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Out of Step: Why Pulliam v. Smith Should Be Overruled to Hold All North Carolina Parents - Gay and Straight - To the Same Custody Standard

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Out of Step: Why *Pulliam v. Smith* Should Be Overruled to Hold All North Carolina Parents—Gay and Straight—to the Same Custody Standard*

INTRODUCTION

It has been ten years since the Supreme Court of North Carolina in *Pulliam v. Smith*[1] took custody away from a father who had been raising his two sons alone for years, merely because he was involved

1. 348 N.C. 616, 501 S.E.2d 898 (1998).

in a committed relationship with another man.[2] Although the court asserted that an individual's homosexuality[3] is not a bar to being a parent,[4] the court used activities that define the father as homosexual against him.[5] Not only were these activities harmless to the children,[6] but the sons were thriving with their father.[7] The father was understandably distraught by the decision: "It seems like the law doesn't apply to me .... My parenting skills or me as a person never entered the decision. The fact I was gay made me unfit. I was guilty before the trial."[8]

The effect of *Pulliam* has been widespread in North Carolina. Although decided a decade ago, the case is very much alive today. It has not been overturned and is viewed as the last major gay and lesbian custody decision in the state, setting precedent that every gay or lesbian parent in North Carolina must confront.[9] Today, as at the time of the case, many same-sex partners in North Carolina are raising children.[10] *Pulliam* has likely discouraged many homosexual parents from raising children in a committed, long-term relationship

2. *Id.* at 627–28, 501 S.E.2d at 904; Joseph Neff, *High Court Alters Custody Standards*, NEWS & OBSERVER (Raleigh, N.C.), July 31, 1998, at A1.

3. "Homosexual" is used throughout this Comment interchangeably with "gay and lesbian."

4. *Pulliam*, 348 N.C. at 627, 501 S.E.2d at 904.

5. *Id.* at 626–27, 501 S.E.2d at 904 (finding the father's private sexual conduct, not proactively counseling the children against homosexual activity, and allowing the children to see the couple in bed in non-intimate situations supported a change of custody). Commentators have criticized the opinion as "anti-gay" from its announcement. *See* Neff, *supra* note 2.

6. *See* discussion *infra* Part I.D.

7. Pulliam v. Smith, 124 N.C. App. 144, 149, 476 S.E.2d 446, 450 (1996), *rev'd*, 348 N.C. 616, 501 S.E.2d 898 (1998) (noting that the children were progressing, performing well in school, and participating in sports).

8. Neff, *supra* note 2.

9. Human Rights Campaign, North Carolina Custody and Visitation Law, http://www.hrc.org/laws_and_elections/1131.htm (last visited Nov. 17, 2008) (describing *Pulliam v. Smith* in the context of providing an overview of the current law in North Carolina on custody and visitation for gay and lesbian parents).

10. U.S. CENSUS BUREAU: U.S. DEP'T OF COMMERCE, ECON. & STATISTICS ADMIN., MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, 9 (2003) (finding that out of the self-identified same-sex partner households in North Carolina as of the 2000 census, 25.9% of male partner households and 34.7% of female partner households had at least one child under eighteen years of age). Additionally, the number of households with same-sex partners increased dramatically in North Carolina during the time leading up to the *Pulliam* decision. Human Rights Campaign, Your Community - North Carolina, http://www.hrc.org/ your_community/3041_3076.htm (last visited Nov. 17, 2008) (counting 16,198 self-identified households with same-sex partners as of the 2000 census, a 720% increase in same-sex households from 1990 to 2000 in North Carolina, and noting that "HRC estimates that the Census 2000 figures could undercount gay and lesbian families by as much as [sixty-two] percent").

because it forces homosexual parents to choose between their children and their life partner. The decision has been "interpreted . . . to mean that a homosexual parent can get custody in North Carolina only if his or her [partner] . . . live[s] away from the home where the children reside."[11] Furthermore, *Pulliam* threw into doubt the stability of prior custody orders granting custody to the numerous homosexual parents who *did* decide to raise children with their partners.[12] Based on the case, if one parent discovers after the custody order that the other parent is homosexual, a court may find this fact to be a "material change in circumstances" that would warrant a modification of custody.[13] This Comment aims to bring fresh attention to *Pulliam* and proposes a better standard for determining child custody in North Carolina when one parent is homosexual.[14]

In child custody cases, North Carolina courts should find that sexual orientation is not a relevant factor. To this end, *Pulliam* must be overruled to establish that gay and lesbian parents are held to the same standard as heterosexual parents in North Carolina custody resolutions. Part I of this Comment discusses the facts and holding of *Pulliam*. It then introduces the general approaches courts take to the issue of a parent's homosexuality in custody decisions and determines that the Supreme Court of North Carolina's approach to the father's homosexuality in *Pulliam* was a rejection of the nexus requirement[15] and an application of the presumption of harm standard. Part II discusses why the presumption of harm standard[16] put forward in *Pulliam* was problematic from the start and argues that developments in the ten years subsequent to the decision have further eroded its

11. North Carolina Gay and Lesbian Attorneys, Legal Guide, http://ncgala.org/guide/guidecust.htm (last visited Nov. 17, 2008).

12. *Id.*

13. *Id.* ("If one parent is homosexual and wins custody while that fact is not known to the former spouse and the Court, and subsequently, it becomes known, it may be grounds for the other party to reopen the case based upon a material change in the circumstances.").

14. This Comment does not address the appropriate standard for courts to apply when *both* parents are homosexual. However, more homosexual couples are raising children than ever before. *See supra* note 10. The presumption of harm standard used by the Supreme Court of North Carolina in *Pulliam* is even less logical in its application to a custody battle between two homosexual parents. If the court finds that both parents are detrimental to the child based on their sexual orientations, no standard exists to guide the court. This is another reason for overruling *Pulliam*.

15. For an explanation of the nexus requirement, see *infra* notes 53–58 and accompanying text.

16. For a description of the presumption of harm standard, see *infra* notes 42–47 and accompanying text.

reasoning. Finally, Part III presents a solution consistent with constitutional law that will eliminate the double standard existing in North Carolina custody cases. This solution overrules *Pulliam* to return North Carolina to a true nexus test and requires specific evidence of harm to the child from the sexual activity of the parent, thus reflecting the same standard for *all* North Carolina parents.

I. *PULLIAM V. SMITH* AND THE SUPREME COURT OF NORTH CAROLINA'S APPLICATION OF THE PRESUMPTION OF HARM STANDARD

A. *The Facts and Trial Court Decision*

In 1990, Fred Smith's nine-year marriage came to an end after his wife Carol had an affair and moved in with another man.[17] Though at the time Fred and Carol had two boys, Joey, age eight, and Kenny, age five, Carol left the two boys with Fred and moved to Kansas with William Pulliam.[18] Fred raised his two sons by himself from 1990 until 1995, a period in which he "realized" he was gay.[19] In 1994, Fred's partner Tim Tipton moved in with Fred and his sons,[20] and Carol immediately responded by suing in Hendersonsville, North Carolina, for sole custody of the boys.[21] "When asked why she thought the children would be better off in her custody, . . . [Carol] stated that it was the 'impact of the homosexual thing.' "[22]

In court, Carol's attorney employed a strategy of graphically questioning[23] both Fred and Tim about their private sex life.[24] From

17. Pulliam v. Smith, 348 N.C. 616, 621–22, 501 S.E.2d 898, 900–01 (1998); Neff, *supra* note 2.

18. *Pulliam*, 348 N.C. at 621–22, 501 S.E.2d at 900–01. Carol later married Pulliam in 1993. *Id.* at 622, 501 S.E.2d at 901.

19. *See* Neff, *supra* note 2; *Pulliam*, 348 N.C. at 621, 501 S.E.2d at 901.

20. *Pulliam*, 348 N.C. at 621, 501 S.E.2d at 901.

21. Transcript of Record at 33, Pulliam v. Smith, 348 N.C. 616, 501 S.E.2d 898 (1998) (No. 499PA96); Neff, *supra* note 2.

22. Pulliam v. Smith, 124 N.C. App. 144, 146, 476 S.E.2d 446, 448 (1996), *rev'd*, 348 N.C. 616 S.E.2d 898 (1998). Fred testified that Carol forced him to tell the two boys that he was gay. Transcript of Proceedings at 46, Pulliam v. Smith, No. 94 CVD 1249 (N.C. Dist. Ct. 29th Div. June 30, 1995).

23. It is not the intention of this Comment to sensationalize the facts of this case through use of strong sexual language. Therefore, the strong language found in this Comment is quoted directly from the Transcript of Record, Transcript of Proceedings, or the opinions themselves.

24. The following questions were allowed by the district judge despite testimony that the door of the bedroom was always locked during these intimate moments:

> Do you sleep in your underwear, sir? . . . How is Mr. Tipton clothed when he sleeps with you, sir? . . . Have you placed your mouth on his penis? . . . Has he

this questioning, the trial court found that Fred and Tim shared a bedroom across the hall from the boys' bedroom where the couple engaged in oral sex about once a week.[25] The couple's sexual activity was confined to the privacy of their bedroom, though they occasionally held hands and kissed each other on the cheek in the boys' presence.[26] The court found that Tim kept four photos of drag queens in a box on the top shelf of the couple's bedroom closet, the couple had at least one party at the home where gay friends were present, the boys had seen the couple in bed in a non-intimate context, and Fred and Tim had been to a gay bar at least three times.[27] The trial court also found that Joey cried when he was told his father was gay.[28] Nonetheless, Joey testified that he had no preference about with whom to live, Tim did not make him nervous, he liked and felt comfortable around Tim, and he liked Tim's cooking.[29] Additionally, evidence showed that the two boys were doing well in school, played with kids in their father's neighborhood, had adequate medical coverage, and that beyond working to support his sons, Fred went to teacher conferences, helped with the boys' homework, and helped coach Joey's baseball team.[30]

Despite this evidence, the trial court found that Fred Smith's conduct was improper and would "expose" his two sons "to unfit and improper influences."[31] It also found that this exposure included "a possibility of . . . embarrassment and humiliation in public because of the homosexuality of the Defendant and his relationship with Tim Tipton"[32] and "a burden . . . of the social condemnation attached to such an arrangement, which will inevitably afflict the two children's

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placed his mouth on your penis? . . . How often have these acts of sexual intimacy occurred . . . ? Do you and Mr. Tipton also engage in anal intercourse?

Transcript of Proceedings, *supra* note 22, at 40–44. Fred was also asked if anyone present during a holiday party in the home had HIV or if Fred knew anyone that had HIV despite no showing of relevance. *Id.* at 49, 52.

25. Transcript of Record, *supra* note 21, at 32.

26. *Id.* at 32–33.

27. *Id.* at 33 ("On at least three . . . occasions since first meeting, [the couple has] gone to an establishment that caters to homosexuals."); Transcript of Proceedings, *supra* note 22, at 51, 142–44. The counsel's questions even prompted presiding judge Deborah Burgin to start asking questions, for her "own education," about what drag queens are and why Tim would be interested in them if he was gay. *Id.* at 149–50.

28. Pulliam v. Smith, 348 N.C. 616, 623, 501 S.E.2d 898, 902 (1998).

29. Transcript of Proceedings, *supra* note 22, at 10, 13. The youngest son Kenny did not testify. *Id.*

30. *Id.* at 12, 56, 59.

31. *Pulliam*, 348 N.C. at 623, 501 S.E.2d at 901–02; *see also* Pulliam v. Smith, 124 N.C. App. 144, 146–47, 476 S.E.2d 446, 448 (1996), *rev'd*, 348 N.C. 616, 501 S.E.2d 898 (1998).

32. Transcript of Record, *supra* note 21, at 34.

relationships with their peers and with the community at large."[33] The court concluded that Fred Smith's sexual orientation would "likely create emotional difficulties" for the two sons but pointed only to evidence that Joey cried when Fred revealed that he was gay.[34] In general, the trial court found that the "active homosexuality" of Fred Smith and "his involvement with Tim Tipton by bringing Tim Tipton into the home of the two minor children [was] detrimental to the best interest and welfare of the two minor children."[35]

Based on these findings, District Court Judge Deborah Burgin concluded there was a "substantial change of circumstances ... adversely affecting the two minor children *or that will likely or probably adversely affect* ... [them]" and "that it [was] in the minor children's best interest that [Carol] have exclusive ... custody."[36] Fred was limited to one month of visitation during the summer with the restrictions that Tim not reside with Fred during these visits and the couple not perform oral sex while the children were in the home.[37]

B. *Approaches to Considering Homosexuality and Sexual Activity in Custody Cases*

When courts must determine the level of consideration a parent's homosexuality or sexual activity warrants in custody cases, as the North Carolina courts did in *Pulliam*, they generally adopt one of three methods.[38] The first approach, increasingly disfavored,[39] is the per se rule. It requires courts to find all parents in a specific category, such as homosexuals, "unfit ... as a matter of law."[40] Under this rule, the court does not compare parents in a custody dispute when one

33. *Id.* at 35.

34. *Id.*

35. *Id.*

36. *Id.* at 36 (emphasis added). The language emphasized is important because it allowed the court to take custody away from the father without finding actual harm. Actual harm under the nexus test is the standard this Comment advocates. *See infra* Part III.A.

37. Transcript of Record, *supra* note 21, at 37.

38. *See* Eileen P. Huff, Comment, *The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear*, 9 AM. U.J. GENDER SOC. POL'Y & L. 695, 699 (2001); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 633–35 (1996).

39. *See* Huff, *supra* note 38, at 699; Shapiro, *supra* note 38, at 639.

40. Huff, *supra* note 38, at 699; *see also* Shapiro, *supra* note 38, at 633–34, 637–39 ("[A]ll parents falling into a particular category ... are necessarily considered unfit.").

parent is gay or lesbian because that parent's homosexuality is an automatic disqualification.[41]

The second approach is the "presumption of harm" standard.[42] It allows courts to presume, even in the absence of evidence, that a gay or lesbian parent's conduct has a negative effect on the child.[43] In theory, the presumption of harm standard is different from the per se rule because it "permits, but does not require, a trial court to infer harm to a child in the absence of any evidence of harm [from a parent's homosexuality]."[44] The two approaches are similar in application, however, because both have the consequence of courts denying gay and lesbian parents custody based not on harm to the children, but on sexual orientation of the parents.[45]

Both the presumption of harm standard and the per se rule "rest[] on a combination of inaccurate stereotypical images [of gays and lesbians,] ... unsupported and insupportable assumptions about the capacity of nonconforming individuals to raise children, and judicial and societal prejudice and bias."[46] Additionally, both approaches allow courts to speculate about harm.[47] The influence of stereotypes and speculation can become dominant in custody cases because, although the best interest of the child serves as an overarching goal, trial courts have a large amount of discretion to determine the best interest in particular situations.[48] In fact, the

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41. Shapiro, *supra* note 38, at 633–34 ("Once a parent's membership in the undesirable category is determined, no further examination of the case's specific facts relating to that parent is required.").

42. Lisa A. Brunner, *Circumventing the "Best Interests of the Child" Standard: Child Custody Law in Missouri as Applied to Homosexual Parents*, 55 J. MO. B. 200, 200 (1999), *available at* http://www.mobar.org/journal/1999/julaug/brunner.htm.

43. Huff, *supra* note 38, at 700. One commentator has also named this approach the "permissible determinative inference." Shapiro, *supra* note 38, at 634, 639–41.

44. Shapiro, *supra* note 38, at 634.

> An appellate affirmance of a denial of custody establishes that the trial court has reasonably found facts or has drawn a permissible and properly supported inference and has reached an acceptable conclusion, but the appellate court does not necessarily determine that the trial court's decision is the only permissible inference or the only acceptable conclusion.

Id.

45. Brunner, *supra* note 42, at 201.

46. Shapiro, *supra* note 38, at 635.

47. Huff, *supra* note 38, at 700.

48. Woodruff v. Woodruff, 44 N.C. App. 350, 352, 260 S.E.2d 775, 776 (1979); *see also* Browning v. Helff, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000) ("In cases involving child custody, the trial court is vested with broad discretion."). "In cases involving custody of children, the trial judge, who has the opportunity to see and hear the parties and the

North Carolina legislature has provided little statutory guidance for trial courts on what should be considered in determining the best interest of the child.[49] While some states have statutes that list factors to consider in custody determinations,[50] North Carolina provides no factors and, additionally, there are no presumptions applicable in custody cases in North Carolina.[51] Because of this wide discretion, courts sometimes explore issues completely irrelevant to the best interest of the child, such as a parent's sexual orientation.[52]

The final approach to determining the level of consideration a parent's homosexuality or sexual activity warrants is the "nexus test," which is designed to combat the use of stereotypes and speculation dominant in the other approaches. This approach requires courts to find that a parent's homosexuality or sexual activity has an effect on the child before that homosexuality or sexual activity is even considered at all in the custody determination.[53] Because of the nexus test's "effect requirement," a parent's homosexuality would not automatically result in a denial of custody.[54] The nexus test mandates that courts compare the two parents and evaluate "the significance of specific characteristics or conduct ... on an individual case-by-case basis."[55] Furthermore, a pure nexus test will not allow the influence of stereotypes and speculation.[56] For the nexus test to eradicate those influences, real harm to the children, not speculation of harm, must be required before a change in custody is allowed. Loosening the effect requirement destroys the requirement's purpose entirely. If a judge is permitted to freely "speculate about possible harm, she or he can avoid the requirement that a link between conduct and harm be demonstrated."[57] Thus, under the nexus test, evidence in the record

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witnesses, is vested with broad discretion." *In re* Custody of Williamson, 32 N.C. App. 616, 620, 233 S.E.2d 677, 680 (1977) (citations omitted).

49. *See* N.C. GEN. STAT. § 50-13.7 (2007) (providing only that a showing of "changed circumstances" is needed to modify a custody order).

50. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403 (2007); OR. REV. STAT. § 107.137 (2007).

51. 3 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 13.8 (5th ed. 2002).

52. *See, e.g.*, Newsome v. Newsome, 42 N.C. App. 416, 423, 256 S.E.2d 849, 853 (1979).

53. Huff, *supra* note 38, at 699; Shapiro, *supra* note 38, at 633 ("This approach is denominated a nexus test because it turns on the court finding a nexus between the characteristic or conduct at issue and the parenting abilities of the mother or father.").

54. Huff, *supra* note 38, at 701.

55. Shapiro, *supra* note 38, at 633, 636 (recognizing that the test "does not dictate any particular result in all cases").

56. *See, e.g.*, Benedict v. Coe, 117 N.C. App. 369, 377–78, 451 S.E.2d 320, 324–25 (1994).

57. Shapiro, *supra* note 38, at 642.

of actual effect—real harm—must be found to support a change in custody. "[E]vidence of 'speculation or conjecture that a detrimental change may take place sometime in the future' will not support a change in custody."[58] Therefore, of the three approaches, the nexus test is the only one that will require courts to find evidence of effect on a child before changing custody. This is desirable because without the effect requirement, courts have wide discretion to venture into areas not relevant to the best interest of the child.

C. *The Approach North Carolina Courts Purport to Follow: The Nexus Test*

The Supreme Court of North Carolina has claimed, before and after *Pulliam*, to follow the nexus test.[59] In the context of custody modification, North Carolina's avowed standard is a two-prong test requiring: (1) "a substantial change of circumstances [since the last order] affecting the welfare of the child;"[60] and (2) that a modification is in the child's best interest.[61] As stated, this standard is a nexus test because "the moving party must prove . . . a 'nexus' between the changed circumstances and the welfare of the child."[62] The Court of Appeals of North Carolina has even gone so far as to define "changed circumstances" as "such a change as affects the welfare of the child."[63] Under this standard, the moving party has the burden of satisfying the first prong—that a substantial change in circumstances has affected the child.[64] If the moving party fails to meet this burden of showing

58. Evans v. Evans, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (quoting Wehlau v. Witek, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985)); *see also Benedict*, 117 N.C. App. at 377, 451 S.E.2d at 324 ("While it is well established that the trial judge is in the best position to observe the parties and witnesses and to hear the evidence, 'it is not sufficient that there *may* be evidence in the record sufficient to support findings that could have been made.' " (quoting Greer v. Greer, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (emphasis added))).

59. *See* Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003); Blackley v. Blackley, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

60. *Blackley*, 285 N.C. at 362, 204 S.E.2d at 681; *see Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 ("[B]efore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child . . . ."); Browning v. Helff, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000); *see also* N.C. GEN. STAT. § 50-13.7 (2007) (requiring a showing of changed circumstances for modification of child custody orders).

61. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

62. *Id.* at 478, 586 S.E.2d at 255–56; *see also* REYNOLDS, *supra* note 51, § 13.103 (describing the North Carolina standard as a nexus test).

63. *Benedict*, 117 N.C. App. at 375, 451 S.E.2d at 323 (quoting *In re* Harrell, 11 N.C. App. 351, 354, 181 S.E.2d 188, 189 (1971)).

64. *Id.* (citing Kelly v. Kelly, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985)).

effect on the child, the analysis should end and custody should not be modified.[65]

The sexual activity of the parents may be an *alleged* basis for custody modification.[66] Frequently in these cases, a party is able to satisfy the initial burden of showing a substantial change in circumstances by providing evidence of the other parent's sexual activity, but the party fails to demonstrate that the change affects the child.[67] Showing this effect is necessary because North Carolina courts profess to follow the nexus test, and North Carolina has no presumption that a child is harmed by the sexual activity of the parents.[68] When homosexuality forms the basis for a party's motion to change custody, the Supreme Court of North Carolina has stated that it should be regarded as a "discrete set of circumstances ... [without] ... self-evident ... [effects on the child, and therefore, the moving party must show] evidence *directly* linking the change to the welfare of the child."[69] Thus, as outlined, the North Carolina standard for modification of custody is characteristic of a nexus test: it contains an element requiring the moving party to show effect on the child;[70] it has no presumption that the sexual activity of parents harms the child;[71] and the supreme court has explicitly stated that an alleged change in homosexuality requires evidence connecting the change to an effect on the child.[72] Regrettably, this nexus test was not the test the Supreme Court of North Carolina applied in *Pulliam*.

65. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 ("If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered."); *see* Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 579 (2000); *see also Browning*, 136 N.C. App. at 425, 524 S.E.2d at 99 (specifying that the trial court was not "empowered to reopen the custody issue and determine what was in the best interest of the children").

66. *See, e.g.*, *Browning*, 136 N.C. App. at 424, 524 S.E.2d at 98 (finding the mother was arguing for a change in custody based on her former husband's cohabitation with his girlfriend).

67. *Id.* at 424–25, 524 S.E.2d at 98–99 (finding no evidence that the father's cohabitation with his girlfriend affected the child).

68. *Id.* at 425, 524 S.E.2d at 99 ("It is the effect on the children upon which the trial court must focus in determining whether to modify custody."); *see also* REYNOLDS, *supra* note 51, § 13.49.

69. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256. For a discussion of *Shipman*, see *infra* text accompanying notes 196–201.

70. Benedict v. Coe, 117 N.C. App. 369, 375, 451 S.E.2d 320, 323 (1994).

71. REYNOLDS, *supra* note 51, § 13.50.

72. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256.

D. *The Approach Utilized in* Pulliam*: The Presumption of Harm Standard*

The Court of Appeals of North Carolina correctly applied the nexus test in *Pulliam* and found that Fred Smith's homosexual activity had no effect on his children.[73] First, the court of appeals reversed the trial court's decision because it held the trial court's findings to be either "speculation and conjecture"[74] or "nothing more than [an opinion] . . . not supported by evidence in the record."[75] Second, the court correctly recognized that the evidence actually showed Fred Smith's children were thriving, and that the conduct of a parent did not "*ipso facto* . . . [have] a deleterious effect on the children."[76] It found "*no evidence* that the defendant's homosexual relationship with Tipton [had or would] likely have a deleterious effect on the children or that the defendant was otherwise an unfit parent."[77] In fact, evidence indicated just the opposite: "[T]he children [were] well adjusted, attend[ed] school regularly, [made] good grades, and participate[d] in after school athletics."[78] Finally, the court of appeals rejected the per se approach to homosexuality and sexual activity:

> First of all, a custodial parent that allows his or her same-sex partner to live in the home will not *per se* adversely affect the child. Second, a violation of [North Carolina's Crime Against Nature statute] in the privacy of one's own bedroom does not *per se* adversely affect a child. Finally, a custodial parent who embraces and kisses his same-sex partner in front of a child will not *per se* adversely affect a child.[79]

Nevertheless, two years later, the Supreme Court of North Carolina reinstated the judgment of the trial court because it found sufficient evidence supporting a change in custody.[80] The court

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73. *See* Vicki Parrott, Note, *The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship—North Carolina Adopts the "Nexus Test" in* Pulliam v. Smith, 19 CAMPBELL L. REV. 131, 151–53 (1996). Following the court of appeals' decision in 1996, one commentator observed: "The obvious effect [of the decision] is the adoption of the 'nexus test' approach to determine whether children are harmed or will likely be harmed by a parent's involvement in an intimate same-sex relationship." *Id.*

74. Pulliam v. Smith, 124 N.C. App. 144, 148, 476 S.E.2d 446, 449 (1996), *rev'd*, 348 N.C. 616, 501 S.E.2d 898 (1998).

75. *Id.* at 148–49, 476 S.E.2d at 449.

76. *Id.* at 149, 476 S.E.2d at 450.

77. *Id.* (emphasis added).

78. *Id.*

79. Parrott, *supra* note 73, at 153.

80. Pulliam v. Smith, 348 N.C. 616, 618, 501 S.E.2d 898, 899 (1998), *rev'g* Pulliam v. Smith, 124 N.C. App. 144, 476 S.E.2d 446 (1996).

applied a standard different from the nexus test—a standard that undercut the purpose of the nexus test entirely, allowing speculation and stereotypes to shift focus away from determining what was in the best interest of the children. According to the nexus test, Carol Pulliam, as the moving party, had the burden to produce "evidence *directly* linking the change [of circumstances] to the welfare of the child[ren]."[81] This effect requirement is the equivalent of showing harm in this case since a negative change in circumstances is alleged: a party's motion based on an *adverse change* requires proof that the change *adversely affects* the child.[82] Evidence of such harm "might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent."[83] The Supreme Court of North Carolina ignored all such evidence.[84]

Instead, the supreme court held that the trial court made findings of adverse effect, citing

> activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, [and] keeping admittedly improper sexual material in the home.[85]

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81. Shipman v. Shipman, 357 N.C. 471, 478, 586 S.E.2d 250, 255–56 (2003) (recognizing that a change in sexual orientation "involves a discrete set of circumstances" that requires this showing).

82. REYNOLDS, *supra* note 51, § 13.103 ("The law [of North Carolina] continues to require proof of a nexus between the changed circumstances and the child .... If the moving party has offered evidence of adverse changes, then the party must establish that the changes adversely affect the child."). The Supreme Court of North Carolina itself stated in *Pulliam* that "an adverse effect upon a child as the result of a change in circumstances . . . will support a modification of a prior custody order." *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900. The court in *Pulliam* then goes on to uphold the trial court's change of custody *based* on what it viewed as an adverse effect upon the children. *Id.* at 626–28, 501 S.E.2d at 904.

83. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256.

84. *See generally Pulliam*, 348 N.C. 616, 501 S.E.2d 898 (containing no mention of these factors).

85. *Id.* at 626–27, 501 S.E.2d at 904; *see supra* text accompanying notes 32–36.

Beyond the fact that this "evidence" was hardly uncontroverted,[86] it is not evidence of harm as required by a true nexus test. Instead, it was simply a description of activity of the father and his partner that identified the two men as homosexual. The focus was not on whether the activity had any effect on the children. Because of the improper focus, one is left with the conclusion that the court *presumed* this activity was harmful since it did not find evidence of any negative effect on the two children.

The supreme court also improperly concluded that the children were experiencing "emotional difficulties" from the fact that Joey once asked his mother to take him home and asked whether Tim Tipton was his stepfather.[87] First, Carol's actions made it difficult to determine if Joey's statement was planted by his mother.[88] Second, Joey making such a statement is not evidence of harm. Additionally, when the court determined that Joey inquired about Tim's status because he was confused, it was merely a statement of the court's belief without evidentiary value. Indeed, one may conclude from the

86. No evidence showed that Fred or his partner Tim discussed their sexual activity with the children, but only that Fred told his sons that he was gay and in a relationship with Tim. *See* Transcript of Record, *supra* note 21, at 31. While "in bed together" is suggestive, no evidence in the record exists that anything sexual was occurring. *Id.* at 33. In fact, the room was accessible at the *request* of the children. Transcript of Proceedings, *supra* note 22, at 136–37 (testimony of Tim Tipton). Furthermore, evidence is not clear that the children even saw the couple in bed. *Id.* at 42 (showing that when asked if the children had seen the couple in bed together, Fred stated, "The youngest one probably has. The oldest one never wakes up before I do."). Additionally, the court improperly concluded that there was "sexual material" in the home when in reality it was four photos of men that Tim knew dressed as women and nothing more. *Id.* at 51. No evidence indicates the photos had an effect on the children or that they were aware of them. The photos were not introduced into evidence, and Carol Pulliam's counsel grossly overstated the photos, saying: "I would characterize [them] as pornography." *Id.* at 153. Fred Smith's attorney responded:

> There's nothing graphic about the photographs that Mr. Jackson seems so determined to discuss. Those photographs were not subpoenaed. We had no idea they were to be an object of discussion today or, as Mr. Tipton said, they certainly would have been made available to the [c]ourt. They were not subpoenaed because, Your Honor, there's nothing wrong with those pictures, they're just simply pictures.

Id. at 158.

87. *Pulliam*, 348 N.C. at 623, 627, 501 S.E.2d at 902, 904.

88. Only after Carol Pulliam told Joey that she "would seek legal counsel to try to get [the children] out of the home" did Joey tell his stepfather that he wanted his mom to take him. Transcript of the Proceedings, *supra* note 22, at 108. Also, William Pulliam, the stepfather, stated that he did not think homosexuality was "right," further highlighting the fact that Joey could have been influenced. *Id.* at 133.

evidence that Joey simply wanted to clarify Tim's role in Joey's life.[89] From the record, it seems that Tim Tipton *did* play a role equivalent to one of a stepfather or adopted father.[90] Moreover, when Joey asked that question, Tim responded that he was like a guardian and that Mr. Pulliam was Joey's stepfather.[91] Any "confusion" Joey might have experienced was quickly resolved.[92]

The court also relied on speculation to support its finding of harm. The court used the fact that Joey cried when his father announced that he was gay to conclude that Joey "may already be experiencing emotional difficulties" from his father's homosexuality, and that his brother would "likely ... also experience emotional difficulties."[93] Here, the court itself hedges any claim of harm by using words such as "likely" or "may,"[94] emphasizing it could find no concrete harm. Furthermore, the fact that Joey cried on this single occasion cannot support the conclusion that he "may already be experiencing emotional difficulties."[95] First, "a finding that the child 'may' be experiencing emotional difficulties is not a finding that the child *is*. Moreover, when extramarital sexual conduct between [heterosexual] persons ... has been in issue, the appellate courts have required more substantial evidence of harm than one isolated outburst by a young child."[96] Joey's reaction appears to be typical of a healthy child. His crying fits a normal pattern of behavior: a negative reaction "to a parent's sexuality ... tends to take the form of simple embarrassment, which—given the universality of children being mortified by their parents at some time or another—is hardly worth consideration."[97] Thus, a one-time isolated crying spell hardly qualifies as sufficient evidence warranting a change in custody.

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89. *Id.* at 142 (testimony of Tim Tipton) ("He didn't ask me if I was his [stepdad], it was like does this mean that you're *like* a stepdad.") (emphasis added).

90. Tim cooked, helped with the children's homework, played ball with the children, and watched the children when Fred was not home. *Id.* at 13, 148.

91. *Id.* at 141.

92. It should also be noted that Joey asked the question "about a week after" his father told Joey that he was gay. *Id.* at 142. There was no evidence of "confusion" after that time.

93. Pulliam v. Smith, 348 N.C. 616, 623, 501 S.E.2d 898, 902 (1998); Transcript of Record, *supra* note 21, at 35.

94. Transcript of Record, *supra* note 21, at 35.

95. *Id.*; *see also Pulliam*, 348 N.C. at 623, 501 S.E.2d at 902.

96. REYNOLDS, *supra* note 51, § 13.14; *see* Williford v. Williford, 303 N.C. 178, 179, 277 S.E.2d 515, 515 (1981); Blackley v. Blackey, 285 N.C. 358, 363, 20 S.E.2d 678, 682 (1974); Browning v. Helff, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000).

97. Matt Larsen, Comment, Lawrence v. Texas *and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53, 77 (2004) (making a constitutional argument that "[i]nfringing on [the fundamental right to

Other appellate decisions support the argument that a child's isolated outburst is insufficient to support a finding of harm. In *Ford v. Wright*,[98] the plaintiff testified in support of the trial court's finding that her child was experiencing emotional difficulties because the child cried after witnessing an argument between the parents.[99] The Court of Appeals of North Carolina held that alone a child crying failed "to provide evidence a reasonable mind might accept as adequate to support the conclusion that the child had experienced emotional trauma."[100] The court went on to find that this reaction was normal, and evidence supported the trial court's finding that the child was "very happy."[101] In contrast, *Correll v. Allen*[102] presents an instance where the court of appeals did find adequate evidence of emotional difficulties that was sufficient, in combination with the mother's antagonism towards the father visiting the child, to justify a change in custody.[103] The emotional difficulties in *Correll* included instances where the child: "(1) had difficulty distinguishing the real from the unreal; (2) felt vulnerable, insecure and helpless; (3) seemed to have low self-esteem and seemed to be unhappy and fragile; and (4) had problems with interpersonal relationships."[104] Joey's reaction as stated in *Pulliam* is much more like the child's in *Ford* than the child's in *Correll*: an isolated crying spell that was a typical child's reaction. Similar to the child in *Ford*, Joey appeared to be doing well emotionally, and unlike the child in *Correll*, Joey was not exhibiting substantial symptoms of emotional trauma. Therefore, Joey's isolated crying occurrence does not support a finding of emotional trauma sufficient to justify a change in custody.

With regards to Fred's younger son, Kenny, the court concluded that he would likely experience emotional difficulties even though the supreme court did not find any evidence of emotional difficulties that pertained to Kenny.[105] The court's conclusion with regard to any repercussions on Kenny is, therefore, nothing more than its unsupported *opinion*.

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parent] because a child feels awkward about a parent's sexuality would be wildly out of step with precedent, which has sustained parental rights in the face of much weightier state arguments about what is in a child's best interests").

98. 170 N.C. App. 89, 611 S.E.2d 456 (2005).

99. *Id.* at 95, 611 S.E.2d at 460.

100. *Id.*

101. *Id.*

102. 94 N.C. App. 464, 380 S.E.2d 580 (1989).

103. *Id.* at 469, 380 S.E.2d at 583.

104. *Id.*

105. *See, e.g.*, *supra* text accompanying notes 87, 93.

The previous analysis presents a court that deviated from the critical component of the nexus test: the effect requirement. The Supreme Court of North Carolina claimed it was not holding that the homosexuality of a parent by itself was enough to deny that parent custody.[106] This Comment asserts that the homosexuality of a parent is never enough to deny a parent custody.[107] Even setting this issue aside, the court's holding is inconsistent with its rhetoric because the majority *did* remove custody from the father based on evidence of his homosexuality alone, such as: his living with his partner, his private sex life, his acknowledgement of his own homosexuality, and other "improper conduct" by the two men.[108] The court found as supportive evidence facts that merely showed that Fred Smith was a homosexual who conducted himself consistent with his sexual orientation, not that his actions harmed the children. Justice Webb in his dissent correctly concluded that finding Fred Smith was "a practicing homosexual" was insufficient to justify a change in custody.[109] Justice Webb went on to note that "the evidence show[ed] only that the defendant [was] a practicing homosexual without showing any harm . . . [to] the children by this practice."[110] Without harm to the children, only the majority's moral opinion about Fred Smith's sexual orientation is left to justify its reasoning.

Thus, the majority's reasoning marked a departure from the nexus requirement because it inappropriately presumed harm to the children solely from Fred Smith's homosexuality.[111] As a result, *Pulliam* "relaxed the 'effect' requirement" when a homosexual parent is involved.[112] This relaxation is a rejection of the fundamentals of the nexus test and an application of the presumption of harm standard, signaling a move towards applying the per se rule against all

106. Pulliam v. Smith, 348 N.C. 616, 627, 501 S.E.2d 898, 904 (1998).

107. *See* discussion *infra* notes 276–80 and accompanying text.

108. *See Pulliam*, 348 N.C. at 627, 501 S.E.2d at 904.

109. *Id.* at 628, 501 S.E.2d at 905 (Webb, J., dissenting).

> [The majority] recites actions by the defendant which the majority considers to be distasteful, immoral, or even illegal and says this evidence supports findings of fact which allow a change in custody. There is virtually *no showing* that these acts by the defendant have adversely affected the two children. The test should be how the action affects the children and not whether we approve of it.

Id. at 629, 501 S.E.2d at 905 (emphasis added).

110. *Id.*

111. *See supra* text accompanying notes 53–58 (describing the nexus test's requirement of showing effect on the child).

112. *See* REYNOLDS, *supra* note 51, § 13.115(b).

homosexual parents.[113] By sanctioning a change in custody without finding harm to the children, the court allowed speculation of harm and stereotypes about homosexuality to influence its decision—the exact troubles the nexus test was designed to combat.[114] The majority's rationale therefore pushed North Carolina into the "many jurisdictions [using standards] . . . called nexus tests, but . . . lack[ing] the substance of a nexus test."[115] While it is true that the supreme court's *language* rejected a per se rule,[116] this has little practical significance because the lower court had already changed custody from the homosexual father, and there was "no need for a per se rule."[117] Even while rejecting a per se rule, the Supreme Court of North Carolina never applied the nexus test; instead, it affirmed the judgment of the trial court despite the absence of evidence of harm to the children.[118] For that reason, the court's logic was typical of a presumption of harm standard because it allowed a court to remove custody from a homosexual parent based on a presumption that the children were harmed by the parent's homosexuality.[119] By applying the presumption of harm standard, the Supreme Court of North Carolina changed custody based on Fred Smith's sexual orientation

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113. *See* Brunner, *supra* note 42, at 200 ("[T]he 'presumption of harm' approach . . . appears only to be the per se rule in disguise: courts are using stereotypes and speculation to circumvent the nexus test."); *see also* Felicia Meyers, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 843 (1993) (noting *both* the per se rule and presumption of harm approach are characterized by courts using five justifications to deny homosexual parents custody).

> First, courts fear that the child will be harassed. Second, they fear that the child will become homosexual because he or she is raised by a homosexual parent. Third, courts believe that the child's morality will be adversely affected by exposure to homosexuality. Fourth, state sodomy statutes prohibit many forms of homosexual intimacy and, consequently, homosexuals are engaging in unlawful behavior. Finally, some courts believe that homosexuals molest their children.
>
> None of the above reasons are factually supported by evidence.

Id.

114. *See supra* notes 53–58 and accompanying text.

115. *See* Shapiro, *supra* note 38, at 642.

116. *See* Pulliam v. Smith, 348 N.C. 616, 623, 627, 501 S.E.2d 898, 902, 904 (1998) ("This court [does not] hold that the mere homosexual status of a parent is sufficient, taken alone, to support denying such parent custody of his or her child or children.").

117. *See* Shapiro, *supra* note 38, at 641 (noting that when a lower court has denied custody to a homosexual parent, the reviewing court is not required to adopt the per se rule to deny custody, thus making the presumption of harm approach attractive to appellate courts because it allows the denial of custody to homosexual parents while avoiding the per se rule).

118. See *supra* notes 85–108 and accompanying text for a discussion of the harm which the court reasoned the children were suffering.

119. *See supra* text accompanying notes 42–45.

without finding evidence that his conduct harmed the children. Although the court simultaneously denied this was the basis for its decision,[120] unfortunately for Fred Smith, it was the application that mattered. The Supreme Court of North Carolina did nothing more than acknowledge the nexus test on its way to applying the presumption of harm standard.

II. THE *PULLIAM* PRESUMPTION OF HARM APPROACH: PROBLEMATIC WHEN DECIDED AND UNDERMINED BY SUBSEQUENT DEVELOPMENTS

A. *Why* Pulliam*'s Presumption of Harm Approach was Problematic from the Start*

The Supreme Court of North Carolina's violation of the nexus requirement in *Pulliam* and application of the presumption of harm standard is harmful and problematic for scores of reasons. This Comment will briefly provide several of such grounds before discussing how the approach has become all the more unacceptable in the last ten years.

One major flaw of the *Pulliam* approach is that a gay or lesbian individual who is an outstanding parent, and who indeed may be the better parent in a custody dispute, may nonetheless be barred from custody under the presumption of harm approach. As noted earlier, the second prong of the standard for modifying custody orders in North Carolina requires a determination that modification is in the child's best interest.[121] The best interest of the child should be "the paramount consideration in determining the custody and visitation rights."[122] A judge "must make a comparison between the two applicants considering all factors that indicate which of the two is 'best-fitted to give the child the home life, care, and supervision that will be most conducive to its well-being.' "[123] If the focus is on the best interest of a child, it seems that courts should assign custody to

120. *See Pulliam*, 348 N.C. at 623, 627, 501 S.E.2d at 902, 904.

121. *See supra* text accompanying note 61.

122. Benedict v. Coe, 117 N.C. App. 369, 375, 451 S.E.2d 320, 323 (1994); *see also* Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 579 (2000) ("[T]he trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue [of the best interest of the child]."); Regan v. Smith, 131 N.C. App. 851, 853, 509 S.E.2d 452, 454 (1998); Paschall v. Paschall, 26 N.C. App. 491, 493, 216 S.E.2d 415, 416 (1975). Neither party has the burden of proof under this second prong. *Regan*, 131 N.C. App. at 853, 509 S.E.2d at 454.

123. *Evans*, 138 N.C. App. at 142, 530 S.E.2d at 580 (quoting Griffith v. Griffith, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954)).

the person with superior parenting skills. Yet that is not always the case because the best interest of the child analysis is noticeably absent under *Pulliam*'s presumption of harm approach.[124]

The presumption of harm approach in *Pulliam* allowed the courts to focus exclusively on the private, sexual activity of Fred Smith when the focus should have been on comparing both parents using the following relevant factors: "the wishes of the child, the character and personality traits of the parents, . . . the conduct of the parents,"[125] and the need for stability.[126] The *Pulliam* courts gave no weight to the children's wishes and need for stability, in spite of evidence that the children's best interest could be served with their father.[127] The courts also failed to adequately analyze the character and personality of the parents.[128] The presumption of harm approach

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124. *See supra* notes 42–52 and accompanying text (describing the presumption of harm approach and the room it leaves for stereotypes and prejudice).

125. REYNOLDS, *supra* note 51, § 13.7c (noting that the focus should be on "the strength of the relationship" between child and parents, and that the environment the child lives in with the parent is relevant but "generally not as important"); *see also In re* Custody of Williamson, 32 N.C. App. 616, 620–21, 233 S.E.2d 677, 680–81 (1977) ("Although not controlling, the wishes of a child who has reached the age of discretion are entitled to consideration in awarding custody 'because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child.' " (quoting Brooks v. Brooks, 12 N.C. App. 626, 631, 184 S.E.2d 417, 420 (1971))).

126. Tucker v. Tucker, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975) (quoting Shepard v. Shepard, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)).

> A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation . . . . This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Id.

127. *See* Pulliam v. Smith, 348 N.C. 616, 501 S.E.2d 898 (1998) (neglecting to mention the wishes of the children or Joey's testimony); *see also* Transcript of Proceedings, *supra* note 22, at 10, 13 (providing testimony by Joey—Kenny did not testify—that he had no preference about whom to live with and that he liked Tim and felt comfortable around him); *id.* at 46, 70 (providing testimony by Fred Smith that the children had always lived with him before their mother obtained custody by suing him after she forced him to acknowledge his sexual orientation to the children). One can argue it was the mother, not the father, who destabilized the boys' lives.

128. The trial court failed to incorporate into its findings that William Pulliam had alcohol problems. See Transcript of Proceedings, *supra* note 22, at 70–71, for testimony of Fred Smith that Carol Pulliam told him William was "definitely an alcoholic." The court also failed to account for the fact that William Pulliam had a son from a previous marriage that Joey and Kenny would have to integrate into their lives. Moreover, the trial court did not include in its findings that "the children [were] well adjusted, attend[ed] school regularly, ma[de] good grades, and participate[d] in after school athletics." Pulliam v.

allows courts, as in *Pulliam*, to abrogate their responsibility to choose the "environment, which will . . . best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties"[129] by presuming harm from a parent's sexual orientation when none is evidenced.

Another problem with the *Pulliam* court's presumption of harm approach is its emphasis on the fact that Fred Smith's sexual activity was extramarital.[130] The consideration of nonmarital sexual activity in prohibiting custody to gay and lesbian parents "ignores the fact that unmarried gay couples can be just as loving and competent caregivers as married straight couples."[131] Critics may argue that, fair or not, because persons of the same sex lack the ability to marry,[132] their relationships lack the stability that creates a proper environment to raise children. Nonetheless, gay and lesbian parents can "provide home environments in which children can thrive,"[133] and "homosexual relationships are equally capable of including the love and commitment regarded as inherent in marriage."[134] Furthermore, as of the publication of this Comment, all but two states (Massachusetts and Connecticut) deny gay and lesbians the right to marry.[135] "Cohabitating gay people who wish to marry but are

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Smith, 124 N.C. App. 144, 149, 476 S.E.2d 446, 450 (1996), *rev'd*, 348 N.C. 616, 501 S.E.2d 898 (1998).

129. Benedict v. Coe, 117 N.C. App. 369, 375–76, 451 S.E.2d 320, 323–24 (1994) (quoting *In re* Peal, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982)).

130. *See Pulliam*, 348 N.C. at 626–27, 501 S.E.2d at 904 (citing as detrimental to the children acts by the unmarried couple which occurred in the home and the unmarried couple allowing the children to see them lying in bed together).

131. Larsen, *supra* note 97, at 91.

132. North Carolina does not recognize same-sex marriage. N.C. GEN. STAT. § 51-1.2 (2007) ("Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.").

133. Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61, 80 (2000).

134. Bruce D. Gill, Comment, *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361, 390 (2001) (providing additional reasons that "courts should focus only on actual harm to the child" such as the consideration that "[since] many custody proceedings take place after divorce, examples of loving and committed relationships, regardless of whether the relationship is a marital one, could restore a child's confidence in intimate relations in the aftermath of divorce").

135. *See* John Christofferson, After California Loss, Gays Get Right to Wed in Connecticut, YAHOO! NEWS, Nov. 12, 2008, http://news.yahoo.com/s/ap/20081112/ap_on_re_us/gay_ marriage. Although the Supreme Court of California in late May 2008 found gays and lesbians had the right to marry, *see* Adam Liptak, *California Court Overturns a Ban on Gay Marriage*, N.Y. TIMES, May 16, 2008, at A1, California voters, in the November 2008 elections, approved a referendum 52.5% to 47.5% that overturned the

prevented by law are surely not choosing a life of unmarried cohabitation. They are choosing to live together rather than apart."[136] Given the current state of the law, it is circular and unfair to deny gay and lesbian parents custody based on extramarital sexual activity.[137]

Additionally, *Pulliam* set precedent disadvantaging gay and lesbian parents by finding that Fred Smith's private sexual activity while the children were in the home supported a change of custody.[138] This reasoning is erroneous both because it violates the nexus requirement and because it conflicts with subsequent North Carolina decisions, such as *Browning v. Helff*,[139] thus discriminating against same-sex couples by creating a double standard. In *Browning*, the Court of Appeals of North Carolina held that "the fact that the children were present [when one parent was residing with a person of opposite sex in a *nonmarital* relationship] cannot be construed as a finding that the children's welfare was affected."[140] As in *Pulliam*, the father in *Browning* was living with a person in a nonmarital relationship.[141] *Browning* is consistent with the nexus test requiring effect on the child to modify custody.[142] The *Browning* court vacated a trial court's modification of visitation because there was a lack of evidence that the former husband's cohabitation with his girlfriend had effect on the children.[143] In *Pulliam*, the children were not witnesses to the couple's sexual activity because it took place in Fred's private bedroom with the door closed *and* locked.[144] Thus, to be in harmony with the nexus requirement and now with *Browning*, the court in *Pulliam* could not conclude that the boys were affected by Fred Smith's private sexual activity simply because they were in the home.

Yet the Supreme Court of North Carolina found the children *were* affected by their father's conduct.[145] The most plausible justification for *Pulliam*'s finding is that the court discriminated

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court decision. CNN, *Gay Marriage Supporters Take to California Streets*, http://www.cnn.com/2008/ US/11/08/same.sex.protests/ index.html (last visited Nov. 17, 2008). Lawsuits challenging the initiative are pending at the time of this Comment. *Id.*

136. Larsen, *supra* note 97, at 90–91 (concluding it is not "intellectually honest for courts to assert that unmarried cohabitation is a choice").

137. *See* Gill, *supra* note 134.

138. Pulliam v. Smith, 348 N.C. 616, 626–27, 501 S.E.2d 898, 904 (1998).

139. 136 N.C. App. 420, 524 S.E.2d 95 (2000).

140. *Id.* at 424, 524 S.E.2d at 98.

141. *Id.* at 422, 524 S.E.2d at 97.

142. *See* Shapiro, *supra* note 38, at 633.

143. *Browning*, 136 N.C. App. at 424, 524 S.E.2d at 98.

144. Transcript of Proceedings, *supra* note 22, at 42.

145. *Pulliam*, 348 N.C. at 626–27, 501 S.E.2d at 904.

against Fred Smith because he engaged in sexual activity with another man. This explanation is supported by the court's silence on the same conduct Carol Pulliam engaged in with William Pulliam.[146] Carol even admitted "engaging in oral sex [with William] *before* and after she was married."[147] Because *Pulliam* remains good law in North Carolina, while being at odds with *Browning* and similar cases involving heterosexual parents, gay and lesbian parents face a double standard.[148] It is unclear how gay and lesbian parents can ever meet this higher standard. Perhaps the standard would be satisfied if homosexual parents did not reside with their partners, did not "come out" to (and be honest with) their children, did not keep private material in the home (no matter that it was stored where the children would not find it), and did not privately engage in intimate conduct with their life partner while the children were in the home. However, all those activities are central to the identity of a homosexual person.

Pulliam has not been the only case to build this double standard for gay and lesbian parents. Such a standard is also seen in *Newsome v. Newsome*.[149] In *Newsome*, a mother who had custody of her daughter by a separation agreement lost custody after the father alleged a change of circumstances based on his discovery of the mother's homosexual relationship.[150] The father's parents, the mother's friends, and a former co-worker of the mother all testified that the child was well cared for and that the mother was a good parent.[151] The trial court even found that "the evidence presented by both the [plaintiff-mother and defendant-father tended] to show that the plaintiff [had] in fact been a good mother to the minor child . . . in

146. *See generally Pulliam*, 348 N.C. 616, 501 S.E.2d 898 (failing to mention that Carol Pulliam engaged in oral sex with William Pulliam). Carol Pulliam admitted to engaging in oral sex during trial. Transcript of Proceedings, *supra* note 22, at 113.

147. Neff, *supra* note 2 (emphasis added).

148. REYNOLDS, *supra* note 51, § 13.14c ("Presumably the reason for a more stringent standard for conduct by gay and lesbian parents is the concern that the child's awareness of the conduct will affect the child's sexual orientation. What little research there is, however, suggests that the sexual orientation of the parents makes no identifiable difference in the orientation of the child.").

149. 42 N.C. App. 416, 256 S.E.2d 849 (1979).

150. *Id.* at 417, 423, 427, 256 S.E.2d at 850, 853, 855 (noting also that the mother "denied being a homosexual"). "None of . . . [the mother's friends] admitted to any knowledge of a homosexual relationship." *Id.* at 422, 256 S.E.2d at 853. On the other hand, the trial court found that the defendant alleged the mother "ha[d] engaged in an illicit homosexual relationship . . . in the presence and on the premises occupied by the . . . minor child." *Id.* at 418, 256 S.E.2d at 850. There was testimony that the mother shared a bedroom with a female and that the couple were seen wearing wedding rings. *Id.* at 419–20, 256 S.E.2d at 851.

151. *Id.* at 420–22, 256 S.E.2d at 852–53.

that she has provided very sufficiently for the physical needs and requirements [of the] minor child."[152] Even so, the court gave custody to the father based on the finding that "the environment in which the minor child [was then] being raised [was] not conducive or beneficial to the raising of a minor child."[153] The Court of Appeals of North Carolina upheld the trial court's change of custody, noting:

> There is certainly an abundance of evidence to support the critical finding that the environment in which plaintiff has placed the child is not in the child's best interest. The evidence would have supported much stronger findings. It may well be that the judge struggled to spare the child as much future embarrassment as possible.[154]

The courts in *Newsome*, as in *Pulliam*, removed custody from a parent because of the parent's sexual orientation without satisfying the nexus requirement involved in determining the best interest of the children.[155] In both cases, evidence showed the children actually doing well in their environment and the respective gay or lesbian parents being good caregivers.[156] Yet in both cases, the courts improperly focused on the sexual orientation of the parents. This demands the conclusion that these parents were held to a different, higher standard than would have been used for heterosexual parents.[157]

True to this deduction, the nexus test has been properly applied when homosexuality is not an issue, as in *Browning v. Helff*[158] and

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152. *Id.* at 423, 256 S.E.2d at 853.

153. *Id.*

154. *Id.* at 427, 256 S.E.2d at 855.

155. *See supra* Part I.C (providing modification standard); *see also supra* Part I.D (analyzing how *Pulliam* lacked evidence of effect on the children). *See generally Newsome*, 42 N.C. App. 416, 256 S.E.2d 849 (neglecting to note any negative effects on the child as a result of the mother's alleged homosexual relationship).

156. *See Newsome*, 42 N.C. App. at 423, 256 S.E.2d at 853; Transcript of Proceedings, *supra* note 22, at 12, 56, 59.

157. *See supra* text accompanying notes 85–86 (showing the focus of the courts in *Pulliam*). The trial court in *Newsome* admitted the following testimony focusing on the mother's alleged sexual orientation: where the mother and another female lived and when they quit their jobs, the father's belief that the mother was engaged in an "illicit homosexual relationship," the opinion of others about the relationship, the mother's former coworker's conversation with the mother about her sexual orientation, the mother's testimony about rumors of her sexual orientation, and the mother's friends' testimony about those same rumors. *Newsome*, 42 N.C. App. at 418–22, 427, 256 S.E.2d at 850–53, 855. That the judge meant to spare "the child as much future embarrassment as possible" also may indicate a judicial bias against homosexuals. *Id.* at 427, 256 S.E.2d at 855.

158. *See supra* text accompanying notes 139–43.

Blackley v. Blackley.[159] In *Blackley*, a father filed a motion to modify an order granting the mother custody of their two children on the basis of premarital nighttime visits to the mother's home by a man the mother subsequently married.[160] As in *Pulliam*, evidence showed that the mother and her partner were not married at the time, and the children saw the couple in the mother's bedroom.[161] Also similar to the children in *Pulliam*, the children in *Blackley* were "well and healthy" and "properly schooled."[162] But unlike *Pulliam*, where the children had no conflict with Fred Smith's partner, evidence was presented in *Blackley* that the mother's partner "popped" the male child.[163] According to the analysis in *Pulliam*, the fact that the children were present in the home while a nonmarital relationship occurred was sufficient to justify a modification in custody.[164] However, in spite of the evidence of discipline by the stepfather, the *Blackley* court found insufficient evidence that the child was or would be "adversely affected because of the chastisement by his stepfather or his stepfather's premarital [overnight] visits with [the mother]."[165] Once again, sexual orientation appears to be the rationale for the different outcomes.[166]

Another defect in the *Pulliam* presumption of harm approach is that it denies gay and lesbian individuals the freedom to be themselves. The fact that society, in this case the courts, forces gays and lesbians to downplay their sexual orientation—to minimize it as part of their identity—has been referred to as "covering."[167] This

159. 18 N.C. App. 535, 197 S.E.2d 243 (1973).

160. *Id.* at 536, 197 S.E.2d at 243.

161. *Id.*

162. *Id.* at 537, 197 S.E.2d at 244.

163. *Id.* at 536, 197 S.E.2d at 243.

164. *See supra* text accompanying note 85.

165. *Blackley*, 18 N.C. App. at 538, 197 S.E.2d at 245.

166. While this Comment argues that sexual orientation often inappropriately causes North Carolina courts to deviate from the standard for modifying custody orders, it does not assert that it is the *only* reason courts sometimes deviate from the standard or that homosexual parents are the *only* ones affected by the courts' deviations. *See, e.g.*, Johnson v. Adolf, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002) (reversing the trial court because it failed to determine if the substantial change in circumstances had effect on the child and never determined the best interest of the child in a custody case between the maternal grandmother and the parents). However, that other families are impacted by the failure of North Carolina courts to meet the standard for modifying custody orders does not lessen the effect on gay and lesbian parents.

167. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS, Preface (2006) ("It is a fact that persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large . . . . This process will be referred to as *covering*." (quoting ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102 (Prentice Hall, 1983))).

demand to "cover" is easy to spot in cases like *Pulliam* in which courts have removed custody from a gay or lesbian parent. In those cases, gay and lesbian parents are punished for engaging in activity that defines them as homosexual individuals—whether it be living with their life partner, having intimate relations with their life partner, or being honest with their children about their sexual orientation.[168] These individuals have to pay a terrible price for the freedom of living authentic lives: the loss of their children.

A less obvious observation is that this demand to cover is just as prevalent in custody cases in which gay and lesbian parents can be said to have "prevailed." These "wins" sometime come at great sacrifice for gay and lesbian parents: not seeing their significant other, not sharing a living arrangement with a significant other, or not making natural physical displays of affection while their children are present. In *Woodruff v. Woodruff*,[169] the Court of Appeals of North Carolina upheld the trial court's award of "unsupervised overnight visitation rights" to a gay father with the condition that the child not be in the *presence* of any boyfriends and the father not have boyfriends over while the child was with him.[170] The gay father can be said to have "won" because he retained visitation rights and also because the court found that "a severance of the father-son relationship in this case would be detrimental to the child's wellbeing [sic] and that maintenance of the father-son relationship would be beneficial and in the child's best interest."[171] The court, however, also exhibited homophobia when it held the father could retain visitation rights only after an expert in clinical psychology testified "there [was] no known cause of male homosexuality . . . [and] in his professional

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> [O]ur major civil rights laws . . . do not currently provide much protection against covering demands. Courts have often interpreted these laws to protect statuses, but not behaviors, *being* but not *doing*. For this reason, courts will often not protect individuals against covering demands, which target behavioral aspects of identity—speaking a language, having a child, holding a same-sex commitment ceremony, wearing a religious garb . . . .
>
> American equality law must be reformed to protect individuals.

Id. at 23–24.

168. *See id.* at 101 ("A survey of state practices . . . reveals convergence around the same general rule—gays who cover retain their children, gays who fail to do so risk losing them."); *see also* Newsome v. Newsome, 42 N.C. App. 416, 417, 256 S.E.2d 849, 855 (1979) (taking custody away from a mother based in part on the allegation that she was living with another woman in a homosexual relationship).

169. 44 N.C. App. 350, 260 S.E.2d 775 (1979).

170. *Id.* at 352–53, 260 S.E.2d at 776–77.

171. *Id.* at 353, 260 S.E.2d at 776–77.

expert opinion, the son of a homosexual father [would] not inherit that homosexuality."[172] Regrettably, the court forced the father to choose between his life partner and his child by allowing visitation only when the father had no partner present.

Even while prevailing in court, a gay or lesbian parent is forced to confront the double standard imposed by *Pulliam* and resort to arguments that should not have to be made. For example, in *Epperson v. Epperson*,[173] a lesbian mother fought a visitation restriction that "she [not] have persons present overnight . . . 'unless these persons [were] related by blood or heterosexual marriage.' "[174] Part of the mother's argument was that the visitation order already forbade any affection in the presence of her children, and, therefore, the limitation barring overnight guests was only aimed at homosexuality itself.[175] The court vacated and remanded the case,[176] but at great costs to the mother. In order to prevail, she was forced to agree not to show affection with her life partner.[177] She was forced to choose between her children and a life partner. The "victories" of *Woodruff* and *Epperson* combined with the defeats of *Newsome* and *Pulliam* seem to establish the principle that it is only acceptable to *be* a homosexual if one does not *act* like a homosexual.[178]

The presumption of harm standard also leads courts to explore moral consideration instead of focusing on the welfare of the children. In *Pulliam*, the Supreme Court of North Carolina found that "failing and refusing to counsel the children against [homosexual] conduct while acknowledging this conduct to them" supported the change in custody.[179] This statement has no evidentiary value but is merely a judicial proclamation of opinion regarding the propriety of the conduct. Fred and Tim acknowledged they were a couple and did not indicate to the children that their relationship was wrong, thus making clear that it is the *court* that considers the relationship wrong.[180] The supreme court did not base its opinion on

172. *Id.* at 353, 260 S.E.2d at 776.

173. No. 99-1003, 2000 N.C. App. LEXIS 766 (N.C. Ct. App. June 20, 2000).

174. Brief of Defendant-Appellant at 10, Epperson v. Epperson, 1999 WL 33758969 (N.C. Ct. App. June 20, 2000) (No. 99-1003).

175. *Id.* at 10–11.

176. Epperson, 2000 N.C. App. LEXIS 766, at *1.

177. Brief of Defendant-Appellant, *supra* note 174, at 10.

178. This is covering in its clearest form. *See* YOSHINO, *supra* note 167, at 101.

179. Pulliam v. Smith, 348 N.C. 616, 627, 501 S.E.2d 898, 904 (1998).

180. *Id.* at 626–27, 501 S.E.2d at 903–04; Transcript of Proceedings, *supra* note 22, at 142 (testimony of Tim Tipton).

legal grounds, such as the illegality of the conduct.[181] In addition, the Supreme Court of North Carolina's opinion that homosexual conduct *should* be counseled against reinforces the double standard which *Pulliam* purports to reject because "[f]ew courts would likely have the audacity to tell straight parents when it is appropriate to educate their children about sexuality."[182]

In sum, *Pulliam*'s presumption of harm approach was problematic from the start because it disqualifies otherwise competent gay and lesbian parents from having custody of their children solely on the basis of their sexual orientation, unfairly penalizes gay and lesbian parents for not marrying when they have no option to do so, creates a double standard for considering sexual activity in custody cases, and denies gay and lesbian parents the basic freedom to be themselves. Because such an approach allows courts to diverge from focus on the best interest of the children, courts often explore their own moral opinions about the sexual orientation of the parents. This divergence was erroneous at *Pulliam*'s announcement and is even more problematic in the face of a national trend towards the nexus test.

B. *Other States Have Increasingly Adopted the Nexus Test and Rejected the Speculation and Stereotypes Characterizing the* Pulliam *Approach*

Across the country, courts have shifted "away from per se rules disqualifying lesbian and gay parents"[183] and toward the nexus test.[184] In the midst of this trend, *Pulliam* remains at the opposite end of the spectrum: its analysis rejected the nexus requirement and adopted the presumption of harm standard, which is more in harmony with the per se rule.[185] Several plausible reasons exist for courts' increasing

181. *Pulliam*, 348 N.C. at 626–27, 501 S.E.2d at 903–04. Incidentally, illegality is now an improper basis for such opinion after *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court of the United States held that all Americans have the right to engage in private, intimate conduct free from government intrusion. *Id.* at 578; *see* discussion *infra* Part II.C. It should be noted that a substantial part of the trial court's findings and reasoning supporting a change in custody was that the private sexual conduct was illegal. *See* Transcript of Record, *supra* note 21, at 32 (finding the defendant's conduct was illegal and "[t]hat despite the fact that the said behavior is a violation of G.S. 14-177 the Defendant testified that there was nothing wrong with his relationship with Tim Tipton").

182. Larsen, *supra* note 97, at 81.

183. Shapiro, *supra* note 38, at 639.

184. *Id.* at 635 ("Courts in a majority of the jurisdictions that have considered within the last twenty years a parent's homosexuality in assessing an individual's fitness as a parent have expressed approval of the basic principles of the nexus test.").

185. *See supra* Part I.D.

rejection of the per se rule. Because the presumption of harm approach and the per se rule both result in homosexual parents losing custody of their children based on their sexual orientation and both share many of the same misconceptions about homosexuality, these reasons are additional justifications for overruling *Pulliam*.[186] First, the per se approach against gay and lesbian parents is questionable under *Lawrence v. Texas*,[187] because this approach relies on moral justification alone and not on the effect on the children.[188] Second, social science research does not support the "assumption that lesbian and gay parents invariably harm their children" and, in fact, shows otherwise.[189] Finally, society is increasingly embracing its gay and lesbian citizens, leaving the per se rule outmoded.[190]

During this movement away from the per se rule, a majority of jurisdictions have approved of the nexus test when a parent's sexual orientation was at issue.[191] For example, in *Jacoby v. Jacoby*,[192] the Second District Court of Appeal of Florida adopted the nexus test and reversed the lower court's decision because it shifted custody from the mother to the father due to the mother's sexual orientation, despite finding no evidence of harm to the children.[193] It recognized that "[f]or a court to properly consider conduct such as Mrs. Jacoby's sexual orientation on the issue of custody, the conduct must have a direct effect or impact upon the children."[194] The court further made clear that the application of the nexus requirement was the reason for the reversal: "The connection between the conduct and the harm to

186. *See supra* text accompanying notes 46–47.

187. 539 U.S. 558 (2003).

188. *See* discussion *infra* Part II.C.

189. Shapiro, *supra* note 38, at 638–39.

190. *Id.* at 639. In Gallup's annual Values and Beliefs Survey, while the public was split on the morality of homosexual conduct at forty-eight percent to forty-eight percent, these percentages are a swing from just the beginning of this decade where majorities found such conduct wrong (fifty-five percent thought homosexuality was immoral in 2002). *See* Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, GALLUP, June 18, 2008, http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx (finding that majorities now believe that homosexual relations should be legal and fifty-seven percent believe homosexuality should be accepted as an "alternative lifestyle"). Additionally, the Survey revealed that eighty-nine percent believed gays and lesbians should not be discriminated against in employment. *Id.*

191. Shapiro, *supra* note 38, at 635–36 ("Application of a nexus test to the question of a parent's homosexuality is consistent with the general family law principle that most parental characteristics are relevant only if they can be shown to have an impact on the child.").

192. 763 So. 2d 410 (Fla. Dist. Ct. App. 2000).

193. *Id.* at 415; *see also* Shapiro, *supra* note 38, at 635 n.67 (listing twenty-seven states as of 1996—before the *Pulliam* decision—to have adopted the basics of a nexus test).

194. *Jacoby*, 763 So. 2d at 413.

the children must have an evidentiary basis; it cannot be assumed . . . [that] the court's comments concerning the negative impact of the mother's sexual orientation on the children . . . [are] conclusory or unsupported by the evidence."[195]

The Supreme Court of North Carolina, while not overruling *Pulliam*, did recognize the trend towards the nexus test in *Shipman v. Shipman*,[196] a heterosexual custody case, decided in 2003.[197] In *Shipman*, the court upheld the trial court's change of custody from the mother to the father based on several findings, including that the mother moved frequently, did not have a home, sought to prevent the father from seeing the child, and permitted the child to stay in a home where the mother had been molested.[198] To reach that holding, the court articulated the standard that "before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection."[199] While this was a step in the right direction for North Carolina courts, the court failed to appropriately interpret *Pulliam*, citing the case for the proposition that "where the substantial change involves a discrete set of circumstances such as . . . a change in a parent's sexual orientation, the effects of the change on the welfare of the child are not self-evident and . . . [require] evidence *directly* linking the change to the welfare of the child."[200] The first problem is that the court failed to recognize that the change in *Pulliam* was not that Fred Smith "changed" into a homosexual. This statement indicates that the court was still willing to focus inappropriately on the sexual orientation of the parents in custody determinations. The second problem is that while the standard itself is correct—the nexus test requires evidence of effect on the children—the court views *Pulliam* as consistent with that approach. In reality, however, *Pulliam* did *not* apply the nexus test but instead utilized the presumption of harm standard.[201]

195. *Id.* The Court of Appeals of North Carolina in *Pulliam* made a strikingly similar holding. *See* Pulliam v. Smith, 124 N.C. App. 144, 148–49, 476 S.E.2d 446, 449 (1996), *rev'd*, 348 N.C. 616, 501 S.E.2d 898 (1998).

196. 357 N.C. 471, 586 S.E.2d 250 (2003).

197. *Id.* at 478, 586 S.E.2d at 255–56.

198. *Id.* at 475–76, 586 S.E.2d at 254 (finding that these factors "warrant[ed] the court's intervention").

199. *Id.* at 478, 586 S.E.2d at 255.

200. *Id.* at 478, 586 S.E.2d at 256 (internal citations omitted).

201. *See supra* Part I.D.

C. *How* Lawrence v. Texas *Undermines* Pulliam*'s Presumption of Harm Approach*

In the middle of the trend towards the nexus test, the Supreme Court of the United States in 2003 announced *Lawrence v. Texas*, which wholly undermined the Supreme Court of North Carolina's approach in *Pulliam*. The Supreme Court in *Lawrence* announced that adults, including gays and lesbians, had the right to engage in private, intimate conduct without government intervention.[202] When police responded to a weapons disturbance complaint at Lawrence's apartment, they entered his home, saw Lawrence and another male engaged in a sexual act, arrested both men, and held them in overnight custody.[203] The men were convicted in lower court of violating a "Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."[204] The Supreme Court of the United States struck down the statute as unconstitutional.[205] In its holding, the Court unambiguously overruled *Bowers v. Hardwick*,[206] which previously held there was no "fundamental right to engage in homosexual sodomy."[207] Not confining the holding of *Lawrence* to the principle that there is a constitutional right for homosexuals to engage in sodomy, the Supreme Court "more broadly announced a substantive due process right of adult sexual intimacy for all Americans."[208] The Court grounded this right in an expansive interpretation of liberty under the Due Process Clause of the Fourteenth Amendment: "Liberty protects

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202. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

203. *Id.* at 562–63.

204. *Id.*

205. *Id.* at 558.

206. 478 U.S. 186 (1986), *rev'd*, 539 U.S. 558 (2003).

207. *Id.* at 191; *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

208. Larsen, *supra* note 97, at 57 (noting also that "since heterosexuals already enjoyed an unspoken right to lead sex lives safe from government intrusion, *Lawrence* is also a kind of equal protection ruling for extending this unofficial right to same-sex couples" (footnote omitted)). Justice O'Connor, concurring in the judgment, explicitly based her conclusion on an Equal Protection analysis. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring). Justice O'Connor recognized the importance of this case in the field of family law. *Id.* at 581–82 ("Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else .... Texas itself has previously acknowledged the collateral effects of the law ... that the law 'legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,' including in the areas of 'employment, *family issues*, and housing.' " (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992) (emphasis added))).

the *person* from unwarranted government intrusions into a dwelling or other private places . . . [and this l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[209] The Court explained that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[210]

Fred Smith and his partner engaged in intimate conduct within the broad definition of liberty set out by *Lawrence*. The trial court in *Pulliam* specifically found that the sexual activity between Fred Smith and Tim Tipton violated North Carolina's sodomy law, and it used this fact to justify removing custody of Fred's two sons.[211] This justification is no longer legitimate because, under *Lawrence*, the North Carolina sodomy statute is unconstitutional as it relates to Fred and Tim's consensual conduct occurring inside Fred's private residence.[212] Although it never referred by name to the sodomy statute when it upheld the trial court's judgment, the Supreme Court of North Carolina relied on the *exact same* private sexual conduct used by the trial court to deny Fred Smith custody.[213] Critics will argue that while *Lawrence* clearly presses for altering the law where consensual sexual conduct among adults is concerned, the interests of children were not at stake in the case.[214] This Comment

209. *Lawrence*, 539 U.S. at 562 (emphasis added); *see also* Larsen, *supra* note 97, at 58 ("Focusing on the rights of a 'person' rather than those of a 'gay person,' the Court explicitly found that the liberty protected by the Due Process Clause includes the freedom to engage in 'certain intimate conduct.' ").

210. *Lawrence*, 539 U.S. at 567.

> The petitioners are entitled to respect for their private lives. The State cannot demean [homosexual persons'] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Id. at 578.

211. *See* Transcript of Record, *supra* note 21, at 32, 37.

212. *See* North Carolina Gay and Lesbian Attorneys, Legal Guide, Sodomy Law, http://ncgala.org/guide/guidesodomy.htm (last visited Nov. 17, 2008); *see also* North Carolina v. Whiteley, 172 N.C. App. 772, 773, 779, 616 S.E.2d 576, 577, 581 (2005) (holding the Crime Against Nature statute unconstitutional when applied to private, consensual sexual conduct between adults); Transcript of Record, *supra* note 21, at 32–33 (detailing the private nature of the couple's sexual conduct).

213. *See* discussion *supra* Part I.D.

214. *Lawrence*, 539 U.S. at 578. The Supreme Court of North Carolina has already declined to apply *Lawrence* in a case when juveniles were prosecuted under North

acknowledges that since "[t]he welfare of the child has always been the polar star which guides courts in awarding custody,"[215] it is logical that parents' interests in sexual autonomy must be balanced against the interests of the children.

While the welfare of the child should always be the central concern in custody cases, this does not mean that courts are free to ignore *Lawrence*'s declaration against the use of morality to oppress gays and lesbians. "State power over domestic relations is not without constitutional limits."[216] While family law is an area largely left to the states, it is "limited by . . . constitutional principles."[217] *Lawrence* declared a principle against the use of moral justification to disadvantage gays and lesbians and can be viewed as setting a public policy against this discrimination.[218] The Supreme Court rejected *Bowers*' use of morality to determine constitutional guarantees: "The *Bowers* Court was, of course, making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code."[219] One commentator has noted that *Lawrence*'s approach "open[s] the door for constitutional considerations to reflect changing social values and to vindicate the rights of those engaged in *harmless* conduct that departs from social norms."[220] In rejecting this moral-based reasoning, the Supreme

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Carolina's Crime Against Nature statute. *See In re* R.L.C., 361 N.C. 287, 295, 643 S.E.2d 920, 925 (2007).

215. Browning v. Helff, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000) (quoting Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998)).

216. Zablocki v. Redhail, 434 U.S. 374, 399 (1978).

217. Larsen, *supra* note 97, at 67 ("The Supreme Court has found the Constitution to contain several rights bearing on family relationships, including the rights to engage in intimate sexual behavior, marry, raise children, safeguard intimate family bonds, use contraception, and terminate pregnancies." (footnotes omitted)).

218. *See Lawrence*, 539 U.S. at 559, 575; Larsen, *supra* note 97, at 64. The public policy argument is analogous to the policy set against racial discrimination. *See* text accompanying *infra* notes 286–91 (applying *Palmore v. Sidodi* and its policy against allowing stigma from racial discrimination to affect custody in the gay and lesbian parent custody context).

219. *Lawrence*, 539 U.S. at 559.

220. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, AND PROBLEMS 861–62 (4th ed. 2004). Similarly, one North Carolina court heard *Lawrence*'s summons against the use of morality to limit sexual autonomy when, in 2006, it found the state statute against fornication unconstitutional as a violation of the "due process right to liberty as explained in *Lawrence v. Texas*." Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006). The statute, also referred to as the "fornication and adultery statute," provided: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor." N.C. GEN. STAT. § 14-184 (2007). The case arose when "Debora

Court in *Lawrence* realized that its holding had an impact against discrimination directed at gays and lesbians in areas far beyond sexual conduct in the home because "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[221] Indeed, the court's analysis in *Pulliam* shows there was good reason for the Supreme Court to be concerned about discrimination against homosexuals in the private sphere and homosexuals' autonomy in forming family relationships.[222]

In *Pulliam*, the Supreme Court of North Carolina relied on its own moral view to deny Fred Smith custody of his two sons. The North Carolina standard for modification of custody orders was never satisfied because there was insufficient evidence of harm to the children.[223] Without a finding of harm, the court failed to act in the best interest of the children when it removed them from their father's custody.[224] Because the Supreme Court of North Carolina *presumed* harm from Fred Smith's homosexuality in violation of the nexus test, only its moral condemnation of the private, consensual sexual conduct of Fred Smith can explain penalizing him by removing custody of his children.[225] Thus, *Pulliam* runs afoul of the constitutional decision in *Lawrence*, not because *Pulliam* explicitly

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Lynn Hobbs, who had been employed by the county as an emergency dispatcher until the sheriff discovered that she was living with a boyfriend[, was] . . . told [by the sheriff that] . . . she had three choices: marry, move, or leave her job, citing the criminal statute." Arthur S. Leonard, *Mopping up Operation on Sex Crimes*, LEONARD LINK, Nov. 6, 2006, http://newyorklawschool.typepad.com/leonardlink/2006/11/mopping_up_oper.html. Because *Lawrence*'s holding applied broadly to all persons, not just homosexuals, *see* Larsen, *supra* note 97, at 57, the superior court in *Hobbs* used *Lawrence*'s definition of due process liberty to strike down a restriction on private intimate conduct. *Hobbs*, 2006 WL 3103008, at *1. Morality without harm was an insufficient justification to limit sexual autonomy. The fornication statute can be seen as nothing more than the state's moral code.

221. *Lawrence*, 539 U.S. at 575.

222. *See id.* at 574–76.

223. *See* discussion *supra* Part I.D.

224. If real harm to the child is found, perhaps one could argue that *Lawrence* has less bearing on a custody decision. However, that is not the case in *Pulliam* because, as discussed previously, there was no evidence of harm to the children from Fred Smith's homosexuality. *See* discussion *supra* Part I.D.

225. Because the court did not specify any true harm to the children, it is unclear what the basis for its moral concerns was. Whatever the concerns, they are invalid considerations because *Lawrence* holds that disfavoring gays and lesbians based on moral disapproval is unconstitutional. *See* Larsen, *supra* note 97, at 74, 76–77 (detailing how the various "adverse effects" that courts assume against children of gay parents do not "hold up under scrutiny," such as "anxieties that the children will develop bad habits, come to hold pro-gay views, grow up to be gay, or become confused about sex or traditional gender roles" (footnotes omitted)).

denies gays and lesbians the right to engage in sexual activity, but because it contradicts the principle of *Lawrence* by *penalizing* a homosexual parent for engaging in that activity.[226] The change of custody based on the court's moral view about homosexuality, rather than any effect on the children, defies both the nexus test and the precepts set out in *Lawrence* that the mere existence of gays and lesbians should not be "demeaned" and that morality alone is insufficient to justify discrimination.[227] Justice Webb was correct in his *Pulliam* dissent when he wrote that the majority "recites actions by the defendant which the majority considers to be distasteful, immoral, or even illegal and says this evidence supports findings of fact which allow a change in custody."[228] As a consequence, the *Pulliam* majority's moral conclusion was the "product[] of discriminatory biases that courts cannot constitutionally credit."[229]

Gay parents should not be penalized for living with their life partners.[230] One can hardly imagine a harsher penalty in a custody case than losing children one has raised since birth, but this loss was the consequence of Fred Smith's choice to live with the person he loved.[231] As part of the due process right to liberty interpreted in *Lawrence*, the Supreme Court of the United States has stated that homosexuals—just as heterosexuals—may seek autonomy to raise

226. Pulliam v. Smith, 348 N.C. 616, 626–27, 501 S.E.2d 898, 904 (1998). *See generally* discussion *supra* Part I.D (illustrating the court's sole focus on the sexual conduct of Fred Smith).

227. *See Lawrence*, 539 U.S. at 571, 578.

228. *Pulliam*, 348 N.C. at 629, 501 S.E.2d at 905 (Webb, J., dissenting).

229. Larsen, *supra* note 97, at 84. In fact, the Supreme Court has found that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." Romer v. Evans, 517 U.S. 620, 634 (1996) (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). For an interesting discussion on the interplay between *Lawrence* and *Romer*, see Larsen, *supra* note 97, at 60–64. However, courts have sometimes been receptive to arguments limiting the application of *Lawrence* because the interests of children were at stake. *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding Florida's ban on adoption by homosexuals by distinguishing the criminal sanction in *Lawrence* and the adoption of children). In *Lofton*, the court noted: "Here, the involved actors are not only consenting adults, but minors as well. The relevant state action is not criminal prohibition, but grant of a statutory privilege." *Id.* at 817. Although both *Lofton* and *Pulliam* involve children as well as consenting adults, this Comment would differentiate *Lofton* because, whereas it dealt with a statutory adoption, Fred Smith in *Pulliam* was the natural father of the two children at the center of the custody dispute.

230. Larsen, *supra* note 97, at 94.

231. *See Pulliam*, 348 N.C. at 621–22, 628, 501 S.E.2d at 900–01, 904; Transcript of Record, *supra* note 21, at 36.

children and form families.[232] The Supreme Court of North Carolina in *Pulliam* inappropriately denied Fred Smith this autonomy.[233]

Beyond the Court's caution in *Lawrence* against using moral-based reasoning to disadvantage homosexuals, the case undermines *Pulliam* in other ways. First, despite the limits on *Lawrence*'s holding proclaimed by the Court,[234] the decision does encompass wording particularly relevant to child custody cases involving gay and lesbian parents. In referencing *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[235] the Court took note that the Constitution protects a person's decisions to build a family and to raise children:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
>
> *Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.*[236]

This language gives weight to the argument put forth by gay and lesbian parents that they may not be held to a discriminatory standard. Second, while cautioning against "demeaning" the lives of gays and lesbians and also adopting an expansive view of liberty, the Court in *Lawrence* advocated a view of the Constitution consistent with greater equality for gay and lesbian citizens: "[The framers] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation

232. *Lawrence*, 539 U.S. at 573–74.

233. *See* Larsen, *supra* note 97, at 68 (taking this idea even further and making a strong argument that gay parents have a "fundamental right . . . [protected by the Fourteenth Amendment] to make decisions concerning the care, custody, and control of their children"). "Millions of gay people are parents, and to fence them out of the constitutional rights guaranteed to parents generally would violate *Lawrence*'s proscriptions against 'demeaning the lives of homosexual persons.' " *Id.*

234. *See Lawrence*, 539 U.S. at 578.

235. 505 U.S. 833 (1992).

236. *Lawrence*, 539 U.S. at 573–74 (quoting *Casey*, 505 U.S. at 851) (emphasis added). This recognition of the autonomy of persons to form homosexual relationships was monumental because "*Lawrence* erased the division that *Bowers* had imposed between gay and straight sexuality, thereby lifting the legal opprobrium that had for seventeen years hung over gay people." Larsen, *supra* note 97, at 59.

can invoke its principles in their own search for greater freedom."[237] As society adopts increased tolerance for gay and lesbian individuals, this constitutional view supports embracing a non-discriminatory custody standard.

As it relates to custody proceedings, *Lawrence* has impacted both the arguments parties have made and the analyses by the courts in other states.[238] Two examples are *L.A.M. v. B.M.*[239] and *McGriff v. McGriff*.[240] In *L.A.M.*, a lesbian mother fighting to retain custody of her child argued that *Lawrence* overruled a prior Alabama Supreme Court decision that removed custody from another lesbian mother.[241] The mother relied on *Lawrence*'s admonition against moral-based reasoning, but the Court of Civil Appeals of Alabama found that this reasoning did not mean the Alabama Supreme Court's prior decision was overruled because *Lawrence* involved only a statute criminalizing conduct.[242] The court of civil appeals distinguished these custody cases by finding that in such cases, the court's function was simply to review evidence and to determine if a change in custody was supported, not to determine the legality of a criminal statute or the "morality of homosexuality."[243] The court ultimately found that sufficient evidence existed to take custody away from the lesbian mother.[244] While the Court of Civil Appeals of Alabama recognized that the interests of children were not at stake in *Lawrence*,[245] even under the standard the Alabama court adopted, the *Pulliam* court's reasoning fails because there was not sufficient evidence that Fred Smith's homosexuality affected the children to justify a custody change.[246] Therefore, *L.A.M.* does not undermine the foregoing analysis of Lawrence's impact—a moral conclusion divorced from any effect upon the child is insufficient to modify custody.

Significantly, the Supreme Court of Idaho acknowledged the credibility of *Lawrence*'s impact on child custody in *McGriff*, stating that *Lawrence* "has at least some bearing on the degree to which

237. *Lawrence*, 539 U.S. at 579.

238. For a full and enlightening analysis on the impact of *Lawrence* on the rights of gay and lesbian parents in the area of child custody, see generally Larsen, *supra* note 97 (arguing that courts are constitutionally forbidden from considering sexual orientation in custody decisions).

239. 906 So. 2d 942 (Ala. Civ. App. 2004).

240. 99 P.3d 111 (Idaho 2004).

241. *L.A.M.*, 906 So. 2d at 946.

242. *Id.*

243. *Id.*

244. *Id.* at 946–47.

245. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

246. *See supra* Part I.D.

homosexuality may play a part in child custody proceedings."[247] In *McGriff*, a homosexual father lost custody at the trial court level and argued to the Supreme Court of Idaho that the magistrate inappropriately decided the case based on the father's homosexuality.[248] The Supreme Court of Idaho upheld the trial court, finding that the magistrate did not rely on the father's homosexuality in modifying custody but instead had decided the case based on the father's refusal to communicate with the mother and the stress on the children resulting from the custody situation at that time.[249] It noted that courts around the country agreed that a change in custody based on a parent's homosexuality is not permissible unless harm to the child is evidenced.[250] The court then adopted the nexus test: "Sexual orientation, in and of itself, cannot be the basis for awarding or removing custody; only when the parent's sexual orientation is shown to cause harm to the child, such that the child's best interests are not served, should sexual orientation be a factor in determining custody."[251] Unlike the Supreme Court of North Carolina in *Pulliam*, the Supreme Court of Idaho explicitly adopted the nexus test and found the custody determination *was not made*—even in part—on the losing parent's homosexuality.[252] *Lawrence* played a major role both in the court's refusal to base its decision on the sexual orientation of the parent and in its adoption of the nexus test.[253]

In conclusion, *Pulliam*'s change of custody based on a moral conclusion, rather than an effect on the children, has been undermined by the warning of *Lawrence* that the existence of gays and lesbians should not be "demeaned" and that the use of morality alone cannot justify government prejudice against homosexuals.[254] *Pulliam*'s moral-based analysis has been further destabilized by the recognition of various courts that the broad principles announced in *Lawrence* have an impact beyond the confines of an adult's right to private, consensual sexual conduct.[255]

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247. McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).

248. *Id.* at 116–17.

249. *Id.* at 118–20.

250. *Id.* at 117 (citing *In re* Marriage of Birdsall, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988); Pryor v. Pryor, 714 N.E.2d 743 (Ind. Ct. App. 1999); Scott v. Scott, 665 So. 2d 760 (La. Ct. App. 1995); T.C.H. v. K.M.H., 784 S.W.2d 281 (Mo. Ct. App. 1989)).

251. *Id.*

252. *Id.* at 118.

253. *Id.* at 117.

254. *See* Lawrence v. Texas, 539 U.S. 558, 571, 578 (2003).

255. In addition to *Hobbs v. Smith* and the custody cases discussed earlier in this Subsection, *Lawrence* has had an impact on the right of gays and lesbians to marry. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948, 953 (Mass. 2003).

III. THE SOLUTION: A TRUE NEXUS TEST WITHOUT SEXUAL ORIENTATION AS A FACTOR

To cure the flaws in North Carolina's approach to child custody previously discussed, *Pulliam v. Smith* must be overruled, and North Carolina courts should return to a true nexus test to adhere to the "best interest of the child" standard which has long been the rule in custody disputes.[256] Traditionally, the nexus test requires courts to find that a parent's homosexuality or sexual activity has some effect on the child before that homosexuality or sexual activity is considered in the custody determination.[257] This requirement of finding an effect on the child is consistent with the requirement that the court ground its decision in the best interest of the child.[258] "The other approaches arbitrarily deprive fit parents of custody and bear no relationship to the best interest standard."[259] Thus, both the per se rule and the presumption of harm standard, as seen in *Pulliam*, fail to consider the best interest of the child. "Far from it, these approaches often sacrifice the interests of particular children in order to express judicial disapproval of parental conduct."[260] Therefore, North Carolina courts should return to the nexus test, which requires showing effect on the child in order to meet the best interests of children in custody disputes.

A. *How to Prevent Misapplications of the Nexus Test*

In theory, the nexus test just described appears advantageous for gay and lesbian parents. Even under this standard, however, gay and lesbian parents are discriminated against based solely on their sexual

256. *See* Browning v. Helff, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000). *See generally* Thomas L. Fowler & Ilene B. Nelson, *Navigating Custody Waters Without a Polar Star: Third-Party Custody Proceedings After* Petersen v. Rodgers *and* Price v. Howard, 76 N.C. L. REV. 2145, 2155 n.36 (1998) (providing an exceptional history of the development of the best interest standard as the polar star in North Carolina custody cases). It is the best interest of the child that "is the paramount consideration which guides the court in awarding the custody of the minor child." Paschall v. Paschall, 26 N.C. App. 491, 493, 216 S.E.2d 415, 416 (1975); *see also* Benedict v. Coe, 117 N.C. App. 369, 375, 451 S.E.2d 320, 323 (1994) (noting, however, that trial courts have great discretion in this area). Neither party has the burden of proof under this second prong. Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 579 (2000) ("[T]he trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue [of the best interest of the child]." (quoting Ramirez-Barker v. Barker, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1982))); Regan v. Smith, 131 N.C. App. 851, 853, 509 S.E.2d 452, 454 (1998).

257. *See supra* text accompanying note 53.

258. Meyers, *supra* note 113, at 843.

259. *Id.*

260. Shapiro, *supra* note 38, at 664.

orientation.[261] Courts frequently misapply the nexus test in cases involving gay and lesbian parents by: (1) hypothesizing about future harm; and (2) generally failing to define harm.[262] The first misapplication happens when "courts engage in or permit speculation about potential future harm, rather than confining the inquiry to proven harm or even harm which is reasonably likely to occur. This dilutes the essential ingredient of a nexus test—the requirement that the parent's conduct cause harm."[263] The second misapplication occurs because neither appellate courts nor the legislature[264] have defined what satisfies the "effect" or "harm" requirement under the nexus test.[265] "This leaves trial judges and the appellate courts free to identify wide-ranging and ill-defined harms, including stigma and moral injury, without engaging in any careful analysis."[266] North Carolina courts should address these misapplications head on.

First, in modification-of-custody cases, appellate courts should prevent inappropriate speculation about future harm by *requiring* the trial courts to make specific findings of fact. The trial court should be required to find evidence that: (1) there has been a substantial change of circumstances; (2) this change has an effect on the child; and (3) modification of the custody order is in the child's best interest. The findings of these three factors are critical to controlling the broad discretion of the trial courts in custody matters.[267] The appellate courts must be guided by the standard that "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[268] These findings are purportedly required under the current standard for modifying custody orders in North Carolina,[269] but the appellate courts must be

261. *Id.* at 642 ("The problems facing lesbian and gay parents are more serious than reading recent opinions suggests: due to their often accurate perception that courts may be hostile to them, lesbian and gay parents are disadvantaged in private resolution of custody disputes and are less able to adopt strong bargaining positions.").

262. *Id.*

263. *Id.*

264. *See supra* text accompanying note 49.

265. Shapiro, *supra* note 38, at 642.

266. *Id.* ("By invoking such harms and indulging in unsupported speculation about their likely occurrence, courts can freely deny custody to lesbian and gay parents while claiming to employ a nexus test.").

267. *See* Evans v. Evans, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) ("[E]vidence of 'speculation or conjecture that a detrimental change may take place sometime in the future' will not support a change in custody." (quoting Wehlau v. Witek, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985))).

268. Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (quoting State v. Smith, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980)).

269. *Id.* at 474, 478, 586 S.E.2d at 253, 255.

stricter when reviewing a lower court's findings. The Supreme Court of North Carolina has stated that

> [t]o avoid further confusion, [it] would encourage trial courts, when memorializing their findings of fact, to pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interest.[270]

The stakes are too high for mere encouragement to be enough; appellate courts should remand cases if these findings are not made. The Supreme Court of North Carolina in *Pulliam* failed to recognize that the trial court made no findings supported by substantial evidence that the change in circumstances had an effect on the children.[271]

Monitoring the discretion of the lower courts through required findings of fact alone is insufficient to eliminate the double standard that exists for gay and lesbian parents and to resolve the constitutional predicament *Pulliam* created. In fact, *Pulliam* illustrates why the divide within the law, not merely the procedure, in gay and lesbian custody cases must be resolved. The Supreme Court of North Carolina in *Pulliam* misread the facts of the case and explained that it did not "hold that the mere homosexual status of a parent is sufficient, taken alone, to support denying such parent custody of his or her child or children. That question is not presented by the facts of this case."[272] Indeed, that question was the *exact* issue

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> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence .... [T]he evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection.

REYNOLDS, *supra* note 51, § 13.108; *see also* Tucker v. Tucker, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975); Johnson v. Adolf, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002) (noting that findings of fact are required to support the court's determination that modification is in best interest of the child and this determination must be made explicitly); Benedict v. Coe, 117 N.C. App. 369, 377, 451 S.E.2d 320, 324 (1994); Greer v. Greer, 101 N.C. App. 351, 354, 399 S.E.2d 399, 401 (1991) ("The trial court [has a] duty to make findings of fact supported by competent evidence that demonstrate a showing of changed circumstances.").

270. *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257.

271. *See supra* Part I.D.

272. Pulliam v. Smith, 348 N.C. 616, 623, 627, 501 S.E.2d 898, 902, 904 (1998).

before the court, and the court addressed the issue incorrectly. As analyzed above, the only evidence of harm presented was that one son cried when told his father was gay, and that alone was insufficient to change custody.[273] Sexual *activity* was not a relevant issue in the case; no evidence existed that the children were exposed to inappropriate sexual language or sexual acts, nor was there any indication of sexual abuse. The issue was Fred Smith's sexual orientation—that is what caused Carol Pulliam to bring the custody suit,[274] that is what formed the basis of the trial court's and state supreme court's analyses,[275] and that is why Fred Smith ultimately lost custody of his two sons. Thus, *Pulliam v. Smith* must be overruled to return North Carolina courts to a true nexus test.

More than overruling *Pulliam* is required, however, to prevent future misapplication of the nexus test. To correct the divide within the law, upon overruling *Pulliam*, the court should define harm to prevent future misapplication of the nexus test and declare that the sexual orientation of a parent is not a legitimate consideration in the "best interest of the child" analysis.[276] When determining if modification is in the child's best interest, it is the trial court's responsibility to choose the "environment, which will ... best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties."[277] The court "must make a comparison between the two applicants considering all factors that indicate which of the two is 'best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being.' "[278] Relevant factors in this analysis include "the wishes of the child, the character and personality traits of the parents, and the conduct of the parents."[279] Additionally, the need for stability in crafting custody

273. *See* discussion *supra* Part I.D.

274. Pulliam v. Smith, 124 N.C. App. 144, 146, 476 S.E.2d 446, 448 (1996), *rev'd*, 348 N.C. 616, 501 S.E.2d 898 (1998).

275. *See supra* Parts I.A and I.D.

276. This breaks with the traditional wording of the nexus test which requires courts to find that the parent's homosexuality has an effect on the child before it may be considered. *See supra* text accompanying note 53. The traditional approach allows sexual orientation itself to be considered. This Comment distinguishes between sexual orientation and sexual activity and argues that sexual orientation itself should never be a factor, but that sexual activity may be a factor under the nexus test.

277. Benedict v. Coe, 117 N.C. App. 369, 375–76, 451 S.E.2d 320, 323–24 (1994) (quoting *In re* Peal, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982)); *see also* Blackley v. Blackley, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

278. Evans v. Evans, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (quoting Griffith v. Griffith, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954)).

279. REYNOLDS, *supra* note 51, § 13.7c (noting that the focus should be on "the strength of the relationship" between child and parents, and explaining that, while the

orders should be considered.[280] Sexual orientation is not one of these relevant factors.

In custody decisions, courts must distinguish between sexual *orientation*, which may not be a factor, and sexual *activity*, which may be a factor. This means that harm will be based not on a court's moral opinion but on research grounded in social science. This research "indicate[s] that a child is not harmed by the mere fact that the child's parent is gay or lesbian, or that the parent associates with other homosexuals, or that the parent is open and honest about his or her sexuality."[281] Rather, studies suggest the "best interest of the child" may include that:

> 1. a child be aware of her [parent's] sexual identity early;
> 2. the [parent] be open and comfortable with [his or] her sexual identity;
> 3. the child be a part of [a lesbian or gay] community and know other children of lesbians [or gays];
> 4. the child be able to talk to peers, family members, and outsiders about the [parent's] sexual identity; and
> 5. if the [parent] is living with or committed to a long-term partner, the couple model healthy nonsexual intimacy and affection, to ensure the child's sense of security and well-being.
>
> Ultimately, courts need to define harm under the nexus standard to prevent its being used to deny a lesbian or gay parent custody of a child based on behavior that is, in fact, in the best interests of the child.[282]

Numerous counter-arguments exist to this definition of harm. One such argument is that a home with one father and one mother is the optimal environment for child rearing. However, even the Supreme Court has recognized that "[t]he demographic changes of

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environment the child lives in with the parent is relevant, it is "generally not as important"); *see also In Re* Custody of Williamson, 32 N.C. App. 616, 620–21, 233 S.E.2d 677, 680–81 (1977) (Finding that although not controlling, the wishes of a child who has reached the age of discretion are entitled to consideration in awarding custody "because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child." (quoting Brooks v. Brooks, 12 N.C. App. 626, 631, 184 S.E.2d 417, 420 (1971))).

280. *See* Tucker v. Tucker, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975) ("As a general rule in this State, parents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and this right may not lightly be denied or interfered with by action of the courts.").

281. Huff, *supra* note 38, at 695, 714.

282. *Id.* at 715.

the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."[283] It has also been argued that, at minimum, more study is necessary before any conclusion can be drawn about the effect of a parent's homosexuality on children.[284] This position, based on alleged insufficient study, is an inadequate justification to *change* custody because it means the nexus test's requirement of effect on the child has *not* been shown. Until effect is shown, custody should not be modified.[285]

The definition of harm advocated here does not comprise the stigma generally associated with homosexuality. Indeed, stigma is an improper consideration because the Supreme Court of the United States held in *Palmore v. Sidodi*[286] that

> the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother .... The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[287]

Although the Court in *Palmore* used strict scrutiny because it found a race-based classification, "it did not condemn only racial biases, but more generally 'private' ones of presumably wide variety."[288] Furthermore, "*Palmore*'s actual holding—that wishing to shield a child from bigotry aimed at a parent is no reason to deny custody to

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283. Troxel v. Granville, 530 U.S. 57, 63 (2000).

284. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 980 (Mass. 2003) (Cordy, J., dissenting).

> Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, compromise a very recent phenomenon.

Id.

285. *See In re* Adoption of Child by J.M.G., 632 A.2d 550, 553–54 (N.J. Super. Ct. Ch. Div. 1993) (recognizing that even though studies have been limited, the "development of gender identity, of gender role behavior, and sexual preference among offspring of gay and lesbian parents was found in every study to fall within normal bounds" (quoting Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1031–32 (1992))).

286. 466 U.S. 429 (1984).

287. *Id.* at 433.

288. Larsen, *supra* note 97, at 86.

that parent—is entirely applicable to cases where the parent is a member of other stigmatized groups."[289] For example, a Florida district court of appeal found that "community beliefs and possible reactions" against the parent's homosexuality could not be considered as having effect on the child under *Palmore*.[290] The court recognized the stigma comes from the fact that the parent *is* a homosexual, not that the child lives with the parent.[291] Regardless of the court's custody decision, the child will still have a parent who is homosexual. Therefore, stigma is not a valid concern under the nexus test advocated here.

B. *One Standard for All Parents: Focusing on Sexual Activity When Appropriate and Not Sexual Orientation*

After explicitly defining harm so that sexual orientation is not a consideration in the "best interest of the child" analysis, it should be made clear that sexual activity may still be a relevant factor. The same conduct that harms children of heterosexual parents will harm children of homosexual parents. This means that the sexual activity of all parents should be held to the same standard. One meaningful part of such standard is that "[d]irect exposure to a parent's intimate conduct may be detrimental to the child's well-being. Thus, consideration of the [sexual activity] to which the child has been directly exposed may be appropriate under the nexus test."[292] Courts are required to "discriminate between intimate sexual [activity], exposure to which might harm a child, and gestures of affection, exposure to which may contribute to a child's understanding of human relationships and thus to the child's well-being."[293] Courts must therefore focus on the conduct involved and not the sexual identity of the parent. The main rule can be summarized as follows: "Conduct which would be inappropriate for a married heterosexual couple is also inappropriate for a lesbian or gay couple. Conversely, conduct in which a married heterosexual couple may engage in front

289. *Id.* at 86–87.

290. Jacoby v. Jacoby, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000); *see also In re* Adoption of Child by J.M.G., 632 A.2d at 552 ("[I]f there is ever any harassment or community disapproval, this court should have no role in supporting or tacitly approving such behavior.").

291. *Jacoby*, 763 So. 2d at 413; *see also* Gill, *supra* note 134, at 373 ("Notwithstanding evidence of stigma, courts should still acknowledge that regardless of the custody order, the gay parent is still gay. If the child's peers are going to tease because the parent is gay, removing the child from custody will not rectify the problem.").

292. Shapiro, *supra* note 38, at 666.

293. *Id.*

of their children should also be appropriate for a lesbian or gay couple."[294]

Consequently, to purge the double standard that exists for gay and lesbian parents and to meet the constitutional touchstone set out in *Lawrence*, sexual orientation should not be a consideration in determining "harm" under the nexus test. To this end, *Pulliam* must be overruled to return North Carolina to the nexus test which requires specific evidence of harm to the child from the sexual activity of the parent and to make clear that this single standard exists for all parents. Adherence to a true nexus test means that courts will not consider collateral issues such as a parent's sexual orientation but instead will focus on the best interest of the child.

CONCLUSION

In *Pulliam v. Smith*, Fred Smith lost custody of the two sons he raised from birth because of his sexual orientation. Currently, the Supreme Court of North Carolina claims to employ a nexus test requiring "evidence *directly* linking the change [of circumstances] to the welfare of the child[ren]."[295] The *Pulliam* court's approach, however, did not match its rhetoric. Instead, it removed custody from Fred Smith without finding sufficient evidence of any effect on the children, thus applying the presumption of harm standard.[296] Under the presumption of harm standard, courts may "presume *without evidence* that a homosexual parent's conduct adversely affects the child."[297]

The Supreme Court of North Carolina's endorsement of the presumption of harm standard was a step backward and was problematic from the beginning. The presumption of harm standard denies custody to many gay and lesbian parents who are excellent caregivers, even when such parents exhibit superior parenting skills as compared to the heterosexual parents involved in the custody dispute. Because courts are allowed to delve into the collateral issue of a parent's sexual orientation instead of focusing on the best interest of the child, courts often do not correctly compare the two parents on a range of factors, including "the wishes of the child, the character and

294. *Id.* ("[U]niform standards would do much to improve the position of children of lesbian and gay parents as well as the parents themselves, for the conduct at issue in most cases is conduct which is readily seen as innocuous if engaged in by a heterosexual couple.").

295. Shipman v. Shipman, 357 N.C. 471, 478, 586 S.E.2d 250, 255–56 (2003).

296. *See supra* Part I.D.

297. Huff, *supra* note 38, at 700 (emphasis added).

personality traits of the parents, . . . the conduct of the parents,"[298] and the need for stability.[299] In *Pulliam*, the court failed to consider the wishes of the children and also failed to adequately analyze the character and personalities of the parents.

Furthermore, *Pulliam* erroneously set precedent disadvantaging gay and lesbian parents by finding that Fred Smith's sexual activity while the children were in the home supported a change of custody.[300] In 2000, the Court of Appeals of North Carolina held in *Browning v. Helff* that the children's presence in the home where one parent was residing with a person of the opposite sex in a nonmarital relationship did not have effect on them.

For *Pulliam* to be in harmony with *Browning* and the nexus requirement, one cannot assert that Fred Smith's *private* sexual activity in the home affected the two boys simply because the children were also in the home. Thus, the Supreme Court of North Carolina discriminated against Fred Smith because he engaged in sexual conduct with another man. *Pulliam* created a double standard for consideration of sexual activity, subjecting homosexual parents to a higher degree of scrutiny than heterosexual parents—a level of scrutiny that the parents may never be able to meet under the presumption of harm standard if courts can presume harm when none exists.

This higher scrutiny under *Pulliam*'s presumption of harm approach denies gay and lesbian parents the freedom to be their authentic selves. If they are honest about their own sexual orientation with their own children, kiss their partner on the cheek in front of their child, or live with their partner, gay and lesbian parents risk losing custody of their children. Even if gay and lesbian parents manage to win custody, it often comes at the price of sacrificing their ability to show affection to their life partner or to live with that person. The courts have made it clear that gay and lesbian parents must choose between their children and their partners. Yet, heterosexual parents are not forced to make this choice.

In the last ten years, it has become even clearer that *Pulliam*'s reasoning is fatally flawed. While *Pulliam* resulted in a move away from the nexus requirement, courts across the country have moved in the opposite direction.[301] The courts' focus on homosexuality

298. REYNOLDS, *supra* note 51, § 13.7c.
299. Tucker v. Tucker, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975).
300. Pulliam v. Smith, 348 N.C. 616, 626–27, 501 S.E.2d 898, 904 (1998).
301. *See* discussion *supra* Part II.B.

divorced from any effect on the children and the decision of the Supreme Court of the United States in *Lawrence v. Texas* likely make *Pulliam*'s presumption of harm standard constitutionally suspect.[302] Grounded in an expansive concept of liberty,[303] the *Lawrence* Court "broadly announced a substantive due process right of adult sexual intimacy for all Americans."[304] *Lawrence* "stands for the proposition that gay couples, 'whether or not entitled to formal recognition in the law,' have the right to develop and maintain personal relationships without state intrusion or penalty. Gay parents should therefore not have to choose between their partners and their children."[305] The Court's caution against the use of morality to disadvantage gays and lesbians[306] likely dealt a fatal blow to *Pulliam*. The *Pulliam* court sanctioned a change of custody based on the court's own moral view about homosexuality rather than its effect on the children. It defied the commands set out in *Lawrence* that the existence of homosexuals should not be "demeaned" and that morality alone is insufficient to justify discrimination against gays and lesbians.[307]

To meet *Lawrence*'s constitutional command and to correct the disparate standards in North Carolina between heterosexual parents and homosexual parents, *Pulliam v. Smith* should be overruled. The Supreme Court of North Carolina should adopt one standard for all parents when considering their sexual activity in modification-of-custody cases: a true nexus test requiring evidence of effect on the child. To prevent misapplication of this nexus test, appellate courts must prevent inappropriate speculation about future harm. Appellate courts should require the trial courts to make specific findings of fact supported by substantial evidence that there has been a substantial change of circumstances, that this change has effect on the child, and that modification of the custody order is in the child's best interest. This will "constrain freewheeling judicial discretion and focus the court's inquiry narrowly on the facts and issues relevant to

302. "Given cases like *Lawrence* and *Romer*, can denying custody to a fit gay parent whose sexuality has caused no harm to the child be anything other than a 'status-based enactment divorced from any factual context' that 'demeans the lives of homosexual persons?' " Larsen, *supra* note 97, at 79 (citations omitted).

303. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003); *see also* Larsen, *supra* note 97, at 58 (noting that the *Lawrence* Court examined the rights of a "person," not "gay person," to find a substantive due process right to sexual privacy).

304. Larsen, *supra* note 97, at 57.

305. *Id.* at 94.

306. *Lawrence*, 539 U.S. at 559.

307. *Id.* at 559, 578.

the well-being of the child."[308] For the nexus test to be effective in guiding courts towards the best interest of the children, the fatal defect in the law when gay and lesbian parents are concerned must be corrected. The Supreme Court of North Carolina should define harm so that sexual orientation is not a legitimate factor in the "best interest of the child" analysis. Courts must distinguish between sexual orientation, which is not a relevant factor, and sexual activity, which may be a relevant factor. This will place all parents, gay and straight, on the same level. The same sexual activity harmful to the children of heterosexual parents will be harmful to the children of homosexual parents. The focus of the courts will thus be shifted to determining what is in the best interest of the children rather than the sexual orientation of the parents.

Ultimately, courts must not be swayed by prejudice nor concentrate unduly on the parents. Instead, courts should do what is best for North Carolina's children by remaining faithful to the long-held principle that "the welfare of the infants themselves is the polar star by which the discretion of the courts is to be guided."[309] As one court recognized fifteen years ago:

> [F]amilies differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.[310]

With society's ever-growing diversity and increasing inclusion of gay and lesbian citizens, *Pulliam v. Smith* is out of step with social and legal norms and must be overruled.

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308. Shapiro, *supra* note 38, at 664.

309. *In re* Lewis, 88 N.C. 47, 50 (1883).

310. *In re* Adoption of Child by J.M.G., 632 A.2d 550, 554–55 (N.J. Super. Ct. Ch. Div. 1993).

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