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Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System

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**TOWARD PROVIDING A WELCOMING HOME
FOR ALL: ENACTING A NEW APPROACH TO
ADDRESS THE LONGSTANDING PROBLEMS
LESBIAN, GAY, BISEXUAL, AND
TRANSGENDER YOUTH FACE IN THE
FOSTER CARE SYSTEM**

*James W. Gilliam, Jr.**

*Why don't you just take your faggot ass out of my house?*¹

I. INTRODUCTION

*To change the meaning of the law we must offer an
alternative vision, imagine a different future.*²

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1. A young boy recounts his mother's final words to him before leaving home and becoming part of the child welfare system in, Nancy D. Polikoff, *Resisting "Don't Ask, Don't Tell" in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth*, 48 HASTINGS L.J. 1183, 1186 (1997).

The American foster care system fails the over 568,000³ children and teenagers under the care of the many state agencies charged with raising and protecting them. Though foster care is intended to provide a “temporary, safe haven for children whose parents are unable to care for them,”⁴ this is not what many youth in foster care experience.⁵ Of particular interest to advocates working in Southern California, Los Angeles County alone has nearly 10 percent of the total number of children in foster care, with over 53,593 children under its care.⁶ This is the largest such system in the nation, which, presumably, also means that there are more LGBT⁷ youth in foster care in Los Angeles than in any other region of the country.

Even worse, LGBT teens, or those who are perceived as such, often experience more severe problems in the foster care system “because of prejudice against their sexual orientation or their

2. Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 325 (1996).

3. See ERIC FERRERO ET AL., ACLU LESBIAN & GAY RIGHTS PROJECT, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 39 (2002). These statistics are taken from the 2000 report of the United States Department of Health and Human Services’ Adoption and Foster Care Analysis and Reporting System (AFCARS) and the National Adoption Information Clearinghouse (NAIC). *Id.* at 38.

4. COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEFENSE AND EDUCATION FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 9 (2001) (quoting Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204 (1988)).

5. See FERRERO ET AL., *supra* note 3, at 40 (“A national crisis in child welfare—with kids backlogged in foster care waiting to be adopted and not enough qualified adoptive parents coming forward—has developed gradually over the last couple of decades.”). See also Mushlin, *supra* note 4, at 199–200 (listing examples of foster child abuse, including physical and sexual assaults, failure to treat for medical conditions, and being forced to drink urine).

6. See Troy Anderson, *Foster Care Failure: Audit Says County’s “Legal Orphans” Languishing in System*, DAILY NEWS OF L.A., Mar. 8, 2002, at N1.

7. LGBT is a shorthand abbreviation for lesbian, gay, bisexual, or transgendered. At other times throughout this article, the phrase “gay and lesbian” may be used interchangeably with LGBT; all such references are meant to be all-inclusive of the gay, lesbian, bisexual, and transgender community as well.

nonconformity to gender stereotypes.”⁸ For example, gay youth have been beaten by other residents while staff watched; taunted by foster parents, staff, and other residents because of their homosexuality; sexually assaulted by staff members; and, forced to undergo conversion therapy in an attempt to teach them that being gay or lesbian is, “repulsive and deviant.”⁹ Because LGBT youth comprise such a large percentage of those in foster care,¹⁰ the foster care system’s failure to protect these adolescents and its failure to place them in welcoming homes presents an even more serious concern. Indeed, “there is a link, perhaps a very strong one, between a child’s sexuality, the ability of families to cope with a gay child, and the likelihood of entry into [the foster care] system.”¹¹

8. SULLIVAN ET AL., *supra* note 4, at 7. Lambda undertook this survey of fourteen states’ LGBT-related foster care policies and services as part of an effort to “urge[] foster care systems and agencies to take crucial remedial steps to serve their LGBT clients.” *Id.* After months of research and policy evaluation, “[w]hat emerge[d] from this survey is a picture of nationwide neglect of LGBT youth in foster care.” *Id.* A survey conducted seven years earlier by New York City also found that “lesbian and gay adolescents have often been misunderstood, neglected and in some instances discriminated against by the child welfare system.” L. Michael Gipson, *Poverty, Race and LGBT Youth*, POVERTY & RACE (Poverty & Race Research Council, Washington, D.C.), Mar./Apr. 2002, at 6.

9. *See* SULLIVAN ET AL., *supra* note 4, at 9. These examples are taken collectively from a book presenting first-hand reports of the “multiple experiences of fifty-four gay/lesbian adolescents in U.S. and Canadian out-of-home child welfare systems.” GERALD P. MALLON, *WE DON’T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN CHILD WELFARE SYSTEMS 2* (1998). Described as “[t]he first comprehensive examination of the experiences of gay and lesbian youths in the child welfare system,” Dr. Mallon’s book “presents narratives of marginalized young people trying to find the ‘right fit.’” *Id.* at back cover.

10. Based on the total number of children in foster care and the prevailing beliefs that five to ten percent of the population is gay or lesbian, one should assume that at a minimum 28,000 to 56,000 lesbian and gay adolescents are in foster care. It is believed, however, that these numbers are deceptively low as gays and lesbians make up a disproportionate part of the total number of adolescents in foster care “[b]ecause gay, lesbian, and gender-nonconforming adolescents commonly find themselves disapproved of and overtly rejected by their own families, [and therefore] they are more likely to be forced from their homes to become part of the foster care, runaway, and ‘throwaway’ populations.” SULLIVAN ET AL., *supra* note 4, at 11.

11. Colleen A. Sullivan, *Kids, Courts, and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 TUL. J.L. & SEXUALITY 31, 35 (1996); *see also* Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in 3

Additionally, state governments' and the foster care agencies' failure to take actions that are in the best interests of the children under their care often leads to increased levels of drug use, homelessness, street prostitution, and even suicide—situations that are a reality already for far too many LGBT teens.¹² For example, “[a]gencies serving street youth in Los Angeles estimate that 25-35% of homeless youth are lesbian or gay, and in Seattle, 40% of homeless youth are estimated to be lesbian or gay.”¹³

Complicating matters, most states, as well as the federal government, have not enacted any laws protecting LGBT youth in foster care from discrimination based on their sexual orientation. As a result, LGBT teens experience and report many instances of abuse and neglect.

This mistreatment of the most vulnerable members of the LGBT community, society's “throw-aways,”¹⁴ should be of paramount concern. As Ryan and Futterman explain:

The struggle to develop and integrate a positive adult identity—a primary developmental task for all adolescents—becomes an even greater challenge for lesbian and gay youth who learn from earliest childhood the profound stigma of a homosexual identity. Unlike many of their heterosexual peers, lesbian and gay adolescents have

REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 113 (Marcia R. Feinleib ed., 1989) (stating that an estimated twenty-eight percent of LGBT youth are forced to leave home because of conflicts over their sexual identity).

12. See Gibson, *supra* note 11, at 114 (stating that LGBT youth “comprise as many as twenty-five percent of all youth living on the streets in this country”); ELAINE LANDAU, ON THE STREETS: THE LIVES OF ADOLESCENT PROSTITUTES 43–44 (1987) (detailing the stories of two young men who became street prostitutes after being forced to leave their homes as a result of their sexual orientation); see also Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 933 (2001) (“[T]he chances of suicide, homelessness, or substance abuse, for a sexual minority or sexually questioning adolescent, vary with the tolerance for sexual variation within the home.”).

13. CAITLIN RYAN & DONNA FUTTERMAN, LESBIAN & GAY YOUTH CARE & COUNSELING: THE FIRST COMPREHENSIVE GUIDE TO HEALTH & MENTAL HEALTH CARE 25 (1998). Ryan and Futterman's groundbreaking handbook on the care and counseling of lesbian and gay youth is the first of its kind and received a 1998 Book of the Year Award from the Journal of Nursing.

14. *Id.* at 25.

no built-in support system

Shunned by the social institutions that routinely provide emotional support and positive reinforcement for children and adolescents—families, religious organizations, schools, and peer groups—lesbian and gay adolescents must negotiate many important milestones without feedback or support.¹⁵

As a result, to combat this issue, “[b]y default, the protection of gay children is the work of gay adults. No one else is going to do it, for no one ever has.”¹⁶ This is especially true with regard to providing appropriate homes for these youth. As one commentator emphasizes, “[l]egislation on foster care and adoption . . . is one of the most critical issues we face today.”¹⁷

To address this problem correctly, states should enact policies that provide for the matching of LGBT teenagers with parents of similar sexual orientation or other adults who have expressed an ability and willingness to serve as parents to these youth. This program would be similar to the race-matching programs currently utilized.¹⁸ Indicators suggest that LGBT adolescents raised by gay or lesbian parents have a more positive experience coming to terms with their sexuality. Thus, more placements like these will improve the foster care experience for a greater number of LGBT youth.¹⁹

15. *Id.* at 4. The research Dr. Sherry Walker and I conducted and presented confirmed further the challenges LGBT youth face in attempting to find institutional support. Dr. Sherry Walker & James W. Gilliam, *The Lesbianaytrans Adolescent Experience*, Presentation at the Annual Meeting of the Southern Sociological Society (Apr. 9, 1999) and at the Eighth Annual Tennessee Undergraduate Social Science Symposium (Nov. 10–11, 1999) (on file with author).

16. Ruskola, *supra* note 2, at 326.

17. Rebecca Isaacs, *The Beltway and Beyond: The Struggle for Gay, Lesbian, Bisexual and Transgender Equality*, 48 CLEV. ST. L. REV. 25, 27 (2000).

18. See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 879 (1998).

19. For example, in one account of gay and lesbian youth, gay parents raised half of the individuals who reported “coming out” as a positive experience. See Sullivan, *supra* note 11, at 34 (discussing TWO TEENAGERS IN TWENTY: WRITINGS BY GAY AND LESBIAN YOUTH 8–9 (Ann Heron ed., 1994) (“Only four of the forty-three youths in the book report coming out as a good experience—two of those four were children of gay parents.”)).

Most telling is that these types of matching programs instituted on a limited basis by individual agencies in cities such as Los Angeles,²⁰ New York, Toronto, Washington D.C., Philadelphia, San Francisco, and Trenton²¹ are experiencing success. Dr. Mallon describes these programs as “offer[ing] nurturing and safe environments for young people who have had difficulty finding a good fit with their own families or within existing child welfare systems.”²² This Article addresses the constitutionality of such sexual orientation-based matching policies for foster care placement, and it concludes, ultimately, that such policies would withstand constitutional scrutiny.

Part II of this Article outlines the current problems openly gay and lesbian teenagers in foster care face as a result of the flawed system used to place them in foster homes. Next, Part III provides a solution to the problems. Part IV addresses the constitutionality of enacting sexual orientation-based matching policies. Finally, Part V concludes the Article with a call to action for state governments; foster care agencies, parents, and staff; and, lesbian and gay adults to take steps to address the needs of this group of adolescents.

II. GAY AND LESBIAN TEENS SUFFER IN TODAY’S FOSTER CARE SYSTEM

*Pushed far into the margins of society by indifference, discrimination, and harassment, LGBT youth in foster care face an array of problems too often ignored—or worsened—by the child welfare agencies responsible for their safety and care.*²³

20. Gay and Lesbian Adolescent Social Services (“GLASS”) is a licensed foster care agency in Los Angeles that recruits, licenses, and certifies gay adults as foster parents for the children in its group homes and foster care programs. More information about GLASS’s programs is available at <http://www.glassla.org>.

21. See HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 3:25 (Beth McKenna ed., 11th ed. 2002) (stating that agencies in progressive cities such as these have taken the lead in placing gay teenagers in gay foster homes); MALLON, *supra* note 9, at 142 (specifically citing programs in many of these cities).

22. MALLON, *supra* note 9, at 142.

23. SULLIVAN ET AL., *supra* note 4, at 9.

Gay and lesbian teens, and those who do not conform to traditional gender stereotypes, often suffer more than other adolescents in the foster care system. As the Lambda Legal Defense & Education Fund (“Lambda”) determined in a recent report:

These problems range from a complete lack of recognition of their very existence and needs by child welfare systems, to insensitive and discriminatory treatment, to outright harassment and violence at the hands not only of peers or foster parents, but also of the child welfare staff responsible for their protection.²⁴

A variety of factors make LGBT foster youth more vulnerable to mistreatment within the foster care system. For example, because religious organizations operate so many foster homes, religious beliefs about homosexuality may play a decisive role in the level of care given to LGBT foster youth. The Kentucky Baptist Home for Children (“KBHC”), the largest private residential child-care provider in Kentucky, illustrates this harsh reality. KBHC claims that “homosexuality is contrary to the religious morals that it attempts to instill in the youth in its care.”²⁵ Moreover, KBHC fired one of its youth counselors because she was a lesbian.²⁶ One can only imagine what these beliefs and actions translate into for the openly gay and lesbian adolescents of Kentucky who are under KBHC’s care, as well as for those placed in similar settings.²⁷ As a family law attorney emphasizes,

When you put these kids in an environment where they are taught that because of their sexual orientation they are sinners, that they have something to be ashamed of, it potentially destroys their self-esteem And when you systematically take away any chance that they have to see a healthy adult version of themselves, these are the worst

24. *Id.* at 7.

25. *Id.* at 28 n.49.

26. *See id.* The counselor challenged her termination. *See* *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757 (W.D. Ky. 2001).

27. As Dr. Mallon reports about the experiences of one young man he interviewed as part of his extensive study of LGBT youth, “the more ‘religious’ a staff member was, the more unlikely it was for him or her to deal positively with those who were homosexually oriented.” MALLON, *supra* note 9, at 75.

environments to put these kids in.²⁸

This type of intolerance and its potential effects demonstrate clearly why LGBT foster youth should be placed with gay and lesbian foster parents rather than being subjected to abuse and discrimination by foster care providers who believe that their religion requires them to “convert” LGBT teens. As one California assemblyman articulates, “We want to make sure gay teens don’t stay with foster parents who aren’t equipped to deal with these issues in a healthy and caring way.”²⁹

Most child welfare systems completely ignore the existence of LGBT youth, and thus fail to provide any of the services they need during their adolescent development.³⁰ Making matters worse, potential “foster parents are not trained to understand gay and lesbian adolescent sexual development, to recognize and overcome their own personal discomfort of adolescent sexuality, [or] to help gay and lesbian teenagers face and respond to social stigma that they experience.”³¹ Because the agencies administering foster care programs are inadequately prepared to handle issues relating to sexual orientation, LGBT foster youth suffer.

Conversely, gay and lesbian adults who have already experienced and overcome the “discomfort” of adolescent

28. Deb Price, *Foster Care Needs to Nurture Gay Kids*, DETROIT NEWS, Dec. 4, 2000, at 9A (quoting Michael Adams of the American Civil Liberties Union (ACLU)).

29. Jim Wasserman, *Assembly Passes Anti-Bias Foster Parent Training Bill*, CONTRA COSTA TIMES (Walnut Creek, Cal.), May 12, 2003, 2003 WL 19955769 (quoting Assemblyman Paul Koretz, D-West Hollywood).

30. See, e.g., SULLIVAN ET AL., *supra* note 4, at 31 (“Arizona has not begun to address the needs of LGBT youth.”); *id.* at 53 (“Colorado . . . has no statewide policies, training, or programs to prevent discrimination against LGBT youth”); *id.* at 93 (Kentucky “currently contracts with a private agency . . . that . . . maintains policies that have the effect of discriminating against LGBT foster youth.”); *id.* at 103 (stating that a representative from Montana’s Child and Family Services Division responded to Lambda’s survey by saying there were “no” LGBT youth in the state’s foster care system and that “Montana has no non-discrimination policies, training, or services for the benefit of LGBT youth”); *id.* at 137 (North Carolina “offers no training or services to address the needs of LGBT youth in its care.”); *id.* at 147 (“Ohio . . . does not require or provide any training on LGBT issues to foster parents or foster care staff.”); *id.* at 157 (Texas “has little in the way of training or services to address the needs of LGBT youth in foster care.”).

31. Polikoff, *supra* note 1, at 1184.

homosexuality will be able to assist the LGBT youth as they endure these experiences. Gay youth “need happy gay adult role models, special counseling and a home free from anti-gay harassment.”³² Thankfully an agency exists in Los Angeles that proactively places a large number of LGBT foster youth in welcoming homes,³³ many of which are composed of two same-sex parents. While this agency’s mission is promising, many more of these types of agencies are needed in every city in the country, especially those areas with large LGBT communities.

Currently, there are no federal laws that require state foster care agencies to refrain from discriminating against potential foster parents or foster children because of their sexual orientation. As such, the federal law prohibiting agencies that receive federal funding for foster care programs from denying or delaying foster care placements “on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved”³⁴ should be amended to include sexual orientation. Unfortunately, California is the only state that has enacted laws protecting LGBT youth from discrimination in the state’s foster care system.³⁵ A protective federal law including sexual orientation, similar to California’s, would prohibit the discriminatory acts that occur in so many states and would require the state foster care agencies to develop LGBT-sensitive policies.

Also, LGBT adolescents are often shifted among different foster homes because they do not fit in where they are initially placed.³⁶

32. Price, *supra* note 28.

33. See Sullivan, *supra* note 11, at 58 (“G.L.A.S.S. is the only agency in California targeted for serving sexual minority youth and it is the only agency nationwide which runs group homes for gay youth . . .”).

34. 42 U.S.C. § 671 (a)(18)(A)-(B) (2000).

35. See CAL. HEALTH & SAFETY CODE §§ 1529.2, 1563 (West Supp. 2004) (requiring training on issues related to sexual orientation, among other characteristics, for foster care workers and potential foster care parents); CAL. WELF. & INST. CODE §§ 16001.9, 16003, 16013 (West Supp. 2004) (prohibiting discrimination or harassment on the basis of sexual orientation, among other characteristics, and requiring training on issues related to sexual orientation, among other characteristics, for foster care workers and potential foster care parents).

36. See Polikoff, *supra* note 1, at 1186 (stating that 89 percent of the gay and lesbian teenagers interviewed in a particular study had experienced multiple placements).

This creates more problems for these youth as “[t]he constant challenge of adapting to a new environment arouses anxiety and unsettledness.”³⁷ Instead of moving openly gay and lesbian adolescents from home to home, which makes them feel completely rejected and unwanted, these children should begin in an accepting environment where their parents understand what they are going through and are willing to allow them to develop naturally. This is exactly what the sexual orientation-based matching policy suggested here can accomplish.

On a positive note, “[s]exual minority youth in foster care have recently become more visible, and their struggle to be heard remains ongoing.”³⁸ This indicates the growing hope that the state and federal governments will address the plight of LGBT foster youth.

III. THE ANSWER TO THE PROBLEM: ENACTING A SEXUAL ORIENTATION-BASED MATCHING PROGRAM

*Beginning January 1, 2005, the division shall establish a policy providing priority for foster care placement of gay, lesbian, bisexual, or transgendered children who are in the custody of the state to families in which the parents are also gay, lesbian, bisexual, or transgendered.*³⁹

Admittedly, the idea of enacting a law giving preference to gay and lesbian couples and other accepting adults who want to serve as foster parents to LGBT youth is a far cry from the law’s present treatment of LGBT foster youth. At the time Lambda issued its report, “no state foster care agency maintain[ed] policies prohibiting discrimination against foster care youth on the basis of sexual orientation,” nor did any “require[] training for foster parents or foster care staff on sensitivity to LGBT youth”⁴⁰ Thankfully, since Lambda published its report, California enacted laws prohibiting this and many other types of discrimination within the

37. MALLON, *supra* note 9, at 54.

38. Robson, *supra* note 12, at 936–37.

39. This is a sample of the proposed policy for which this Article argues.

40. SULLIVAN ET AL., *supra* note 4, at 7. Though there are many suggestions that could be given to foster care agencies to help them become more accepting and affirming of the sexual orientation of gay and lesbian youth, a full discussion of such actions is beyond the purview of this Article.

foster care system.⁴¹ However, considering that California is the *only* state with a law protecting LGBT youth in foster care from harassment and discrimination, it may seem unrealistic to expect state legislatures or officials in charge of foster care to enact a policy as protective of LGBT youth as this Article urges. However, a well-supported argument demonstrating that doing so is in the best interests of the children could be quite persuasive to state legislators, or could at least provide a strong defense to an attack on such a policy once it is proposed. As one gay foster parent battling to adopt the child he has been raising for years remarks, “This isn’t about . . . gay rights This is about children’s rights The gay rights issue gets in the way of that.”⁴² Though the parent made this statement in the context of bans on gay adoptive parents, the same reasoning applies to gay foster parents. The focus must continue to be on the best interests of the youth in need of a loving and welcoming home. Additionally, the state’s failure to provide the most suitable home possible for LGBT adolescents may violate their constitutional rights to equal protection; this may also prompt the legislature to act before an aggrieved individual brings a lawsuit against the state to demonstrate this principle.

The approach that this Article urges is not completely novel, but such matching programs are rare.⁴³ In fact, it appears “Massachusetts is the only state that . . . actively recruits gay and lesbian foster parents with the specific goal of placing at-risk LGBT youth in a gay home.”⁴⁴

41. See *supra* note 35.

42. Julie Sullivan, *Oregon Family at Vortex of Ban on Gay Adoption*, OREGONIAN, Mar. 14, 2002, at A01.

43. In fact, Colleen Sullivan, an attorney from Lambda, appears to have been one of the first people to advance publicly this idea. See Sullivan, *supra* note 11, at 57–62. Dr. Mallon also suggests “utilizing gay and lesbian adults as foster parents” as an alternative “for meeting the needs of gay and lesbian adolescents who require out-of-home placements.” MALLON, *supra* note 9, at 142. As such, the author believes this to be the first published Article outlining fully how such a policy of this sort could be implemented and effectuated.

44. Symposium, *Queer Law 2000: Current Issues on Lesbian, Gay, Bisexual, and Transgender Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 137, 237 (2000-2001). Ms. Sullivan, a participant in this symposium, stated further that these types of matching programs are “one of the most important things we can do” to help keep gay children off the streets. *Id.*

A. *What Such a Matching Policy Would Accomplish*

Because the policy pairing LGBT foster youth with LGBT foster parents creates a family environment built on support rather than stigma, it will achieve a multitude of positive results.⁴⁵ First, it effectively addresses the problem of multiple placements that often occur because LGBT adolescents do not “fit in” where they are initially placed; it seems inherently obvious that placing LGBT teens in homes with other gays, lesbians, or adults who have expressed an interest in serving as foster parents to these teens would eliminate both the parents’ feelings of discomfort and the children’s feelings of rejection.

Even more promising, the high levels of senseless drug use, homelessness, street prostitution, and suicide among LGBT adolescents would most likely decrease once these confused and troubled youth were able to live in more accepting environments. A gay man or a lesbian could be the role model an LGBT adolescent needs to alleviate the feelings of alienation so prevalent among LGBT youth, who may believe they are the only LGBT person in the world. These types of feelings can easily lead to suicide. On the other end of the spectrum, when provided “[w]ith a much wider range of ‘variety’ of role models, young gays and lesbians are freer to develop in the ways that are most natural for them as individuals.”⁴⁶ Further, because LGBT youth are obviously less likely to run away from homes where they are wanted and accepted, placing them in gay and lesbian parented homes will reduce the number of homeless LGBT youth on the streets. Indeed, the few LGBT youth who have been placed in settings “that were openly gay and lesbian affirming or settings where there were openly gay or lesbian staff members” report having a positive experience. Such a setting is “the best place to be if you have to be in a group home because you can be yourself.”⁴⁷

Additionally, “[o]pen licensing of gay foster parents sends a powerful message to those youth that it’s okay to be gay, and we

45. See Ruskola, *supra* note 2, at 324.

46. Teresa DeCrescenzo, *The Brave New World of Gay and Lesbian Youth*, in *POSITIVELY GAY: NEW APPROACHES TO GAY AND LESBIAN LIFE* 275, 276 (Betty Berzon ed., 1992).

47. MALLON, *supra* note 9, at 79.

need the state to send that message in as many ways as possible.”⁴⁸ In fact, such actions could also serve to educate society as a whole about sexual orientation issues. Finally, placing LGBT youth with gay or lesbian foster parents who can serve as positive adult role models would provide the youth with open channels of communication to raise and discuss their thoughts and concerns without fear of harassment or reprisal. Such relationships would serve as invaluable resources for so many of these troubled youth. Indeed, “When [LGBT youth] are free to come out and integrate their lives, they leave behind the costs of compartmentalized and hidden lives experienced by earlier generations of lesbians and gay men.”⁴⁹

Of course, to place LGBT adolescents in the homes of gay or lesbian adults, the foster care agency will need to know the child’s and the potential parents’ sexual orientation. This will not always be obvious. Thus, questions arise as to who should be able to participate in such a matching program, and to whom such a policy should even apply.

B. Which Potential Foster Parents Should Be Allowed to Participate in a Matching Program?

Gay, lesbian, bisexual, or transgendered adults who have developed positive images of themselves and their sexual orientation could provide welcoming and appropriate homes for LGBT youth who need to learn “what are acceptable behaviors and lifestyles” as members of the gay and lesbian community.⁵⁰ “The role of providing those learning opportunities so necessary to the well-being of our youngsters must be assumed by the established older, adult gay and lesbian community.”⁵¹

In fact, in *M.P. v. S.P.*,⁵² one court went so far as to assert that it is reasonable to expect that children raised in homes with a gay parent:

will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the

48. Polikoff, *supra* note 1, at 1184.

49. RYAN & FUTTERMAN, *supra* note 13, at 143.

50. DeCrescenzo, *supra* note 46, at 278.

51. *Id.*

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

majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.⁵³

Indeed, as this court saw it, “growing up with a homosexual parent may be a virtue because the child would develop tolerance and understanding.”⁵⁴ If only more courts and agencies could understand these issues as clearly as the *M.P.* court, LGBT youth would be far better off.

Though the matching program this Article urges creates a preference that appears to benefit any gay, lesbian, bisexual, or transgendered adult who wants to serve as a foster parent, the program guidelines should not be written to operate as an automatic placement; other relevant factors that are typically evaluated in custody decisions should still be considered. Obviously, those LGBT adults who have not developed positive images of themselves and their sexual orientation would not be the best foster parents for LGBT children.

In addition to matching LGBT youth with LGBT foster parents, heterosexual adults who have demonstrated an ability and willingness to serve as foster parents to LGBT adolescents should be able to participate in these programs. For example, parents who have already raised a gay or lesbian child in a positive and accepting environment may be interested in serving as a foster parent to other LGBT youth. Due to their past experience raising an LGBT child, these adults would be excellent candidates to serve as foster parents to other LGBT children. Finally, allowing non-gay adults to participate in the program would enable those adults unable to openly admit that they were LGBT, such as those in the military, to serve as foster parents to LGBT children without having to “come out” themselves.

53. *Id.* at 1263. The court in *M.P.* was considering the appropriateness of allowing a lesbian to continue raising her own child who was not gay or lesbian, so it would seem that an LGBT adult raising an LGBT adolescent could be even more beneficial to the child’s development than was the case in *M.P.*

54. David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U.L. REV. 31, 61 (1993).

C. Which Foster Children Should Benefit from a Matching Policy?

Determining to which adolescents this matching program should apply presents perhaps the greatest challenge to enacting and effectuating such a policy. Indeed, there is still some controversy about the age at which it is appropriate to talk to children about sex, and at what age children are able to discern their own sexual orientations.⁵⁵ Additionally, “Queer youth . . . are considered not only invisible but *impossible*.”⁵⁶ Unfortunately, “[t]he consequence of the fantasy of gay kids’ non-existence is the discursive and material violence that gay kids confront in their lives.”⁵⁷ However, many indicators suggest that adolescents are recognizing and acknowledging their sexual orientations as lesbian, gay, bisexual, or transgender at young ages.⁵⁸ “Studies of adolescent sexual orientation show that the age of ‘coming out’ or self-identification as lesbian or gay has been dropping steadily.”⁵⁹ Consequently, “self identification as lesbian or gay at younger ages also means greater stress, more negative social pressure, and greater need for support, particularly from nonjudgmental and informed providers who can offer appropriate guidance, health education, and referrals.”⁶⁰ Of course, to address the problems this group of adolescents encounters, society must first recognize that they exist. “The first step in the protection of gay kids must be to see them as gay kids; unless the law is able to name the child, it will be unable to safeguard him or her.”⁶¹

As one example illustrates, denying that LGBT youth are facing issues related to sexual orientation at early ages inflicts further damage upon these individuals. According to Dave Grossman, a gay adolescent, “It was a lot of built-up frustration over everyone saying,

55. See, e.g., Libby Copeland, *Out of the Closet, But Not Out of Middle School*, THE WASH. POST, June 29, 1999, at A1 (highlighting that “[i]n the national debate about gay and bisexual identity, age is a volatile fault line”).

56. Ruskola, *supra* note 2, at 280. Ruskola’s article discusses thoroughly the multiple factors leading to the belief that “gay kids are not gay but merely ‘confused.’” *Id.* at 270.

57. *Id.* at 270.

58. “Powerful as the fantasy that there are no gay youth may be, . . . it is a fact—and a miracle—that there are youth who, against all odds, self-identify as gay.” *Id.* at 323.

59. RYAN & FUTTERMAN, *supra* note 13, at 10.

60. *Id.*

61. Ruskola, *supra* note 2, at 273.

‘You’re too young, you’re too young, you’re too young’⁶² Additionally, Lambda, the ACLU, and others have litigated several cases involving LGBT youth who have suffered as a result of their decision to identify as LGBT.⁶³ Collectively, these cases illustrate that youth are identifying as LGBT at young ages and are facing a variety of challenges as a result.

Perhaps under a sexual orientation-based matching policy, discussions about sexual orientation should occur at a time when other other age-appropriate discussions about sex would naturally take place between a parent and a teenager. As for discerning the adolescents’ sexual orientation, one commentator has suggested, “[o]nce a minor has initial contact with . . . the child welfare system, the state should inquire into the minor’s sexuality.”⁶⁴ This information would “not [be] for punitive purposes but for the purpose of reaching non-heterosexual youths and helping them to develop in healthy and productive ways;”⁶⁵ or in this case, to place them in healthy and productive gay or lesbian parented homes. Although the concept of inquiring into an adolescent’s sexual orientation may seem intrusive and potentially harmful, such fact finding can be accomplished with appropriate sensitivity. Perhaps

62. Copeland, *supra* note 55 (discussing a seventh-grade youth’s experience with coming out at age thirteen).

63. *See, e.g.*, Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (describing the harassment several gay and lesbian students endured for several years during high school); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (chronicling the harassment and physical abuse a middle school student suffered at the hands of his fellow students because he was homosexual); Massey v. Banning Unified Sch. Dist., 256 F. Supp. 2d 1090 (C.D. Cal. 2003) (discussing locker room segregation forced upon a middle school student after she self-identified as a lesbian); Gay-Straight Alliance Network v. Visalia Unified Sch. Dist., 262 F. Supp. 2d 1088 (E.D. Cal. 2001) (describing the challenge a group of gay and lesbian high school students who wanted to form a support group at their school faced); Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001) (discussing the torture inflicted on a ninth-grade student who self-identified as gay); E. High Sch. PRISM Club v. Seidel, 95 F. Supp. 2d 1239 (D. Utah 2000) (detailing the struggle a group of gay and lesbian eleventh-grade students faced attempting to start a club at East High School in the Salt Lake City School District); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (discussing the legal challenge of a tenth-grade student’s attempt to establish a gay-straight alliance at El Modena High School in the Orange Unified School District).

64. Sullivan, *supra* note 11, at 58.

65. *Id.*

only youth who have experienced abuse or neglect that appears to the foster care agency to have resulted from the teen's sexual orientation should be questioned in this manner.

This is not to suggest that the matching policy this Article urges should only be available to LGBT adolescents who have already experienced either an incident of physical or emotional abuse because of their sexual orientation. Indeed, we must pursue all opportunities to prevent these forms of violence that disproportionately affect LGBT youth. Perhaps foster care agencies should provide information that invites LGBT youth to "come out" to their social worker. This could eliminate the concern of alienating LGBT youth by asking them about their sexual orientation before they are prepared to discuss the issue.

For example, foster care agencies could develop posters inviting all youth in foster care to disclose any information they consider relevant to their placement decision. These materials would explicitly include sexual orientation as one of the characteristics that the youth should feel comfortable discussing with the individual responsible for their placement decision and other agency representatives.⁶⁶ Additionally, the agencies should develop brochures that discuss the use of the sexual orientation-based matching program when the agency knows or is informed that the placement is for an LGBT youth. Furthermore, the forms that adolescents must complete when first entering the child welfare system that require demographic or personal background information should include a field to indicate whether they are LGBT. Once again, this method would be less intrusive than a specific verbal inquiry into sexual orientation.

If the states implement these suggestions, adolescents will be aware that disclosure of their sexual orientation factors into the ultimate decision of where they will live.⁶⁷

66. In conjunction with the publication of its landmark report, Lambda developed a poster that was distributed nationwide advertising a toll-free helpline, 1-866-LGBTTeen, for LGBT foster youth. Hopefully, measures such as this will comfort LGBT teens about discussing their sexual orientation in conjunction with the decisions about their placement.

67. In fact, foster care agencies in at least two areas, New York City and Massachusetts, already ask some questions about same-sex behavior on their versions of the National Youth Risk Behavior Survey ("YRBS"). Gipson, *supra* note 8, at 2.

As the discussion above illustrates, society must acknowledge “the capacity of adolescents to form a non-heterosexual identity.”⁶⁸ The benefits of making well-informed foster care placement decisions for LGBT youth far outweigh unfounded concerns about the propriety of asking youth questions about their sexual orientation.

D. How Such a Policy Could Operate in the Courts

Courts often determine custody and visitation rights based on the “best interests of the child.”⁶⁹ This determination “always involves balancing that placement against the available alternatives. The benefits from placing a child in a gay or lesbian parented home are especially clear-cut for ‘hard-to place’ children,”⁷⁰ like LGBT youth. Since “[m]ost states currently have a shortage of foster or adoptive parents for such children and many end up either in inappropriate settings, . . . or in a series of foster homes,”⁷¹ it is in the LGBT youth’s best interest to be placed in a gay or lesbian parented home from the beginning.

The vague “best interests of the child” standard governing placement decisions under American custody law, that gives courts broad discretion in deciding custody cases,⁷² could be used to find this type of policy beneficial and lawful. In the past, this standard was used to deny gays and lesbians custody of their own children.⁷³ Thus, it will be difficult to persuade courts to turn their analysis in favor of gay and lesbian foster parents. Proponents of enacting a sexual orientation-based matching policy will need to show that doing so is in the best interest of the LGBT youth by demonstrating

68. RYAN & FUTTERMAN, *supra* note 13, at 143.

69. *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989).

70. *Id.* at 1645.

71. *Id.* at 1645–46.

72. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 236–37 (1975) (stating that although the statutes frequently cite criteria to use in determining the best interests standards, the criteria is usually described vaguely).

73. See, e.g., *In re J.S.*, 324 A.2d 90, 94–97 (N.J. Super. Ct. Ch. Div. 1974) (restricting parental visitation rights on the basis of the father’s homosexual conduct, purportedly in the child’s “best interest”); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (stating that “living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child”).

how gay or lesbian parented homes can better address and solve the common problems gay and lesbian foster youth face. Unfortunately, as one commentator explained, “[a]s long as ideological differences remain significant, so will varied interpretations of the best-interests-of-the-child standard.”⁷⁴ As a result, because this proposed policy is not intended to operate to effectuate an automatic placement decision, thereby making it harder to attack constitutionally, a judge who disagrees with the policy may refuse to apply it when he or she orders a particular placement.

IV. THE CONSTITUTIONALITY OF A SEXUAL ORIENTATION-BASED MATCHING POLICY

*I do not think the Constitution had fear, as well as enforced suffering, in mind as a prerequisite for minorities living under it. But so it has turned out.*⁷⁵

As is the case with any law that makes facial distinctions between different groups of people, this sexual orientation-based matching policy is susceptible to legal challenges under both the U.S. Constitution and state constitutions. Those opposed to gays and lesbians serving as foster parents may therefore argue against using such considerations in placement decisions.

On the other hand, not placing LGBT foster youth in the best homes available to them may violate the adolescents’ constitutional rights to equal protection under the law. Because the states have a duty to care for children in the welfare system, not addressing or preventing the harm that LGBT youth experience in foster care may violate these children’s constitutional rights. Placing LGBT youth in homes where their sexual orientation is at odds with their adoptive or foster parents’ morals and beliefs can be very damaging. “Homophobia and heterosexism from socializing agents like family . . . compound LGBT youths’ challenges by enforcing rigid gender roles, condemning gender nonconformity and homosexuality.”⁷⁶ As more data emerge showing that gay and lesbian parented foster families are proving successful, the argument

74. Banks, *supra* note 18, at 880.

75. Larry Kramer, *Whose Constitution Is It, Anyway?* reprinted in LESBIANS, GAY MEN, AND THE LAW 563, 565 (William B. Rubenstein ed., 1993).

76. Gipson, *supra* note 8, at 2.

that failing to place LGBT children in these more beneficial environments⁷⁷ violates their right to equal protection becomes increasingly persuasive.

A. *The Equal Protection Challenge to the Policy*

Though the question remains unanswered, sexual orientation-based distinctions would likely be evaluated under the more lenient rational basis review standard.⁷⁸ Because the United States Supreme Court has failed to specify the level of scrutiny applied to laws that make distinctions based on sexual orientation, nor has the Court addressed the issue of whether homosexuals constitute a suspect or quasi-suspect class,⁷⁹ such laws appear to be subject to the mere rational basis test.⁸⁰ A sexual orientation-based matching policy would seemingly satisfy this test. Considering the numerous problems so many LGBT foster youth face, one can hardly dispute that a rational basis exists for distinguishing between potential foster

77. See Catherine Wilson, *Florida Suit Challenges Ban on Gay Adoption*, L.A. DAILY J., Mar. 5, 2003, at 4. "There's a shortage [of available homes in which to place children who are up for adoption]. Why isn't that something we would consider when evaluating the rationality of the law?" *Id.* (quoting a question from Ninth Circuit Court of Appeal Judge Proctor Hug posed during a recent lawsuit challenging the constitutionality of Florida's ban on allowing gays and lesbians to adopt children).

78. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 529 (2001).

Under strict scrutiny, a law is upheld if it is proven necessary to achieve a compelling government purpose. The government must have a truly significant reason for discriminating and it must show that it cannot achieve its objective through any less discriminatory alternative

. . . Under intermediate scrutiny a law is upheld if it is substantially related to an important government purpose.

. . . Under rational basis review a law will be upheld if it is rationally related to a legitimate government purpose. The government's objective need not be compelling or important, but just something that the government legitimately may do. The means chosen only need be a rational way to accomplish the end.

. . . [O]nly rarely have laws been declared unconstitutional for failing to meet this level of review.

Id. at 529-30.

79. See Russman, *supra* note 54, at 57.

80. See *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis review to a law that prohibited homosexuals from asserting their rights through the political process).

parents based on their sexual orientation when placing LGBT foster youth. Gay or lesbian adults, and those other adults who have demonstrated an ability and willingness to care for an LGBT foster child, could provide the environment necessary for these youth to develop into adults without the fear of abuse, neglect, or intolerance. Indeed, this may very well be one instance where gay rights advocates can be thankful that the laws that make distinctions based on sexual orientation are typically only subjected to rational basis review.

However, to simply assume the constitutionality of such a policy under rational basis review ignores the possibility that the courts likely will soon recognize that laws discriminating against gays and lesbians deserve to be evaluated on a higher level of constitutional scrutiny. Indeed, many scholars argue, and some judges agree, that gays and lesbians satisfy many of the same criteria used to classify other groups as a suspect or quasi-suspect class.⁸¹ Therefore, laws that make such facial sexual orientation-based distinctions would be subjected to intermediate or strict scrutiny—constitutional tests that are harder to pass.⁸² Thankfully, it appears that courts may nonetheless uphold this type of policy, just as they have upheld other types of matching programs in place in many other jurisdictions, irrespective of the level of scrutiny applied.⁸³

81. See, e.g., Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 36 (D.C. 1987); Jonathan Deitrich, Comment, *The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin*, 78 MARQ. L. REV. 121, 130–31 (1994); Note, *The Constitutional Status of Sexual Orientation Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153 (1993). But see *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 268 (6th Cir. 1995); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 102–04 (D.C. Cir. 1987).

82. See CHEMERINSKY, *supra* note 78, at 529.

83. Because the bulk of this Article is dedicated to outlining how a matching policy would operate and why such a policy is necessary, a thorough discussion of the various permutations of the levels of scrutiny under an equal protection analysis is beyond the scope of this Article.

B. Comparing Sexual Orientation-Based Matching Programs with Other Types of Placement Preferences

1. Race-based preferences

Constitutional challenges to the use of race-based considerations in custody decisions have proven unsuccessful,⁸⁴ even though such programs have been subjected to a strict scrutiny analysis. In *In re R.M.G.*, for example, the court found that the "District had a compelling interest in placing children with the best adoptive families, and that the race of the child and the adoptive parents was relevant to that compelling state interest."⁸⁵ The court reasoned that since

adoptees often have difficulty with a sense of identity, and because the attitude of the adoptive parents toward race may be highly relevant to the child's sense of identity, those responsible for an adoption decision will not be able to focus adequately on an adoptive child's sense of identity, and thus on the child's best interest, without considering race.⁸⁶

The court even acknowledged that its holding, finding a racial classification valid, was unusual, noting "an inherently suspect, indeed presumptively invalid, racial classification in the adoption statute is, in a constitutional sense, necessary to advance a compelling governmental interest."⁸⁷ Though this case and the language in the decision center on adoption, its rationale applies with equal force to foster care because the foster system becomes a permanent home for many children and teens as they wait to be adopted. The National Association of Black Social Workers ("NABSW") was one of the earliest proponents of using race-based preferences in placement decisions. The delegates announced that:

Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally in Black

84. *E.g.*, *In re R.M.G.*, 454 A.2d 776 (D.C. 1982).

85. Rita J. Simon & Howard Altstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 177 (1997).

86. *Id.* (internal citations and quotation marks omitted).

87. *In re R.M.G.*, 454 A.2d at 788.

families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.⁸⁸

Because young members of both communities have experienced harassment and discrimination, the judicial treatment of race-based preferences may be useful to predict how the courts will treat a sexual orientation-based matching policy. Additionally, both groups of adolescents are “[m]embers of an oppressed community [who] have unique obstacles to overcome in order to fulfill their potential.”⁸⁹ Comparing the incidences of discrimination and other negative experiences of LGBT youth to those of youth of color, there is no denying that LGBT youth struggle with their sense of identity in much the same way. Further, one cannot ignore that adoptive or foster parents’ attitudes toward these adolescents’ sexual orientation is incredibly relevant to their development of their sense of self. Additionally, one can easily argue that raising an LGBT child in a gay or lesbian parented home could contribute to the healthy development of LGBT people in general in much the same way that the NABSW envisioned for youth of color. How can LGBT adolescents come to terms with who they are when the individuals responsible to care for them do not even recognize or acknowledge that they are different from their peers? Thus, the same type of reasoning used to justify race-based preferences in *In re R.M.G.* should apply to placing LGBT youth in gay and lesbian homes through a sexual orientation-based matching program such as the one presented in this Article.

Ultimately, however, because sexual orientation-based distinctions most likely would not be subjected to strict scrutiny, it appears that a policy that makes a facial distinction based on sexual orientation would be upheld even more easily than have been race-based distinctions. As long as the court is convinced that the sexual

88. See Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 25.

89. Gipson, *supra* note 8, at 1.

orientation of both the foster child and the potential foster parent are relevant to determining the best family placement for the child, it should find that such a matching program is in the child's best interest.

One lesson that should be learned from racial preferences is that looking for a home of the same ethnicity or race in which to place the child often delays placement.⁹⁰ Clearly, LGBT adolescents should not be forced to remain in a foster care group home longer than they would without the use of a matching program while the agency looks for a gay or lesbian parented home. Instead, the policy should operate only when there is a particular individual or couple ready to take the foster child, not as the impetus to begin a long-term search for such parents.

Indeed, it appears racial preferences have been used for quite some time, and "they are not seen as inherently troublesome or problematic. We take for granted that an individual would want to adopt a child of his own race. We see little reason to question the assumptions, beliefs, and values that underlie such preferences."⁹¹ Why should it be any different for those gay and lesbian adults who may prefer to serve as a foster parent to a child who is also lesbian, gay, bisexual, or transgendered? Why do we not take for granted that LGBT youth would rather be raised by a gay or lesbian foster parent if their biological parents are no longer able to raise them?

2. Religious preferences

Many statutes include provisions allowing for matching children with families from the same religious background. For example, Arkansas law allows a child's biological parents to stipulate whether they want the child placed in a home where a particular religion is practiced.⁹² Unfortunately, there are no reported decisions addressing Arkansas' statute. Minnesota's policy also includes a provision that allows the biological parents to specify whether they

90. See Jennifer Mullins, Note and Comment, *Transracial Adoption in California: Serving the Best Interests of the Child or Equal Protection Violation?*, 17 J. JUV. L. 107, 108 (1996) (stating that "these restrictions cause delay in finding appropriate homes for these children by placing additional hurdles in the way of the adoption").

91. Banks, *supra* note 18, at 920.

92. See ARK. CODE ANN. § 9-9-102 (Michie 1993 & Supp. 1995).

want their child placed in a home with parents of the same religious background.⁹³ Again, though Minnesota's statute has been cited in a few opinions, it has not been challenged constitutionally.⁹⁴ Similarly, current California law allows consideration of "the child's religious background in determining an appropriate placement."⁹⁵ Finally, courts that have considered the constitutionality of religious preferences have upheld such policies, but often only to the extent that it would cause emotional or physical harm to the child to not do so.⁹⁶

The discussion surrounding religious preferences is particularly analogous to sexual orientation-based matching programs because, like sexual orientation, one's religion is developed and realized over time and is disclosed to others only if one so desires. Religion and sexual orientation are different from race in that, for the most part, one's race is readily apparent. Thus, the challenge of determining a child's religion is similar to that of determining one's sexual orientation. As one commentator has inquired, "[H]ow is the child's faith to be determined?"⁹⁷ Similarly, how is the child's sexual orientation to be determined? To determine religion, "[a] state might look to family heritage, to formal religious acts such as baptism or circumcision, or might arbitrarily allocate children to different religions. Surprisingly, there has been little judicial discussion about the constitutional acceptability of such practices."⁹⁸

Additionally, the same types of concerns that have been considered when determining how much weight to give to expressed

93. See MINN. STAT. ANN. § 259.29 (West Supp. 1997).

94. See *In re S.T.*, 512 N.W.2d 894 (Minn. 1994); *In re D.L.*, 479 N.W.2d 408 (Minn. Ct. App. 1991). These published opinions speak favorably of preferences for placing children with relatives but have yet to address the constitutionality of the portion of Minnesota's statute that relates to a religious preference.

95. CAL. FAM. CODE § 8709 (West Supp. 2004).

96. See, e.g., *Osier v. Osier*, 410 A.2d 1027, 1032 (Me. 1980) (stating that the mother's religious practices should be considered only as they relate to the child's well-being); *In re Marriage of Hadeen*, 619 P.2d 374, 382 (Wash. Ct. App. 1980) ("[R]eligious decisions and acts may be considered in a custody decision only to the extent that [they] will jeopardize the temporal mental health or physical safety of the child.").

97. Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 *FORDHAM L. REV.* 383, 406 (1989).

98. *Id.*

religious preferences apply when deciding how much weight to give to an LGBT adolescent's opinion about where he or she wants to live. As one scholar posits, "Does only a mature child have actual religious needs, or do they exist from the earliest stages of religious training?"⁹⁹ Conversely, does only a mature child have actual sexual orientation-based needs, or do they exist from the earliest stages of development? Some courts focus on the child's expressed wishes, while others focus on the value of stability in all phases of the child's life. Indeed, one can hardly discount the value of providing more stability to LGBT adolescents. Up to this point, religious matching statutes have also survived Establishment Clause challenges.¹⁰⁰

V. CONCLUSION: A CALL TO ACTION

*The world will start spinning forward, because it must.
Gay kids will be citizens. The time has come.*¹⁰¹

States that recognize personal characteristics of both the adolescents in the child welfare system and the potential foster or adoptive parents as relevant to the placement decision should consider sexual orientation as well.

As Lambda concluded in its groundbreaking report, "[t]here is a dire need for child welfare agencies nationwide to take basic remedial steps throughout their programs, without further delay, to acknowledge and care for neglected LGBT adolescents."¹⁰²

Additionally, lesbian, gay, bisexual, and transgender adults must apply to become foster parents and make it known to the foster care agency that they are able and willing to open their homes to these youth. As the founder of G.L.A.S.S. instructs, "It is the clear responsibility of older gays and lesbians to optimize developmental opportunities for our young counterparts."¹⁰³

This vulnerable community cannot be ignored any longer, nor should laws that will only protect them in words, but not in actions, be the only method for addressing the current problem. Indeed,

99. *Id.* at 399.

100. See *In re Goldman*, 121 N.E.2d 843, 846 (Mass. 1954); *Dickens v. Ernesto*, 281 N.E.2d 153, 155-56 (N.Y. 1972).

101. Ruskola, *supra* note 2, at 331.

102. SULLIVAN ET AL., *supra* note 4, at 10.

103. DeCrescenzo, *supra* note 46, at 276.

placing LGBT adolescents in homes with gay and lesbian parents and other accepting adults who can serve as excellent role models is an appropriate avenue to pursue the goal of providing safe, welcoming homes to all children and teenagers in foster care. State legislatures and local foster care agencies should enact such policies quickly so the trauma and discrimination that LGBT foster children face may end as soon as possible, thereby saving others from having to face what so many other LGBT adolescents have already had to endure.

