mores of society" are insufficient interests.¹⁵⁹ The abortion cases do hold that the state and parents have powerful interests in ensuring that a youth makes informed life decisions.¹⁶⁰ Even if sexual orientation were a choice, under *Lawrence*, the choice is entirely personal and should not be subject to compulsive force of the state.¹⁶¹ Finally, a court may not consider society's possible condemnation of an LGB youth's life choices as weighing against the youth's orientation in light of *Palmore*.¹⁶²

Of course, an LGB youth is not suddenly free to exercise her sexuality in harmful ways simply because she is gay, lesbian, or bisexual. A court may properly consider conduct that would be harmful to any child, straight or gay, since such consideration does not violate the right to equal respect of one's sexual orientation.

Together, *Lawrence* and *Limon* answer the two "best interests" questions that a judge must consider in determining custody. First, a judge may not consider an LGB youth's emerging sexual orientation as an undesirable goal for the child. Such a determination violates the right to equal respect, and in the *Lawrence* Court's words, seeks to "control [the youth's] destiny."¹⁶³ Second, the [*190] LGB youth's rights weigh heavily in favor of granting custody to the supportive parent. Such an arrangement would almost certainly be more conducive to helping the child develop into a healthy, autonomous LGB person who could fully exercise her rights than a placement with the non-supportive parent. Viewed through the lens of the "Enjoyment Theory," the supportive parent would likely serve as a better trustee of the LGB youth's rights than the non-supportive parent.¹⁶⁴ Of course, if the non-supportive parent's hostility translated into mental or physical neglect or abuse, the traditional "best interests" standard would support placing the child with the supportive parent.

2. The Substantive Due Process Rights of a Transgender Youth and the Best Interests Standard

The rights a transgender youth possesses in her gender identity/expression are more nuanced than those possessed by an LGB youth. The origins and nature of these rights vary greatly depending upon whether she has a gender identity disorder ("GID") diagnosis.

¹⁵⁹ [State v. Limon, 122 P.3d 22, 34-35 \(2005\).](#)

¹⁶⁰ See *infra* Section III.A (outlining a minor's right to obtain an abortion and the counterbalancing parental and state interests).

¹⁶¹ [Lawrence v. Texas, 539 U.S. 558, 574 \(2003\).](#)

¹⁶² See [Palmore v. Sidoti, 466 U.S. 429 \(1984\).](#)

¹⁶³ [Lawrence, 539 U.S. at 578.](#)

¹⁶⁴ See *Houlgate*, *supra* note 22.

Regardless of whether a transgender youth has a GID diagnosis, the freestanding language of Lawrence provides a right to her gender identity and expression.¹⁶⁵ As noted in Subsection III.B, Lawrence may be interpreted to protect the rights of transgender youth.¹⁶⁶ According to the Lawrence Court, "beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."¹⁶⁷ If a judge, in an attempt to inhibit a transgender child's emerging gender identity/expression, grants custody to the non-supportive parent, the judge would effectively impose her own understandings of "the attributes of personhood" upon the transgender youth using the compulsive force of the state and thus violate the principles underlying the Lawrence decision.

The practical and legal realities facing transgender youth underscore this concept.¹⁶⁸ Transgender persons often wish to transition to their understood gender, which could entail a legal name change and perhaps medical treatment such as hormone therapy or reassignment surgery.¹⁶⁹ In most states, a minor lacks the [*191] power to make these legal decisions without the consent of her parent.¹⁷⁰ Although there are some instances where the state considers minors competent, these instances remain the exception to the dominating rule.¹⁷¹ If a judge grants legal custody of a transgender youth to a parent who is not supportive of that youth's gender identity/expression, the judge effectively forecloses the child's ability to transition to her understood gender.¹⁷² As the Court stated in *Danforth*, the judge would effectively hand the parent an "absolute, and possibly arbitrary, veto" against a minor's right.¹⁷³

Should a youth be diagnosed as having GID, her rights relating to her gender identity/expression go beyond the right to "define one's existence" and could include the right to medical treatment. Despite its surrounding controversy, the current Diagnostic and Statistical Manual of Mental Disorders ("DSM") does define GID as a mental disorder requiring some form of treatment.¹⁷⁴ The HBGDA Standards of Care for Gender Identity Disorders states that some form of psychotherapeutic, endocrine, or surgical therapy may be necessary for a transgender person to have lasting personal comfort in the gendered self.¹⁷⁵ However, a transgender youth

¹⁶⁵ See Feldblum, *supra* note 133.

¹⁶⁶ *Id.*

¹⁶⁷ [*Lawrence v. Texas*, 539 U.S. 558, 574 \(2003\)](#) (quoting [*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 \(1992\)](#)).

¹⁶⁸ See Amanda Kennedy, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, [*19 Hastings Women's L.J.* 281, 290 \(2008\)](#) (explaining "if a minor wants to pursue psychological and medical treatment, there are significant hurdles to overcome. In many states, youth are unable to consent to medical treatment without the support of their parents. Some states allow 'mature minors' to consent to medical treatment. Even in these states, youth must often get a court to determine they are 'mature.'").

¹⁶⁹ *Id.*

¹⁷⁰ See NASW, *supra* note 26.

¹⁷¹ See Arshagouni, *supra* note 26, at 331-40 (exploring the abortion context, the rule of sevens, the mature minor's doctrine, and emancipated minors).

¹⁷² See Kennedy, *supra* note 168, at 300 (stating "unfortunately, at this point, there are few decisions that transgender youth are able to make for themselves regarding the path that their transitions take. For the most part, youth cannot consent to medical treatment without parental consent. The ability of youth to obtain formal psychological treatment, as opposed to support groups or informal counseling, is also limited by parental consent. Youth also cannot change their names or legal gender without the consent of their parents."

¹⁷³ [*Planned Parenthood v. Danforth*, 428 U.S. 52, 94 \(1976\)](#).

¹⁷⁴ DSM, *supra* note 34, at §§302.6, 302.85.

¹⁷⁵ HBGDA, *supra* note 42, at 1.

typically lacks the legal capacity to consent to the treatments she would need in order to transition.¹⁷⁶ Such consent rests with the parent.¹⁷⁷ If a parent withholds her consent for such treatments, a transgender youth could suffer anxiety, depression, and an increased risk of suicide.¹⁷⁸ Regardless of the transgender youth's right to self-expression, the traditional best interests of the child standard strongly favors granting custody to the parent who is supportive of the youth's transgender identity, if only to avoid these harms.

Regardless of whether a transgender youth is diagnosed with GID, the state could have a legitimate interest in ensuring that minors make informed and carefully considered life decisions concerning medical treatments.¹⁷⁹ Because a youth's gender is often in flux, a youth could conceivably latch on to the wrong [*192] gender, undergo sex reassignment, and later regret the decision.¹⁸⁰

When facts raise such a concern, a court should defer to the HBGDA Standards of Care for Gender Identity Disorders. The HBGDA Standards of Care recommends escalating levels of physical intervention that correlate with the youth's maturity - the older the youth, the more permanent the intervention may be.¹⁸¹ The manual only recommends irreversible physical intervention after the youth turns eighteen.¹⁸² Prior to that point, interventions are either entirely reversible or largely reversible.¹⁸³ The reversible nature of the treatment thus mitigates the state's interest in preventing a transgender youth from making the wrong choice concerning sex reassignment.¹⁸⁴ Finally, a judge may not consider society's potentially negative reaction to the youth's gender identity/expression as weighing against the youth's rights.¹⁸⁵

Again, Lawrence answers the two questions a judge must consider in making a custody determination. First, the judge may not consider the transgender youth's emerging gender identity/expression as an undesirable outcome. Under the freestanding language of Lawrence, a judge may not force a youth to define the attributes of her personhood under the compulsion of the state,¹⁸⁶ here, the compulsive force of a custody determination. If a youth has diagnosable GID, the youth could require medical treatment or face serious mental or physical harm. The traditional "best interest" standard, which seeks to avoid harm, thus requires the judge to respect the youth's emerging gender expression. Second, to help the transgender child reach this end, the judge should favor a placement with the supportive parent. A transgender youth often requires parental consent for medical treatment related to GID. If the court awards custody to the non-supportive parent, the court effectively vetoes the youth's Lawrence rights, as the youth would unlikely be able to secure sex reassignment until after she reaches the age of eighteen. By that time, sex reassignment is far more difficult to accomplish.¹⁸⁷

¹⁷⁶ See Arshagouni, *supra* note 26, at 331-32 (2006) ("The general age of majority in the United States has shifted downwards from twenty-one to eighteen...In most legal contexts, the age of majority is now eighteen years. This is especially true with respect to matters of health care consent.").

¹⁷⁷ *Id.*

¹⁷⁸ See Shield, *supra* note 42, at 383.

¹⁷⁹ See *infra* Section II.C.1.

¹⁸⁰ See Shield, *supra* note 42, at 388-90.

¹⁸¹ HBGDA, *supra* note 42, at 8-11.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See [Palmore v. Sidoti, 466 U.S. 429 \(1984\)](#).

¹⁸⁶ [Lawrence v. Texas, 539 U.S. 558, 574 \(2003\)](#).

¹⁸⁷ HBGDA, *supra* note 42, at 10 (explaining the earlier administration of puberty-delaying hormones may make later transition easier to accomplish).

There remains one final and powerful consideration: the rights of the non-supportive parent. This Commentary now turns to this issue.

II. The Rights of the Parent Who Objects to Her Child's Sexuality or Gender

As explained in Section II, a judge making a child custody determination for an LGBT youth should respect the youth's rights under *Lawrence*. This respect [*193] may, in many instances, direct the judge to place the LGBT youth with the supportive parent. Almost inevitably, a non-supportive parent might object that denying her custody because of her opposition to her child's sexuality or transgender identity violates her own substantive due process rights. If this parent's opposition is based in religion, she may also claim that the court's refusal to grant her custody because of that belief violates her First Amendment rights.

As will be shown, such arguments ultimately fail for the following reasons: first, such an assertion of a parent's rights is a misunderstanding of parental rights; and second, the focus of custody proceedings is necessarily on the child and not on the competing rights of the parents.

A. Parental Rights Generally

Parents have a substantive due process right in deciding how to raise their children.¹⁸⁸ The U.S. Supreme Court first recognized this right in *Meyer v. Nebraska*, stating that parents have the right to "establish a home and bring up children"¹⁸⁹ and to "control the education of their own."¹⁹⁰ Shortly after *Meyer*, the Court stated in *Pierce v. Society of Sisters* that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁹¹ Since *Meyer* and *Pierce*, the Court has found that a parent's substantive due process rights include the right to exercise control over the child's education,¹⁹² to order or refuse certain medical care, and to instruct the child in religion.¹⁹³

Although courts often refer to a parent's power over her children as a right, correctly understood, it is a duty to raise the child into a mature, responsible citizen.¹⁹⁴ As explained in Subsection III.A, a child's rights are held in trust by the parent who acts as trustee. A parent's rights are therefore analogous to the powers of a trustee and can only extend so far as what is necessary to affect this trusteeship.¹⁹⁵ The state generally defers to the parent's

¹⁸⁸ [Troxel v. Granville, 530 U.S. 57, 66 \(2000\)](#) ("It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); for a review of the relevant U.S. Supreme Court case law, see Susan E. Lawrence, Substantive Due Process and Parental Rights: From *Meyer v. Nebraska* to *Troxel v. Granville*, [8 J. L. & Fam. Stud. 71 \(2006\)](#).

¹⁸⁹ [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#).

¹⁹⁰ [Id. at 401](#).

¹⁹¹ [Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 \(1925\)](#) (striking down as a violation of the fourteenth amendment a state statute that required public school attendance).

¹⁹² [Meyer, 262 U.S. at 401](#).

¹⁹³ [Wisconsin v. Yoder, 406 U.S. 205, 214 \(1971\)](#) (holding that the state must balance compulsory education with the right of parents to exercise their First Amendment right to bring up their children in their religion).

¹⁹⁴ See Eric G. Anderson, Children, Parents, and Nonparents: Protected Interests and Legal Standards, 1998 B.Y.U. Rev. 935, 943 (1998); see also [Pierce, 268 U.S. at 535](#).

¹⁹⁵ See Anderson, *supra* note 194, at 943.

judgment, presuming [*194] that the parent has the best interests of the child at heart.¹⁹⁶ In certain situations, the presumption no longer applies, in which case the government may exercise its role as *parens patriae* to remove certain child-rearing decisions from the parent and decide for itself what is in the minor's best interest.¹⁹⁷ Ultimately, the best interests of the child, which include the eventual realization of the child's own rights, trump the parent's rights.¹⁹⁸ Cases concerning a parent's First Amendment rights illustrate this concept well.

A parent has a powerful substantive due process right in deciding how her child is raised in terms of religion.¹⁹⁹ However, even this powerful right is limited.²⁰⁰ *Prince v. Commonwealth of Massachusetts* is the touch-point U.S. Supreme Court case in this area. In *Prince*, the petitioner, a Jehovah's Witness, had been arrested for allowing her minor daughter to sell religious magazines on the street in violation of a state statute that prohibited minors from soliciting.²⁰¹ The petitioner claimed that the statute violated her due process rights in raising her child.²⁰² The Court recognized a parent's right to control her child's religious upbringing was "sacred" and "basic in a democracy."²⁰³ However, the state as *parens patriae* also had a valid interest in protecting the child's welfare, and this interest was not "nullified merely because the parent grounds her claim to control the child's course of conduct on religion or conscience."²⁰⁴ The Court found the state's interest in protecting children from exploitation overrode the petitioner's rights in raising her children.²⁰⁵

Courts have applied the holding of *Prince* to numerous cases in which a parent claimed a due process right to raising her child in accordance with her religion to the detriment of the child.²⁰⁶ Courts addressing such questions have [*195] consistently held that parents may not exercise their religious belief if doing so would cause the child

¹⁹⁶ See [Troxel v. Granville, 530 U.S. 57, 65](#) (outlining the history of the U.S. Supreme Court's recognition of parents' liberty interest in raising their children); [Santosky v. Kramer, 455 U.S. 745, 753 \(1982\)](#) (holding that parents have a "fundamental liberty interest...in the care, custody, and management of their child.").

¹⁹⁷ [Troxel, 530 U.S. at 88.](#)

¹⁹⁸ Child Custody & Visitation, *supra* note 53, at § 10.01[2][b].

¹⁹⁹ [Wisconsin v. Yoder, 406 U.S. 205 \(1971\).](#)

²⁰⁰ Anderson, *supra* note 194, at 943 ("Parental rights have a dual purpose. They do recognize and protect the parent's personal interest in the care and companionship of the child, in inculcating values and perpetuating tradition. But they have the further purpose of promoting the welfare of the family as an institution. Parents have a trusteeship not only or their children as individuals, but for the family organization itself...Within the family, a parent's interests are entitled weight, but they are not absolute or necessarily superior to those of the child. They must accommodate the interests of other family members. Nor, of course, are the parents' interests unqualified vis-a-vis the world outside the family. Those interests (or rights) are strong, but they must take account of the interests of the larger society.").

²⁰¹ [Prince v. Massachusetts, 321 U.S. 158, 160 \(1944\).](#)

²⁰² *Id.*

²⁰³ [Id. at 165.](#)

²⁰⁴ [Id. at 166.](#)

²⁰⁵ [Id. at 170-71.](#)

²⁰⁶ See Leslie J Harris & Lee E. Tetelbaum, Children, Parents, and the Law, 256-69 (2002) (citing [In re Green, 292 A.2d 387, 390 \(Pa. 1987\)](#); [In re Cabrera, 552 A.2d 1114, 1118 \(Pa. Super. Ct. 1989\)](#); [In re Willman, 493 N.E.2d 1380, 1388 \(Ohio Ct. App. 1986\)](#); [Newmark v. Williams, 588 A.2d 1108, 1116 \(Del. 1990\)](#); See, e.g., [In re McCauley, 565 N.E.2d 411, 413-14 \(Mass. 1991\)](#) (listing five factors a court should consider in determining whether to order a blood transfusion against the parents' religiously motivated objections); [Commonwealth v. Twitchell, 617 N.E.2d 609 \(Mass. 1993\).](#)

serious harm. ²⁰⁷ The courts often recite Prince: "parents may be free to become martyrs themselves [for their religious beliefs]. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." ²⁰⁸

When applied to the conflict between the wishes of the non-supportive parent and the best interest of the LGBT youth, it becomes clear that a parent cannot subject her LGBT child to harm simply because her actions are grounded in religious beliefs. Outside of the child custody context, this harm must be serious. Inside the child custody context, the standard for the level of harm is much lower, as the judge simply compares the benefits and harms presented by each parent. ²⁰⁹

B. Parental Rights in Child Custody Disputes Involving LGBT Youth

Parental rights operate very differently in child custody proceedings. As explained in Section II.A, both parents ordinarily share the rights and duties of raising their child. However, when these parents divorce, their rights and duties fracture, and the court must determine which parent will continue to serve the child's best interests. In a child custody dispute where parents disagree as to what is in the child's best interest, the court must decide for itself which parent will continue to carry out his/her duty best. ²¹⁰ The parent to whom the court does not grant custody cannot object that her rights are violated because, as a trustee, her rights could only be used to secure the child's best interest - a fact the court has determined against her.

[*196] Additionally, when a court makes a custody determination, and the two parents' views as to how to raise their child conflict, the court cannot advance one parent's rights without violating the other parent's rights. It is a tug of war - gain for one parent necessarily means loss to the other. Conflicts over religious upbringing and instruction are again illustrative, especially since many parents object to their LGBT child's sexual orientation or gender identity/expression on religious grounds. ²¹¹

Under the First Amendment, the state can neither establish a religion nor inhibit the free-exercise thereof. ²¹² For example, suppose that in the introductory case *Smith v. Smith*, Kevin, the father, had objected to Christine's gender

²⁰⁷ [Prince v. Massachusetts, 321 U.S. 158, 170 \(1944\)](#); see Thomas Jacobs, *Children and the Law: Rights and Obligations* § 10:09, 26-33 (2010); see, e.g., [In re McCauley, 565 N.E.2d at 414](#) (upholding the lower court's order to move forward with blood transfusion for eight-year-old leukemia victim); compare [In re Eric B., 189 Cal. App. 3d 996 \(1987\)](#) (upholding a lower court's order to continue chemotherapy for a seven-year-old cancer victim), with [Newmark, 588 A.2d at 1120](#) (honoring the parent's decision to refuse chemo treatment for child cancer victim where there was a 40% chance of survival and the child expressed strong fears).

²⁰⁸ [Prince, 321 U.S. at 170.](#)

²⁰⁹ See *Child Custody Prac. & Proc.* supra note 63, at § 4:1 ("The threshold requirement for any custody award is that the parent be "fit." Courts have defined "unfitness" of a parent in relation to child custody as meaning personal deficiency or incapacity which has prevented, or possibly will prevent, performance of reasonable parental obligations in child rearing and which has caused, or probably will result in, detriment to a child's well-being. There is usually not a custody dispute if one (or both) of the parents is clearly unfit. Most custody disputes arise because both parents are relatively fit (or both are not so fit) and want the child to live with them. Therefore, the usual questions are which parent is "more fit" and what placement is in the child's best interests.").

²¹⁰ *Child Custody & Visitation*, supra note 53, at § 10.03[1].

²¹¹ See [Lawrence v. Texas, 539 U.S. 558, 571 \(2003\)](#) (stating, "it must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.").

²¹² [U.S. Const. amend I.](#)

expression for religious reasons and asserted his view as a First Amendment right.²¹³ If the court recognized this "right" and ruled in favor of Kevin, the court would have endorsed religion.²¹⁴ This endorsement would violate Victoria's right to be free from a state establishment of religion. The converse would be true if Victoria had asserted her view as a First Amendment right. Consequently, a court generally does not recognize First Amendment rights in child custody proceedings.²¹⁵ A court must "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."²¹⁶ Rather than resolve parental rights conflicts, courts focus solely on the welfare of the child.²¹⁷ As such, attempts to justify the violation of an LGBT youth's rights by asserting parental substantive due process or First Amendment rights fail.

Conclusory Remarks and Recommendations to Judges and Attorneys Concerning LGBT Youth in Custody Proceedings

An LGBT youth possesses the same substantive due process right to respect for her sexual orientation or gender identity/expression as a straight or cisgender child. Because the best interests of the child standard is highly subjective and deferential, it is insufficient to protect the rights of the LGBT youth. Instead, a court must move beyond its own conceptions of the child's best interest, recognize the LGBT youth's rights, and rule accordingly. In short, a judge cannot [*197] consider an LGBT youth's sexual orientation or gender expression as a harm to be avoided. Lawrence enjoins the state from arbitrarily demeaning or controlling an LGBT person's destiny.²¹⁸ Lawrence may also create a presumption in favor of the supportive parent in order to help the LGBT child develop into a healthy and autonomous LGBT adult. Although it is impossible to fully know what entered the judge's calculations in *Smith v. Smith*, it is more than possible that the result would have been very different, and more respectful of Christine's gender identity, had the court better understood the constitutional implications of its decision.

Although this Commentary specifically addresses LGBT youth in custody determinations, one may apply the concepts outlined here in numerous other contexts. The best interests of the child standard reigns in guardianship cases, guardian ad litem recommendations, and child support determinations.²¹⁹ In all such cases, LGBT youth are vulnerable and their rights must be understood, asserted, and respected.

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²¹³ Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, [82 Mich. L. Rev. 1702](#), 1717-19 (1984).

²¹⁴ *Id.*

²¹⁵ CHILD CUSTODY & VISITATION, *supra* note 53, at § 10.10[3][a].

²¹⁶ [Comm. for Pub. Educ. & Religious Liberty v. Nyquist](#), *413 U.S. 756, 788 (1973)*.

²¹⁷ CHILD CUSTODY & VISITATION, *supra* note 53, at § 10.10[3][a].

²¹⁸ [Lawrence v. Texas](#), *539 U.S. 558, 578 (2003)*.

²¹⁹ For an exploration on how a guardian ad litem can effectively represent the best interests of an LGBT youth, see Sarah Valentine, *When Your Attorney is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, [19 Colum. J. Gender & L. 773, 774 \(2010\)](#).

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