TRANSPARENTHOOD

Sonia K. Katyal & Ilona M. Turner***

Despite the growing recognition of transgender rights in both law and culture, there is one area of law that has lagged behind: family law's treatment of transgender parents. We perform an investigation of the way that transgender parents are treated in case law and discover striking results regarding the outcomes for transgender parents within the family court system. Despite significant gains for transgender plaintiffs in employment and other areas of law, the evidence reveals an array of ways in which the family court system has systematically alienated the rights and interests of transgender parents. In many cases involving custody or visitation, we find that the transgender parent loses their bid, sometimes even losing their right to be recognized as a parent. This absence of equal treatment is striking and deserving of analysis, particularly given the law's shift toward a standard that is supposed to minimize the risk of bias in LGBT parenting cases. In a striking number of cases, however, we found evidence of persistent bias regarding the gender identity and expression of the transgender parent—which we refer to as transition, contagion, and volition related concerns—that underscores the courts' analysis. Normatively, this Article calls for a deeper interrogation of the ways in which family equality can be expanded—and even reoriented—to better protect the interests of transgender parents within the family law system. As a solution, we propose a way to balance courts' broad discretion with the disproportionate risk that bias will infect the decisionmaking, resulting in irreparable harm to both the child and the parent.

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* Haas Distinguished Chair and Chancellor's Professor of Law, University of California, Berkeley.

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INTRODUCTION

In an opening scene from the Emmy Award–winning show *Transparent*, Jeffrey Tambor plays Maura, a transgender woman who is in the early stages of explaining to her three children that she plans to transition.[1] At one point, one of the daughters, Sarah, says to Maura, with a hint of disbelief, "Can you just help me out here? Are you saying you're gonna start dressing up like a lady all the time?"[2] Maura laughs, and then says to her, "No."[3] She continues,

1. Amazon Studios, *Transparent: The Letting Go*, AMAZON (Sept. 26, 2014), https://www.amazon.com/The-Letting-Go/dp/B00I3MOT0Y/ [https://perma.cc/J8DU-ALT9].

2. *Id.* at 2:09–2:17.

3. *Id.* at 2:17.

"my whole life I've *been* dressing up . . . like a man."[4] She pulls Sarah's hand to her chest and then says, gently, "This is me."[5]

Although *Transparent* faced a number of cogent critiques from both inside and outside of the transgender community,[6] it was the first mainstream television drama to focus on a transgender woman as the central character, telling her story in a way that captured the complexity following her transition. *Transparent* made its debut around the same period that several transgender women—Caitlyn Jenner, Laverne Cox, and Janet Mock—also received widespread public attention, bringing one mainstream magazine to proclaim 2014 the "Transgender Tipping Point."[7]

But amidst the greater strides toward inclusion on television and social media, it is worth remembering some other, more sobering realities. The year 2017 was the deadliest year for transgender people in modern history, and the statistics for 2018 are not much better.[8] In 2017 the U.S. Department of Justice reversed the previous administration's position on transgender inclusion in public schools, thereby allowing schools to discriminate on the basis of gender identity.[9] The current commander in chief ordered a ban on service by transgender people in the armed forces, which was quickly en-

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4. *Id.* at 2:21–2:25.

5. *Id.* at 2:26–2:32.

6. *See, e.g.*, Steven Funk & Jaydi Funk, *Transgender Dispossession in* Transparent*: Coming Out as a Euphemism for Honesty*, 20 SEXUALITY & CULTURE 879 (2016); Marcy Cook, *Why* Transparent *Has Lost the Trust of the Trans Community*, MARY SUE (Feb. 4, 2015, 8:00 PM), https://www.themarysue.com/transparent-trust/ [https://perma.cc/U62U-QKG9]; Cael Keegan, *Op-ed: How* Transparent *Tried and Failed to Represent Trans Men*, ADVOCATE (Oct. 22, 2014, 10:00 AM), https://www.advocate.com/commentary/2014/10/22/op-ed-how-transparent-tried-and-failed-represent-trans-men [https://perma.cc/ALL2-KSTL]. In 2017, Tambor was fired from the show due to allegations of sexual harassment. Yohana Desta, Transparent *Plots a Way Forward After Jeffrey Tambor's Messy Firing*, VANITY FAIR (June 12, 2018, 9:16 AM), *https://www.vanityfair.com/hollywood/2018/06/transparent-final-season-ending-jeffrey-tambor* [https://perma.cc/JL39-NN28].

7. *See* TIME, June 9, 2014 (titling the issue "The Transgender Tipping Point"); Samantha Allen, *Whatever Happened to the Transgender Tipping Point?*, DAILY BEAST (Mar. 31, 2017, 1:02 AM), https://www.thedailybeast.com/whatever-happened-to-the-transgender-tipping-point? [https://perma.cc/53SX-RSAN] (describing the cover of *Time*'s June 9, 2014 issue as a declaration that 2014 was the "Transgender Tipping Point").

8. *See* Sarah McBride, *HRC & Trans People of Color Coalition Release Report on Violence Against the Transgender Community*, HUM. RTS. CAMPAIGN (Nov. 17, 2017), https://www.hrc.org/blog/hrc-trans-people-of-color-coalition-release-report-on-violence-against-the [https://perma.cc/N6BK-3XBL]; *see also* Lauren Lee, *Transgender Community Faces Its Deadliest Year, but This Group Wants to Help*, CNN (June 11, 2018, 7:51 PM), https://www.cnn.com/2018/06/11/us/sproj-iyw-anti-violence-project-transgender-violence/index.html [https://perma.cc/8BMF-A2YY].

9. Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter (Feb. 22, 2017); *see also* Ariane de Vogue et al., *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017, 10:16 AM), https://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html [https://perma.cc/8N2K-VP7Z].

joined by multiple federal courts on constitutional grounds.[10] In October 2018, the *New York Times* reported that the Trump Administration would seek to go even further: to "defin[e] gender as a biological, immutable condition" that is determined by one's genitalia at birth, for the purpose of rolling back protections for transgender individuals.[11]

Despite these steps backward from the White House, it is also important to note how much progress has been made elsewhere.[12] State legislatures and courts across the country have lowered barriers to obtaining legal recognition by, for example, removing the requirement that a person undergo surgery before they can change the gender marker on a driver's license.[13] A (now) near-unanimous wave of court decisions, many at the circuit level, has held that transgender individuals are protected from discrimination under sex-discrimination laws like Title IX and Title VII[14]—a position still defended by the EEOC despite the Department of Justice adopting a contrary posi-

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10. *See, e.g.*, Stockman v. Trump, 331 F. Supp. 3d 990 (C.D. Cal. 2018) (denying motion to dissolve preliminary injunction), *appeal filed*, No. 18-56539 (9th Cir. Nov. 16, 2018), *stay of preliminary injunction granted*, 139 S. Ct. 950 (2019); Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017) (granting preliminary injunction), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018), *stay of preliminary injunction granted*, No. GLR-17-2459 (D. Md. Mar. 7, 2019), ECF No. 249; Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017) (granting preliminary injunction), *rev'd*, Doe 2 v. Shanahan, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019). After Supreme Court rulings in January 2019 lifted two of the preliminary injunctions, the remaining injunctions were subsequently lifted by the lower courts, and the ban took effect on April 12, 2019, although lawsuits continued. *See* Erik Larson, *Ban on Trans People in Military Cleared to Take Effect April 12*, BLOOMBERG (Mar. 26, 2019, 5:34 PM), https://www.bloomberg.com/news/articles/2019-03-26/ban-on-trans-people-in-military-cleared-to-take-effect-april-12 (on file with the *Michigan Law Review*).

11. Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?module=inline [https://perma.cc/36SC-S2VQ].

12. *See* Sonia K. Katyal, *The* Numerus Clausus *of Sex*, 84 U. CHI. L. REV. 389, 390–92 (2017).

13. *See* 1 SEXUAL ORIENTATION AND THE LAW § 10:11 (Karen Moulding in conjunction with Nat'l Lawyers Guild eds., 2018) (citing jurisdictions that have removed surgery requirements).

14. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018) (holding "discrimination on the basis of transgender and transitioning status violates Title VII"), *cert. granted*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019) (granting review of "the following question: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)"); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) ("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination . . . ."); Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (holding that discrimination against a transgender woman is "*literally* discrimination 'because of . . . sex' " prohibited under Title VII).

tion.[15] Although transgender individuals have enjoyed some increased protection in the courts, their interests are distinctly vulnerable in the face of a president and a Supreme Court that may give priority to the rights of those who would discriminate against LGBT individuals.

Indeed, just as we are starting to recognize greater protections for transgender, nonbinary, and gender variant individuals under the law,[16] we are also driven to confront the many ways in which this recognition is just one small step toward equalizing the law's treatment of transgender individuals. Even if jurisdictions increase their recognition of transition and take greater steps toward protecting transgender individuals in the workplace, there are other areas of law—criminal law, privacy law, and constitutional law—that deserve a much more searching interrogation of how they may systematically disadvantage the interests of transgender people.

Enter family law, which has received only scant attention from legal scholars regarding its intersections with the rights of transgender individuals.[17] For example, until 2017, transgender individuals in over twenty countries that have signed on to the European Convention on Human Rights were required to undergo sterilization before they were able to change their name or other legal documents, effectively foreclosing their ability to have biological children.[18] Although these laws are now called into question due

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15. *Harris Funeral Homes*, 884 F.3d at 574–75 (holding "discrimination on the basis of transgender and transitioning status violates Title VII"); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7–9, *11 (Apr. 20, 2012) ("[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex . . . .' "); *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm [https://perma.cc/85EM-LJHM].

16. These terms are in some respect synonymous, since a broad definition of "transgender" includes anyone who doesn't conform to gender stereotypes, and since being transgender is always in some sense gender nonconforming (or variant) in relation to the gender assigned at birth. But it is often difficult to find a term that everyone finds comfort with. For example, many trans people might bristle at being considered "nonconforming" or "gender variant"; and many gender nonconforming people—that is, people whose gender expression is different from that stereotypically associated with their gender or their sex assigned at birth—do not identify as transgender. We also use the terms "gender" and "sex" interchangeably, since sex is ultimately an amorphous concept that includes a multitude of factors (including hormones, external reproductive organs, internal reproductive organs, secondary sex characteristics, sexual orientation, gender identity, and gender expression) that may or may not all point in the same direction, and where those factors are inconsistent is best determined by deference to a person's gender identity. For a longer discussion, see Katyal, *supra* note 12. Likewise, we do not distinguish between "gender" and "gender identity," because gender is best defined by a person's gender identity. *Id.* See, for example, the 2017 California law that permits an individual to correct the gender marker on a birth certificate based on a simple personal affidavit that the change is necessary to reflect the person's gender identity. CAL. HEALTH & SAFETY CODE § 103426 (West Supp. 2019).

17. *See infra* note 22; *see also* Beth A Haines et al., *Making Trans Parents Visible: Intersectionality of Trans and Parenting Identities*, 24 FEMINISM & PSYCHOL. 238 (2014).

18. *See* A.P. v. France, App. Nos. 79885/12, 52471/13 & 52596/13 (Eur. Ct. H.R. Apr. 6, 2017), http://hudoc.echr.coe.int/eng?i=001-172913 [https://perma.cc/L5KS-F4S3] (holding

to a recent European Court ruling,[19] other countries, including Japan, still have these reproductive restrictions in place.[20]

Many of these sorts of restrictions often escape public attention. Surprisingly, despite the attention given to the rights of transgender individuals in the United States, including the rights of children,[21] there is comparably much less legal scholarship regarding the rights of transgender parents. There are only a smattering of law articles on the topic, and only a few of these address the topic in any depth.[22]

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that conditioning recognition of transition on medical or surgical treatment that results in sterilization violates an individual's right to respect for their private life under Article 8 of the European Union Convention on Human Rights); *see also* Harriet Agerholm, *Japan Urged to Scrap Law Forcing Transgender People to Be Sterilised Before They Can Transition*, INDEPENDENT (Dec. 1, 2017, 11:17 AM), https://www.independent.co.uk/news/world/asia/japan-transgender-people-sterilise-before-transition-gender-change-lgbt-rights-a8086341.html [https://perma.cc/Q9AP-GP63].

19. *A.P.*, App. Nos. 79885/12, 52471/13 & 52596/13, at ¶ 135.

20. Agerholm, *supra* note 18.

21. *See, e.g.*, Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L., GENDER & SOC'Y 271 (2013).

22. *See, e.g.*, Helen Y. Chang, *My Father Is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649 (2003); Shannon Price Minter, *Transgender Family Law*, 56 FAM. CT. REV. 410 (2018); Mark Strasser, *Defining Sex: On Marriage, Family, and Good Public Policy*, 17 MICH. J. GENDER & L. 57 (2010); Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209 (2006); Charles Cohen, Note, *Losing Your Children: The Failure to Extend Civil Rights Protections to Transgender Parents*, 85 GEO. WASH. L. REV. 536 (2017); Shannon Shafron Perez, Note, *Is It a Boy or a 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 & FAM. ADVOC. 367 (2010). Aside from these articles, there are a few books that have chapters that discuss the issue in some detail, including CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD (2012), and Taylor Flynn, *The Ties that (Don't) Bind: Transgender Family Law and the Unmaking of Families*, *in* TRANSGENDER RIGHTS 32 (Paisley Currah et al. eds., 2006). Another book that features valuable information and perspectives, including personal reflections on transition and divorce, is LGBT DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE (Abbie E. Goldberg & Adam P. Romero, eds., 2019). We call particular attention to two chapters within this book: Denise Brogan-Cantor, *Transition Through a Shattered Glass Snowglobe: Reflections on Transitioning and Divorce*, *in* LGBT DIVORCE AND RELATIONSHIP DISSOLUTION, *supra* at 327, and Amanda Veldorale Griffin, *A Daughter of a Transgender Parent's Perspective on Relationship Dissolution*, *in* LGBT DIVORCE AND RELATIONSHIP DISSOLUTION, *supra* at 340. These issues are also discussed in some practice guides for attorneys, including the excellent TRANSGENDER FAMILY LAW (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012). *See also FAQ About Transgender Parenting*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/trans-parenting-faq [https://perma.cc/WSK4-MQT9]; *Promising Practices for Serving Transgender & Non-Binary Foster and Adoptive Parents*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/all-children-all-families-serving-trans-non-binary-foster-adoptive-parents [https://perma.cc/5ACS-A4CU]; *Protecting the Rights of Transgender Parents and Their Children: A Guide for Parents and Lawyers*, ACLU, https://www.aclu.org/report/protecting-rights-transgender-parents-and-their-children [https://perma.cc/TUX8-P4BF];

To remedy this absence, we conducted a search for transgender and gender variant parents within the case law and literature.[23] We found many more cases than the literature discussed, and even many cases supporting the rights of trans parents as well. Yet overall, the results are striking and unforgettable. In many cases, transgender and gender nonconforming parents lost their bids for custody or visitation. And in a few cases, transgender and gender variant parents had their parental rights terminated or narrowed based solely on their decision to transition.[24] These decisions do not just harm the transgender parent; they also inflict harm on children who are denied their ability to bond with a known parent when a transgender parent has been pushed aside, despite their desire to remain a part of their child's family.

This Article has four parts, spanning history, doctrine, and public policy. In Part I, we account for the various ways in which transgender persons have formed families and received unequal treatment at the hands of family court judges, prior to the legislative enactments and constitutional rulings that guaranteed marriage equality across the nation. In Part II, we provide a short background on how family courts have addressed the standards of custody and visitation, drawing on the case law addressing the rights of lesbian, gay, bisexual, and transgender parents.

Transgender Family Law Facts, TRANSGENDER L. CTR., http://transgenderlawcenter.org/wp-content/uploads/2013/11/Family-Law-Facts-301013-web-version.pdf [https://perma.cc/8Y2V-HG4N]. For an important literature review on transgender parenting research, see REBECCA L. STOTZER ET AL., TRANSGENDER PARENTING: A REVIEW OF EXISTING RESEARCH, WILLIAMS INST. (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/transgender-parenting-oct-2014.pdf [https://perma.cc/XM2U-PP9Q].

23. In order to locate these cases, we put in the following search terms: "transgender parent"; "cross dress" + "parent"; "transsexual parent"; and "transvestite parent." We used these terms not because we agreed with the terminology used, but because our research showed that courts used these terms, and thus the terms would locate the cases most likely to address the issue of transgender parenting decisions. We pulled up a total of thirty cases that turned out to be directly on or related to the subject of transgender parenthood—specifically issues of child custody and caregiving where a transgender person is involved in the child's life.

24. *See infra* Part III. In this Article, we use the term transgender to broadly include individuals whose gender identity or expression does not conform to the social expectations that generally accompany the sex assigned at their birth. *See* Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS, *supra* note 22, at 3–4. As Professor Susan Stryker has noted, the term refers to "all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries," and is often used to denote a pluralistic variety of differing identities. Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, *in* THE TRANSGENDER STUDIES READER 244, 254 n.2 (Susan Stryker & Stephen Whittle eds., 2006); *see also* JACK HALBERSTAM, TRANS* (2018). Following these approaches, we adopt a broad construction of the term "transgender" that includes a variety of gender nonconforming identities and expressions, but we note that some cases may involve parents who undergo the process of transition, and other cases involve parents who may engage in gender nonconforming activities or expression (cross-dressing privately, for example) but who do not wish to transition. Thus, we included both groups in our analysis and note the potential distinction between them.

Part III examines how those custody and visitation standards have applied to transgender parents. Our analysis is based on a collection of thirty opinions, which, we hope, represents every (published or unpublished) custody and visitation case involving a transgender or gender variant parent since the 1970s.[25] That treatment has paralleled in many ways the evolution of the treatment of lesbian, gay, and bisexual parents in family court proceedings. The earliest cases involving LGB parents found that, *per se*, custody or contact with such a parent would obviously be against a child's best interest, without the need for specific findings or evidence to support that conclusion. By the 1990s, however, courts in most states had shifted to a rule requiring at least some evidence of the harm that the parent's sexual orientation would allegedly cause the child. This is commonly known as the "nexus" test.[26]

While some early cases were willing to entirely sever or disregard the rights of transgender parents, more recent case law has avoided such *per se* determinations. Despite these developments, our investigation shows that bias against transgender parents continues to appear throughout court opinions. Drawing on existing case law and legal scholarship, we present a model that analyzes a variety of observations offered by courts, each of which suggests three types of biases that serve as proxies for discriminatory treatment. While courts today rarely reject transgender parents' claims outright, they instead offer analysis that is indirectly tied to the parents' transgender status—analysis that is tied to concerns about *transition*, for example—that winds up disadvantaging the interests of transgender parents. Second, courts also express concerns about the transmission of gender nonconforming behavior to the child, thereby destabilizing the child's own gender identity or sexual orientation, what we describe as concerns about *contagion*. A final set of concerns are directed more specifically to parents who engage in gender variant activities, like cross-dressing, even when this behavior takes place outside of the child's purview. We analyze these concerns and situate them within a larger anxiety about gender *volition*, that is, the idea that a parent's nonconforming gender expression or behavior will negatively affect a child.

In the final section, we propose alternative ways to guide judges' treatment of transgender parents in the family court system. Because decades of experience with the nexus test has proven that it is still susceptible to implicit bias, we posit that the only way to guarantee fair consideration that takes into account both the rights of transgender parents and the actual needs of their children is to completely prohibit consideration of a parent's transgender identity or expression, as well as consideration of any factors

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25. Our analysis follows a similar set of inquiries as Cliff Rosky in his excellent article, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009).

26. *See* COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 1:2 (2018).

that may be used as proxies for such status, such as concerns about stigma or a child's anxiety about transition.

Admittedly, the cases we examine are small in number, but they are deeply instructive in terms of how the law must evolve in the coming era. Our goal is to offer insight for both lawyers and judges, but also for legal scholars considering family law's disparities. One crucial step in equalizing families involves taking stock of existing research on transgender parenting and noting where the law has failed to protect the interests of transgender parents. As we argue, the need to perform a thorough investigation of the past treatment of transgender parents is especially important, not just because of the demographic shifts in transgender parenthood but also because of the added analytical insight that these cases offer into the need for change within family law as a whole.

A final point deserves mention. At the same time that these results—and this Article—suggest a persistent inequality, it is also important to note that these cases are but a very small snapshot of the spectrum of transgender parenting, kinship, and caregiving, which are almost all taking place, without conflict or crisis, outside of the shadows of the courtroom. Consequently, at the same time we are mindful of the growing spectrum of transgender parenting, we are also acutely mindful of the ways in which the courts have not yet caught up with the reality of this spectrum. Taking stock of this reality—which, the research reveals, is often not that different from any other family—is a first step in building out a cohesive and comprehensive system that treats all families fairly.[27]

I. TRANSGENDER FAMILY FORMATION AND RECOGNITION

Ten years ago, Thomas Beatie, a transgender man, created an international stir when he announced that he was pregnant in an article in the *Ad-*

27. In doing this work, as two queer cisgender women, we are acutely mindful of the importance, as Paisley Currah, Richard Juang, and Shannon Minter have reminded us, of ensuring gender self-determination as an imperative matter of "well-being" rather than "an intellectual curiosity." Paisley Currah et al., *Introduction*, *in* TRANSGENDER RIGHTS, *supra* note 22, at xiii, xxii; *see also* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015) ("For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development."). Despite our histories of advocacy in allyship with trans communities and our connections with trans, gender nonconforming, and gender variant chosen family, it is important to acknowledge the inherent limitations of our perspectives as cisgender women. *See* JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 209–12 (2007); Jacob Hale, *Suggested Rules for Non-Transsexuals Writing About Transsexuals, Transsexuality, Transsexualism, or Trans___*, SANDY STONE (Nov. 18, 2009), http://sandystone.com/hale.rules.html [http://perma.cc/9T6W-8ERX] (observing the importance of interrogating one's subject position and goals in writing about the trans community).

vocate magazine.[28] Despite the sensationalist accounts of Beatie's pregnancy, it is important to note that ten years later, the visibility of trans parents has become much less remarkable. Of course, transgender people form families through a variety of means, just as other queer and straight people do, including adoption, alternative insemination of a female partner by a sperm donor, or through conventional means in a different-sex marriage before coming out as trans. Today, an estimated 1.4 million members of the population identify as transgender, and a large proportion of them are also raising—and having—children at the same time, as we discuss below.[29]

It bears mentioning that during that time, and for the last forty years, courts have considered cases involving transgender parents regarding matters of divorce, custody, and visitation. Before we discuss the legal treatment of transgender parents in family court cases, however, it is important to take stock of how transgender parents form and raise families, and then specifically interrogate how the law has historically applied these general rules to transgender parents.

It should be noted that even Beatie's marriage was eventually scrutinized by the courts, precisely because of his pregnancy and childbirth. When Beatie and his wife sought a divorce in 2012, the Arizona family court judge hearing the case initially ruled that their marriage appeared to be an invalid same-sex marriage because, even though Beatie had obtained a new birth certificate recognizing him as male prior to the marriage, he had retained his reproductive capacity that the court viewed as inherently "female."[30] The state's court of appeals reversed that order, however, holding that Beatie's amended birth certificate from Hawaii must be given full faith and credit, and further holding that denying recognition would violate his constitutional rights under the Equal Protection Clause of the U.S. Constitution.[31] The appellate court also noted that the right to procreate is "one of the basic civil rights of man,"[32] a "liberty interest afforded special constitutional protection."[33] To deny Beatie recognition as a man because he chose to maintain

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28. *See* Thomas Beatie, *Labor of Love*, ADVOCATE (Mar. 14, 2008, 12:00 AM), https://www.advocate.com/news/2008/03/14/labor-love [https://perma.cc/Z677-KUKN].

29. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?, WILLIAMS INST. 2 (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf [https://perma.cc/G5A3-4R84]; *see* STOTZER ET AL., *supra* note 22. For a fuller discussion of the history of the transgender community in the United States, and the legal trajectory of the transgender movement, see SUSAN STRYKER, TRANSGENDER HISTORY (rev. ed. 2017).

30. Michael Kiefer, *'Pregnant Man's' Divorce Case Leaves Judge in Doubt*, USA TODAY (Dec. 12, 2012, 8:22 PM), https://www.usatoday.com/story/news/2012/12/12/pregnant-mans-divorce-case/1765359/ [https://perma.cc/32MY-EKBU].

31. Beatie v. Beatie, 333 P.3d 754 (Ariz. Ct. App. 2014).

32. *Id.* at 760 n.10 (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

33. *Id.* at 759 n.10.

his reproductive capacity and have children would violate that foundational constitutional right: the right to create a family.

A. *Transgender Family Formation*

A recent article by Shannon Price Minter, arguably the nation's leading expert on transgender family law, describes the various ways that trans and gender variant people create families and how those families are treated by the state.[34] As he explains, most transgender parents today became parents through typical means prior to transitioning: either intentionally having children before medically transitioning, or having children during a prior relationship before coming out as transgender.[35] Every state will recognize such individuals as legal parents from the outset, provided that they either carried the child, were married to the person who carried the child, or, for unmarried partners, signed a legal declaration of paternity.[36] Unmarried partners who intentionally bring a child that is not genetically related to one parent into the world can also ensure legal recognition through adoption or a court order recognizing the person as a parent.[37] As Minter observes, "once a person becomes a legal parent, the fact that the person later undergoes a gender transition does not affect the person's continued legal status as a parent. If the person was a legal parent before transitioning, the person continues to be a legal parent after transitioning."[38] Finally, even in the absence of those formal means of confirming the parent–child relationship, many states now recognize some form of equitable parentage for a person who has functioned as the child's parent.[39]

A 2011 national survey of transgender participants found that 38% of respondents were parents, noting that over 80% of those who transitioned after the age of fifty-five were parents.[40] In the 2015 U.S. Transgender Survey performed by the National Center for Transgender Equality, 18% of respondents reported having children, and 69% of those were out as transgender to their children.[41]

Although there is not a great deal of research on the effect of a parent's transition on child development,[42] the earliest research suggested that a par-

34. Minter, *supra* note 22.

35. *Id.* at 412–14.

36. *Id.* at 412–13.

37. *Id.* at 416.

38. *Id.* at 413.

39. *Id.* at 416.

40. Haines et al., *supra* note 17, at 239 (citing JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), https://endtransdiscrimination.org/PDFs/NTDS_Report.pdf [https://perma.cc/E3S3-D8L2]).

41. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 66 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/3QYX-D4D9].

42. As Sally Hines has insightfully written,

ent's transition did not adversely impact children's development.[43] One of the most cited studies, performed by Richard Green, concluded in 1978 that "children being raised by transsexual or homosexual parents do not differ appreciably from children raised in more conventional family settings on . . . measures of sexual identity."[44] Twenty years later, the author reached the same conclusion after a subsequent study, observing that "[a]vailable evidence does not support concerns that a parent's transsexualism directly adversely impacts . . . the children."[45] "By contrast," Green noted, "there is extensive clinical experience showing the detriment to children in consequence of terminated contact with a parent after divorce."[46]

The most comprehensive review of transgender parenting research was performed by the Williams Institute in 2014, which reviewed fifty-one studies that included research on transgender parents.[47] The study offers a much more detailed picture of transgender parent demographics than previously available, finding that studies found that "between one quarter and one half of transgender people report being parents," with higher percentages of transgender women than transgender men.[48] The study has a number of valuable insights, but three are particularly notable for our purposes.

First, the Williams Institute study found that in its review of all of the existing literature, "the vast majority [of transgender parents] reported that their relationships are good or positive generally, including after 'coming out' as transgender or transitioning."[49] Following a period of adjustment,[50]

> the partnering and parenting practices of trans people are not only neglected within sociologies of the family, but also go unrecognized within gender research. As such, transgender lives and experiences remain absent from these analytical frameworks, which rest on an uninformative and naturalized binary gender model that recognizes only male or female gender categories.

Sally Hines, *Intimate Transitions: Transgender Practices of Partnering and Parenting*, 40 SOCIOLOGY 353, 355 (2006).

43. *See* Richard Green, *Transsexuals' Children*, INT'L J. TRANSGENDERISM, Oct.–Dec. 1998. *But see* Tonya White & Randi Ettner, *Disclosure, Risks and Protective Factors for Children Whose Parents Are Undergoing a Gender Transition*, J. GAY & LESBIAN PSYCHOTHERAPY, no. 1-2, 2004, at 129, 131 [hereinafter White & Ettner, *Disclosure*] (noting that Green did not use a control group). More recent studies indicate that children, particularly preadolescent children, adjust well to gender transition, and that postponing a transition or not disclosing a transition places children at greater risk of damaging their emotional health than the transition itself. *See id.* at 142 (noting that failure to disclose or postponement places children at greater risk than transition); Tonya White & Randi Ettner, *Adaptation and Adjustment in Children of Transsexual Parents*, 16 EUR. CHILD & ADOLESCENT PSYCHIATRY 215, 215 (2007) (noting that preadolescent children adjust well post-transition).

44. Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696–97 (1978).

45. Green, *supra* note 43, at 4.

46. *Id.*

47. *See* STOTZER ET AL., *supra* note 22, at 1–2.

48. *Id.* at 2.

49. *Id.* at 2. Consider some quotes from Green's 1998 study:

studies indicate that "relationships may be just as strong, or even stronger than before."[51] Other recent academic research echoes these conclusions and suggests that the majority of transgender parents report having good relationships with their children, particularly after coming out or transitioning.[52] Indeed, in a recent study, an overwhelming majority of respondents—70 percent—reported that their children continued a relationship with them after they came out as transgender.[53]

Second, the Williams Institute reports that studies "found no evidence that having a transgender parent affects a child's gender identity or sexual orientation development, nor has an impact on other developmental milestones."[54] Indeed, some research cited by the Williams study noted that transgender parents increase the likelihood of positive outcomes, like accepting differences and embracing diversity.[55] The most recent study we found, published in 2018 in Belgium, performed a series of in-depth interviews with minor children.[56] Although the study recognized, in some detail, that a gender transition can be a "challenging and emotional process for the entire family," it noted that "most of the children we interviewed did not experi-

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> "Linda wants to be a woman. Linda wants to start a fresh life. She likes living as a woman. I think that is happy for her. At first (when I was 4 ½) I didn't quite understand. As I got older, I realized she must be happy living as a woman, so I'll just accept that." (7 year old son of a trans woman).

Id. at 10 (quoting Green, *supra* note 43, at 3). Or:

> "My Mother's not happy in the body she is in. My mom is a lot happier since starting to live as who she wants to be. When I was 13, my mother said, 'I want to be a man, do you care?' I said, no, as long as you are the same person inside and still love me. I don't care what you are on the outside . . . It's like a chocolate bar. It's got a new wrapper but it's the same chocolate inside." (14 year old daughter of a trans man).

Id. (quoting Green, *supra* note 43, at 3).

50. *See* ARLENE ISTAR LEV, TRANSGENDER EMERGENCE (2004) (cited in STOTZER ET AL., *supra* note 22, at 9–10) (discussing four stages of adjustment: The first involves disclosure, where the transgender parent informs the child of their transgender identity. A second stage of turmoil ensues, where the family starts to grapple with the transition. This leads to a third stage, which Lev refers to as the negotiation stage, and the final stage is the balanced stage, where parties adjust to the new normal post-transition). The Lev study is limited to parents who "come out" as transgender after having a child, not someone who has already transitioned by the time of family formation. *Id.* at 9–10.

51. STOTZER ET AL., *supra* note 22, at 10 (citing GRANT ET AL., *supra* note 40, and JACK PYNE, TRANSFORMING FAMILY: TRANS PARENTS AND THEIR STRUGGLES, STRATEGIES, AND STRENGTHS (2012), http://lgbtqpn.ca/wp-content/uploads/2014/10/Transforming-Family-Report-Final-Version-updated-Sept-30-2014-reduced.pdf [https://perma.cc/NKH8-RUDX]).

52. *Id.* at 2 (reviewing articles on the subject of transgender parents).

53. Haines, *supra* note 17, at 239 (citing GRANT ET AL., *supra* note 40).

54. STOTZER ET AL., *supra* note 22, at 2.

55. *Id.* at 11.

56. *See* Myrte Dierckx et al., *Resilience in Families in Transition: What Happens When a Parent Is Transgender?*, 66 FAM. REL. 399, 399, 403, 408 (2017).

ence their parent's gender transition as a painful loss," often due to the various protective processes developed by the family, including family continuity and communication, the acceptance of a partner, and reflection and analysis from both the parent and child regarding the meaning of transition to set them at greater ease.[57] In every study that we found, the most dominant factor to impact the child's well-being was not the transition itself, but rather the "parental relationship and family constellation."[58]

Third, the study finds that "[t]ransgender parents have reported discrimination—either formally through the courts or informally by the child(ren)'s other parent—in child custody and visitation arrangements."[59] The National Transgender Discrimination Survey, which is the largest study of transgender people in the United States, found that 29% of transgender parents faced an ex-spouse limiting their contact with their children.[60] Significantly, 13% of respondents reported that courts had also actively limited their relationships with their children due to parental transgender status, noting that respondents of color experienced "higher rates of court intervention."[61] Of course, external factors, like culture, history, and economics, also affect the relationships between transgender parents and their children,[62] as do the laws that exist to protect against discrimination on the basis of gender identity. Although at latest count 20 states and more than 100 municipalities in the United States have adopted explicit statutory protections against discrimination based on gender identity, that is only a minority compared to the rest of the nation.[63] Further, transgender parents who are also of a racial or ethnic minority face even more challenges, both from the surrounding social context as well as from the law.[64] Class and economic opportunity con-

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57. *Id.* at 408; *see also* Stephen Erich et al., *Family Relationships and Their Correlations with Transsexual Well-Being*, 4 J. GLBT FAM. STUD. 419, 430 (2008) (noting that transgender individuals and their families are "able to develop, maintain, or reconceptualize their relationships in a positive and supportive manner . . . and eventually reach a new level of adaptive balance").

58. White & Ettner, *Disclosure*, *supra* note 43, at 139 (noting that the "parental relationship and family constellation had significantly more bearing on the outcome of the children than the transition itself"); *see also* STOTZER ET AL., *supra* note 22, at 10 (citing studies noting that the main stressors for children were not about the gender transition alone, but rather about the tension between the parents regarding the transition).

59. STOTZER ET AL., *supra* note 22, at 2.

60. GRANT ET AL., *supra* note 40, at 98; *see also* Green, *supra* note 43, at 1 ("Many [ex-spouses] are so enraged at the transsexual parent that they defiantly oppose any contact with the child.").

61. Haines, *supra* note 17, at 239 (citing GRANT ET AL., *supra* note 40). One study from Canada noted that a court had imposed particular conditions on a transgender mother, going so far as to ban her from visiting her child's school. STOTZER ET AL., *supra* note 22, at 14 (citing PYNE, *supra* note 51).

62. Amanda Veldorale-Griffin, *Transgender Parents and Their Adult Children's Experiences of Disclosure and Transition*, 10 J. GLBT FAM. STUD. 475, 479 (2014).

63. 1 SEXUAL ORIENTATION AND THE LAW, *supra* note 13, at §§ 10:5, :7.

64. *See* Veldorale-Griffin, *supra* note 62, at 479.

tinue to challenge the well-being of transgender parents and their surrounding communities, limiting their opportunities to seek out psychological and medical resources and support.[65]

Nevertheless, while these external factors impact the support transgender parents receive, it is undeniable that more and more transgender individuals are having babies and forming families. It is not difficult, therefore, to predict that such families will inevitably become seen as an unremarkable part of the fabric of our society.[66]

B. *Challenges to Parental Recognition Before* Obergefell

Prior to nationwide marriage equality, a number of courts invalidated the marriages of transgender people, leaving the fate of the children's parentage in such cases open to further revision. In one example from this period, in a Maryland case a cisgender[67] mother challenged a bid for shared custody from her ex-spouse, a transgender man (Michael Conover, formerly Michelle),[68] arguing the following:

> Should Michelle [sic] have her way with the court, she would have a court order backed by the full powers of the court enabling her to walk down the sidewalk to Jaxon's home, knock on the door with police behind her, and with court papers in hand announce that she is there for visitation with Jaxon and take him off for overnight visitations . . . . Other parents will be going home and having discussions behind closed doors. "Little pitchers have big ears." Other five year old children in his class are going to be picking up terms easier for them to say in the colloquial vernacular. The term "transvestite" may be too long for them to say. We can almost guess at the other terms they'll hear their father or mother say.
>
> Children can be cruel (they are not politically correct) and on the playground and on the school bus they are going to taunt him "Your father's a

65. *Id.*; *see also* STOTZER ET AL., *supra* note 22, at 3 (noting that further study on a wide number of variables—including the role of race, class, gender, age of transition, range of family formation, genderqueer or nonbinary individuals, and the evolution of parent-child relationships—is needed); Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377 (2017) (providing an excellent exploration of the role of intersectionality in family law litigation).

66. *See* Timothy F. Murphy, *The Ethics of Helping Transgender Men and Women Have Children*, 53 PERSP. BIOLOGY & MED. 46, 55 (2010) (noting that while it might be "tempting to imagine lots of possible damaging social effects to children born of transgender men, just as earlier it was easy to imagine lots of possible damaging social effects to children born to surrogate mothers, by IVF and ET, children born to unmarried or unpartnered women, and children born to homosexual men and women," the "knowable risks do not set this type of parenting apart from all others").

67. A cisgender person is someone whose sex assigned at birth is consistent with the person's gender identity.

68. Conover v. Conover, 146 A.3d 433 (Md. 2016); Petition for Writ of Certiorari to the Court of Special Appeals at 2 n.3, *Conover*, 146 A.3d 433 (No. 79), https://freestate-justice.org/wp-content/uploads/2015/10/Conover-Petition-for-Certiorari.pdf [https://perma.cc/83A6-QMUZ].

> _____. Ha Ha Ha." They'll sing it with a sing-song ring as children do. They will bully him. Little children will think if his father is thus and so, he must be one too. They'll think it is somehow passed on. They will shun him. . . . All in the name of "equality."[69]

Thankfully, the high court ignored the mother's deeply offensive and legally irrelevant arguments about the potential risks to the child from having a transgender man recognized as his father.[70] Nonetheless, the mother's arguments demonstrate the ways that stereotypes and fears about transgender parents can influence even cases involving what might seem to be purely legal questions, such as whether or not the law will recognize an individual as a parent when they lack a biological or adoptive relationship to a child they helped raise.

Prior to *Obergefell*'s recognition of marriage equality nationwide, a number of decisions invalidated marriages based on the transgender status of one partner, often permanently altering the transgender parent's relationship to their child.[71] In this set of cases, almost always involving transgender men married to cisgender women, one spouse sought to invalidate the marriage, in part in order to sever the parent–child relationship that would otherwise automatically flow to a non-biological father for children born during the marriage.[72] The argument generally used was that a marriage between two individuals with the same birth-assigned sex was an invalid same-sex marriage. Since the marriage was invalid, the argument went, any parental rights of the non-biological parent that were based in the presumption of paternity of children born to a spouse[73] were invalid, as well.

Until *Obergefell*, such arguments were often successful; today, they are no longer good law.[74] Here, the reasoning was that a person could never transition because of the presumed immutability of sex.[75] In a perceptive account of these cases, Taylor Flynn asks,

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69. Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals at 2–3, *Conover*, 146 A.3d 433 (No. 79), http://freestate-justice.org/wp-content/uploads/2015/12/Conover-2015.10.28-Opp-to-Pet-for-Cert-for-web.pdf [https://perma.cc/H63L-EEGZ].

70. *Conover*, 146 A.3d at 437 (holding that Michael, as a non-biological *de facto* parent, has standing to seek custody and visitation).

71. *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004), *reh'g denied* (Sept. 29, 2004), *cert denied*, 898 So. 2d 80 (Fla. 2005) (voiding a marriage between a transgender man and his wife as not recognized under Florida law); *In re* Marriage of Simmons, 825 N.E.2d 303, 307–09 (Ill. App. Ct. 2005) (voiding a marriage between a transgender man and his wife as not recognized under Illinois law).

72. On rare occasions, a trans or same-sex parent has sought to disclaim a parental relationship to avoid responsibility for child support. *See, e.g.*, Karin T. v. Michael T., 484 N.Y.S.2d 780 (Fam. Ct. 1985); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

73. *See, e.g.*, Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 739–40 (2012).

74. *See* Elizabeth E. Monnin-Browder, *Relationship Recognition and Protections*, *in* TRANSGENDER FAMILY LAW, *supra* note 22, at 36, 41.

75. *Id.* at 46.

> What if you were declared a "legal stranger" to your child and were prohibited from ever seeing her again? What if you were told that your marriage never existed, your name is not your own, or your sex is not what you know it to be? These are the lived experiences of many transgender people who walk into civil or family court every day.[76]

Many early cases appear to have taken this approach, a factor that suggests that one of the great wins of *Obergefell* may be the removal of scrutiny regarding the marriages of transgender individuals.

In such cases, courts invalidated these marriages, either because the court rejected the transition, or because the court substituted its judgment for another state entity in concluding that the transition was somehow incomplete. Consider the observations by a Texas appellate court that refused to recognize the marriage between Christie Lee Littleton, a transgender woman, and Jonathan Mark Littleton, a cisgender man:

> The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?
>
> . . . .
>
> There are some things we cannot will into being. They just are.
>
> . . . .
>
> We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male.[77]

After *Littleton*, appellate courts in Kansas, Ohio, and New York ruled that marriages involving transgender individuals were null and void.[78]

As a result, in some of these cases the transgender parent was cut off from their children, sometimes permanently, and, in at least one case, even after winning in the trial court. In Florida, for example, Michael Kantaras, a transgender man, faced a custody battle regarding his children (who were biologically fathered by Michael's brother).[79] In the lower court, Kantaras won a three-week trial that focused, in part, on his role as a parent.[80] In that case, the trial court had made extensive findings supporting the conclusion that Michael is male, noting that he had a driver's license and birth certificate that recognized him as male and had participated in adoption proceedings and childrearing as a father.[81]

Yet despite the weight of this evidence, the appeals court reversed the lower court's decision. The appellate opinion cited courts in Ohio, Kansas,

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76. Flynn, *supra* note 22, at 32.

77. Littleton v. Prange, 9 S.W.3d 223, 224, 231 (Tex. App. 1999).

78. Kantaras v. Kantaras, 884 So. 2d 155, 158 (Fla. Dist. Ct. App. 2004).

79. *Id.* at 156.

80. *See id.*

81. *Id.*

Texas, and New York, all of which invalidated marriages between a transgender person and a cisgender spouse on the grounds that the marriages violated state statutes or public policy.[82] Quoting the Kansas Supreme Court, it observed:

> The words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female .... [T]he transsexual still "inhabits ... a male body in all aspects other than what the physicians have supplied."[83]

Since the marriage was no longer valid, the court remanded for a determination of the legal status of the children after the annulment was completed.[84]

Other transgender parents faced similar challenges.[85] Interestingly, many of these cases emerged around the same time that the nation began to confront the emergence of legalized same-sex marriage.[86] Some courts invalidated marriages, not because a person could never transition, but because the court concluded that the individual had not "successfully" transitioned.[87]

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82. *Id.* at 158–61; *see also In re* Estate of Gardiner, 42 P.3d 120, 135, 137 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2002) (voiding marriage because transgender woman did not "fit the definition of a female" without female reproductive capacity and chromosomal expression); Frances B. v. Mark B., 355 N.Y.S.2d 712, 716–17 (N.Y. Sup. Ct. 1974) (annulling marriage of transgender man based on public policy that marriage is "for the purpose of begetting offspring"); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500–01 (Sup. Ct. 1971) (invalidating marriage based on interpretation of New York statutes); *In re* Marriage License for Nash, No. 2002-T-0149, 2003 WL 23097095, at *1, *6 (Ohio Ct. App. Dec. 31, 2003) (following *Ladrach* and denying marriage license issuance to cisgender woman and transgender man); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) (denying issuance of marriage license to transgender woman and cisgender man and stating the state legislature can "change the statutes" if such issuance "is to be the public policy of the state"); *Littleton*, 9 S.W.3d at 231 (invalidating marriage because "as a matter of law, [a transgender woman] is a male" and "cannot be married to another male" based on interpretation of Texas statutes).

83. *Kantaras*, 884 So. 2d at 159 (quoting *In re Estate of Gardiner*, 42 P.3d at 135). Such decisions, Flynn writes, reflect an "almost fetishistic attitude toward trans individuals, evident in the courts' reductionist tendency to replace substantive analysis (whether Michael is a good parent) with a relentless focus on sexual anatomy (whether Michael has a penis)." Flynn, *supra* note 22, at 33 (noting that "courts simultaneously 'de-sex' and hypersexualize trans men and women").

84. *Kantaras*, 884 So. 2d at 161. The custody case between Michael Kantaras and his former wife ultimately settled. Emanuella Grinberg, *Settlement Reached in Transsexual Custody Case*, CNN (June 16, 2005, 2:17 PM), http://edition.cnn.com/2005/LAW/06/16/ctv.transsexual.custody/ [https://perma.cc/95RE-WKFR].

85. *See In re* Marriage of Simmons, 825 N.E.2d 303, 307–09 (Ill. App. Ct. 2005); Monnin-Browder, *supra* note 74, at 47–48 (discussing case).

86. We are grateful to Shannon Minter for this point.

87. *See In re Estate of Gardiner*, 42 P.3d at 136 (invalidating marriage on the grounds that "transsexuals are not included" in the statutes requiring marriage to be of members of the opposite sex); Monnin-Browder, *supra* note 74, at 48 (discussing *Simmons*).

In one case from Illinois, *In re Marriage of Simmons*, even though a transgender father had obtained an amended birth certificate, the trial court found that the marriage was still invalid because he had not "completed" sex reassignment surgery.[88] When the transgender parent argued that his amended birth certificate essentially removed an impediment to the marriage's recognition, the court disagreed, noting that "he still possesses all of his external female genitalia and requires additional surgeries before sex reassignment can be considered completed."[89] It rejected the new birth certificate as "ministerial," and refused to extend the Parentage Act to cover him because it did not extend to same-sex parents.[90]

In a particularly devastating move, the court denied standing to the parent even though the child had always known him as "Daddy."[91] In his final conclusion, the judge stated that "[i]t would be illogical to hold that because petitioner and respondent agreed to enter into a marriage prohibited under Illinois law, the state is now obliged to recognize that illegal union and all that flows therefrom simply because respondent participated and acquiesced in it."[92] Here, the judge made little or no effort to grapple with the significance of the court's holding, which immediately divested a child from his parent.[93]

In similar cases, where the state had not set forth specific procedures for recognizing a gender transition, courts concluded that there was no authority to recognize the marriage and, therefore, no basis to find a legal parent–child relationship between the child and the transgender father.[94] In some cases, as in *Simmons*, courts reached this conclusion even when the transgender parent had obtained a birth certificate recognizing their transition. In others, if the state did not set forth guidelines to recognize a person's transition, then the court would automatically invalidate the marriage. In one case demonstrating this outcome, *In re Ladrach*, an Ohio court opined that "if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license . . . must issue."[95] However, since Ohio did not permit transgender people to change their birth certificates, the *Ladrach* court refused to issue a marriage license, even after the transgender person had undergone gender confirmation surgery.[96]

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88. 825 N.E.2d at 308.

89. *In re Marriage of Simmons*, 825 N.E.2d at 309–10.

90. *Id.* at 310–11.

91. *Id.* at 312.

92. *Id.* at 314.

93. *Id.* at 315.

94. *See* Monnin-Browder, *supra* note 74, at 49 (discussing *In re* Ladrach, 513 N.E.2d 828, 831–32 (Ohio Prob. Ct. 1987)).

95. 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987).

96. *In re Ladrach*, 513 N.E.2d at 831.

Eventually, where states had formalized a procedure to change the gender marker on a birth certificate, courts began to recognize marriages, so long as the transgender person transitioned prior to the marriage.[97] For example, in a New Jersey opinion, *M.T. v. J.T.*, a state appellate court recognized a transgender woman's marriage to a man, reasoning that a determination of one's sex required consideration of a variety of factors, including her "self-image, the deep psychological or emotional sense of sexual identity and character."[98] The appellate court observed that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."[99] Other courts suggested that the issues of transition were not necessarily controlling when the court was willing to consider alternative theories, such as estoppel, to maintain some relationship between a child and an adult who had acted as a parent.[100]

While a step up from denying recognition altogether, requiring proof of medical transition excludes many transgender individuals who may not seek to undergo particular treatments or who for other reasons cannot access them. Fortunately, as noted above, states are moving more and more toward systems of gender recognition that do not rely on surgery or any other medical treatment.[101] Instead, legal regimes are increasingly recognizing that an individual's gender is defined by the person's gender identity alone.[102] That change, combined with the legal irrelevance of gender to marriage post-*Obergefell*, means that the government may eventually be able to cease regulating gender altogether.

II. TRANSGENDER PARENTS AND CONTESTED CHILD CUSTODY CASES: A HISTORICAL OVERVIEW

Today, since *Obergefell*, while trans individuals no longer face the same risk of outright invalidation of their families, they continue to face the risk of biased treatment by the courts in decisions regarding the allocation of physi-

97. *See* Miller v. Angel, Civ. No. GD053180 (Cal. Super. Ct. Aug. 6, 2014), http://transgenderlawcenter.org/wp-content/uploads/2016/05/millerorder.pdf [https://perma.cc/EA5G-RGKW]; Monnin-Browder, *supra* note 74, at 43–46 (citing the California court ruling discussed in Greg Hernandez, *Judge Rules Transsexual in Custody Case Is Male*, L.A. TIMES (Nov. 26, 1997), http://articles.latimes.com/1997/nov/26/news/mn-57925 [https://perma.cc/JJ9K-QY7K]).

98. 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976); Monnin-Browder, *supra* note 74, at 43–44.

99. *M.T.*, 355 A.2d at 209.

100. *See* JOSLIN ET AL., *supra* note 26, at § 7:5.

101. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 103426 (West Supp. 2019) (allowing a transgender person to update the gender marker on a birth certificate by submitting an affidavit confirming that the change would reflect the person's gender identity).

102. *See* Levasseur, *supra* note 27, at 990.

cal custody, decisionmaking, and visitation between a child's parents.[103] As this Part shows, while the law has evolved in treating lesbian, bisexual, and gay parents more equally in these family court determinations, it has not evolved as far where transgender parents are involved.[104]

A. *Overview of Child Custody Decisionmaking Standards*

Courts and legislatures today generally recognize that, following a divorce, the maintenance of parent–child bonds and frequent contact with both parents is presumptively in a child's best interest.[105] This is supported by social science evidence indicating that losing contact with a parent is the most painful effect of divorce for a child and that frequent and quality visitation with a nonresident parent has a significant protective benefit.[106] Courts will therefore only deny visitation or impose restrictions (such as requiring supervision) in exceptional circumstances that endanger the child.[107] Removal of a child by the state or termination of parental status is an even more drastic and disfavored act that generally requires "clear and convincing evidence" that a parent is unfit and that the child will be harmed if returned to the home, as well as a finding that the termination of the relationship is in the child's best interest.[108]

When determining how to apportion residential time ("physical" custody) and decisionmaking authority ("legal" custody) between two recognized

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103. For transgender (and non-transgender) parents who are not biologically connected to their children, the risk of invalidation may still be very real. *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (noting how biological connection anchors nonmarital parenthood, at the cost of other forms of parental recognition).

104. *See generally* Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503 (providing an excellent account of how national, mainstream LGBT rights organizations, by pursuing an assimilationist agenda, have also failed to prioritize the issues faced by transgender individuals, making them more vulnerable as a result).

105. *See, e.g.*, CAL. FAM. CODE § 3020(b) (West Supp. 2019) (declaring "that it is the public policy of this state to ensure that children have frequent and continuing contact with both parents").

106. Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. 352, 354, 356 (2003).

107. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-129(1)(b)(I) (West 2018) ("The court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger the child's physical health or significantly impair the child's emotional development."); Dehlman v. White, 602 N.Y.S.2d 435, 436 (App. Div. 1993) ("Absent exceptional circumstances, a parent may not be deprived of his or her natural right to meaningful visitation with a child."). Such a denial would also have constitutional implications. *See, e.g.*, *In re* Marriage of Hatton, 160 P.3d 326, 333 (Colo. App. 2007) (holding that a trial court cannot deny a parent visitation without expressly considering whether that is "the least detrimental alternative," because such a denial would infringe "a parent's fundamental, constitutional right to maintain a relationship with his or her children").

108. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (holding that due process requires high bar of "clear and convincing evidence" of unfitness before parent's rights can be terminated).

legal parents, courts today are generally guided by the standard known as "the best interest of the child."[109] The best interest test became formalized in American law relatively recently, in the latter third of the twentieth century.[110] Before that time, an evolving series of rules and presumptions guided the placement of children following a divorce.[111] In the English common law, until at least the nineteenth century, the father was entitled to automatic custody of children in recognition of his property rights over them, although this rule was less absolute in the United States.[112] By the early twentieth century that principle had given way to a popular recognition that, particularly in a child's youngest, or "tender," years, the mother should retain custody.[113]

By the 1960s, however, with the rise of women's liberation, courts began to conclude that the presumption of maternal custody was overly restrictive and did not always lead to the most desirable or most equitable outcome.[114] But no new candidate for a simple presumption or rule took its place. Instead, courts and then legislatures turned to the open-ended standard requiring courts to make an individualized determination of what custodial arrangement would be in the best interest of this particular child.[115]

The best interest standard has now been adopted by statute in every state.[116] But despite its dominance, the best interest standard has faced heavy criticism from legal scholars, psychologists, and others for offering judges breathtakingly wide discretion, unparalleled in almost any other area of

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109. This broad discretionary standard is not usually used, however, in cases that do not involve a legal parent, such as petitions for visitation or custody by grandparents or by other third parties not recognized as a legal parent. *See* Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (plurality opinion) (holding unconstitutional a Washington statute permitting courts to order grandparent visitation against the wishes of the parents where such visitation would be in the best interest of the child).

110. *See* Annual Review Article, *Child Custody, Visitation, & Termination of Parental Rights*, 16 GEO. J. GENDER & L. 41, 47–50 (2015) (listing several state laws from the late twentieth century establishing the standard of best interest of the child).

111. *See generally* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994) (detailing the history of American law relating to child custody from the colonial era to the end of the twentieth century); Annual Review Article, *supra* note 110, at 44–50.

112. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 233–35.

113. *Id.* at 235.

114. *Id.*

115. Until the last few decades, courts almost always awarded only one parent as the custodian, leaving the other parent with only occasional visitation. The strong trend today, however, is a preference for joint legal and physical custody, under which parents are encouraged to work with the court to devise a "parenting plan" that divides up decisionmaking and parenting time based on the unique needs of the family. *See, e.g.*, J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 215–16, 226 (2014).

116. *See* Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 117 n.19 (2009) (listing statutes).

law.[117] One critique is that the limited resources of the family courts cannot possibly allow judges to accurately understand or predict the future implications for children of various custodial arrangements.[118] Another is that it includes no room for considerations of fairness or the rights of parents.[119]

The best interest standard has also been criticized for its indeterminacy, as it leaves judges to decide between opposing child-rearing approaches, religious beliefs, or value systems without adequate guideposts from either law or societal consensus.[120] That indeterminacy also creates incentives for parties to litigate instead of negotiate agreements and allows a party to manipulate the system; for instance, a parent might ask for more custody than they really want in an attempt to convince the other parent to trade away money for parenting time or decisionmaking authority.[121]

In response to these criticisms, some limitations have been put in place to attempt to narrow and channel judges' discretion. The Uniform Marriage and Divorce Act (UMDA), issued in 1970 and amended in 1971 and 1973, provides a good example of the broad range of factors courts are typically directed to consider as part of the best interest standard.[122] It instructs courts

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117. *See, e.g.*, Mnookin, *supra* note 112, at 289. For more commentary on the best interests test, see CHILDREN'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2016), http://www.childwelfare.gov/pubPDFs/best_interest.pdf [https://perma.cc/6ZM4-RC8L]; Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345 (2005); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267 (1987); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11 (1987); Robert E. Emery, *Rule or Rorschach? Approximating Children's Best Interests*, 2 CHILD DEV. PERSP. 132 (2007); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, L. & CONTEMP. PROBS., no. 1, 2014, at 69, 69–70 (2014) (characterizing indeterminacy as one of the deficiencies of the best interests standard); and Raymie H. Wayne, *The Best Interests of the Child: A Silent Standard—Will You Know It When You Hear It?*, 2 J. PUB. CHILD WELFARE 33 (2008). *But see* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2244 (1991) (defending discretion).

118. *See, e.g.*, Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 565–69 (1997).

119. *See, e.g.*, Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325, 353 (1996–1997); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

120. *See, e.g.*, Elster, *supra* note 117.

121. *See, e.g.*, Garska v. McCoy, 278 S.E.2d 357, 360–62 (W. Va. 1981); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

122. UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. LAW COMM'N 1973); *see* Schneider, *supra* note 117, at 2216 ("Although the UMDA has not been widely adopted, its child custody provisions reflected, and to an important degree continues to reflect, standard American law.").

to "determine custody in accordance with the best interest of the child."[123] In so doing, the court must "consider all relevant factors including" the parents' wishes, the child's wishes, the child's relationship with their parents, siblings, home, and community, and the parents' mental and physical health.[124] The UMDA puts only one express limitation on that broad discretion: "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."[125]

Nearly thirty years later, there was another attempt at promulgating model rules for family law. In 2000, the American Law Institute, which publishes influential restatements of the law in various subject areas, issued its Principles of the Law of Family Dissolution.[126] The Principles attempt to simplify the determination of custody and visitation by moving away from the open-ended best interest standard to more concrete rules, including the "approximation" standard, which aims to have custody arrangements mirror the proportion of time each parent spent caring for the child prior to the divorce.[127]

Neither the ALI Principles nor the UMDA have been broadly adopted by courts or state legislatures, however. Only eight states have adopted portions of the UMDA,[128] and only one state, West Virginia, has adopted the ALI's approximation standard for custody.[129]

Today nearly all states limit judges' discretion by listing statutory factors that must be considered in assessing a child's best interest: past, present, and future circumstances; the interaction and relationship between parent and child; and other factors such as their location, adjustment, and mental and physical health.[130] Even with guideposts in place, however, judicial discretion

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123. UNIF. MARRIAGE & DIVORCE ACT § 402.

124. *Id.*

125. *Id.*

126. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (AM. LAW INST. 2002).

127. *See* Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83 (2011).

128. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 394 (2008).

129. ANN HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4.3 n.18 (3d ed. 2018) (noting that "[a] number of appellate decisions refer to the ALI Principles, but few have specifically adopted any portions of them"); Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution, *Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 576 (2008).

130. Those factors may include:

> (1) The past, present, and potential future relationship between the parent and the child; (2) The interaction and interrelationship of the child with the child's parent or parents, the child's siblings, and any other person who may significantly affect the child's best interest; (3) The child's adjustment to home, school, and community; (4) If the child is of suitable age and maturity, and the wishes of the child as to legal decision-making and parenting time; (5) The mental and physical health

to interpret the child's best interest remains staggeringly broad, as nearly every statute includes a catchall instruction to courts to consider any other factor "having a reasonable bearing on the physical and psychological well-being of the child."[131]

B. *Legal Relevance of Sexual Orientation and Gender Identity in Custody Determinations*

Within the broader context of the development of custody law, the rules courts apply to consider whether lesbian, gay, bisexual, and transgender parents can be granted custody or visitation have also evolved over the past half century. Until the 1970s, most courts applied a blanket, *per se* rule against allowing children to live with or spend time with an LBGT parent.[132] Under a similar justification, parents (especially mothers) who engaged in extramarital sexual conduct were also typically barred from having custody.[133] It was widely accepted that association with such a person would by definition have a detrimental impact on a child.

After Stonewall and the rise of the gay rights movement, as societal attitudes toward homosexuality began to change, courts began to renounce the *per se* prohibition on custody or visitation. In its place, courts adopted a more nuanced "nexus" or "adverse interest" test that required demonstration (or at least recitation) of a link to specific harms that could result from contact with an LGBT parent.[134] Rather than disqualifying an LGBT parent out-

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> of all individuals involved; and (6) Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent.

ARIZ. REV. STAT. ANN. § 25-403(A) (2017); *see also* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 4.3 (2019).

131. ME. REV. STAT. ANN. tit. 19-A, § 1653(3)(N) (Supp. 2018); *see also* Blew v. Verta, 617 A.2d 31, 35 (Pa. Super. Ct. 1992) (declaring that the best interest standard "requires us to consider the full panoply of a child's physical, emotional, and spiritual well-being").

132. *See, e.g.*, Nadler v. Superior Court *ex rel.* County of Sacramento, 63 Cal. Rptr. 352 (Ct. App. 1967) (reversing lower court that had denied custody to lesbian mother finding her unfit "as a matter of law"). Note that some commentators have further broken down the "*per se*" test into more than one category: for example, an irrebuttable presumption of unfitness and a rebuttable presumption of unfitness. Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 639–41 (1996) (noting that some appellate decisions often cited as examples of a *per se* test actually applied a broadly deferential standard of review that permitted, but did not require, trial courts to deny custody to lesbian or gay parents for any reason or no reason at all); *see also* Robert A. Beargie, Commentary, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71 (1988); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF L. REV. 691 (1976); Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 447–48 (1988).

133. *See* Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 10–11 (2012).

134. JOSLIN ET AL., *supra* note 26, at § 1:1; Shapiro, *supra* note 132, at 635–37; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 858–59 (2002). For more discussion on the nexus test and LGB parenting, see Kim H. Pearson, *Sexuality in Child Custody Decisions*, 50 FAM. CT. REV. 280, 284–86 (2012); Annual Review Article, *supra* note 110, at 56–57; Heather J. Lange-

right, a court would instead have to identify a nexus between the parent's identity or conduct and a harmful effect on the child. That shift came about, in part, due to calls from LGBT advocates for a rule grounded more in reality than in stereotypes.[135]

Although states use varying formulations, a representative statement of the nexus test comes from an Alaska Supreme Court decision in 1985, reversing a custody decision that was based on the mother's homosexuality:

> We have often endorsed the requirement that there be a nexus between the conduct of the parent relied on by the court and the parent-child relationship.
>
> For example, that a mother is living with another man in an adulterous relationship does not justify denying her custody absent any indication of adverse effects on the child. Nor does bearing children out of wedlock or instability in relationships warrant a custody change where the parent's conduct does not adversely affect the child or the mother's parenting abilities. Even the mental health of the custodial parent is "relevant only insofar as it has or can be expected to negatively affect the child."[136]

Or as Maryland's highest court held in 1998, in a case involving a gay parent, "[t]he only relevance that a parent's sexual conduct or lifestyle has in the context of a visitation proceeding of this type is where that conduct or lifestyle is clearly shown to be detrimental to the children's emotional and/or physical well-being."[137]

Many states have codified some version of the nexus test. For example, Kentucky's child custody statute instructs courts to consider "all relevant factors" in weighing the best interest of the child, and it sets forth a variety of factors that courts must consider, including the child's wishes; the relationship of the child to each of the parties; the child's adjustment to home, school, and community; and the mental and physical health of all the par-

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mak, Comment, *The "Best Interest of the Child": Is a Categorical Ban on Homosexual Adoption an Appropriate Means to This End?*, 83 MARQ. L. REV. 825, 842 (2000); and Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 858 (1985).

135. JOSLIN ET AL., *supra* note 26, at § 1:1 ("Fortunately, however, courts in the vast majority of states today apply the nexus or 'adverse impact' rule, under which a parent's sexual orientation cannot be taken into account in making a custody or visitation determination unless the parent's sexual orientation has directly harmed the child."); Nancy D. Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA L. REV. DISCOURSE 226, 237 n.82 (2013) ("[C]ourts . . . ought to rule that, until and unless a nexus is established between lesbianism and its effect on the child, the mother's sexual activity shall be irrelevant. The nexus itself must be factually specific and concrete. The evidence required to support such a connection must be definite and relevant to the individuals involved. Speculation should not suffice." (quoting Hunter & Polikoff, *supra* note 132, at 714–15)).

136. S.N.E. v. R.L.B., 699 P.2d 875, 878 (Alaska 1985) (citations omitted) (quoting Morel v. Morel, 647 P.2d 605, 608 (Alaska 1982)).

137. Boswell v. Boswell, 721 A.2d 662, 678 (Md. 1998).

ties.[138] Until July 14, 2018, the statute also specifically carved out a nexus-type exception to the court's broad discretion: "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."[139] The Kentucky Court of Appeals relied on that provision in 2012 to overturn a family court's assumption that a mother's same-sex relationship was *per se* harmful to the children, holding that the statute "does not allow sexual orientation to be a determining factor unless there is a direct negative impact on the children."[140]

Washington, D.C. is so far the only jurisdiction to codify a version of the nexus test that specifically limits a court's ability to consider a parent's LGB or trans status: "In any proceeding between parents in which the custody of a child is raised as an issue, the . . . . race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration."[141] Note that the statute does not prohibit all consideration of gender identity or expression, only consideration of that characteristic to the exclusion of all other relevant characteristics, which would amount to a *per se* ban.

Courts have similarly moved away from *per se* bans and adopted nexus tests to restrict judicial discretion in cases involving other parental characteristics that could inadvertently be influenced by bias, such as race,[142] adultery,[143] nonmarital sexual relationships,[144] polyamory,[145] religion,[146] HIV

138. KY. REV. STAT. ANN. § 403.270(2) (LexisNexis 2018).

139. KY. REV. STAT. ANN. § 403.270(3) (LexisNexis 2004), *amended by* KY. REV. STAT. ANN. § 403.270 (LexisNexis 2018).

140. Maxwell v. Maxwell, 382 S.W.3d 892, 898 (Ky. Ct. App. 2012).

141. D.C. CODE § 16-914(a)(1)(A) (2001); *see also* Shapiro, *supra* note 132, at 635–36 n.67.

142. Before the Supreme Court's decision in *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984), which disallowed race as a consideration in custody cases on constitutional grounds, courts had begun to make the same shift in considering the placement of mixed-race children under the best interest standard. *Compare* Ward v. Ward, 216 P.2d 755, 756 (Wash. 1950) (upholding trial court decision granting custody of mixed-race children to black father because "[t]hey will have a much better opportunity to take their rightful place in society if they are brought up among their own people"), *with* Fountaine v. Fountaine, 133 N.E.2d 532, 534–35 (Ill. App. Ct. 1956) (holding that while a court should consider "all relevant considerations" relating to the children's best interests, "the question of race alone can[not] overweigh all other considerations and be decisive of the question").

143. Davis v. Davis, 372 A.2d 231, 235 (Md. 1977) (noting that adultery may be a relevant consideration "only insofar as it affects the child's welfare").

144. *In re* Custody of Temos, 450 A.2d 111, 122 (Pa. Super. Ct. 1982) (holding that a court must determine effect of a nonmarital relationship on the children).

145. *In re* R.E., 775 S.E.2d 542, 546 (Ga. Ct. App. 2015); V.B. v. J.E.B., 55 A.3d 1193, 1202 (Pa. Super. Ct. 2012) (finding the trial court erred in placing undue weight on the father's polyamory).

146. Pater v. Pater, 588 N.E.2d 794, 800 (Ohio 1992) (holding a court cannot deny custody due to religious practices unless there is "evidence that those practices will adversely affect the mental or physical health of the child").

status,[147] age,[148] and disability.[149] In each of those areas, courts have recognized that a case-by-case evaluation is more likely to protect the best interest of the child than a blanket ban based on the parent's status.

For example, in one of the earliest cases to reject the *per se* rule that a gay parent is unfit, a California court of appeals in 1967 overturned a trial court's decision to remove a child from the custody of her lesbian mother.[150] The lower court had based its decision solely on its finding that "[t]he Plaintiff is a homosexual female engaging in sexual acts with other females," which it held "as a matter of law constitutes her not a fit or proper person" to have custody.[151] The appeals court remanded, holding that the judge had erred in not even considering any other evidence of the child's best interest.[152]

Although the nexus was undoubtedly an improvement on a *per se* ban, it has its problems as well. The problem with the nexus test, as we outline further below, is that harm is often in the eye of the beholder. That is, courts applying the nexus test often consider evidence of harm that is minimal, hypothesized, or purely imaginary.[153] For example, a 1987 Missouri decision claimed to apply the nexus test in a custody case involving a lesbian mother, noting that "[t]here must be a nexus between harm to the child and the parent's homosexuality."[154] Nonetheless, the court found that allowing the lesbian mother to retain custody would necessarily harm the children.[155] The court cited examples including the fact that the mother and her partner "show affection toward one another in front of the children" and "sleep together in the same bed at the family home," creating "an unhealthy environment for minor children" that could affect their moral development.[156] The court also cited the "peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative life style' their mother has chosen."[157] Upon closer inspection, every one of those considerations is simply a stand-in for the mother's sexual orientation.[158] It is thus clear that the broad

147. North v. North, 648 A.2d 1025, 1030–31 n.2 (Md. Ct. Spec. App. 1994) (holding that the father's HIV-positive status could not be used as a factor to restrict overnight visitation "unless the court finds that visitation without that restriction might endanger the child's physical health or impair his or her emotional development").

148. Collins v. Collins, 497 N.Y.S.2d 544 (App. Div. 1985).

149. *In re* Marriage of Carney, 598 P.2d 36, 44–45 (Cal. 1979).

150. Nadler v. Superior Court *ex rel.* County of Sacramento, 63 Cal. Rptr. 352 (Ct. App. 1967).

151. *Id.* at 353.

152. *Id.* at 354

153. Shapiro, *supra* note 132, at 641–46.

154. S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 689 (2010) (rejecting distinction between prohibiting same-sex conduct and discriminating against gay people); Stockman v. Trump, 331 F. Supp. 3d 990, 998–

best interest of the child test, even modified by the nexus requirement, is capable of being abused to justify a bias-driven outcome.

C. *Transgender Parenting and Judicial Bias: The* Daly *Case*

The best interest test can also be used to justify bias-driven outcomes for transgender parents. As we discuss further in Part III, in the past, several courts had held that a parent's decision to transition justified a *per se* termination of the transgender parent's legal rights as a parent.[159] In these decisions, the interest in the preservation of family bonds is subordinated to an overwhelming fear of the transgender parent's difference and an accompanying determination to "protect" the child by isolating them from the danger assumed to be posed by a transitioning parent. The "best interest of the child," so misconstrued, takes precedence over the interest of the child in maintaining relationships with existing caregivers and entirely subsumes any interests of the transgender parent, which are often absent from the analysis.

Consider the example below, which is one of the more well-known cases that involved a transgender parent.[160] In 1969, Suzanne Daly (then known as Tim) and Nan Toews were married.[161] Their daughter, Mary, was born four years later.[162] They divorced about twelve years later, and Nan took custody of Mary in Reno, Nevada. Suzanne (then Tim) moved to Berkeley, California, to begin work at the Lawrence Berkeley National Laboratory, all the while continuing to pay child support and alimony.[163]

Suzanne had known for many years that she was a woman,[164] and she began to take steps to undergo her transition to Suzanne shortly after her divorce, when her daughter was about eight years old.[165] To prepare her daughter for the transition, while Mary was visiting, Suzanne explained that she would be undergoing a gender transition under the care of medical professionals, and requested that Mary avoid telling her mother or maternal grandmother about the transition.[166]

1000 (C.D. Cal. 2018) (barring from military service only transgender people who seek to transition is the same thing as barring all transgender people).

159. *See* Minter, *supra* note 22, at 413 & 421 n.15 (citing Daly v. Daly, 715 P.2d 56 (Nev. 1986); then citing Cisek v. Cisek, No. 80 C.A. 113, 1982 WL 6161 (Ohio Ct. App. July 20, 1982); and then citing M.B. v. D.W, 236 S.W.3d 31 (Ky. Ct. App. 2007)).

160. For compelling analysis of the *Daly* case and related issues regarding transgender parents, see BALL, *supra* note 22, and Flynn, *supra* note 22. Also see Nancy Polikoff's excellent rewrite of the Daly case in FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN (forthcoming) (draft on file with authors).

161. Dennis McBride, *Stripped Rights: How Nevada Helped Destroy a Family*, RENO NEWS & REV. (July 13, 2017), https://www.newsreview.com/reno/stripped-rights/content?oid=24641178 [https://perma.cc/2EDG-2H9A].

162. *Id.*

163. *Id.*

164. *Id.*

165. Daly v. Daly, 715 P.2d 56, 57 (Nev. 1986).

166. *Id.*

Indeed, the reason why Mary was asked to keep quiet about Suzanne's transition was because she worried (correctly, it turned out) that Nan would use the information against Suzanne.[167] When Mary returned back to Nan's house, she allegedly became withdrawn and finally admitted the news of the transition to Nan.[168] Nan then took the child to a psychologist, who, in the words of the court, "advised respondent that it was very dangerous to allow Mary to be in the company of her father again."[169]

Nan immediately sought an order from the court terminating Suzanne's parental rights.[170] In the words of Dennis McBride, one journalist who covered the case, Nan "did not want simply to end Suzanne's visiting privileges but to sunder her legal identity as Mary's natural parent."[171] As Suzanne underwent her transition, changing her name and obtaining gender confirmation surgery, Suzanne's ex-wife sought—and was granted—a restraining order to prevent Suzanne from contacting her daughter during the termination proceedings.[172]

Suzanne, for her part, sought legal representation to protect her parental interests, but she had a difficult time finding anyone to represent her.[173] Eventually she found representation from a lawyer who was herself transgender and who was able to marshal a strong degree of evidence of Suzanne's fitness as a parent to address concerns about her transgender identity and her relationship to Mary.[174] While one of their experts recognized that there was almost no research to address the effect of a parent's transition on a child, he stated that

> [i]f the child has felt himself to be loved by this person I think he can accept the rather traumatic transformation, as long as he feels that he will continue to get love and support from his biological parent. . . . The concern and caring of a parent isn't totally tied up with the individual gender identity.[175]

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167. *Id.* at 61–62 (Gunderson, J., dissenting). The dissent also noted that the biological mother had, at one point, unilaterally decided to cut Suzanne off from seeing Mary, even lying about the existence of a court order in asking two sheriff's deputies to deter her from seeing her daughter. *Id.* Suzanne was also threatened by Mary's grandmother, who was wielding a gun. *Id.* at 62.

168. *Id.* at 57 (majority opinion).

169. *Id.*

170. *See id.*

171. McBride, *supra* note 161.

172. *Id.*

173. When she tried to hire the same lawyers who represented her during her divorce, for example, they refused when they found out she had transitioned. *Id.*

174. *Id.*

175. *Id.* At trial, others testified about Mary's obvious love for Suzanne, noting that Mary was wise beyond her nine years, had attended meetings with Suzanne at the Pacific Center where she got support, and had initially readily accepted the fact of Suzanne's transition. *Id.*

Unfortunately, despite the best efforts of Suzanne's lawyers, the testimony from the other side was dramatically slanted in the opposite direction. As a news article recounted:

> Nan Daly and her lawyer, Nada Novakovich, however, turned the hearings into a seething circus of hatred, racism, AIDS panic, homophobic bigotry, and personal harassment of those involved in Suzanne's defense. Novakovich, a former Democratic U.S. House candidate, persistently referred to Suzanne Daly in the masculine, suggested sexual impropriety between her and Mary, and claimed that merely taking Mary to meetings at the Pacific Center [a center supporting LGBT individuals] constituted physical endangerment "because of a disease that is prevalent in this type of community." Mary, Novakovich said, was "a gifted child with a brilliant future ahead of her. Shall we keep her that way or shall we take a risk and put her in an environment of lesbians, gays, homosexuals, transsexuals, and perverts?"[176]

In an ironic twist, Novakovich was able to convince the court that any therapy to help Mary understand Suzanne's transition was both risky and dangerous to Mary, because Mary was "normal" and from "a small town like Reno," unlike San Francisco where "[h]omosexuals and transsexuals and all the perverts are more accepted."[177]

For her part, Nan, too, fanned the flames of prejudice, noting,

> I can't accept that individual sitting there as my ex-husband. [C]an [Mary's] father take her to Father's Day at Girl Scouts? . . . Does she have to address him as mother? And, if so, what does that make me? . . . I don't move in circles where people are anything other than what they prove to be in their appearance.[178]

Two months later, the judge permanently terminated Suzanne's parental rights.[179] Although Suzanne appealed to the Supreme Court of Nevada,[180] the court upheld the termination, 3–2. At the hearing, one of the justices asked, "What's Mary gonna call Tim? . . . Daddy? Mama the Second? I have five children, [and] it's just very, very difficult for me to understand how a father could do that with a child."[181] Other justices, however, were more compassionate. "It isn't only a choice, is it?" Justice Springer said.[182] "I can see where somebody medically might have to undergo this sort of operation. But does that necessarily mean that you're ipso facto immoral or depraved?"[183]

In its written decision, the Nevada Supreme Court cited the testimony of a psychologist who testified that there was a serious risk of emotional and

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

mental injury to the child and that Mary would not face injury if she never saw Suzanne again.[184]

Three elements of the opinion are particularly instructive. The first demonstrates a strong tendency to associate "harm" not with terminating a parental relationship with a child but instead with allowing a child to associate with a transgender person.[185] "It must be remembered," the court noted, "that in termination proceedings, the interests of the child are paramount and a child should not be forced to undergo psychological adjustments, especially in view of the risk involved, solely to avoid termination of a parent's rights."[186]

Second, consistent with this idea of "best interests," the court showed that it was far more willing to validate social discomfort with transgender individuals than to provide treatment or counseling to the affected child to retain a parental bond. Under these circumstances, any attempt to provide Mary therapy or to help Mary understand Suzanne's situation was construed as a kind of attack on "normal" values. Under this view, mental health counseling, the court observed, constituted "mental conditioning" with doubtful success "at best, and a serious risk of further emotional injury to the child at worst."[187] The court was careful to note that Mary herself had told the trial judge that she did not want to see Suzanne again.[188] Similarly, the court also dismissed Suzanne's desire to integrate Mary within her social group, which included members of the LGBT community, concluding that it did not see the "necessity for inflicting a continuing sense of instability and uneasiness on this child."[189] It noted that Suzanne "has thus postured herself in a position of recurring conflict with the child's mother and the 'traditional' upbringing enjoyed by Mary," concluding that "[t]he resulting equation does not bode well for the emotional health and well being of the child."[190]

Third, central to this framing is the misperception that once a parent transitions, they can no longer function as a parent.[191] Even though the case was handed down nearly thirty years ago, it bears mentioning that gender dysphoria was considered a medical condition at the time (and still is today). Yet gender dysphoria—unlike nearly every other medical condition—

184. Daly v. Daly, 715 P.2d 56, 58 (Nev. 1986).

185. *Id.*

186. *Id.*

187. *Id.* at 59.

188. In a footnote, the court observes, "It was shown that Mary is at the tender age when she is very much concerned about the impression of her peers and doesn't want to have any sort of uncomfortable fears. Mary would prefer to have her personal life remain a private event. By terminating Suzanne's parental rights, Mary will finally have the assurance and comfort of knowing the visitation matter is settled." *Id.* at 59 n.5.

189. *Id.* at 59.

190. *Id.*

191. *See id.*

becomes singled out and then justified as a reason for parental termination.[192]

Indeed, in a powerful dissent, two judges observed that even if the medical advice Suzanne received would "offend the religious precepts of many," the court's decision was "unnecessarily and impermissibly punitive to the exercise of a medical option we personally find offensive, thereby depriving a child of a legal relationship which might well be to the child's advantage in the future."[193] The dissent further argued that it was important to consider the existence of less restrictive means in place to permit preservation of the family tie.[194] The dissenting judges noted that Suzanne was even willing to forego visitation rights, if needed, and had continued to support Mary financially because she had wanted so badly to maintain a legal and parental connection to her daughter.[195]

The majority, however, was unconvinced. In a final, parting observation, the court laid the blame on Suzanne herself, noting that, "Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."[196] In reaching this decision, the court further deferred to the trial court's characterization of Suzanne as "a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter, Mary."[197] And in one swift move, the court made Suzanne a legal stranger to her child.

The decision was subsequently cited by other courts in other jurisdictions, and it went on to serve as an example of extreme judicial prejudice against trans parents.[198] The case is an instructive lesson in how private prejudice against transgender individuals can be harnessed by an ex-spouse to sever a transgender parent's connection to a child. Here, Suzanne's post-

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192. We note that the literature has discussed the complicated role of medical intervention and diagnosis at length. *See, e.g.*, DEAN SPADE, NORMAL LIFE (rev. & expanded ed. 2015); Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 GEO. J. GENDER L. 721 (2003). While it may be true that some members of the transgender population desire medical intervention, it is by no means true for everyone. In any case, it should have no effect on one's ability to parent effectively. *See* Murphy, *supra* note 66, at 47, 51 ("Neither is there anything about GID that necessarily undermines the ability of transgender men and women to understand the responsibilities of parenthood, in regard to feeding a baby, keeping the child warm and clean, playing with the baby, seeing that the child is schooled, or, indeed, any of the other activities that are important to children's welfare.").

193. *Daly*, 715 P.2d at 64 (Gunderson, J., dissenting).

194. *Id.* at 63.

195. *See id.* at 60, 64.

196. *Id.* at 59 (majority opinion).

197. *Id.*

198. *See, e.g.*, M.B. v. D.W., 236 S.W.3d 31, 38 (Ky. Ct. App. 2007) (citing *Daly* in support of the decision to affirm a termination of parental rights of a biological parent who underwent gender reassignment surgery, stating *Daly* was overruled on other, jurisdictional, grounds).

divorce transition led to the termination of her rights as a parent. The story of ex-spouses attempting to leverage every advantage against one another in court in order to improve their chances of gaining custody or visitation is not new. However, as we just saw from the *Daly* case, an ex-spouse can easily seize upon cultural discomfort regarding transgender individuals (let alone transgender parents) and extract significant advantage in the judicial system based on the mere fact of a parent's transition.

Although *Daly* has been discussed in several cases and commentaries on transgender parents, it was only in the last several years, due to McBride's significant journalistic efforts, that the world learned the full story of the case, its outcome, and its effects on the parties after its conclusion. As McBride documented, Suzanne later appealed her case to the U.S. Supreme Court, but the Court let the decision stand.[199] Although she fought as much as she could, by 1989 she had dropped her claims, having lost at every turn.[200] She would never see her daughter again.[201] Even when Mary turned eighteen and could legally contact Suzanne, she never did, and she once admitted to a mutual friend that Nan had raised her to hate Suzanne.[202] Eventually, Suzanne developed agoraphobia, struggled with alcoholism, and lost her job, passing away alone in 2002.[203]

Fourteen years after its decision in *Daly*, the Nevada Supreme Court overruled its decision in that case,[204] in part because the Nevada Legislature had amended the termination statute to ensure "that parental rights and children's rights [are] of equal importance . . . and must be considered together."[205] Although these were wins, by then it was too late. It was doubtful that Suzanne even knew about the decision, and even more difficult to imagine how she would have responded.[206] "I think it would've made her angry," one friend, Kitty Wright, said, "that all of this was for nothing."[207]

III. THE STATE OF TRANSPARENTHOOD: THREE BIASES

What happened to Suzanne Daly more than thirty years ago may be tragic and unforgettable, but it is not at all that unique. Consider this example, decades after that case. In 2015, when a member of an orthodox Jewish community left her community in Britain in order to transition, a judge

199. McBride, *supra* note 161.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *In re* Termination of Parental Rights as to N.J., 8 P.3d 126, 132 n.4 (Nev. 2000) (overruling *Daly* and specifically finding that a court must consider both the best interests of the child and parental fault).

205. *Id.* at 131.

206. McBride, *supra* note 161.

207. *Id.*

barred her from ever seeing her children again.[208] In court, she pleaded for the right to visit them and offered to accept "any contact conditions," including reverting to her previous male appearance in the early stages of her transition, just to stay in direct contact with her children.[209] Her bid was denied by the trial court, which concluded that the risk of the children and their birth mother "being marginalised or excluded . . . is so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact."[210] The court barred the transgender parent from direct contact with the children, only allowing her to send them letters or cards *four times a year*: on their birthdays and major holidays.[211] In a deeply revealing statement, the lower court judge argued that his decision was not "a failure to uphold transgender rights . . . but the upholding of the rights of the children to have the least harmful outcome in a situation not of their making."[212]

Just as in *Daly*, the court's judgment subordinates the interests of the transgender parent to a vague assertion of the "rights of the children," a motivation that overlooks the fact that, in many situations, this factor often dictates retaining a strong bond between parent and child. In fact, recognizing this, the lower court opinion was eventually reversed by a higher court that ruled that the decision overlooked the human rights of the transgender parent and thus discriminated against her based on her gender identity.[213]

Yet the outcome is instructive because it shows us essentially how the risks to transgender parents remain largely unchanged. Courts often come out differently regarding the rights of a transgender parent, and they often rely on evidence that plays on conventional fears and stereotypes regarding transgender persons. In several of the custody and visitation cases that we examine below in more detail, the applicable legal standards were used to justify excluding the transgender parent from their child's future. As we argue, even under the "best interest" standard, courts frequently cite concerns that relate to a parent's transition, their dress and appearance, and whether or not they socialize with other transgender persons or cross-dress, in reach-

208. *See* Harriet Sherwood, *Transgender Jewish Woman Wins Review of Child Contact Case*, GUARDIAN (Dec. 20, 2017, 11:55 AM), https://www.theguardian.com/law/2017/dec/20/high-court-custody-case-transgender-ultra-orthodox-jewish-woman [https://perma.cc/7BZM-CS29]; Harriet Sherwood, *Transgender Ultra-Orthodox Case Reveals Painful Clash of Minority Communities*, GUARDIAN (Feb. 3, 2017, 8:21 AM), https://www.theguardian.com/world/2017/feb/03/transgender-ultra-orthodox-court-case-reveals-painful-clash-of-minority-communities [https://perma.cc/SH43-Z8ME]; *see also* J v. B [2017] EWHC (Fam) 4, [2017] 4 WLR 201 (Eng).

209. *See* Sherwood, *Transgender Jewish Woman Wins Review of Child Contact Case*, *supra* note 208.

210. *Id.*

211. *See J v. B*, [2017] EWHC (Fam) 4 [41].

212. *Id.*

213. *See* Sherwood, *Transgender Jewish Woman Wins Review of Child Contact Case*, *supra* note 208.

ing their determinations. These decisions often reflect a severe misunderstanding of the transgender population, regularly substituting a court's judgment for expert testimony and considering variables that are not clearly linked to parental fitness. Most significant, courts often overlook the primary importance of retaining—and protecting—a strong bond between parent and child.[214]

A further note: many of the harms we document below apply not only to transgender parents but to LGBT people more broadly. Same-sex couples who break up may share the experience of having one partner attempt to use the lack of formal recognition for their relationship to deny the other parent a legal relationship with the children they raised together. And parents who come out as lesbian, gay, or bisexual following the breakup of a different-sex marriage often have their sexual orientation used as a weapon against them by their heterosexual exes who seek to deny them custody or visitation. But while the "T" for "transgender" is often subsumed under the broader LGBT (or queer) category, it is also important to recognize the particularized forms of discrimination faced by transgender individuals, both inside and outside the law, that carry a different trajectory from those who face discrimination on the basis of sexual orientation. Those differences stem from factors that may include the small size of the transgender population and thus the lack of exposure to and education about trans people or trans identity, and the arguably deeper and more virulent prejudice against those who visibly do not conform to gender norms. In a post-marriage-equality world, being lesbian or gay is, more often, seen as close to normal. Being trans or gender variant, all too often, still is not.

A. *Methodology and Limitations*

In our study, we conducted a search of the case law, published and unpublished, looking for custody or family law disputes that dealt with transgender parents. We have reviewed every case we could find, published or unpublished, that involved a transgender parent, coming up with thirty cases in total, spanning from 1971 to 2015.[215] We found that at trial, 63 percent of transgender parents lost their cases, and 62 percent of transgender parents lost on appeal, in part due to explicit biases that relate to the transgender status of the parent.[216]

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214. For an excellent discussion of the harms of nonrecognition, see NeJaime, *supra* note 103, at 2317–23.

215. *See supra* note 23. While there are not many cases, we note a significant number of them are unpublished, which may suggest a discomfort in giving these cases precedential value.

216. *See* Appendix A. By "lost their cases," we mean a denial of the transgender parent's claim, mostly involving loss of custody, a narrowing of visitation rights, termination of parentage, or some combination of these outcomes. These percentages include some cases in which the parental rights of *both* parents were terminated. Also counted as losses are cases in which it was not strictly a *trans parent* whose custody or visitation rights were affected, but a parent

Of course, a few opening disclaimers here are warranted. First, we note the small size of our data, which weighs against predicting the landscape of future outcomes. Because of the small number of cases, we did not randomly collect a representative sample; instead, we gathered all available cases.[217] After reading the cases, we looked for patterns that could be construed as meaningful; in other words, a pattern that was large enough to be regarded as a trend rather than an "outlier" or an anomalous case.[218]

Admittedly, the small number of cases weighs strongly against making broad and predictive generalizations about the future path of the law in this field. Here, it is important to note that our goal was not to predict future cases, nor to explain a definite rationale behind the outcome, but rather to demonstrate how both implicit and explicit forms of trans-related bias can surface at times, deleteriously affecting the outcome for the transgender parent. In this light, we echo Clifford Rosky's observations that even without a predictive intent, the analysis "may still shed new light on old problems, leading us toward new lines of advocacy and thought."[219] Consequently, while we should be cautious about drawing broad generalizations from the data, particularly given the changing legal status of trans individuals over the last fifty years, the results help us to situate the legal realities faced by many transgender parents in court decisions and suggest some further modes of evolution.

We also note some further disclaimers. Neither the appellate or trial court opinions we draw from may be representative of the mediations, arbitrations, and settlements that may populate a much wider degree of parenting disputes.[220] And there is the fact that times have changed significantly, as have the legal and social contexts under which these cases were filed.[221] But at the same time, the evidence of explicit and implicit bias in these cases is too mounting to avoid. Some of the cases reflect a grave misunderstanding of the lives and experiences of transgender parents, jettisoning expert testimony. And others simply overlook the fact that a central function of family courts is to ensure a bond between parent and child.

Further, while more and more transgender individuals are forming families in the world at large, our review of the case law suggests that judges have taken a somewhat outdated set of approaches. Part of this may be attributable to the very small numbers of cases. Even though studies show a demographic rise in the transgender parent population, both anecdotally and

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whose loss in court seems attributable at least in part to *association* with a trans individual. *See infra* notes 306–308 and accompanying text.

217. *See generally* Rosky, *supra* note 25, at 276.

218. *See generally id.*

219. *Id.* at 277.

220. In our project, we pulled every case that addressed the marriage, custody, or visitation of a transgender parent.

221. *See id.* at 274 & n.79 (making this observation in lesbian and gay parenting cases, particularly regarding the adoption of the nexus test in such contexts).

empirically, only a fraction of transgender parents will make their way into court through divorce, custody, or estate proceedings.[222] Many of those cases will likely be the most acrimonious of situations, and most judges will have had little exposure to transgender parents.

Nevertheless, the small number of published opinions like *Daly*, we argue, risks creating a feedback loop that sets precedent, affecting future family law cases. The cases, as we see them, are also reflective of a disquieting trend within the case law, in which courts consider evidence regarding the transgender parent that would normally not arise in the case of a cisgender, gender conforming parent. For this reason, better, more current research that captures the dynamic plurality of the transgender and nonbinary parenting community, and more thoughtful judging in response, is especially important.

B. *Three Persistent Biases*

Through our case research, we focused on isolating the biases and approaches relied upon in the judicial opinions. Thankfully, due in part to the growing adoption of the best interest and nexus tests, we could find no recent, reported cases that utilize an obvious *per se* standard of terminating recognition of a transgender parent. At the same time, however, our investigation suggests that transgender parents continue to face unequal treatment at the hands of family court judges, who enjoy enormous discretion in deciding these cases and who at times demonstrate bias in their judgments to the disadvantage of the transgender parent.

Our research reveals that there are cases, like the one involving a British Orthodox Jewish parent discussed above, that fall short of the *per se* rule but are still deserving of the most scrutiny for bias. Just as the nexus test can serve to suggest an increasing liberalization regarding the rights of lesbian and gay parents, it can also serve to mask the employment of stereotypical, prejudicial viewpoints about transgender parents and have the same result as a *per se* denial of custody. The only difference here is that the discrimination is harder to spot because it is often couched in indirect observations regarding the transgender parent's behavior.

Most troubling and deserving of further analysis, we argue, is this wider range of cases. These cases might purport to avoid directly discriminating against the transgender parent, but they still employ arguments that actively conflate concerns about gender transition with parenting concerns. Some of these, cited by experts, include the following: arguments that "continued contact with a [transgender] parent may have detrimental effects on the child's psychosexual development"; "that the child's mental health will be [deleteriously] affected by difficulties in comprehending the . . . transition";

222. *See* STOTZER ET AL., *supra* note 22 (citing relevant studies).

or that stigma from peers will negatively impact the child.[223] All of these arguments, as we show below, have been repudiated by the available evidence. Yet, by raising them, courts may wind up with the same result as under the *per se* rule: discriminating against the transgender parent.[224]

Indeed, courts have found the following specific reasons relevant to justify ending or limiting a transgender parent's contact with a child under a purported nexus test:

- fear of contagion of gender nonconformity;[225]
- the circumstances surrounding disclosure of a parent's intent to transition;[226]
- the parent's decision to transition or express their gender, which is associated with presumptions of selfishness and distraction;[227]
- a presumption of instability regarding the gender identity of the transgender parent;[228]
- concern about the effect of the transgender identity of the parent on the child's sexual orientation, gender expression, or gender identity;[229]
- the specter of a presumed connection to sexuality;[230]
- a child's (potential) anxiety around transition and loss;[231] and
- the risk of stigma from being associated with a transgender parent or other transgender individuals.[232]

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223. David Freedman et al., *Children and Adolescents with Transsexual Parents Referred to a Specialist Gender Identity Development Service: A Brief Report of Key Developmental Features*, 7 CLINICAL CHILD PYSCHOL. & PSYCHIATRY 423, 423–32, 424 (2002).

224. Indeed, this phenomenon can be compared to Reva Siegel's concept of "preservation-through-transformation," where privilege is maintained despite changing legal norms. We are grateful to Doug NeJaime for this observation. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997) (applying this theory to explore the dominance of racial hierarchy during the Reconstruction Era).

225. *See* M. v. M., No. FA 940064700, 1996 WL 434302, at *23 (Conn. Super. Ct. July 11, 1996); *supra* Section III.B.3 (on contagion).

226. M.B. v. D.W., 236 S.W.3d 31 (Ky. Ct. App. 2007).

227. Daly v. Daly, 715 P.2d 56, 59 (Nev. 1986); *see* Tipsword v. Tipsword, No. 1 CA-CV 12-0066, 2013 WL 1320444, at *3 (Ariz. Ct. App. Apr. 2, 2013) (unpublished memorandum decision); *In re* L.S., 717 N.E.2d 204, 210 (Ind. Ct. App. 1999).

228. *See* Cisek v. Cisek, No. 80 C.A. 113, 1982 WL 6161, at *1–2 (Ohio Ct. App. July 20, 1982).

229. *See* M.R. v. San Mateo Cty. Superior Court, No. A122117, 2008 WL 4650440, at *9 (Cal. Ct. App. Oct. 22, 2008).

230. J.L.S. v. D.K.S., 943 S.W.2d 766, 775 (Mo. Ct. App. 1997).

231. *Daly*, 715 P.2d at 59.

232. *See* Lowhorn v. Lowhorn, No. 49A04-0712-CV-678, 2008 WL 2839485, at *1 (Ind. Ct. App. July 24, 2008); *In re* Reesing, 483 P.2d 872, 873 (Wash. Ct. App. 1971).

Many of these variables, when examined more closely, tend to cluster into three categories of bias, each expressing a different set of conflicting (and sometimes paradoxical) concerns regarding gender nonconformity. In the first set of cases, the court expresses a fear of harm to the child based on the presumed effect on the child due to the permanence of the gender *transition* of the parent. In a second set of cases, usually involving (assigned-male) parents who cross-dress,[233] courts express a somewhat opposing fear surrounding exposing the child to what we describe as gender *volition*—that is, that the child will be harmed by witnessing the destabilization of the parent's gender expression in transgressing their state-assigned gender. Whereas the first category of cases is obsessed with the permanence of gender transition, primarily focusing on gender identity, the second category of cases demonstrates some discomfort with the impermanence of gender-related expression, what we call volition-related concerns. In these cases, the courts may directly require the parent to restrict their gender expression in front of the child, instructing them to refrain from cross-dressing and the like. A third category of cases, closely related to the prior category, expresses concern about the harm posed to the child through the lens of gender *contagion*—the idea that normalizing gender transition or variance can introduce a level of instability into the child's own gender identity. A related set of concerns is associational: the court terminates or narrows a child's relationship to a parent based on their association with a transgender person.

Each of these concerns, we found, can often become relevant and determinative in parental custody and visitation decisions. Of course, it is important to note that these concerns are not always the sole or dominant rationale for the court's decision, since family court decisions always reflect a maze of concurrent considerations. Nevertheless, our research suggests that these three strands of concerns—transition, volition, and contagion—constitute an appreciable, and overlooked, part of the landscape of judicial analysis.

1. Concerns Regarding Transition

In our study, we found that courts frequently conflated concerns about transition with concerns about parenting. As Carlos Ball has pointed out, in such cases, courts question whether a transgender parent can still function as a parent after transitioning, often reaching a negative conclusion.[234] However, as Ball observes, it is not clear why gender transition is at all relevant to legal parentage; a gender transition has nothing to do with one's attributes as a parent.[235] In such situations, it is not the fact of the transition that causes

233. While the courts identify such parents as men who cross-dress, it is of course possible that they are transgender women who have been incorrectly identified by the courts. We tried to be as accurate as possible, but it is entirely possible that the reported language failed to capture the importance of self-identity.

234. BALL, *supra* note 22, at 191.

235. *Id.*

concern for the court, but rather the facts that are connected to the transition. Among these facts are the process of disclosure (or lack thereof) to the children and the transgender parent's emotional connection to the children prior to the transition. Consideration of these transition-related factors often results in a determination adverse to the transgender parent.

Concerns about disclosure of transition. Many courts express greater concern for children regarding the circumstances of disclosure of a parent's transition, just as we saw in *Daly*. The results can be devastating for the transgender parent, who is caught in a catch-22 between disclosure and self-protection. In one typical case, the court granted an adoption without the consent of the transgender parent, thereby terminating her parental rights.[236] In that case, the court justified its view on the grounds that there was no evidence in the record to suggest that the transgender parent had tried to prepare the children for her transition.[237] During a holiday visit, the court noted concern that the children all noticed that the appellant, Martha Boyd, a transgender female, "exhibited various feminine features," such as long fingernails, short shorts, and evidence of breast augmentation.[238] She also sent one of the children a photograph of her "dressed as a woman," the court observed.[239]

Ultimately each of the three children said that "they did not want to see the appellant again."[240] Two years after she underwent gender confirmation surgery, Martha filed a motion to enforce visitation rights with the only remaining child who had not been emancipated, but she was told that the child, Sarah, did not want to see the parent and was in counseling.[241] The court responded by directing Martha not to contact Sarah, eventually granting the petition for adoption by a stepfather and terminating Martha's rights entirely.[242] In examining the evidence on appeal, with a more deferential standard to the lower court's factfinding, the appeals court upheld the verdict, noting that Sarah had suffered a psychological injury, including major depression, a declination in student performance, suicidal thoughts, physical symptoms of headaches, and withdrawn behavior.[243]

The court noted that a treating psychiatrist clearly linked the depression and other issues to the "emotional injury occasioned by the appellant's ac-

236. M.B. v. D.W., 236 S.W.3d 31 (Ky. Ct. App. 2007). This case is also extensively discussed in BALL, *supra* note 22, at 186–89.

237. *M.B.*, 236 S.W.3d at 35.

238. *Id.* at 33, 35.

239. *Id.* at 35.

240. *Id.* at 33–34.

241. *Id.* In fact, Martha had tried to visit her children, but had been rebuffed by her ex-spouse. *See* BALL, *supra* note 22, at 188.

242. *M.B.*, 236 S.W.3d at 34. The standard for termination of a parent's rights under Kentucky law requires: (1) a showing of abuse or neglect; (2) a showing that termination is in the child's best interests; and (3) the existence of grounds that show injury, emotional harm, or an inability to care for the child's basic needs, among other categories. *Id.*

243. *Id.* at 35.

tions."[244] Sarah herself testified, stating in court that she felt "'abandoned,' and that the worst part was 'knowing that I did not have a father, where you go to school and say, "I don't have a father, he's a woman."'"[245] Her mother and sibling also testified about the issue, characterized by the court as a series of "detrimental effects on [Sarah] brought about by the appellant's actions."[246]

In its opinion, the court clearly wrestles with what to do. Like other courts, this court was careful to note in its opinion that the circuit court did not find that the transition, "by itself, inflicted [Sarah]'s emotional injury and justified termination . . . . Rather, the court found that the entire series of events, including the appellant's behavior surrounding the sex change, caused the emotional injury."[247] Although the court noted that none of the children were "adequately prepared" for the transition, it concluded that the circuit court showed no error in holding the appellant primarily responsible for Sarah's injury.[248] At no time, the record showed, did Martha ever notify anyone in the family either before or during the transition, a factor that the lower court characterized as "at best an unconscionable indifference to the emotional welfare" of the family.[249]

Throughout the opinion, we see the emergence of several themes: first, the parent's desire to transition is cast as an "injury" to the child; second, the "harm" caused by the transition is one caused not by society's intolerance, but by the parent's own choices; and, third, the child's desire to have a "legal father" justifies the termination. The opinion cited Sarah's testimony, where she explained that "it was her decision to seek this adoption, and that, 'I want to be able to have a father in my life, a legal father. I don't have that with my biological father and I don't want it with my biological father.'"[250] The court rejected the prospect of less drastic measures, deferring to the trial court's decision to terminate the parental relationship.[251]

In the end, the court was careful to note, explicitly, that it was not holding that gender reassignment is, in itself, grounds for termination (even though it cited to cases that reached similar conclusions).[252] It concluded instead that if a trial court concludes that termination is warranted under the statutory requirements, then the appellant could not be "exempt" from hav-

244. *Id.*

245. *Id.*

246. *Id.* at 35–36.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 37. Sarah went on to explain her wish to be adopted by her stepfather, explaining that if the action was granted by the court, "I will be able to call him my real father. I will be able to tell people, 'That's my dad, that's my real dad,' and I will feel like he's always been there." *Id.*

251. *Id.* at 37–38.

252. *Id.* at 38.

ing their rights terminated because the neglect or abuse occurred during the process of the transition.[253] In reaching this conclusion, however, the court placed the blame squarely on the transitioning parent, who is already forced to take tremendous risks—given the case law we have just discussed—in deciding whether to tell her children beforehand.

Again, the court's conclusion blames the transgender parent for making a rational decision (given the case law) to avoid drawing attention to the issue of transition.[254] Even beyond this misplaced blame, studies show that these outcomes have the further effect of forcing transgender parents even further into the closet, often at the cost of their own well-being and that of their children.[255]

Concerns surrounding emotional attachment. In addition to concerns about the disclosure of transition, courts also express concerns surrounding emotional attachment as it relates to transition. The emotional distance of a transgender parent, due in part to their struggles over their transition, can often be cited as a factor against recognizing continued parental rights, even though the transgender parent may be in entirely different circumstances after their transition. In one example, similar to *M.B. v. D.W.*, a transgender woman (the biological parent of the children) argued that a lower court improperly considered her transgender status in denying her claim for joint custody of her children and thus violated her right to equal protection.[256]

In response, the court observed that the parent "had little interaction with the children" and that the parent was emotionally absent during the marriage, according to her ex-spouse and other family members.[257] Then the court continued,

> Such absence may have been the by-product of Father's emotional issues which also led to his current transgender transformation from being Zachary to Zoe. Mother also expressed concerns . . . [that] the confusion that is just starting to surface as the person they know as "daddy" now dresses and presents herself as a woman and wishes to be called "mommy." Father is certainly free to be who he or she wishes to be and as the Court commented on at trial, the goal is for the parents to have a meaningful relationship at some point with the children. But the consequences of and confusion caused by his choices in the lives of 4 and 2 year old children simply cannot be ignored.[258]

253. *Id.*

254. *Cf.* Veldorale-Griffin, *supra* note 62, at 477 (describing the importance of and the challenges attending initial disclosure decisions).

255. *See id.* at 478, 486, 492 (reporting predominately either no change or a positive change in their parent-child relationships as a result of disclosure of transition).

256. Tipsword v. Tipsword, No. 1 CA-CV 12-0066, 2013 WL 1320444, at *2 (Ariz. Ct. App. Apr. 2, 2013) (unpublished memorandum decision).

257. *Id.* at *2–3.

258. *Id.* at *2. This language came from the lower court, which the appellate court quoted approvingly without citation.

Like the courts cited above, the appeals court noted that the operative test was the "child's best interests and welfare," and further observed that "[t]he bare fact that a parent is transgender is not relevant to his or her ability to parent effectively," citing another case that reached this observation.[259] It also noted that evidence of societal prejudice due to a parent's transgender status cannot be a factor for consideration in the determination of custody.[260]

Yet at the same time that the court noted the irrelevance of the transition, it contradicted itself by noting: "But when a parent's conduct attendant to his or her gender transition harms the parent-child relationship, that conduct and resulting harm is a legitimate consideration in determining the child's best interests—just as all parental conduct is relevant."[261] The court concluded that "[p]laced in context, we read the court's reference to 'the consequences of and confusion caused by [Father's] choices in the lives of 4 and 2 year old children' " to refer not to the transgender identity of the parent, "but to the effect of his choices in absenting himself from the children's lives."[262] The court affirmed the custody determination.[263]

Such cases, inasmuch as they recite the irrelevance of the parent's transgender status, also unwittingly rely on the transition decision of the parent as a factor that weighs in favor of terminating the parent's bid for recognition. Courts here characterize transgender parents as being "distracted" due to their transition.[264] Or, like in *Daly*, they may describe the transgender parent as "selfish" for their transition decision, conflating their transition with an inability to serve as a parent to their child.[265]

In another custody case, *Cisek v. Cisek*, an appellate court overturned a lower court's decision permitting the transgender parent to continue visitation, suggesting that it might have viewed the transgender parent more sympathetically if that parent had offered more evidence that the transition was "compelled by some mental imbalance."[266] Absent such evidence, the court was left to wonder, rhetorically, "Was his sex change simply an indulgence of some fantasy?"[267] Whether such evidence would have in fact made a difference in the outcome is unclear, but the court certainly implied that the im-

259. *Id.* (citing Christian v. Randall, 516 P.2d 132, 133–34 (Colo. App. 1973)).

260. *Id.* (citing Palmore v. Sidoti, 466 U.S. 429, 434 (1984)).

261. *Id.*

262. *Id.* at *3. We have purposely cited the court's language here, using the pronouns "he" and "Father," not because we agree with those terms for these circumstances, but in order to underscore the bias faced by the transgender parent.

263. *Id.* at *4.

264. *See id.* at *3.

265. Daly v. Daly, 715 P.2d 56, 59 (Nev. 1986); *see also In re* L.S., 717 N.E.2d 204, 208, 210–11 (Ind. Ct. App. 1999) (upholding termination and observing that "[i]t was Danielle's choice to place her needs above those of the children by choosing to leave the State" when an intersex parent began the process of transition and moved to another state to finalize transition, yet failed to communicate with children's counselor about transition).

266. No. 80 C.A. 113, 1982 WL 6161, at *1–2 (Ohio Ct. App. July 20, 1982).

267. *Cisek*, 1982 WL 6161, at *2.

mutable—or at least unavoidable—character of a parent's gender identity could be entitled to greater consideration than a purely indulgent, selfish "choice" perhaps connected to sexual desire.[268] The court then cited an expert who testified that the transgender status of the plaintiff would have a "sociopathic affect [sic] on the child" and "felt that physical contact should be stopped."[269] Since the court saw its duty as protecting the children, it concluded that "[t]here is evidence that there might be mental harm. Common sense dictates that there can be social harm," and decided that without therapy, "the two minor children are in harm's way."[270] Like in *Daly*, the court in *Cisek* presented the transgender parent with an impossible choice: transition, and risk losing their child; or refrain from transition, and risk losing their own self-recognition.

2. Concerns About Volition

The previous discussion demonstrated situations in which the transition—either its permanence or other factors—indirectly influenced a court's decision to rule against the transgender parent. In other cases, particularly those involving cross-dressing behavior, courts express concern, either directly or indirectly, about the effect of the parent's behavior or expression on the child, prompting the court to examine such factors as the location of the cross-dressing behavior and whether the child has been exposed. If the transgender parent is granted visitation rights, courts will, at times, subject the transgender parent to significant restrictions to ensure that the child is not exposed to gender nonconforming behavior or expression.[271] In cases where a transgender parent is able to retain custody, a court's decision may "rest[] at least in part on the fact that the parent had concealed her gender identity from her children."[272] The concern here is not the effect of the per-

268. This language also echoes the Nevada Supreme Court's description of Suzanne Daly as "a selfish person whose own needs, desires, and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter." *Daly*, 715 P.2d at 59.

269. *Cisek*, 1982 WL 6161, at *1.

270. *Id.* at *2.

271. *See* M.R. v. San Mateo Cty. Superior Court, No. A122117, 2008 WL 4650440, at *9 (Cal. Ct. App. Oct. 22, 2008) ("The issue of the cross-dressing is relevant as follows: I don't care what you do in your personal life, sir. That's your business. But you do it around children who are the dependent children of this court after a social worker told you not to, now it's my business. These boys are at an age where they can begin to become very confused. You're not helping the situation by not following the social worker's rules.").

272. LESLIE COOPER, PROTECTING THE RIGHTS OF TRANSGENDER PARENTS AND THEIR CHILDREN 7 (2013), https://nicic.gov/protecting-rights-transgender-parents-and-their-children-guide-parents-and-lawyers [https://perma.cc/B2LZ-VLSX] (noting cases where evidence demonstrated that the parent would not cross-dress in front of the children or had decided to maintain their state-assigned gender identity); *see, e.g.*, *In re* Custody of T.J., No. C2-87-1786, 1988 WL 8302, at *3 (Minn. Ct. App. Feb. 9, 1988) (noting that the parent would "maintain his male identity"); *In re* Marriage of D.F.D., 862 P.2d 368, 371 (Mont. 1993) (noting that father would not cross-dress in front of child); P.L.W. v. T.R.W., 890 S.W.2d 688, 690 (Mo. Ct. App. 1994) (noting privacy of cross-dressing).

manence of the shift in gender; it is about the child's exposure to gender fluidity.[273]

In reality, however, gender falls along a spectrum, not a binary. While some people have a gender identity and expression that perfectly matches binary gender norms of masculinity or femininity, many do not. Some people who identify as transgender or otherwise fall within that term's umbrella have an explicitly nonbinary gender identity—a category that is finding increasing recognition in recent years from courts and legislatures as well as society as a whole.[274] Others whose gender expression is different from traditional expectations of masculinity and femininity, either all of the time or some of the time, may describe themselves as butch, femme, gender nonconforming, gender variant, gender fluid, gender expansive, or use other terms to describe themselves. The terms "transvestite" and "cross-dresser" (which we often see in these opinions) first gained currency in the mid-twentieth century to describe heterosexual men who occasionally or frequently dressed as women but continued to identify as men.[275] While those terms are still in common use among older generations or those who feel pressure to keep their gender expression secret, younger people today are more likely to self-describe with terms like genderqueer, gender fluid, or other terms they use denote a nonbinary identity.

Gender nonconforming behavior, such as cross-dressing, in male-assigned people tends to prompt the most negative reactions—presumably due to pervasive norms of sexism and homophobia that penalize men particularly harshly because they have adopted characteristics associated with women. Unlike transgender men and transgender women, cross-dressers may be seen as secretive, primarily motivated by sexual purposes, and able to choose when (and whether) they will transgress gender norms. These concerns about cross-dressing have appeared in academic literature as well, con-

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273. Part of the focus on cross-dressing behavior may be indirectly linked, somewhat ironically, to the rise of transgender recognition. As more and more individuals have been able to acquire recognition through medicalized forms of intervention, often gender confirmation surgery, it has contributed to the view that transition from one assigned sex to another, often through medical intervention, is the *only* appropriate way to express a gender different from that assigned at birth. That is, there are only two acceptable options: cisgender identity and expression, or complete and uniform transition to the opposite binary gender.

274. *See* ARIELLE WEBB ET AL., NON-BINARY GENDER IDENTITIES: FACT SHEET (2015), http://www.apadivisions.org/division-44/resources/advocacy/non-binary-facts.pdf [https://perma.cc/A67V-2KSZ]; James Michael Nichols, *California Becomes First State to Legally Recognize a Third Gender*, HUFFPOST (Oct. 17, 2017, 12:45 PM), https://www.huffingtonpost.com/entry/california-third-gender-option_us_59e61784e4b0ca9f483b17b9 [https://perma.cc/C6K3-VEB3] (describing a California law recognizing nonbinary identity on birth certificates and driver's licenses). *See generally* Katyal, *supra* note 12 (discussing how cross-dressing and other forms of gender variant expression often receive less protection by courts).

275. *See* Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, *in* TRANSGENDER RIGHTS, *supra* note 22, at 171, 171–73; STRYKER, *supra* note 29, at 17–18.

tributing to a lack of understanding (at best) and an overpathologizing of such behavior (at worst) in the context of transgender parenting.[276]

Indeed, discomfort with cross-dressing has existed in the law for hundreds of years, once compelling some jurisdictions to pass laws that banned individuals from appearing "in a dress or costume not customarily worn by his or her sex."[277] Although those laws were eventually overturned due to First Amendment considerations, a persistent discomfort regarding cross-dressing pervades the law.[278] Since then, courts have permitted spouses to divorce upon discovery of cross-dressing or transition-related behavior, on the grounds that "humiliating and degrading" conduct "to a woman has been held to provide evidence sufficient in itself to constitute indignities."[279] Other cases have found evidence of cross-dressing to be relevant to the court's ruling against the party.[280] Due in no small part to the discomfort

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276. In one law review article about transvestism, for example, the authors argue that cross-dressing can often coexist with other kinds of paraphilias, like sadomasochistic behavior, general fetishism, exhibitionism, and rape. Khaya Novick Eisenberg et al., *Transvestism and Foster Parenting: A Child Protection Concern?*, 15 FLA. COASTAL L. REV. 175, 182–84 (2014). Although the authors note that most "transvestite persons" live "normal, functional lives" and that any increased association with criminal sex acts only appears in the clinical population (rather than the normative population), the article continues to exaggerate a notion of risk to children. *Id.* at 194–95. For an excellent commentary on these issues, see Julia M. Serano, *The Case Against Autogynephilia*, 12 INT'L J. TRANSGENDERISM 176 (2010).

277. Hasan Shafiqullah, Note, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195, 204 (1997); *see also* CINCINNATI, OHIO, MUNICIPAL CODE § 901-D9 (1971) (outlawing non-gender-conforming dress worn "with the intent of committing any indecent or immoral act"); ERICKSON EDUC. FOUND., LEGAL ASPECTS OF TRANSEXUALISM AND INFORMATION ON ADMINISTRATIVE PROCEDURES 2–3 (rev. ed. 1971), https://archive.org/details/legalaspectsoftr0000noau [https://perma.cc/4THE-APJS] (reporting that at least ten states had laws prohibiting cross-dressing at the time of publication and that New York only recently repealed a similar law).

278. *See* Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) (classifying gender-fluid appearance of plaintiff to be a choice rather than an immutable aspect of their identity); Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 237–38 (2005); Yofi Tirosh, *Adjudicating Appearance: From Identity to Personhood*, 19 YALE J.L. & FEMINISM 49, 58 (2007) (noting that "underneath every personal appearance there is (and should be) a solid, clear, and stable identity of the bearer").

279. McKolanis v. McKolanis, 644 A.2d 1256, 1259 (Pa. Super. Ct. 1994); Steinke v. Steinke, 357 A.2d 674, 676–77 (Pa. Super. Ct. 1975).

280. *See, e.g.*, *In re* A.J., 190 Cal. Rptr. 3d 762, 766 (Ct. App. 2015) (noting relevance of father's date with a trans person to guardianship); *In re* G.V., B258385, 2015 WL 996610, at *2 (Cal. Ct. App. Mar. 4, 2015) (noting father had posted ad online looking for sexual relations with a trans person); People v. Anderson, No. C061974, 2011 WL 2341297, at *3 (Cal. Ct. App. Jun. 13, 2011) (noting that evidence of defendant's cross-dressing was relevant to the crime); Spring v. Spring, No. FA054004151S, 2006 WL 3008446, at *2 (Conn. Super. Ct. Oct. 12, 2006) (noting that father's cross-dressing detrimentally affected relationship with daughter); *In re* S.R.A., No. 90351, 2004 WL 2578660, at *1 (Kan. Ct. App. Nov. 12, 2004) (noting evidence of cross-dressing paraphernalia was relevant to evidence of sexual misconduct); *In re* Jeremy Jordon M., No. 101297, 2012 WL 1737135, at *11 (N.Y. Fam. Ct. May 10, 2012) (noting that cross-

with gender fluidity, it is not unusual for a parent's cross-dressing activities to be considered by the court in custody determinations and monitored during visitation. In one case, a court denied a request for overnight visitation on the grounds of the parent's cross-dressing activities, even though the reviewing court noted that the testimony was contradictory and derived in part from hearsay evidence, because of the "impressionable" age of the child.[281]

In one typical example underscoring the invasiveness of these restrictions, a court decided to award custody to a male-assigned parent who cross-dressed over the mother who had sexually abused their daughter.[282] But even though the court sided with this parent, it took more than just a passing notice of the parent's cross-dressing behavior, noting that "[h]e cross-dresses in the privacy of his bedroom and has taken steps to insure that his daughter does not see him in women's clothing."[283] In that case, the court further noted that in the years that he has looked after his young daughter, "he has not received or kept transvestite literature in his home."[284]

While both sides presented testimony about the impact of the father's cross-dressing on the child, leading the court to cite testimony from one expert who argued that "knowledge of respondent's behavior would be harmful to the child's own sexual identity," the court was careful to stress the insulated, private nature of the cross-dressing behavior, which the court thought mitigated any risk to the child.[285] This outcome is not unusual—our research identified a trend in situations where transgender parents won their cases: in many such cases, any cross-dressing behavior was private.[286]

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dressing in front of child was considered inappropriate); State v. Liddle, No. 23287, 2007 WL 1138421, ¶ 59 (Ohio Ct. App. Apr. 18, 2007) (finding evidence of cross-dressing relevant to sexual predation); State v. Kessler, 879 P.2d 333, 336 (Wash. Ct. App. 1994) (finding evidence of cross-dressing relevant to prosecution decisions).

281. B. v. B., 585 N.Y.S.2d 65 (App. Div. 1992); *cf.* Joanna K. v. Jennifer L., No. E06693, 2005 WL 668829, at *1 (Cal. Ct. App. Mar. 23, 2005) (evidence of father's cross-dressing raised but rejected by court in custody determination).

282. *In re* Welfare of V.H., 412 N.W.2d 389, 390 (Minn. Ct. App. 1987).

283. *Id.* (noting that the child's therapists and guardian ad litem, who knew of the parent's cross-dressing, supported awarding custody to the father, and observing that the father planned to tell his daughter about his cross-dressing behavior with the aid of a therapist when she was older). Note that here (as in other, similar cases) we have used male pronouns when the reported facts of this case do not suggest female self-identification or transition, but we note that courts have often been mistaken in their classifications and pronoun usage, particularly regarding the recognition of transition or intent to transition. Wherever possible, we tried to use terms, names, and pronouns that followed the transgender person's own representations, but note that our language may be limited in its accuracy due to an inadequate factual record.

284. *Id.*

285. *Id.* at 393–94.

286. *E.g.*, M. v. M., No. FA 940064700, 1996 WL 434302, at *19 (Conn. Super. Ct. July 11, 1996) (finding that the cross-dressing behavior of the trans parent's friends—and child's godparents—was "not entered into in front of the children" and awarding custody to the trans parent, about whom no cross-dressing behavior was discussed); *V.H.*, 412 N.W.2d at 393 (not-

We have already seen, in such cases, the desire to confine or ban cross-dressing expression. But this intention often crosses into a juridical concern about who the transgender parent associates with, and whether their friends or partners also display gender variance. In one example, a parent moved her two sons to another state (as in *Daly*) and refused to allow any contact with the transgender parent, prompting one of the sons to express unhappiness and suicidal thoughts due to his lack of contact with the transgender parent.[287] In Missouri, their new location, the cisgender mother filed a petition for dissolution, arguing that her ex-spouse had "adopted a lifestyle such that it would be extremely harmful to the minor children for them to be placed even in the temporary custody of or visitation with [the transgender parent]."[288]

After a hearing, the mother was awarded primary custody of the two sons subject to visitation rights that were set to begin after the parent's transition.[289] The trial court had recognized that the children's transgender parent was a loving and caring parent, and the court required the mother to permit the children to see a counselor to address transition-related issues.[290] At the same time, however, the court also issued an order dictating that during temporary custody, the transgender parent "shall not cohabit with other transsexuals or sleep with another female."[291]

Over a year later, the mother asked for sole custody on appeal, arguing that the counseling provisions were vague and inadequate and that the court erred in granting joint custody because the parties lacked "any commonality of beliefs" regarding child-rearing.[292] Like so many of the other cases, the court decided to take the position least favorable to the transgender parent. Despite the strong evidence of a parental bond, the court terminated the order of joint custody, observing that it was "not designed to insure that a parent maintains his or her relationship with the child."[293] Since there was no

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ing that the trans parent "has taken positive steps to keep his behavior from his daughter" and "does not cross-dress in front of her"); P.L.W. v. T.R.W., 890 S.W.2d 688, 690 (Mo. Ct. App. 1994) (declining to restrict trans parent's visitation rights after noting that "the incidents involving Mother's clothing . . . were not in the child's physical presence"); *In re* Marriage of D.F.D., 862 P.2d 368, 376 (Mont. 1993) (reversing district court's restriction of visitation to child's parent who cross-dressed, on the grounds that the behavior was private, secretive, and addressed in therapy)..

287. During the marriage, the transgender parent struggled with the urge to cross-dress, and then finally decided to transition. No first names are provided in the opinion, which is why we use the terms above. J.L.S. v. D.K.S., 943 S.W.2d 766, 770 (Mo. Ct. App. 1997).

288. *Id.*

289. *Id.* at 769, 771–72.

290. *Id.* at 771–72.

291. *Id.* at 775.

292. *Id.* at 773–74.

293. *Id.*

additional evidence to suggest how the parents might function as a unit, the court simply handed all actual legal custody to the cisgender mother.[294]

On appeal, the court further upheld the invasive court order that required the transgender parent not to cohabit with other transgender individuals.[295] The appeals court first noted the relevance of past and present conduct as a guide to future behavior, concluding that "[c]onsideration of conduct is not limited to that which has in fact detrimentally affected the children."[296] It then went on to note that the transgender spouse testified that she is indeed living with one other "transsexual" and had a woman sleep over on occasion, thereby justifying the previous trial court's order.[297] The court, reflexively, rejected any consideration of the privacy or associational rights of the trans parent, even though most of these activities took place outside of visitation.

Like many of the other cases we have explored, this opinion was accompanied by a dissent. The dissent pointed out that the sole reason the cisgender mother objected to the transgender parent's joint custody was because she objected to the trans parent's lifestyle, and it recommended a remand for trial on the issue of what was in the children's best interests.[298] The dissent further noted that the record showed that the mother was supportive of overnight visits, so long as "he acted in no way like a woman," and suggested modifying the order limiting contact with trans persons or other women only when the children were in her custody.[299] In addition, the dissent pointed out that the evidence showed that the children asked to see their parent and missed her.[300]

In the above case, two things become clear. First, the court appears far more concerned with "protecting" the children from exposure to cross-dressing (and other "transsexuals") than maintaining the children's relationship to their parent. Contrary to all governing law, the court flatly rejected the idea that the purpose of a joint custody decision was to maintain the parents' relationship with the child, deciding that it instead had to rule exclusively based on the perceived best interests of the child.[301] Second, in order to maintain clear boundaries regarding gender, the court engaged in a detailed, fairly invasive set of parameters for the transgender parent to follow—what

294. *Id.* at 774–75.

295. *Id.*

296. *Id.*

297. Citing this evidence, the court observed that there was no abuse of discretion in making these requirements. *Id.*

298. *Id.* at 775, 781 (Karohl, J., dissenting in part).

299. *Id.* We have changed some of the pronouns here to accord with the transgender parent's identity, but note the use of "he" by the court.

300. *Id.* at 776.

301. *Id.* at 774–75 (majority opinion).

they can wear and when, and who they can socialize and cohabitate with.[302] This is not uncommon. Taylor Flynn has written that in many cases, "trans individuals must undergo an almost unimaginable host of intrusive inquiries about their bodies, medical history, and sex lives."[303] In another case, even when a transgender parent initially won sole custody, she had to seek a protective order to ban her former spouse from asking questions about the dysphoria, the identities of other support group members, and related information, presumably to avoid raising the risk of an even more invasive modification from the court regarding association.[304] Again, these cases suggest a near-constant concern about the impact of cross-dressing on the child, elevating these concerns to suggest that they motivate judicial decisions.[305]

Finally, there are at least four cases in which a custodial parent's relationship with a transgender person led to a reexamination of custody, including one case in which a Tennessee trial court threatened to remove two daughters from a mother's custody if she did not end a relationship with a "transvestite" boyfriend.[306] In two of these cases, the courts' decisions made children legally orphans—*orphans*—due to the parent's association with transgender individuals.[307] In one 1980 case, the Oregon Court of Appeals actually terminated a mother's rights to her children because she continued

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302. *See In re* L.S., 717 N.E.2d 204, 210 (Ind. Ct. App. 1999) (noting that trial court would prohibit visitation unless transgender parent dressed in state-assigned gender, rather than her gender identity).

303. Flynn, *supra* note 22, at 38.

304. *In re* Custody of T.J., No. C2-87-1786, 1988 WL 8302, at *1 (Minn. Ct. App. Feb. 9, 1988).

305. *E.g.*, *id.* at *2–3.

306. *See* Perez, *supra* note 22, at 391–92. Note that Perez slightly misreads *Isbell*. In *Isbell* the appellate court reprinted district court allegations that the parent's friend was a transvestite; given that the only evidence of cross-dressing involved a Halloween party, the appellate court overturned the district court. Isbell v. Isbell, No. 01-A-01-9002-GS00058, 1990 WL 107497, at *1, *4 (Tenn. Ct. App. Aug. 1, 1990), *rev'd on other grounds*, 816 S.W.2d 735 (Tenn. 1991); *see also* Lowhorn v. Lowhorn, No. 49A04–0712–CV–678, 2008 WL 2839485 (Ind. Ct. App. July 24, 2008) (overturning the trial court, rejecting its finding that the mother's longstanding platonic friendship with a transgender female has had a negative psychological impact on the children, and noting that the friendship involved only a "private dinner in their residence" a few times a month); *In re* Reesing, 483 P.2d 872, 873–74 (Wash. Ct. App. 1971) (affirming keeping child in temporary custody of the Department of Health and Social Services, due in part to parent's roommate's plan to undergo transition, concluding that "[t]here is an appearance of a relationship between persons within the home which are likely to cause the child future humiliations, embarrassments and degradations"). For an example of how far associational concerns—and those about cross-dressing—can extend, see Pulliam v. Smith, 501 S.E.2d 898, 901 (N.C. 1998), where the court awarded exclusive custody to the mother after noting that the father's male partner "keeps in the bedroom he shares with the [father] pictures of 'drag queens' " and that the pictures are accessible to the children.

307. Perez, *supra* note 22, at 392; *see also In re* Darnell, 619 P.2d 1349, 1351–52 (Or. Ct. App. 1980); *In re Reesing*, 483 P.2d at 873.

to live with her husband, a transgender man, who had been the children's legal parent until the court terminated his parental rights.[308]

3. Concerns About Contagion

In other cases in our study, especially those that include a bias against either a transitioning or cross-dressing parent, the concern is not necessarily about the fluidity of gender expression, but rather its effect on the child. In such situations, the parental fitness of the transgender parent is subordinated to an almost overwhelming consideration of the *effect* of gender nonconforming behavior on the child and whether the behavior will destabilize the child's own gender identity as a result. One expert has explained that this opposition to trans parenting "derives in part from concerns that the children will become confused in their own gender identity during critical years of psychosexual development," noting that the "first handful of years are seen as exceptionally vulnerable."[309]

The contagion argument is not at all new in the context of sexuality.[310] Kenji Yoshino has written about how since Stonewall, even as the concept of homosexuality as a literal disease or a mental disorder began to wane, the notion of homosexuality as a figurative disease, what he describes as a "disfavored social condition that was contagious," remained a vital presumption.[311] The contagion model, Nancy Knauer has written, was a theme in the 1928 obscenity trial regarding the book *The Well of Loneliness* by Radclyffe Hall.[312] There, the court found the work to be obscene, concluding that it had the tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall."[313]

In Knauer's framing of the contagion model, homosexuality is a "freely chosen vice, not a valid medical or scientific category."[314] Here, homosexuals are thought to "prey on innocent victims," which, as the model describes, is especially concerning because "children or young adults[] are very easily

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308. Perez, *supra* note 22, at 392; *see also In re Darnell*, 619 P.2d at 1352.

309. Green, *supra* note 43.

310. *See, e.g.*, Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 149 (2008) (noting that children of LGB parents are predicted to be more likely to engage in homosexual relationships and "to show gender nonconforming behaviors"); *see also* Rosky, *supra* note 25, at 294–311.

311. Yoshino, *supra* note 134, at 786.

312. Nancy J. Knauer, *Homosexuality as Contagion: From* The Well of Loneliness *to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 404 (2000).

313. *Id.* at 404 (quoting R v. Hicklin (1868) 3 QB 360 at 369 (Eng.)). Undergirding this conclusion, Knauer writes, lies a presumption (among others) of contagion that continues even today, demonstrated by the Supreme Court case barring James Dale, a gay scoutmaster, from serving as a leader in the Boy Scouts. *Id.* at 406–07.

314. *Id.* at 406.

lured into experimenting with homosexual practices, thereby accounting for homosexuality's contagious quality."[315] As Knauer writes, under this contagion model, because homosexuality "can so easily infect normal people, particularly children, any public image of homosexuality that is not negative—including simply the presence of an openly gay individual, such as an assistant Scout Master or a teacher—sends a dangerous message that must be forbidden, silenced, and repressed."[316]

In the transgender context, over and over again, we see courts expressing significant concern regarding the effect of transition on the child's own gender identity.[317] In the context of family court cases regarding lesbian or gay parents, Cliff Rosky's work has shown how concerns about contagion regularly surface, reflecting typical stereotypes about recruitment (defined by the risk of "indoctrinating" children) and the effect of role modeling (defined by the risk of children "identifying" with LGB parents).[318] In the transgender parent context, the research has shown no evidence of a link between a parent's transgender identity and the child's self-identification.[319] Even when a transgender parent is recognized for the purposes of custody or visitation, courts often take pains to question whether the child mimics transsexual behavior, or whether the child's play is consistent with their assigned sex role.[320] Again, the concern is one of contagion—the idea that the child will reflect gender nonconforming behavior that can be attributed to the parent's gender dysphoria.

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315. *Id.*

316. *Id.* at 406–07.

317. After noting that an expert testified that the child "does not mimic transsexual behavior, and his play is consistent with the sex roles of a male child," and concluding "[t]here is nothing in any of the evidence submitted to suggest that T.J. has any gender identity confusion," the court upheld the award of custody to a gender dysphoric father who decided not to transition. *In re* Custody of T.J., No. C2-87-1786, 1988 WL 8302, at *3 (Minn. Ct. App. Feb. 9, 1988); *see also* M. v. M., No. FA 940064700, 1996 WL 434302, at *23 (Conn. Super. Ct. July 11, 1996).

318. Rosky, *supra* note 25, at 295; *see also* Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013) (providing an extensive account of the fear that exposure to homosexuality will cause homosexuality in children).

319. The most recent study, published in the UK, found that out of eighteen children of trans parents, only one child, a female, met two of the criteria for a diagnosis of gender identity disorder, and only temporarily. According to the clinicians, by her last session at a clinic, she no longer met these criteria, leading the clinicians to conclude that "[n]one of the children of transsexual parents referred to the service developed any characteristics of a gender identity disorder." Freedman et al., *supra* note 223, at 428; *see also* Green, *supra* note 43.

320. *E.g.*, Franklin v. Franklin, No. 602, 2014, 2015 WL 3885834, at *2 (Del. June 22, 2015) (finding evidence of contagion demonstrated by noting that a daughter once refused to take medicine because she was afraid it would turn her into a boy, but rejecting assertion that lower court showed anti-transgender bias when it reached conclusion that daughter showed confusion regarding gender transition); *T.J.*, 1988 WL 8302, at *6–7 (awarding custody to father who decided to maintain a male identity after finding no evidence that awareness of father's gender dysphoria negatively impacted child).

In an illustrative case before the Montana Supreme Court in 1993, an ex-spouse alleged that her husband had "in the past, cross-dressed or worn women's undergarments."[321] The husband began cross-dressing as a teenager, but had done so always privately—in fact, not even his wife knew until they decided to get a divorce.[322] Even though the wife had never personally observed him in female clothing, and had no other concern about his parenting skills, she still wished to bring up the matter in court.[323] The wife's attorney alleged that the husband's conduct was a form of sexual deviance that would harm the child if exposed to it, prompting the court to perform further evaluation and to order additional consultation of the impact of the cross-dressing behavior on the child.[324]

The findings led the trial court to conclude that the father's admitted transvestism would have an irreparably harmful impact on the child if exposed to such conduct: "The court found that transvestism was compulsive and secretive and that the couple's son could not be protected during unsupervised visitation with his father. The court found that a transvestite father cannot be entrusted with such a tender young child."[325] The court's findings elaborated on the nature of the harm, observing that the mental health of the child would be at risk if the child had been exposed to the father's cross-dressing because "the child would face irreparable sexual misidentification if he saw his father as both a man and a woman."[326]

Eventually, the trial court's judgment was overturned at the state supreme court, which noted throughout its opinion that the district court judge continually substituted its judgment for the findings of experts.[327] The experts, in fact, had concluded that the father's sporadic cross-dressing did not even qualify him to fit the medical definition of a "transvestite."[328] The experts further believed there was only a very small chance that the son would imitate the conduct even if exposed to the father's cross-dressing.[329]

Despite the evidence, the wife's attorney asked for additional testimony from experts who had more experience with children.[330] Another expert, Richard Green, was summoned, this time from the staff at UCLA Medical School.[331] Here, Green assured the court that children of sexually atypical parents do not demonstrate their own "sexual identity conflict[s]."[332] The

321. *In re* Marriage of D.F.D., 862 P.2d 368, 369 (Mont. 1993).
322. *Id.* at 376.
323. *Id.* at 372.
324. *Id.* at 369–70.
325. *Id.* at 370.
326. *Id.*
327. *Id.* at 375–77.
328. *Id.* at 372–73.
329. *Id.* at 373.
330. *Id.* at 374.
331. *Id.*
332. *Id.*

expert advised that "no cross-dressing by the husband [should] take place in the boy's presence for the next few formative years," and concluded, according to the court, that "the more time a boy can spend with his father, the more available will be a male for appropriate sexual identification. He concluded that there was no evidence that transvestism by a father affects parenting qualities," nor was there a heightened risk of sexual abuse.[333] More testimony by the husband showed that "he had not cross-dressed for a year and a half," and he assured the court that he would never do so in the presence of his son.[334]

Yet despite this evidence, the district court concluded that the father was "an admitted transvestite" (even though the expert testimony showed the opposite) and that if the son were exposed to cross-dressing he could be irreparably harmed.[335] The court further concluded that transvestism was compulsive and secretive and that there was a risk of sexual misidentification if the child was exposed to the behavior.[336] The court awarded sole custody to the wife as a result of these findings.[337]

As noted above, the state supreme court reversed the trial court's findings on appeal, noting that an expert professional counselor had testified that it was "not an issue in regard to [the husband's] ability to parent."[338] The court noted that that lower court had rejected all of the expert testimony concluding that the child would not face irreparable harm, and had substituted its own judgment in finding that child's mental health was at risk, noting that this finding "was directly contrary to all of the competent evidence in this case."[339] The court's exchange was notable here:

> THE COURT: It doesn't mean that he is a molester, or he is a homosexual, or he is a danger to the child?
>
> THE WITNESS: No. Absolutely not. To me it means that he has a sexual preference that involves wearing female's clothing and that's basically it.[340]

When asked if the child could be harmed if he inadvertently viewed the parent cross-dressing, the witness replied that children could be harmed by viewing a range of sexual activities, but that the risk was minimal here.[341] Most enlightening is the husband's testimony, in which he explained that he had every intention to get counseling but had been unable to find a counse-

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333. *Id.*

334. *Id.* at 375. The guardian ad litem further conducted her own investigation, noting that the husband appeared to be able to control the behavior and that it should not disqualify him as a custodial parent, and recommended joint physical custody for the child. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 370.

338. *Id.* at 371–72, 376–77.

339. *Id.* at 375.

340. *Id.* at 372.

341. *Id.*

lor, that he had never cross-dressed in public, and that he "did not want his son to do what he had done and experience the pain that had resulted from his problem."[342] In any event, any harm that would result from observing cross-dressing would be less than the harm from not being able to have a normal relationship with his father, the court explained in reaching its reversal.[343]

Again, like the previous cases, particularly at the trial court level there is a suggestion that the cross-dressing behavior is of primary concern, even when it is isolated and private in nature and can be shown to have no effect on the child. Again and again, courts reinforce the notion that exposing a child to cross-dressing behavior justifies narrowing or modifying a custody or visitation order, jettisoning expert testimony, despite the absence of credible evidence that the exposure could have a more harmful effect on a child than limiting the child's relationship to their parent. This tendency only further reifies the possibility of prejudice, leaving transgender parents at a significant disadvantage in the judicial system.

IV. A NORMATIVE MODEL

Having looked closely at some of the ways in which courts frequently misstep when swayed by biases against transgender parents, in this Part we consider what approach courts *should* take when faced with a custody dispute involving a transgender parent.[344] Here, an important area of study is not whether the transition affects the child, but rather how discrimination—either formally at the hands of the courts or informally by another parent—surrounding the transition affects the family.[345] By flipping the concern away from transition and toward the *effect* of bias surrounding the transition, we can gain a better sense of how the law needs to evolve.[346]

One challenge in attempting to guide the decisionmaking process in child custody cases is the vast discretion generally afforded to judges to de-

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342. *Id.* At the same time, however, the father explained that he did not want to abandon his child, since his own father had passed away at a very young age and he had always felt a void in his life. *Id.*

343. *Id.* at 376.

344. Again, we use the shorthand "custody" in this Article to encompass the whole range of disputes a court might consider involving the degree to which an adult should have parenting time, decisionmaking authority, or the opportunity to preserve a legal relationship with a child.

345. *See* STOTZER ET AL., *supra* note 22, at 3.

346. As one expert concludes:

> [A]s a matter of equity—treating people alike in relevant ways—it is unfair to require that transgender parents have children only under ideal circumstances, when parents elsewhere have and rear children in ways that involve risks and vagaries that emanate from disease and disorders, from unforeseeable changes in relationships, and from events beyond anyone's control.

Murphy, *supra* note 66, at 55.

termine the "best interest of the child."[347] While the broad "best interest" test laudably aims to center the needs of children, as discussed above, the test has been criticized for permitting the subjective biases and values of a particular judge to determine what may be best for a child. If the judge harbors anti-transgender bias, or inadvertently may be swayed by the bias of others, the traditional deferential approach provides little protection against that influence.

Consequently, we conclude that the only way to ensure that anti-transgender bias does not affect decisionmaking[348] is to expressly exclude the consideration of that factor. Leading authorities have taken or recommended the same approach with respect to other parental characteristics—such as race and sexual orientation—that are unlikely to have any genuine connection to a person's ability to be a good parent, but that at the same time pose a serious risk of distorting the judicial process by triggering conscious or unconscious bias on the part of decisionmakers.[349] We additionally propose that courts should be barred from considering specific factors that are commonly used as proxies for transgender status, such as the possibility of a child being bullied by peers because a parent is transgender.

A. *Constitutional Considerations*

To begin, the constitutional rights of adults to parent their children without the interference of the state are well established.[350] Parenting has long been considered a fundamental right—a right so foundational that it

347. *See supra* Section II.0.

348. To be sure, no rule can entirely guarantee bias will not sneak into a judge's decision, but clear rules can at least help improve the odds. *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 720–21 (2006).

349. In this respect, it is similar to the constitutional notion of a suspect classification, but adoption of this test would not be dependent upon a constitutional analysis. As discussed below, that is because biased judicial decisionmaking not only interferes with the rights of the transgender parent but also undermines the interests of the children of transgender parents.

350. Of course, these standards are not always evenly applied. It is important to note that evidence shows a substantial divergence from these legal standards in the reported experiences of lower income parents and women of color, who are often subjected to higher degrees of state interference and surveillance in birthing and parenting. *See, e.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017) (arguing that lower income women are denied the same privacy rights that many others enjoy); Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 1023 (2003) (noting that lower income families are more likely to be reported to child protective services).

cannot be abrogated without a showing of a compelling state interest.[351] Indeed, in *Santosky v. Kramer*,[352] the Court observed:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.[353]

Courts have long recognized the fundamental right to direct the upbringing of one's children,[354] along with the right to maintain parental status absent a compelling showing of harm.[355] Laws that disproportionately restrict the parental rights of unwed fathers, for instance, have been held to violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[356] Similarly, courts are increasingly recognizing that transgender people have a fundamental right to be themselves and to live in accordance with their gender identity.[357]

That principle is reflected in antidiscrimination laws that either explicitly or implicitly protect transgender people from discrimination in employment, housing, public accommodations, and other contexts. Explicit protections include those found in the twenty states that have adopted antidiscrimination laws that bar discrimination based on gender identity or ex-

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351. *See* Brinig, *supra* note 117, at 1350 (citing a long list of cases); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (describing the "primary role" of parents in raising their children as "an enduring American tradition"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing a "private realm of family life"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing the right of parents to raise children "as essential to the orderly pursuit of happiness by free men").

352. 455 U.S. 745 (1982) (holding that there must be clear and convincing evidence before terminating a parent's rights under the Due Process Clause of the Fourteenth Amendment).

353. *Santosky*, 455 U.S. at 753.

354. *See* Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (recognizing fundamental nature of "the interest of a parent in the companionship, care, custody, and management of his or her children").

355. *See Santosky*, 455 U.S. 745; *In re* Heather B., 11 Cal. Rptr. 2d 891, 904 (Ct. App. 1992) (noting that it is "settled that a state cannot terminate a parental relationship based solely upon the 'best interests' of the child without some showing of parental unfitness"); *see also* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 881 (2006).

356. *Stanley*, 405 U.S. at 649 (holding that a state law that discriminated against unwed fathers violated due process and equal protection under the Fourteenth Amendment); *see also* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (holding that a federal law that discriminated against unwed fathers violated equal protection principle of the Fifth Amendment).

357. *See, e.g.*, Arroyo Gonzales v. Rossello Nevares, 305 F. Supp. 3d 327 (D.P.R. 2018) (holding that Puerto Rico's policy barring transgender people from correcting the gender marker on birth certificates violated the fundamental rights to privacy and autonomy). Flynn has argued that "[t]he determination of legal sex should be considered within the context of our constitutional values—values that reflect a deep suspicion of governmental intrusion on individual rights." Flynn, *supra* note 22, at 34.

pression[358] and the state and federal laws and regulations that provide transgender people the ability to obtain identification documents that accurately reflect the person's true identity.[359]

Implicit protections include those flowing from the state and federal laws that protect every person in the country from discrimination based on sex[360] and disability.[361] At least half of the federal circuit courts of appeals have now recognized that sex discrimination laws bar discrimination against those who are perceived to transgress gender stereotypes, including transgender people,[362] an issue that the Supreme Court will consider in the 2019–2020 term.[363] More recently, courts and administrative agencies across the country have interpreted laws against sex discrimination not only to bar discrimination but more specifically to guarantee the right of a transgender person to be recognized and treated as a member of the sex with which they identify, in contexts ranging from dress codes[364] to single-sex facilities like bathrooms[365] and locker rooms.[366] Nondiscrimination laws and principles are also increasingly interpreted to guarantee the right to gender transition, such as through medical treatments relating to gender transition[367] or access to accurate identity documents.[368]

Federal courts have also begun to recognize that the rights of transgender people are protected by the Constitution. The guarantee of equal protection prohibits the government from discriminating against groups that have historically been the subject of bias without a compelling justification.[369] Though the question has not reached the Supreme Court, lower courts are increasingly concluding that discrimination against transgender people should receive heightened scrutiny, either as a form of discrimination based on sex[370] or as its own suspect or quasi-suspect classification.[371] Apply-

358. 1 SEXUAL ORIENTATION AND THE LAW, *supra* note 13, § 10:7.

359. *Id.* § 10:11.

360. *See* Brenda D. Alzadon et al., *Sexual Harassment*, 1 GEO. J. GENDER & L. 583, 586–92 (2000).

361. 1 SEXUAL ORIENTATION AND THE LAW, *supra* note 13, § 10:6.

362. *Id.* § 10:5.

363. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 577 (6th Cir. 2018), *cert. granted*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019).

364. *See, e.g.*, *id.*

365. *E.g.*, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).

366. *See, e.g.*, M.A.B. v. Bd. of Educ., 286 F. Supp. 3d 704, 718 (D. Md. 2018).

367. *E.g.*, Nondiscrimination in Health Programs or Activities, 45 C.F.R. § 92 (2016).

368. *E.g.*, F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Idaho 2018) (holding that Idaho policy barring transgender people from amending birth certificates but permitting others, such as adoptive parents, to amend birth certificates violated equal protection).

369. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

370. *E.g.*, *Whitaker*, 858 F.3d at 1034; Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011).

ing the traditional four-factor test for determining whether a group is entitled to heightened scrutiny, those courts have found that transgender people: (1) have "been historically 'subjected to discrimination' ";[372] (2) "ha[ve] a defining characteristic that 'frequently bears no relation to ability to perform or contribute to society' ";[373] (3) "exhibit immutable or distinguishing characteristics that define them as a discrete group";[374] and (4) "as a class, . . . are a minority with relatively little political power."[375] As a result, any government action that penalizes a person based on their transgender status should be subject to strict, or at least intermediate, scrutiny under the Equal Protection Clause.

The Supreme Court's gay rights jurisprudence since *Lawrence v. Texas* has also suggested that the liberty interest encompassed within due process protects a person's right to live in accordance with their identity, including as an LGBT person, without interference or punishment from the state.[376] As commentators have noted, that jurisprudence sometimes blurs the lines between the equal protection and due process guarantees,[377] but under either formulation a person's right to be themselves is protected against those who would condition equal treatment on going back in the closet. Along these lines, lower courts have held that denying transgender people accurate gov-

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371. *E.g.*, Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d. 730 (E.D. Va. 2018); *M.A.B.*, 286 F. Supp. 3d at 719; *F.V.*, 286 F. Supp. 3d at 1145; Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018); Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016), *denying stay pending appeal sub nom*, Dodds v. U.S. Dep't of Educ. 845 F.3d 217 (6th Cir. 2016); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Adkins v. City of New York, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015).

372. Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)).

373. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985)).

374. *Id.*; see also Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (defining as "immutable" those traits, including gender identity, that are "so fundamental to one's identity that a person should not be required to abandon them"). It is, however, important to note that there have been many powerful critiques of immutability as applied to matters of sexual and gender identity. *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507 (1994).

375. *Evancho*, 237 F. Supp. 3d at 288.

376. Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015) (holding that the liberty protected by the Constitution includes "intimate choices defining personal identity and beliefs"); Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992))); *see also* Weisberger v. Weisberger, 60 N.Y.S.3d 265, 275 (App. Div. 2017) (holding, in a case involving a religious father who sought to deny custody to his lesbian former wife, that a divorce agreement will not be interpreted in a way that "violates a parent's legitimate due process right to express oneself and live freely" (citing *Lawrence*, 539 U.S. at 574, and *Obergefell*, 135 S. Ct. at 2584)).

377. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776–81 (2011).

ernment-issued IDs impermissibly restricts their due process rights to privacy and autonomy.[378] Moreover, limiting a trans person's ability to live in accordance with their gender identity may also infringe the First Amendment right to expression.[379]

Considering a parent's transgender status or gender expression in a custody determination thus raises serious constitutional concerns. Regardless of the level of scrutiny that courts ultimately agree transgender people are entitled to, it is clear, to us, that relying on a parent's gender identity or expression to deny or limit custody or visitation cannot pass constitutional muster.[380] The intermediate scrutiny test demands "an 'exceedingly persuasive justification' " for discrimination based on gender.[381] Under the strict scrutiny test, the fit between means and ends must be even tighter; the discrimination must be "necessary" to the accomplishment of the government's goal.[382]

In *Palmore v. Sidoti*, the Supreme Court held that the goal of granting custody based on a child's best interests is "indisputably a substantial governmental interest" under the equal protection analysis.[383] Nonetheless, the Court concluded that the lower court's ruling—denying custody to a white mother because she was living with a black man—was not permissible.[384] The Court reached this conclusion despite its acknowledgment that a child living in a mixed-race household might face disapproval from others in the community and that such bias could subject the child to harmful pressures and stresses that would not exist if the child were living with parents of the same race.[385] The Court concluded that while "[t]he Constitution cannot control such prejudices[,] . . . 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."[386]

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378. Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 333 (D.P.R. 2018); Love v. Johnson, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015); *see also* Beatie v. Beatie, 333 P.3d 754, 759 n.10 (Ariz. Ct. App. 2014) (noting that barring a transgender man from legal gender change because he had previously given birth would violate the fundamental right to procreation).

379. *See, e.g.*, Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305, at *9 (W.D. Wash. Dec. 11, 2017) (granting preliminary injunction of President Trump's ban on open military service by transgender people, on First Amendment grounds), *stay granted*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019).

380. Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 726–30 (2003); *see* Cohen, *supra* note 22, at 536, 556–57.

381. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

382. *See* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984).

383. *Id.* at 433.

384. *Id.* at 431–33.

385. *Id.* at 433.

386. *Id.* It is important to note however, that *Palmore*'s observations have not always been followed. In powerful work, Katie Eyer and Melissa Murray (among others) have shown

Even under intermediate scrutiny, a court would have to show an "exceedingly persuasive justification" for relying on a parent's transgender status to deny custody or visitation. Generalizations and stereotypes about transgender people, or fears stemming from the biases of others, cannot plausibly justify making custody decisions on any basis other than a person's ability to be a good parent.[387]

In fact, because of the danger that bias can infect and undermine a decisionmaker's ability to effectively focus on the child's ultimate long-term interest, allowing courts to consider a parent's transgender status should fail even the rational basis test. Under any standard, considering a parent's transgender status in custody cases should be constitutionally impermissible.

B. *Policy Interests*

As compelling as the constitutional arguments may be, in practice, courts often seem unpersuaded by such considerations in custody decisions outside the narrow area of racial discrimination.[388] In the more than thirty years since the Supreme Court's decision in *Palmore*, the Court has not expanded that holding to prohibit or limit consideration of characteristics other than race, even though the consideration of those characteristics carries a similar risk of being influenced by impermissible bias. In the absence of such an unmistakable prohibition, as other scholars have noted, courts generally give little weight to constitutional considerations in custody determinations.[389] While decisions may give a passing nod to the rights of parents, in practice, judges tend to conclude that their own perception of the child's best interest outweighs just about any other consideration, even a serious infringement of a parent's constitutional rights.[390]

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that, at times, race has been considered in decisionmaking regarding the family. *See, e.g.*, Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537 (2014); Melissa Murray, Loving*'s Legacy: Decriminalization and the Regulation of Sex and Sexuality*, 86 FORDHAM L. REV. 2671 (2018).

387. *Cf.* Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that generalizations about unwed fathers cannot justify discrimination).

388. *See* Polikoff, *supra* note 135, at 229 (concluding that, in general, "when a child's heterosexual parent has challenged the exercise of custody or visitation by a parent who has come out as gay or lesbian, the gay or lesbian parent's assertion of a constitutional right has amounted to nothing").

389. *See id.* at 228–29.

390. *See, e.g.*, Tipsword v. Tipsword, No. 1 CA-CV 12-0066, 2013 WL 1320444, at *2 (Ariz. Ct. App. Apr. 2, 2013) (holding that "a parent's conduct attendant to his or her gender transition [that] harms the parent-child relationship" is a legitimate consideration, and denying custody to the transgender parent, despite recognizing that the Constitution forbids consideration of "societal prejudice" relating to a parent's transgender status). *But see, e.g.*, Maxwell v. Maxwell, 382 S.W.3d 892, 899 (Ky. Ct. App. 2012) (holding that the trial court violated a lesbian mother's "due process, equal protection, and fundamental right to parent her children" when it relied on her sexual orientation as a "determinative factor" in awarding sole custody to the father).

Fortunately, the Constitution isn't the only limiting principle when it comes to custody decisionmaking. In fact, the factors that courts already consider as part of the best interest analysis—that is, children's own interests—also support such a limitation. We argue that courts and legislatures seeking to promote children's best interests should prioritize the maintenance of parent–child bonds, which is undoubtedly in the child's own interests regardless of a parent's gender identity or expression.

As discussed in Part I, the reality is that hundreds of thousands of transgender people across the United States and the world are living in families and raising children related by blood, adoption, or other forms of formal and informal kinship.[391] Any approach should be grounded in that reality and not in fears that are based on the inaccurate perception that a transgender parent is *sui generis* or even an impossibility.[392]

We propose centering two policy goals that we contend are undeniably supported by the social science evidence.[393] The first is that children are generally best off when they are supported in maintaining close relationships with the adults they know as their parents.[394] This interest is reflected in virtually all statutes listing factors to be considered in determining custody and parenting time arrangements.[395] Many states have even adopted so-called "friendly parent" provisions that call on courts to consider "[w]hich parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent"[396] (although those have faced scrutiny in recent years by domestic violence advocates as going too far in restricting the ability of a battered spouse to protect a child from an abusive parent).[397]

The second is that transgender people (like all people) are generally best off when they don't have to hide or feel ashamed of who they are; that is, when they are supported in transitioning to be able to live consistent with their gender identity. Research shows that transition is the most effective—

391. *See* JAMES ET AL., *supra* note 41, at 68; STOTZER ET AL., *supra* note 22, at 2–5.

392. *See* Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (quoting Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 469 (1990)) (holding that courts should not "perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form").

393. Courts and legislatures properly consider social science research as part of the broad range of materials that can be relevant to determining what decision is likely to lead to the best developmental outcome for a child. *See, e.g.*, Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (1987) (critiquing what the authors view as overreliance on such data).

394. Catherine M. Lee & Karen A. Bax, *Children's Reactions to Parental Separation and Divorce*, 5 PAEDIATRICS & CHILD HEALTH 217 (2000).

395. *See* Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 424 (2006).

396. ARIZ. REV. STAT. ANN. § 25-403(A)(6) (2017).

397. *See* Elrod & Dale, *supra* note 128, at 394–96.

indeed, the *only* effective—treatment for gender dysphoria.[398] Similarly, maintaining close family relationships can be a critical factor in the well-being of transgender people, as family rejection is tied to a host of negative consequences.[399]

For families with transgender parents, those two goals fit neatly together: when parents are given the freedom to live in accordance with who they are, they are happier and healthier. It hardly requires research to recognize that happier and healthier parents are better for kids. If we are to prioritize the well-established principle of maintaining children's relationships with parental figures, we should do whatever we can to give those adults the support they need to be the happiest and healthiest parents they can be. That will ultimately serve the best interest of that child and all the other children living in families that include a transgender person. Those children deserve to live free of stigma and fear, too.[400]

A rule that disallows consideration of a parent's gender identity or expression is the only approach that meets both of those goals, ensuring that children have permanent relationships with adults who are well equipped to love and support them. Conversely, an approach that grants courts unfettered discretion to consider factors based in bias thinly disguised as neutrality is likely to incentivize patently harmful results: emboldening non-transgender parents experiencing normal tension post-breakup to seize on a former partner's trans status as an opportunity to wrest sole control away from the other parent; encouraging trans parents to live in secrecy or postpone transition for fear of losing their children; and, ironically, increasing the stigma and fear associated with having a transgender parent, to the detriment of both the parent and the child, and to the benefit of no one.[401]

Constitutional arguments are not the only avenue, therefore, to achieve the goal we argue should be prioritized. The ordinary best interest analysis can itself, in theory, protect and support the ability of a child to maintain a relationship with a transgender parent. For consideration of illegitimate factors ultimately undermines the best interests of a child with a transgender parent.

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398. *See* Bd. of Trs., Am. Med. Ass'n, *Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients*, 163 AM. MED. ASS'N PROC. 95, 96 (2014).

399. JAMES ET AL., *supra* note 41, at 65.

400. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (invalidating a federal law barring recognition of same-sex marriages because that law "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. . . . The differentiation demeans the couple . . . [a]nd it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").

401. *See* Wald, *supra* note 395, at 424–25.

C. *Limitations of the Nexus Test*

In looking for possible rules that could be adopted to ensure that courts do not unfairly penalize transgender parents, the nexus test might seem an obvious candidate.[402] As discussed above, the nexus test was originally viewed as welcome progress from the older *per se* test that uniformly denied custody to LGBT parents.[403] And it has often served its purpose, providing a framework for courts to appropriately reject efforts to remove a child from the custody of a trans or gay parent.

For example, in *Christian v. Randall*, the Colorado Court of Appeals overturned a lower court decision that had taken away custody from a transgender parent who had transitioned to male.[404] The appeals court noted that the evidence below showed "that the children were happy, healthy, well-adjusted children who were doing well in school and who were active in community activities."[405] There was zero evidence that the home environment "endangered the children's physical health or impaired their emotional development."[406]

Nonetheless, the trial judge had ruled that the children should be removed, basing its decision "solely on th[e] ground" that the parent was "going through a transsexual change."[407] The appellate court held that the lower court's decision violated the state statute that codified a version of the nexus test, which provided that, in determining best interests, "[t]he court *shall not* consider conduct of a proposed custodian that does not affect his relationship with the child."[408] Since the record indicated that the parent's transgender status "did not adversely affect respondent's relationship with the children nor impair their emotional development," the decision to change custody was overturned.[409] Indeed, *Christian* serves as an early and powerful reminder that it is possible for courts to look beyond the issue of transition and to focus primarily on questions of parenting instead.

In other cases, however, even when courts purport to apply the nexus test, they actually apply that test in a distorted fashion to justify the exact same outcome as a blanket ban: denying an LGBT parent custody of their

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402. *See, e.g.*, Chang, *supra* note 22, at 697 (arguing that "a parent's gender status should be merely one of many factors to be balanced—not the ultimate determinant"); Carter, *supra* note 22, at 235 (arguing that "the most important issue" for courts in cases involving transgender parents and child custody is "[e]valuation of the effect of a parent's gender identity upon a child," rather than the parent's gender identity alone).

403. *See supra* Section II.B.

404. 516 P.2d 132, 132 (Colo. App. 1973). For a longer discussion of this case, see BALL, *supra* note 22, at 193–95.

405. *Christian*, 516 P.2d at 133.

406. *Id.*

407. *Id.* at 134.

408. *Id.* (emphasis added) (quoting Uniform Dissolution of Marriage Act, ch. 130, § 46-1-24(2), 1971 Colo. Sess. Laws 520, 530).

409. *Id.*

child based only on fears and stereotypes tied directly to the parent's status. As noted in Section III.B, potential harms that have been found sufficient to justify ending or limiting a transgender parent's contact with a child under a purported nexus test include the fear of contagion of gender nonconformity;[410] the parent's exercise of the supposedly-volitional "choice" to transition or express their gender, including presumptions of selfishness[411] and distraction;[412] a presumption of instability;[413] the specter of an inherent connection to sexuality;[414] a child's (potential) anxiety around transition and loss;[415] and the risk of stigma from being associated with a trans person.[416] While those harms were previously recited in support of a *per se* rule, once that kind of blanket rule fell out of fashion, they were simply repackaged as an acceptable part of the analysis under the nexus test.

Indeed, in the case of Suzanne Daly, the Nevada Supreme Court purported to apply a version of the nexus test to uphold the termination of the transgender parent's rights based on the lower court's specific factual findings formed by its "careful[] consider[ation] [of] the record."[417] That supposedly objective review of the evidence "found abandonment and risk of serious mental and emotional harm" and compelled the conclusion that Suzanne was "a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact" on her child.[418] As discussed in Part III, closer inspection reveals that those conclusions, supposedly based in record evidence, were in fact a barely disguised stand-in for Suzanne's trans status.

Scholars like Michael Wald and Nancy Polikoff have criticized the nexus test as applied to cases involving lesbian, gay, or bisexual parents or parents who live with an unmarried partner.[419] While the test is certainly an improvement on a *per se* prohibition or presumption of unfitness, Wald and Polikoff point out that the nexus test is unnecessary to advance any reasonable goals and may even contribute to significant harm.[420] As Polikoff ex-

410. B. v. B., 585 N.Y.S.2d 65, 66 (App. Div. 1992) (denying overnight visitation to cross-dressing father due to concerns about its effect on the "impressionable" five-year-old child).

411. Daly v. Daly, 715 P.2d 56, 59 (Nev. 1986).

412. Tipsword v. Tipsword, No. 1 CA-CV 12-0066, 2013 WL 1320444, at *3 (Ariz. Ct. App. Apr. 2, 2013).

413. Magnuson v. Magnuson, 170 P.3d 65, 66–67 (Wash. Ct. App. 2007). For a longer discussion of this case, see BALL, *supra* note 22 at 195–97 ("[D]espite the appellate court's protestations to the contrary, it ended up essentially applying a *per se* standard by approving the lower court's view that the mere decision to transition . . . constituted evidence of parental instability.").

414. Cisek v. Cisek, No. 80 C.A. 113, 1982 WL 6161, at *2 (Ohio Ct. App. July 20, 1982).

415. M.B. v. D.W., 236 S.W.3d 31, 35–36 (Ky. Ct. App. 2007).

416. *Id.*

417. Daly v. Daly, 715 P.2d 56, 59 (Nev. 1986).

418. *Id.*

419. Polikoff, *supra* note 135, at 237; Wald, *supra* note 395, at 427.

420. Polikoff, *supra* note 135, at 237; Wald, *supra* note 395, at 427.

plains, the fundamental premise of the nexus test is mistaken, because "a parent's sexual orientation, in and of itself, can never have an adverse impact on a child."[421] Any parent, including a gay or lesbian parent, might fall short:

> A parent might not pay sufficient attention to a child's needs and feelings or might choose a new partner who treats a child poorly. These could have an adverse impact on the child. But neither has anything to do with whether the parent is gay or straight, married or not.[422]

Polikoff asserts that courts have ample authority to identify and prevent potential harm to children whenever they see it, within their existing general authority to protect the best interests of children, without the need to resort to referencing a parent's sexual orientation or the nonmarital character of the parents' relationship.[423]

Such plain logic makes clear that a special nexus test for unpopular parental characteristics is unnecessary surplusage. Worse still, Wald and Polikoff each point out ways that the nexus test is in fact harmful. Wald makes an exhaustive study of social science research and concludes that "it is almost always detrimental to children if decisionmakers consider an adult's sexual orientation when making placement decisions."[424] Yet, as Polikoff explains, the nexus test by its very framing "implies that a child *might* be uniquely harmed because a parent is gay or lesbian."[425] Such a rule singles out sexual orientation, or gender identity, "as though that factor requires special monitoring by a court,"[426] which it does not, and essentially invites courts to look closer for possible signs of harm.

As discussed, courts regularly misuse the nexus test to deny custody or visitation to LGBT parents by relying on supposedly neutral factors, such as the risk of stigma, that are in fact stand-ins for LGBT status *per se*.[427] Beyond the obvious unfairness of that type of discrimination to transgender parents and children of transgender parents, which is worthy of serious consideration by courts and legislatures,[428] Wald identifies a number of other negative policy outcomes that necessarily result from such a regime. For example, by setting out the possibility of a public spectacle that would drag the child into the conflict and force them to take sides, such a rule incentivizes the non-LGBT parent to bargain aggressively for restrictions on the other parent's

421. Polikoff, *supra* note 135, at 237.

422. *Id.*

423. *See id.*

424. Wald, *supra* note 395, at 383.

425. Polikoff, *supra* note 135, at 238–39.

426. *Id.* at 238; *see also* Kim, *supra* note 133, at 58 (explaining how the nexus test "projects the message that the sexuality of sexually nonconforming parents requires special scrutiny").

427. *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

428. Wald, *supra* note 395, at 409–10.

quality or quantity of time with the child,[429] or instead to take the chance of pressuring a child to take a side in the conflict, knowing that they have a higher possibility of succeeding based on a court's potential bias against the other parent.[430] This risk is a particular concern in cases involving a breakup between an LGBT and a non-LGBT parent, where deep conflict may be especially prevalent due to highly negative feelings of abandonment, betrayal, and embarrassment that the non-LGBT parent might have in connection with the newly revealed sexual orientation or gender identity of their former partner.[431]

More fundamentally, Wald points out that the nexus test simply provides an insufficient bulwark against bias infiltrating decisionmaking in cases involving LGBT parents, which leads to bad decisions for children. When judges are focused on irrelevant characteristics, like the morality or presumed inherent harm from a parent's identity, it is likely that they will ignore or place incorrect weight on the other factors that are of genuine importance to the child's well-being.[432] Wald notes the overwhelming research concluding that the most critical predictive factor for the child's well-being is the nature of the child's relationship with each parent.[433] It is therefore essential for courts to maintain focus on that relationship in all decisions involving custody of a child.[434]

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429. *Id.* at 424 (citing Mnookin & Kornhauser, *supra* note 121). One illustration of this type of bargaining is seen in the 2015 film *Carol* and the 1952 novel it is based on, *The Price of Salt*. Carol, a mother going through a divorce, knows that she will lose custody of her young daughter if her husband informs the court of her sexual relationship with another woman. She therefore agrees to give him full custody and to receive severely restricted supervised visitation ("she can come and visit me a couple of afternoons a year"), knowing that is the best outcome she can hope for. Today this penalty strikes audiences as shocking; in 1952 it was a standard (indeed, mild) consequence for a character's unrepentant queerness. PATRICIA HIGHSMITH [CLAIRE MORGAN], THE PRICE OF SALT (Leslie Parr ed., Arno Press Inc. 1975) (1952).

430. Wald, *supra* note 395, at 424, 426, 427; *see, e.g.*, Johnson v. Schlotman, 502 N.W.2d 831, 834–35 (N.D. 1993) (declining to overturn a lower court's denial of custody to the lesbian mother because, while recognizing that a parent has a duty not to intentionally alienate a child from the other parent, the court determined that the father's assertion to the children that homosexuality is deviant and not to be tolerated was not relevant, since homophobic views are widespread in society).

431. Wald, *supra* note 395, at 424–26.

432. *Id.* at 425.

433. *Id.* at 428 (citing a panel of the leading national experts on child custody that concluded that "a parent's competence to provide a child all the food, clothing, shelter, and physical, educational, and emotional nurturance a child needs cannot possibly be measured by the parent's sexual practices or gender preferences" and that "how the parent deals with the child is all that matters" (quoting NAT'L INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY LAW, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES § 3:8 (Robert J. Levy ed., 1998))).

434. *Id.* at 425.

D. *Beyond the Nexus Test: Bar Any Consideration of a Parent's Status or Related Factors*

We have now identified several approaches that are either outright harmful (i.e., a *per se* ban or presumption of unfitness) or that, while well-intended, can have serious unintended harmful consequences (i.e., the nexus test). What other options might there be to more effectively guide or limit courts when considering custody determinations where one parent is transgender or gender nonconforming?

The most thoughtful recent court decisions considering cases involving LGB parents have emphasized the importance of "neutrality" with respect to a parent's sexual orientation in a way that pushes the nexus test closer to the outright bar of *Palmore*.[435] For example, a 2017 decision, *In re Marriage of Black*, overturned a lower court decision that had given the father primary custody in part because the mother was a lesbian.[436] In that case, the lower court ruled that the father "is clearly the more stable parent" because he would maintain their strict religious upbringing, which would be in conflict with the mother's homosexuality.[437] The Washington Supreme Court held that this "reasoning unfairly punishes a parent . . . on the basis of her sexual orientation,"[438] which it noted is constitutionally suspect.[439] Rather, the court held that "courts must remain neutral toward a parent's sexual orientation in order to ensure that custody decisions are based on the 'needs of the child rather than the sexual preferences of the parent.' "[440]

The state's high court found that the lower court's consideration of factors connected to the mother's sexual orientation—including the possibility that the children would be uncomfortable with the mother's homosexuality and the risk that they could experience bullying as a result of the mother's relationship with a woman—was inappropriate and indicative of bias, citing

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435. *E.g.*, *In re* Marriage of Black, 392 P.3d 1041, 1050 (Wash. 2017) (holding that "courts must remain neutral toward a parent's sexual orientation in order to ensure that custody decisions are based on the 'needs of the child rather than the sexual preferences of the parent' " (quoting *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983))); Weisberger v. Weisberger, 60 N.Y.S.3d 265, 273–74 (App. Div. 2017) ("[T]o the extent the mother's sexual orientation was raised at the hearing, we note that courts must remain neutral toward such matters." (citing *Black*, 392 P.3d at 1049–50)). Note, however, that courts have interpreted *Palmore* unevenly, at times taking race into account. See Murray, *supra* note 386, at 2691–93 (reaching this observation).

436. 392 P.3d 1041.

437. *Black*, 392 P.3d at 1047.

438. *Id.* at 1050.

439. *Id.* at 1049 (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015), and SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) (holding that sexual orientation classifications receive heightened scrutiny)).

440. *Id.* at 1050 (quoting *In re* Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983)). The court noted that Washington courts follow an analogous rule of "strict impartiality" in regard to parents' conflicting religious beliefs. *Id.*

Palmore.[441] The Washington Supreme Court acknowledged that under the nexus test, courts may consider a parent's sexual orientation where there is "an express showing of direct harm."[442] But it clarified that even under that test, any evidence that relies on an "assumption that a parent's sexual orientation is inherently harmful to his or her children" is not a valid factor for consideration because it is not in fact neutral.[443]

We believe that, even at its best, the nexus test is inherently flawed and confusing. Courts that seek to adhere to a standard of strict neutrality can still be misled under the nexus test by claims of harm that are in fact mere restatements of the parent's orientation. The most straightforward approach would be to simply prohibit courts from considering a parent's sexual orientation or transgender status. Carl Schneider, who has argued persuasively in defense of the broad discretion generally granted to courts under the best interest test, has noted that any danger of improper bias could most easily be addressed through "direct prohibitions" of consideration of particular factors, as in the prohibition of the consideration of race that the Supreme Court adopted in *Palmore*.[444] This is the basic approach proposed by Wald, who argues that in custody determinations, "a parent's sexual orientation should be irrelevant."[445] Polikoff adopts Wald's reasoning and goes slightly further, suggesting that courts should be barred entirely from considering the nonmarital nature of a parent's relationship.[446]

The American Law Institute (ALI) has already proposed something similar with respect to the sexual orientation of a parent. In its 2002 Principles of the Law of Family Dissolution, the ALI set forth a strict black-letter rule:

> In issuing orders under this Chapter [concerning custody or visitation], the court should not consider any of the following factors: (a) the race or ethnicity of the child, a parent, or other member of the household; (b) the sex of a parent or the child; . . . [or] (d) the sexual orientation of a parent . . . .[447]

In the official comments, the ALI explains:

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441. *Id.* at 1051.

442. *Id.* at 1050.

443. *Id.* at 1050 n.9.

444. Schneider, *supra* note 117, at 2268, 2296; *see also* Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1611–12 (1998) (applying Schneider's suggestion to propose barring courts from improperly considering a parent's religion).

445. Wald, *supra* note 395, at 383. Wald's formulation would include the caveat that sexual orientation can be considered "where an older child indicates that the parent's sexual orientation is relevant to them," although that exception would also apply to any reasoning expressed by an older child, and it does not require a special "gay-only" exception. *Id.* at 383, 430. A better formulation of Wald's exception, then, would not even reference sexual orientation or gender identity, but simply would provide that an older child's wishes receive a certain level of deference.

446. Polikoff, *supra* note 135, at 237.

447. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12(1) (AM. LAW INST. 2002).

> All stereotypes should be avoided in decisionmaking under this Chapter, including those based on many factors not covered by this section such as disability, age, intelligence level, personality, and appearance. The section singles out race, ethnicity, sex, religion, sexual orientation, extramarital conduct, and financial circumstances because these factors historically have created the most troublesome distortions in judgments about what is best for a child, and thus require the greatest vigilance to avoid.[448]

As we have argued in this Article, a parent's gender identity or gender expression is well suited to be added to that list of forbidden factors in judicial decisionmaking about custody or visitation. As with other illegitimate considerations like race, ethnicity, sex, and sexual orientation, an outright prohibition is essential to get to the root of the problem because gender nonconformity has no relevance to a person's ability to be a good parent for a child. And yet because of continued widespread implicit bias, a high risk exists that courts will—intentionally or not—be swayed by such bias. The only sure way to guarantee that bias will not infect a decision is to prohibit consideration of a parental characteristic that in fact bears no relation to good parenting.[449]

It is true that in the nearly two decades since the ALI Principles were published, their impact has been surprisingly limited. No state has adopted any version of Section 2.12[450] (although, as noted earlier, Washington, D.C. does have a statute prohibiting courts from making decisions based *solely* on sexual orientation).[451] Some court decisions have acknowledged the ALI's recommendations, however,[452] and the recommendations may receive more attention as broader recognition of the humanity of LGBT people continues to grow.

Our proposal would go even further than the ALI's prohibition, though. Where the risk that bias will unintentionally and inappropriately seep into decisionmaking is so great, an even stricter guard is necessary: courts should also be expressly barred from considering specific illegitimate factors that are frequently used as stand-ins for transgender (or LGB) status. As discussed above, those include: the fear that a child will become gender nonconforming or gay;[453] the potential stigma of association with a trans person; the par-

448. *Id.* § 2.12(1) cmt. a.

449. *See* Schneider, *supra* note 117, at 2298.

450. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12 Reporter's Notes cmt. a.

451. D.C. CODE § 16-914(a)(1)(A) (2018).

452. *E.g.*, Tipsword v. Tipsword, No. 1CA-CV-12-0066, 2013 WL 1320444, at *2–3 (Ariz. Ct. App. Apr. 2, 2013) (citing the ALI Principles in acknowledging that "[t]he bare fact that a parent is transgender" is not a relevant consideration, but concluding that the transgender parent's "conduct" in relation to her transition was reason enough to deny her custody); Woods v. Ryan, 696 N.W.2d 508, 518 (N.D. 2005) (Maring, J., dissenting) (citing the ALI Principles in acknowledging that courts should not generally consider a parent's financial circumstances in custody decisions).

453. *See, e.g.*, *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (imposing strict limitations on visitation with gay father in part based on expert testimony that "the fa-

ent's openness (lack of "discretion") about their gender nonconformity; the fact of transition and the changes it may bring; a transgender parent's presumed instability, selfishness, or distraction; and a child's anxiety around transition or preference to avoid a trans parent. Consideration of those factors should be expressly disallowed in cases involving a trans parent because they have little meaning separate from the illegitimate consideration of a parent's trans status and, in almost any case involving a trans parent, a court could imagine those factors lurking in the corners. Allowing them to be considered creates too great a risk that courts will rely on stereotypes and fears that do not in fact support the best interest of the child.

This is not an entirely novel concept, as many contexts recognize the dangers posed by implicit bias. Just this year, Washington State adopted a rule banning "implicit, institutional and unconscious" racial and ethnic bias in the process of jury selection.[454] In other contexts, evidence of cross-dressing behavior has been challenged in an evidentiary context as prejudicial and excluded for its risk of bias.[455] Similarly, over the decades that the nexus test has been in place, a number of thoughtful family court and appellate decisions have recognized the danger posed by illegitimate factors such as stigma or anxiety masquerading as genuine harm, and they have held that such considerations are impermissible surrogates for a parent's status.[456] But no statute or appellate court ruling has squarely adopted such a clear prohibition. It should not require so much effort for each family court judge to wind through the swamp of wrong choices distorted to seem reasonable by the misleading framing of the nexus test. The risk of wrong decisions—for children, for parents, and for our values of fairness—is too great.

This approach would appropriately bar consideration of illegitimate factors, while permitting consideration of every other factor relevant to a child's well-being. That could include, as Wald suggests, deferring to the wishes of an older child, so long as that deference is applied equally regardless of the

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ther's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development," as well as on the risk to the children of "either overt or covert homosexual seduction" upon reaching puberty).

454. See WASH. CT. R. GR 37, https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr37 [https://perma.cc/F39Z-6SK9]; *see also Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU (Apr. 9, 2018), https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection [https://perma.cc/G33X-8UHE] (explaining that Washington is the first state to ban implicit bias based on race or ethnicity in jury selection).

455. *See* Robinson v. State, 415 S.E.2d 21, 23 (Ga. Ct. App. 1992) (noting evidence of cross-dressing may be prejudicial and irrelevant, but permitting it because it had been raised before without objection).

456. *See, e.g.*, *In re* Marriage of Black, 392 P.3d 1041, 1048 (Wash. 2017) (potential for bullying not a legitimate consideration); Weigand v. Houghton, 730 So.2d 581, 587 (Miss. 1999) (child's embarrassment not a legitimate consideration). *See generally* JOSLIN ET AL., *supra* note 26.

reason for the child's preference.[457] A parent's gender nonconformity or transgender status, however, whether considered directly or indirectly, is never a legitimate factor. Thus, it should have no bearing on whether a person is permitted to be a parent to their children.

CONCLUSION

Our survey of the existing case law is sobering. While marriage equality is now the law of the land and transgender people have gained ground in many areas in recent years, transgender parents are still subject to discrimination at the hands of family court judges applying the best interest of the child standard in custody decisions. Those courts too frequently consider illegitimate factors, such as anxieties around transition, to impose irreparable harm by severing family relationships that are critical for the well-being of both children and parents.

Fortunately, we are optimistic about the possibility for a new direction. Following the approaches taken in other areas where unlawful bias has threatened the validity of judicial decisionmaking, legislatures and courts of appeal should prohibit judges from taking into account a parent's gender nonconformity or related factors that too-frequently masquerade as cognizable harm. Transgender parents, and their children, deserve nothing less.

457. *See* Wald, *supra* note 395, at 383, 430.

APPENDIX A

Case Citation	Identity/ Expression†	Trial Outcome	Appeal Outcome	Bias Toward Trans Parent		
				T	V	C
In re Reesing, 483 P.2d 872 (Wash. Ct. App. 1971)	MtF	Anti Trans (Association)	Anti Trans (Association)	X	X	
Christian v. Randall, 516 P.2d 132 (Colo. App. 1973)	FtM	Anti Trans Parent	Pro Trans Parent			
In re Darnell, 619 P.2d 1349 (Or. Ct. App. 1980)	FtM	Anti Trans (Association)	Anti Trans (Association)	X		
Cisek v. Cisek, No. 80 C.A. 113, 1982 WL 6161 (Ohio. Ct. App. July 20, 1982)	MtF	Pro Trans Parent	Anti Trans Parent	X		
Karin T. v. Michael T., 484 N.Y.S.2d 780 (Fam. Ct. 1985)	FtM	Pro Trans Parent (due to parentage being recognized for support purposes)	N/A	X		
Daly v. Daly, 715 P.2d 56 (Nev. 1986)	MtF	Anti Trans Parent	Anti Trans Parent	X	X	X
In re Welfare of V.H., 412 N.W.2d 389 (Minn. Ct. App. 1987)	MtF*	Pro Trans Parent	Pro Trans Parent		X	X
In re Custody of T.J., No. C2-87-1786, 1988 WL 8302 (Minn. Ct. App. Feb. 9, 1988)	MtF	Pro Trans Parent	Pro Trans Parent	X		X
Summers-Horton v. Horton, No. 88AP-622, 1989 WL 29421 (Ohio Ct. App. Mar. 30, 1989)	MtF*	Pro Trans Parent	Pro Trans Parent			
Isbell v. Isbell, No. 01-A-01-9002-GS0058, 1990 WL 107497 (Tenn. Ct. App. Aug. 1, 1990)	MtF*	Anti Trans (Association)	Pro Trans (Association)	X	X	
* Denotes cross-dressing behavior T = Transition; V = Volition; C = Contagion						

† Note that we decided to record gender identities and expression (MtF, FtM), with some trepidation, given the potential limitations of the factual records within the opinions, as we have explained, and the wide variance of transgender identities and expressions that may not be adequately captured by these categories. In addition, we tried to distinguish between cases involving cross-dressing behavior from cases that involved a transition, but here, also, we note that these categories may only imperfectly map onto the wide variance of gender identities and expressions, and that the factual records we drew upon may not reflect the complexity of self-identification.

Case Citation	Identity/ Expression	Trial Outcome	Appeal Outcome	Bias Toward Trans Parent		
				T	V	C
B. v. B., 585 N.Y.S.2d 65 (App. Div. 1992)	MtF*	Anti Trans Parent	Anti Trans Parent		X	X
In re Marriage of D.F.D., 862 P.2d 368 (Mont. 1993)	MtF*	Anti Trans Parent	Pro Trans Parent		X	X
P.L.W. v. T.R.W., 890 S.W.2d 688 (Mo. Ct. App. 1994)	MtF*	Pro Trans Parent	Pro Trans Parent		X	
M v. M., No. FA 940064700, 1996 WL 434302 (Conn. Super. Ct. July 11, 1996)	MtF	Pro Trans Parent	N/A	X		X
Mayfield v. Mayfield, No. 96AP030032, 1996 WL 489043 (Ohio Ct. App. Aug. 14, 1996)	MtF*	Pro Trans Parent	Pro Trans Parent			
J.L.S. v. D.K.S., 943 S.W.2d 766 (Mo. Ct. App. 1997)	MtF	Anti Trans Parent	Anti Trans Parent	X	X	X
Vecchione v. Vecchione, No. 95D003769 (Cal. Sup. Ct., filed Apr. 23, 1996)‡	FtM	Pro Trans Parent	N/A			
In re L.S., 717 N.E.2d 204 (Ind. Ct. App. 1999)	MtF	Anti Trans Parent	Anti Trans Parent	X	X	
In re Marriage of Arndt, No. 00-76, 2001 WL 487348 (Iowa Ct. App. May 9, 2001)	MtF*	Anti Trans Parent	Anti Trans Parent		X	
Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004)	FtM	Pro Trans Parent	Anti Trans Parent	X		
Pierre v. Pierre, 2004-21496 (La. App. 1 Cir. 12/30/04); 898 So. 2d 419	FtM	Anti Trans Parent	Pro Trans Parent	X		
* Denotes cross-dressing behavior T = Transition; V = Volition; C = Contagion						

‡ The orders and opinions in this case, which was in California's Orange County Superior Court, are not published or publicly available. The trial outcome has been determined through Taylor Flynn, Essay, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 415–16 (2001).

Case Citation	Identity/ Expression	Trial Outcome	Appeal Outcome	Bias Toward Trans Parent		
				T	V	C
In re Marriage of Simmons, 825 N.E.2d 303 (Ill. Ct. App. 2005)	FtM	Anti Trans Parent	Anti Trans Parent	X		
M.B. v. D.W., 236 S.W.3d 31 (Ky. Ct. App. 2007)	MtF	Anti Trans Parent	Anti Trans Parent	X	X	
Magnuson v. Magnuson, 170 P.3d 65 (Wash. Ct. App. 2007)	MtF	Anti Trans Parent	Anti Trans Parent	X		
Lowhorn v. Lowhorn, No. 49A04-0712-CV-678, 2008 WL 2839485 (Ind. Ct. App. July 24, 2008)	MtF	Anti Trans (Association)	Pro Trans (Association)		X	
M.R. v. San Mateo Cty. Superior Court, No. A122117, 2008 WL 4650440 (Cal. Ct. App. Oct. 22, 2008)	MtF*	Anti Trans Parent	Anti Trans Parent	X	X	X
K.B. v. J.R., 887 N.Y.S.2d 516 (Sup. Ct. 2009)	FtM	Pro Trans Parent	N/A	X		
Tipsword v. Tipsword, No. 1 CA-CV 12-0066, 2013 WL 1320444 (Ariz. Ct. App. Apr. 2, 2013)	MtF	Anti Trans Parent	Anti Trans Parent (regarding custody, but visitation revisited in favor of trans parent)	X	X	
In re N.I.V.S., No. 04-14-00108-CV, 2015 WL 1120913 (Tex. App. March 11, 2015)	FtM	Anti Trans Parent	Anti Trans Parent	X		
Franklin v. Franklin, No. 602, 2014, 2015 WL 3885834 (Del. June 22, 2015)	MtF	Anti Trans Parent	Anti Trans Parent	X		X
* Denotes cross-dressing behavior T = Transition; V = Volition; C = Contagion						