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## Custody Rights of Gay and Lesbian Parents

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1991]

## Comments

### CUSTODY RIGHTS OF GAY AND LESBIAN PARENTS

I can bear [all else except that] . . . my two children are taken from me by legal procedure. That is, and always will remain to me a source of infinite distress, or infinite pain . . . . The disgrace of prison is as nothing compared with it.<sup>1</sup>

Oscar Wilde, 19th century gay poet and playwright, writing in *De Profundis*, while he was imprisoned for sodomy.

#### I. INTRODUCTION

The United States Supreme Court has validated the commonly held belief that parents in most intact marriages have a fundamental right to bear and raise children.<sup>2</sup> When a marriage is irretrievably broken because of a divorce or legal separation, however, any automatic right to care for one's children is supplanted by a judicial determination of which parent should have physical custody of the children.<sup>3</sup> Courts overwhelmingly apply the "best interest of the child" standard when making this determination.<sup>4</sup>

In theory, the best interest standard requires courts to examine the circumstances of each parent in determining which parent can offer the child the optimal environment.<sup>5</sup> Courts applying this standard should not allow their decisions to be influenced by a desire to punish or reward parents for pre-divorce conduct. Instead, such courts should examine the situation from the child's point of view and should place the

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1. O. WILDE, *DE PROFUNDIS* 34 (R. Ross ed. 1909). Other comprehensive and well-written articles on this subject have also begun with this Wilde quote. See, e.g., Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 *FAM. L.Q.* 71, 71 (1988); Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 *CAL. W.L. REV.* 395, 395 (1990).

2. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right to "bring up children" is within scope of fourteenth amendment protection).

3. Comment, *Gay Parents: A Legal Oxymoron in Ohio?*, 18 *CAP. U.L. REV.* 277, 278 (1989) (once marriage is dissolved, state has compelling interest in placing child's best interests above parental rights).

4. See, e.g., *Ellerbe v. Hooks*, 490 Pa. 363, 366, 416 A.2d 512, 513 (1980) ("[I]n every custody dispute the fundamental issue is the best interest of the child."); *Bull v. Bull*, 206 Cal. App. 2d 642, 643, 24 Cal. Rptr. 149, 150 (1962) (standard is which home will allow the child to be "better cared for, better trained, more secure and happier").

5. See, e.g., *Bull*, 206 Cal. App. 2d at 643-46, 24 Cal. Rptr. at 150-51 ("best interest" standard was applied to ensure parental fitness).

(1665)

child in the best home.<sup>6</sup> In reality, however, judges often inject their biases and prejudices about societal norms and morality under the guise of the “best interest” of the child.<sup>7</sup> Consequently, the best interest of the child standard becomes highly problematic where one of the parents is homosexual.<sup>8</sup>

Due to society’s misunderstandings and preconceived notions about homosexual individuals, gay men and lesbian women<sup>9</sup> have incredible burdens to overcome in obtaining or retaining custody of their natural children.<sup>10</sup> Courts invariably consider a parent’s homosexuality

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6. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. 561 (1987). Section 402 of the Uniform Marriage and Divorce Act provides:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child’s parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) the child’s adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

*Id.*

7. Comment, *Gay Parenting: Myths and Realities*, 9 PACE L. REV. 129, 160-61 (1989) (“best interest” standard may allow judges and attorneys to impose “their own sentimental values about child rearing”).

8. *Id.* at 161. One commentator has noted:

With regard to homosexuality, many decisions based on the best interest of the child presuppose that a child whose parent is socially devalued is injured by placement with that parent. At the very least, in many cases judges and attorneys have intimated that a child raised in a homosexual home environment is necessarily worse off than a child raised in a heterosexual home environment. The more subtle issue in these cases is to what extent the court has given tacit approval to social and moral proscriptions against homosexual expression.

*Id.* (footnotes omitted).

I use the term “homosexual” as an adjective and not as a noun because it is a characteristic of a person’s sexual orientation and not a characterization of who or what he or she is. The term cannot define a kind of person any more than the label “a blonde” can define all kinds of people who have blonde hair. Additionally, for the sake of this discussion, the term “homosexual” shall include people who classify themselves as “bisexual,” in other words, those individuals who are sexually attracted to both men and women. A bisexual parent is often involved in divorce-related custody cases after creating the child through heterosexual relations with his or her spouse.

9. The terms “gay” and “lesbian” will be used as adjectives and not as nouns.

10. See Comment, *supra* note 3, at 279-81 (judges may consciously or subconsciously allow community standards and personal prejudices against homosexual parenting to influence “best interests” analysis); see also Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1013-21 (1989). The author expresses his appreciation to the authors of both of

when determining whether awarding custody would be in the child's best interest.<sup>11</sup> Moreover, because initial custody determinations are not permanent, there is no guarantee that a homosexual parent who obtains custody of his or her child will not lose that custody at a later date.<sup>12</sup> A court may modify or revoke an earlier custody determination upon a showing of "materially changed circumstances" by either of the parties involved.<sup>13</sup> One parent's "coming out of the closet"<sup>14</sup> may suffice to resurrect the custody issue, as may a parent's entering into a significant relationship with a member of the same sex.<sup>15</sup>

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these cited sources for their well written and thoughtful articles which address many of the same issues addressed in this Comment.

11. For a discussion of jurisdictions considering homosexuality as grounds for denial of custody rights, see *infra* notes 26-48 and accompanying text. For a discussion of jurisdictions considering the parent's sexual orientation as merely one factor in their analysis, see *infra* notes 49-120 and accompanying text. For a discussion of jurisdictions applying the true "best interest of the child" test, where the parent's homosexuality is only considered when there is a "nexus" which connects the orientation to an adverse effect on the child, see *infra* notes 133-65 and accompanying text.

12. For cases illustrating that initial custody determinations are not permanent, see *infra* note 15. Section 409(a) of the Uniform Marriage and Divorce Act creates a two year period during which the initial custody decree cannot be modified, unless there is a showing of serious endangerment to the child's physical, mental, moral or emotional health. UNIFORM MARRIAGE AND DIVORCE ACT § 409(a), 9A U.L.A. 628 (1987). The goal of placing restrictions on custody modification challenges is to maximize finality and provide continuity for the child. See UNIFORM MARRIAGE AND DIVORCE ACT § 409(a) comment, 9A U.L.A. 628 (1987); see also *M.P. v. S.P.*, 169 N.J. Super. 425, 431-32, 404 A.2d 1256, 1259-60 (App. Div. 1979); Note, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug-Of-War?*, 67 WASH. U.L.Q. 923 (1989).

13. See Note, *Parent's Sexual Lifestyle Not Determinative in Custody Proceeding*, 40 S.C.L. REV. 116, 116 (1988) ("Modification is required only if the evidence indicates a change of conditions that substantially affects the welfare of the child.").

14. "Coming out of the closet" is the euphemism for a person identifying himself or herself as a gay man or lesbian woman. See Harris & Turner, *Gay and Lesbian Parents*, 12 J. HOMOSEXUALITY 101, 102 (1986).

15. See, e.g., *In re Jane B.*, 85 Misc. 2d 515, 527, 380 N.Y.S.2d 848, 860 (Sup. Ct. 1976). Where the announcement of one parent's homosexuality is made in conjunction with a decision to live with a member of the same sex, the other parent often will argue that such a decision represents a sufficient change of circumstances to warrant a modification of the initial custody order. In *Jane B.*, a father successfully petitioned for change of custody due to the mother's suspected and later confirmed lesbianism. *Id.* at 527-28, 380 N.Y.S.2d at 860. The New York court found that the mother's homosexual relationship created an "improper environment" for her child. *Id.*; accord *M.J.P. v. J.G.P.*, 640 P.2d 966, 967 (Okla. 1982) (lesbian mother's continuing relationship sufficient change of circumstance to warrant modification of custody order).

"Coming out," however, is not always interpreted as a significant changed circumstance which warrants modification. For example, in *Stroman v. Williams*, 291 S.C. 376, 353 S.E.2d 704 (Ct. App. 1987), a father failed in his attempt to obtain modification based solely on the lesbian mother's ongoing relationship. *Id.* at 378, 353 S.E.2d at 706; accord *M.P. v. S.P.*, 169 N.J. Super. 425, 438-39, 404 A.2d 1256, 1263 (App. Div. 1979) (mother's sexual orientation

Adoption proceedings often involve many of the same issues that arise in custody proceedings. Adoption is a privilege created by state statute to allow people who cannot or choose not to bear children to establish a parental relationship with a child.<sup>16</sup> Courts have held that there is no fundamental right to adopt, and therefore, adoption petitions by homosexual individuals may be rejected without infringing on the equal protection clause.<sup>17</sup>

Courts administering adoption proceedings are charged with the responsibility of creating a permanent family environment where originally there was none.<sup>18</sup> Many courts are reluctant to create permanent "non-traditional" families.<sup>19</sup> Furthermore, most jurisdictions prefer to place children with married couples rather than to allow single people, whether heterosexual or homosexual, to adopt.<sup>20</sup> This judicial preference for married couples prejudices gay and lesbian couples because homosexual relationships, regardless of their genuineness and stability, carry no legal significance in most states.<sup>21</sup> Additionally, although sin-

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improper grounds for custody modification, absent any other showing of changed circumstances affecting child).

16. See Comment, *supra* note 10, at 1026. For a discussion of several state adoption statutes, see *infra* notes 172-79 and accompanying text.

17. See, e.g., *In re Opinion of the Justices*, 129 N.H. 290, 295-96, 530 A.2d 21, 24 (1987). The New Hampshire Supreme Court applied a rational relationship test to the question of whether a fundamental right to adopt existed. *Id.* The court held that proposed legislation that would exclude gay or lesbian persons as possible foster and adoptive parents was constitutional. *Id.* The court found a legitimate state purpose in eliminating "the 'social and psychological complexities' which living in a homosexual environment could produce in . . . children." *Id.*

18. See *In re Appeal in Pima County Juvenile Action B-10489*, 151 Ariz. 335, 338-39, 727 P.2d 830, 833-34 (Ct. App. 1986). Unlike custody decisions, adoption orders, when finalized, are not subject to future modification upon a showing of changed circumstances because a legal parent-child relationship is created. See *id.* at 339, 727 P.2d at 834 ("[S]ingle-parent adoptions are final with no subsequent available option of shifting custody between parents. Once an adoption is final, the sole means of reversal is by termination of parental rights—a remedy not lightly undertaken.").

19. See, e.g., *id.* at 338-40, 727 P.2d at 833-35 (possibility that child may be exposed to father's homosexual relationships at some point in future was sufficient reason to deny certificate of acceptability to gay man who wished to adopt). For example, Massachusetts has a policy that requires foster care and adoption agencies to attempt to place children in so-called "traditional settings." See Comment, *supra* note 10, at 1027 nn.123-25.

20. See Comment, *supra* note 10, at 1030. In Massachusetts, for example, agencies are required to use the following order of priority in placing children: (1) married couples with experience in childraising, (2) married couples without experience in childraising, (3) single parents or unmarried couples and (4) gay and lesbian couples or singles. *Id.* at 1027 n.123.

21. See Comment, *Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1606 (1989) (states "universally" have denied same-sex couples the right to marry). Some progress in acknowledging the rights of homosexual couples, however, has been made through the creation of legally-recognized "domestic partnership" rights for heterosexual and homosexual cohabitants. See, e.g., D.C.

gle heterosexual persons can adjust their status as potential adoptive parents by marrying, homosexual persons cannot.<sup>22</sup>

A gay man or lesbian woman applying to adopt a child may encounter many of the same obstacles confronting a homosexual parent seeking to assert custody rights.<sup>23</sup> These obstacles include societal and court biases against homosexual parents.<sup>24</sup> Unfortunately, courts hesitate to place a child in a non-traditional environment, even when the placement would arguably be in the best interest of the child.<sup>25</sup>

## II. CUSTODY DETERMINATIONS

### A. *A Parent's Homosexuality as the Sole Ground for Denial of Custody*

Courts making custody determinations<sup>26</sup> differ with respect to the standards and tests applicable when one parent is homosexual. Several courts have held that a parent's homosexuality may be an absolute bar to his or her custody rights.<sup>27</sup> Other courts apply a conclusive presumption of unfitness, and find that a person's status as a gay man or lesbian

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CODE ANN. § 2-3601 (Supp. 1991) (creating Commission on Domestic Partnership Benefits for District of Columbia government employees); *see also* *Two Assocs. v. Brown*, 131 Misc. 2d 986, 989-90, 502 N.Y.S.2d 604, 606-07 (Sup. Ct. 1986), *rev'd on other grounds*, 127 A.D.2d 173, 513 N.Y.S.2d 966 (1987), *appeal dismissed, appeal denied*, 70 N.Y.2d 792, 522 N.Y.S.2d 106, 516 N.E.2d 106 (1987) (same-sex cohabitant permitted to remain in rent-controlled apartment registered in name of deceased homosexual partner because his relationship to the man had been "as close as that of a family member").

22. Comment, *supra* note 10, at 1030. Presently, no state has a provision for legally-recognized homosexual marriages. *See* Comment, *supra* note 21, at 1606 & nn. 16-18 (even if statutes do not expressly prohibit homosexual marriage, courts will interpret them as if they do). Some clergy members of various religions, however, have supported "marriage ceremonies" that carry no legal significance, but illustrate the stability of a couple's homosexual relationship. *See* L.A. Times, Dec. 7, 1987, § 1, at 3, col. 1 (rabbi and various Protestant officials have performed ceremonial blessings for gay and lesbian couples).

23. Comment, *supra* note 10, at 1029-30.

24. *Id.* at 1029-32. For a further discussion of the misconceptions that hinder homosexual parents seeking custody, *see infra* notes 53-120 and accompanying text.

25. *See* Comment, *supra* note 3, at 277. One commentator has defined a gay person's right to adopt as "the most tenuous of parental rights today." *Id.*

26. It is important to distinguish custody arrangements from visitation rights. This section deals only with custody, because visitation is normally generously granted, barring any threat of harm to the child. *See, e.g., In re Marriage of Cabalquinto*, 100 Wash. 2d 325, 328-29, 669 P.2d 886, 888 (1983), *appeal after remand*, 43 Wash. App. 578, 718 P.2d 7 (1986) (homosexual father's right to visitation should be upheld, absent any showing of harm to physical, mental or emotional health of child).

27. *See, e.g., G.A. v. D.A.*, 745 S.W.2d 726, 727-28 (Mo. Ct. App. 1987) (mother's lesbian relationship, which court believed would provide "unhealthy environment" for her son, "tipped the scales" in favor of custody award to father); *Constant A. v. Paul C.A.*, 344 Pa. Super. 49, 58, 496 A.2d 1, 5 (1985) ("presumption of regularity" favors traditional, in other words, heterosexual relationships). For a discussion of *G.A.*, *see infra* notes 42-45 and accompanying

woman directly contradicts his or her status as a parent.<sup>28</sup> Some courts, rather than applying a conclusive presumption, nevertheless require gay and lesbian parents to rebut the presumption that homosexuality renders them unfit to raise their children.<sup>29</sup> For example, in *Constant A. v. Paul C.A.*,<sup>30</sup> the Pennsylvania Superior Court expressly stated that “where there is a custody dispute between members of a traditional family environment and one of homosexual composition, the presumption of regularity applies to the traditional relationship.”<sup>31</sup>

The *Constant A.* court held that despite the mother’s stable eight year relationship with a woman, her lesbianism prevented her from obtaining expanded custody of two of her children.<sup>32</sup> The lower court had contended that the mother’s lesbian relationship showed her “moral deficiency.”<sup>33</sup> The superior court actually commended the trial judge for his candor, noting: “We would prefer to have [him] express his belief as to the morality of this issue, than to conceal it and to have it be an un-verbalized consideration.”<sup>34</sup> The superior court also acknowledged that there exists a “national bias, which cannot be ignored, . . . to favor the non-homosexual parent in a custody case.”<sup>35</sup> In considering the argument that homosexuality is against societal values associated with the propagation of the human race, the court opined that any comparison between “illicit” homosexual relationships and meretricious heterosexual relationships was unfounded because the latter may still produce offspring.<sup>36</sup> Additionally, the court remarked that “if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society.”<sup>37</sup>

#### Jurisdictions that use homosexuality as a bar to awarding custody

text. For a discussion of *Constant A.*, see *infra* notes 30-37 and accompanying text.

28. See, e.g., *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985). In *Roe*, the court held that “[t]he father’s continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law.” *Id.* at 727, 324 S.E.2d at 694. For a more detailed discussion of the burden this presumption places on the homosexual parent, see Beargie, *supra* note 1, at 74-75.

29. See, e.g., *Constant A.*, 344 Pa. Super. at 58, 496 A.2d at 5.

30. 344 Pa. Super. 49, 496 A.2d 1 (1985).

31. *Id.* at 58, 496 A.2d at 5.

32. *Id.* at 67-68, 496 A.2d at 10. The mother sought expanded shared custody rights although she was initially granted only controlled partial custody and visitation rights. *Id.* at 52, 496 A.2d at 2. She sought modification to reflect her “changed circumstance” in that she had resolved her sexual identity problems and had maintained a stable lesbian relationship for eight years. *Id.* at 53, 496 A.2d at 3.

33. *Id.* at 54, 496 A.2d at 3.

34. *Id.* at 57, 496 A.2d at 5 (emphasis omitted).

35. *Id.*

36. *Id.* at 60-61, 496 A.2d at 6-7.

37. *Id.* at 59 n.6, 496 A.2d at 6 n.6.

fail to focus on which parent can offer the child the optimal environment, as the "best interest of the child" standard requires. These courts judge the homosexual parent by his or her alleged "indiscretion" without actually considering the interests of the child involved.<sup>38</sup> Empirical data shows that a person's sexual orientation does not have a per se detrimental effect on his or her child.<sup>39</sup> Therefore, such punitive custody decisions directly contradict the rationale behind the "best interest of the child" standard. Just as many courts hold that a heterosexual parent's prior sexual history or non-marital relationship cannot by itself bar his or her custody rights,<sup>40</sup> a homosexual parent's orientation should not by itself destroy his or her right to raise children.

Jurisdictions that view homosexuality as conflicting with notions of parenting often deny custody to homosexual parents with little or no evidence of any detrimental effect.<sup>41</sup> Furthermore, even when evidence is presented that repudiates the alleged detrimental effect on the child, many judges still favor the heterosexual parent over the homosexual

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38. See, e.g., *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 (Tenn. App. Mar. 30, 1988). One Tennessee Court of Appeals judge stated: While Mother's homosexuality may be beyond her control, submitting to it and living with a person of the same sex in a sexual relationship is not. Just as an alcoholic overcomes the habit and becomes a non-drinker, so this mother should attempt to dissolve her "alternate life style" of homosexual living. Such is not too great a sacrifice to . . . [expect] of a parent in order to gain or retain custody of his or her child. This Court can take judicial notice of the fact that throughout the ages, dedicated, loving parents have countless times made much greater sacrifices for their children.

*Id.* at \*29-30 (Tomlin, P.J., concurring).

39. For a discussion of empirical data revealing that a person's homosexuality does not have a per se detrimental effect on his or her child, see *infra* notes 54, 72 and 157-61 and accompanying text.

40. See *Beargie*, *supra* note 1, at 76. In New York, for example, the sexual lifestyle of a parent is deemed to be one of the factors to consider in a custody determination, but a court cannot deny a parent custody of his or her child solely on that basis. See *Feldman v. Feldman*, 45 A.D.2d 320, 322, 358 N.Y.S.2d 507, 510 (1974) ("[A]morality, immorality, sexual deviation and what we conveniently consider aberrant sexual practices do not *ipso facto* constitute unfitness for custody."); *CC v. CC*, 37 A.D.2d 657, 657, 322 N.Y.S.2d 388, 389-90 (1971) (heterosexual mother's overnight visitors did not render her unfit for custody, absent evidence that her conduct was "actually affecting" her son's upbringing).

41. See, e.g., *G.A. v. D.A.*, 745 S.W.2d 726, 727-28 (Mo. Ct. App. 1987) (custody awarded to single father rather than lesbian mother with no discussion of parenting skills).



parent.<sup>42</sup> For example, in *G.A. v. D.A.*,<sup>43</sup> the Missouri Court of Appeals denied a lesbian mother custody, finding that her lesbianism and her failure to specify a program of religious training for her son indicated that her home could be an unhealthy and harmful environment for him.<sup>44</sup> The dissenting judge ridiculed the majority's limited approach for determining which parent could provide a better environment, noting that the facts of the case clearly revealed that the mother was capable of providing the "superior" physical living arrangement.<sup>45</sup>

Rulings which are based solely on the parent's homosexuality are contrary to the requirements of the "best interest of the child" test.<sup>46</sup> Such punishment-oriented decisions are contrary to the view of other courts that "custody and visitation privileges are not to be used to penalize or reward parents for their conduct."<sup>47</sup> Courts seeking what is in the child's best interest should not discriminate on the basis of a parent's sexual orientation unless a direct causal relationship is shown between that orientation and a possible adverse affect on the child.<sup>48</sup>

#### B. *A Parent's Homosexuality as One Factor to be Considered in Custody Determinations*

Most courts do not expressly state that a parent's homosexuality is a bar to his or her custody rights.<sup>49</sup> Instead, most courts find that the sexual orientation of a parent is one factor that necessarily must be con-

42. See, e.g., *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 283-85 (Mo. Ct. App. 1989) (despite children's desire to live with mother and determination by psychologists and social workers that she would be the better custodian, court stated that her lesbianism would adversely affect children's morality); cf. Comment, *supra* note 1, at 408 (presumption that homosexual parent is unfit "may frequently leave the child in the hands of a less-fit parent or third party"). Evidence showing "fitness" is often found only in dissents of these cases, because the judges writing the majority opinions are predisposed to find against the homosexual parent. See, e.g., *G.A. v. D.A.*, 745 S.W.2d at 728-30 (Lowenstein, J., dissenting) (majority opinion failed to mention facts which could dispel presumption of unfitness, if it were rebuttable, and instead relied on fact of lesbianism as proof positive of unfitness).

43. 745 S.W.2d 726 (Mo. Ct. App. 1987).

44. *Id.* at 727-28.

45. *Id.* at 728-29 (Lowenstein, J., dissenting) ("To tip the scales solely on the basis of what "may" befall the child because of the mother's sexual preference results in this high stakes decision on the child's welfare being made on less than complete information and renders it suspect.").

46. See Comment, *supra* note 1, at 409.

47. See *In re Marriage of Cabalquinto*, 100 Wash. 2d 325, 669 P.2d 886 (1983), *appeal after remand*, 43 Wash. App. 578, 718 P.2d 7 (1986). The Washington Supreme Court stated that the lower court's restriction of visitation rights, if based solely on father's homosexuality, violated Washington state law that "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation." *Id.* at 329, 669 P.2d at 888.

48. For a discussion of the causal relationship, or "nexus" approach, see *infra* notes 133-165 and accompanying text.

49. See Comment, *supra* note 7, at 150.

sidered for a complete "best interest of the child" analysis.<sup>50</sup> A genuine adherence to the "best interest of the child" standard, however, examines the parent's sexual orientation only to discover whether it has some direct and adverse effect on the child.<sup>51</sup> Unfortunately, some courts reject this approach, and prefer to presume that a parent's homosexuality must adversely affect the child.<sup>52</sup> Therefore, many courts still strongly weigh the sexual orientation of a parent when making custody decisions.

### 1. *Alleged Effect a Parent's Homosexuality on a Child's Morality*

Because a parent plays an important role in teaching a child right from wrong, courts often consider the effect a parent's own lifestyle has on his or her child when making custody determinations. This analysis conforms with the "best interest" standard. A problem arises, however, when a court determines that the fact that a parent is a gay man or a lesbian woman is, in and of itself, evidence of his or her immorality.<sup>53</sup> The court's purported concern is that the alleged immorality will "rub off" on the children, and that they will become immoral, or even homosexual, themselves.<sup>54</sup>

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50. See Comment, *supra* note 7, at 151. In some cases, however, courts merely give lip service to the notion that homosexuality does not per se bar custody and list other reasons for denying custody to the homosexual parent simply to justify their preconceived view that a homosexual parent should not have custody. See *id.* at 150-52.

51. See *id.* at 153. For an analysis of the "nexus" test as the most appropriate means of evaluating custody disputes under the "best interest of the child" standard, see *infra* notes 133-165 and accompanying text.

52. See, e.g., *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (explicitly rejecting the "nexus" approach); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) ("[Homosexual] conduct can never be kept private enough to be a neutral factor in the development of a child's values and character.").

53. See, e.g., *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284-85 (Mo. Ct. App. 1989) (mother's lesbian relationship and "series of lies" she told in denying it viewed as "proof" of immorality); *G.A. v. D.A.*, 745 S.W.2d 726, 727-28 (Mo. Ct. App. 1987) (mother's lesbianism, combined with failure to specify whether she would provide religious training for her son, rendered her unfit to have custody).

54. See, e.g., *In re Jane B.*, 85 Misc. 2d 515, 521, 380 N.Y.S.2d 848, 854 (Sup. Ct. 1976) (psychiatrist testified that child might "emulate" mother's lesbian lifestyle). Many psychological and sociological studies suggest that a child will not become homosexual merely by living with a homosexual parent. In fact, some published reports conclude that a child establishes his or her own sexual orientation by age three. See *In re Appeal in Pima County Juvenile Action B-10489*, 151 Ariz. 335, 342, 727 P.2d 830, 837 (Ct. App. 1986) (Howard, J., dissenting) (testimony verified young age of sexual orientation). Information regarding the possible affects of a parent's homosexuality has been used in custody cases. See Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY, 692, 696 (1978) (parental lifestyle is not sole contributing factor influencing child's style of psychosexual development); Kleber, Howell & Tibbits-Kleber, *The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature*, 14 BULL. AM. ACAD. PSYCHIATRY L. 81, 83 (1986) (children of lesbian mothers have not demonstrated aberrant gender identity development, increased preference for homosexual object choice or

In *J.P. v. P.W.*,<sup>55</sup> the Missouri Court of Appeals affirmed the restriction of a gay father's custody rights, even though the lower court had justified the restriction on the alleged immorality associated with the father's sexual orientation.<sup>56</sup> Initially, the father had been granted "possessory custody" of his daughter for ten days every other month.<sup>57</sup> The child's mother, however, successfully petitioned to have the custody order modified to require adult supervision of the father's visits and to exclude the father's gay partner from those visits.<sup>58</sup> Stressing the role that a homosexual lifestyle may play in a child's moral development, the trial court stated:

It is not our function to indite a revisionary preachment as to moral models. We do recognize that today we have changing standards of morality. Certain conduct once looked upon by society with opprobrium does not carry the social or private stigma it once did a few short years ago. Such conduct may even be socially "approved." But private personal conduct by a parent which could well have an effect on children during the years in which their character, morality, virtues, and values are being formed, cannot be ignored or sanctioned by courts. Private conduct of a parent in the presence of a child or even under some other circumstances may well influence his or her young, impressionable life. . . . No matter how [this parent] or society views the private morality of the situation, we cannot ignore the influence [the parent's] conduct may well have upon the future of this child and cannot give our judicial cachet to such conduct by etching in the law-books for all to read and follow. We see no salutary effect for the young child in exposing him [or her] to the [parent's] miasmatic moral standards.<sup>59</sup>

Although direct testimony from the child's guardian ad litem<sup>60</sup> por-  
enhanced social/emotional maladjustment, when compared with children raised by single heterosexual mothers).

A recent study by Simon LeVay, a biologist at the Salk Institute for Biological Studies in San Diego, California revealed that there may be a physiological basis for the sexual orientation of gay men. LeVay's research suggested that the interstitial nuclei of the anterior hypothalamus, the portion of the brain which regulates male sexual behavior, was found to be smaller in the brains of homosexual cadavers than in heterosexual ones. While the test was limited to the 41 patients tested, the study strongly indicates that sexual orientation is biologically predestined within a person. For a full discussion of LeVay's study, see Gorman, *Are Gay Men Born That Way?*, TIME Sept. 9, 1991, at 60.

55. 772 S.W.2d 786 (Mo. Ct. App. 1989).

56. *Id.* at 794.

57. *Id.* at 786.

58. *Id.* at 786-87, 794.

59. *Id.* at 789 (quoting *L.H.Y. v. J.M.Y.*, 535 S.W.2d 304, 308 (Mo. Ct. App. 1976)).

60. The court appointed a guardian ad litem, who was a social worker and

trayed the gay father as a "conscientious, responsible, loving and caring person,"<sup>61</sup> the *J.P.* court found that his homosexuality could have an adverse effect on the child's moral development, and therefore, it concluded that it would be in the child's best interest to restrict the father's custody rights.<sup>62</sup>

*Collins v. Collins*<sup>63</sup> provides another example of a court finding that a parent's homosexuality may detrimentally affect his or her child's moral development. In *Collins*, the fact that the mother had taken four different lesbian partners over a ten year period greatly contributed to the court's finding that she was less fit as a parent than the father, who was involved in a nine year heterosexual relationship.<sup>64</sup> One judge, concurring in the majority opinion, believed that the mother established an immoral example which would adversely affect her daughter and therefore, found the mother to be an unfit parent.<sup>65</sup> The judge reasoned that because "homosexuality has been considered contrary to the morality of man for well over two thousand years," children must be protected from

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certified counselor, because the child was only two years old at the time of these proceedings. *Id.* at 791.

61. *Id.*

62. *Id.* at 792-94. The *J.P.* court noted:

[G]iven its concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles.

*Id.* at 792 (quoting *Roberts v. Roberts*, 22 Ohio App. 3d 127, 129, 489 N.E.2d 1067, 1070 (1985)).

63. No. 87-238-II, 1988 Tenn. App. LEXIS 123 (Tenn. App. Mar. 30, 1988).

64. *Id.* at \*7-8. While the *Collins* majority specifically said that it was not going to judge the mother by her morals, the court's decision appears to be based solely on the mother's homosexual lifestyle. *Id.* at \*6-8.

An in-depth analysis of the details of a homosexual parent's sexual activity is not uncommon in court opinions. *See, e.g., id.* at \*10-16 (Tomlin, P.J., concurring). In contrast, court decisions in custody disputes between heterosexual couples restrict discussion of the moral standards or conduct of the parents only to situations where such conduct may adversely affect the child. *See, e.g., Kraus v. Kraus*, 10 Ohio App. 3d 63, 460 N.E.2d 680 (1983) (mother's cohabitation with boyfriend did not indicate need for change in custody). *But see* *Beargie, supra* note 1, at 81-83.

In a 1988 Ohio Court of Appeals decision, the dissenting judge remarked that "all adult male homosexuals do not pursue a 'gay-lifestyle' anymore [sic] than all adult male heterosexuals pursue a 'swingers-lifestyle.'" *In re* the Adoption of Charles B., No. CA-3382, 1988 Ohio App. LEXIS 4435, at \*28 (Ohio App. Oct. 28, 1988) (Wise, J., dissenting), *rev'd, sub nom. In re* Adoption of Charles B., 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990). Unfortunately, these stereotypes do exist, and courts continue to cross-examine homosexual parents about their sexual activity.

65. *Collins*, No. 87-238-II, at \*9-30 (Tenn. App. March 30, 1988) (LEXIS, States library, Tenn. file) (Tomlin, P.J., concurring).

“choosing” it as a lifestyle.<sup>66</sup> He also placed great weight on his fear that homosexuality is a learned behavior, stating that “[y]oung people form their sexual identity partly on the basis of models they see in society. If homosexual behavior is legalized, and thus partly legitimized, an adolescent may question whether he or she should ‘choose’ heterosexuality.”<sup>67</sup> This logic, however, directly contradicts psychological studies which indicate that homosexuality is not a learned behavior.<sup>68</sup>

Although courts should examine the fitness of each parent to ensure that a child is placed in the best environment, homophobic<sup>69</sup> fears that the child’s sexual identity or social development will be damaged by a gay or lesbian parent’s sexual identity should not control custody decisions. Furthermore, psychological and sociological studies indicate that the effects these courts fear have not been found in children examined.<sup>70</sup> Children of homosexual parents exhibit the same psychosexual characteristics as those of heterosexual parents in the areas of sexual orientation, gender identity and sex role behavior.<sup>71</sup> One study has shown that there is no difference in the type and frequency of emotional problems between the two groups of children.<sup>72</sup> In addition, tests re-

66. *Id.* at \*15-16 (Tomlin, P.J., concurring).

67. *Id.* at \*17 (Tomlin, P.J., concurring). This logic was also expressed by a California court which feared that children may “pick up mannerisms, the behavior, and the way of speaking and talking, and gait, and other things that are likely to be decisive in which way these girls will go with their sexual identification at this particular time and over the next few years.” See Hitchens, *Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases*, 5 J. HOMOSEXUALITY 89, 95 n.2 (1979) (citing *Smith v. Smith*, Civ. No. 125497 (Superior Court of California, County of Stanislaus 1978) (Reporter’s Transcript, at 38)).

68. See, e.g., Green, *supra* note 54, at 696 (at least 36 of 37 children raised in unconventional families had “typical” and “apparently conventional” psychosexual development); Kleber, Howell & Tibbits-Kleber, *supra* note 54, at 83 (“no evidence of aberrant gender identity, social development, or sexual object choice” in lesbian mother families). There is no indication that the Collins judge’s observations were based on any psychological or sociological evidence. In fact, a strong argument can be made that children benefit from exposure to homosexual relationships. See, e.g., *M.P. v. S.P.*, 169 N.J. Super. 425, 438, 404 A.2d 1256, 1263 (App. Div. 1979). In *M.P.*, a New Jersey superior court suggested that placing two girls with their lesbian mother would not necessarily “jeopardize” their moral development, because it was “just as reasonable to expect” that they would become stronger and more self-confident in their developing moral standards as a result of their living in a homosexual-parent family. *Id.* Additionally, teenagers who are questioning their own sexual orientation and fear that society will disapprove may “closet” their emotions and remain detached. Having positive gay and lesbian role models may help them come to terms with their own sexuality.

69. “Homophobia” is generally defined as “an irrational fear or intolerance of homosexuality or homosexual persons.” Herek, *On Heterosexual Masculinity*, 29 AM. BEHAV. SCIENTIST 563 (1986).

70. For a discussion of the psychological and sociological data, see *supra* note 54 and *infra* notes 72 & 157-164 and accompanying text.

71. For a discussion of survey results concerning the characteristics of children with homosexual parents, see *supra* note 68.

72. Kirkpatrick, Smith & Roy, *Lesbian Mothers and Their Children: A Compara-*

veal that there is no evidence of "conversion" of otherwise heterosexual children into homosexual children.<sup>73</sup> The very fact that homosexual children are the offspring of heterosexual parents verifies that the sexual orientation of a parent does not control the child's orientation.<sup>74</sup>

## 2. *Societal Stigma and Homophobia*

Courts often will look to issues peripheral to morality in determining whether a gay or lesbian parent is fit to have custody of his or her child.<sup>75</sup> The justification frequently used for this approach is that harassment, stigmatization and peer pressure will have a detrimental impact on the child of a gay or lesbian person.<sup>76</sup> This justification, however,

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*tive Study*, 51 AM. J. ORTHOPSYCHIATRY 545, 551 (1981) (citing other environmental influences, such as marital discord and frequent moves or changes of child-care arrangement, as having a more significant detrimental impact on the children than sexual orientation of their parents).

73. See Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 547 (1979) (gay father commented: "My straight parents failed to make me straight, so there's no reason to believe I'd succeed in doing the reverse with [my son] even if I wanted to."); Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 882 (1985) (idea of "homosexual recruiters" refuted by fact that "every study on the subject" discovers homosexual orientation "as randomly and in the same proportion" among children of homosexual couples as in general population); see also Rivera, *Legal Issues in Gay and Lesbian Parenting*, in GAY AND LESBIAN PARENTS 199, 211 (F. Bozett ed. 1987) ("Who are the parents of gay human beings? Heterosexuals hold that distinction, in the great majority of cases. Obviously, the way to prevent homosexuality is to prevent heterosexual childbearing or childrearing.").

In fact, contrary to the argument that a homosexual parent will "convert" his or her child, many gay and lesbian parents report that they would not want their children to be homosexual because of social stigma and homophobic stereotypes. See, e.g., *J.P. v. P.W.*, 772 S.W.2d 786, 789 (Mo. Ct. App. 1987) (gay father stated he would prefer his daughter to be heterosexual because of society's attitude towards homosexuality). Apparently, courts that fear the possibility that children of homosexual parents will themselves be homosexual are unaware of the psychological studies performed. Perhaps if the legal community was exposed to the information obtained in these social science reports, custody decisions would reflect a more realistic analysis.

74. See N.Y. Times, Jan. 21, 1987, § 3, at 1, col. 1. The chairman of the American Psychological Association's Committee on Lesbian and Gay Concerns stated: "People who worry that a child's sexual orientation inevitably will follow that of their parents should remember that most people who are homosexual were raised by heterosexual parents and surrounded by heterosexual role models as they were growing up." *Id.* Furthermore, evidence indicates that gay or lesbian parents do not have the ability to "convert" their children to lead a homosexual lifestyle even if this was their goal. See Comment, *supra* note 73, at 882 ("[A]s they grow up, children adopt sexual orientations independently from their parents.").

75. Cf. Hitchens, *supra* note 67, at 90 ("[S]ociety's assumptions and prejudices regarding both homosexuality and the proper way to raise children are reflected in the laws and court decisions.").

76. See Comment, *supra* note 73, at 877 n.157 (quoting Steven Lachs, the first openly gay United States judge, who considers concern over harassment "a

must not be permitted to bar homosexual custody per se, otherwise the legal system is condoning the persistence of homophobia.<sup>77</sup>

The kind of harassment to which homosexual parents and their children are subjected by "queer bashers" and cruel children is similar to the harassment historically experienced by persons who sought interracial marriages.<sup>78</sup> Initially, courts were reluctant to accept such marriages, viewing interracial relationships as against the best interest of the children.<sup>79</sup> The United States Supreme Court, however, held that majoritarian morals could not prevail where they promoted miscegenation laws that were clearly based on prejudice.<sup>80</sup>

Additionally, the Supreme Court has explicitly rejected the argument that fears of societal prejudice and harassment should control custody decisions.<sup>81</sup> In *Palmore v. Sidoti*,<sup>82</sup> the Court acknowledged that there was a possibility the child might be stigmatized because her white mother had married a black man, but stated that the equal protection clause of the Constitution would not allow this fact to be the determinative factor in deciding whether to remove the child from her mother's custody.<sup>83</sup> The Court opined that a denial of custody may not be based on "private biases and the possible injury they might inflict."<sup>84</sup> Instead, the Court found that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>85</sup> While the Supreme Court has yet to rule on the custody rights of homosexual parents, some state courts have applied *Palmore*-like reasoning in granting custody to homosexual parents.<sup>86</sup>

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truly rational concern, considering the intensity of our society's prejudice and the cruelty which children can exhibit toward one another").

77. *Id.* at 878. One commentator has warned:

Each time a court recognizes society's lack of acceptance as a valid reason for anti-gay discrimination, the non-acceptance is perpetuated and further memorialized in law. The judge is in a unique position to help to alleviate some of the social stigma of homosexuality, . . . by allowing a loving (homosexual) parent to share in the custody of his or her child. Instead, . . . judges often feel compelled to invoke society's prejudice as the justification for hindering that parent-child relationship.

*Id.* (footnote omitted).

78. See Comment, *supra* note 1, at 404.

79. See *Palmore v. Sidoti*, 466 U.S. 429, 430-31 (1984).

80. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (Virginia's laws prohibiting interracial marriage violated equal protection and due process clauses of Constitution, because conduct they proscribed was generally accepted when engaged in by white couples or black couples).

81. See *Palmore*, 466 U.S. at 433-34.

82. 466 U.S. 429 (1984).

83. *Id.* at 433-34.

84. *Id.* at 433.

85. *Id.*

86. See cases cited *infra* notes 87, 90-92. It should be noted that homosexuality is not currently a protected constitutional classification. In *Bowers v.*

In *M.P. v. S.P.*,<sup>87</sup> a New Jersey appellate court became the first court to hold that private biases may not affect custody orders, when it refused to modify an order granting a lesbian mother custody of her children. The New Jersey court recognized that the social stigma involved would not be eliminated by changing the custody decree. The court found that the stigma and potential embarrassment, if they existed at all, were the result of having a homosexual parent and did not arise from the fact that the children lived with a lesbian mother.<sup>88</sup> The court also recognized that the lesbian mother's continuing custody of her children could have a beneficial effect, stating:

Of overriding importance is that within the context of a loving and supportive relationship there is no reason to think that the girls will be unable to manage whatever anxieties may flow from the community's disapproval of their mother. . . .

If defendant retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the 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.<sup>89</sup>

Since the 1984 *Palmore* decision, the Supreme Court's reasoning has been applied to custody cases involving homosexual parents in Alaska,<sup>90</sup>

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*Hardwick*, 478 U.S. 186 (1986), the Supreme Court expressly stated that there is no fundamental right to engage in homosexual conduct and therefore, such conduct is not afforded constitutional protection. *Id.* at 191-92. For a plausible argument that homosexuality should be afforded intermediate scrutiny under the equal protection clause, see Comment, *supra* note 1, at 397-407 (homosexual people should be classified as quasi-suspect class because they are target of incorrect stereotypes, have faced history of discrimination and stigmatization and are politically powerless minority, and because homosexuality is immutable and unchangeable characteristic).

87. 169 N.J. Super. 425, 404 A.2d 1256 (App. Div. 1979).

88. *Id.* at 436, 404 A.2d at 1261-62.

89. *Id.* at 436-38, 404 A.2d at 1262-63.

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



New York<sup>91</sup> and Ohio.<sup>92</sup> If other courts are to take affirmative steps in countering society's negative views of homosexual parents, they must use the *Palmore* logic and set aside societal pressures in order to make custody by the gay or lesbian parent a more realistic option in custody battles.

### 3. Criminalization of Sodomy

Approximately half of the states have statutes which criminalize sodomy.<sup>93</sup> Not surprisingly, even orientation-neutral sodomy laws, though rarely enforced at all, are usually enforced only against homosexuals.<sup>94</sup> The existence of these laws has been used to strengthen the argument that society does not approve of homosexual conduct, and therefore, does not approve of homosexual people.<sup>95</sup> Those jurisdictions that use this argument contend that any parent who participates in criminal acts is unfit to have custody of his or her child.<sup>96</sup>

Through its decision in *Bowers v. Hardwick*,<sup>97</sup> the Supreme Court revitalized the use of criminalization of sexual conduct as a means to deny custody to homosexual men and women.<sup>98</sup> In *Bowers*, the Court held that a Georgia statute which prohibited consensual sodomy was

91. *M.A.B. v. R.B.*, 134 Misc. 2d 317, 323-24, 331, 510 N.Y.S.2d 960, 963-64, 969 (Sup. Ct. 1986) (acknowledging son would require strength to contend with genuine social pressures, court nonetheless granted custody to gay father).

92. *Conkel v. Conkel*, 31 Ohio App. 3d 169, 173, 509 N.E.2d 983, 987 (1987) (given that children would eventually have to come to terms with father's homosexuality regardless of custody or visitation rights, stigmatization resulting from his sexual orientation was inappropriate factor for modification of custody decree).

93. Sodomy laws generally prohibit "contact between the genitals of one person and the mouth or anus of another." See Comment, *supra* note 1, at 419 n.176; see, e.g., CAL. PENAL CODE § 286 (West 1988); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1986); GA. CODE ANN. § 16-6-2 (1988); LA. REV. STAT. ANN. § 14:89 (West 1986); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1990); MICH. COMP. LAWS ANN. § 750.158 (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 566.090 (Vernon 1979); OKLA. STAT. ANN. tit. 21, §§ 886, 887 (West 1983); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1976); TEX. PENAL CODE ANN. § 21.06 (Vernon 1989).

94. See generally, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

95. See, e.g., *id.* at 196 (Supreme Court recognized probable basis for Georgia sodomy law was societal belief that homosexual sodomy is "immoral and unacceptable"); *Constant A. v. Paul C.A.*, 344 Pa. Super. 49, 55-57, 496 A.2d 1, 4-5 (1985) (court found homosexual conduct to be included in statutory definition of "deviate sexual intercourse" and stated that sodomy was a crime and unprotected outside of marital relationship).

96. See Comment, *supra* note 1, at 419-20 (noting that presumption of unfitness is inappropriate because not all states have outlawed sodomy, and not all homosexual parents engage in this behavior).

97. 478 U.S. 186 (1986).

98. See Rivera, *supra* note 73, at 214 ("The . . . *Hardwick* decision will lend great credence to [the argument that homosexual parents are immoral and should be denied custody], not only in the states that still criminalize adult con-

constitutional.<sup>99</sup> Although the statute did not distinguish between homosexual and heterosexual relationships in prohibiting the conduct, the Court's ruling dealt only with "whether the federal constitution confers a fundamental right upon homosexuals to engage in sodomy."<sup>100</sup>

The *Bowers* decision did not mandate the enactment of sodomy statutes in those states which did not previously have them.<sup>101</sup> Additionally, statutes prohibiting sodomy do not outlaw all sexual activity in which homosexual men and women engage, nor do they outlaw the existence of homosexual relationships.<sup>102</sup> Most states, however, do not provide statutory protection for homosexual persons against discrimination.<sup>103</sup> Absent such statutory protection, many courts refuse to protect homosexual persons from discrimination in areas such as employment<sup>104</sup> and the military.<sup>105</sup>

The jurisdictions that still have sodomy laws effectively legitimize similar discriminatory treatment of homosexual parents involved in custody disputes. Until all sodomy laws are repealed, it will be difficult for

sensual sex, but also in others because of the chilling effect of the majority's words.").

99. See *Bowers*, 478 U.S. at 196. The Georgia sodomy statute provided:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

*Id.* at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

100. *Id.* at 190.

101. See *Rivera*, *supra* note 73, at 200 ("[T]he *Hardwick* decision does not technically affect the status of homosexual persons in those states that have decriminalized sodomy. Those states are not required to recriminalize such behavior. . . . [The decision] simply allows states to retain sodomy laws free from a constitutional challenge based on federal constitutional privacy doctrines.").

102. See Comment, *supra* note 1, at 419-20.

103. A number of states, however, have recently included sexual orientation as a protected classification under discrimination laws. See, e.g., CONN. GEN. STAT. ANN. § 53a-181b(a) (West Supp. 1991) ("A person is guilty of intimidation based on bigotry or bias if such person maliciously, and with specific intent to intimidate or harass another person because of such other person's race, religion, ethnicity or sexual orientation does any of the following . . ."); MINN. STAT. ANN. § 609-595(b) (West 1991) ("Whoever intentionally causes damage to another's physical property without the other person's consent because of the property owner's actual or perceived race, color, religion, sex, sexual orientation, disability . . . age or national origin" may be imprisoned or fined); WIS. STAT. ANN. §§ 16.765 (employment) (West 1986), 21.35 (national guard) (West 1986), 36.12 (students at University of Wisconsin) (West Supp. 1990), 38.23 (vocational, technical, and adult education) (West Supp. 1990), and 66.395 (housing) (West 1990).

104. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979) (Title VII of Civil Rights Act does not extend to sexual orientation in employment discrimination context).

105. See, e.g., *Oronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (private homosexual behavior of naval officer valid grounds for dismissal).

gay and lesbian parents to overcome a presumption that their "lifestyle" is illegal and thus, necessarily detrimental to their children.

#### 4. AIDS and Misinformation About Health Care Issues

Acquired Immune Deficiency Syndrome (AIDS)<sup>106</sup> has had a catastrophic affect on members of the gay community. This incurable disease has struck a devastating blow to the homosexual male population—the primary group to contract AIDS in this country.<sup>107</sup> While the consequences of the disease are tragic, AIDS is not a "gay plague" or a "punishment from God," nor is every member of the gay community infected with it. The threat of AIDS, however, is now mentioned with alarming frequency in cases of child custody,<sup>108</sup> particularly where the homosexual parent is the father.<sup>109</sup>

Misconceptions about AIDS, who it affects and how it is transmitted, have made it more difficult for gay parents to assert visitation and custody rights.<sup>110</sup> In one case, a court imposed restrictions on a gay

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106. AIDS is "a condition of acquired immunological deficiency associated especially with male homosexuality and intravenous drug abuse." Comment, *supra* note 10, at 1013 n.35.

107. See L. FRUMKIN & J. LEONARD, QUESTIONS AND ANSWERS ON AIDS 32-33 (1987); see also, R. BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES (1979) (discussing societal consequences of AIDS to gay community and nation at large); D. TYCKOSON, AIDS BIBLIOGRAPHY SERIES, AIDS 1989, PART 1, at 3 (1990) (reporting that in United States and Europe, homosexual men account for 63% of AIDS cases).

108. I am referring only to cases raising the possibility of the homosexual parent's contraction of AIDS or expressing fear of exposure of the child to the HIV virus which causes it. None of the cases to be discussed herein deal with situations where the gay parent has or had AIDS or was HIV-positive at the time of the custody battle in question. Such a case would raise genuine health care issues, which should appropriately be considered by the courts in determining custody rights. This paper will not discuss the position of an HIV-positive parent, but rather will deal with misconceptions about the disease that hinder other homosexual parents in their attempts to assert custody and visitation rights.

109. See, e.g., J.P. v. P.W., 772 S.W.2d 786, 789 (Mo. Ct. App. 1989) (denying partial custody to father and noting that incidence of AIDS is higher in homosexual men than rest of populace and that "false negatives" may hide actual cases of AIDS); cf. Doe v. Roe, 139 Misc. 2d 209, 221, 526 N.Y.S.2d 718, 726 (Sup. Ct. 1988) (court refused to compel blood test for HIV antibody, recognizing potential for harassment of homosexual parents in other custody cases).

In the recent case of *In re Adoption of Charles B.*, 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990), the dissenting judge felt that a gay man, although he had tested negative for the HIV virus, was unfit to be the adoptive parent of a child with leukemia because the child would be at an increased risk of exposure to the AIDS virus. *Id.* at 95-96, 552 N.E.2d at 890-91 (Resnick, J., dissenting). Because the child's immune system was already impaired from the leukemia, exposure to the HIV virus would "exacerbate" the physical and mental problems associated with the child's own immune system problems. *Id.* (Resnick, J., dissenting).

110. Rivera, *supra* note 73, at 215 ("[T]he fear in the general population, the low level of knowledge about AIDS, and the unfortunate connection between the disease and gay men have created a formidable obstacle for gay women and men who wish to parent their children."). *But see* Comment, *supra* note

father for fear that, since he refused to be tested for AIDS, he might transmit the virus to his children.<sup>111</sup> Although medical evidence, confirmed by experts in the health care industry, indicates that the AIDS virus is not spread by casual contact, this evidence has not lessened the homophobic and AIDS-phobic attitudes of society that have been reinforced in the courtroom.<sup>112</sup> In fact, lesbian women, who are least susceptible to the AIDS virus, are also victims of uneducated courts that rely on the mistaken belief that all homosexual people are equally likely to carry the AIDS virus.<sup>113</sup>

Fear of AIDS is only the most recent factor raised by courts attempting to deny custody to homosexual parents. Prior to the appearance of this disease, homosexual people were branded with alarming psychological labels. Homosexual orientation was viewed as a kind of mental illness, and courts were reluctant to award custody to someone who was "imbalanced."<sup>114</sup> By 1977, however, both the American Psychiatric Association and the American Psychological Association had defined homosexuality as being neither a mental disorder nor a mental

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1, at 422 ("To date, most cases to change custody or deny visitation solely on the parent's possible or actual infection with the HIV virus have been unsuccessful.").

111. See NEWSWEEK, June 30, 1986, at 26 (Chicago court denied overnight visitation rights to gay father who refused to submit to AIDS test).

112. See L. FRUMKIN & J. LEONARD, *supra* note 107, at 32-52. AIDS is transmitted through body fluids, usually sexual contact, intravenous injection of drugs with unsterilized needles, blood transfusions or in utero from mother to child. *Id.*

Many courts that have felt compelled to mention the fact that homosexual men are in the high-risk category for contracting the AIDS virus have never distinguished between gay men who were in stable, monogamous relationships and those who were single and participating in the "flamboyant gay lifestyle" of gay bars and discos. Rather than recognizing the gay or lesbian couple as a stable family environment, courts would prefer to give custody to a single heterosexual parent so as to avoid any alleged detrimental effect on the children. See, e.g., J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (denying partial custody to homosexual father and his partner in favor of single heterosexual mother); G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987) (custody of son awarded to heterosexual father rather than to former wife who was lesbian and lived with her lover).

113. Lesbian women are not considered a "high risk group" for the virus. See L. FRUMKIN & J. LEONARD, *supra* note 107, at 34 ("AIDS is not prevalent among lesbians as a group."). Some courts, however, group all homosexual people together and limit visitation and custody rights based on an alleged health care justification. See Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907, 913 (1986) (justice of West Virginia Supreme Court expressed belief that AIDS should cause judges to rethink opinions on fitness of lesbian mothers to have custody); Rivera, *supra* note 73, at 215 (court forbade lesbian mother to kiss her children or even have them in her home because of potential danger from AIDS).

114. See Comment, *supra* note 3, at 282-83 (long standing prejudices that homosexuality is a mental illness still cloud judicial evaluation of cases involving homosexual people).

illness.<sup>115</sup>

Another irrational fear is that homosexual men and women molest their children.<sup>116</sup> Studies show that most child molestations are committed by heterosexual men with female victims.<sup>117</sup> Nevertheless, the unfounded fear that homosexual parents will molest their children plays a large role in custody determinations involving gay and lesbian parents.<sup>118</sup> For example, in one adoption proceeding, an Arizona trial court which denied a gay man's petition for pre-adoption certification closely questioned him about any "unusual urge or . . . sexual attraction to younger boys."<sup>119</sup> While the Arizona case was an adoption proceeding and the applicant had no parental right to custody, similar fears are indulged in many custody determinations.<sup>120</sup>

### C. Conditions Placed on Homosexual Parents Seeking to Obtain or Retain Custody of Their Children

Courts often impose conditions on gay or lesbian parents as prerequisites to granting them custody of their children.<sup>121</sup> Many of these con-

115. Comment, *supra* note 73, at 872 & nn.125-27. In 1973, the American Psychiatric Association decided that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational abilities." *Id.* at 872 n.125 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M. III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281-82, 380 (3d ed. 1980)).

116. See Rivera, *supra* note 73, at 210-11 (allegations that homosexual parent will molest child are "often accepted by courts").

117. See H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 129 (4th ed. 1986) (97% of child molesters in America are heterosexual males and 87% of victims are female); Rivera, *supra* note 73, at 211 (heterosexual men commit 85% of child molestations while homosexual men commit only 14%).

118. Rivera, *supra* note 73, at 210-11.

119. According to the dissent of *In re Appeal in Pima County Juvenile Action B-10489*, the trial court asked the homosexual petitioner whether his "relationship with any adoptive child would be essentially or totally asexual," and further asked, "Do you feel that you have any unusual urge or any unusual sexual attraction to younger boys? Do you feel the absence of any urge towards younger boys? Have you ever had any psychological tests that were intended to assess that relationship between you and younger boys?"

*In re Appeal in Pima County Juvenile Action B-10489*, 151 Ariz. 335, 343, 727 P.2d 830, 838 (Ct. App. 1986) (Howard, J., dissenting).

120. See Rivera, *supra* note 73, at 210-11. Accusations of child molestation are also directed, though much less frequently, at lesbian parents. *Id.* at 211.

121. These conditions only appear in jurisdictions where courts believe that there is potential harm from the fact that the parent is an "active" or "practicing" homosexual. Although in such courts homosexuality per se does not exclude custody rights, these conditions are viewed as compromises to protect the child from alleged adverse effects of the parent's homosexual behavior. See *Kallas v. Kallas*, 614 P.2d 641, 645 (Utah 1980) ("Although a parent's sexuality in and of itself is not alone a sufficient basis upon which to deny completely a parent's fundamental right, the manifestation of one's sexuality and resulting

ditions stem from prejudices and stereotypes regarding the exposure of the child to elements of the so-called "gay lifestyle," especially in the context of the single-sex home.<sup>122</sup> In the past, courts relied on fear of exposure of the gay community in order to completely deny custody to the gay or lesbian parent.<sup>123</sup> Recently, "conditional" custody has provided a more lenient means of compromise.

The most significant condition placed on a gay or lesbian parent's custody and visitation rights is the forbidding of contact between the children and the parent's partner.<sup>124</sup> Despite the argument that significant and stable relationships provide an ideal role model for children, most courts feel that exposure to a homosexual relationship would be detrimental to a child.<sup>125</sup> As a result, many courts have enjoined the

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behavior patterns are relevant to custody . . ."). In reality, these conditions are more often punitive measures to halt the parent's homosexual conduct. *Cf.* Collins v. Collins, No. 87-238-II, 1988 Tenn. App. LEXIS 123, at \*28 (Tenn. App. March 30, 1988), (Tomlin, P.J., concurring) (one judge suggested that mother should sacrifice lesbian life style in order to retain custody of her child). For other cases where courts have imposed conditions on gay or lesbian parents as prerequisites to granting them custody of their children, see *infra* notes 122-32.

122. See Rivera, *supra* note 73, at 212. One commentator has remarked: Parents who are allowed to keep custody are often ordered not to live with their life partner or have any overnight visitors. Presumably, the children would be affected adversely by seeing their parent express affection and love toward a same-sex individual. We are not talking about limits imposed on open sexual intimacy in front of children such as those implicitly imposed on even heterosexual couples. Rather, a gay parent who is allowed custody must in effect live an "ostensibly" celibate life presumably seeking sexual gratification in clandestine and furtive ways. Ironically, courts would thus force gay persons to live the kind of lives for which they are being condemned by society.

*Id.* (footnote omitted).

123. See, e.g., *In re Jane B.*, 85 Misc. 2d 515, 527-28, 380 N.Y.S.2d 848, 860-61 (Sup. Ct. 1976) (custody transferred from lesbian mother and visitation conditioned on isolation of child from mother's partner and other homosexual individuals); see also *Jacobson v. Jacobson*, 314 N.W.2d 78, 82 (N.D. 1981) ("[B]ecause [the mother] is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the best interests of the children will be better served by placing custody of the children with [their father].").

124. I use the word "partner" to represent a significant person to whom the parent has chosen to make a stable, monogamous commitment. The word is meant to be a shortened form of the more cumbersome "life partner," and not meant to suggest only a "sex partner." I do not use the term "lover" because this suggests that the relationship is a meretricious one, based solely on sexual relations. In most cases, partners have decided to establish a home together, and many live as they would if it were possible for them to marry.

125. See, e.g., *In re Jane B.*, 85 Misc. 2d at 525, 380 N.Y.S.2d at 858 ("[T]he home environment with [the mother's] homosexual partner in residence is not a proper atmosphere in which to bring up this child or in the best interest of this child."); *A. v. A.*, 15 Or. App. 353, 356, 359, 514 P.2d 358, 359, 361 (1973) (court affirmed grant of custody to father suspected of "homosexual traits and tendencies," on condition that no man live in family home, so court might "safeguard the home environment against possible pernicious influences").

parent's partner from any contact with the child.<sup>126</sup> Other courts have simply prohibited overnight visits with a non-custodial homosexual parent and his or her partner.<sup>127</sup> Some of the more extreme restrictions involve a court's ordering the homosexual parent not to live with his or her partner<sup>128</sup> or to end completely any relationship of a homosexual nature.<sup>129</sup>

One particularly troubling aspect of family living considered by some courts is the parent's attitude regarding involvement in the "gay community." Those parents that have tried to lessen the impact of their homosexual lifestyle on their children have been rewarded with custody,<sup>130</sup> while those who were more open about their homosexuality have been denied that same right.<sup>131</sup> These decisions appear to be concerned primarily with punishing or rewarding the parent rather than ap-

126. See, e.g., *Pascarella v. Pascarella*, 355 Pa. Super. 5, 7, 512 A.2d 715, 716 (1986) (gay father granted partial custody and permitted to "spend time with his children outside of [their guardians'] residence to engage in reasonable activities and events with his children so long as it is not in the presence or company of [his male partner]"); *Scarlett v. Scarlett*, 257 Pa. Super. 468, 470, 390 A.2d 1331, 1333 (1978) (lesbian mother granted custody on condition that daughter not be exposed to "improper influences," particularly mother's lesbian partner).

127. In *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 (Tenn. App. Mar. 30, 1988), the Tennessee Court of Appeals affirmed a trial judge's grant of custody to a heterosexual father that limited visitation by the lesbian mother, stating:

[The mother] will be enjoined and restrained during that visitation from having the child around her lesbian friend on an overnight basis. They can go on picnics and things like that, but overnight or spending the night while this child is in the house would continue the relationship that I am trying to get her out of.

*Id.* at \*3, 8-9.

128. See, e.g., *Schuster v. Schuster*, 90 Wash. 2d 626, 629-30, 585 P.2d 130, 132-33 (1978) (reinstating provision of custody decree that allowed lesbian mothers to retain custody of their children only on condition that they live separate and apart).

129. See, e.g., *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (court analogized between homosexually active mother and drug pusher, habitual criminal or child abuser, and affirmed trial court's grant of custody only on condition that she terminate relationship with partner).

130. See, e.g., *Whitehead v. Black*, (Maine Super. Ct., Cumberland County, June 14, 1976) (full custody granted to lesbian mother because she "intelligently [sought] to minimize, if not totally eliminate" the impact of her homosexual lifestyle on her children), *reprinted in digest form in* 2 Fam. L. Rep. (BNA) 2593.

131. See, e.g., *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987). In *S.E.G.*, the court restricted visitation rights of a lesbian mother "to prevent extreme exposure" of her life style to her children, stating:

[The mother] has chosen not to make her sexual preference private but invites acknowledgement and imposes her preference upon her children and her community. . . . We are not forbidding Wife from being a homosexual, from having a lesbian relationship, or from attending gay activist or overt homosexual outings. We are restricting her from exposing these elements of her "alternative life style" to her minor children.

*Id.* at 167; see also *M.J.P. v. J.G.P.*, 640 P.2d 966, 967 (Okla. 1982) (fact that

plying the "best interest of the child" test.<sup>132</sup>

D. *The Better Model—Requiring a Proven "Nexus" Between the Parent's Sexual Orientation and an Adverse Effect on the Child*

The most logical standard adopted by courts is the "nexus" test, whereby a parent's homosexuality is not a consideration in granting or denying custody unless there is a proven connection between the parent's homosexuality and a detrimental effect on the children.<sup>133</sup> This approach is the most direct application of the traditional "best interest of the child" standard, because it does not create an inference that a parent's homosexuality itself has a detrimental impact on the child's upbringing.<sup>134</sup> As a result, the parental fitness of each person can be properly examined to determine which home environment is best, and the determination can be free from unfounded fears, misconceptions and prejudices about homosexual parenting.<sup>135</sup>

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lesbian mother and partner confirmed their relationship with "Gay-la Wedding" in church contributed to court's denial of custody).

For an interesting discussion of the effects of hiding one's sexual orientation in order to gain custody of one's children, see Polikoff, *supra* note 113, at 907-08.

132. Because the trial court's determination of what is in "the best interest of the child" is based on several factors, including the sexual lifestyle of the parent, it is easy for a court to cloak its holding in the "best interest of the child" test, when in reality, the court is punishing the homosexual parent because of the court's prejudice. See Comment, *supra* note 7, at 142-43.

133. Requiring a "nexus" is not a recent development of custody law. In *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973), a Michigan appeals court reversed a denial of custody because there was "little, if any, . . . evidence to support the finding that the appellants' homosexual relationship rendered their home unfit for their children." *Id.* at 365, 212 N.W.2d at 59. Additionally, in 1980, the Supreme Judicial Court of Massachusetts overturned a lower court's ruling that a mother's intent to raise her children in a lesbian household rendered her unfit to have custody. See *Bezio v. Patenaude*, 381 Mass. 563, 410 N.E.2d 1207 (1980). In *Bezio*, the court required that a mother's lesbianism must affect her parenting ability in order to justify denying the mother custody of her children. *Id.* at 578-79, 410 N.E.2d at 1215-16. Finding no connection between her sexual orientation and her parenting ability, the court reversed the denial of custody to the lesbian mother. *Id.* at 578-80, 410 N.E.2d at 1215-16.

134. See Comment, *supra* note 1, at 412-13 ("Because the court, under [the nexus] approach, actually analyzes the evidence regarding the fitness of the parent and the particular needs of the child, rather than bypassing these questions through presumptions, the best interests of the child can be more consistently and accurately determined.").

135. See *id.* at 411-13. Such an approach does not leave all of the traditional approaches regarding parental fitness by the wayside. As in any custody dispute, once a homosexual parent's activities are found to be detrimental to the child, that factor must be considered in applying the "best interest" test. The "nexus" approach merely avoids any presumption against the gay or lesbian parent and places both parents on an equal footing. As the Supreme Judicial Court of Massachusetts stated in *Bezio*: "The State may not deprive parents of custody of their children 'simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or



One of the first cases applying the "nexus" test, *Guinan v. Guinan*,<sup>136</sup> has led to favorable results for gay and lesbian rights advocates. In *Guinan*, it was not clear whether the mother had actually engaged in a lesbian relationship, as the father alleged.<sup>137</sup> Therefore, the court was required to examine the impact that *any* sexual activity by the mother had on the children.<sup>138</sup> Because the evidence revealed no adverse reaction arising from the mother's sexuality, and the court found her to be "a fit, competent and loving parent," she was permitted to retain custody of her children.<sup>139</sup>

The "nexus" test was further refined in the case of *Gottlieb v. Gottlieb*,<sup>140</sup> which dealt with conditions placed on a homosexual parent's custody rights.<sup>141</sup> In *Gottlieb*, the lower court had limited the gay father's visitation rights as follows:

[It is] ORDERED AND ADJUDGED that defendant's visitation privileges at his home are conditioned on the total exclusion of his lover or any other homosexuals during such visitation periods; and . . . that defendant's visitation privileges not limited to his home are conditioned upon the total exclusion of his lover and any other homosexuals from any contact with defendant and child . . . .<sup>142</sup>

One appellate judge noted that there was "no real purpose" for these conditions absent punishment of the father for his sexual orientation.<sup>143</sup> Applying the nexus test used in *Guinan*,<sup>144</sup> the *Gottlieb* court removed these restrictions from the custody order.<sup>145</sup>

Courts can best effectuate the placement of children in a home envi-

pursue life-styles at odds with the average.' " *Bezio*, 381 Mass. at 579, 410 N.E.2d at 1216 (citation omitted).

136. 102 A.D.2d 963, 477 N.Y.S.2d 830 (1984).

137. *Id.* at 964, 477 N.Y.S.2d at 831. Unfounded allegations of homosexuality often appear in custody disputes because of the presumption that they will result in granting custody to the other parent. The "nexus" test can be used to ferret out those fabricated claims by restricting the discussion to whether there is any adverse effect on the children.

138. *Id.* at 964, 477 N.Y.S.2d at 832 (court noted any sexual activity taking place in the presence of the children could have adverse effect upon them, whether parent's partners were homosexual or heterosexual).

139. *Id.* at 964, 477 N.Y.S.2d at 831-32.

140. 108 A.D.2d 120, 488 N.Y.S.2d 180 (1985).

141. *Id.* at 120-21, 488 N.Y.S.2d at 180-81.

142. *Id.* at 122, 488 N.Y.S.2d at 182 (Kupferman, J.P., concurring).

143. *Id.* (Kupferman, J.P., concurring).

144. For a discussion of *Guinan*, see *supra* notes 136-39 and accompanying text.

145. 108 A.D.2d at 121, 488 N.Y.S.2d at 181. It should be noted, however, that the court retained another provision which prohibited the child's involvement in homosexual activities or publicity. *Id.* The dissenting judge recognized that the retention of this clause preserved the "unpleasant connotation" that a gay parent would not realize it is inappropriate to expose a small child to sexual

ronment by stressing factors other than the sexual orientation of a parent. For example, in *M.A.B. v. R.B.*,<sup>146</sup> a twelve-year-old child who had severe behavioral problems "in and out of school" was placed in the home of his gay father who lived with his male partner.<sup>147</sup> The New York Supreme Court upheld the placement because there was no adverse effect on the boy and, in fact, "the boy fared far better with his father than with his mother."<sup>148</sup> The court acknowledged the possibility that the child might be confronted with social stigma as a result of his living with a homosexual parent, but found this fact alone could not be considered an "adverse effect" caused by the father's conduct.<sup>149</sup> The court also found that the boy thrived in school and was subject to more rigid studying guidelines in the home of his father.<sup>150</sup> Because of the positive influences and guidance received by the child in his father's home, the court found that the son should permanently reside with his father.<sup>151</sup>

*Stroman v. Williams*<sup>152</sup> provides yet another example of the use of the "nexus" test. In *Stroman*, the South Carolina court found that a mother's involvement in an interracial lesbian relationship was not in itself a reason to modify a custody order, absent proof of an adverse affect on her daughter.<sup>153</sup>

These decisions would not have been rendered if the homosexual parent's relationship had been evaluated under one of the previous tests.<sup>154</sup> In cases where the children have suffered no adverse effects from exposure to to their parent's homosexuality, the "nexus" test en-

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activities or publicity of any nature, whether homosexual or heterosexual. *Id.* at 123-24, 488 N.Y.S.2d at 183 (Sandler, J., dissenting).

146. 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. 1986).

147. *Id.* at 320, 510 N.Y.S.2d at 961.

148. *Id.* at 320-21, 510 N.Y.S.2d at 962. The court noted:

R.B. is a caring, worthy father. His homosexuality is not flaunted and has no adverse deleterious effect on his 12-year-old son. In view of [cited precedents], the court finds that it is impermissible as a matter of law to decide the question of custody on the basis of the father's sexual orientation. The guiding consideration must be [the son's] best interest. At this time, [the child's] needs can best be met by his father.

*Id.* at 331, 510 N.Y.S.2d at 969.

149. *See id.* at 323, 510 N.Y.S.2d at 963-64.

150. *See id.* at 320-21, 510 N.Y.S.2d at 961-62.

151. *Id.* at 331, 510 N.Y.S.2d at 969.

152. 291 S.C. 376, 353 S.E.2d 704 (S.C. Ct. App. 1987).

153. *Id.* at 378-79, 353 S.E.2d at 705-06; *see also* Note, *supra* note 13, at 116-17. The fact that the father maintained a "traditional" nuclear family with his new wife and daughter did not sway the South Carolina court, because the father failed to prove that the 11-year-old girl was adversely affected by her mother's lesbianism. *Id.* This case represents a dramatic departure from previous orders where custody awards were based on disapproval of homosexuality and fear of social stigma.

154. *See* Comment, *supra* note 1, at 413 ("[T]he presumptions of the gay parent's unfitness used in both the per se and middle ground approaches ignore the need for factual analysis of the parties' capabilities and of the particular

sure that the real “best interest of the child” is served without needless inquiry into moral and societal concerns.<sup>155</sup>

Most psychological studies show that the homophobic fears expressed by courts that do not apply the “nexus” test are unwarranted.<sup>156</sup> Children of homosexual men and women who have been studied do not learn their sexual orientation from their parents,<sup>157</sup> nor do they develop “improper” sex-role behavior.<sup>158</sup> One study showed that lesbian mothers were actually more concerned with providing positive male figures to their children than their heterosexual counterparts.<sup>159</sup> Another study found that fear of harassment and peer stigmatization affected surprisingly few of the children evaluated.<sup>160</sup>

Furthermore, some studies indicate that children may benefit from being raised in a household where a parent is homosexual.<sup>161</sup> Gay men

needs of the child. . . . Both approaches inevitably deprive deserving parents of custody . . . .”).

155. *See id.* (“only the nexus approach is substantially related to the governmental objective of protecting the best interests of the child”). For example, the Ohio Court of Appeals, granting visitation rights to a gay father, stated:

Too long have courts labored under the notion that divorced parents must somehow be perfect in every respect. The law should recognize that parents, married or not, are individual human beings each with his or her own particular virtues and vices. The children of married parents are expected to take their parents as they find them—as Oliver Cromwell said to his portraitist, “with warts and all.” . . .

[Thus,] whether the issue is custody or visitation, before depriving the sexually active parent of his crucial and fundamental right of contact with his child, a court must find that the parent’s conduct is having, or is probably having, a harmful effect on the child.

*Conkel v. Conkel*, 31 Ohio App. 3d 169, 171-73, 509 N.E.2d 983, 985-87 (1987) (affirming trial court’s order granting bisexual father overnight visitation with his two minor sons).

156. For a discussion of the results of these psychological studies, see *supra* notes 54 & 72 and *infra* notes 157-160 and accompanying text.

157. *See* Miller, *supra* note 73, at 547 (“[T]he link between parental sexual orientation and children’s orientation is weak . . . .”); *see also* Comment, *supra* note 7, at 145 & nn.86-90 (citing empirical studies which indicate that parents’ homosexuality has no significant effect on children’s sexual identities).

158. *See* Hoeffler, *Children’s Acquisition of Sex Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536, 542 (1981) (study showed “[i]rrespective of mother’s sexual orientation, both boys and girls preferred toys traditionally associated with their gender”); Kirkpatrick, Smith & Roy, *supra* note 72, at 551 (study of children’s “play preferences and sexual interest, and behavior exhibited in the playroom revealed no indication of differences in gender development between children brought up by lesbian mothers and those raised by unmarried heterosexual mothers”).

159. Kirkpatrick, Smith & Roy, *supra* note 72, at 549.

160. Green, *supra* note 54, at 695-96 (of the 37 children studied, only one boy reported being teased because of his parent’s sexual orientation).

161. Harris & Turner, *supra* note 14, at 103 (Studies show that gay fathers “demonstrate greater nurturance, are less traditional in their overall paternal attitudes, and assess themselves as significantly more positive in the parental role.”).

have been found to be more nurturing fathers, with less traditional paternal attitudes than heterosexual men.<sup>162</sup> Openly gay fathers have also been found to use less authoritarian parenting skills and less physical punishment, and have been found to consciously avoid sexist values in raising their children.<sup>163</sup> Another study found that lesbian mothers are more tolerant and open to sharing personal information with their children than single heterosexual mothers.<sup>164</sup>

In light of these and other studies, courts purporting to use the "best interest of the child" standard as the basis of their custody decisions have little excuse for using subjective tests of "fitness" rather than the more rational "nexus" test.<sup>165</sup> By examining each situation on a case-by-case basis, without injecting unfair prejudices, social stereotypes or unfounded homophobic fears, these courts could more properly determine what is in the child's best interest.

### III. ADOPTION

In contrast to the relatively more progressive approaches to custody arrangements taken where a parent is gay or lesbian, adoption lags behind custody law and remains a difficult option for homosexual people who wish to raise children.<sup>166</sup> One reason for the difference in the two areas is the permanent nature of an adoption order.<sup>167</sup> While courts may be more willing to grant custody to a natural parent who is gay or lesbian, because the order can be subsequently modified upon a showing of changed circumstances, courts are reluctant to issue adoption orders because the order is final when issued.<sup>168</sup> Furthermore, in contrast to custody proceedings, judges in adoption proceedings have the discre-

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162. *Id.* (citing R. Scallen, *An Investigation of Paternal Attitudes and Behavior in Homosexual and Heterosexual Fathers*, 42 DISSERTATION ABSTRACTS INT'L 3809B (1982) (doctoral dissertation, California School of Professional Psychology, Los Angeles, 1981)).

163. Miller, *supra* note 73, at 551.

164. Harris & Turner, *supra* note 14, at 103-04 (citing M. Hill, *Effects of Conscious and Unconscious Factors on Child Rearing Attitudes by Lesbian Mothers*, DISSERTATION ABSTRACTS INT'L 1608B (1981) (doctoral dissertation, Adelphi University, 1981)).

165. Therapists are aware that more and more children are being placed in the homes of their gay or lesbian parents and same-sex partner. See Baptiste, *Psychotherapy with Gay/Lesbian Couples and Their Children in "Step families": A Challenge for Marriage and Family Therapists*, 14 J. HOMOSEXUALITY 223, 223-24 (1987). There are many specialists in the field who understand the implications of this new family structure on a child. For an interesting proposal of how the social sciences should deal with this new family unit, see *id.* at 226-37 (offering specific guidelines for therapists counseling gay step-families).

166. See Comment, *supra* note 10, at 1025.

167. See, e.g., *In re Appeal in Pima County Juvenile Action B-10489*, 151 Ariz. 335, 338-40, 727 P.2d 830, 832-35 (Ct. App. 1986) (possibility that gay man may enter homosexual relationship in future rendered him unacceptable to adopt because parental rights could not lightly be reversed after final adoption).

168. See *id.* at 339-40, 727 P.2d at 833-34 ("custody and visitation determi-

tion to avoid making any decision at all.<sup>169</sup> As in custody proceedings, the “best interest of the child” standard is commonly used in adoption proceedings, and it is subject to the same stereotypes and irrational fears about homosexuality.<sup>170</sup>

Adoption law is created by state statutes, and therefore, it varies among jurisdictions.<sup>171</sup> For example, in New Hampshire, the adoption code expressly prohibits homosexual parents from adopting.<sup>172</sup> In contrast, New York, New Mexico and the District of Columbia expressly state that sexual orientation may not be used as the sole determinant in adoption placement proceedings.<sup>173</sup>

A Florida statute, which expressly excluded homosexual individuals from adopting,<sup>174</sup> was recently held unconstitutional by a Florida trial court that found that a presumption of unfitness based on homosexual-

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nations are subject to modification upon changing conditions, while single-parent adoptions are final”).

169. In an adoption proceeding, a judge may decide that a person’s adoption application should not be approved, and therefore, the child remains in the foster care system or adoption agency. *See id.* at 337-40, 727 P.2d at 832-35. Such a conservative “decision” avoids dealing with the issue of whether the child will benefit from placement with a homosexual parent.

170. *See* Comment, *supra* note 10, at 1026 & nn.115-17 (citing Florida and New Hampshire statutes prohibiting adoption by gay and lesbian persons). For a discussion of the “best interest of the child” standard and how it is subject to stereotypes and fears about homosexual parents, *see supra* notes 75-92 and accompanying text.

171. *See* Comment, *supra* note 10, at 1026-27 (states regulating adoptions through states or private agencies may incorporate into law policies regarding homosexual applicants).

172. N.H. REV. STAT. ANN. § 170-B:4 (1990) (allowing adoption only by an individual who is “not a homosexual”). The New Hampshire statute expressly prohibits homosexuals from adopting or being foster parents. *See In re Opinion of the Justices*, 129 N.H. 290, 530 A.2d 21 (1987) (describing proposed bill later enacted into law). When the constitutionality of this statute was challenged prior to its passage, the Supreme Court of New Hampshire (with then Judge David Souter agreeing with the majority) recognized that the bill’s goal of eliminating “the ‘social and psychological complexities’ which living in a homosexual environment could produce in . . . children [affected by state adoption or foster care programs]” was a legitimate state purpose. *Id.* at 296, 530 A.2d at 24. The court then affirmed the legislature’s finding that “the exclusion of homosexuals . . . from foster parentage and adoption can be found to be rationally related to the bill’s purpose . . . to provide appropriate role models for children.” *Id.* at 296, 530 A.2d at 25. The court, however, struck down provisions prohibiting homosexual involvement in funded day care facilities as unconstitutional. *Id.* at 296-98, 530 A.2d 25-26.

173. *See* The Christian Science Monitor, June 21, 1985, (National), at 3. In 1985, six other states had an unwritten policy that a parent’s sexual orientation could not be the sole basis for denying placement for adoption or foster care. *Id.* The 1985 survey also revealed that officials in the area of public welfare were more likely not to discriminate against homosexual people in placing children with parental applicants. *Id.*

174. FLA. STAT. ANN. § 63.042(3) (West 1991). The Florida statute provided that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” *Id.*

ity violated the substantive and procedural due process rights of gay and lesbian applicants.<sup>175</sup> The Florida court noted:

While the state's interest in protecting the best interests of children is admittedly compelling, that interest is not advanced by this statutory exclusion. Further, the state's interest in advancing the best interests of adoptive parents is totally frustrated by excluding an entire class of parents based upon their sexual orientation.<sup>176</sup>

Most state statutes do not expressly address the issue of homosexual parents, but rather leave the decision of what is in the child's best interest to the judicial forum.<sup>177</sup> Consequently, some state courts, like those in Arizona, have consistently held that gay men may not adopt.<sup>178</sup> Other courts, like those in California, do not allow a parent's sexual orientation to be the determinative factor in approving or dismissing a petition for adoption.<sup>179</sup>

*In re the Appeal in Pima County Juvenile Action B-10489*,<sup>180</sup> illustrates Arizona's policy of rejecting homosexual petitioners for adoption solely on the basis of their sexual orientation. In that case, the Court of Appeals affirmed the trial court's refusal to certify a bisexual man as acceptable to adopt, despite the fact that he was not involved in a relationship, heterosexual or homosexual, at the time he filed the petition.<sup>181</sup> The court noted that the Arizona statute required a consideration of an applicant's "social history, financial condition, *moral fitness*, religious background, physical health, mental health, fingerprint records and any prior court actions involving children" before a finding of acceptability may be made.<sup>182</sup> One judge, in his dissent, strongly criticized the majority's alleged acceptance of "unsupported findings" to hide the fact that the

175. *Sebol v. Farie*, No. 90-923-CA-18, 17 Fam. L. Rep. (BNA) 1331 (Fla. Cir. Ct., Monroe County, March 15, 1991).

176. *Id.* at 1331.

177. *See* Comment, *supra* note 10, at 1027.

178. *See* Comment, *supra* note 3, at 282 n.32 (because state common law characterizes homosexuality as wrong behavior, Arizona courts have not permitted gay men to adopt). For an example of an Arizona case that used such notions, see the discussion of *In re the Appeal in Pima County Juvenile Action B-10489*, *infra* notes 180-84 and accompanying text. *But see* ARIZ. REV. STAT. ANN. § 8-105 (1989) (providing for investigation into adoptive parents' "fitness" but with no express provision regarding homosexuality).

179. *See* Comment, *supra* note 10, at 1029 (describing California cases treating homosexuality as only one factor used in determining child's best interests); *cf.* *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991) (where Uniform Parentage Act was used to find that non-biological lesbian partner had no co-parenting rights to child conceived by artificial insemination despite a fifteen-year relationship with the biological mother and being listed on the child's birth certificate).

180. 151 Ariz. 335, 727 P.2d 830 (Ct. App. 1986).

181. *Id.* at 339-40, 727 P.2d at 834-35.

182. *Id.* at 338, 727 P.2d at 833 (emphasis added).

applicant's bisexuality was "the sole reason for its ruling."<sup>183</sup> The dissenting judge analyzed and rejected the court's professed concerns that the father might be involved in gay rights organizations, its doubts that an appropriate parent-child bond could be created with a bisexual adoptive parent, and its fear that the applicant might have an unnatural or abnormal sexual interest or intent with respect to the child.<sup>184</sup>

Courts also frequently view gay or lesbian couples as equally unfit, if not more so, than single gay men. For example, in *In re Adoption of Charles B.*,<sup>185</sup> the Ohio Court of Appeals overturned an order that granted a gay man and his partner custody of a seven-year-old boy who had been diagnosed with acute lymphocytic leukemia.<sup>186</sup> The court removed the child from this environment despite the fact that: 1) the child wanted to remain with this couple in their home;<sup>187</sup> 2) the agency had not found the "ideal" parents for the child in three years of searching;<sup>188</sup> 3) the child's guardian ad litem pleaded with the court to allow this temporary placement to become a final adoption;<sup>189</sup> and 4) the home of the gay couple was found to be stable.<sup>190</sup>

The *Charles B.* court described the concepts of homosexuality and adoption as "so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an ex-

183. *Id.* at 340, 727 P.2d at 835 (Howard, J., dissenting) (noting that majority clearly had "no intention of ever letting a bisexual adopt a child").

184. *Id.* at 342-43, 727 P.2d at 837-38 (Howard, J., dissenting).

185. No. CA-3382, 1988 Ohio App. LEXIS 4435 (Ohio App. Oct. 28, 1988), *rev'd*, *In re Adoption of Charles B.*, 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

186. *Id.* at \*7, 17.

187. *Id.* at \*6.

188. *Id.* at \*12-14. The agency, having constructed a "characteristics profile" of the ideal adoptive family for Charles, sought to approximate as closely as possible:

1. a two parent family with older siblings, at least one of whom is a male;
2. a family with a child-centered lifestyle;
3. a couple with definite parenting experience and preferably with adoption experience;
4. parents with proven ability in dealing with behavior disorder issues;
5. a family that is open to counseling both in the pre-adoptive and post-adoptive stages; and
6. a family that demonstrates an ability to deal with learning disabilities, speech problems, and medical problems.

*Id.* at \*13.

189. *Id.* at \*20-21 (Wise, J., dissenting). The guardian ad litem testified that "[Charles] is [in] need of permanency and stability. . . . The petitioner has demonstrated the maturity, commitment and love for the child such as is consistent with a parent, and, I submit the child will substantially benefit from such an adoption." *Id.* at \*21 (Wise, J., dissenting).

190. *See id.* at \*8 (court acknowledged petitioner and his partner "share[d] a long-term, stable homosexual relationship").

press ineligibility provision."<sup>191</sup> The court further stated that the government should play no role in "encouraging" homosexuality.<sup>192</sup> Additionally, the court used a modified version of the social stigma test, finding that it would be "impossible for the child to pass as the natural child of the adoptive 'family' or to adapt to the community by quietly blending in free from controversy and stigma."<sup>193</sup> Although the court stated that it was evaluating the case in terms of what was best for the child and not the petitioner,<sup>194</sup> the majority disregarded all of the positive testimony before it because of their own biases and misconceptions.

Recently, however, the Supreme Court of Ohio declared that the court of appeals' ruling in *Charles B.* was incorrect, and therefore, it reinstated the trial court's placement of Charles with the petitioner for adoption.<sup>195</sup> In doing so, the court utilized the traditional "best interest of the child/nexus test" to determine the optimal placement for the child.<sup>196</sup>

The Ohio Supreme Court affirmed the trial court's finding that homosexual couples were not excluded from adopting under Ohio law.<sup>197</sup> The Ohio Supreme Court then looked to the decision of the trial court and determined that there was no abuse of discretion in its placement of Charles in the home of a gay male and his partner.<sup>198</sup> The court found that the list of qualities for determining "ideal parents" provided an unrealistic goal in this case.<sup>199</sup> Additionally, the court looked at the specific applicant here and determined that he was "the one consistent and caring person in the life of Charles B."<sup>200</sup> By reinforcing his credentials

191. *Id.* at \*1.

192. *Id.* This statement implies that the court was punishing the homosexuality of the couple, and consequently, lost sight of the "best interests of the child."

193. *Id.* at \*6. In the Supreme Court of Ohio, Justice Resnick repeated this same concern for Charles' adaptation to the community when she stated in dissent that Charles had "too many other issues that he has to conquer in his life" to be a good candidate for a homosexual family setting. *In re Adoption of Charles B.*, 50 Ohio St. 3d 88, 96, 552 N.E.2d 884, 891 (1990) (Resnick, J., dissenting).

194. *In re Adoption of Charles B.*, No. CA-3382, 1988 Ohio App. LEXIS 4435, at \*17 (Ohio App. Oct. 28, 1988).

195. *In re Adoption of Charles B.*, 50 Ohio St. 3d at 94, 552 N.E.2d at 890.

196. *See id.* at 90-94, 552 N.E.2d at 886-90.

197. *Id.* at 90, 552 N.E.2d at 886. In reversing the court of appeals' determination that homosexual applicants were not eligible to adopt as a matter of law, the Supreme Court of Ohio relied on the plain language of the state adoption laws, which provided, in relevant part, that "an unmarried adult" is eligible to adopt in Ohio and "adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted." *Id.* (citing OHIO REV. CODE ANN. §§ 3107.03(B), 3107.14(C) (Anderson 1989)).

198. *Id.* at 93-94, 552 N.E.2d at 889-90.

199. *Id.* at 91, 552 N.E.2d at 887.

200. *Id.* at 89, 552 N.E.2d at 885.



with numerous character witnesses, including his live-in partner, the homosexual applicant was able to convince the court that it would be in Charles' best interest to be placed with him.<sup>201</sup>

Hopefully, this landmark case granting a gay couple the right to adopt a child will be followed in other jurisdictions. The approach taken was neither radical nor extreme. Rather, the traditional "best interest of the child" standard, upon which our legal system purports to base all of its custody decisions, was applied in its purest sense.

#### IV. CONCLUSION

As more and more parents are revealing their sexual orientation, it is necessary to eliminate the antiquated stereotypes, fears, taboos and misconceptions that permeate custody decisions and adoption proceedings involving gay and lesbian parents. The "nexus test" is not a radical new approach to a changing world. It is instead a clarification of the traditional "best interest of the child" standard that has always governed custody hearings. Socio-psychological evidence reveals that a parent's homosexuality does not per se adversely affect a child. Therefore, only when a connection between the parent's conduct and an adverse effect on his or her child is proven should the parent be denied custody rights. Considerations of punishment and reward have no place in custody determinations. By applying the "nexus" test to custody and adoption cases, courts can more accurately judge each situation on a case-by-case basis and truly determine what is in the "best interest of the child."

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201. *Id.* at 93-94, 552 N.E.2d at 888-90. The witnesses included two experts, each with a Ph.D in psychology, the applicant's mother, his sister, his life partner, the vice-president of a social service agency and the guardian ad litem for the child. The experts testified to the applicant's close relationship with the child, his success in integrating the child into his own family and his professional reputation as a psychological counselor. *Id.* at 93, 552 N.E.2d at 888-89. The adoption agency, on the other hand, presented only one witness, a social worker who never observed the relationship between the child and the petitioner and testified only that the applicant did not meet the "characteristic profile of preferred adoptive placement." *Id.* at 93, 552 N.E.2d at 888.