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Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia

Clifford J. Rosky[†]

ABSTRACT: This Article argues that gender influences the expression of homophobic and heterosexist stereotypes about gay and lesbian parents. By conducting a comparative analysis of reported family law opinions, it shows that gay and lesbian parents are subjected to gender-influenced stereotypes in custody and visitation cases—stereotypes that are influenced by the parent’s gender, the child’s gender, and the judge’s gender. First, gay fathers are subjected to two stereotypes that are influenced by the parent’s gender. They are stereotyped as HIV agents and child molesters—men who infect children with HIV and sexually abuse children, especially boys. Lesbian mothers are not stereotyped as HIV agents, and they are rarely stereotyped as child molesters. Next, both gay fathers and lesbian mothers are subjected to two stereotypes that are influenced by the child’s gender. They are stereotyped as recruiters and role models—people who encourage children to become homosexual. Although recruiting and role modeling stereotypes are applied to both gay and lesbian parents, they are applied more often to the parents of sons than the parents of daughters, and they are rarely applied to the fathers of daughters. This pattern betrays patriarchal concerns about the importance of fathers in the production of masculine, heterosexual boys. Finally, all of these stereotypes are influenced by the judge’s gender. Male judges are more likely than female judges to accept gender-influenced stereotypes about gay and lesbian parents. This pattern reflects the observed tendencies of heterosexual men to accept homophobic and heterosexist stereotypes more often than heterosexual women and apply such stereotypes to gay men more often than to lesbians.

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In the legal academy's responses to stereotypes about gay and lesbian parents, scholars have been blind to the influence of gender. By ignoring the influence of the parent's gender, we have introduced unnecessary omissions and weaknesses into our responses to HIV and child molestation stereotypes. By ignoring the influence of the child's gender, we have failed to notice the reciprocal relationship between homophobia and gender, and we have imposed arbitrary limits on our responses to recruiting and role modeling stereotypes. By taking account of the relationship between homophobia and gender, we can develop a more rigorous and inclusive case on behalf of gay and lesbian families—a case that vindicates not only the parental interests of gay men and lesbians but the developmental interests of children who may grow up to be gay men and lesbians, too.

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INTRODUCTION

This Article argues that gender influences the expression of homophobic and heterosexist stereotypes about gay and lesbian parents.¹ On a general level, it challenges a paradigm that ignores the influence of gender or pretends that gender has no influence at all. On a specific level, it focuses on the influence of male gender—the maleness of fathers, sons, and judges—which has generally been neglected by lesbian, feminist, and family law scholars. By conducting a comparative analysis of reported family law opinions, it shows that gay and lesbian parents are subjected to gender-influenced stereotypes in custody and visitation cases—stereotypes that are influenced by the parent’s gender, the child’s gender, and the judge’s gender. By taking account of the reciprocal relationship between homophobia and gender—the gender of homophobia and the homophobia of gender—this Article aims to develop a more nuanced model of homophobia and a more compelling case for gay and lesbian parenthood.

In most disputes over gay and lesbian parenthood, you don’t hear much talk about gender. Opponents claim that children should not be exposed to the “homosexual lifestyle,” and they ask gay men and lesbians to choose between homosexuality and parenthood.² Advocates call such claims “homophobic” and “heterosexist,” and they urge judges and politicians to reject them.³ On both sides, the debate over gay and lesbian parenthood remains gender-blind: Gay fathers are lumped together with lesbian mothers; sons are lumped together with daughters.⁴

For the most part, the legal scholarship on gay and lesbian parenthood reflects a similar framework. If gender has had any influence in disputes over gay and lesbian parenthood, legal scholars have largely ignored it. In the past several decades, lawyers and law professors have written dozens of articles about homosexuality and parenthood, in which they have generally argued for pro-gay reforms to family law. In most of these articles, lesbian mothers and gay fathers have been considered together and the legal problems that they face have not been distinguished.⁵ While several scholars have written articles

1. For an explanation of how and why I use the term “gender” in this Article, see discussion *infra* Part I.D.5.

2. See, e.g., *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985) (holding that “[t]he state has a substantial interest . . . in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles”).

3. See, e.g., Mary Coombs, *Insider and Outsider: What the American Legal Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL’Y 87, 93-94 (2001) (arguing that “homophobic” family courts frequently allow a parent’s homosexuality to be “counted against that parent in determining custody or visitation rights”); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 32 n.128 (2004) (arguing that opponents of gay and lesbian parenthood rely on “sexist and heterosexist assumptions . . . to justify denying child custody to gay parents”).

4. See *infra* Part I.D.

5. See *infra* Part V.

specifically about lesbian mothers,⁶ only a few have written specifically about gay fathers.⁷ In this body of scholarship, no one has considered the influence of the child's gender on disputes over gay and lesbian parenthood at all.

In today's legal academy, this framework is a little surprising. Among sexuality and family law scholars, it is now axiomatic that gender plays a powerful role in shaping how law governs homosexuality and parenthood.⁸ These days, we often speak of "heterosexism" rather than "homophobia," to underscore the structural similarity between discrimination against women and discrimination against gay men and lesbians.⁹ In the debates over same-sex

6. Nancy Polikoff was one of the earliest legal scholars to focus specifically on lesbian mothers. See, e.g., Nan Hunter & Nancy Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976); Nancy Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbians and Homosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996); Nancy Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986); Nancy Polikoff, *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203 (1996); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459 (1990).

Since the 1980s, Polikoff has been joined by a number of other scholars. See, e.g., Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261 (2003); Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175 (1995); Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J. L. & FEMINISM 341 (1995); Carmel B. Sella, *When a Mother is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135 (1991); Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245 (2001). Ruthann Robson has been especially prolific. See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002); Ruthann Robson, *Making Mothers: Lesbian Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15 (2000); Ruthann Robson, *Mostly Monogamous Moms? An Essay on the Future of Lesbian Legal Theories and Reforms*, 17 N.Y.L. SCH. J. HUM. RTS. 703 (2000); Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994). In addition, many law students have written notes and comments about cases involving lesbian mothers.

7. My research has revealed only four legal publications about gay fathers in the last thirty years: one book chapter written by a law professor, one symposium essay, one law review article, and one student comment. See Sharon Elizabeth Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, in *KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 102 (Diana Tietjens Meyers et al. eds., 1993); Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER SOC. POL'Y & L. 183 (1995); E. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195 (2005); Darryl Robin Wishard, Comment, *Out of the Closet and into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401 (1989).

8. See *infra* Parts I.A-B.

9. See, e.g., Gregory M. Herek, *The Psychology of Sexual Prejudice*, in 9 CURRENT DEVELOPMENTS IN PSYCHOLOGICAL SCIENCE 19 (2000) (describing the use of "heterosexism . . . as a term analogous to sexism . . . [that refers to] societal-level ideologies and patterns of institutionalized oppression of non-heterosexual people"). In this Article, I generally follow the convention of using the term "homophobic" to describe "irrational fears" about gay men and lesbians and the term "heterosexist" to describe the structural, institutional subordination of people who are not heterosexual. See *id.* at 20. For the sake of simplicity, however, I use the term "homophobia" as a shorthand noun that incorporates the meaning of both concepts. Scholars have criticized the generic use of the term "homophobia" for falsely implying that "antigay attitudes are best understood as an irrational fear and represent a form of individual psychopathology rather than a social reinforced prejudice." *Id.* In this Article, however, I argue that "homophobia" is influenced by broader social and historical forces—viz., traditional gender norms. Given the nature of my argument, there seems to be relatively little danger of implying that "homophobia" is no more than a set of individual psychopathologies.

marriage, we often claim that traditional marriage laws discriminate not only on the basis of sexual orientation but also on the basis of sex and gender.¹⁰ Meanwhile, in the debates over gay and lesbian parenthood, we have left the relationships between homophobia, heterosexism, and gender unexplored.

This Article examines how these relationships play out in legal disputes over gay and lesbian parenthood. The argument is based on my analysis of a collection of almost 200 family law opinions, which represents every custody and visitation case involving a gay, lesbian, or bisexual¹¹ parent and a heterosexual parent reported in the United States since the 1950s.¹²

Part I provides background material on laws governing homosexuality and parenthood, a description of the collection of cases, and an explanation of my analytical framework. Applying this framework, Parts II and III argue that gay and lesbian parents have been subjected to gender-influenced stereotypes in custody and visitation cases.

Part II argues that gay fathers have been subjected to two stereotypes that are influenced by the parent's gender. First, they have been stereotyped as HIV agents—men who carry HIV and infect children with HIV. Second, they have been stereotyped as child molesters—men who sexually abuse children, especially boys. Unlike gay fathers, lesbian mothers have not been stereotyped as HIV agents. Both gay fathers and lesbian mothers have been accused of sexual abuse, but gay fathers have been stereotyped as child molesters more often and more explicitly than lesbian mothers.

Part III argues that both gay fathers and lesbian mothers have been subjected to two stereotypes that are influenced by the child's gender. They have been stereotyped as recruiters and role models—people who encourage children to become homosexual. Although recruiting and role modeling stereotypes have been applied to both fathers and mothers, they have been applied more often to the parents of sons, and they have rarely been applied to the fathers of daughters. I argue that these patterns reflect the influence of two

10. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

11. Although this Article is about gay fathers, I have included cases involving bisexual fathers in my analysis. In custody and visitation cases, courts generally have not acknowledged the existence of male "bisexuality," so they have not generally recognized the distinction between fathers who identify as gay or bisexual. When fathers identified themselves as "bisexual," courts generally re-classified them as "homosexual," even if they had not described themselves as "gay" or "homosexual." See, e.g., *Conkel v. Conkel*, 509 N.E.2d 983, 984-87 (Ohio Ct. App. 1987) (where the parties stipulate that the father is "bisexual" but the trial and appellate court describe the father as "homosexual"). See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (describing the "erasure" of bisexual identity by heterosexuals and gay men and lesbians). My analysis suggests that courts may be more willing to recognize mothers as "bisexual," but that question is beyond the scope of this Article. For these purposes, I have included cases involving bisexual mothers in my analysis so that my comparisons of cases involving fathers and mothers are sound.

12. See *infra* Appendix (listing opinions); *infra* Part I.C (describing opinions).

psychological theories about childhood sexual development—one theory suggesting that children identify with parents of the same gender and another theory suggesting that “domineering” mothers raise “effeminate” boys. Taken together, these two theories produce disparities in the expression of recruiting and role modeling stereotypes that betray patriarchal concerns about the role of fathers in the production of masculine, heterosexual boys.

Part IV briefly explores the influence of the judge’s gender on the stereotypes identified in Parts II and III. Part IV argues that male judges have been more likely than female judges to accept stereotypes about gay and lesbian parents that are influenced by the parent’s gender and the child’s gender. This pattern reflects the observed tendencies of heterosexual men to accept homophobic and heterosexist stereotypes more often than heterosexual women and apply such stereotypes to gay men more often than to lesbians.

Part V examines what happens when the legal academy adopts a gender-blind framework for responding to stereotypes that are influenced by gender. It argues that our gender-blind framework has weakened and warped our advocacy on behalf of gay and lesbian families. By reviewing the scholarship on each of the stereotypes identified in Parts II and III, Part V offers concrete ways to strengthen and broaden the case for gay and lesbian parenthood.

First, in our responses to HIV stereotypes, we have ignored the influence of the parent’s gender. Because of this oversight, we have overlooked one group type of stereotypes altogether. We have not noticed that gay fathers have been stereotyped as HIV carriers, so we have not yet articulated a response to this stereotype at all. Similarly, in our responses to sexual abuse stereotypes, we have ignored the influence of the parent’s gender as well. Because of this oversight, we have allowed ourselves to rely on stock arguments that “most child molesters are heterosexual men,” “most child molestation is heterosexual,” and “children are more likely to be sexually abused by heterosexuals than homosexuals,” rather than developing a rigorous response to the stereotype, which is based on the available empirical data about homosexuality and child sexual abuse. Finally, in our responses to recruiting and role modeling stereotypes, we have ignored the homophobia of gender as well as the gender of homophobia. By failing to appreciate that gender development stereotypes are often conflated with sexual development stereotypes, we have imposed an arbitrary limit on the scope of our argument: Even as we defend the possibility that the children of gay and lesbian parents may grow up to be “different,” we refuse to consider the possibility that they may grow up to be gay men or lesbians.

I. HOMOSEXUALITY, PARENTHOOD, AND FAMILY LAW:
IDENTIFYING THE GENDER OF HOMOPHOBIA

This Part provides background for the analysis in Parts II and III. It includes an overview of how gender has historically shaped laws governing homosexuality and parenthood, a primer on how custody and visitation law applies to cases involving gay and lesbian parents, and an explanation of my analytical method. Once we place modern custody and visitation law in social and historical context, we can appreciate the influence of gender in disputes over gay and lesbian parenthood.

A. The Law of Parenthood

Until the 1800s, the legal status of parents was determined by the parent's gender. Under the common law, "fathers had an absolute right to ownership and control over children—as if they had title—and a corresponding duty to support them."¹³ In this era, mothers were owed "reverence and respect," but they were granted "no power."¹⁴

As the United States was industrialized, however, the balance of power shifted in American families. Fathers left the home and began working for wages, leaving children in the primary care of mothers.¹⁵ As fathers took on the role of providers or "breadwinners,"¹⁶ mothers were assigned the role of homemakers and caretakers.¹⁷ With fathers off to work, Americans discovered the "joys of motherhood."¹⁸ By the 1830s, motherhood was widely thought to be "not only critical to a child's welfare and America's future, but also the cornerstone of a woman's happiness."¹⁹

This transformation brought about significant changes in the legal status of fathers and mothers. By the late 1800s, the property rights of fathers were increasingly rejected, and judges generally awarded custody to mothers in cases

13. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 76 (1995).

14. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *452-53.

15. See, e.g., NANCY E. DOWD, *REDEFINING FATHERHOOD* 34 (2000); RALPH LAROSSA, *THE MODERNIZATION OF FATHERHOOD: A SOCIAL AND POLITICAL HISTORY* 27 (1997); John Demos, *The Changing Faces of Fatherhood: A New Exploration in Family History*, in *FATHER AND CHILD: DEVELOPMENTAL AND CLINICAL PERSPECTIVES* 425, 433-34 (Stanley Cath, Alan Gurwitt & John M. Ross eds., 1982); Michael E. Lamb, *The History of Research on Father Involvement: An Overview*, in *FATHERHOOD: RESEARCH, INTERVENTIONS, AND POLICIES* 23, 26-27 (H. Elizabeth Peters & Randal D. Day eds., 2000); Joseph H. Pleck, *Parental Involvement: Levels, Sources, and Consequences*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 66, 66 (Michael E. Lamb ed., 3d ed. 1997).

16. DOWD, *supra* note 15, at 10, 29; see also LAROSSA, *supra* note 15, at 27 (describing father's role as "economic provider").

17. See LAROSSA, *supra* note 15, at 28 (citing MAXINE L. MARGOLIS, *MOTHERS AND SUCH: VIEWS OF MOTHERHOOD AND WHY THEY CHANGED* 9 (1982)).

18. LAROSSA, *supra* note 15, at 28.

19. *Id.*

involving infants and toddlers, especially girls.²⁰ This maternal preference became known as the “tender years” doctrine, and it was adopted by a majority of states.²¹

In the postwar era, women began working for wages in unprecedented numbers, which brought about a second shift in the legal status of fathers and mothers.²² During the 1970s, feminists proposed a new model of the family headed by co-equal, genderless “parents” who shared household and childcare duties with each other.²³ In the 1980s, this new model was co-opted by fathers’ rights groups, which called for the adoption of gender-neutral custody standards and a presumption in favor of joint legal custody awards.²⁴ Today, the tender years doctrine has been largely abolished and joint legal custody is commonly awarded.²⁵

This is not to suggest, however, that the feminist ideal of the family has been achieved or that gender no longer influences the law of parenthood. Even after the adoption of gender-neutral custody and visitation standards, the old division of labor between mothers and fathers has survived and the traditional models of parenthood are still reflected in the practice of family law.²⁶ In families with two parents, mothers are still far more likely to be the custodial parent, and in families with one parent, mothers are far more likely to be the only parent.²⁷ In most divorces, mothers are awarded custody because fathers do not pursue it.²⁸ As divorce rates have increased, men have increasingly functioned as stepfathers, but they have often lost touch with children from

20. See FINEMAN, *supra* note 13, at 77; ROBERT L. GRISWOLD, FATHERHOOD IN AMERICA: A HISTORY 30 (1993).

21. See FINEMAN, *supra* note 13, at 77; Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235, 247-48 (1983); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1072-74 (1979).

22. See Mary T. Coleman & John Pencavel, *Trends in Market Work Behavior of Women Since 1940*, 46 INDUS. & LAB. REL. REV. 653, 660 (1993); Manuelita Ureta, *Women, Work and Family: Recent Economic Trends*, 19 N. ILL. U. L. REV. 57, 62 (1998).

23. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 175-76 (1989) (proposing that “public policies and laws should generally assume no social differentiation of the sexes” and “facilitat[e] and encourag[e] . . . equally shared parenting”).

24. See FINEMAN, *supra* note 13, at 82-83. “Legal custody” is the right to make decisions regarding the child’s basic welfare. When courts award joint legal custody, both parents have the right to participate in decisions that affect the child’s welfare. *Id.*

25. See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers To Parent*, 153 U. PA. L. REV. 921, 985-86 (2005).

26. See generally DOWD, *supra* note 15, at 4 (“To a remarkable degree, legal notions of fatherhood reflect fathering divorced from nurturing. The model of fatherhood embedded in the law is predominantly biological and economic within the marital framework. It accords with historic concepts of fathers as property holders with relation to their children.”); *id.* at 5-8 (citing “[e]xamples of this marital-biological-economic model” from “adoption, paternity-legitimation, and divorce law”).

27. See DOWD, *supra* note 15, at 23; Maldonado, *supra* note 25, at 946-48.

28. See DOWD, *supra* note 15, at 59-60, 141; Maldonado, *supra* note 25, at 974.

previous marriages.²⁹ In the vast majority of cases, family court judges award physical custody to mothers and require fathers to pay child support.³⁰

B. The Law of Homosexuality

The law of homosexuality may be less familiar than the law of parenthood, but it has not been any less influenced by traditional gender norms. Until the twentieth century, prohibitions of homosexual activity were prevalent in Western civilizations, and they often distinguished between male and female homosexual acts.³¹ Such laws generally punished sexual activity between men more harshly than sexual activity between women, and in some cases, they did not refer to sexual activity between women at all.³² For example, the Old Testament prohibited a man from “lying” with a man as he “lieth” with a woman, but it did not prohibit two women from “lying” together.³³ In early England, the law against “buggery” prohibited anal intercourse between men or between a man and a woman, but it did not prohibit any female homosexual acts.³⁴ In the United States, many courts adopted similar definitions of “sodomy,” holding that “penetration” was an element of this offense.³⁵

In spite of these distinctions, there is no question that both male and female homosexual activity has been persecuted harshly for centuries.³⁶ Until the last century, however, gay men and lesbians were condemned as “sexual inverters”—

29. See DOWD, *supra* note 15, at 60, 64; Maldonado, *supra* note 25, at 946-48.

30. See DOWD, *supra* note 15, at 7, 132-54; Maldonado, *supra* note 25, at 946-48.

31. See, e.g., WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003, at 19 (2008) (“All the original states, and almost all subsequent ones adopted laws criminalizing sodomy and attempted sodomy.”).

32. See *id.* at 17.

33. *Leviticus* 20:13 (King James) (“If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”); see ANNIE LAURIE GAYLOR, WOE TO THE WOMEN—THE BIBLE TELLS ME SO: THE BIBLE, FEMALE SEXUALITY AND THE LAW 94 (1981) (observing that “the Mosaic law does not even consider the possibility of lesbianism”); RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 35 (1992) (observing that “[t]here is apparently no mention of lesbianism in the Old Testament”).

34. See THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 133 (Stein & Day 1963) (1957).

35. See, e.g., *State v. Hill*, 176 So. 719 (Miss. 1937) (holding that the act of cunnilingus was not prohibited by the state’s sodomy statute because it failed to satisfy the “penetration” element of the offense), *overruled by* *Miller v. State*, 636 So. 2d 391 (Miss. 1994); see also *State v. Pond*, 131 S.W.3d 792 (Mo. 2004) (en banc) (holding that conviction for “deviate sexual intercourse” requires “proof of penetration, however slight”).

36. See VERN L. BULLOUGH, HOMOSEXUALITY: A HISTORY 17-18 (1979). Although gay male sex was treated more harshly than lesbian sex in most ancient civilizations, there is no question that early Christian commentators interpreted the New Testament to prohibit lesbian sex. ROBSON, *supra* note 33, at 34-42. In the Middle Ages, lesbian sexual activities were specifically identified and vigorously punished as sins. *Id.* In many cases, the harshest punishments were reserved for latter-day “tribades”—women who penetrated other women with an “enlarged clitoris” or a “material instrument.” *Id.* In 1656, the New Haven colony prohibited “women” from “lying with women.” ESKRIDGE, *supra* note 31, at 18. After 1890, the prosecution of women for sodomy became more common in the United States. *Id.* at 53-56, 69.

not “homosexuals”—and they were grouped together with others who “reversed” or “inverted” conventional gender roles.³⁷ In the early nineteenth century, for example, the category of “sexual invert” included women who wore pants, men who wore dresses, women who liked politics, and men who liked cats.³⁸ It was not until the late 1800s that men and women who engaged in homosexual activity were grouped together as “homosexuals” and “homosexuality” was identified as a mental disorder.³⁹

By the postwar era, psychologists had transformed the paradigm of homosexuality from “sin” to “sickness,”⁴⁰ and the legal system’s response began to shift from punishment to treatment.⁴¹ Between the 1960s and the 1980s, sodomy laws were repealed in about half of the United States, in connection with the widespread adoption of the Model Penal Code.⁴² In the 1970s and 1980s, however, several states replaced the old laws with new ones that expressly prohibited both male and female homosexual conduct.⁴³ By the turn of the century, thirteen states still had sodomy laws on the books, and none of them distinguished between male and female homosexual conduct. In *Lawrence v. Texas*,⁴⁴ the United States Supreme Court declared the country’s remaining sodomy laws unconstitutional, so homosexual conduct can no longer be criminalized in the United States.⁴⁵

These days, gay men and lesbians are often described in gender-neutral terms—as “homosexuals,” “same-sex couples,” or “same-sex parents.” As a practical matter, however, gay men and lesbians are not always viewed in the same light. Recent surveys have revealed that heterosexuals in the United States still hold more negative attitudes toward gay men than lesbians.⁴⁶ In one survey, for example, respondents were more likely to regard gay men as mentally ill and less likely to support gay male adoption rights.⁴⁷ In each of

37. See DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15-16 (1990).

38. *Id.*

39. *Id.*; see 1 MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 43 (Robert Hurley trans., Vintage Books ed. 1990) (1976).

40. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 794-98 (2002).

41. See, e.g., *Evans v. Evans*, 8 Cal. Rptr. 412, 414 n.1 (Ct. App. 1960) (citing trial court’s order that gay father “obtain psychiatric treatment” for his homosexual behavior).

42. See WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 147 (3d ed. 2007).

43. See Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 538 (1992).

44. 539 U.S. 558 (2003).

45. *Id.*

46. See Gregory M. Herek, *Gender Gaps in Public Opinion About Lesbians and Gay Men*, 66 PUB. OPINION Q. 40, 42, 53 (2002) [hereinafter Herek, *Gender Gaps*] (reporting survey findings that “[o]verall, gay men were rated significantly more negatively than lesbians”); Gregory M. Herek, *Sexual Prejudice and Gender: Do Heterosexuals’ Attitudes Toward Lesbians and Gay Men Differ?*, 56 J. SOC. ISSUES 251, 262 (2000) [hereinafter Herek, *Sexual Prejudice and Gender*] (reporting survey findings that “ratings of gay men were significantly lower overall than ratings of lesbians”); Gregory M. Herek & John P. Capitanio, *Sex Differences in How Heterosexuals Think About Lesbians and Gay Men: Evidence From Survey Context Effects*, 36 J. SEX RES. 348, 357 (1999) (reporting survey findings that heterosexual men and women have more negative attitudes toward gay men than lesbians).

47. See Herek, *Gender Gaps*, *supra* note 46, at 49-53.

these surveys, it has been heterosexual men who account for the disparity in attitudes about gay men and lesbians.⁴⁸

C. Homosexuality and Parenthood in Family Law

This Article analyzes a collection of 191 opinions from 171 cases reported between 1951 and 2007.⁴⁹ About 93% of the opinions were written by appellate courts and 7% were written by trial courts. With respect to the parent's gender, about 71% of the cases involve lesbian mothers and 29% involve gay fathers. Finally, with respect to the child's gender, about 30% of the cases involve sons, 36% involve daughters, 21% involve both sons and daughters, and 16% involve children whose gender was not disclosed.

To the best of my knowledge and effort, the collection includes every custody and visitation case involving a gay, lesbian, or bisexual parent and a heterosexual parent reported in the United States since the 1950s.⁵⁰ Because the collection spans a wide range of issues, jurisdictions, and years, this Section provides a brief overview of how custody and visitation laws have been applied to disputes between homosexual and heterosexual parents.

If the parents contest custody at the time of divorce, custody is awarded based on the "best interests" of the child.⁵¹ Once custody is awarded, there is a strong presumption against changing it. After the divorce, if one parent seeks a change of custody, that parent must generally show a "change in

48. See Herek, *Gender Gaps*, *supra* note 46, at 41-42, 54 (reporting that heterosexual men's attitudes toward gay men and lesbians were more negative than heterosexual women's attitudes); Gregory Herek, *Heterosexuals' Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. SEX RES. 451, 452, 464, 469 (1988) (finding that heterosexual men's attitudes toward gay men were consistently more negative than heterosexual women's); Herek, *Sexual Prejudice and Gender*, *supra* note 46, at 255, 259, 262 (finding that heterosexual men's attitudes toward gay men were significantly "more hostile than their attitudes toward lesbians or heterosexual women's attitudes toward homosexuals of either gender"); Herek & Capitanio, *supra* note 46, at 348 (finding that "heterosexual men generally manifest higher levels of sexual prejudice than do heterosexual women").

49. See *infra* Appendix (listing opinions). Throughout this Article, I use the term "reported" to refer to any opinion that is publicly available on Westlaw or Lexis, regardless of whether it was classified as a "published" or "unpublished" opinion under local court rules.

50. When I first gathered the collection of cases, I compiled all of the custody and visitation cases involving gay and lesbian parents from heterosexual relationships—not only the cases involving both of the child's parents but also neglect proceedings brought by child protective agencies, and custody, visitation, and adoption proceedings brought by non-parents, such as grandparents and stepparents. I have excluded the neglect and non-parent cases from my quantitative analysis for several reasons. First, most of the neglect and non-parent cases involved lesbian mothers—because, as a general matter, mothers are more often custodial parents than fathers. Second, courts apply different legal standards in neglect and non-parent cases, which are significantly more favorable to the child's parent. Finally, neglect and non-parent cases included an unusually high number of sexual abuse allegations, which would have skewed my analysis of sexual abuse stereotypes. Taken together, these differences would have undermined my ability to make sound comparisons based on the parents' gender. Throughout the Article, I have noted when similar stereotypes have appeared in neglect and non-parent cases.

51. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 803 (3d ed. 2006).

circumstances” to warrant the transfer.⁵² In many cases involving gay and lesbian parents, courts have held that a parent’s homosexuality is a “change in circumstances” that justifies a transfer of custody to the other parent.⁵³

There is a strong presumption against denying a parent all visitation rights, which is considered tantamount to the termination of parental rights.⁵⁴ There is a much weaker presumption, however, against restricting a parent’s visitation rights. If a court finds that a parent’s behavior may have an “adverse effect” on the child, then the court may impose broad restrictions on that parent’s visitation rights.⁵⁵ In cases involving gay and lesbian parents, typical visitation restrictions include prohibitions against overnight visits, unsupervised visits, or visits in the company of a parent’s same-sex partner.⁵⁶

Over the last half-century, courts have gradually adopted a more liberal approach toward a parent’s homosexuality in custody and visitation cases.⁵⁷ In some early cases, courts articulated a “per se” rule against custody and visitation claims made by gay and lesbian parents, holding that homosexuality was inherently inconsistent with parenthood as a matter of law. In 1960, for example, a California court ordered a gay father to move out of his partner’s apartment, “take up residence in the home of his parents,” and “obtain psychiatric treatment” for his homosexual behavior; in the meantime, the court required the father’s mother to be present “at all times” when he visited his child.⁵⁸ Similarly, in 1985, the Supreme Court of Virginia held that the father’s “exposure” of his homosexual relationship to his child rendered him “an unfit and improper custodian as a matter of law.”⁵⁹

In the last twenty-five years, the majority of jurisdictions have abandoned the per se rule in favor of a “nexus” test.⁶⁰ Under the nexus test, a parent’s homosexuality is not a sufficient ground to revoke or limit the parent’s custody or visitation rights, unless one parent proves that the other parent’s homosexuality has an “adverse effect” on the child.⁶¹

52. *Id.* at 899.

53. *See, e.g.*, Pulliam v. Smith, 501 S.E.2d 898, 899 (N.C. 1998).

54. *See* WEISBERG & APPLETON, *supra* note 51, at 860.

55. *Id.* at 854.

56. *See* RUBENSTEIN, BALL & SCHACTER, *supra* note 42, at 756-57.

57. *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1165-66 (2d ed. 2004); WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 810-11 (2d. ed. 1997).

58. *Evans v. Evans*, 8 Cal. Rptr. 412, 414 n.1 (Ct. App. 1960).

59. *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985). In some jurisdictions, courts adopted a per se presumption (as opposed to a per se rule) that a parent’s homosexuality would adversely affect the child. Although such a presumption was rebuttable, it was the burden of the gay or lesbian parent to prove that his or her behavior did not have any adverse effect on the child. *See, e.g.*, *Pascarella v. Pascarella*, 512 A.2d 715, 717 (Pa. Super. Ct. 1986).

60. *See* ESKRIDGE & HUNTER, *supra* note 57, at 1169.

61. *See, e.g.*, *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 965 (Sup. Ct. 1986).

As many scholars have observed, the shift from a per se rule to a nexus test represents a measure of progress for gay and lesbian parents.⁶² Today, the concept of “homosexual parenthood” is no longer a contradiction in terms. In most jurisdictions, gay and lesbian parents stand a chance in custody and visitation disputes with heterosexual parents, whereas fifty years ago, they generally did not.

Yet the nexus test has not eliminated homophobia from custody and visitation cases. Because the “best interest” standard is notoriously vague, the devil is often in the details. The standard authorizes courts to restrict a parent’s rights based upon subjective judgments about what is “best” for a child. In disputes between heterosexual and homosexual parents, the result often turns on whether the court views the gay or lesbian parent as “discreet” or “flamboyant.”⁶³ Even under the nexus test, many courts still presume that when a parent exposes a child to the “homosexual lifestyle”—for example, by coming out, spending time with other gay men or lesbians, displaying same-sex affections, or living with a same-sex partner—the parent’s homosexuality has an adverse effect on the child.⁶⁴

In such cases, gay and lesbian parents are often forced to choose between living in the closet or losing parental rights. Only four years ago, a trial court sentenced a gay father to two days in jail for coming out to his child.⁶⁵ The father’s conduct had violated the court’s restraining order, which had prohibited the father “from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle.”⁶⁶

D. Identifying the Gender of Homophobia

Has gender had any influence on the behavior of litigants, experts, and judges in these cases? If so, the influence of gender would not be easy to discover, because it could not be explicitly acknowledged in the opinions themselves. During the 1980s, most jurisdictions shifted toward gender-neutral

62. See RUBENSTEIN, *supra* note 57, at 810-11 (describing the shift from the per se test rule to the nexus test as “an improvement”); Yoshino, *supra* note 40, at 851 (describing the shift from the per se test rule to the nexus test as “progress”).

63. See, e.g., *M.A.B.*, 510 N.Y.S.2d at 963 (granting custody to a gay father on the ground that the “[f]ather’s behavior has been discreet, not flamboyant”).

64. See, e.g., *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980). Kenji Yoshino has argued that the nexus test represents a “covering regime,” which demands that gay and lesbian parents “cover” or downplay gay identity. Yoshino, *supra* note 40, at 851. Michael Wald has suggested that the nexus test unduly focuses the best interests inquiry on the parent’s sexual orientation, which should generally be irrelevant in custody and visitation cases. See Michael S. Wald, *Adults’ Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 427 (2006).

65. See *Hogue v. Hogue*, 147 S.W.3d 245, 248 (Tenn. Ct. App. 2004). The trial court’s order was struck down as “vague” under the Due Process Clause of the Fourteenth Amendment. The appellate court did not reach the question of whether the order violated the father’s freedom of speech under the First Amendment. *Id.*

66. *Id.* at 247.

custody and visitation laws, so opinions and briefs have been written in gender-neutral terms since this era. Judges and litigants cite cases involving gay fathers and lesbian mothers interchangeably as precedent, and they casually presume that gay fathers and lesbian mothers are treated alike by courts. When they disagree, they normally argue over the relationship between homosexuality and parenthood rather than factors explicitly based on the parent's gender or the child's gender.⁶⁷

If we proceed carefully, however, we may still observe the gender of homophobia in custody and visitation cases. After much trial and error, I have developed the following method for analyzing the influence of gender in this collection of cases: By comparing the distribution of homophobic and heterosexist stereotypes in cases involving gay fathers and lesbians mothers (Part II), and in cases involving sons and daughters (Part III), I argue that gay and lesbian parents have been subjected to a series of stereotypes that have been influenced by the parent's gender and the child's gender. By counting cases and reading rhetoric, I have documented the influence of gender in disputes over gay and lesbian parenthood. Before proceeding with this analysis, I will anticipate a handful of methodological questions.

1. Reading Opinions

First, there is the question of what I am looking at—reported opinions, mostly appellate opinions. I acknowledge that reported opinions are not representative of unreported opinions, appeals are not representative of trials, and neither appeals nor trials are representative of mediations, arbitrations, or settlements, which are far more numerous. Appellate opinions are always exceptional, and they may be more exceptional in this area of law than in any other.⁶⁸ There are reasons to think that in studies of bias, appellate opinions

67. In some cases, this gender-neutral framework has been explicitly articulated and defended by judges. *See, e.g.*, *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 361 (Sup. Ct. 1994) (“The notion that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment.”); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, P.J., concurring) (“While we are dealing with lesbianism, there is no ground for a gender-based distinction. Therefore, I shall speak to this issue solely in terms of homosexuality. Homosexuality has been considered contrary to the morality of man for well over two thousand years.”).

68. *See* WILLIAM B. RUBENSTEIN, *TEACHER'S MANUAL TO ACCOMPANY CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 119 (2d ed. 1997) (noting that “reported appellate opinions . . . are perhaps more exceptional in [family] law than in any other” field). *See generally* WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT* 98 (1984) (“It is important to stress that ‘the facts’ recited in the appellate opinion do not represent a complete, coherent story of the dispute.”); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1024-25 (2000) (noting that “[a]ppellate opinions are not representative of trials”); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. ECON. REV. 1, 2 (2004) (noting that “[r]esearchers have also found that published decisions are not representative of the larger population of all case filings” and “published cases can create a misleading image of the overall work of courts”).

may show us only the tip of the iceberg.⁶⁹ By applying my method, I will show that even these exceptional texts reflect conventional assumptions about homosexuality, parenthood, and childhood.

2. *Defining Stereotypes*

Second, there is the question of what I am looking for—explicit references to anti-gay stereotypes about gay and lesbian parents that are influenced by the parent’s gender or the child’s gender. For these purposes, I have defined a “stereotype” as a generalization based on conventional assumptions about homosexuality, parenthood, and childhood, as opposed to a specific allegation based on evidence about an individual parent or child.⁷⁰

By focusing on explicit references to anti-gay stereotypes, I have placed three significant limitations on my analysis. First, this is a study of *explicit* references—it considers only references to stereotypes that appear in the text of opinions rather than those that may be inferred from ambiguous remarks or factual circumstances.⁷¹ Second, this is a study of *stereotypes*—it considers only the nature of judicial rhetoric rather than the legitimacy of litigation results.⁷² Finally, this is a study of anti-*gay* stereotypes—it considers only stereotypes about gay men and lesbians rather than broader stereotypes about men, women, fathers, and mothers.⁷³

69. In recent years, experimental psychologists have produced a growing body of evidence that “implicit” or “unconscious” bias based on race, gender, sexuality, and other legally protected characteristics remains a pervasive force in the contemporary United States. See, e.g., Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 100 (2003) (reporting psychological research showing that “[s]tereotypes, when they function as implicit prototypes or schemas, operate beyond the reach of decisionmaker self-awareness and, therefore, cognitive bias may well be both unintentional and unconscious” (internal citations and quotation marks omitted)).

70. For a discussion of the distinction between stereotypes and specific allegations, see *infra* Part III.B (analyzing sexual abuse stereotypes).

71. There are significant risks associated with limiting my analysis to explicit references to stereotypes, and the limitation may not work well in other contexts. By focusing on explicit references, one may “teach” litigants, experts, and judges to avoid making such references in future cases. To some people, a world in which people no longer articulated anti-gay stereotypes may seem like an obvious improvement, but it would not necessarily be a better world for gay and lesbian parents. The literature on implicit bias warns that even when people no longer rely explicitly on stereotypes, they may continue to rely implicitly on stereotypes. In comparison to explicit bias, implicit bias is considerably more difficult to detect. See generally Bodensteiner, *supra* note 69, at 101-07 (describing the difficulty of proving the existence of implicit bias in discrimination cases).

72. By focusing on judicial rhetoric, I have avoided making overall comparisons between how often gay fathers and lesbian mothers have prevailed against heterosexual parents in custody and visitation cases. In light of the limited number of reported cases, my attempts to make such comparisons were confounded by the influence of other variables, such as the jurisdictions and years in which cases were decided, the fact that mothers litigated custody more often than fathers, and the merits of anomalous cases.

73. By focusing on stereotypes about gay men and lesbians, I have sidestepped the broader debate about how fathers and mothers are treated in custody and visitation cases and the need to include a “control group” of cases involving heterosexual fathers and mothers. Although I have not surveyed the cases involving two heterosexual parents, it would be quite surprising if heterosexual parents were

As a general matter, I have adopted a narrow definition of the concept of “stereotype” in order to take a conservative approach to classifying and counting cases. When opinions left any reasonable doubt about the meaning of references, I excluded them from my tallies.⁷⁴ In one respect, however, my definition of “stereotype” remains broad. By counting all *references* to stereotypes, I have included both affirmations and denials—not only statements that a stereotype *does* apply to a parent but statements that a stereotype does *not* apply to a parent. In some cases, one person’s denial may be responding to another person’s affirmation, which may not have appeared in the opinion itself, or even in the underlying proceedings.⁷⁵ Even when a denial stands by itself, however, it affirms that the stereotype exists as a general matter, operating as a presumption that must be rebutted by gay and lesbian parents in particular cases.⁷⁶

3. *Identifying Actors*

Third, there is the question of whom I am looking for—which actors are responsible for expressing stereotypes about gay fathers and lesbian mothers. In my analysis, I include stereotypes expressed by three different types of actors—litigants, experts, and judges. Whenever possible, I analyze the cases separately to distinguish how often stereotypes were expressed by litigants and experts and how often they were accepted by judges.⁷⁷

stereotyped as HIV agents, child molesters, recruiters, and role models in traditional custody and visitation cases. In any case, the legal scholarship on gay and lesbian parenthood strongly suggests that lesbian and gay parents are subjected to these stereotypes more often than heterosexual parents.

74. For example, there were several cases in which courts referred to the possibility that gay and lesbian parents would adversely affect the “moral” development of children, without specifically referring to the “sexual” development of children. *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987). I excluded these cases from my list of recruiting and role modeling cases, on the ground that these courts may well have been referring to the child’s development of pro-gay attitudes rather than homosexual desires.

75. In a few cases, I have analyzed the appellate records to test my assumptions about the underlying proceedings. *See, e.g., infra* notes 349, 409 and accompanying text.

76. In this respect, the denial of a stereotype is analogous to a familiar form of backhanded compliment, in which a white speaker describes an African-American as “articulate,” thereby suggesting that as a general matter, African-Americans are inarticulate. *See* Lynette Clemetson, *The Racial Politics of Speaking Well*, N.Y. TIMES, Feb. 4, 2007, at 41 (analyzing Senator Biden’s description of Senator Obama as “articulate” during presidential primaries). For my analysis of cases involving the denial of stereotypes, see *infra* Part III.B (analyzing sexual abuse stereotypes) and Part V (analyzing the influence of the judge’s gender).

77. Needless to say, stereotypes are most troubling when they are accepted by trial judges and especially by appellate courts, because they gain the force of law in such cases. I have included stereotypes expressed by litigants and experts in my analysis, however, because they have costs for gay and lesbian parents as well. When litigants and experts express stereotypes about gay and lesbian parents in custody and visitation cases, these parents are stigmatized and disadvantaged. In responding to such stereotypes, gay and lesbian parents are often forced to incur additional attorney and expert witness fees; in addition, they experience the humiliation of being subjected to degrading stereotypes and the risk of attempting to disprove them.

Within each group of cases, there was no meaningful difference between how often stereotypes were accepted by trial judges and how often they were accepted by appellate courts. In general, trial

4. *Specifying Jurisdictions and Years*

Fourth, there are the questions of when and where—the times and places in which stereotypes have appeared. Since the 1950s, social understandings of homosexuality and parenthood have changed dramatically in most jurisdictions, and to some extent, the laws of custody and visitation have changed with them. In this changing environment, it would have been folly to analyze cases out of historical and geographical context. When I refer to cases in this Article, I make special efforts to incorporate this broader context. Throughout the text, I present each line of cases in chronological order, and alongside the case names, I include the state and the year in which the case was decided.⁷⁸ More generally, as I examine each stereotype, I describe the social context from which it emerged.⁷⁹

5. *Distinguishing “Gender” from “Sex”*

Fifth, there is the question of gender—specifically, my use of the term “gender” and the associated distinctions between “male” and “female,” “father” and “mother,” and “son” and “daughter.” For the purposes of this Article, I define the term “gender” to include any and all of the conventional distinctions between “male” and “female,” whether they refer to social or biological characteristics. My broad usage may be unfamiliar (and unsatisfying) to many gender and sexuality scholars, because I do not generally distinguish “gender” from “sex.” (In Part III.C, I briefly distinguish the general concept of “gender” from the specific concepts of “gender identity” and “gender roles” to reflect terms used by litigants, experts, and judges in the opinions themselves.) I admit that this usage of “gender” produces some vague formulations, but I believe that it most accurately reflects what is going on in the cases.

On the surface, it may appear that litigants, experts, and judges were specifically influenced by “sex” rather than “gender,” because they expressed

judges accepted each stereotype in one or two more cases than appellate courts; the difference was no greater than two cases for any individual stereotype. In light of these patterns, I have reported the rate of acceptance by all “judges” together rather than breaking down the acceptance rate for trial judges and appellate courts.

78. For similar reasons, I have cited cases in reverse chronological order in the footnotes without distinguishing by jurisdiction rather than the order suggested by the Bluebook. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R. 1.4(d)(8), at 50 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005). Throughout this Article, I have attempted to present my data in the most accessible and digestible formats.

79. In general, I found that stereotypes of gay fathers and lesbian mothers appeared most often in southern and midwestern states, such as Alabama, Tennessee, Ohio, and Missouri, and especially during the late 1980s and late 1990s, in the midst of two national backlashes against gay and lesbian rights. About half of the stereotypes appeared in the remaining twenty-four states and about half appeared during other time periods. My research did not reveal any custody, visitation, or neglect cases involving a gay, lesbian, or bisexual parent reported during the relevant period in any of the following twelve states: Arizona, Hawaii, Kansas, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Rhode Island, Vermont, and Wisconsin. *See infra* Appendix (listing opinions).

some stereotypes more often about fathers than mothers, and they expressed other stereotypes more often about the parents of sons than the parents of daughters. This reading is too casual, however, because there is no sense in which litigants, experts, and judges actually distinguished gender from sex.

When litigants, experts, and judges stereotyped a gay or lesbian parent, for example, they did not distinguish between the parent's "gender" and the parent's "sex." On the contrary, they assumed that the parent's gender identity and gender role were determined by the parent's biological sex.⁸⁰ Although they held a belief about that parent's sex, they did not make any attempt to verify that belief by independently determining the parent's sex as distinguished from the parent's gender. On the contrary, they made conventional assumptions about that parent's sex based on the parent's declaration of gender identity and performance of gender roles. When the parent was identified as a "father," or by a masculine name, they assumed that the parent was male; when the parent was identified as a "mother," or by a feminine name, they assumed that the parent was female.⁸¹ Even when they applied stereotypes, they conflated gender with sex. Based on assumptions about the parent's sex, they made further assumptions about the parent's behavior based on what they regarded as normal or expected behavior for gay men or lesbians.⁸²

6. Counting Cases

Sixth, there are questions about numbers—specifically, how many times each stereotype has appeared in the collection of cases. To measure the influence of gender, I have counted the number of times that stereotypes appear in cases involving fathers and mothers, and sons and daughters, and in opinions written by male and female judges. Because my analysis reports quantitative differences, some readers may wonder whether my findings are "statistically

80. The tendency of courts to conflate "sex" and "gender" has been observed by many feminist and queer legal scholars. See, e.g., Mary Ann Case, *Disaggregating Gender from Sex from Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that courts generally conflate sex and gender); David Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002) (arguing that the Constitution generally conflates sex and gender); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995) (arguing that courts generally conflate sex, gender, and sexual orientation).

81. In order to analyze how stereotypes were applied in cases involving fathers and mothers, sons and daughters, and male and female judges, I was forced to adopt a similar framework. To categorize each group of cases, I applied conventional assumptions about the "maleness" and "femaleness" of parents who were identified as "fathers" and "mothers," children who were identified as "sons" and "daughters," and judges who were identified by "masculine" and "feminine" names. See *infra* note 320 (explaining method of categorizing opinions by judge's gender).

82. In any event, I do not believe that any aspect of my argument turns on the distinction of gender and sex in this Article. If you disagree with my usage of "gender," please feel free to substitute "presumed sex" or "sex/gender" in lieu of the term "gender." I considered both of these formulations but rejected them as too awkward.

significant”—that is, whether they can be used to support generalizations about other cases.

Because of the nature of my data, this question has no meaningful answer. My method is both empirical and quantitative, but it is not “statistical” in the technical sense of that word. Instead of randomly collecting a representative sample of cases,⁸³ I have systematically gathered all of the available cases from Westlaw, Lexis, casebooks, and law reviews. I do not offer my observations to support generalizations about other cases, let alone other kinds of disputes, such as the many divorces that do not involve lawyers, experts, or judges. It would be equally futile to make generalizations about future cases, given the social and legal changes of recent years.

I am left with my own observations of judicial opinions, which may be evaluated based on any number of criteria. In quantitative terms, the question is not whether the differences that I observe are “significant” but whether they are “meaningful”—that is, whether they are large enough to be regarded as a pattern or trend rather than the random influence of “outliers” or anomalous cases.⁸⁴ In this Article, I define a difference to be “presumptively meaningful” when it is based on a disparity of at least three cases, and thus, it could not have been produced by one or two anomalous cases.⁸⁵ Once I determine that a difference is presumptively meaningful, I test my finding by asking whether it can be confirmed or explained by the social and historical context in which the relevant cases were decided.⁸⁶ If so, then I conclude that the difference is meaningful. Rather than asking whether these differences are statistically

83. The concept of statistical significance applies only to *representative* samples—i.e., samples that do not include a complete universe of the observed data. Moreover, the concept is most accurately applied only to *randomly* collected data—i.e., samples that are gathered through the application of techniques designed to minimize selection bias. See M.G. BULMER, PRINCIPLES OF STATISTICS 139-64 (2d ed. 1979); DAVID FREEDMAN ET AL., STATISTICS 375-86 (4th ed. 2007).

84. This question is analogous to the statistical concept of “robustness.” Like the concept of significance, the concept of robustness applies only to representative samples. For a detailed explanation of the concept of robustness, see PETER ROUSSEEUW & ANNICK LEROY, ROBUST REGRESSION AND OUTLIER DETECTION 8 (2003).

85. It is important to keep in mind that when we compare cases involving gay fathers and lesbian mothers, the number of cases in each group is not equal, so disparities can only be expressed as a minimum number of cases involving gay fathers, or a range of cases in both groups, rather than an absolute number of cases. For example, if a stereotype appears in 3 of 50 cases involving gay fathers, and it does not appear in any of the 121 cases involving lesbian mothers, then there are two ways to describe this difference: On the one hand, it is produced by the existence of 3 cases involving gay fathers; on the other hand, it is produced by the corresponding absence of 8 similar cases involving lesbian mothers. For the sake of simplicity, I refer to this difference as a disparity of “at least three cases.” Although the concept of statistical significance does not apply in this context, it is worth noting that if one applied the traditional two-tailed test for statistical significance, this difference would be statistically significant at the 5% level, with a P-value of .0066. See JOHN E. FREUND, MODERN ELEMENTARY STATISTICS 289 (6th ed. 1984) (explaining traditional two-tailed test for statistical significance).

86. This technique is analogous to the sociological concept of “triangulation”—the verification of observed findings through the application of multiple research methods. See NORMAN K. DENZIN, SOCIOLOGICAL METHODS 340 (1978) (identifying different methods of “triangulation” and observing that “[t]he greater the triangulation, the greater the confidence in the observed findings”).

significant, I ask whether they are legally, politically, or morally significant. Even though my analysis does not allow us to predict future cases, it may still shed new light on old problems, leading us toward new lines of advocacy and thought.

7. *Theorizing the Framework*

Last but not least, there are theoretical questions—specifically, questions about how my framework fits into scholarly debates about the relationships among homosexuality, parenthood, and gender. These days, the boundaries of “feminist” and “queer” theory are hotly contested, so any claims to these labels will be controversial. Nonetheless, with a long list of caveats, I can generally say that my perspective on parenthood is “feminist,” my perspective on homosexuality is “queer,” and my perspective on gender is both “feminist” and “queer.”⁸⁷

87. In a recent book, Janet Halley has offered both a criticism of feminist theory and a pitch for queer theory. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 4-5, 112-114 (2006). The book has sparked controversy among feminists, queer theorists, and others. In two recent reviews, scholars have claimed that Halley has drawn a false dichotomy between the two disciplines—specifically, that she presents feminism as simplistic and narrow in her effort to make feminism look bad and queer theory look good. See Mary Anne Franks, Book Review, *Split Decisions: How and Why to Take a Break From Feminism*, 30 HARV. J.L. & GENDER 257 (2007); Adam P. Romero, Book Review, *Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories*, 19 YALE J.L. & FEMINISM 227 (2007). Although Halley’s definition of feminism is controversial, it is both well-known and clearly articulated, so it provides a good point of departure for describing my theoretical framework. In this footnote, I will elaborate my perspectives on feminist and queer theory by making two passes at Halley’s definitional framework.

To start, I will describe my relationship to feminism. Among other things, Halley claims that in the United States, feminism “is persistently a subordination theory set by default to seek the social welfare of women, femininity, and/or female or feminine gender by undoing some part or all of their subordination to men, masculinity, and/or male or masculine gender.” HALLEY, *supra*, at 4. This definition incorporates three elements: “[1] a distinction between something m and something f; [2] a commitment to be a theory about, and a practice about, the subordination of f to m; and [3] a commitment to work against that subordination on behalf of f.” *Id.* at 4-5; see also *id.* at 15-16. (Halley makes other definitional claims about feminism, but they are more controversial, and they are neither helpful nor relevant here.)

By Halley’s definition, my framework is only partially “feminist.” First, this Article assumes, for the sake of clarity and argument, that there is “a distinction between something m and something f”—more certainly, a distinction between “male” and “female” and less certainly, a distinction between “masculine” and “feminine.” As a result, the Article speaks freely of differences between men and women, fathers and mothers, sons and daughters, and gay men and lesbians. To some extent, my use of these distinctions reifies the dichotomy between male and female—and regrettably, it tends to marginalize parents and children who are transgendered. (In this respect, my analysis of gender could be legitimately criticized as insufficiently “queer.”) This Article does not, however, assume that gay men are “feminine” and lesbians are “masculine” or that heterosexual men are “masculine” and heterosexual women are “feminine.” On the contrary, it criticizes judges, experts, and litigants for promoting such stereotypes. See Part V.C.3.

Second, this Article often describes the subordination of women to men, but it describes the subordination of gay men as well. In this respect, Parts I and III are classically feminist, but Part II departs from this model. Part I traces the law of parenthood, which has been historically characterized by the subordination of women, even in the law’s early celebration of mothers and motherhood. Part III traces how sexual development stereotypes reflect patriarchal concerns about the role of fathers in the production of masculine, heterosexual boys. Part II, however, traces how gay fathers have been

This Article explores how homophobia and sexism “intersect” with each other, placing special burdens on subordinated groups.⁸⁸ Like others, I have generally sought to show that homophobia and sexism support one another by idealizing the identity of masculine, heterosexual men and devaluing other identities.⁸⁹ I have not, however, followed those who suggest that in the domain of identity politics, subordination and resistance are zero-sum games.⁹⁰ In particular, I have resisted any sweeping comparisons of the burdens shouldered by gay fathers and lesbian mothers. I have not claimed that gay fathers stand alone at the intersection of homophobia and sexism—“doubly burdened” as gay men and fathers⁹¹—nor have I claimed such a status for lesbian mothers.⁹² My

subjected to HIV and sexual abuse stereotypes. In doing so, this Part suggests that it is not always lesbians who stand at the intersection of sexism and homophobia.

Third, this Article works against the subordination of women to men, but it squarely rejects the notion that feminists have an obligation to work specifically on behalf of women or lesbians to the exclusion of others. When feminist work is one-sided, it yields one-sided gains. In the United States, for example, it is now generally acceptable for women to wear pants, but it still controversial for men to wear dresses. Similarly, it is now common for women to perform wage work, but it is still relatively unusual for men to assume primary child-care responsibilities. I believe that both of these disparities are problems—for both men and women—and a good theory of feminism should be equipped to address them.

Next, I will adapt Halley’s definitional framework—swapping “hetero” for “m” and “homo” for “f”—to briefly elaborate my relationship to queer theory as well. First, this Article assumes—again, for the purposes of clarity and argument—that there is a distinction between something “hetero” and something “homo.” As a result, the Article speaks freely of differences between gay men and lesbians, gay fathers and lesbian mothers, gay sons and lesbian daughters. To some extent, my use of this distinction reifies the dichotomy between “hetero” and “homo”—and regrettably, it tends to marginalize parents and children who are bisexual. (In this respect, my analysis of homosexuality could be legitimately criticized as insufficiently “queer.”) Second, this Article describes the subordination of “homo” to “hetero”; it does not consider the subordination of “hetero” to “homo” or describe any instances in which this occurs. Third, this Article works against the subordination of “homo” to “hetero,” but it squarely rejects the notion that queer theorists have an obligation to work on behalf of gay men, lesbians, bisexuals, or transgendered people to the exclusion of heterosexuals. Following Halley, I believe that homophobia and sexism imprison us all and that when we work against them, we work for the equality and liberty of all.

88. See, e.g., Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 289 (2002) (arguing that the intersection of homophobia and sexism led to the exclusion of lesbians from the feminist movement “because of fear that homophobia would jeopardize that movement’s goals”); cf. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (describing the “intersectionality” of racism and sexism in antidiscrimination law).

89. See Ehrenreich, *supra* note 88, at 294 (arguing that “compulsory heterosexuality and patriarchy reinforce each other in the construction of masculinity,” resulting in the subordination of women and the stigmatization of “all men who fail to conform to hypermasculine gender norms”).

90. *Id.* at 267-69.

91. See, e.g., Wishard, *supra* note 7, at 420 (claiming that gay fathers face a “double” challenge in custody proceedings because “society shuns them because they are gay, and other gays shun them because they are fathers”); see also Jerry J. Bigner & R. Brooke Jacobsen, *The Value of Children to Gay and Heterosexual Fathers*, in *HOMOSEXUALITY AND THE FAMILY* 163, 164 (Frederick W. Bozett ed. 1989) (describing gay fathers as “a minority within a minority” that is “marginal to the cultural worlds of both heterosexuals and gays”).

92. Cf. Ehrenreich, *supra* note 88, at 275 (“A . . . woman is oppressed because of her gender If she is a lesbian, she is oppressed once again because of her sexual orientation.”); Ruthann Robson, *The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Legal Theorizing*, 5 ST. THOMAS L. REV. 433, 457 (1993) (placing “lesbian identity” at the “intersection between sexuality and gender”).

analysis suggests that there is no one figure who stands at the intersection of homophobia and sexism, and moreover, that there is no one intersection at which such a figure could stand. Because homophobia and gender influence each other, they assume different forms at different intersections. If we mean to theorize these intersections, then we will have to observe them, rather than relying on generalizations about which groups are “doubly burdened” by the intersection of identity norms.

II. THE INFLUENCE OF THE PARENT’S GENDER: GAY FATHERS AS HIV AGENTS AND CHILD MOLESTERS

This Part argues that in custody and visitation cases gay fathers have been subjected to two stereotypes that have been influenced by the parent’s gender. First, they have been stereotyped as HIV agents—men who are likely to contract HIV and infect children with HIV. Second, they have been stereotyped as child molesters—men who are likely to sexually abuse children, especially boys.

With respect to HIV stereotypes,⁹³ the influence of gender is fairly straightforward. Unlike gay fathers, lesbian mothers have not been stereotyped as HIV agents. With respect to sexual abuse stereotypes, the influence of gender is somewhat subtler. Both gay fathers and lesbian mothers have been accused of sexual abuse, but gay fathers have been stereotyped more often and more explicitly as child molesters.

A. HIV Stereotypes: Gay Fathers as HIV Agents

The first stereotype portrays gay fathers as HIV agents—men who are likely to contract HIV and infect children with HIV. When we compare the cases involving gay fathers and lesbian mothers, we see that HIV stereotypes were raised exclusively in cases involving gay fathers. Specifically, concerns that parents would contract HIV or infect children with HIV were raised in 12% (6 of 50) of the cases involving gay fathers and none (0 of 121) of the cases involving lesbian mothers.⁹⁴ In 67% (4 of 6) of these cases, HIV

93. The distinction between HIV and AIDS is often collapsed and conflated by litigants, experts, and judges in custody and visitation cases. For the sake of simplicity, I generally refer to “HIV” when discussing the stereotypes that appear in the opinions.

94. This section is based upon my analysis of the following cases involving gay fathers: *North v. North*, 648 A.2d 1025, 1027-29 (Md. Ct. Spec. App. 1994); *H.J.B. v. P.W.*, 628 So. 2d 753, 754-55 (Ala. Civ. App. 1993); *J.P. v. P.W.*, 772 S.W.2d 786, 786-89 (Mo. Ct. App. 1989); *Stewart v. Stewart*, 521 N.E.2d 956, 959, 964 (Ind. Ct. App. 1988); *Jane W. v. John W.*, 519 N.Y.S.2d 603, 604 (Sup. Ct. 1987); and *Conkel v. Conkel*, 509 N.E.2d 983, 986-87 (Ohio Ct. App. 1987).

For other cases expressing similar themes, see *Soteriou v. Soteriou*, No. FA030733243S, 2005 WL 3471472, at *3 (Conn. Super. Ct. Nov. 23, 2005); *Inscoe v. Inscoe*, 700 N.E.2d 70, 76 (Ohio Ct. App. 1997); *In re J.L.O.*, 398 S.E.2d 853, 853 (Ga. Ct. App. 1990); and *Doe v. Roe*, 526 N.Y.S.2d 718, 718 (Sup. Ct. 1988).

stereotypes were accepted by judges.⁹⁵ All of the HIV stereotypes appeared in cases reported during the late 1980s and early 1990s.⁹⁶

1. Opposing Litigants and HIV

In the HIV cases, it was most often opposing litigants—heterosexual mothers—who stereotyped gay fathers as HIV agents.⁹⁷ When there was no evidence that the father had actually contracted HIV, litigants argued that gay fathers were more likely than the general public to contract HIV because they were homosexual.

In *J.P. v. P.W.* (Missouri 1989),⁹⁸ the father and his partner had both tested negative for HIV, but the mother expressed her “concern[] with the exposure of the child to AIDS.”⁹⁹ Based on evidence that “the incidence of AIDS is higher in homosexuals than in the general population,” and “it is possible [for] a person infected with the AIDS virus to test negative,” the mother asked the court to allow her to supervise the father’s visits.¹⁰⁰ In *Conkel v. Conkel* (Ohio 1987),¹⁰¹ there was “no evidence that the father . . . [was] seropositive with HIV or ha[d] AIDS,” but the mother testified that she was “‘petrified’ that the children will contract AIDS,” and she asked the court to deny the father overnight visits.¹⁰²

In these arguments, litigants often couched concerns about HIV infection in medical and scientific terms, such as “exposure,” “incidence,” and “risk.” Rather than assessing the individual risk posed by each father, however, they assessed the collective risk posed by the gay male population itself. From this epidemiological standpoint, if a gay father had not already contracted HIV, then he was in imminent danger of doing so. By generalizing from groups to individuals, litigants stereotyped all gay fathers as promiscuous and reckless, including those who were monogamous and safe.¹⁰³

When gay fathers acknowledged that they were HIV-positive, litigants articulated concerns about HIV infection in more concrete terms. In *North v. North* (Maryland 1994),¹⁰⁴ the father was living with his gay partner, and he

95. See *North*, 648 A.2d at 1027-29; *H.J.B.*, 628 So. 2d at 754-55; *J.P.*, 772 S.W.2d at 786-89; *Stewart*, 521 N.E.2d at 959, 964.

96. All seven cases were reported between 1987 and 1994. See *supra* note 94.

97. But see *J.L.O.*, 398 S.E.2d at 853 (involving gay father and maternal grandmother); *Doe*, 526 N.Y.S.2d at 718 (involving gay father and maternal grandparents).

98. 772 S.W.2d 786 (Mo. Ct. App. 1989).

99. *Id.* at 789.

100. *Id.* at 788-89.

101. 509 N.E.2d 983 (Ohio Ct. App. 1987).

102. *Id.* at 987.

103. See, e.g., *J.P. v. P.W.*, 772 S.W.2d 786, 786-89 (restricting the father’s visitation rights based on, inter alia, the mother’s concerns about the child’s exposure to AIDS, in spite of evidence that the father had tested “negative” for HIV, he had only one “monogamous” male partner, and the couple’s relationship was limited to “oral sex”); see *infra* Part V.A (analyzing HIV stereotypes in *J.P. v. P.W.*).

104. 649 A. 2d 1025 (Md. Ct. Spec. App. 1994) (internal quotations omitted).

acknowledged that they had both contracted HIV. At the mother's request, the court ordered the Department of Social Services to investigate the father's home. The DSS reported that during overnight visits, the father and his partner slept in separate bedrooms, "they had agreed not to discuss or display their sexuality . . . during visits during day or evening hours, and [they] were taking every precaution to avoid any risk of the children acquiring HIV."¹⁰⁵

The mother was not satisfied with the father's precautions. "[S]he did not trust [the father] to shield the children" from his "homosexual lifestyle" or the risk presented by his HIV-positive status, because the father had exposed her to HIV during the marriage.¹⁰⁶ She argued that by living and sleeping together, the father and his partner were exposing the children to "harmful psychological effects" and "serious health risks":

I was concerned that the longer the children stayed with the two of them, that somehow the children would be damaged by their sleeping together. The children love to jump in bed with me, and when we were together, when we were married they loved to jump in bed with the two of us, and when—the fear was that they would wake up at night, and they would see that he's not in the room, and they would wonder where is my father. Then the next thing you know you see that they go into the other man's room, and they are both on top of each other making love. The contraction of the body fluids, after they finished making love, that there is residue left on the sheets that the children may get. He's not a very clean person at all.¹⁰⁷

To protect the children from these "health risks," the mother asked the court that "all visitation be denied and that [the father] be enjoined from taking the children from her home."¹⁰⁸ The trial court restricted the father's visitation to "daylight hours," but the order was reversed on appeal.¹⁰⁹

2. *Experts, Judges, and HIV*

Gay fathers did not challenge the notion that gay men were likely to be HIV carriers, but they challenged the notion that they would infect their children with HIV.¹¹⁰ To support this argument, they often introduced expert evidence showing that HIV could only be transmitted through the "direct mixing of bodily fluids"—"sexual contact, the sharing of needles among

105. *Id.* at 1028.

106. *Id.*

107. *Id.*

108. *Id.* at 1027.

109. *Id.*

110. *See, e.g.,* North v. North, 648 A.2d 1025, 1029 (Md. Ct. Spec. App. 1994); J.P. v. P.W., 772 S.W.2d 786, 789 (Mo. Ct. App. 1989); Stewart v. Stewart, 521 N.E.2d 956, 964 (Ind. Ct. App. 1988); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987); Jane W. v. John W., 519 N.Y.S.2d 603, 604 (Sup. Ct. 1987); Doe v. Roe, 526 N.Y.S.2d 718, 725 (Sup. Ct. 1988) (involving gay father and maternal grandparents).

intravenous drug abusers and the transfusion of blood”—and not through everyday contact between parent and child.¹¹¹ This evidence was rarely contested by litigants and was generally accepted by judges.¹¹²

This is not to say, however, that judges never stereotyped gay fathers as HIV carriers, or that they always rejected the fear that fathers could infect children with HIV. In *Stewart v. Stewart* (Indiana 1988),¹¹³ the father sought a change of custody on the grounds that the mother was not giving the child “adequate nourishment” and was supplying the child with “alcohol and narcotics.”¹¹⁴ The mother denied the father’s allegations, and she claimed that the father “led a homosexual lifestyle, [and] was infected with the AIDS virus.”¹¹⁵ The trial court not only denied the father’s custody claim but also terminated his visitation rights, even though the mother had not requested it. To justify this *sua sponte* order, the court reasoned: “[E]ven if there was a one percent chance that this child is going to contract it from him, I’m not going to expose her to it.”¹¹⁶

The trial court’s order was reversed by a divided appellate court. The majority found that “[a]n examination of the evidence leads to but one conclusion: the medical evidence and studies available . . . showed that AIDS is not transmitted through everyday household contact.”¹¹⁷ “In light of the medical evidence presented,” the majority held that the trial court’s “complete termination of visitation was an extreme and unwarranted action” and restored the father’s visitation rights.¹¹⁸

One dissenting judge, however, was troubled by the medical evidence. Under cross-examination, the father’s expert had acknowledged that it was “theoretically possible for a parent to infect a child with the AIDS virus while extracting a child’s tooth.”¹¹⁹ Although the judge acknowledged that pulling a child’s tooth was “a poor example upon which to base a hypothesis,” he would have concluded that “under such circumstances, a parent ‘might’ infect his child with AIDS.”¹²⁰ To eliminate any risk of the father infecting the child, the judge would have upheld the trial court’s termination of the father’s visitation rights.

107. *Jane W.*, 519 N.Y.S.2d at 604; *see also North*, 648 A.2d at 1029; *J.P.*, 772 S.W.2d at 789; *Stewart*, 521 N.E.2d at 964; *Conkel*, 509 N.E.2d at 987; *cf. Doe*, 526 N.Y.S.2d at 725 (involving gay father and maternal grandparents).

112. *See North*, 648 A.2d at 1029; *Stewart*, 521 N.E.2d at 963; *Conkel*, 509 N.E.2d at 987; *Jane W.*, 519 N.Y.S.2d at 604; *see also Doe*, 526 N.Y.S.2d at 725 (involving gay father and maternal grandparents). *But see J.P.*, 772 S.W.2d at 789 (upholding restrictions on father’s visitation rights based on mother’s concerns about child’s exposure to AIDS).

113. 521 N.E.2d 956 (Ind. Ct. App.1988).

114. *Id.* at 958.

115. *Id.*

116. *Id.* at 959 (quoting trial court).

117. *Id.* at 964.

118. *Id.* at 965.

119. *Id.* at 967 (Conover, J., dissenting).

120. *Id.*

In *J.P. v. P.W.* (Missouri 1989),¹²¹ the stereotype of the gay father as HIV agent was unanimously endorsed on appeal. As previously noted, the father and his partner had tested negative for the HIV virus, yet the mother sought to supervise the father's visits to prevent "the exposure of the child to AIDS."¹²² In a hearing on the mother's request, the father acknowledged that he had met his partner while he was still married to the mother, and the two men had developed "a sexual relationship" in which "they were engaging in oral sex on a regular basis . . . approximately once or twice each week."¹²³ The court found, however, that the father's relationship with his partner was "monogamous" and "permanent" and that "[h]e probably would marry [his partner] if he were permitted to do so."¹²⁴ In response to the mother's concerns about the child's exposure to AIDS, the father called an expert witness who "doubted that AIDS could be spread through casual contact."¹²⁵ Under cross examination, the expert acknowledged that "the incidence of AIDS is higher in homosexuals than in the general population" and that "it is possible that a person infected with the AIDS virus [could] test negative."¹²⁶

The trial court was sympathetic to the mother's concerns about HIV, finding that "AIDS has a higher incidence of occurrence among homosexuals than the general public" and noting that "[a]fter his homosexual encounter with [his partner], the father continued to have normal sexual intercourse with the mother."¹²⁷ After making these findings, the court prohibited the father's partner or "any other male" from participating in the father's visits.¹²⁸ When both parents appealed, the appellate court relied on the lower court's findings about HIV to justify restricting the father's visitation rights.¹²⁹ In addition, at the mother's request, the appellate court required that the father's visitation be "supervised" by "a responsible adult."¹³⁰

Finally, in *H.J.B. v. P.W.* (Alabama 1993),¹³¹ the father gained custody of his daughter from foster care after the child had been sexually abused by her stepfather. Once the mother and stepfather were divorced, the mother sought a transfer of custody from the father. Prior to the custody trial, the mother sought to prove that the father was gay and HIV-positive. The father did not disclose his sexual orientation or his health status until the day of trial. The trial court found that the father's failure to "disclose his personal health and affairs . . . [was] tantamount to an attempt to secrete his true health status from the

121. 772 S.W.2d 786 (Mo. Ct. App. 1989).

122. *Id.* at 789.

123. *Id.* at 787-88.

124. *Id.* at 788.

125. *Id.* at 789.

126. *Id.*

127. *Id.* at 787, 789.

128. *Id.* at 786.

129. *Id.* at 789.

130. *Id.* at 794.

131. 628 So. 2d 753 (Ala. Civ. App. 1993).

Court.”¹³² Based on this finding, the trial court disregarded the father’s testimony and transferred custody to the mother. Relying on “the father’s present health and lifestyle,” the appellate court affirmed the trial court’s transfer.¹³³

3. *Gay Men and HIV*

It is no mystery why gay fathers have been specifically stereotyped as HIV agents in custody and visitation cases. In Western societies, male homosexuality has been portrayed through infection metaphors, such as “plague, infestation, and disease,” for thousands of years.¹³⁴ In the contemporary United States, the spread of HIV has been linked to the demographic of gay men—specifically, to the practice of gay anal sex—since the earliest signs of the outbreak.¹³⁵

In 1981, the first AIDS cases were diagnosed as Gay-Related Immune Deficiency (GRID), because the syndrome was thought to afflict only gay men and to be caused by a combination of illegal drug use and promiscuous anal sex.¹³⁶ As the scope of the epidemic became broader and the causes of the illness became clearer, the syndrome was renamed Acquired Immune Deficiency Syndrome (AIDS), but the links between gay men and AIDS have lasted much longer.¹³⁷ Since the early 1990s, HIV has spread most quickly among sexually active gay men and intravenous drug users in the United States.¹³⁸ By comparison, the virus has spread more slowly among women and hardly at all among lesbians.¹³⁹

Likewise, it is no mystery why HIV stereotypes appeared most often in cases reported during the late 1980s and early 1990s. In the early 1980s, more than 12,000 people died of AIDS in the United States, but the syndrome was

128. *Id.* at 755.

133. *Id.* at 756.

134. See BYRNE FONE, *HOMOPHOBIA: A HISTORY* 186-87 (2001) (observing that “[s]ince Old Testament days, sodomy had been implicated as a cause of natural calamity, and antisodomitical rhetoric had also consistently described sodomy as pestilential and sodomites as sources of infection” and that during the Middle Ages, “[i]mages of plague, infestation, and disease became the primary metaphors for sodomy and its effects”).

135. RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC* 53-112, 121, 171 (2007).

136. *Id.*

137. *Id.*

138. See generally JONATHAN ENGEL, *THE EPIDEMIC: A GLOBAL HISTORY OF AIDS* 5-10 (2006) (describing the spread of AIDS among gay men and IV drug users).

139. *Id.* at 113-14. Of course, some lesbians were infected with HIV and some developed AIDS as early as the late 1980s. *Id.* Some lesbians became targets of AIDS phobia in this period, because homosexuality and AIDS were so thoroughly conflated. See, e.g., TERRY CASTLE, *THE APPARITIONAL LESBIAN: FEMALE HOMOSEXUALITY AND MODERN CULTURE* 12 & n.15 (1993); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 38 & n.39 (1990). For the most part, however, it was gay men who were victimized by the AIDS epidemic and gay men who were targeted by AIDS phobia. See ENGEL, *supra* note 138, at 113-14.

widely dismissed as a “homosexual” disease by politicians, epidemiologists, physicians, and journalists.¹⁴⁰ It was not until 1985, when the media reported that the actor Rock Hudson had developed AIDS, that the American public became generally aware of the risk of HIV infection and the scope of the AIDS epidemic.¹⁴¹ In the late 1980s, the nation was swept up in a panic over the spread of AIDS, which fueled a backlash against the “homosexual lifestyle” and the gay rights movement.¹⁴² In 1987 and 1988, family courts openly acknowledged the “stigma” and “hysteria” associated with AIDS in custody cases involving gay fathers.¹⁴³

Since the early 1990s, however, there has been only one custody or visitation case in which a gay father was explicitly portrayed as an HIV carrier, and it was an exceptional case in several respects. In *Inscoe v. Inscoe* (Ohio 1997),¹⁴⁴ the mother testified that four years earlier, shortly after the father had come out to her, he had told her that “he was sick, was going to die of AIDS, and that he was going to go down the road to commit suicide.”¹⁴⁵ In this private moment, the father portrayed himself as an HIV carrier.¹⁴⁶ When he took the stand in court, however, he clarified that he had not actually contracted HIV or developed AIDS.¹⁴⁷

Several aspects of *Inscoe* suggest how attitudes towards HIV have changed since the early 1990s, insofar as they are reflected in reported custody and visitation cases. First, unlike in previous cases, the mother did not seek to contradict the father’s testimony or argue that his homosexuality made him more likely to contract HIV than the general public. Second, neither the trial judge nor the appellate court bothered to mention the possibility of the father infecting the child. Finally, although *Inscoe* was reported in 1997, the father’s statement was made four years earlier, when the rate of AIDS fatalities was still increasing rapidly in the United States and AIDS phobia was still prevalent. In 1991, for example, a survey of Americans revealed that about one-fifth of respondents believed that AIDS victims “deserved” the illness, one-fourth were

140. See SHILTS, *supra* note 135, at xxi-xxiii.

141. *Id.* at xxi.

142. ENGEL, *supra* note 138, at 69-102.

143. *Doe v. Roe*, 526 N.Y.S.2d 718, 721, 726 (Sup. Ct. 1988) (involving gay father and maternal grandparents); *Jane W. v. John W.*, 519 N.Y.S.2d 603, 604 (Sup. Ct. 1987).

144. 700 N.E.2d 70, 76 (Ohio Ct. App. 1997).

145. *Id.* at 76.

146. I have not counted this reference to AIDS as an HIV stereotype because it is not clear why the father initially told the mother that he had AIDS. On the one hand, his statement may have been based on his own internalized assumptions about male homosexuality and HIV; on the other hand, it may have been based on his own knowledge of his sexual behavior along with an accurate assessment of the associated HIV risks. In any case, it is clear that the father’s initial portrayal of himself as an HIV carrier was not factually accurate. Aside from the father’s statement, which he disavowed under oath at trial, the record does not include any evidence that the father had contracted HIV or developed AIDS. See *supra* Part I.D.2 (explaining method for identifying stereotypes).

147. 700 N.E.2d at 78.

“disgusted” or “angry” with AIDS victims, and one-third were “afraid” of AIDS victims and believed that they should be quarantined.¹⁴⁸

We should be wary of drawing too many conclusions from a single case, however, or even from the lack of references to HIV and AIDS in more recent cases. Although AIDS phobia no longer explicitly appears in reported opinions, it clearly persists among a minority of Americans. In 1999 and 2000, surveys revealed that although very few Americans still supported quarantines for AIDS victims, one-fifth of respondents were still “afraid” of AIDS victims, one-fourth believed that AIDS victims “deserved” the illness, and almost one-half believed that HIV could be transmitted by coughing, sneezing, or sharing a drinking glass.¹⁴⁹ More recently, a 2006 survey found that “[s]ince 1990, there has been no change in the share [of Americans] who incorrectly think HIV might be transmitted through kissing, sharing a drinking glass, or touching a toilet seat.”¹⁵⁰ In one recent custody case, *Soteriou v. Soteriou* (Connecticut 2005),¹⁵¹ a mother played upon the general association of male homosexuality and disease by claiming that the father had “engaged in extramarital homosexual activities” and was “spreading disease.”¹⁵²

B. Sexual Abuse Stereotypes: Gay Fathers as Child Molesters

The second stereotype portrays gay fathers as child molesters—men who sexually abuse children, especially boys. When we compare the cases involving gay fathers and lesbian mothers, we see that the subject of sexual abuse was raised more than twice as often in cases involving gay fathers—specifically, in 22% (11 of 50) of the cases involving gay fathers and about 9% (11 of 121) of the cases involving lesbian mothers.¹⁵³ In about 59% (13 of 22) of these cases,

148. See Gregory M. Herek & John P. Capitanio, *Public Reactions to AIDS in the United States: A Second Decade of Stigma*, 83 AM. J. PUB. HEALTH 574, 575 (1993).

149. See Centers for Disease Control and Prevention, *HIV-Related Knowledge and Stigma—United States, 2000*, in 49 MORBIDITY & MORALITY WKLY REP. 1062, 1063 (2000) (reporting 1999 survey results); Gregory M. Herek, John P. Capitanio & Keith F. Widaman, *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999*, 92 AM. J. OF PUB. HEALTH 371, 372 (2002) (reporting 2000 survey results).

150. KAISER FAMILY FOUNDATION, SURVEY OF AMERICANS ON HIV/AIDS (2006), available at <http://www.kff.org/kaiserpolls/pomr050806pkg.cfm>.

151. No. FA030733243S, 2005 WL 3471472, at *3 (Conn. Super. Ct. Nov. 23, 2005). I have not counted *Soteriou* as an HIV case because the litigant did not make an explicit reference to “HIV” or “AIDS.” See *supra* Part I.D.2 (explaining method for identifying stereotypes).

152. *Soteriou*, 2005 WL 3471472, at *3.

153. This section is based upon my analysis of the following cases involving gay fathers, *Soteriou v. Soteriou*, No. FA030733243S, 2005 WL 3471472, at *4-5 (Conn. Super. Ct. Nov. 23, 2005); Pamela J. v. Santiago J., No. CN98-06021, 2000 WL 1279443, at *1-2 (Del. Fam. Ct. May 4, 2000); Boswell v. Boswell, 701 A.2d 1153, 1160 (Md. Ct. Spec. App. 1997); *Inscoe v. Inscoe*, 700 N.E.2d 70, 76 (Ohio Ct. App. 1997); *Glover v. Glover*, 586 N.E.2d 159, 164 (Ohio Ct. App. 1990); *J.P. v. P.W.*, 772 S.W.2d 786, 793 (Mo. Ct. App. 1989); *Conkel v. Conkel*, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 964-65 (Sup. Ct. 1986); *Wolff v. Wolff*, 349 N.W.2d 656, 658 (S.D. 1984); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982); and *In re J.S. & C.*, 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974), and the following cases involving lesbian mothers, *Gould v. Dickens*,

concerns about sexual abuse were accepted by judges.¹⁵⁴ Sexual abuse concerns appeared in cases reported during every decade since the 1970s, and 50% (11 of 22) appeared in the late 1990s and early 2000s.¹⁵⁵

If we look closer at the language of the sexual abuse cases, we can discover why these concerns were raised twice as often in cases involving gay fathers. Both gay fathers and lesbian mothers were *accused* of sexual abuse, but gay fathers were *stereotyped* as child molesters more often and more explicitly than lesbian mothers.

1. Sexual Abuse Accusations: Specific Allegations of Child Sexual Abuse Against Gay and Lesbian Parents

In most of the sexual abuse cases, the heterosexual parent specifically accused the gay or lesbian parent, or that parent's same-sex partner, of sexually abusing a child.¹⁵⁶ In almost all of these cases, there was a direct relationship between the parent's gender and the child's gender—gay men were accused of molesting boys and lesbians were accused of molesting girls.¹⁵⁷ In most of

143 S.W.3d 639, 641-42 (Mo. Ct. App. 2004); *In re Marriage of Faulhaber*, No. 2001-P-0110, 2002 WL 1401066, at *2 (Ohio Ct. App. June 28, 2002); *Ex Parte J.M.F.*, 730 So. 2d 1190, 1193 (Ala. 1998); *In re Marriage of McKay*, No. C6-95-1626, 1996 WL 12658, at *4 (Minn. Ct. App. Jan. 16, 1996); *Phillips v. Phillips*, No. CA94-03-005, 1995 WL 115426, at *2 (Ohio Ct. App. Mar. 20, 1995); *Hertzler v. Hertzler*, 908 P.2d 946, 951 (Wyo. 1995); *D.B. v. R.B.*, 652 A.2d 1254, 1256 & n.3 (N.J. Super. Ct. App. Div. 1995); *In re Marriage of Williams*, 563 N.E.2d 1195, 1199 (Ill. App. Ct. 1990); *Miller v. Hawkins*, 549 So. 2d 102, 103 (Ala. Civ. App. 1989); *Kallas v. Kallas*, 614 P.2d 641, 643 (Utah 1980); and *In re Jane B.*, 380 N.Y.S.2d 848, 851 (Sup. Ct. 1976).

For neglect cases involving child sexual abuse allegations, see *In re T.B. & J.B.*, No. 04JC998-999, 2007 WL 2781274, at *3 (Ohio Ct. App. Sept. 19, 2007); *In re B.P. & A.P.*, 995 P.2d 982, 988 (Mont. 2000); *In re Jason L.*, 272 Cal. Rptr. 316, 323 (Ct. App. 1990); *In re C.M.M.*, 757 S.W.2d 601, 602 (Mo. Ct. App. 1988); *McKinney v. Ala. Dept. of Pensions & Sec.*, 475 So. 2d 568, 570 (Ala. Civ. App. 1985); *In re T.L.H.*, 630 S.W.2d 441, 444 (Tex. App. 1982); and *In re Jane Doe*, 542 P.2d 1195, 1200 (N.M. Ct. App. 1975).

154. See *Soteriou*, 2005 WL 3471472, at *4-5; *Glover*, 586 N.E.2d at 164; *J.P.*, 772 S.W.2d at 793; *Wolff*, 349 N.W.2d at 658; *J.L.P.(H.)*, 643 S.W.2d at 869; *J.S. & C.*, 324 A.2d at 96; *Faulhaber*, 2002 WL 1401066, at *2; *J.M.F.*, 730 So. 2d at 1193; *Phillips*, 1995 WL 115426, at *2; *Hertzler*, 908 P.2d at 951; *Williams*, 563 N.E.2d at 1199; *Hawkins*, 549 So. 2d at 103; *Kallas*, 614 P.2d at 643.

155. See *supra* note 153.

156. In about 64% (14 of 22) of the sexual abuse cases, the heterosexual parent made specific accusations of sexual abuse against the gay or lesbian parent or the parent's same-sex partner. For cases involving gay fathers, see *Soteriou*, 2005 WL 3471472, at *4-5; *Boswell*, 701 A.2d at 1160; *Glover*, 586 N.E.2d at 164; *J.P.*, 772 S.W.2d at 793; and *Wolff*, 349 N.W.2d at 658. For cases involving lesbian mothers, see *Gould*, 143 S.W.3d at 641-42; *Faulhaber*, 2002 WL 1401066, at *2; *J.M.F.*, 730 So. 2d at 1193; *Phillips*, 1995 WL 115426, at *2; *Hertzler*, 908 P.2d at 951; *D.B.* 652 A.2d at 1256 & n.3; *Williams*, 563 N.E.2d at 1199; *Hawkins*, 549 So. 2d at 103; and *Kallas*, 614 P.2d at 643.

In general, the neglect cases were similar to the sexual abuse cases—courts generally rejected sexual abuse accusations against gay and lesbian parents. See, e.g., *T.B. & J.B.*, 2007 WL 2781274, at *9; *B.P. & A.P.*, 995 P.2d at 988; *T.L.H.*, 630 S.W.2d at 444; *Jane Doe*, 542 P.2d at 1200. In two neglect cases, courts expressly found that gay fathers had molested girls. See *In re Jason L.*, 272 Cal. Rptr. at 323; *C.M.M.*, 757 S.W.2d at 602. In one neglect case, the court suggested that the father “may have attempted” to molest one of his sons. *McKinney*, 475 So. 2d at 570.

157. Only about 14% (3 of 22) of the sexual abuse cases involved accusations that a gay man or lesbian parent had sexually abused a child of the other sex. See *Gould*, 143 S.W.3d at 641; *Miller*, 549 So. 2d at 103; *J.P.*, 772 S.W.2d at 793.

these cases, the alleged victim was the parent's own child,¹⁵⁸ but in some cases, the alleged victim was another minor.¹⁵⁹

When the alleged victim was the parent's own child, the litigant's accusation was generally rejected, even when it was supported by the testimony of experts and witnesses.¹⁶⁰ In the majority of these cases, courts reviewed the evidence and expressly rejected the accusation as unfounded.¹⁶¹ In only a few of these cases, courts suggested that a child "may" have been abused, citing evidence of sexual abuse to support a ruling against a gay or lesbian parent.¹⁶² There was not a single custody or visitation case in which a court expressly found that a gay or lesbian parent had sexually abused his or her child.

When the alleged victim was another minor, by contrast, the litigant's accusation was generally accepted. In most of these cases, courts found that a gay or lesbian parent had engaged in sexual activity with another minor, and based on this conduct, the court restricted the parent's custody or visitation rights.¹⁶³

In all of these cases, when litigants made specific accusations against gay fathers and lesbian mothers, neither the accusations nor the results seemed to be influenced by the parent's gender. There was no meaningful difference in how often gay fathers and lesbian mothers were accused of sexual abuse¹⁶⁴ or how often they were cleared of such accusations.¹⁶⁵

158. See *Gould*, 143 S.W.3d at 641-42; *J.M.F.*, 730 So. 2d at 1193; *Boswell*, 701 A.2d at 1160; *Glover*, 586 N.E.2d at 164; *Phillips*, 1995 WL 115426, at *2; *Hertzler*, 908 P.2d at 951; *D.B.*, 652 A.2d at 1256 & n.3; *Hawkins*, 549 So. 2d at 103; *J.P.*, 772 S.W.2d at 793.

159. See *Williams*, 563 N.E.2d at 1199 (finding that mother enticed "minor" into sexual relationship); *Wolff*, 349 N.W.2d at 658 (finding that father had relationship with "juvenile"); *Kallas*, 614 P.2d at 643 (discussing evidence that mother made sexual advances on neighbor's thirteen-year-old daughter).

160. See *Gould*, 143 S.W.3d at 641-42; *Boswell*, 701 A.2d at 1160; *Glover*, 586 N.E.2d at 164; *Phillips*, 1995 WL 115426, at *2; *Hertzler*, 908 P.2d at 951; *D.B.*, 652 A.2d at 1256 & n.3.

161. See *Gould*, 143 S.W.3d at 641-42; *Boswell*, 701 A.2d at 1160; *Glover*, 586 N.E.2d at 164; *Phillips*, 1995 WL 115426, at *2; *Hertzler*, 908 P.2d at 951; *D.B.*, 652 A.2d at 1256 & n.3.

162. See *J.M.F.*, 730 So. 2d 1193; *J.P.*, 772 S.W.2d at 793; *Miller v. Hawkins*, 549 So. 2d 102, 103 (Ala. Civ. App. 1989).

163. See *Wolff*, 349 N.W.2d at 658 (stating that father had relationship with "juvenile"); *Williams*, 563 N.E.2d at 1199 (suggesting that mother enticed "minor" into sexual relationship); *Kallas*, 614 P.2d at 643 (claiming that mother made sexual advances on neighbor's thirteen-year-old daughter); see also *Soteriou v. Soteriou*, No. FA030733243S, 2005 WL 3471472, at *4-*5 (Conn. Super Ct. Nov. 23, 2005) (noting that father's partner sexually assaulted nineteen-year-old employee); *In re Marriage of Faulhaber*, No. 2001-P-0110, 2002 WL 1401066, at *2 (Ohio Ct. App. June 28, 2002) (finding that the mother's partner sexually assaulted co-habitant).

164. Sexual abuse accusations were made in 10% (5 of 50) of the cases involving gay fathers and about 7% (9 of 121) of the cases involving lesbian mothers. This amounts to a difference of only two cases, which is too small to be regarded as meaningful.

165. These patterns were too small to be regarded as meaningful, but they were remarkably consistent. Overall, both gay fathers (2 of 4) and lesbian mothers (4 of 8) prevailed against half of the sexual abuse accusations to which they were subjected. When the alleged victim was the parent's own child, both gay fathers (2 of 3) and lesbian mothers (4 of 6) prevailed against two-thirds of the sexual abuse accusations to which they were subjected. Finally, when the alleged victim was another minor, neither gay fathers (0 of 1) nor lesbian mothers (0 of 2) ever prevailed.

2. *Sexual Abuse Stereotypes: The Gay Child Molester*

There was, however, one meaningful difference between the sexual abuse cases involving gay fathers and lesbian mothers: In 10% (5 of 50) of the cases involving gay fathers, there were references to a stereotype that portrayed gay men as child molesters, even though there were no specific accusations of sexual abuse against the father, his partner, or his friends.¹⁶⁶ In the most notorious of these cases, the stereotype was explicitly based on the parent's gender and the child's gender—it referred specifically to “the molestation of minor *boys* by adult *males*.”¹⁶⁷ In the 121 cases involving lesbian mothers, there was only one reference to a stereotype that portrayed lesbians as child molesters, and it took the form of a denial about the mother's partner, rather than an affirmative stereotype about the mother herself.¹⁶⁸

In *In re J.S. & C.* (New Jersey 1974),¹⁶⁹ the mother was granted custody of three children, two boys and one girl, when the parents separated. In the divorce hearing, the mother sought a restriction prohibiting overnight visits with the father. In reviewing her request, the court noted that the father had brought the children to “‘The Firehouse,’ a meeting hall for homosexuals, where one witness has testified [that] he observed men ‘fondling each other, necking and petting.’”¹⁷⁰ In restricting the father's visitation rights, the court cited one expert's testimony that in light of “‘the father's milieu . . . it is possible that these children upon reaching puberty would be subject to either overt or covert *homosexual seduction* which would detrimentally influence their sexual development.”¹⁷¹ The court's order restricted the father's weekly and holiday visits to daylight hours and generally prohibited the father from exposing the children to “his lover” or taking them to “the Firehouse” during visits.¹⁷² On appeal, the lower court's order was affirmed in a *per curiam* order on “substantially” similar grounds.¹⁷³

In *J.L.P.(H.) v. D.J.P.* (Missouri 1982),¹⁷⁴ the stereotype of the gay child molester was articulated in more specific terms, and it was proffered by a

166. See *Inscoc v. Inscoc*, 700 N.E.2d 70, 77 (Ohio Ct. App. 1997); *Conkel v. Conkel*, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 964-65 (Sup. Ct. 1986); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982); *In re J.S. & C.*, 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974).

167. *J.L.P.(H.)*, 643 S.W.2d at 869 (emphasis added).

168. *In re Jane B.*, 380 N.Y.S.2d 848, 854 (Sup. Ct. 1976). This ratio (1 in 121) amounts to less than 1% of the cases involving lesbian mothers. The difference between the cases involving gay fathers (5 of 50) and lesbian mothers (1 of 121) amounts to a difference of at least four cases, which is large enough to be regarded as meaningful. See *supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

169. 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974).

170. *Id.* at 95.

171. *Id.* at 96 (emphasis added).

172. *Id.* at 97.

173. *In re J.S. & C.*, 364 A.2d 54, 55 (N.J. Super. Ct. App. Div. 1976).

174. 643 S.W.2d 865 (Mo. Ct. App. 1989).

unanimous appellate court. During the trial, the father acknowledged discussing his homosexuality with his child, introducing the child to “three or four” of his homosexual partners, and taking the child to a church in which “over half” of the congregants were “homosexual persons.”¹⁷⁵ In addition, the mother testified that “the father took the child out of the state for a period of several days . . . in the company of another homosexual and his juvenile nephews.”¹⁷⁶ The mother did not, however, make any allegations of sexual abuse against the father or any of his partners or friends.

The father presented the testimony of two psychologists at trial. Both experts testified that “the child suffered . . . no psychological damage arising from his association with his father.”¹⁷⁷ Although the mother had not accused the father of sexual abuse, both experts testified that “most child molestation occurs between adult heterosexual males and female children.”¹⁷⁸ In addition, one expert testified that “child molestation was approximately 95% heterosexual and . . . homosexual molestation is rare.”¹⁷⁹ The father’s expert testimony was not challenged by the mother.

The trial court found that the father’s behavior was “*seductive* in nature,”¹⁸⁰ even though the mother had not accused him of seducing or molesting the child. Based on this finding, the court issued an order denying the father overnight visitation and prohibiting him from taking the child to his church or any “gay activist social gatherings.”¹⁸¹

In his appeal, the father argued that the expert testimony “refuted” the trial court’s characterization of his behavior as “*seductive*.”¹⁸² The appellate court rejected this argument by invoking conventional assumptions about gay men and child sexual abuse:

The trial court was simply not required to accept the opinions of the experts. . . . The experts’ testimony with respect to molestation of minors is . . . suspect. Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychologist experts’ testimony indicated.¹⁸³

To provide empirical support for this claim, the court observed that “[a] few minutes research discloses the following appellate decisions involving such molestation” and cited seven criminal cases reported between 1957 and 1978 in which adult men were convicted of sexually abusing young boys.¹⁸⁴ In rejecting

175. *Id.* at 869.

176. *Id.* at 867.

177. *Id.*

178. *Id.* at 866.

179. *Id.* at 867.

180. *Id.* at 869 (emphasis added).

181. *Id.* at 866.

182. *Id.* at 868.

183. *Id.* at 868-69.

184. *Id.* at 869. For a criticism of the court’s analysis, see *infra* Part V.B.5.

the father's appeal, the court suggested that the father's "seductive" behavior had not only supported the trial court's order, but "would support an even broader prohibition upon the father's exercise of visitation in the presence of known homosexuals."¹⁸⁵

Even among the sexual abuse cases, cases like *J.S. & C.* (New Jersey 1974) and *J.L.P.(H.)* (Missouri 1982) stand out as unusual. In most of these cases, courts did not affirmatively suggest that "homosexuals" are child molesters. In the remaining cases, the stereotype of the gay child molester was expressed in the form of a denial—a nonsequitur statement that a gay or lesbian parent, or that parent's partner, had not sexually abused the parent's child.¹⁸⁶ In these cases, courts did not generally rule against gay or lesbian parents, but they affirmed that the stereotype of the gay child molester exists, operating as a presumption that must be rebutted in particular cases. Even in the absence of any specific accusations of sexual abuse, these courts felt compelled to rebut the conventional assumption that "homosexuals" are child molesters—as if a gay or lesbian parent who was not a child molester was an exception to the general rule.¹⁸⁷

In *In re Jane B.* (New York 1976)¹⁸⁸—the only one of these cases involving a lesbian mother—the judge emphasized that the mother's partner had "no physical relationship with the infant . . . or any other child," and that "any [of her] homosexual relationships have been with adult females," even though the father had not accused the mother or her partner of sexually abusing the child.¹⁸⁹ Similarly, in *M.A.B. v. R.B.* (New York 1986),¹⁹⁰ one of the cases involving a gay father, the judge rejected the notion that "if gay parents have custody, they will molest the children," even though the mother had not articulated this position at trial.¹⁹¹ In *Conkel v. Conkel* (Ohio 1987),¹⁹² the court mentioned that the father "had never made any sexual advances toward his

185. *Id.* at 872.

186. See *Inscoc v. Inscoc*, 700 N.E.2d 70, 77 (Ohio Ct. App. 1997); *Conkel v. Conkel*, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 964-65 (Sup. Ct. 1986); *In re Jane B.*, 380 N.Y.S.2d 848, 854 (Sup. Ct. 1976).

187. For an explanation of why I have included denials in my analysis, see *supra* Part I.D.2. By dividing the cases into three categories—cases involving specific accusations, explicit stereotypes, and implicit stereotypes—I do not mean to suggest that the categories are mutually exclusive. For example, it seems likely that at least some of the specific accusations were based on implicit stereotypes rather than any specific evidence of a parent sexually abusing a child. It would have been exceedingly difficult, however, to identify which accusations were based on implicit stereotypes. Finally, my research revealed only two cases suggesting that accusations were based on implicit stereotypes. See *Ex parte J.M.F.*, 730 So. 2d 1190, 1193 (Ala. 1998) (expert testifying that the father's suspicion of sexual abuse stemmed from the fact of the mother's lesbianism); *Grant v. Grant*, No. WD-88-29, 1989 WL 80951 (Ohio App. Ct. July 21, 1989) (mother alleging that father is "a latent homosexual who has forced his son to perform fellatio").

188. 380 N.Y.S.2d 848 (Sup. Ct. 1976).

189. *Id.* at 854.

190. 510 N.Y.S.2d 960 (Sup. Ct. 1986).

191. *Id.* at 964-65.

192. 509 N.E.2d 983 (Ohio Ct. App. 1987).

sons,” even though the mother had stipulated to this fact during trial and did not contest the stipulation in her appeal.¹⁹³

The strongest example of a denial appeared in *Inscoe v. Inscoe* (Ohio 1997),¹⁹⁴ where a witness testified that people in the father’s neighborhood had stereotyped the gay father and his partner as child molesters. Mr. Inscoe, a gay father, had been awarded custody of his thirteen-year-old son at the time of his divorce. When the father and son moved in with the father’s partner, the boy’s mother challenged the original custody order. During the trial, the boy’s paternal grandfather told the court what “people” had been saying about the father and his partner: “Well, I’ve heard people say, you know, Herb and Charlie is gay and all this, and they might do something to the kids and all this, you know.”¹⁹⁵ In his testimony, the grandfather dismissed the rumors as “a bunch of malarkey.”¹⁹⁶ “None of that thing happens,” he explained, “not even one time. Not one incident that I’ve ever been around.”¹⁹⁷ Although the father initially lost custody to the mother, he prevailed in his appeal, on the ground that “[a] parent’s sexual orientation, standing alone, has no relevance to a decision concerning the allocation of parental rights and responsibilities.”¹⁹⁸

Taken together, these affirmations and denials explain why sexual abuse was mentioned twice as often in cases involving gay fathers, and they demonstrate the ways that the stereotype of the gay child molester was influenced by the parent’s gender. On the whole, sexual abuse stereotypes appeared in 10% (5 of 50) of the cases involving gay fathers and less than 1% (1 of 121) of the cases involving lesbian mothers.¹⁹⁹

3. *Gay Men and Child Sexual Abuse*

Like associations between male homosexuality and disease, associations between male homosexuality and child sexual abuse—from “pederasty” to “pedophilia”—can be traced back for many centuries in Western societies.²⁰⁰ In a divorce case reported over 100 years ago, for example, the wife charged that her husband “was guilty of what is known as ‘pederasty,’” which she defined as “improper intimacy with the male sex.”²⁰¹ In affirming her divorce, the Mississippi Supreme Court held that the husband’s conduct was “cruel and

193. *Id.* at 984.

194. 700 N.E.2d 70 (Ohio Ct. App. 1997).

195. *Id.* at 77.

196. *Id.*

197. *Id.*

198. *Id.* at 81.

199. See *supra* notes 166, 168.

200. See generally FONE, *supra* note 134, at 19, 47-48, 87-90, 193, 232 (tracing the development of Western associations between homosexuality and “pederasty” from ancient Greece to Enlightenment Europe).

201. *Crutcher v. Crutcher*, 38 So. 337, 337 (Miss. 1905).

inhuman treatment,” while reserving the question of whether his conduct was properly described as “pederasty” or “sodomy.”²⁰²

In the 1950s and 1960s, American psychologists often portrayed gay men as child molesters, based on the view that homosexuality was an “adolescent” stage of sexual development.²⁰³ In the 1970s, Anita Bryant portrayed “homosexuals” as child molesters when she launched her “Save Our Children” campaign against the gay liberation movement.²⁰⁴

Because American attitudes about homosexuality have changed considerably since the 1980s, the stereotype of the gay child molester is less prevalent now than in recent years.²⁰⁵ In light of these changes, it is no wonder that in *J.L.P.(H.) v. D.L.P.* (Missouri 1982), three appellate judges agreed that “every judge knows” that gay men are child molesters,²⁰⁶ but fifteen years later, in *Inscoe v. Inscoe* (Ohio 1997), such rumors were rejected as “a bunch of malarkey” because “[n]one of that thing happens.”²⁰⁷ Once again, *Inscoe* seems like a sign of how times have changed.

Yet old rumors die hard. In this context, too, we should be wary about drawing too many conclusions from a single case, or from the lack of sexual abuse stereotypes in more recent cases. For some Americans, the association between gay men and child sexual abuse remains powerful. In 1999, a national survey found that about one-fifth of heterosexual men still believed that most gay men are child molesters, while only one-tenth believed the same to be true about lesbians.²⁰⁸ More recently, stereotypes of gay men as “pedophiles” and “child molesters” have been revived in the debates over the Boy Scouts’ exclusion of gay scoutmasters,²⁰⁹ the sexual abuse of boys by Catholic priests,²¹⁰ and the sexually charged communications between Representative

202. *Id.*

203. PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 62 (1998) (observing that during the 1950s, “[p]revailing therapeutic orthodoxy viewed homosexuality as a form of an arrested psychosexual development, one likely to be associated with an un-natural attraction toward children”).

204. *See id.* at 124-25 (observing that Bryant’s campaign “stressed homosexuals’ alleged predilection for child pornography and involvement in organized pedophile rings,” including one allegation that “25,000 boys seventeen years old or younger in [Los Angeles] alone have been recruited into a homosexual ring to provide sex for adult male customers”).

205. *See* Gregory Herek, Facts About Homosexuality and Child Molestation, http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html (last visited Dec. 1, 2008) (citing ALBERT D. KLASSEN & COLIN J. WILLIAMS, SEX AND MORALITY IN THE UNITED STATES: AN EMPIRICAL ENQUIRY UNDER THE AUSPICES OF THE KINSEY INSTITUTE (Hubert J. O’Gorman ed., 1989)).

206. 643 S.W.2d 865, 866 (Mo. Ct. App. 1982).

207. 700 N.E.2d 70, 77 (Ohio Ct. App. 1997).

208. Herek, *Gender Gaps*, *supra* note 46, at 51.

209. *See, e.g.*, HANS ZEIGER, GET OFF MY HONOR: THE ASSAULT ON THE BOY SCOUTS OF AMERICA (2005) (“The BSA’s position against homosexuality is not just an issue of moral principle in an effort to affirm the Scout Oath and Law, it is a serious safety effort to prevent cases of sexual abuse and harassment.”).

210. Sean Cahill & Kenneth T. Jones, Child Sexual Abuse and Homosexuality: The Long History of the “Gays as Pedophiles” Fallacy (National Gay and Lesbian Task Force), at 1, *available at*

Mark Foley and his congressional pages.²¹¹ Even today, most dictionaries still define “pederasty” in ambiguous terms, as “sexual relations between two males, esp. when one of them is a minor.”²¹²

III. THE INFLUENCE OF THE CHILD’S GENDER: GAY FATHERS, LESBIAN MOTHERS, AND THE SEXUAL DEVELOPMENT OF SONS

The last Part showed that disputes over gay and lesbian parenthood are influenced by the parent’s gender. This Part shows that they are influenced by the child’s gender as well. By analyzing the same group of custody and visitation cases from another angle, this Part demonstrates that gay and lesbian parents have been subjected to two stereotypes that have been influenced by the child’s gender.

In some cases, gay and lesbian parents have been stereotyped as “recruiters”—people who overtly encourage children to become homosexual by taking them to pro-gay events and exposing them to pro-gay media. In other cases, gay and lesbian parents have been stereotyped as “role models”—people who subtly encourage children to become homosexual by providing influential models of same-sex relationships. In recruiting cases, parents were criticized for exposing children to gay and lesbian parades and rallies,²¹³ weddings and churches,²¹⁴ magazines and books,²¹⁵ conferences and lectures,²¹⁶ and radio and

www.rainbowfamilynm.org/pubs/childsexualabuse.pdf (“[S]ome in the Catholic Church hierarchy have blamed homosexuality for the widespread pattern of sexual abuse of children, teens and young seminarians by priests.”); Herek, *supra* note 205 (“[T]he Vatican’s early response to the 2002 revelations of widespread Church cover-ups of sexual abuse by priests was to declare that gay men should not be ordained.”).

211. See Kate Zernike & Abby Goodnough, *Lawmaker Quits Over E-Mail Sent to Teenage Pages*, N.Y. TIMES, Sept. 30, 2006, at A1.

212. Dictionary.com Unabridged, <http://dictionary.reference.com> (defining “pederasty” as “sexual relations between two males, esp. when one of them is a minor”) (citing RANDOM HOUSE UNABRIDGED DICTIONARY (2006)); see also AMERICAN HERITAGE DICTIONARY 914 (2d ed. 1982) (defining “pederast” as “one who engages in anal intercourse, esp. with a boy”); 7 OXFORD ENGLISH DICTIONARY 372 (2d ed. 1961) (defining “pederasty” as “sodomy” or “[u]nnatural connection with a boy” and defining “pederast” as “sodomite”); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1428 (2d ed. 1987) (defining “pederasty” as “sexual relations between two males, esp. when one of them is a minor”); STEDMAN’S MEDICAL DICTIONARY 1446 (28th ed. 2006) (defining “pederasty” as “[h]omosexual anal intercourse, especially when practiced on boys”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1664 (3d ed. 1976) (defining “pederasty” as “anal intercourse esp. with a boy as the passive partner”); Dictionary.com Unabridged, *supra* (defining “pederasty” as “[t]he crime against nature; sodomy”) (citing WEBSTER’S REVISED UNABRIDGED DICTIONARY (1996)). But see BLACK’S LAW DICTIONARY 1167 (8th ed. 2004) (defining “pederasty” as “[a]nal intercourse between a man and a boy”).

213. See, e.g., *Pleasant v. Pleasant*, 628 N.E.2d 633, 637 (Ill. App. Ct. 1993) (describing trial court’s criticism of lesbian mother for bringing her child to “a gay and lesbian pride parade”); *In re J.S. & C.*, 324 A.2d 90, 95-96 (N.J. Super. Ct. Ch. Div. 1974) (criticizing father for involving his children in “gay rights movement” by bringing them to “protest marches” and “rallies”).

214. See, e.g., *M.J.P. v. J.G.P.*, 640 P.2d 966, 968-69 (Okla. 1982) (criticizing lesbian mother for exposing her child to “an acknowledged open homosexual relationship” and “invit[ing] forty friends to a ‘Gay-la Wedding’ at a church, performed by a minister”); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 866

television programs.²¹⁷ In role modeling cases, parents were criticized for living with same-sex partners, coming out to children, and displaying same-sex affections.²¹⁸ Recruiting stereotypes are concerned about gay and lesbian parents “indoctrinating” children;²¹⁹ role modeling stereotypes are concerned about children “identifying” with gay and lesbian parents.²²⁰

Although these two stereotypes are phrased differently, they are based on the same underlying concerns—that children raised by gay and lesbian parents are more likely to develop homosexual desires, experiment with homosexual conduct, and grow up to be gay and lesbian adults. Whether or not these concerns have any factual basis, they draw support from conventional assumptions about the process of sexual development—that before puberty, children have both homosexual and heterosexual tendencies, and that during puberty, they develop sexual relationships based on models provided by adults, especially parents.²²¹ By keeping children away from gay and lesbian parents,

(Mo. Ct. App. 1982) (prohibiting gay father from bringing his child to “a church at which a large proportion of the congregation are homosexuals”).

215. See, e.g., T.C.H. v. K.M.H., 693 S.W.2d 802, 803 (Mo. 1985) (en banc) (criticizing lesbian mother for bringing her child to “a bookstore where there was literature on training for ‘the gay and lesbian hotline . . . and for homosexual lovemaking’”).

216. See, e.g., Marlow v. Marlow, 702 N.E.2d 733, 736-37 (Ind. Ct. App. 1998) (criticizing gay father for exposing his children to “a ‘Liberty and Justice for All’ conference . . . addressing the concerns of gay-lesbian people”); Schuster v. Schuster, 585 P.2d 130, 134, 136 (Wash. 1978) (Rosellini, J., dissenting) (criticizing lesbian mother for exposing her children exposure to “lectures” in which she “publicly espoused . . . the superiority of the homosexual lifestyle”).

217. See, e.g., Schuster, 585 P.2d at 134, 136 (Rosellini, J., dissenting) (criticizing lesbian mother for exposing her children exposure to “radio and television” appearances in which she “publicly espoused . . . the superiority of the homosexual lifestyle”); J.S. & C., 324 A.2d at 95-96 (criticizing gay father for allowing children to be filmed with him on “television show which discussed homosexuality”).

218. See, e.g., L. v. D., 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982) (criticizing lesbian mother for living with her same-sex partner, coming out to her children, and displaying same-sex affections); Dailey v. Dailey, 635 S.W.2d 391, 392, 394 (Tenn. Ct. App. 1981) (criticizing lesbian mother for living with her same-sex partner and displaying same-sex affections).

219. See, e.g., Hertzler v. Hertzler, 908 P.2d 946, 949 (Wy. 1996) (finding that lesbian mother engaged in “intensive and unrelenting efforts to immerse the children in her alternative lifestyle, seemingly to the point of *indoctrination*”) (emphasis added); J.S. & C., 324 A.2d at 95 (finding that gay father’s children would not be aware of gay rights movement “without prodding and *indoctrination* by an adult”) (emphasis added).

220. See, e.g., Gottlieb v. Gottlieb, 488 N.Y.S.2d 180, 182 (Sup. Ct. 1985) (Kassal, J., concurring) (arguing that gay father’s visitation should be restricted because “a child’s sexual maturation and sense of sexual security must be safeguarded so that the child will have a proper *identification* as to what the parents’ role model should be”) (emphasis added); Dailey, 635 S.W.2d at 394 (upholding transfer of custody from lesbian mother to heterosexual father because “homosexuality is a learned trait and it would be very difficult for [the child] to learn and approximate sex role *identification* from a homosexual environment”) (emphasis added).

221. See, e.g., Schuster, 585 P.2d at 136 (Rosellini, J., dissenting). In one form or another, both of these assumptions can be traced back to the model of child sexual development introduced by Sigmund Freud. On “bisexual” tendencies, see Sigmund Freud, *Analysis Terminable and Interminable*, in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 211, 243-44 (James Strachey trans., Hogarth Press 1973) (1937) [hereinafter WORKS OF SIGMUND FREUD] (“We have come to learn, however, that every human being is bisexual in this case and that his libido is distributed either in a manifest or latent fashion, over objects of both sexes.”); Sigmund Freud, *Civilization and its Discontents*, in 21 WORKS OF SIGMUND FREUD, *supra*, at 57, 105 (1930) (“Man is an

courts have sought to establish “a proper atmosphere for young, pliable minds” in which children are shielded from “any course of conduct that might influence them to develop homosexual traits.”²²²

Since the 1950s, recruiting and role modeling stereotypes have been expressed more often than HIV or sexual abuse stereotypes, and they have been accepted more often by judges. Specifically, these “sexual development” stereotypes were raised in about 28% (48 of 171) of all cases,²²³ and they were

animal organism . . . with an unmistakably bisexual disposition.”); Sigmund Freud, *The Psychogenesis of a Case of Homosexuality in a Woman*, in 18 WORKS OF SIGMUND FREUD, *supra*, at 145, 158 (1920) (“In all of us, throughout life, the libido normally oscillates between male and female objects . . .”); *id.* at 157 (noting “the universal bisexuality of human beings”). On parents as role models for sexual development, see Sigmund Freud, *Three Essays on the Theory of Sexuality*, in 7 WORKS OF SIGMUND FREUD, *supra*, at 197-224 (1905) (introducing Oedipal theory of child sexual development).

222. *Black v. Black*, 1988 WL 22823, at *2-3 (Tenn. Ct. App. Mar. 10, 1988).

223. This Part is based upon my analysis of the following cases involving gay fathers, *Price v. Price*, No. E1999-00102-COA-R10-CV, 2000 WL 704596, at *4 (Tenn. Ct. App. May 31, 2000); *Weigand v. Houghton*, 730 So. 2d 581, 591-92 (Miss. 1999) (McRae, J., dissenting); *Marlow v. Marlow*, 702 N.E.2d 733, 736-37 (Ind. Ct. App. 1998); *Glover v. Glover*, 586 N.E.2d 159, 164 (Ohio Ct. App. 1990); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989); *In re Marriage of Birdsall*, 197 Cal.App.3d 1024, 1027, 1030 (Ct. App. 1988); *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 963 (Sup. Ct. 1986); *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); *Gottlieb v. Gottlieb*, 108 A.D.2d 120, 123 (N.Y. Sup. Ct. 1985) (Kassal, J., concurring); *In re Marriage of Cabalquinto*, 669 P.2d 886, 888-89 (Wash. 1983); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 866 (Mo. Ct. App. 1982); *Woodruff v. Woodruff*, 260 S.E.2d 775, 776 (N.C. Ct. App. 1979); and *In re J.S. & C.*, 324 A.2d 90, 95-96 (N.J. Super. Ct. Ch. Div. 1974), and the following cases involving lesbian mothers, *Cook v. Cook*, 965 So. 2d 630, 633-34 (La. Ct. App. 2007); *In re Marriage of Collins*, 51 P.3d 691, 692 (Or. Ct. App. 2002); *Ex parte H.H.*, 830 So. 2d 21, 36 n.11 (Ala. 2002) (Moore, C.J., concurring); *S.B. v. L.W.*, 793 So. 2d 656, 657 (Miss. Ct. App. 2001); *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fl. Ct. App. 2000); *Eldridge v. Eldridge*, No. 03A01-9904-CH-00146, 1999 WL 994099, at *1 (Tenn. Ct. App. Oct. 27, 1999); *Ex Parte J.M.F.*, 730 So. 2d 1190, 1195 (Ala. 1998); *Hassenstab v. Hassenstab*, 570 N.W.2d 368, 374-75 (Neb. Ct. App. 1997); *Maradie v. Maradie*, 680 So. 2d 538, 540-41 & n.2 (Fla. Dist. Ct. App. 1996); *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995); *Hertzler v. Hertzler*, 908 P.2d 946, 949 (Wyo. 1995); *Pleasant v. Pleasant*, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993); *Chicoine v. Chicoine*, 479 N.W.2d 891, 894, 896 (S.D. 1992); *Blew v. Verta*, 617 A.2d 31, 36 n.2 (Pa. Super. Ct. 1992); *In re Marriage of Diehl*, 582 N.E.2d 281, 289 (Ill. App. Ct. 1991); *Barron v. Barron*, 594 A.2d 682, 684 (Pa. Super. Ct. 1991); *Lundin v. Lundin*, 563 So. 2d 1273, 1275 (La. Ct. App. 1990); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988); *Black v. Black*, 1988 WL 22823, at *3 (Tenn. Ct. App. Mar. 10, 1988); *G.A. v. D.A.*, 745 S.W.2d 726, 729 (Mo. Ct. App. 1987); *T.C.H. v. K.M.H.*, 693 S.W.2d 802, 803 (Mo. 1985); *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985); *Constant A. v. Paul C.A.*, 496 A.2d 1, 8 (Pa. Super. Ct. 1985); *Brownell v. Brownell*, No. 1233, 1985 WL 17450, at *2 (Ohio Ct. App. Nov. 19, 1985); *Bennett v. O'Rourke*, 1985 WL 3464, at *3 (Tenn. Ct. App. Nov. 5, 1985); *M.J.P. v. J.G.P.*, 640 P.2d 966, 968-69 (Okla. 1982); *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981); *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. Ct. App. 1980); *M.P. v. S.P.*, 404 A.2d 1256, 1259, 1270 (N.J. Super. Ct. App. Div. 1979); *Schuster v. Schuster*, 585 P.2d 130, 134, 136 (Wash. 1978) (Rosellini, J., dissenting); and *In re Jane B.*, 380 N.Y.S.2d 848, 854 (Sup. Ct. 1976).

For neglect and non-parent cases involving recruiting and role modeling stereotypes, see *Holmes v. Holmes*, 255 S.W.3d 482, 484 (Ark. Ct. App. 2007); *In re Breisch*, 434 A.2d 815, 817 (Pa. Super. Ct. 1981); *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981); *Gerald D. v. Peggy R.*, No. C-9104, 79-12-143-CV, 1980 WL 20452 (Del. Fam. Ct. Nov. 17, 1980); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *Towend v. Towend*, No. 639, 1976 Ohio App. LEXIS 6193 (Ohio Ct. App. Sept. 30, 1976); and *Chaffin v. Frye*, 45 Cal.App.3d 39 (Ct. App. 1975).

accepted by judges in about 90% (43 of 48) of these cases.²²⁴

This Part explores the influence of gender in the expression of sexual development stereotypes. The first section shows that gay fathers and lesbian mothers were subjected to sexual development stereotypes equally often, but the parents of sons were subjected to such stereotypes more often than the parents of daughters. On a general level, this pattern shows that litigants, experts, and judges expressed more concerns about the sexual development of boys than the sexual development of girls.

After developing a more specific framework for identifying the influence of gender, the remaining sections analyze how the expression of sexual development stereotypes was influenced by both the parent's gender and the child's gender. By comparing how sexual development stereotypes were expressed in four groups of cases—cases involving fathers and sons, mothers and daughters, mothers and sons, and fathers and daughters—we can develop a more specific account of why and how litigants, experts, and judges expressed more concerns about the sexual development of boys than the sexual development of girls.

A. Sexual Development Stereotypes: Recruiters, Role Models, and the Sexual Development of Sons

When we first look at the sexual development cases, it seems that the expression of stereotypes is not influenced by the parent's gender at all. When we compare the cases involving gay fathers and lesbian mothers, we see that gay fathers and lesbian mothers were stereotyped as recruiters and role models in the same percentage of cases—in exactly 28% (14 of 50) of the cases involving gay fathers and about 28% (34 of 121) of the cases involving lesbian mothers.²²⁵

In this context, the expression of stereotypes seems to depend more on the child's gender than the parent's gender. When we compare the cases involving sons and daughters, we see that the parents of sons were stereotyped as recruiters and role models 49% more often than the parents of daughters. Specifically, sexual development stereotypes appeared in about 38% (20 of 52) of the cases involving sons and 26% (16 of 62) of the cases involving daughters.²²⁶

224. Sexual development stereotypes were rejected by judges in the following cases: *Weigand*, 730 So. 2d at 591-92; *Blew*, 617 A.2d at 36 n.2; *Conkel*, 509 N.E.2d at 986; *S.N.E.*, 699 P.2d at 879; and *Woodruff*, 260 S.E.2d at 776.

225. This amounts to a difference of only one case, which is too small to be regarded as meaningful. See *supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

226. This amounts to a difference of at least six cases, which is large enough to be regarded as meaningful. See *supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

Based on this difference, we can see that litigants, experts, and judges expressed more concerns about the sexual development of boys than the sexual development of girls. Needless to say, this hierarchy of concerns was not explicitly acknowledged by litigants, experts, and judges in the sexual development cases. They did not claim, for example, that it was more important or more difficult to raise heterosexual boys.

To gain a better understanding of this hierarchy of concerns, we must develop a more specific framework for identifying the influence of gender in the sexual development cases. By breaking down the cases by the parent's gender and the child's gender, we can analyze the expression of sexual development stereotypes in more detail. To this end, the following matrix shows how often sexual development stereotypes appeared in four groups of cases defined by the parent's gender and the child's gender: (1) cases involving gay fathers and sons; (2) cases involving lesbian mothers and daughters; (3) cases involving lesbian mothers and sons; and (4) cases involving gay fathers and daughters.

**Distribution of Sexual Development Stereotypes
by Parent's Gender and Child's Gender²²⁷**

	Fathers	Mothers
Sons	50% (9/18)	32% (11/34)
Daughters	10% (2/20)	33% (14/42)

By breaking down the sexual development cases in this manner, we can see that the parent's gender has a role to play after all. Although the expression of sexual development stereotypes generally depends on the child's gender, it specifically depends on the relationship between the parent's gender and the child's gender.

Based on these differences, we can identify the following hierarchy of concerns expressed by litigants, experts, and judges in the sexual development cases:

- (1) They were *most* concerned about gay fathers raising gay sons. This stereotype appeared in half (9 of 18) of all cases involving fathers and sons.

227. These findings come with two caveats: First, this analysis excludes cases involving both sons and daughters as well as cases in which the child's gender was not disclosed. For these purposes, such cases are inherently ambiguous. Second, this analysis reflects how often sexual development stereotypes were expressed by litigants and experts, but it does not reflect how often they were accepted by judges. Because of the small number of sexual development cases, I could not identify any meaningful differences in how often judges endorsed stereotypes in cases involving fathers, mothers, sons, and daughters.

(2) They were *less* concerned—but only slightly less concerned—about lesbian mothers raising lesbian daughters. This stereotype appeared in one-third (14 of 42) of the cases involving mothers and daughters.²²⁸

(3) They were *equally* concerned about lesbian mothers raising gay sons and lesbian mothers raising lesbian daughters.²²⁹ Like the second stereotype, this stereotype appeared in about one-third (11 of 34) of the cases involving mothers and sons.²³⁰

(4) They were *least* concerned—indeed, they were hardly concerned at all—about gay fathers raising lesbian daughters. This stereotype appeared in only two cases—one-tenth (2 of 20) of the cases involving fathers and daughters.

Above all, the differences between the father-daughter cases and the other cases are most meaningful: Litigants, experts, and judges were three times more concerned about lesbian mothers raising gay sons or lesbian daughters,²³¹ and they were five times more concerned about gay fathers raising gay sons.²³²

The following sections examine the evidence of this hierarchy of concerns in each group of the sexual development cases.

B. Identification: Like Parent, Like Child

It is not difficult to understand why sexual development stereotypes were so prevalent in cases where the parent's gender and the child's gender were the same. In cases involving gay fathers and sons, the stereotypes reflect the assumption that gay men are more likely to recruit boys, or conversely, that boys are more likely to identify with male role models. In cases involving lesbian mothers and daughters, the stereotypes reflect the assumption that lesbians are more likely to recruit girls, or conversely, that girls are more likely

228. The difference between the first group of cases (father-son) and the second group of cases (mother-daughter) amounts to three cases, which is barely large enough to be regarded as meaningful. *See supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

229. The difference between the second group of cases (mother-daughter) and the third group of cases (mother-son) is exceedingly small, less than 0.5%. It amounts to a difference of only one case, which is too small to be regarded as meaningful. *See supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

230. Even if we included cases involving both sons and daughters, these differences would still exist in all of the cases involving lesbian mothers: Sexual development stereotypes appeared in 30% (8 of 27) of the cases involving lesbian mothers who had both sons and daughters; overall, they appeared in 32% (33 of 103) of the cases involving lesbian mothers in which the child's gender was disclosed.

231. The difference between the last group of cases (father-daughter) and the second and third groups of cases (mother-daughter and mother-son) amounts to a difference of at least five cases, which is large enough to be regarded as meaningful. *See supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

232. The difference between the last group of cases (father-daughter) and the first group of cases (father-son) amounts to a difference of eight cases, which is large enough to be regarded as meaningful. *See supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”).

to identify with female role models. Whether or not these assumptions are sound, they draw support from the wisdom of two common proverbs—“like father, like son” and “like mother, like daughter”—which suggest that children typically take after parents of the same gender. More specifically, they draw support from many psychological theories of sexual development, which generally suggest that children typically form a bond of “identification” with parents of the same gender—that is, boys normally identify with fathers and girls normally identify with mothers.²³³

In most of the sexual development cases, courts did not explicitly analyze the relationship between the parent’s gender and the child’s gender, so the significance of this bond was not often acknowledged. In a few cases, however, courts explicitly suggested that children are more likely to imitate parents of the same gender, in the course of denying custody to gay and lesbian parents. In *Bennett v. O’Rourke* (Tennessee 1985),²³⁴ the court noted that “the homosexual parent and the minor child are both female.”²³⁵ In denying the mother custody of her daughter, the court explained, “we consider this factor particularly important because of the increased chance of role-modeling.”²³⁶ In *Constant A. v. Paul C.A.* (Pennsylvania 1985),²³⁷ the court expressed concern that awarding custody to a lesbian mother would “proselytize” the children by indicating that such a “role model” represented “a suitable lifestyle for the children”—“particularly [for] Andrea,” the court added, referring specifically to the family’s only daughter.²³⁸ In *Cook v. Cook* (Louisiana 2007),²³⁹ a court-appointed mental health counselor claimed that the mother’s “lesbian partner would distort the children’s (especially the girls’) perception of female role models,” and the father claimed that “kids raised by lesbian parents are more likely to grow up lesbian.”²⁴⁰ In *Glover v. Glover* (Ohio 1990),²⁴¹ when the court rejected the testimony of the father’s expert witness, it expressed similar concerns about sons raised by gay fathers: “Although studies showed that

233. See, e.g., ALEXANDRA G. KAPLAN & MARY ANNE SEDNEY, *PSYCHOLOGY AND SEX ROLES* (1980).

There are three theories of how sex roles develop within the family: psychoanalytic, social learning, and cognitive development theory. Although each theory has its problems, all three are important because they have virtually ‘cornered the market’ of thinking in this area. A central concept in the three traditional theories of sex-role development is *identification*. Although some authors prefer to use the term ‘imitation’ most agree that the process is one by which a person takes on some of the characteristics of another makes them a part of her or his own personality. When talking about sex-role identification psychologists are usually referring to the process by which a child comes to emulate certain behaviors of a parent, especially the same-sex parent.

Id. at 180 (internal citation omitted).

234. 1985 WL 3464 (Tenn. Ct. App. Nov. 5, 1985).

235. *Id.* at *3.

236. *Id.*

237. 496 A.2d 1 (Pa. Super. Ct. 1985).

238. *Id.* at 8.

239. 965 So. 2d 630 (La. Ct. App. 2007).

240. *Id.* at 633-34.

241. 586 N.E.2d 159 (Ohio Ct. App. 1990).

children raised by lesbian mothers were not affected by the custodial parent's sexual preference, [the expert] admitted no such research was available for male children raised by homosexual fathers."²⁴² In a similar vein, opponents of gay and lesbian parenthood often claim that "[p]arents are important as role models for their children of the same gender because children learn to be adults by watching adults."²⁴³

C. Gender Identity Disorder of Childhood: Lesbian Mothers, Effeminate Sons

The question remains, however, why lesbian mothers were so often portrayed raising gay sons, while gay fathers were so rarely portrayed raising lesbian daughters. If gay fathers were stereotyped *along* gender lines, why were lesbian mothers stereotyped *across* gender lines? Put differently, why would litigants, experts, and judges be more concerned that the sons of lesbians would grow up to be gay men and less concerned that the daughters of gay men would grow up to be lesbians?

Answers to these questions can be developed from a brilliant essay by Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*.²⁴⁴ As Sedgwick explains, the modern war over the sexual development of boys has been played out in the evolution of two theories of childhood sexual development that have been adopted by mainstream psychologists during different periods. The first is an old theory of why homosexuality develops in boys, which was closely associated with the diagnosis of homosexuality as a mental disorder. The second is a new theory of why effeminacy develops in boys, which is closely associated with the diagnosis of gender identity disorder of childhood—as well as the old theory of why homosexuality develops in boys. By briefly reviewing the evolution of these theories, we can develop a more specific understanding of why litigants, experts, and judges expressed heightened concerns about lesbian mothers raising gay sons.

242. *Id.* at 164. In a handful of other cases, litigants and courts invoked gender-specific language to express sexual development concerns about the influence of mothers over daughters and fathers over sons. In *Collins v. Collins*, the court expressed "great concern" that the "mother" had exposed her "young, female child" to her "lesbian relationships." *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988) (emphasis added). In *Conkel v. Conkel*, the mother expressed a "'fear' that contact with [the] father will trigger homosexual tendencies in the two boys." *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (emphasis added); see *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (expressing concern about mother's influence over daughter "as her sexual awareness develops with the approach of young womanhood") (emphasis added); *accord Bennett v. O'Rourke*, 1985 WL 3464, at *3 (Tenn. Ct. App. Nov. 5, 1985); *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982).

243. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 860-61 (1997) (internal quotation and citation omitted).

244. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in *TENDENCIES* 154 (Eve Kosofsky Sedgwick ed., 1993).

1. The Psychology of Homosexuality: Domineering Mothers, Gay Sons

In *Woodruff v. Woodruff* (North Carolina 1979),²⁴⁵ a psychologist testified that there was “a substantiated theory that a male child, raised by an extremely domineering mother, may pursue a homosexual lifestyle.”²⁴⁶ In the postwar era, this theory was popularized by conversion therapists, who diagnosed homosexuality as a mental disorder—specifically, an arrested form of sexual development. Citing clinical observations and psychological studies, conversion therapists claimed that male homosexuality most often developed in boys raised by mothers who were “domineering,” “harsh,” or “close-binding” and fathers who were “weak,” “absent,” or “detached.”²⁴⁷ During this period, most psychologists believed that this family dynamic caused boys to identify across gender—to identify with mothers instead of fathers—and as a result, such boys developed “effeminate” rather than masculine traits, including a sexual attraction toward other males. This theory both informed and reflected the conventional wisdom that boys raised by “smothering” mothers grow up to be “sissies,” “fairies,” or “mama’s boys.”²⁴⁸ Although some psychologists proposed similar theories about female homosexual development in this era,²⁴⁹ none gained widespread acceptance among mainstream psychologists.²⁵⁰

Based on this theory of homosexuality, therapists often sought to “convert” male patients to heterosexuality by “curing” them of maternal influences and effeminate traits. In the early 1970s, however, this theory of homosexuality came under attack, as a growing number of psychologists and gay rights activists began to view homosexuality as a normal and healthy form of sexual development. In 1973, the American Psychiatric Association (APA) voted to remove the diagnosis of “homosexuality” from the Diagnostic and Statistical Manual of Mental Disorders (DSM), indicating that psychologists should no

245. 260 S.E.2d 775 (N.C. 1979).

246. *Id.* at 776.

247. See IRVING BIEBER ET AL., *HOMOSEXUALITY* 79-81 (1972) (observing that mothers “promoted homosexuality” by falling into a pattern described as “close-binding-intimate”); *id.* at 114 (observing that “the pathologic seeking of need fulfillment from men has a clear point of origin in fathers who were detached”); CHARLES W. SOCARIDES, *HOMOSEXUALITY*, 183-84 (1978) (observing that “[t]he absence of the father or the presence of a weak father combined with a domineering, harsh, and phallic mother favor the development of [male] homosexuality” (emphasis omitted)). These theories are aptly summarized in Yoshino, *supra* note 40, at 795 (noting that “Bieber systematized the popular model that male homosexuality arose from close-binding mothers and distant fathers”).

248. See, e.g., RICHARD GREEN, *THE “SISSEY BOY SYNDROME” AND THE DEVELOPMENT OF HOMOSEXUALITY* (1987).

249. See, e.g., SOCARIDES, *supra* note 247, at 188 (claiming that lesbianism derives from a girl’s “dread of . . . a malevolent mother” and her conviction that her father “rejects and hates her”).

250. See EDA G. GOLDSTEIN & LOIS C. HOROWITZ, *LESBIAN IDENTITY AND CONTEMPORARY PSYCHOTHERAPY: A FRAMEWORK FOR CLINICAL PRACTICE* 16-17 (2003) (criticizing Freudian theories of lesbianism as “contradictory,” “negative,” and “phallogentric”); *id.* at 17-19 (noting that several early psychoanalysts dissented from Freudian theories of lesbianism and female sexual development); *id.* at 23 (noting that lesbianism and female sexual development were not systematically explored by psychotherapists until the 1970s).

longer diagnose or treat homosexuality as a mental disorder.²⁵¹ For the next several years, the APA's decision was met with "strong opposition" from a substantial minority of APA members, including several prominent conversion therapists.²⁵² By the 1990s, however, the APA's view had been embraced by every major mental health association in the United States.²⁵³ Today, the practice of conversion therapy has been thoroughly marginalized, and the theory that blames domineering mothers for the development of gay sons has been widely debunked.²⁵⁴

2. *The Psychology of Gender Identity Disorder: Overbearing Mothers, Effeminate Sons*

This is not to say, however, that the underlying logic of the theory has been abandoned, even by mainstream psychologists. In 1980, when the diagnosis of "homosexuality" was officially removed from the DSM, a new diagnosis known as "Gender Identity Disorder of Childhood" (GIDC) was added.²⁵⁵ As several scholars have noted, the new theory of GIDC is similar to the old theory of homosexuality in at least three ways: (1) it is specifically concerned with the development of effeminacy in boys; (2) it blames mothers for fostering effeminacy in boys; and (3) it links effeminacy in boys to homosexuality in gay male adolescents and adults.²⁵⁶ Once we spell out the nature of these similarities, it will be easier to see why litigants, experts, and judges have been specifically concerned about lesbian mothers raising gay sons.

First, like the old diagnosis of homosexuality, the new diagnosis of GIDC was specifically concerned with the gender development of boys. As Sedgwick explains, although the DSM's original diagnosis of GIDC was "nominally gender-neutral," it was "actually highly differentiated between boys and girls," insofar as it established a much lower threshold for diagnosing the disorder in boys.²⁵⁷ Under the DSM's guidelines, a girl could be treated for GIDC only in the rare case in which she denied that she was anatomically female (for

251. See RUBENSTEIN, BALL & SCHACTER, *supra* note 42, at 78.

252. See *In re J.S. & C.*, 324 A.2d 90, 96-97 (N.J. Super. Ct. Ch. Div. 1974) (claiming that the controversy among APA members over the diagnosis of homosexuality supported restrictions on gay father's visitation rights).

253. Yoshino, *supra* note 40, at 800 & n.147.

254. Even today, however, the theory persists among a handful of conservative psychological and religious organizations that continue to advocate conversion therapies. *Id.* at 799-800.

255. See Kenneth J. Zucker & Robert L. Spitzer, *Was the Gender Identity Disorder of Childhood Diagnosis Introduced into DSM-III as a Backdoor Maneuver to Replace Homosexuality? A Historical Note*, 31 J. SEX & MARITAL THERAPY 31, 32 (2005).

256. For helpful summaries of the similarities between these two theories, see Sedgwick, *supra* note 244; Zucker & Spitzer, *supra* note 255, at 34-35; and Katherine K. Wilson, *The Disparate Classification of Gender and Sexual Orientation in American Psychiatry* (Annual Meeting of the American Psychiatric Association June 2, 1998), available at <http://www.transgender.org/gidr/kwapa98.html>.

257. Sedgwick, *supra* note 244, at 156.

example, “she is biologically unable to become pregnant,” “she will not develop breasts,” or “she has no vagina”) or asserted that she was anatomically male (for example, “she has, or will grow a penis”).²⁵⁸ A boy, by contrast, could be treated for asserting merely that “it would be better not to have a penis,” or that “his penis or testes are disgusting”—or alternatively, if he displayed “a preference for either cross-dressing or simulating female attire, or . . . a compelling desire to participate in the games and pastimes of girls.”²⁵⁹

Even today, under the DSM’s most recent version of the diagnosis, boys may still be treated for “dressing in girl’s or women’s clothes,” using “[t]owels, aprons, and scarves . . . to represent long hair or skirts,” adopting the “mother roles” when “playing ‘house,’” and playing with “[s]tereotypical female-type dolls, such as Barbie.”²⁶⁰ Alternatively, even if boys do not display stereotypically feminine behavior, they may still be treated for displaying an aversion toward “rough-and-tumble play” and rejection of “stereotypical boy’s toys,” games, and activities, such as “cars,” “trucks,” and “competitive sports.”²⁶¹ The DSM’s focus on boys is only exacerbated by the secondary literature, which is almost “exclusively” preoccupied with the diagnosis and treatment of “effeminate boys.”²⁶²

Second, like the old theory of homosexuality, the new theory of GIDC blames mothers for fostering effeminacy in boys. Although the DSM does not specify the causes of GIDC, the secondary literature speculates that effeminacy develops when mothers give boys too much attention and fathers fail to “validate” boys “as masculine.”²⁶³ In this account, “[m]others . . . have nothing to contribute to [the] process of masculine validation . . . any involvement is overinvolvement; any protectiveness is overprotectiveness.”²⁶⁴ Much like conversion therapists, GIDC theorists often reserve the harshest criticisms for mothers who display “any tolerance” for effeminacy in sons.²⁶⁵

Finally, the DSM acknowledges that for most boys, a diagnosis of GIDC is little more than a precursor to homosexuality in adulthood. “By late adolescence or adulthood,” the DSM reports, “about three-quarters of boys who

258. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 265-66 (3d ed. 1980) [hereinafter DSM-III]; see also Sedgwick, *supra* note 244, at 156 (summarizing DSM-III’s GIDC diagnostic criteria for girls).

259. DSM-III, *supra* note 258, at 265-66; see also Sedgwick, *supra* note 244, at 156 (summarizing DSM-III’s GIDC diagnostic criteria for boys).

260. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 533, 537 (4th ed. 1994) [hereinafter DSM-IV].

261. *Id.*

262. Sedgwick, *supra* note 244, at 155; see also Susan Coates & Kenneth J. Zucker, *Gender Identity Disorders in Children*, in 2 HANDBOOK OF CLINICAL ASSESSMENT OF CHILDREN AND ADOLESCENTS 893, 893 (1988) (noting that “very little material has been published on girls with severe gender identity disorder”).

263. Sedgwick, *supra* note 244, at 160, 161.

264. *Id.* at 161.

265. *Id.* at 163.

had a childhood history of Gender Identity Disorder report a homosexual or bisexual orientation, but without concurrent Gender Identity Disorder.”²⁶⁶

In light of these similarities, some observers have claimed that the APA’s introduction of the new diagnosis of GIDC was a “backdoor maneuver” to reinstate the old diagnosis of homosexuality as a mental disorder.²⁶⁷ Whether or not they are correct, the similarities between the theories can hardly be doubted. Both theories are specifically concerned with the development of effeminacy and homosexuality in boys, and both theories blame a surplus of mothering and a deficit of fathering for inhibiting the development of masculine, heterosexual boys.

3. *The Law of Gender Identity Disorder: Lesbian Mothers, Effeminate Sons*

The theory of GIDC has played a significant role in the sexual development cases involving lesbian mothers and sons.²⁶⁸ In 55% (6 of 11) of the sexual development cases involving mothers and sons, concerns were expressed about the development of “gender identity” or gender “masculine roles” in boys,²⁶⁹ in addition to the development of homosexuality in boys.²⁷⁰ In 83% (5 of 6) of these cases, gender identity and gender role stereotypes were

266. DSM-IV, *supra* note 260, at 536. “The corresponding percentages for sexual orientation in girls,” the manual admits, “are not known.” *Id.*

267. Zucker & Spitzer, *supra* note 255, at 32; *see also* 1 LAWRENCE D. MASS, *DIALOGUES OF THE SEXUAL REVOLUTION: HOMOSEXUALITY AND SEXUALITY* 214 (1990) (suggesting that “American psychiatry [is] simply engaged in a long, subtle process of reconceptualizing homosexuality as a mental illness with another name—the gender identity disorder of childhood”); Zucker & Spitzer, *supra* note 255, at 34-35 (collecting criticisms of GIDC diagnosis). *But see* Zucker & Spitzer, *supra* note 255, at 36 (arguing that GIDC was introduced as a psychiatric diagnosis because it met the generally accepted inclusion criteria of “clinical utility, acceptability to clinicians of various theoretical persuasions, reliability, and validity”).

268. This section is based on my analysis of the following cases: *Scott v. Scott*, 665 So. 2d 760 (La. Ct. App. 1995); *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993); *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992); *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992); *Lundin v. Lundin*, 563 So. 2d 1273 (La. Ct. App. 1990); *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987); *Brownell v. Brownell*, No. 1233, 1985 WL 17450 (Ohio Ct. App. Nov. 19, 1985); *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *L. v. D.*, 630 S.W.2d 240 (Mo. Ct. App. 1982); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); and *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1981).

269. In these cases, litigants, experts, and judges generally conflated the concepts of “gender identity” and “gender roles.” *See, e.g.*, Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003) (observing that judges often conflate “gender identity” and “gender roles” in cases involving same-sex adoptions). This conflation is not surprising, in light of the DSM’s tendency to interpret a child’s failure to conform with traditional gender roles as symptomatic of gender identity disorder—especially when exhibited by boys. *See supra* Part III.C.2 (describing GIDC diagnostic criteria for boys and girls).

270. *See Scott*, 665 So. 2d at 766; *Pleasant*, 628 N.E.2d at 637, 639; *Blew* 617 A.2d at 36 n.2; *Lundin*, 563 So. 2d at 1275; *M.J.P.*, 640 P.2d at 968-69; *Dailey*, 635 S.W.2d at 394. For an example of a neglect case expressing similar themes, *see In re Breisch*, 434 A.2d 815, 817 (Pa. Super. Ct. 1981).

accepted by judges.²⁷¹ By contrast, gender development stereotypes appeared in only 7% (1 of 14) of the cases involving mothers and daughters,²⁷² and none (0 of 50) of the cases involving gay fathers. The term “masculine” appeared three times in the cases—all in cases involving lesbian mothers and sons—while the term “feminine” did not appear at all.²⁷³ In other words, gender development stereotypes were applied almost exclusively to lesbian mothers raising sons.

In *Dailey v. Dailey* (Tennessee 1981),²⁷⁴ the court cited a psychologist’s view that it would be “preferable” to raise Rusty, a four-year-old boy, in “a normal relationship wherein males and females adhere to their roles,” rather than in “a homosexual relationship involving a mother in a submissive role,” because “homosexuality is a learned trait and it would be very difficult for Rusty to learn and approximate sex role identification from a homosexual environment.”²⁷⁵ Based on this testimony, the court transferred custody to the father and allowed the mother overnight visitation on alternating weekends.²⁷⁶ On appeal, the custody order was affirmed.²⁷⁷ Although neither the mother nor the father had challenged the visitation order, it was reversed *sua sponte* by the appellate court. After reciting the expert’s testimony, the court reasoned that the mother’s behavior “could provide nothing but harmful effects in the [boy’s] future life.”²⁷⁸ Based on this finding, the court prohibited overnight visits with the mother as well as any visits in the presence of the mother’s live-in partner.²⁷⁹

In *Lundin v. Lundin* (Louisiana 1990),²⁸⁰ the court cited a psychologist’s concerns that if a two-year-old boy were raised by his lesbian mother, he may not learn “masculine and female” roles, which the psychologist referred to as “sex appropriate roles.”²⁸¹ “I would be concerned,” the psychologist explained,

271. See *Scott* 665 So. 2d at 766; *Pleasant*, 628 N.E.2d at 637, 639; *Lundin*, 563 So. 2d at 1275; *M.J.P.*, 640 P.2d at 968-69; *Dailey*, 635 S.W.2d at 394. But see *Blew*, 617 A.2d at 36 n.2 (rejecting gender development stereotypes).

272. See *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988). As previously noted, in *Cook v. Cook*, the court-appointed mental health counselor expressed his belief that “a lesbian partner would distort the children’s (especially the girls’) perception of female role models.” 965 So. 2d 630, 633-34 (La. Ct. App. 2007). Although the counselor was generally concerned about the gender development of the family’s boys and girls, he was “especially” concerned about the gender development of girls. *Id.*

273. See *Pleasant*, 628 N.E.2d at 637 (referring to ten-year-old boy’s exposure to men who are not “masculine”); *Lundin*, 563 So. 2d at 1275 (describing two-year-old boy’s formation of “gender identity” based on “appropriate roles for [his] own sex,” i.e., “masculine” roles); *M.J.P.*, 640 P.2d at 968-69 (describing boy’s “sexual identity” as “masculine”). For a neglect case in which the court criticizes the mother for being “masculine,” see *Breisch*, 434 A.2d at 817 (“The mother is a lesbian who effects a masculine appearance, wears men’s clothing, and has a masculine oriented mental status.”).

274. 635 S.W.2d 391 (Tenn. Ct. App. 1981).

275. *Id.* at 394.

276. *Id.* at 395.

277. *Id.* at 394.

278. *Id.* at 396.

279. *Id.*

280. 563 So. 2d 1273 (La. Ct. App. 1990).

281. *Id.* at 1275.

“if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected.”²⁸² The court awarded primary custody to the father, based on a specific finding that “the child is of an age where gender identity is being formed.”²⁸³

In *Pleasant v. Pleasant* (Illinois 1993),²⁸⁴ the trial court questioned the mother “extensively” about a visit in which she took Jimmie, a ten-year-old boy, to march with her friends in a “gay and lesbian pride parade”:

After asking whether the parade was an appropriate environment for Jimmie and whether it had any effect on his sexual orientation, the judge asked if there were men who were not masculine in the parade. When the mother answered that there [were] no “unmasculine” men in the parents group with which she walked, the judge argued with her about the presence of so-called “unmasculine” men.²⁸⁵

In restricting the mother’s visitation rights, the trial court cited a psychiatrist’s testimony that if Jimmie continued to spend extended, unsupervised visits with his mother, he “might not develop a gender identity and may be confused about what it is to be a male.”²⁸⁶ Based on this testimony, the court found that Jimmie had a “gender identity problem” and that “having Jimmie in the presence of gays and lesbians was endangering his gender identity and morals.”²⁸⁷ After reviewing the expert’s testimony, the appellate court reversed the trial court’s visitation restrictions, finding that “there is no evidence that Jimmie has a gender identity problem.”²⁸⁸

In some cases, gender development stereotypes were raised more obliquely than others. Litigants, experts, and judges expressed concerns that closely tracked the DSM’s diagnosis of gender identity disorder in boys, without explicitly referring to the boy’s “gender identity” or his understanding of “masculine” roles.²⁸⁹ In *Holmes v. Holmes* (Arkansas 2007),²⁹⁰ for example, the court observed that Zachary, a seven-year-old boy, would “not participate in organized sports despite [his father’s] efforts to get him involved.”²⁹¹ To support a transfer of custody, the boy’s father testified that “he did not approve

282. *Id.*

283. *Id.* at 1277.

284. 628 N.E.2d 633 (Ill. App. Ct. 1993).

285. *Id.* at 637.

286. *Id.* at 639.

287. *Id.* at 638-39.

288. *Id.* at 641. The appellate court explained: “Although [the expert] testified that he was concerned that Jimmie might ‘not develop a gender role identity and that he might be confused about what it is like to be a male,’ he did not testify that Jimmie has a gender role identity problem. . . . In fact,” the court noted, “[the expert] never even spoke with Jimmie.” *Id.* at 641-42.

289. *See, e.g., Holmes v. Holmes*, 255 S.W.3d 482, 484 (Ark. Ct. App. 2007); *L. v. D.*, 630 S.W.2d 240, 242 (Mo. Ct. App. 1982). Because my analysis is focused on explicit references to anti-gay stereotypes, these cases were not included in my quantitative comparisons. I have included them as background evidence that supports my claim that gender identity disorder plays a lead role in cases involving lesbian mothers.

290. 255 S.W.3d. 482.

291. *Id.* at 484.

of [the mother's] lifestyle and believed that he had a right to raise Zachary in a heterosexual environment."²⁹² In addition, the father expressed concerns "about how much Zachary cried and about his lack of desire to play sports,"²⁹³ and the father's friend testified "that Zachary was whiney and did not like to be rambunctious."²⁹⁴ The mother acknowledged that "Zachary was afraid of getting hurt," but she insisted that he "was not a whiner";²⁹⁵ moreover, she argued, "the evidence that Zachary whines and does not like to play sports is of no consequence."²⁹⁶ The trial court transferred custody to the father, based on a finding that Zachary's "exposure to [his mother's] sexual partners was detrimental to [his] welfare."²⁹⁷ The court's order was affirmed on appeal.²⁹⁸

Finally, in *In re Breisch* (Pennsylvania 1981),²⁹⁹ the court suggested that even if a lesbian mother was "masculine," she could not raise her son to be "masculine."³⁰⁰ Based on testimony that "[t]he mother is a lesbian who effects a masculine appearance, wears men's clothing, and has a masculine oriented mental status,"³⁰¹ the court found that she had exposed "Joey," a four-year-old boy, "to a chaotic and harmful home life."³⁰² In this neglect proceeding, the court transferred custody to the local child protection agency, and the court's order was affirmed on appeal.³⁰³

D. Fatherless Daughters: The Male Supremacy Principle

Sexual development stereotypes about boys raised by lesbian mothers reflect not only the prevailing psychology of the times, but much older, much broader concerns about boys raised by "fatherless" families, or families that lack "strong" male role models.³⁰⁴ Although these concerns were originally a product of the early industrial era, they continue to spawn controversies over single motherhood in the contemporary United States.³⁰⁵

292. *Id.* at 486.

293. *Id.*

294. *Id.* at 485.

295. *Id.*

296. *Id.* at 487.

297. *Id.* at 488.

298. *Id.* Similarly, in *L. v. D.*, the court noted the son's complaints that "his father made him play sports," "he received but little praise and affection from his father," and "he got a lot of hugs and kisses from [his mother] and [her partner]." 630 S.W.2d 240, 242 (Mo. Ct. App. 1982).

299. 434 A.2d 815 (Pa. Super. Ct. 1981).

300. *Id.* at 817.

301. *Id.*

302. *Id.*

303. *Id.* at 821.

304. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 161 (2000) (noting that "opponents of homosexual parenthood . . . rel[y] on a controversial literature that decries the putative risks of fatherlessness in general").

305. See, e.g., DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); ELIZABETH HEROG & CECELIA E. SUDIA, *BOYS IN FATHERLESS FAMILIES* (2004); LOUIS KREISBERG, *MOTHERS IN POVERTY: A STUDY OF FATHERLESS FAMILIES* (2006); LOST

The analogy between lesbian mothers and single mothers may seem far-fetched, but it is made frequently by opponents of gay and lesbian parenthood. Lynn Wardle, for example, has criticized lesbian mothers by invoking studies of children raised by single mothers. Defending the importance of fatherhood, he has argued that “father love and mother love are different kinds of love,” because only father love provides children with the following benefits: “First, it provides them with a father’s physical protection. Second, it provides them with a father’s money and other material resources. Third, and probably most importantly, it provides them with what might be termed paternal cultural transmission: a father’s distinctive capacity to contribute to [children’s] identity, character, and competence.”³⁰⁶

Although critics of “fatherless” families often express generic concerns about the impact on “children,” they generally focus on the impact on boys.³⁰⁷ In *Goodridge v. Department of Public Health* (Massachusetts 2003), three justices objected to the recognition of same-sex marriage on the ground that such unions “raise[] the prospect of children lacking any parent of their own gender.”³⁰⁸ Although the justices initially stated this objection in gender-neutral terms, they quickly slipped into the classic trope of fatherless boys: “For example,” they explained, “a *boy* raised by two *lesbians* as his parents has no *male* parent. . . . [T]he child himself might invoke gender as a justification for the view that neither of his parents understands him, or that they ‘don’t know what he is going through,’ particularly if his disagreement or dissatisfaction involves some issue pertaining to sex.”³⁰⁹

As this analogy suggests, developmental stereotypes about boys raised by lesbian mothers are patriarchal: They imply that every family should have a father, because only a “man” can raise masculine, heterosexual boys. In *Pleasant v. Pleasant* (Illinois 1993),³¹⁰ the trial court suggested that men who are not “masculine” do not fit the bill: If boys are exposed to “unmasculine” men, then they are likely to become “unmasculine” boys, or boys with “gender identity problems.”³¹¹ In the patriarchal framework, boys raised by gay fathers

FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA (Cynthia R. Daniels ed., 1998); David Popenoe, *American Family Decline: 1960-1990: A Review and Appraisal*, 55 J. MARRIAGE & FAM. 527 (1993); Julie Bosman, *Obama Calls for More Responsibility from Black Fathers*, N.Y. TIMES, June 16, 2008, at A15; Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

306. Wardle, *supra* note 243, at 859-60 (quoting BLANKENHORN, *supra* note 305, at 25).

307. See, e.g., HEROG & SUDIA, *supra* note 305.

308. 798 N.E.2d 941, 1000 n.29 (Mass. 2003) (Cordy, J., dissenting).

309. *Id.* (emphasis added).

310. 628 N.E.2d 633, 637 (Ill. App. Ct. 1993).

311. *Id.* In the cases involving lesbian mothers and sons, litigants often expressed concerns that boys would be exposed to gay men, even though they were not being raised by gay fathers. In *In re Marriage of McKay*, No. C6-95-1626, 1996 WL 12658, at *2 (Minn. Ct. App. Jan. 16, 1996), for example, the father sought to restrict the mother’s visitation rights on the grounds that she was a lesbian living with her same-sex partner. To support his request, the father testified that his son had been sent a greeting card from a friend of the mother’s named “N.E.,” who was “an adult gay male.” *Id.* The father

lack strong male role models, so they are viewed as “fatherless” too, like boys raised by lesbian mothers.

What about girls raised by gay fathers? We have now analyzed three of the four groups of cases, so only the last group of cases remains. There were only two cases in which litigants, experts, or judges expressed stereotypes about gay fathers raising lesbian daughters, and neither case yields much meaningful insight. In *Gottlieb v. Gottlieb* (New York 1985),³¹² one judge invoked a generic need for “proper identification” between the “parents” and the “child,” rather than a gender-specific need for identification between fathers and daughters.³¹³ In *J.P. v. P.W.* (Missouri 1989),³¹⁴ the court did not directly express any sexual development stereotypes, but it quoted two such stereotypes from other opinions.³¹⁵ In this context, however, the silences seem to signify more than the stereotypes. In 85% (17 of 20) of the cases involving gay fathers and daughters, there were no references to the sexual or gender development of girls.

Even without a text to guide us, we can guess why litigants, experts, and judges may not have been too concerned about the “gender identity” of girls raised by gay fathers. If they were anything like the trial judge in *Pleasant*, then they would have viewed gay men as effeminate, so they would have assumed that gay fathers would raise feminine daughters.³¹⁶

There are, however, other conventional stereotypes about girls who lack “strong” male role models—yet they did not appear in any of the cases involving daughters. In the literature on “fatherless” families, commentators often claim that girls without fathers are likely to be “wayward” or

explained that N.E. had signed the card with “Love,” and he had included the name of “Kelvon,” his male partner. *Id.* After the father intercepted the card, he informed N.E. that “he would not allow correspondence from adult males who were not family members.” *Id.* at *3.

312. 108 A.D.2d 120 (N.Y. Sup. Ct. 1985).

313. In *Gottlieb*, a divided appellate court upheld an order restricting the father from involving his daughter in “any homosexual activities or publicity” during her visits. *Id.* at 121. Writing separately, one concurring judge reasoned that “a child’s sexual maturation and sense of sexual security must be safeguarded so that the child will have a proper identification as to what the parents’ role model should be.” *Id.* at 123 (Kassal, J., concurring). Note how the judge framed this stereotype in gender-neutral terms—he referred only to “parents” and child—rather than referring specifically to the “father” and his “daughter.” *Id.*

314. 772 S.W. 2d 786 (Mo. Ct. App. 1989).

315. In *J.P. v. P.W.*, an appellate court required the father’s visits with his daughter to be conducted without his partner or “any other male,” *id.* at 786, and to be “supervised” by “a responsible adult,” *id.* at 794. In justifying this order, the court quoted passages from two other cases in which stereotypes had been expressed. In one of these cases, a court upheld the state’s authority “to protect minors from being influenced by those who advocate homosexual lifestyles.” *Id.* at 792 (quoting *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio 1985)). In the other—a case involving a lesbian mother and a daughter—a court found that “damage [was] likely to occur as [the daughter’s] sexual awareness develops with the approach of young womanhood.” *Id.* (quoting *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. App. 1980)).

316. See, e.g., Case, *supra* note 80, at 2 (arguing that when a man displays feminine characteristics, “his behavior is generally viewed as a marker for homosexual orientation”).

“promiscuous,” bearing children out of wedlock as teenagers.³¹⁷ In cases involving gay fathers, the opportunity for an analogy seems clear. The same commentators who stereotype “fatherless” girls as promiscuous often stereotype gay men as promiscuous.³¹⁸ If litigants, experts, and judges had adopted both of these stereotypes, then we would expect them to express concerns about gay fathers raising promiscuous daughters.

There is, however, no evidence of these stereotypes in any of the custody and visitation cases. Litigants, experts, and judges expressed no concerns about gay fathers raising promiscuous daughters, and they expressed very few concerns about gay fathers raising lesbian daughters. Apparently, they believed that gay fathers were “strong” enough models for daughters, even if they were not “strong” enough models for sons.

I can think of only one principle that would explain this belief, and it is related to the patriarchal framework itself: If litigants, experts, and judges considered masculinity to be more valuable than femininity—that is, if they adopted a male supremacy principle—then they would generally be more concerned about the role of masculine, heterosexual fathers in the production of masculine, heterosexual boys.³¹⁹

IV. IDENTIFYING THE JUDGE’S GENDER: MALE JUDGES AND THE GENDER OF HOMOPHOBIA

Parts II and III showed that disputes over gay and lesbian parenthood are influenced by the parent’s gender and the child’s gender. This brief Part shows that they are influenced by the judge’s gender as well. By analyzing the same group of custody and visitation cases from yet another angle, this Part demonstrates that gay and lesbian parents have been subjected to stereotypes that are influenced by the judge’s gender.³²⁰

317. See, e.g., Wardle, *supra* note 243, at 853 (reporting one psychological case study in which a daughter “experimented with homosexual practices and also indulged in heterosexual promiscuity”).

318. See, e.g., *id.* at 862 (claiming to observe the “chronic instability of homosexual liaisons, especially gay liaisons”).

319. The male supremacy principle, which is often referred to simply as “patriarchy,” has been the primary target of feminist theorists for many years. See, e.g., JUDITH M. BENNETT, HISTORY MATTERS: PATRIARCHY AND THE CHALLENGE OF FEMINISM 55 (2006) (describing the feminist definition of “patriarchy” as “male power”); ADRIENNE RICH, OF WOMAN BORN 57 (1995) (defining “patriarchy” as “a familial-social, ideological, political system in which . . . the female is everywhere subsumed under the male”); *Redstockings Manifesto*, in SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN’S LIBERATION MOVEMENT 533, 534 (Robin Morgan ed., 1970) (“Male supremacy is the oldest, most basic form of domination. All other forms of exploitation and oppression . . . are extensions of male supremacy.”).

320. To examine whether the judge’s gender had any influence on the acceptance of stereotypes, I began by finding the first names of the judges who authored each majority opinion in the collection, as well as any concurring or dissenting opinions analyzed in Parts II and III. Applying conventional assumptions about which names are “masculine” and “feminine,” I coded each judge as presumptively “male,” “female,” or “N/A,” for the purposes of this analysis. When a judge’s name was ambiguous, I reviewed biographical information for clues about the judge’s gender, such as the use of gender-specific

Initially, when I set out to explore the influence of the judge's gender, I did not expect to find any meaningful differences, because the large majority (71%) of opinions were written by male judges. To my surprise, however, the differences were not only meaningful but stark: Gender-based stereotypes were accepted in 39% (47 of 122) of the opinions written by male judges and only 5% (1 of 21) of the opinions written by female judges—that is, eight times more often in opinions written by male judges.³²¹

In fact, only one female judge authored an opinion in which she accepted a stereotype that portrayed gay and lesbian parents as HIV agents, child molesters, recruiters, or role models, and her opinion is the kind of exception that proves the contrary rule. In *In re Marriage of Birdsall* (California 1988),³²² a gay father had testified at trial that “he had no intention of raising [his son] as a homosexual.”³²³ Based on this statement, the male trial judge found that the father “obviously recognizes some possibility of harm to the child from his lifestyle,” because “he indicated that he does not want his son to become a homosexual.”³²⁴ Relying on this finding, the trial judge prohibited the father from exercising overnight visitation “in the presence of any friend, acquaintance or associate known to be homosexual.”³²⁵

The trial judge's order was vacated on appeal. Writing for the unanimous panel, a female judge found that the father “only said he would not raise his son as a homosexual.”³²⁶ “A denial of any intention to attempt to indoctrinate [the child] into a homosexual lifestyle,” she explained, “cannot support an inference that [the father] believes his lifestyle would be detrimental to his child.”³²⁷ While the judge's analysis seemed to entertain the stereotype that gay and lesbian parents can “raise” a child “to become a homosexual,” the court's judgment did not seem to be influenced by the stereotype itself.

pronouns. I then cross-referenced each judge's gender with the stereotypes identified in Parts II and III to determine how often male and female judges authored opinions in which they accepted stereotypes that portrayed gay and lesbian parents as HIV agents, child molesters, recruiters, and role models.

321. This amounts to a difference of seven cases, which is large enough to be regarded as meaningful. *See supra* Part I.D.6 (defining minimum threshold for identifying differences that are “presumptively meaningful”). This analysis does not include twenty-eight cases in which the judge's gender could not be identified—either because the judge's first name was not clearly “masculine” or “feminine,” or because the judge's first name could not be found. For the purposes of this analysis, such cases are inherently ambiguous.

Using an alternative approach, one could estimate the total number of opinions written by “male” and “female” judges, based on the distribution of the opinions in which the judge's first name could be identified and coded as “masculine” or “feminine.” Under these assumptions, my results would not have been significantly altered: Gender-based stereotypes would be accepted in 35% (50 of 147) of the opinions written by “male” judges and only 7% of the opinions written by “female” judges—i.e., five times more often in opinions written by “male” judges.

322. 197 Cal.App.3d 1024, 1027 (Ct. App. 1988).

323. *Id.*

324. *Id.* at 1030.

325. *Id.* at 1027.

326. *Id.* at 1030.

327. *Id.*

This difference—that male judges are more likely to accept gender-based stereotypes of gay and lesbian parents—is more difficult to interpret than the other differences, because it is not specifically related to any stereotypes, and it is not mentioned in the opinions themselves. Moreover, although we can make assumptions about which judges are male and which judges are female, we have no basis to assume which judges are gay and which judges are heterosexual.

If we assume, for the purposes of argument, that most of these judges would identify as heterosexual, then we can begin to place this difference in social context. In recent years, surveys have generally found that heterosexual men are more likely than heterosexual women to accept homophobic and heterosexist stereotypes—and specifically, that they are more likely to apply such stereotypes to gay men than to lesbians.³²⁸ In this respect, the influence of the judge's gender seems to parallel the broader relationship between homophobia and gender.

V. SCHOLARSHIP, ADVOCACY, AND THE GENDER OF HOMOPHOBIA

Gay and lesbian parents have been subjected to gender-influenced stereotypes—stereotypes influenced by the parent's gender, the child's gender, and the judge's gender. This fact has implications for both lawyers and scholars. On the strategic level, it can inform how we argue on behalf of gay and lesbian families. On the theoretical level, it can inform how we understand the relationship between homophobia and gender.

Most legal scholarship on gay and lesbian parenthood focuses on strategy—namely, how to build better arguments on behalf of gay and lesbian parents. Law review articles on the subject are generally structured as briefs, handbooks, and references for activists, lawyers, and judges. By referring to empirical studies conducted by psychologists and sociologists, they attempt to refute the most common stereotypes about gay and lesbian parents. With only a few exceptions, these articles are not “theoretical”—they do not offer new insights into the intersections of homophobia, parenthood, and childhood. Yet this body of scholarship is profoundly useful. By gathering and articulating pro-gay responses to anti-gay stereotypes, it provides activists, lawyers, and judges with valuable tools.

To date, however, this body of scholarship has adopted a gender-blind framework. It presents stereotypes of gay and lesbian parents in gender-blind terms, and it responds to these stereotypes in gender-blind terms. This Part examines what happens when scholars adopt a gender-blind framework for responding to stereotypes that are influenced by gender. It argues that our

328. See *supra* notes 46-48 and accompanying text (citing surveys).

gender-blind framework has weakened and warped and our advocacy on behalf of gay and lesbian families. By reviewing the scholarship on each of the stereotypes identified in Parts II and III, Part V offers concrete ways to strengthen and broaden the case for gay and lesbian parenthood.

A. The Gender of HIV Stereotypes

Between the late 1980s and the late 1990s, legal scholars published a half-dozen articles that specifically considered the impact of concerns about HIV in custody and visitation cases.³²⁹ Although these articles approached the subject from different angles, they all framed the subject in gender-blind terms. In every article, the authors wrote of discrimination against “parents” who were at risk of contracting HIV, or were already infected with HIV, without acknowledging any potential differences between fathers and mothers or gay men and lesbians.

This is a curious development. In light of the historical association between male homosexuality and disease, the specific association between male homosexuality and HIV, and the fact that all of the relevant cases involved gay fathers, it is somewhat puzzling to see legal scholars writing as though all “parents”—male, female, gay, heterosexual—were equally subject to HIV stereotypes in custody and visitation cases. Reading through these articles, one would hardly suspect that gay men have been specifically stereotyped as HIV agents in the United States.

In most of these articles, the authors briefly acknowledged the demographic link between gay men and HIV before they proceeded to analyze the legal impact of HIV in custody and visitation cases.³³⁰ After they mentioned this fact, however, they quickly passed over it, without considering whether it had any specific implications for gay fathers.³³¹ In one article after another,

329. See Nancy Mahon, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. REV. 1092 (1988); Amy Pearce, *Visitation Rights of an AIDS Infected Parent*, 27 J. FAM. L. 715 (1989); Pierce Jo Reed & Laura Davis Smith, *HIV, Judicial Logic and Medical Science: Toward a Presumption of Noninfection in Child-Custody and Visitation Cases*, 31 NEW ENG. L. REV. 471 (1997); Lauren Shapiro, *An HIV Advocate's View of Family Court: Lessons from a Broken System*, 5 DUKE J. GENDER L. & POL'Y 133 (1998); Aline Cole Barrett & Michelle A. Flint, Comment, *The Effect of AIDS on Child Custody Determinations*, 23 GONZ. L. REV. 167 (1987); Robert Zaslow, Comment, *Child Custody, Visitation, and the HIV Virus: Revisiting the Best Interests Doctrine to Ensure Impartial Parental Rights Determinations for HIV-Infected Parents*, 3 J. PHARMACY & L. 61 (1994).

330. See, e.g., Mahon, *supra* note 329, at 1095 (noting that “bisexual and gay men . . . are at a higher risk of becoming HIV infected than the general public”); Reed & Smith, *supra* note 329, at 478 (noting that “gay men remain disproportionately represented in HIV epidemiologic studies”); Barrett & Flint, *supra* note 329, at 170 (noting that “[n]inety percent of [HIV] victims are members of two main high risk groups: male homosexuals (73%) and intravenous drug users (17%)”); Zaslow, *supra* note 329, at 70 (noting that during the early 1980s, “[w]orkers at the Centers for Disease Control mockingly called AIDS the disease of the “4-H’s”: homosexuals, Haitians, heroin addicts, and hemophiliacs”).

331. See Mahon, *supra* note 329, at 1095; Reed & Smith, *supra* note 329, at 478; Barrett & Flint, *supra* note 329, at 170; Zaslow, *supra* note 329, at 70.

authors emphasized that the virus was spreading rapidly *beyond* the gay male demographic, and they expressed concerns about discrimination against all parents who are “infected” with HIV.³³² Even as they acknowledged the specific link between male homosexuality and HIV, they neglected the special problems that it raised for gay fathers in custody and visitation cases.

In some articles, the authors pushed this neutrality principle even further. Writing as HIV advocates, they wrote exclusively in terms of discrimination against “HIV-positive parents” and “AIDS-infected parents,” without acknowledging the demographic link between male homosexuality and HIV at all.³³³ By focusing on problems of parents who were “infected” with HIV, they ignored the problems of gay fathers—parents who were often stereotyped as HIV carriers, even when there was no evidence that they had actually contracted HIV.

The most striking example of this framework appears in the earliest article, where two authors introduced the legal academy to “The Effect of AIDS on Child Custody Determinations” and specifically considered the intersection of HIV, homosexuality, and parenthood. The authors broached the subject of HIV by observing that “[n]inety percent of victims are members of two main high risk groups: male homosexuals (73%) and intravenous drug users (17%).”³³⁴ In the next sentence, however, they emphasized that “the disease . . . can be transmitted through heterosexual contact, which puts at risk women who engage in sex with members of the high risk groups.”³³⁵ By the time they return to the subject of “homosexuals,” the “male” modifier has dropped out of the analysis.³³⁶ Under the heading, “The Homosexual Parent,”³³⁷ they predicted that “[i]n a case involving an AIDS-infected *parent*, the moral stigma attached to *homosexuality* will certainly play a large part in the court’s determination” of that parent’s rights.³³⁸ Given that lesbians are at a “very low risk” for

332. See Mahon, *supra* note 329, at 1095 (noting that “the number of women exposed to the virus by men, who are intravenous drug users or bisexuals, is growing”); Reed & Smith, *supra* note 329, at 478 (noting that “throughout the past decade, heterosexual women show the greatest increases in infection rates,” “HIV is now the fourth leading cause of death among all American women of childbearing ages,” and “[w]omen of color are particularly at risk for HIV infection in both urban and rural areas”); Barrett & Flint, *supra* note 329, at 170 (noting that “[t]he disease . . . can be transmitted through heterosexual contact, which puts at risk women who engage in sex with members of the high risk groups”); Zaslow, *supra* note 329, at 70 (noting that in the late 1980s, Americans learned that “the epidemic was reaching all peoples”).

333. See Pearce, *supra* note 329; Shapiro, *supra* note 329.

334. Barrett & Flint, *supra* note 329, at 170.

335. *Id.*

336. *Id.* at 182.

337. *Id.* at 178.

338. *Id.* at 182 (emphasis added).

contracting HIV,³³⁹ it is not clear why these authors framed the controversy in terms of “homosexuality” and “parenthood.”³⁴⁰

This strikes me as a missed opportunity. As Eve Sedgwick explains: “No one should wish to reinforce the myth that the epidemiology of AIDS is a matter of discrete ‘risk groups’ rather than of particular acts that can call for particular forms of prophylaxis.”³⁴¹ Whether or not Sedgwick’s claim makes for sound public health policy, it is especially compelling in the context of custody and visitation cases, where courts are generally required to make specific, individualized findings about a child’s best interests. If courts were concerned about parents exposing children to HIV, then they should have focused on the epidemiology of individual gay fathers rather than the epidemiology of gay men in general. Instead of reinforcing the discourse of risk groups, legal scholars should have been challenging it.

In any particular case, there would be nothing contradictory about admitting that gay men are more likely than (most) other people to contract HIV, but insisting that a particular gay man is less likely than (most) other people to contract HIV. After all, all gay men are not equal, even in epidemiological terms. Some have tested negative; some are monogamous; some practice safe sex. These are all obvious facts. All of them undermine the stereotype of gay men as HIV carriers—and thus, the application of “risk group” analysis in custody and visitation cases. Unfortunately, none of these statements appear in the legal scholarship in this field.

There are reasons to think that such arguments may have been useful in custody and visitation cases. Recall that in *J.P. v. P.W.* (Missouri 1989),³⁴² the father and his partner tested negative for HIV, but the mother sought to supervise the father’s visits to protect her child from “exposure . . . to

339. Mahon, *supra* note 329, at 1095 n.25; see ENGEL, *supra* note 138, at 113 (“Differences in sexuality, promiscuity, and simple biology dictated that HIV would spread quickly among sexually active gay men, but hardly at all among lesbian women.”).

340. In theory, this gender-blind framework might be defended as a subtle way of presenting a united front against AIDS phobia and homophobia—a way of bringing gay men and lesbians together in the fight against HIV. The theory would be that by speaking in gender-neutral terms, legal scholars would emphasize that “the epidemic was reaching all peoples,” undermining the cultural association between gay men and HIV. Zaslow, *supra* note 329, at 71.

There is no question that in the late 1980s and early 1990s, many lesbians took common cause with gay men in the fight against AIDS phobia and homophobia. See CASTLE, *supra* note 139, at 12; ENGEL, *supra* note 138, at 113; SEDGWICK, *supra* note 139, at 38. It is a separate question, however, whether this phenomenon had anything to do with the legal academy’s gender-blind response to HIV stereotypes in custody and visitation cases.

As a theoretical matter, such a strategy seems dubious: It is not clear how one could effectively undermine a stereotype without even naming it, let alone articulating arguments to disprove it. In any event, as a practical matter, it did not seem to be the project of legal scholars writing on the impact of HIV in custody and visitation cases. They were interested in the broader fight against HIV, so they generally ignored the stereotype that portrayed gay men as HIV carriers.

341. SEDGWICK, *supra* note 139, at 38 n.39.

342. 772 S.W.2d 786, 786-89 (Mo. Ct. App. 1989).

AIDS.”³⁴³ Based on the father’s testimony, the trial court found that the father and his partner had engaged in “oral sex” during the marriage, and they had entered into a “monogamous” and “permanent” relationship shortly after the divorce.³⁴⁴ In spite of these facts, the court found that “AIDS has a higher incidence of occurrence among homosexuals than the general public” and that “[a]fter his homosexual encounter with [his partner], the father continued to have normal sexual intercourse with the mother.”³⁴⁵ Relying on these findings, the court prohibited the father’s partner or “any other male” from visiting the child, and the court’s order was affirmed on appeal.³⁴⁶

During the trial, the mother’s lawyer had questioned the father extensively about his sexual conduct with his partner and his wife, in order to show that the father had exposed both his wife and his daughter to the “AIDS virus.”³⁴⁷ To rebut the alleged risk to the child, the father’s lawyer called an expert witness who testified that HIV could not be spread through “casual contact.”³⁴⁸ He did not, however, make any attempt to rebut the alleged risk to the mother, or the generalization that as a gay man, the father was more likely than the general public to contract HIV. Throughout the proceedings, no one mentioned that the father’s risk of contracting HIV was actually *lower* than the general public’s risk, insofar as he and his partner had tested negative and were in a “monogamous” relationship limited to “oral sex.”³⁴⁹ It is not possible to say whether such an argument would have changed the outcome of *J.W. v. P.W.*, or whether similar arguments would have influenced the outcomes of similar cases. It seems clear, however, that scholars and lawyers gained no advantage by overlooking this argument.

B. The Gender of Sexual Abuse Stereotypes

Most legal scholars have addressed the subject of homosexuality and child sexual abuse in passing, as part of broader studies on the impact of homophobia and heterosexism in American family law. Only one author, Susan Becker, has written a law review article that specifically addresses the impact of child

343. *Id.* In the opinion, the appellate court implies that the father had tested negative for HIV, reciting the expert’s testimony that “it is possible that a person infected with the AIDS virus [could] test negative.” *Id.* at 789. In the trial transcript, the father testifies that both he and his partner had tested “negative” for “AIDS.” Statement of Facts, Cross Examination of Paul Robert Waller by Steven E. Rodgers, *In re Marriage of Jolene Marie Waller*, No. 410,536 (Travis County District Court, June 22, 1988) at 46 (on file with author).

344. *J.P.*, 772 S.W.2d at 788.

345. *Id.* at 787.

346. *Id.* at 786, 789.

347. See Statement of Facts, Cross Examination, *supra* note 343, at 41-49.

348. *J.P.*, 772 S.W.2d at 789.

349. See *id.* at 788 (describing father’s relationship with his partner as “monogamous” and finding that relationship involved “oral sex”); Statement of Facts, Cross Examination, *supra* note 343, at 46 (recounting father’s testimony that he and his partner had tested “negative” for “AIDS”).

sexual abuse stereotypes in custody and visitation cases involving gay and lesbian parents.³⁵⁰ “On one level,” Becker offered her article as “a litigation primer for attorneys representing gay or lesbian parents accused of sexual abuse.”³⁵¹ “More importantly,” she explained, “it is an appeal to judges and . . . experts in such cases . . . to reconsider their views on sexual orientation and the undue influence that these views may have on the outcome of their opinions when child sexual abuse is alleged.”³⁵² In short, Becker aimed to help lawyers fend off specific accusations of sexual abuse and the generic stereotype of the gay child molester.

As this introduction suggests, Becker’s approach to the subject was systematically blind to the influence of gender. In her title, she announced her battle against the bias that experts and judges display when a lesbian or gay parent is accused of sexually abusing a child.³⁵³ Throughout her article, she spoke of “heterosexuals,” “homosexuals,” and “gay men and lesbians,” without recognizing any distinction between stereotypes about gay men and lesbians.³⁵⁴ She claimed, for example, that courts “automatically” condemn “gay” and “lesbian” parents who are accused of child sexual abuse in custody and visitation cases,³⁵⁵ even though “empirical data demonstrates on homosexual parents demonstrates that . . . children are much more likely to be sexually abused by heterosexuals than homosexuals.”³⁵⁶ Whenever Becker sought to describe or rebut the stereotype of the gay child molester, she spoke in these gender-blind terms.

In this respect, Becker’s article was representative of four trends in the legal scholarship on homosexuality and child sexual abuse. In responding to the stereotype of the gay child molester, most legal scholars have: (1) obscured the significance of the parent’s gender in custody and visitation cases involving sexual abuse stereotypes; (2) obscured the significance of the perpetrator’s gender in studies on homosexuality and child sexual abuse; (3) invoked absolute numbers rather than relative proportions to describe the likelihood of child sexual abuse in heterosexual and homosexual populations; and (4) obscured the significance of the victim’s gender in debates over homosexuality and child sexual abuse. In the following sections, I spell out each of these criticisms in more detail, citing examples from scholarship in the field.

1. The Significance of the Parent’s Gender in Custody and Visitation

350. Susan Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75 (1996).

351. *Id.* at 82.

352. *Id.*

353. *Id.* at 75.

354. *Id.* at 77, 94-95.

355. *Id.* at 77.

356. *Id.* at 94-95.

Cases

The problems begin with the notion that in custody and visitation cases, when “gay or lesbian” parents are accused of sexually abusing children, they are “automatically condemned” by “the public and the courts.”³⁵⁷ A number of similar suggestions have been made in casebooks and law review articles on gay and lesbian parenthood.³⁵⁸ In one of the leading casebooks on sexual orientation and the law, William Rubenstein claims that in custody and visitation cases, “[s]ome courts make explicit allegations that lesbians and gay men are, generally speaking, child sexual abusers.”³⁵⁹ Charlotte Patterson, one of the country’s leading authorities on studies of gay and lesbian parenthood, observes that “[t]here is a history of judicial hostility towards lesbian and gay families with children, and negative stereotypes are evident in many court rulings.”³⁶⁰ In her list of negative stereotypes, Patterson writes of courts expressing the view that the “children of lesbian or gay parents . . . are more likely to be sexually abused by parents or by parents’ friends.”³⁶¹

By lumping together gay men and lesbians in these claims, scholars obscure the role that the parent’s gender has played in sexual abuse cases, and specifically, in how courts have expressed the stereotype of the gay child molester. In Part II, we saw that both gay men and lesbians were specifically accused of sexual abuse, but gay fathers were stereotyped as child molesters more often and more explicitly than lesbian mothers. In the most notorious of these cases, the court’s stereotype was specifically concerned with “the molestation of minor boys by adult males.”³⁶² Although lesbians were also

357. *Id.* at 77.

358. See, e.g., WEISBERG & APPLETON, *supra* note 51, at 825 (suggesting that “common beliefs about homosexual parents” may play a role in custody and visitation disputes, including the belief that “a homosexual parent is more likely to molest the child”); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1629, 1639 (1989) (noting “[t]he courts’ fear that gay or lesbian parents will molest children”); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 359 (1994) (“Some courts have contended that children living with gay or lesbian parents face an increased risk of sexual molestation in the home environment, either at the hands of the parent, or one of the parent’s friends or associates”); Erica Gesing, *The Fight to Be a Parent: How Courts Have Restricted the Constitutionally-Based Challenges Available to Homosexuals*, 38 NEW ENG. L. REV. 841, 859 (2004) (“Another concern raised by opponents of homosexuals as adoptive parents is that parents involved in same-sex relationships are more likely to molest their children than heterosexual parents”); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1027 (1991) (“Sometimes, the claim is not that same-sex couples will not have children, but rather that they will, and that the children will be molested”); David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1684 (1991) (“[T]he unfounded fear that homosexual parents will molest their children plays a large role in custody determinations involving gay and lesbian parents.”).

359. RUBENSTEIN, *supra* note 57, at 834.

360. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 197-98 (1995).

361. *Id.* at 199.

362. *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982).

specifically accused of sexual abuse, they were not explicitly stereotyped as child molesters.³⁶³

2. *The Significance of the Perpetrator's Gender in Child Sexual Abuse Studies*

Because legal scholars have overlooked the influence of gender in the sexual abuse cases, they have not formulated a rigorous or compelling response to sexual abuse stereotypes. Like many others, Susan Becker and Charlotte Patterson answer the stereotype of the gay child molester by citing empirical studies. According to Becker, “[e]mpirical data demonstrates that gay men and lesbians are the least likely persons to sexually abuse children” and that “children are much more likely to be sexually abused by heterosexuals than by homosexuals.”³⁶⁴ Summarizing the “social science research on children of lesbian and gay parents,” Patterson writes that “the existing research suggests that the great majority of child sexual abuse is committed by heterosexual men, not by lesbians or gay men.”³⁶⁵

The legal scholarship on gay and lesbian parenthood contains many similar claims. Based on another review of the “social science literature,” David Flaks claims that “the vast majority of sex crimes committed by adults on children are heterosexual, not homosexual.”³⁶⁶ “In fact,” he continues, “it has been reported that most child molesters are heterosexual men, [and] that gay men and lesbians are not more likely to molest children . . . than are heterosexual men and women, and that ‘there are virtually no cases of pedophilia committed by gay parents.’”³⁶⁷ In more popular versions, this argument begins and ends

363. See *supra* Part II.B (citing cases). Some legal scholars, it should be noted, have accurately acknowledged this disparity in the expression of sexual abuse stereotypes. See, e.g., ROBSON, *supra* note 33, at 131 (noting that “the harm of molestation . . . is more likely to be emphasized in a gay father’s case than a lesbian mother’s”); Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2001 U. ILL. L. REV. 1, 49 (2001) (“One common concern is that homosexual people are likely to prey on children as sexual partners. Although this fear is primarily directed at gay men, it is occasionally directed at lesbians.”).

Susan Becker’s claim that courts “automatically condemn[]” both gay and lesbian parents as child molesters, Becker, *supra* note 350, at 77, was apparently based on her experience as co-counsel in *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995), a case in which a heterosexual father accused a lesbian mother and her partner of sexually abusing Miriam, the adopted young daughter of the mother and father, see Becker *supra* note 350, at 75. Based on the testimony of the father’s expert, the trial court found that Miriam and her brother had been “eroticized” by the mother and her partner. *Hertzler*, 908 P.2d at 116. The trial court did not, however, adopt the expert’s view that “Miriam had possibly been sexually abused.” *Id.* at 109. In any event, the trial court’s finding of “eroticization” was expressly overturned by the Wyoming Supreme Court on appeal. *Id.* at 124. In fact, the Wyoming Supreme Court found that the trial court had “indulged an essentially personal viewpoint in derogation of [the mother’s] lifestyle,” and the Supreme Court specifically mocked the trial court’s finding of “eroticization” as the “solipsistic contrivance of [an] erstwhile expert.” *Id.* Becker does not cite any other opinions in which lesbian mothers (or gay fathers) were either accused of sexual abuse or stereotyped as child molesters.

364. Becker, *supra* note 350, at 77, 95.

365. Patterson, *supra* note 360, at 199.

366. Flaks, *supra* note 358, at 360.

367. *Id.*

with any of the following observations—“heterosexuals are more likely to molest children than are homosexuals,”³⁶⁸ “[t]he vast majority of child molesters are heterosexual men,”³⁶⁹ or “[n]inety percent of child abuse is committed by heterosexual men.”³⁷⁰

Although there are some differences among these arguments, they all suffer from the same basic flaw: When they characterize the findings of empirical studies, they overstate the significance of the perpetrator’s sexual orientation and downplay the significance of the perpetrator’s gender. By comparing the incidence of sexual abuse among “heterosexuals” and “homosexuals,” or “heterosexual men” and “gay men and lesbians,” they make two implications: (1) heterosexual men are more likely to molest children than gay men, and (2) gay men are no more likely to molest children than heterosexual women or lesbians.

In truth, the first claim is not supported by the empirical evidence and the second claim is demonstrably false. As some scholars have acknowledged, the perpetrator’s gender is a much more powerful predictor of sexual abuse than the perpetrator’s sexual orientation.³⁷¹ The data establish that men are far more likely to molest children than women, regardless whether they are heterosexual, gay, or bisexual.³⁷² The data do not, by contrast, establish that heterosexual men are more likely to molest children than gay or bisexual men.³⁷³ In light of these facts, it is neither accurate nor persuasive to compare the incidence of sexual abuse among heterosexuals and homosexuals, or even among heterosexual men and gay men and lesbians. At the very least, it is clear that gay men are more likely to molest children than heterosexual women or lesbians.

This fact may not be convenient for pro-gay scholars, lawyers, and activists, but it is not likely to surprise anyone else. By any measure, men

368. Strasser, *supra* note 358, at 1027.

369. *Developments in the Law*, *supra* note 358, at 1639-40; *see also* RUBENSTEIN, *supra* note 57, at 834 (“[s]ome courts make explicit allegations that lesbians and gay men are, generally speaking, child sexual abusers”).

370. Gesing, *supra* note 358, at 860. Similar claims have appeared in a number of more sophisticated rebuttals, which are considered in more detail below.

371. *See* ESKRIDGE & HUNTER, *supra* note 57, at 1169-70; Stephan H. Black, *A Step Forward: Lesbian Parentage After Elisa B. v. Superior Court*, 17 GEO. MASON U. CIV. RTS. L.J. 237, 264 (2006); *Developments in the Law*, *supra* note 358, at 1640; Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 69 (1996).

372. David Finkelhor & Diana Russell, *Women as Perpetrators*, in CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 171, 174 (David Finkelhor ed., 1984) (reporting study’s finding that male offenders were responsible in 94% of offenses against girls and 86% of offenses against boys); Carole Jenny, Thomas A. Resler & Kimberly L. Poyer, *Are Children at Risk of Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 42 (1994) (finding that in 269 cases of alleged child sexual abuse, 248 (92%) involved male offenders, 11 (4%) involved female offenders, and 10 (4%) involved both male and female offenders); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD. DEV. 1025, 1034 (1992).

373. This point is analyzed in more detail in Part V.B.4.

commit more sexual assaults than women in the United States, and in this respect, men who molest children are no different.³⁷⁴ To some extent, the relative prevalence of male child molesters may help explain why gay fathers were stereotyped as child molesters more often and more explicitly than lesbian mothers, and why one court's stereotype was specifically concerned with "the molestation of minor boys by adult males."³⁷⁵

Because legal scholars have refused to acknowledge this fact, they have overlooked an interesting analogy to custody and visitation cases involving heterosexual couples. Although it is well-known that men are more likely to sexually abuse children than mothers, this fact is not generally weighed against fathers in custody and visitation cases involving heterosexual couples. Based on this analogy, we might argue that the same rule should apply to gay men who are fathers.³⁷⁶

3. *Proportionality: Comparing the Incidence of Child Sexual Abuse in Heterosexual and Gay Male Populations*

This approach, however, was not taken by advocates for gay and lesbian parenthood. Like other scholars writing in this field, advocates sought to refute the stereotype of the gay child molester on empirical grounds. Within this framework, the key question is whether the stereotype has any basis in fact—whether studies show that the incidence of child sexual abuse is greater in heterosexual male or gay male populations, or whether it is roughly equivalent.

In responding to sexual abuse stereotypes, scholars have typically answered this question by claiming that "heterosexual men are overwhelmingly responsible for child abuse,"³⁷⁷ "the vast majority of sex crimes committed by

374. JENKINS, *supra* note 203, at 61-62.

375. J.L.P.(H.) v. D.L.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982)

376. The merit of this argument is not straightforward. It depends on why the evidence is excluded in cases involving heterosexual couples and whether those reasons would apply to cases involving gay fathers as well. I can think of three possible reasons for excluding such evidence, and only the first two reasons would clearly apply to gay fathers. The first reason is statistical: Even if men are more likely to sexually abuse children than women, an individual man is still not likely to sexually abuse an individual child, because the overall incidence of sexual abuse is still exceptionally low. The second reason is evidentiary: Even if men are somewhat more likely to sexually abuse children than women, courts should still rely on individual evidence in custody and visitation cases, because they have an independent obligation to determine the best interests of every child. The third reason is constitutional: Even if men are more likely to sexually abuse children than women, courts may not decide cases based on "overbroad generalizations about . . . males and females." See *United States v. Virginia*, 518 U.S. 515, 517, 533 (1996) (holding that state action may not be justified by "fixed notions concerning the roles and abilities of males and females" or "overbroad generalizations about the different talents, capacities, or preferences of males and females"). Only the last reason would not apply to cases involving gay fathers, unless the father could persuade the court to apply "heightened scrutiny" to sexual orientation classifications.

For these purposes, however, I am less concerned with the merits of the argument, and more concerned with the fact that it has been overlooked by scholars who advocate on behalf of gay and lesbian parenthood.

377. Becker, *supra* note 363, at 49.

adults on children are heterosexual, not homosexual,³⁷⁸ and “children are much more likely to be sexually abused by heterosexuals than by homosexuals.”³⁷⁹

Although these claims are factually correct, they are not responsive to the key question about homosexuality and child sexual abuse. They do not disprove the stereotype of the gay child molester on empirical grounds because they are not based on the relevant comparisons. In mathematical terms, they use the wrong denominators: They compare how many child molesters are “heterosexual” and “homosexual,” how many offenses are “different-sex” and “same-sex,” and how many children are abused by “heterosexual” and “homosexual” offenders. They do not, however, compare any of these findings to the number of heterosexual and gay men in the general public, so they do not compare the incidence of child sexual abuse within those two populations.

This is a problem of straightforward arithmetic, and it marks another unfortunate oversight in the legal scholarship on this subject. It is a problem so obvious that even people like Paul Cameron have noticed it.³⁸⁰ Paul Cameron is the country’s leading proponent of the stereotype of the gay child molester, and by almost all accounts, he is a quack and a fraud.³⁸¹ Yet when he claims that “proportionality” is the “key” to the debate over homosexuality and child sexual abuse, he is uncharacteristically insightful.³⁸² Given that “there are so many more heterosexuals than homosexuals,” he writes, the question is “which kind of child molestation—homosexual or heterosexual—is proportionately more common?”³⁸³

378. Flaks, *supra* note 358, at 360; *see also* Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 307 (“The vast majority of child molestation acts in this country . . . are perpetrated by heterosexual men.”); Rosenblum, *supra* note 358, at 1684 (“Studies show that most child molestations are committed by heterosexual men with female victims.”).

379. Becker, *supra* note 350, at 95; *see also* Wishard, *supra* note 7, at 411 (“[S]exual molestation of children is much more likely to be performed by heterosexual rather than homosexual men.”).

380. For a more detailed version of Cameron’s argument, *see* Timothy Dailey, *Homosexuality and Child Sexual Abuse*, INSIGHT, No. 247 (May 17, 2002), *available at* <http://www.traditionalvalues.org/urban/one-a.php>. Dailey’s analysis has been methodically refuted by Gregory Herek. *See* Herek, *supra* note 205.

381. Cameron has been expelled from the American Psychological Association, and his views on homosexuality and child molestation have been specifically disavowed by the American Sociological Association and renounced by a federal district court judge as “misrepresentations.” *See* Gregory Herek, Paul Cameron Bio and Fact Sheet, http://psychology.ucdavis.edu/rainbow/html/facts_cameron_sheet.html (last visited Dec. 1, 2008) (citing Neb. Psychol. Ass’n Resolution (Oct. 19, 1984)).

382. Paul Cameron, Child Molestation and Homosexuality, http://familyresearchinst.org/FRI_Edu Pamphlet2.html (last visited Dec. 1, 2008).

383. Cameron claims that “perhaps 2% of adults regularly indulge in homosexuality,” “[y]et they account for between 20% to 40% of all molestations of children.” *Id.* This claim is supported only by Cameron’s own surveys, and it has been thoroughly debunked by leading experts in the field. *See, e.g.*, Herek, *supra* note 205; Herek, *supra* note 381. Interestingly, however, Cameron’s claim is not addressed by any of the customary responses from legal scholars—heterosexual men are “overwhelmingly responsible for child abuse,” Becker, *supra* note 363, at 49, the vast majority of abuse is “heterosexual, not homosexual,” Flaks, *supra* note 358, at 360, and children are “much more likely to be sexually

By ignoring the question of proportionality, legal scholars have left themselves vulnerable to a simple yet powerful counterargument: Most child molesters are heterosexual because most people are heterosexual. If we mean to refute the stereotype of the gay child molester with data, rather than answering a straw version of the stereotype, then we must make our case in proportional terms. We must prove that the average heterosexual man is *more likely* to sexually abuse children than the average gay man—or at least, that the average gay man is *no more likely* to sexually abuse children than the average heterosexual man. In other words, we must show that sexual orientation is not an accurate predictor of child sexual abuse.

In the legal scholarship responding to sexual abuse stereotypes, this argument has not been spelled out. For the most part, scholars have relied on the claim that “most child molesters are heterosexual” to answer the stereotype of the gay child molester, without comparing the incidence of child sexual abuse within heterosexual and gay populations at all.³⁸⁴ In a few cases, they have actually claimed that heterosexual men are “more likely” to molest children than gay men, or that heterosexual men are responsible for a “disproportionate” amount of child sexual abuse, although the leading studies do not support such definitive claims.³⁸⁵

So what is the fact of the matter? Fortunately, gay fathers have little to fear from the data. None of the evidence supports the stereotype of the gay child molester. In 1994, a study published in a leading medical journal found that, based on the study’s 95% confidence interval, the incidence of child sexual

abused by heterosexuals,” Becker, *supra* note 350, at 345. In light of the small proportion of gay men to heterosexual men in the general public, these positions are not mutually exclusive.

384. See Becker, *supra* note 350, at 49; Flaks, *supra* note 358, at 360; Gesing, *supra* note 358, at 860; Patterson, *supra* note 360, at 199.

385. In another leading casebook in the field, William Eskridge and Nan Hunter claim that “[s]traight males are the group most likely to molest children,” when compared to gay men, heterosexual women, and lesbians. ESKRIDGE & HUNTER, *supra* note 57, at 1169-70. To support this statement, the authors cite to the most recent study on the subject, which found that “a child’s risk of being molested by his or her relative’s heterosexual partner is over 100 times greater than [the child’s risk of being molested] by someone who might be identifiable as being homosexual, lesbian, or bisexual.” *Id.*

The casebook’s claim about the relative propensity of heterosexual and gay men, however, does not quite follow from the study’s findings. After all, the study could not have found that the average heterosexual man is *100 times* more likely than the average gay man to be a child molester. As Paul Cameron suggests, an individual child’s risk of being molested by a heterosexual or gay man is influenced far more by the distribution of heterosexual and gay men in the general public than by the relative propensities of heterosexual and gay men toward pedophilia.

For examples of similar claims, see Marc Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 216 (1995) (“[R]esearch on the sexual abuse of children shows that offenders are *disproportionately* heterosexual men.”) (emphasis added); Strasser, *supra* note 371, at 69 (“[I]f one examines the information regarding four groups—lesbian women, straight women, gay men, and straight men, an individual belonging to the last group is *most likely* to be a molester and an individual belonging to the first group is least likely to be a molester.” (emphasis added)); *id.* at 1027 (“heterosexuals are *more likely* to molest children than are homosexuals” (emphasis added)); and Steve Susoeff, Comment, *Assessing Children’s Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 880-81 (1985) (“Research on the sexual abuse of children, however, shows that offenders are, in *disproportionate* numbers, heterosexual men.” (emphasis added)).

abuse among gay men was between 0% and 3.1%, which the authors concluded was “within current estimates of the prevalence of homosexuality in the general community.”³⁸⁶ In other words, the authors found that given the distribution of heterosexual and gay men in the general public, gay men were neither more nor less likely to molest children than heterosexual men. In light of these findings, the study concluded: “[N]o evidence is available from this data that children are at a *greater* risk to be molested by identifiable homosexuals than by other adults.”³⁸⁷ In 1986, another study reached similar conclusions based on the finding that 4% of male offenders in the study were “known homosexuals.”³⁸⁸

4. Terminology: Distinguishing the Perpetrator’s Sexual Orientation from the Victim’s Gender

In order to compare the incidence of child sexual abuse in heterosexual and homosexual populations, we must be able to distinguish between “heterosexuals” and “homosexuals.” There are significant definitional problems here, which are familiar to sexuality scholars: Should sexual orientation be defined by desire, behavior, or self-identification as “heterosexual” or “homosexual?”

How we define the concept of sexual orientation may well influence the prevalence of sexual abuse that we find among heterosexual and gay male populations. In any case, the most critical question will be whether we distinguish heterosexuality and homosexuality from pedophilia at all.

386. Jenny, Resler & Poyer, *supra* note 372, at 44.

387. *Id.* (emphasis added).

388. Mary J. Spencer & Patricia Dunklee, *Sexual Abuse of Boys*, 78 PEDIATRICS 133, 135 (1986). A few legal scholars, it should be noted, have accurately acknowledged this limit in the empirical data. See, e.g., Becker, *supra* note 363, at 49 (“Gay men appear to be *no more likely* than heterosexual men to abuse children.” (emphasis added)); Flaks, *supra* note 358, at 359 (“[I]t has been reported that . . . gay men and lesbians are *no more likely* to molest children or to commit crimes with children than are heterosexual men and women” (emphasis added)).

Based on a survey of the available studies, psychologist Gregory Herek summarizes the empirical data on homosexuality and sexual abuse in modest terms:

The empirical research does not show that gay or bisexual men are any more likely than heterosexual men to molest children. This is not to argue that homosexual and bisexual men never molest children. But there is no scientific basis for asserting that they are more likely than heterosexual men to do so.

Herek, *supra* note 205.

There is only one study that suggests that heterosexual men may be more likely to molest children than gay men, but the claim is not actually supported by the study’s own data. In 1978, a study of 175 convicted child molesters did not find any examples of men who had “regressed” from an “adult homosexual orientation” to pedophilia. A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 ARCHIVES OF SEXUAL BEHAV. 175, 181 (1978). Based on this finding, the authors theorized: “It appears, therefore, that the adult heterosexual male constitutes a greater sexual risk to underage children than does the adult homosexual male.” *Id.* This statement ignores the study’s own 95% confidence interval, which forecloses any conclusion that heterosexual men represent 100% of all convicted child molesters. Because gay men represent such a small percentage of the general public, even a small deviation in the study’s findings would undermine the validity of the author’s hypothesis.

In some instances, legal scholars have sought to sidestep proportionality questions by observing that most men who sexually abuse children are “heterosexual,” whether the victims are girls or boys.³⁸⁹ In a debate over gay and lesbian parenthood, Carlos Ball and Janice Farrell Pea argued that “the vast majority of child molestation acts in this country, *including those perpetrated on boys*, are perpetrated by heterosexual men.”³⁹⁰ In a footnote, they explained further that (1) “girls are at a greater risk of being molested than boys,” (2) “[a]lmost all of the adults who molest girls are men,” (3) “[a]lmost all adults who molest boys are also men,” and (4) “[t]he majority of men who abuse male children engage in adult heterosexual relationships.”³⁹¹ To support the last statement, they cited the two sexual abuse studies already mentioned, which found that about 75% of male victims were sexually abused by a father, a stepfather, or a mother’s boyfriend.³⁹²

This argument begs the same kind of proportionality questions as the others—presumably, the “majority” of men who abuse boys have engaged in heterosexual relationships because the “majority” of men are heterosexual. But this argument begs a more fundamental question as well: If a man engages in a relationship with an adult woman and sexually abuses a boy, is he “heterosexual,” “homosexual,” or something else? To interpret the data on homosexuality and sexual abuse, we must understand the distinction between homosexuality and pedophilia, and the related distinction between the perpetrator’s sexual orientation and the victim’s gender. Otherwise, we cannot understand how perpetrators have been classified as “heterosexual” or “homosexual,” and we cannot distinguish between offenses committed by gay men against boys and offenses committed by men against boys. This question is especially relevant for gay fathers in custody and visitation cases: By definition, such men have engaged in heterosexual relationships with adult women—just like the perpetrators classified as “heterosexual” in recent studies, who were responsible for abusing 75% of male victims.

This question has generally been ignored by pro-gay scholars, but it has caught the attention of a few opponents of gay and lesbian parenthood. James Donovan observes that in the debate over homosexuality and child sexual abuse, “[e]verything hinges upon how one defines homosexual.”³⁹³ In Donovan’s view, “the definition of homosexual does not require that the object

389. Ball & Pea, *supra* note 378, at 308; Gesing, *supra* note 358, at 859.

390. Ball & Pea, *supra* note 378, at 308 (emphasis added).

391. *Id.* at 307 n.279.

392. *Id.*; see also Gesing, *supra* note 358, at 859 (citing study’s finding that “in seventy-four percent of the cases where a male sexually abused a boy, the offender had been or was currently involved in a heterosexual relationship with the child’s mother or relative”).

393. James Donovan, *A Philosophical Ground for Gays’ Rights: “We Must Learn What Is True in Order To Do What Is Right,”* 4 GEO. MASON U. CIV. RTS. L.J. 1, 8 (1993). For less sophisticated versions of this argument, see Dailey, *supra* note 380 (defending the stereotype of the gay child molester on the grounds that “[p]edophiles are invariably male” and “[s]ignificant numbers of victims are male”); and Herek, *supra* note 205, at 133 n.2 (citing a similar argument made by Paul Cameron).

be an adult, but merely of the same sex.”³⁹⁴ He acknowledges that not every man who molests boys is a “homosexual.”³⁹⁵ He claims, however, that if a man is “fixated” on molesting boys, then he should be classified as a “homosexual,” albeit a “homosexual pedophile.” Citing a 1978 study finding that “fixated” pedophiles “show[ed] a slight preference for boys over girls,”³⁹⁶ Donovan argues that the stereotype of the gay child molester has empirical support.

Once Donovan concedes the distinction between homosexuality and pedophilia, however, his concerns about “fixated” pedophiles are no longer relevant to the debate over gay and lesbian parenthood. Even if male pedophiles showed a slight preference for molesting boys, this fact would tell us nothing about openly gay adult males—men who are sexually attracted to other men. The point holds true for all gay men, but it is no less true for gay fathers in custody and visitation cases. Although studies have found that a boy is most likely to be molested by his father, stepfather, or his mother’s boyfriend, they have not found that such offenders are more likely to be gay than heterosexual.

5. *Implications: The Role of Empirical Studies in Sexual Abuse Cases*

There are reasons to think that arguments based on an awareness of the parent’s gender and the child’s gender may have been useful in some custody and visitation cases. As previously mentioned, in *J.L.P.(H.) v. D.J.P.* (Missouri 1982),³⁹⁷ the father’s psychological experts invoked all of the legal scholarship’s customary responses to the stereotype of the gay child molester. Both experts argued that “most child molestation” was committed by “adult heterosexual males,” without comparing the incidence of child sexual abuse in heterosexual and gay male populations.³⁹⁸ One expert compared the number of “heterosexual” and “homosexual” offenses—by which he meant different-sex and same-sex offenses—and he even claimed that “child molestation was approximately 95% heterosexual,”³⁹⁹ without acknowledging the significance of the perpetrator’s gender. Neither expert explained the distinction between

394. Donovan, *supra* note 393, at 16.

395. *Id.* at 14.

396. See Groth & Birnbaum, *supra* note 388, at 175. There are a number of specific methodological problems with the Groth and Birnbaum study, and there are a number of sampling problems with child sexual abuse studies in general. See Jenny, Resler & Poyer, *supra* note 372, at 44. More recent studies have resolved some of these shortcomings, and they have not shown any support for the finding that male pedophiles show “a slight preference for boys over girls.” Groth & Birnbaum, *supra* note 388, at 175; see, e.g., Jenny, Resler & Poyer, *supra* note 372, at 44; Spencer & Dunklee, *supra* note 388, at 135. Yet even if we put aside our reservations about a thirty-year-old study that has not been replicated, we can still see that Donovan’s conclusion from the Groth and Birnbaum study is not logically sound.

397. 643 S.W.2d 865 (Mo. Ct. App. 1982).

398. *Id.* at 867.

399. *Id.*

homosexuality and pedophilia or the related distinction between the perpetrator's sexual orientation and the victim's gender.

The court's rejection of the expert testimony was a classic statement of the stereotype of the gay child molester, which exploited each of the oversights made by the experts:

Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor *boys* by adult *males* is not as uncommon as the psychological experts' testimony indicated. A few minutes research discloses the following appellate decisions involving such molestation. [The court cites seven cases reported between 1957 and 1978.] It may be that *numerically* instances of molestation occur with more *frequency* between heterosexual males and female children, but given the statistical *incidence* of homosexuality in the population, which the father claims is 5 to 10%, homosexual molestation is probably, on an *absolute* basis, more *prevalent*.⁴⁰⁰

Needless to say, there were a number of flaws in the court's logic, especially the casual citation to seven criminal cases in which men were convicted of sexually abusing boys. First, none of the cited cases involved the crime of incest—a father who had sexually abused his own child.⁴⁰¹ Second, none of the cases involved a man who had identified himself as “gay” or “homosexual,” or even a man who had been described in such terms by the court. Finally, the court's list of seven cases over twenty-two years was one-sided. Because the court did not include a general survey of sexual abuse cases, it did not suggest how often men were convicted of sexually abusing girls during the same period. As a result, the court's list of cases did little to detract from the expert's testimony that as a general matter, “most child molestation occurs between adult heterosexual males and female children.”⁴⁰² More fundamentally, the court's argument conflates the perpetrator's sexual orientation with the victim's gender. By comparing the incidence of men sexually abusing boys with the incidence of male homosexuality, the court presumes that all men who sexually abuse boys are “homosexual.”⁴⁰³

Putting these problems aside, however, the court's response to the expert testimony was not groundless. When we look closely, we see that even the court's infamous remark about “the molestation of minor boys by adult males”⁴⁰⁴ had some statistical merit. By testifying that “child molestation was approximately 95% heterosexual,”⁴⁰⁵ one of the experts suggested that

400. *Id.* at 869 (emphasis added).

401. One of the cases, *State v. Counts*, 572 S.W.2d 885 (Mo. App. Ct. 1978), involved a stepfather who had sexually abused his stepson. *Id.* at 886. In the remaining cases, there was no familial relationship (or at least, no reference to a familial relationship) between the victim and the offender.

402. *J.L.P.(H.)*, 643 S.W.2d at 867.

403. *Id.*

404. *Id.* at 869.

405. *Id.* at 867.

“homosexual molestation was rare”⁴⁰⁶—presumably about 5%. This was misleading. In the most recent study, for example, 22% of sexual abuse offenses involved allegations of same-sex contact, the vast majority between men and boys.⁴⁰⁷ What the experts failed to observe, however, was that in this study, less than 1% of the perpetrators were identified as potentially “homosexual.”⁴⁰⁸

The court’s strongest objection, however, was the proportionality claim, which has not yet been answered by advocates for gay and lesbian parenthood. As the court correctly observed, the claim that most child molesters are heterosexual men is not convincing, because most child molesters are men and most men are heterosexual. Because the experts did not compare the proportionality of abuse in the two populations,⁴⁰⁹ they left themselves vulnerable to the court’s infamous response.

In the legal scholarship on gay and lesbian parenthood, *J.L.P.(H)* is notorious. In the twenty-five years since it was published, it has been cited in over fifty law review articles and several casebooks, typically for the shocking assertion that “every . . . judge knows” about “the molestation of minor boys by adult males.”⁴¹⁰ Like others, I regard the court’s claim as abhorrent. Like others, I squarely reject the notion that gay men are more likely than others to sexually abuse children or that by definition, any man who sexually abuses a boy is “homosexual.” My concern is that no one has actually refuted the court’s notorious claim in the twenty-five years since the case was published. We have had answers at our disposal, but we have been burdened by our gender-blind framework. Operating within this framework, we have failed to articulate a compelling response to the stereotype of the gay child molester.

C. *The Sexuality of Gender Development Stereotypes*

Unlike HIV and sexual abuse stereotypes, recruiting and role modeling stereotypes are not ghosts from our past. In today’s cases, the battle over gay and lesbian parenthood is most often fought in the field of sexual

406. *Id.*

407. Jenny, Resler & Poyer, *supra* note 372, at 42 tbl.1 (finding that in 269 cases of alleged child sexual abuse, 60 involved same-sex conduct, including 42 involving male-male contact, 8 involving female-female contact, and 10 involving offenders of both genders).

408. *Id.* at 44.

409. The court’s characterization of the expert testimony is accurate. *See* Transcript of Admin. Hearing, *J.L.P.(H) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982) (No. DR80-7186). On direct examination by the father’s lawyer, the first expert testified that “the vast majority [of abusers] are heterosexual males and the victims are adults and children, female.” *Id.* at 43. On cross examination by the mother’s lawyer, the same expert testified that “[m]ost molesting occurs within the nuclear family and it occurs mostly between heterosexual males and female children.” *Id.* at 51. Finally, on direct examination by the father’s lawyer, the second expert testified that “child molestation is almost exclusively heterosexual, approximately, oh, ninety-five percent heterosexual . . . Homosexual molestation is very rare.” *Id.* at 61.

410. *J.L.P.(H)*, 643 S.W.2d at 869.

development.⁴¹¹ In the last ten years, recruiting and role modeling stereotypes have appeared in ten reported cases, including one case published only last year.⁴¹²

Legal scholars have responded to sexual development stereotypes in two ways that should both sound familiar: (1) We have claimed that “the vast majority of lesbians and gay men were raised by heterosexual parents”⁴¹³ and (2) we have cited a growing body of empirical studies on the sexual development of children raised by gay and lesbian parents.⁴¹⁴ In this literature, “[v]irtually all of the published research claims to find no differences in the sexuality of children reared by lesbigay parents and those raised by nongay parents,”⁴¹⁵ and more generally, no “significant differences” of any kind.⁴¹⁶ In a recent review of the empirical data, the American Academy of Pediatrics reported that “[n]o differences have been found in the gender identity, social roles, or sexual orientation of adults who had a divorced homosexual parent (or

411. J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 *DEVEL. PSYCHOL.* 124, 124 (1995) (“[A] primary focus of expert testimony in custody cases has been the impact of being reared by a gay or lesbian parent on children’s sexual orientations.”); Stacey & Biblarz, *supra* note 304, at 163 (describing the “sexual behavior and identity” of children as “the most politically sensitive issue in the debate” over gay and lesbian parenthood).

412. See *Cook v. Cook*, 965 So. 2d 630, 633-34 (La. Ct. App. 2007); *In re Marriage of Collins*, 51 P.3d 691, 693 (Or. Ct. App. 2002); *Ex parte H.H.*, 830 So. 2d 21, 36 n.11 (Ala. 2002) (Moore, C.J. concurring); *S.B. v. L.W.*, 793 So. 2d 656, 660-61 (Miss. Ct. App. 2001); *Jacoby v. Jacoby*, 763 So. 2d 410, 415 (Fl. Ct. App. 2000); *Price v. Price*, No. E1999-00102-COA-R10-CV, 2000 WL 704596, at *4 (Tenn. Ct. App. May 31, 2000); *Eldridge v. Eldridge*, No. 03A01-9904-CH-00146, 1999 WL 994099, at *1 (Tenn. Ct. App., Oct. 27, 1999); *Weigand v. Houghton*, 730 So. 2d 581, 591-92 (Miss. 1999) (McRae J., dissenting); *Ex parte J.M.F.*, 730 So. 2d 1190, 1195-96 (Ala. 1998); *Marlow v. Marlow*, 702 N.E.2d 733, 736-37 (Ind. Ct. App. 1998).

413. Ball & Pea, *supra* note 378, at 287; see Elovitz, *supra* note 385, at 213 (“The fact that most lesbian and gay people were raised by heterosexual parents demonstrates that, as they mature, children develop sexual orientation independently from their parents.”); Flaks, *supra* note 358, at 369 (“Clearly, the vast majority of lesbians and gay men are raised by heterosexual parents”); Kari E. Hong, *Parents Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 *CAL. W. L. REV.* 1, 57 (2003) (“[T]he claim that a parent transmits her sexual orientation to her child defies common sense. The fact that most gay and lesbian individuals were raised by heterosexual parents demonstrates the fallacy behind the asserted syllogism that heterosexual parents raise children who develop into heterosexual adults.”); Kathryn Kendall, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 *FAM. ADVOC.* 21, 24 (1997) (“Most lesbians and gay men were raised in heterosexual households and are the product of heterosexual parents.”); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 *IND. L.J.* 623, 651 n.158 (1996) (“Most lesbians and gay men are the children of heterosexual parents.”); Philip S. Gutis, *Homosexual Parents Winning Some Custody Cases*, *N.Y. TIMES*, Jan. 21, 1987, at C1 (“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.” (quoting Interview of Gregory M. Herek, Chairman of Am. Psychol. Ass’n Comm. on Lesbian and Gay Concerns)); see also Jennifer Ellis Lattimore, *Life After Lawrence v. Texas: An Examination of the Decision’s Impact on a Homosexual Parent’s Right to Custody of His/Her Own Children in Virginia*, 15 *GEO. MASON U. CIV. RTS. L.J.* 105, 142-43 (2004) (“Studies regarding offspring of gay and lesbian parents show that the vast majority of these children were heterosexual.”).

414. Stacey & Biblarz, *supra* note 304, at 160.

415. *Id.* at 163.

416. *Id.* at 162.

parents), compared with those who had divorced heterosexual parents.”⁴¹⁷ As both sides of the debate have observed, the “unanimity” among scholars, lawyers, and activists on this subject has been truly “remarkable.”⁴¹⁸

In this context, my concern is not that the legal academy’s framework has been blind to the gender of homophobia. This is undoubtedly true: In the literature on gay and lesbian parenthood, there has been no attempt to distinguish between sexual development stereotypes about fathers and mothers or sons and daughters. In this context, however, these oversights are less problematic because they do not seem to compromise the legal case for gay and lesbian parenthood.⁴¹⁹

For present purposes, my concern is that the legal academy’s framework has been blind to the homophobia of gender—specifically, to the conflation of stereotypes about sexual development and gender development, and generally, to the underlying conflation of sexual orientation and gender. Because we have ignored the conventional associations among stereotypes about “queers, sissies, dykes, and tomboys,”⁴²⁰ we have imposed an arbitrary limit on the scope of our arguments. Even as we defend the possibility that the children of gay and lesbian parents may grow up to be “different,” we refuse to consider the possibility that they may grow up to be gay men or lesbians.⁴²¹

1. Lynn Wardle: *The Attack on the “No Differences” Paradigm*

Since the late 1990s the “no differences” paradigm has come under attack from opponents of gay and lesbian parenthood.⁴²² In *The Potential Impact of Homosexual Parenting on Children*, Lynn Wardle argued that the legal scholarship on gay and lesbian parenthood was written in a “propagandistic style” and based on “very unreliable” body of empirical studies, which he claimed were tainted by methodological and analytical flaws.⁴²³ Most significantly, Wardle claimed that pro-gay researchers and advocates have misrepresented the data produced by studies of gay and lesbian parenthood.⁴²⁴ Properly understood, he argued, the data “provide[] a basis for serious concerns

417. Ellen C. Perrin & Comm. on Psychosocial Aspects of Child and Fam. Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342 (2002).

418. Wardle, *supra* note 243, at 837, 844; *see also* Stacey & Biblarz, *supra* note 304, at 160 (“This body of research, almost uniformly, reports findings of no notable differences between children reared by heterosexual parents and those reared by lesbian and gay parents.”).

419. *See infra* note 517 (explaining why the gender-blindness of Carlos Ball’s argument against gender development stereotypes, although theoretically inaccurate, does not have any strategic implications for advocates of gay and lesbian parenthood).

420. Valdes, *supra* note 80, at 3.

421. *See infra* Part V.C.5.

422. *See, e.g.*, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 999 (Mass. 2003) (Cordy, J., dissenting); *Ex parte* H.H., 830 So. 2d 21, 37 (Ala. 2002) (Moore, C.J., concurring); Wardle, *supra* note 243, at 838; Maggie Gallagher, *The Science of Gay Parenting*, N.Y. POST, Mar. 30, 2000, at 3.

423. Wardle, *supra* note 243, at 838, 844-52.

424. *Id.* at 850.

about potential detrimental effects upon children raised by gay or lesbian parents.”⁴²⁵

Like most of today’s opponents of gay and lesbian parenthood, Wardle was chiefly concerned with the potential impact of gay and lesbian parents on children’s sexual development: “The most obvious risk to children from their parents’ homosexual behavior suggested by the current studies relates to the sexual development of the child. Both theory and empirical studies indicate the potential that disproportionate percentages of children raised by homosexual parents will develop homosexual interests and behaviors.”⁴²⁶

To bolster his argument, Wardle expressed several concerns about the findings of gay and lesbian parenting studies. To a remarkable extent, he shared the same concerns expressed by litigants, experts, and judges in custody and visitation cases. In his view, one study indicated that more than 10% of the “sons” of “gay men” were “gay,”⁴²⁷ another suggested “a link between a daughter’s sexual behavior and fantasy and her mother’s homosexual behavior,”⁴²⁸ and yet another reported that “boys raised by homosexual mothers may have a lower self-image regarding masculinity.”⁴²⁹ In other words, Wardle expressed specific concerns about (1) the sexual development of sons raised by gay fathers; (2) the sexual development of daughters raised by lesbian mothers; and (3) the gender development of sons raised by lesbian mothers. He did not, by contrast, express any developmental concerns about daughters raised by gay fathers. Like other opponents of gay and lesbian parenthood, Wardle invoked the literature on “fatherless” families, comparing the children of lesbian mothers with the children of single mothers.⁴³⁰

2. *Judith Stacey and Timothy Biblarz: Acknowledging Differences*

In the ten years since it was published, Wardle’s article has received mixed reviews. While the article has been cited favorably by judges in custody and adoption cases,⁴³¹ it has been rejected by most legal scholars, who overwhelmingly support the case for gay and lesbian parenthood.⁴³² For present purposes, however, the reaction of two sociologists is most relevant. In 2001, Judith Stacey and Timothy Biblarz published an article in the *American*

425. *Id.* at 852.

426. *Id.*

427. *Id.* at 849.

428. *Id.* at 853.

429. *Id.* at 854.

430. *Id.* at 859-60 (quoting BLANKENHORN, *supra* note 305, at 25).

431. *See, e.g., In re Adoption of M.J.S.*, 44 S.W.3d 41, 71-72 (Tenn. Ct. App. 2000) (Tomlin, Jr., J., dissenting) (describing Wardle’s article as “[a] most enlightening and judicially balanced law review article”); *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 & n.4 (Ala. 1998) (noting Wardle’s “criticism of the methods by which the results of [gay and lesbian parenting] studies are reached, based upon substantial methodological and analytical flaws”).

432. *See, e.g., Ball & Pea, supra* note 378, at 253.

Sociological Review, in which they asked, *(How) Does the Sexual Orientation of Parents Matter?*⁴³³ The answer, they argued, is that the sexual orientation of parents matters “somewhat more” than pro-gay researchers have acknowledged.⁴³⁴

The article offers profound insight into the ways that ideology and fear have shaped the popular, academic, and legal debates over gay and lesbian parenthood, so it is worth describing Stacey’s and Biblarz’s argument in some detail. From the start, the authors emphasized that they were sympathetic to the case for gay and lesbian parenthood, and more generally, to the case for the equal treatment of gay men, lesbians, and bisexuals.⁴³⁵ They were sharply critical of Wardle’s arguments against gay and lesbian parenthood, including his analogy between lesbian and “fatherless” families.⁴³⁶

Stacey and Biblarz reluctantly agreed, however, with Wardle’s suggestion that “ideological pressures constrain intellectual development in this field.”⁴³⁷ “In our view,” they explained, “it is the pervasiveness of social prejudice and institutionalized discrimination against lesbians and gay men that exerts a powerful policing effect on the basic terms of psychological research and public discourse on the significance of parental sexual orientation.”⁴³⁸ “Because anti-gay scholars seek evidence of harm,” they concluded, “sympathetic researchers defensively stress its absence.”⁴³⁹

After surveying the empirical data on gay and lesbian parenthood, Stacey and Biblarz reported a controversial result: They claimed that researchers have “downplayed” evidence that the children of gay and lesbian parents were actually different than the children of heterosexual parents, out of legitimate fears about how such evidence would be used by opponents of gay and lesbian parenthood.⁴⁴⁰ Moreover, the authors claimed that researchers have been “hesitant to theorize” about how the “no differences” paradigm could be squared with any of the prevailing theories of sexual and gender development.⁴⁴¹ Based on these concerns, the authors argued for a paradigm shift in empirical studies of gay and lesbian parenthood. In place of “a hierarchical model,” they proposed a “pluralist” model, in which researchers refrain from passing judgment on the sexual orientation and gender identity of children and parents.⁴⁴²

433. Stacey & Biblarz, *supra* note 304, at 159.

434. *Id.* at 167.

435. *Id.* at 160.

436. *Id.* at 161-62.

437. *Id.* at 160.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 164.

To analyze the empirical data, Stacey and Biblarz gathered twenty-one studies of gay and lesbian parenthood published between 1981 and 1998, which they considered the “best equipped to address sociological questions about how parental sexual orientation matters to children.”⁴⁴³ After conducting an independent review, they found statistically significant differences concerning the sexual and gender development of the children of gay and lesbian parents—differences that they claimed had been downplayed and ignored by the researchers who conducted the studies.

The key findings were related to “children’s gender preferences and behavior” and “children’s sexual preferences and behavior.”⁴⁴⁴ With respect to children’s gender development, Stacey and Biblarz relied on five studies of the children of lesbian mothers. Analyzing these studies, they found that the daughters of lesbian mothers “more frequently dress, play, and behave in ways that do not conform to sex-typed cultural norms” and held “higher aspirations to nontraditional gender occupations . . . such as doctor, lawyer, engineer, and astronaut.”⁴⁴⁵ With respect to sons of lesbian mothers, the authors found mixed results. “On some measures, like aggressiveness and play preferences,” they found that “the sons of lesbian mothers behave in less traditionally masculine ways than those raised by heterosexual single mothers.”⁴⁴⁶ “[O]n other measures, such as occupational goals and sartorial styles,” they did not find any statistically significant differences between the two groups of sons.⁴⁴⁷

With respect to children’s sexual development, Stacey and Biblarz relied upon two “intergenerational” studies—one study of the adult children of lesbian mothers and one study of the adult sons of gay fathers.⁴⁴⁸ Of the two studies, the authors emphasized the first, which they regarded as one of the best designed of the twenty-one studies that they reviewed.⁴⁴⁹

Reviewing the first study, Stacey and Biblarz found that the children of lesbian mothers were more likely to engage in homosexual behavior than the children of heterosexual mothers, and even when they had not engaged in homosexual behavior, they were more likely to consider the possibility of doing so.⁴⁵⁰ These children were not, however, more likely to identify as gay, lesbian,

443. *Id.* at 167.

444. *Id.* at 168-71.

445. *Id.* at 168.

446. *Id.*

447. *Id.*

448. *Id.* at 171; *see also id.* at 169 tbl.1.

449. *Id.* at 170. The second study observed only the sons of gay fathers, it polled them only in adulthood, and it observed only whether they identified as heterosexual, gay, or bisexual. *See* Bailey et al., *supra* note 411, at 124. By contrast, the first study observed the children of both heterosexual and lesbian mothers, followed them from childhood into adulthood, and observed a much broader range of data—whether they had thought about engaging in homosexual behavior, whether they actually engaged in homosexual behavior, and whether they identified as heterosexual, gay, lesbian, or bisexual. *See* FIONA L. TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT* (1998).

450. Stacey & Biblarz, *supra* note 304, at 170.

or bisexual adults.⁴⁵¹ Reviewing the second study, the authors found that the adult sons of gay fathers reported “a moderate degree of parent-to-child transmission of sexual orientation.” These sons, in other words, were more likely than others to identify as gay or bisexual adults.⁴⁵²

With respect to other aspects of child development, Stacey and Biblarz generally confirmed the other researchers’ conclusions that “no significant differences” existed in the “self-esteem,” “psychological well-being,” and cognitive ability of the children of gay and lesbian parents.⁴⁵³ “The few significant differences found,” they added, “actually tend to favor children with lesbian mothers.”⁴⁵⁴ Based on this review of the empirical data, they argued: “Most of the differences in the findings . . . cannot be considered deficits from any legitimate public policy perspective. They either favor the children with lesbian parents . . . or represent ‘just a difference’ of the sort democratic societies should respect and protect.”⁴⁵⁵ For these reasons, they concluded, “there is no evidentiary basis for considering parental sexual orientation in decisions about children’s ‘best interest.’”⁴⁵⁶

3. *Carlos Ball: Defending Gender Development Differences*

The Stacey and Biblarz article caused quite a stir in debates over gay and lesbian parenthood. It was widely reported in the popular press when it was published,⁴⁵⁷ and it has been frequently quoted in cases, casebooks, and law review articles in subsequent years.⁴⁵⁸

The legal academy’s response to the article has been a case study in the politics of gay and lesbian parenthood, and a testament to the article’s claim that “ideological pressures constrain intellectual development in this field.”⁴⁵⁹

451. *Id.* at 171. In addition, the authors observed yet another difference between daughters and sons, which was related to the conventional stereotype that girls raised without fathers are likely to be “promiscuous.” See *supra* Part III.D (describing conventional stereotype of “fatherless” girls). They found that the daughters of lesbian mothers were “more sexually adventurous and less chaste, whereas the sons of lesbians evince the opposite pattern—somewhat less sexually adventurous and more chaste.” Stacey & Biblarz, *supra* note 304, at 171. “In other words,” they explained, “once again, children (especially girls) raised by lesbians appear to depart from traditional gender-based norms.” *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 177.

456. *Id.* at 176.

457. See, e.g., Bettina Boxall, *Sociologists Challenge Data on Gay Parenting Families*, L.A. TIMES, Apr. 27, 2001, at B1; Erica Goode, *A Rainbow of Difference in Gays’ Children*, N.Y. TIMES, July 17, 2001, at F1; Bill Hoffman, *Study on Kids of Gay Parents Stirs a Flap*, N.Y. POST, June 9, 2001, at 18.

458. A Westlaw search indicates that the Stacey and Biblarz article has been cited in two same-sex marriage cases, one adoption case, one custody case, and over ninety law review articles. In addition, it has been cited and excerpted in several leading casebooks on sexual orientation and family law. See, e.g., ESKRIDGE & HUNTER, *supra* note 57, at 1186-88; RUBENSTEIN, BALL, & SCHACTER, *supra* note 42, at 731-36; WEISBERG & APPLETON, *supra* note 51, at 826.

459. Stacey and Biblarz, *supra* note 304, at 160.

Opponents like Wardle have welcomed the article, which they cite as conclusive proof that gay men and lesbians should not be granted custody, visitation, adoption, or marriage rights.⁴⁶⁰ Among advocates, the reaction has been guarded. In law review articles, legal scholars have generally downplayed the article's finding that there were "differences" between the children of gay and lesbian parents and the children of heterosexual parents. When they refer to the article, they cite only the conclusion that there were "no differences" that could be considered "deficits."⁴⁶¹ They do not acknowledge that the authors found significant differences in children's gender and sexual development at all.

To date, only one scholar has squarely confronted the legal implications of the article's controversial findings. This exceptional scholar is Carlos Ball, the legal academy's chief critic of Lynn Wardle's arguments against gay and lesbian parenthood. In *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, Ball considered whether the findings presented by Stacey and Biblarz could justify laws prohibiting adoptions by gay and lesbian couples.⁴⁶²

Rather than insisting that the differences observed by Stacey and Biblarz were not significant, Ball acknowledged that they marked a "turning point" in the debate over gay and lesbian parenthood.⁴⁶³ "As a practical matter," he conceded, "it is not likely that . . . state policy makers, judges, or the opponents of lesbian and gay families will soon view differences associated with gender and sexual preferences and behavior as irrelevant" to determinations of children's best interests.⁴⁶⁴ "It is therefore necessary," he resolved, "to explore

460. In one form or another, Lynn Wardle has invoked the Stacey and Biblarz article in seven articles in the past four years. See Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 293 (2005); Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbigay" Parenting*, 23 QUINNIPIAC L. REV. 541, 550 (2004); Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 561 n.1 (2005); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 250 (2006); Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 512 n.1 (2006); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 364 (2004); Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 378 (2003). Wardle's argument has been picked up by judges in two highly publicized cases. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1000 n.29 (Mass. 2003) (Cordy, J. dissenting); *Ex parte H.H.*, 830 So. 2d 21, 37 (Ala. 2002) (Moore, C.J., concurring).

461. See, e.g., Cruz, *supra* note 80, at 1083 n.425 (quoting the claim of Stacey and Biblarz that "most differences . . . cannot be considered deficits from any legitimate public policy perspective"); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2186 n.625 (2002) (suggesting that Stacey and Biblarz found no "malignant impact"); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2246 (2005) (suggesting that Stacey and Biblarz found "no difference in adverse outcomes"); see also RUBENSTEIN, BALL & SCHACTER, *supra* note 42, at 731 ("Most of the responses to Wardle continued to insist that children raised by gay parents were no different than those raised by heterosexuals.").

462. Ball, *supra* note 269, at 692.

463. *Id.* at 692, 697-705.

464. *Id.* at 702.

some of the policy and legal implications of the differences noted by Stacey and Biblarz.⁴⁶⁵

For the sake of argument, Ball assumed that the article's findings about children's "gender related differences" were not only "plausibl[e]" but would be "confirm[ed]" by future studies.⁴⁶⁶ In other words, he assumed that when children are raised by gay and lesbian parents, they are less likely to conform to traditional gender roles.⁴⁶⁷ "Daughters of lesbians and gay men," he conceded, "may be more interested in 'masculine' clothing or in careers that have traditionally been the prerogative of men," and "the sons of lesbians and gay men may be less interested in sports or more interested in nurturing."⁴⁶⁸

Ball argued, however, that even if these findings were confirmed, they could not provide a legitimate basis for laws prohibiting adoptions by gay and lesbian couples, because laws based on gender stereotypes violate the Equal Protection Clause.⁴⁶⁹ Quoting the Supreme Court's decision in *United States v. Virginia* (U.S. 1996),⁴⁷⁰ Ball reasoned that laws cannot be justified by "fixed notions concerning the roles and abilities of males and females" or "overbroad generalizations about the different talents, capacities, or preferences of males and females."⁴⁷¹

In light of the "no differences" paradigm of debates over gay and lesbian parenthood, this is a refreshing and pathbreaking argument. Although Ball's claims were specifically tailored to adoption laws, they could be extended to custody and visitation cases with one minor adjustment: In custody and visitation cases, it is not a statute that is based on gender stereotypes but a court's determination of a child's best interests.⁴⁷² This kind of argument could

465. *Id.*

466. *Id.* at 704.

467. *Id.*

468. *Id.* at 723.

469. *Id.* at 742. Ball articulates this argument on two alternative grounds. First, he argues that laws prohibiting adoptions by gay and lesbian couples discriminate on the basis of sex, and as a result, they should be subject to "heightened scrutiny" under the Equal Protection Clause. *Id.* at 730-40. Second, he argues that even if such laws are not subject to heightened scrutiny, they should not pass "rational basis review," because the enforcement of gender stereotypes is "a per se illegitimate objective." *Id.* at 740-47. In both cases, Ball's conclusions are based on the Supreme Court's holding in *United States v. Virginia*. See *id.* at 733, 742 (quoting *United States v. Virginia*, 518 U.S. 515, 533, 541 (1996)).

470. 518 U.S. 515 (1996).

471. Ball, *supra* note 269, at 733, 742 (quoting *Virginia*, 518 U.S. at 533, 541).

472. In the adoption context, Ball argues that statutes prohibiting adoptions by gay and lesbian couples discriminate on the basis of sex, insofar as they permit a man to adopt with a woman but prohibit a man from adopting with another man, and vice-versa. *Id.* at 731. This argument is known as the "facial" sex discrimination argument, and it is frequently advanced in same-sex marriage cases. See Widiss, Rosenblatt & NeJaime, *supra* note 10, at 462.

In custody and visitation cases, courts apply the best interests standard. Because the best interests standard does not explicitly discriminate on the basis of sex, it is not vulnerable to facial sex discrimination claims. In some cases, however, gay and lesbian parents could argue that the standard was applied in a discriminatory manner. When judges rely on explicit stereotypes about the "gender identity" and "masculinity" of boys, it should not be too difficult to prove that decisions are based on gender stereotypes.

be especially useful for lesbian mothers raising sons, who so often confront stereotypes about the formation of “gender identity” and the adoption of “masculine” roles.⁴⁷³ Rather than conceding that boys should be “masculine”—“no different” than boys raised by “masculine” fathers—mothers could insist that the state has no legitimate interest in the production of “masculine” boys.⁴⁷⁴

4. *Carlos Ball: Ignoring Sexual Development Differences*

In one respect, however, Ball’s argument is surprisingly limited: It is expressly confined to stereotypes about children’s gender development; it does not address stereotypes about children’s sexual development at all.

In reviewing the Stacey and Biblarz article, Ball drew a sharp distinction between the article’s findings on “gender behavior and preferences” and “sexual behavior and preferences.”⁴⁷⁵ For the sake of argument, he was willing to concede the empirical controversy over children’s gender development, so that he could “focus fully on the implications of difference in this area, and in particular on the effects of such difference on the equality claims [of] lesbian and gay parents.”⁴⁷⁶ He was not, however, willing to concede the empirical controversy over children’s sexual development—not even for the sake of argument.

Ball argued that the evidence on gender development had reached “a minimum threshold of plausibility,” but he claimed that the evidence on sexual development was not “anywhere near” such a “minimum threshold.”⁴⁷⁷ On this

Although the facial sex discrimination has long been a darling of legal scholars, it has experienced a string of defeats in recent same-sex marriage cases. *Id.* at 468, 474-45. Recently, some scholars have proposed that in same-sex marriage cases, “the sex discrimination argument may be strengthened by grounding the facial sex discrimination argument in a discussion of sex stereotypes.” *Id.* at 464.

473. *See supra* Part III.C.3 (citing *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995); *Pleasant v. Pleasant*, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993); *Blew v. Verta*, 617 A.2d 31, 36 n.2 (Pa. Super. Ct. 1992); *Lundin v. Lundin*, 563 So. 2d 1273, 1275 (La. Ct. App. 1990); *M.J.P. v. J.G.P.*, 640 P.2d 966, 968-69 (Okla. 1982); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981)).

474. In Ball’s article, he makes both moral and legal arguments against laws based on gender stereotypes. In moral terms, Ball argues that such laws violate the principles of “equality” and “parental autonomy,” which he claims are “reflected in American law.” Ball, *supra* note 269, at 705-24. In one respect, Ball’s moral argument would be even stronger in custody and visitation cases than in traditional adoption cases. In custody and visitation cases, the child already has a relationship with the gay or lesbian parent. In such circumstances, parents have a right to direct children’s “upbringing,” so Ball’s principle of “parental autonomy” would be supported by the Due Process Clause. *See Troxel v. Granville*, 530 U.S. 57, 72 (2000) (plurality) (recognizing a parent’s “fundamental right to make decisions regarding the care, custody, and control” of his or her child); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

475. Ball, *supra* note 269, at 699-700, 702 (quoting Stacey & Biblarz, *supra* note 304, at 168).

476. *Id.* at 704-05.

477. *Id.* at 702.

ground, he refused to entertain the notion that the children of gay and lesbian parents might be more likely to grow up to be gay and lesbian adults.⁴⁷⁸

Ball provided two reasons for distinguishing so sharply between the evidence on gender development and sexual development. Above all, he emphasized that the evidence on sexual development was based on “only one study” and contradicted by “many studies,” whereas the evidence on gender development was “found in multiple studies.”⁴⁷⁹ He warned that “[w]e should be careful before we reach any conclusions, even tentative ones, regarding the transmissibility of sexual orientation from parents to children based on only one study of roughly twenty-five children of lesbian mothers.”⁴⁸⁰ “[W]hatever conclusions are reached from only one study,” he continued, “are likely to be so speculative so as to be both useless and dangerous.”⁴⁸¹ In addition, he noted that “the vast majority of lesbians and gay men were raised by heterosexual parents.”⁴⁸² In his view, “anyone who wants to argue plausibly that parents influence the sexual orientation of their children must in some way address [that] obvious and seemingly relevant fact.”⁴⁸³

5. Like Parent, Like Child: A New Front in the Fight for Gay and Lesbian Parenthood

I respectfully disagree. While I applaud Ball for taking up the subject of children’s gender development, I do not believe that he has identified compelling reasons to withhold argument on the subject of children’s sexual development. I believe that the underlying theory is too plausible, the underlying stereotypes are too often conflated, and the stakes for gay and lesbian parents are too significant to be ignored.

This is not the place, and I am not the person, to resolve a long-standing dispute over the empirical data on gay and lesbian parenthood. While I have a few qualms about Ball’s view of the data,⁴⁸⁴ I will not dwell on the empirical

478. *Id.* at 703.

479. *Id.* at 702, 703.

480. *Id.* at 703.

481. *Id.*

482. *Id.*

483. *Id.*

484. I am most concerned with Ball’s treatment of the second study relied upon by Stacey and Biblarz, which observed “evidence of parent-to-child transmission of sexual orientation” between gay fathers and adult sons. Stacey & Biblarz, *supra* note 304, at 171 (citing Bailey et al., *supra* note 411). As we saw in Part III, the number one fear expressed by litigants, experts, and judges in custody and visitation cases is that gay fathers will raise gay sons. *See supra* Part III.A tbl.1. Because the second study provides specific support for this common stereotype, it seems too significant to be ignored.

In the text of his article, Ball repeatedly claims that the evidence on sexual development was based on “only one study” and contradicted by “many studies,” whereas the evidence on gender development was “found in multiple studies.” Ball, *supra* note 269, at 702-03. As he acknowledges in his footnotes, however, the evidence on sexual development cited by Stacey and Biblarz was actually based on two studies—one study of the children of lesbian mothers and one study of the sons of gay fathers. *See id.* at 703 n.71; *see also* Stacey & Biblarz, *supra* note 304, at 171.

controversy in this Article. I will, however, note a few theoretical problems with Ball's refusal to confront the underlying premise of recruiting and role modeling stereotypes—the notion that the children of gay and lesbian parents are more likely to become gay and lesbian adults.

The first problem concerns Ball's claim that this premise is not plausible because "the vast majority of lesbians and gay men were raised by heterosexual parents."⁴⁸⁵ This type of argument gets a lot of play in the legal scholarship on gay and lesbian parenthood. For most advocates of gay and lesbian parenthood, this fact is enough to end the debate over sexual development stereotypes by

The lead author of this study, J. Michael Bailey, is admittedly a controversial figure whose work has been questioned by colleagues and LGBT advocates. See, e.g., Robin Wilson, *Northwestern U. Concludes Investigation of Sex Researcher but Keeps Results Secret*, CHRON. HIGHER EDUC., Dec. 1, 2004, available at <http://chronicle.com/daily/2004/12/2004120103n.htm>. Yet Ball's criticisms of the study's findings are not based on the controversy surrounding the lead author; they are based on the merits of the study itself.

In his footnotes, Ball claims that the second study was "at best inconclusive" because "the vast majority . . . of the . . . sons of gay fathers who participated in the study . . . were heterosexual." Ball, *supra* note 269, at 703 n.71. I am not persuaded by Ball's "vast majority" argument. It is similar to the "vast majority" argument addressed in the text, and it falls victim to a similar rejoinder: Most of the sons of gay fathers were heterosexual because most people are heterosexual. The study concluded that nine percent of the sons were gay or bisexual. Bailey et al., *supra* note 411, at 125. Based on this finding, the authors suggested that "the rate of homosexuality in the sons (nine percent) is several times higher than that suggested by the population-based surveys and is consistent with a degree of father-to-son transmission." *Id.* at 126.

More broadly, it is not clear why Ball suggests that the evidence produced by these studies has been contradicted by "many studies." Ball, *supra* note 269, at 702. As Stacey and Biblarz explained, the two studies on which they relied are the only two "intergenerational" studies of the children of gay parents, so they are the only studies that compare the adult sexual orientation of children and parents. In both studies, the authors found some evidence that children's sexual development was influenced by gay or lesbian parents. Stacey & Biblarz, *supra* note 304, at 171.

Ball cites six other studies, see Ball *supra* note 269, at 702 n.70, which he claims have reached different results, but the studies do not seem to support Ball's claims. Most of these studies do not include "control" groups of the children of heterosexual parents, so they cannot support meaningful comparisons between the children of heterosexual and homosexual parents—which is why they were not included in the meta-analysis conducted by Stacey and Biblarz. See Frederick W. Bozett, *Children of Gay Fathers*, in *GAY AND LESBIAN PARENTS* 39 (Frederick W. Bozett ed., 1987); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978); Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544 (1979); Ann O'Connell, *Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 SMITH COLLEGE STUD. IN SOC. WORK 281 (1993). Moreover, some of these studies are vulnerable to the same objections articulated by Stacey and Biblarz: The authors claim to find "no differences," but this conclusion is belied by the data produced by the studies themselves. See, e.g., Bozett, *supra* (finding that 16% of the children of gay fathers self-identified as "gay or bisexual"); Green, *supra* (finding that between 8% and 14% of the children of gay fathers were identified as "homosexual"); Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 23 CHILD PSYCHIATRY & HUM. DEV. 235 (1993) (finding that 27% of the daughters of lesbian mothers self-identified as "asexual" and reported that they "did not want to have children," compared with none of the daughters of heterosexual mothers). In one of these studies, the author explicitly warned that "the sexual orientation of the children was not specifically investigated." Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *HOMOSEXUALITY AND THE FAMILY* 123 (Frederick W. Bozett ed., 1992).

I want to emphasize that I remain agnostic on the question of whether a parent's sexual orientation influences a child's sexual development. Although I am concerned with Ball's view of the data, I do not mean to advance the contrary view. I do not believe that the empirical controversy can be resolved or avoided. I mean to raise the question of how to proceed in the absence of conclusive data.

485. Ball, *supra* note 269, at 703.

itself.⁴⁸⁶ If most gay men and lesbians were raised by heterosexual parents, the logic goes, then there is no reason to think that a parent's sexual orientation would influence a child's sexual development.

This reasoning should sound familiar. It is much like the claim that "most child molesters are heterosexual," and it falls victim to a similar counterargument: Most lesbians and gay men are raised by heterosexual parents because most parents are heterosexual. Opponents of gay and lesbian parenthood do not claim that *all* of the children of gay and lesbian parents will be homosexual or that *all* of the children of heterosexual parents will be heterosexual. They suggest that all other things being equal, *more* of the children of gay and lesbian parents will be homosexual and *more* of the children of heterosexual parents will be heterosexual. Stereotypes are based on generalizations, not absolute claims. As Lynn Wardle writes, "Both theory and empirical studies indicate the potential that *disproportionate percentages* of children raised by homosexual parents will develop homosexual interests and behaviors."⁴⁸⁷ Unless we compare the incidence of homosexuality in children raised by gay and lesbian parents to the incidence of homosexuality in children raised by heterosexual parents—or at least, to the incidence of homosexuality in the general public—then we will not be able to reject sexual development stereotypes on empirical grounds.

What about theoretical grounds? As you may have noticed, Wardle claims that his position is supported by "theory" as well as "empirical studies."⁴⁸⁸ This leads us to the second problem with Ball's rejection of the evidence on sexual development: He has not offered any theory of sexual development that supports it. In this respect, too, Ball's argument is typical of the legal scholarship on this subject. As Stacey and Biblarz have explained, dozens of scholars have claimed to find "no differences" between the sexuality of the children of gay and heterosexual parents, but they have been "hesitant to theorize" how such a lack of differences could be explained.⁴⁸⁹ In all of the arguments made on behalf of gay and lesbian parenthood, no one has attempted to square the "no differences" paradigm with the prevailing wisdom on childhood sexual development.

To make matters worse, Stacey and Biblarz do not believe that such a theory exists:

[I]t is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbian parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents. . . . In fact, the only "theory" of child development we can imagine in which a child's

486. See *supra* note 413.

487. Wardle, *supra* note 243, at 852 (emphasis added).

488. *Id.*

489. Stacey & Biblarz, *supra* note 304, at 162.

sexual development would bear no relationship to parental genes, practices, environment, or beliefs would be an arbitrary one.⁴⁹⁰

While advocates for gay and lesbian parenthood have been ignoring these objections, opponents of gay and lesbian parenthood have been getting a great deal of mileage out of them. In the last five years, Wardle has quoted the above passage five times to support some version of the following statement: “[T]he social science that purports to show ‘no difference’ defies all theories of child development.”⁴⁹¹

Again, this is not the place, and I am not the person, to resolve a long-standing dispute over the etiology of homosexuality. I will, however, take a moment to illustrate some of the theoretical challenges posed by Stacey and Biblarz. To oversimplify for a moment, let us imagine that there are only two theories of homosexual development—“nature” and “nurture.” On the one hand, if homosexuality were influenced by “nature,” then one might reasonably expect some measure of genetic transmission from parent-to-child—perhaps just a predisposition, if not a “gay gene.” On the other hand, if homosexuality were influenced by “nurture,” one might reasonably expect some measure of cultural transmission from parent-to-child—perhaps just a greater willingness to experiment with same-sex behavior, among children who were naturally predisposed.

This “nature”/“nurture” model is too simplistic in many ways. In this context, the most significant problem with this model is that the influence of “nature” is not necessarily genetic.⁴⁹² In spite of the skepticism expressed by Stacey and Biblarz, there may well be some causes of homosexual development that do not depend on a parent’s “genes, practices, environment, or beliefs” after all. It has often been suggested, for example, that male homosexuality may be influenced by elevated fetal androgen levels, which increase as women give birth to multiple sons.⁴⁹³ On this theory, a boy with older brothers would be more likely to become gay than a boy with no older brothers, but the son of

490. *Id.* at 163.

491. Wardle, *Children and the Future of Marriage*, *supra* note 460, at 295; Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, *supra* note 460, at 544; Wardle, *Form and Substance in Parentage Law*, *supra* note 460, at 253; Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, *supra* note 460, at 364; Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, *supra* note 460, at 378.

492. In addition, even if the influence of nature were genetic, the legal consequences of the “nature” model would not be straightforward. On the one hand, if homosexuality were *wholly* determined by genetic transmission from parent to child, then a parent’s homosexuality might actually be *less* relevant in traditional adoption, custody, and visitation cases: Because the child already exists in such cases, any genetic transmission from parent to child has already occurred. On the other hand, if homosexuality were *partially* determined by genetic transmission from parent to child, then a parent’s homosexuality might be *more* relevant: If the state has an interest in raising children to become heterosexual, then courts might be especially unwilling to let gay and lesbian parents raise children who are genetically predisposed to become homosexual.

493. *See, e.g.*, Nicholas Kristof, *Gay at Birth?*, N.Y. TIMES, Oct. 25, 2003, at A19.

a gay father would not be more likely to become gay than the son of a heterosexual father.

Even if such a theory were proved, however, it would not establish that a parent's sexual orientation plays *no* role in the process of sexual development whatsoever. At the end of the day, even Ball concedes that based on our present state of knowledge, "it is not unreasonable to believe that the children of lesbian and gay men would feel freer to explore and affirm same-gender sexual desires."⁴⁹⁴

I agree. Because I am agnostic on the empirical and theoretical questions, I am not willing to insist—as many scholars do—that a parent's homosexuality does not have any influence on a child's sexual development at all. Following in Ball's own footsteps, I would like to explore some of the legal implications of this thought.

Apart from the empirical and theoretical questions, one might wonder whether Ball's reluctance to entertain sexual development stereotypes could be defended on strategic grounds. "[W]hatever conclusions are reached from only one study," Ball warns, "are likely to be so speculative so as to be both useless and dangerous."⁴⁹⁵ Yet in custody and visitation cases, gay and lesbian parents do not have the luxury of avoiding such dangers—at least not by invoking a sharp distinction between stereotypes about gender development and sexual development, as Ball does. As Francisco Valdes has observed, our legal system often conflates sex, gender, and sexual orientation in order to facilitate discrimination against "queers, sissies, dykes, and tomboys."⁴⁹⁶ Because litigants, experts, and judges conflate sexual orientation with gender identity and gender roles,⁴⁹⁷ they conflate sexual development stereotypes with gender development stereotypes, particularly in cases involving boys raised by lesbian mothers. As a result, even as a strategic matter, we cannot pick our battles here. In order to fight gender development stereotypes effectively, we must fight sexual development stereotypes as well.

In custody and visitation cases, the overlap between gender development stereotypes and sexual development stereotypes was nearly perfect. In all but one (7 of 8) of the cases in which parents were subjected to stereotypes about gender development, they were also subjected to stereotypes about sexual development.⁴⁹⁸ In several of these cases, the two concerns were so thoroughly conflated that they were difficult to distinguish from each other.

494. Ball, *supra* note 269, at 703 n.73.

495. *Id.* at 703.

496. Valdes, *supra* note 80.

497. *Cf.* Ball, *supra* note 269, at 705 ("Concerns about gender roles among the children of lesbians and gay men often bleed into issues of gender identity.").

498. *See* Cook v. Cook, 965 So. 2d 630, 633-34 (La. Ct. App. 2007); Pleasant v. Pleasant, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993); Blew v. Verta, 617 A.2d 31, 36 n.2 (Pa. Super. Ct. 1992); Lundin v. Lundin, 563 So. 2d 1273, 1275 (La. Ct. App. 1990); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988); M.J.P. v. J.G.P., 640 P.2d 966, 968-69 (Okla. 1982);

Recall that in *Dailey v. Dailey* (Tennessee 1981),⁴⁹⁹ a psychologist testified that it would be “preferable” to raise Rusty, a four-year-old boy, in “a normal relationship wherein males and females adhere to their roles,” because “homosexuality is a learned trait and it would be very difficult for Rusty to learn and approximate sex role identification from a homosexual environment.”⁵⁰⁰ In *M.J.P. v. J.G.P.* (Oklahoma 1982),⁵⁰¹ a psychiatrist described the “sexual identity” of the mother’s six-year-old boy as “masculine.”⁵⁰² In *Lundin v. Lundin* (Louisiana 1990),⁵⁰³ the court cited a psychologist’s concerns that if a two-year-old boy were raised by his lesbian mother, he may not learn “masculine and female” roles, which the psychologist described as “sex appropriate roles.”⁵⁰⁴ In response to the court’s question about the boy seeing his mother and her partner sharing a bed, the psychologist testified: “I would be concerned if the role models were confused so that a child would not understand or know that *this*”—that is, the mother’s homosexuality—“was not typical or usual or to be expected.”⁵⁰⁵ Finally, in *Pleasant v. Pleasant* (Illinois 1993),⁵⁰⁶ the trial court expressed concerns about a ten-year-old boy’s “sexual orientation” and “gender identity problem,” and the court repeatedly described gay men as “unmasculine.”⁵⁰⁷

The phenomenon is not unique to custody and visitation cases. In *Lofton v. Kearney* (11th Cir. 2004),⁵⁰⁸ the plaintiffs argued that Florida’s law prohibiting adoptions by gay men and lesbians was unconstitutional. In defense of the law, the state claimed that “dual-gender parenting” plays “a vital role . . . in shaping sexual and gender identity and in providing heterosexual role modeling.”⁵⁰⁹ In upholding the law, the district court relied upon the state’s interest in providing “proper gender role modeling”⁵¹⁰ and promoting “proper gender identification,”⁵¹¹ while the Eleventh Circuit relied upon the state’s interest in providing “heterosexual role models.”⁵¹²

In fact, the phenomenon is not even limited to court cases—it comes up often in the scholarship on gay and lesbian parenthood. Lynn Wardle’s work,

Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981). *But see* *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) (expressing gender development stereotypes but not mentioning sexual development stereotypes).

499. 635 S.W.2d 391 (Tenn. Ct. App. 1981).

500. *Id.* at 394.

501. 640 P.2d 966.

502. *Id.* at 968-69.

503. 563 So. 2d 1273.

504. *Id.* at 1275.

505. *Id.* (emphasis added).

506. 628 N.E.2d 633 at 637.

507. *Id.* at 639.

508. *Lofton v. Sec’y of Dept. Children & Fam. Servs.*, 358 F.3d 804 (11th Cir. 2004) (*Lofton II*).

509. *Id.* at 818.

510. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383 (S.D. Fla. 2001).

511. *Id.*

512. *Lofton II*, 358 F.3d at 822.

for example, leaves little question that his concerns about gender development are both linked to and derived from his concerns about sexual development. For Wardle, “the most obvious risk to children from their parents’ homosexual behavior suggested by the current studies relates to the sexual development of the child.”⁵¹³ He has argued at length, in several places, that “children raised by homosexual parents will develop homosexual interests and behaviors.”⁵¹⁴ By contrast, he has spared only two sentences in one article to express concerns about the “masculinity” of boys and the “cross-dressing” of girls, in the midst of a paragraph listing several concerns about the sexual development of children raised by gay and lesbian parents.⁵¹⁵

In light of the ubiquitous conflation of gender development stereotypes with sexual development stereotypes, Ball’s limited response to gender development stereotypes seems likely to fall on deaf ears—especially in cases involving gay fathers raising sons, where sexual development stereotypes are most prevalent.⁵¹⁶ For opponents of gay and lesbian parenthood, concerns about gender development are rarely expressed by themselves, and they are often expressed as synonyms or euphemisms for concerns about sexual development. Because Ball did not notice the link between stereotypes about gender development and sexual development, he imposed an arbitrary limit on the scope of his argument.⁵¹⁷

513. Wardle, *supra* note 243, at 852.

514. *See, e.g., id.* at 850-54.

515. *Id.* at 854-55.

516. *See supra* Part III.A tbl.1.

517. In addition to the problem explained in the text, Ball portrays gender development stereotypes in gender-blind terms, like so many other scholars in this field. In Ball’s view, opponents of gay and lesbian parenthood have expressed the following objections about children’s gender development: (1) “the fear that the sons of lesbians and gay men will be less masculine and more feminine than the sons of heterosexual parents and that the daughters of lesbian and gay men will be less feminine and more masculine than the daughters of heterosexual parents,” Ball, *supra* note 269, at 717; (2) the “argument that male children can best learn from their male parents what it means to be a complete man and a good father and that female children can best learn from their mothers what it means to be a complete woman and a good mother,” *id.* at 716; and (3) “the idea that men as fathers and women as mothers have unique and complementary skills and attributes that are absent whenever a woman tries to father a child and a man tries to mother a child,” *id.* at 710.

When I survey the debates over gay and lesbian parenthood, I do not see this kind of balance between concerns about boys and girls. In arguments against gay and lesbian parenthood—as in the custody and visitation cases—there seem to be much broader, much deeper concerns expressed about the gender development of boys than the gender development of girls. In this respect, anti-gay scholars like Lynn Wardle are similar to experts and judges in custody and visitation cases. On the one hand, Wardle has expressed the sweeping concern that “boys raised by homosexual mothers may have a lower self-image regarding masculinity”; on the other hand, he has expressed the narrower concern that “lesbians . . . disclosed increased cross-dressing among daughters.” Wardle, *supra* note 243, at 854.

The distinction is a subtle one, but it would be familiar to psychologists, because it closely tracks the DSM’s diagnosis of gender identity disorder in childhood. By invoking the image of “unmasculine” boys, Wardle calls to mind a wide range of ways in which boys might deviate from conventional styles of play, dress, behavior, and demeanor. By invoking the image of “cross-dressing” girls, by contrast, Wardle calls to mind a much narrower set of behaviors. In today’s society, girls are not generally regarded as “cross-dressing” unless they insist on wearing neckties or emphatically refuse to wear dresses or skirts. *See, e.g., DSM-IV, supra* note 260, at 576-77 (observing that boys with Gender Identity Disorder “may have a preference for dressing in girls’ or women’s clothes,” while “[g]irls with

To some extent, Ball may have been concerned about asking too much of judges by advancing an argument that depends on an extension of existing law. There is no question that under today's equal protection jurisprudence, it is significantly easier to challenge sexist stereotypes than homophobic or heterosexual stereotypes.⁵¹⁸ Although recent decisions from the California and Connecticut Supreme Courts are promising, federal courts have widely rejected the claim that discrimination against gay men and lesbians is "inherently suspect."⁵¹⁹

In some cases, this tradeoff may not be required. Even when judges do not articulate stereotypes about gender development, they sometimes articulate gender-specific stereotypes about sexual development—especially in cases involving gay and lesbian parents and children of the same gender. In *Bennett v. O'Rourke* (Tennessee 1985),⁵²⁰ for example, the court's ruling was based explicitly on the "increased chance of role-modeling" because "the homosexual parent and the minor child [we]re both female."⁵²¹ In such cases, the parent might challenge these stereotypes by invoking the Supreme Court's holding in *United States v. Virginia* (U.S. 1996) that state action may not be based "on fixed notions concerning the roles and abilities of males and females."⁵²²

Such cases are already rare, however—and if gay and lesbian parents begin challenging judges who articulate gender-based stereotypes, then these cases are likely to become even rarer. Sooner or later, a gay or lesbian parent will be

Gender Identity Disorder display intense negative reactions to parental expectations or attempts to have them wear dresses or other feminine attire [and] may refuse to attend school or social events where such clothes may be required").

In this context, however, Ball's gender-blind analysis does not have any strategic implications, because it does not cut off any valuable legal arguments. The Equal Protection Clause prohibits all laws based on gender stereotypes, whether or not the stereotypes apply to one sex or both sexes. In constitutional terms, there is no difference between a ruling based on the notion that "boys should be masculine and girls should be feminine," and a ruling based on the notion that "boys should be masculine but girls may be masculine or feminine." One might say that only the second ruling is based on a kind of "male supremacy principle," but both rulings are based on gender stereotypes, so both would be unconstitutional. See Widiss, Rosenblatt & NeJaime, *supra* note 10, at 474-75.

518. See Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 534 (2001) ("The sex discrimination argument relies on settled law . . . Each of the other principal arguments for gay equality—the privacy and suspect classification arguments—depend on an innovative extension of existing law to cover gays.").

519. Compare *Kerrigan v. Comm'r Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) (holding that under Connecticut's equal protection provisions, classifications based on sexual orientation are "quasi-suspect" and subject to "heightened . . . scrutiny"), and *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (holding that under California's equal protection clause, classifications based on sexual orientation are "suspect" and subject to "strict scrutiny"), with *Lofton v. Sec'y of Dept. Children & Fam. Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (holding that under the Federal Constitution, classifications based on sexual orientation are subject to rational basis review), *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997) (same), *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997) (same), *Richenberg v. Perry*, 97 F.3d 256, 260 (7th Cir. 1996) (same), *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (same), and *Steffan v. Perry*, 41 F.3d 677, 685 n.3 (D.C. Cir. 1994) (same).

520. 1985 WL 3464 (Tenn. Ct. App. Nov. 5, 1985).

521. *Id.* at *3.

522. *United States v. Virginia*, 518 U.S. 515, 541 (1996).

stereotyped as a recruiter or a role model, and the judge's assumptions about the parent's gender and the child's gender will not be expressed in the opinion itself. This consequence is one of the costs of focusing legal argument on the use of explicit stereotypes, which is familiar to civil rights scholars and lawyers in other contexts.⁵²³ In these cases, gay and lesbian parents will have to make difficult choices, and the argument for gay and lesbian parenthood will have to stand or fall by itself.

These choices are not easy to make, but the options are fairly straightforward. On the one hand, we could insist that the children of gay and lesbian parents are "no different"—no more likely to be homosexual, no less likely to be heterosexual—than the children of heterosexual parents. On the other hand, we could acknowledge that they may well be different, but we can insist that a child's homosexuality is "just a difference"—the kind of difference that a democracy should "respect and protect."⁵²⁴ By confronting the fear of parent-to-child transmission, we stand not only to win greater protections for gay and lesbian parents but to challenge the homophobic, heterosexist, and ubiquitous "fantasy that gay and lesbian youth do not exist."⁵²⁵

Without the support of sex discrimination claims, this route to progress may well be slower, but the argument would not be wholly without precedent. In *Romer v. Evans* (U.S. 1996),⁵²⁶ the Supreme Court held that under the Equal Protection Clause, a state's actions may not be based solely on "animus" toward gay men and lesbians.⁵²⁷ When gay and lesbian parents are subjected to sexual development stereotypes, they might invoke *Romer* for support, arguing that the court's ruling was based on no more than "animus" toward gay men and lesbians. After all, the state's interest in preventing the development of gay and lesbian children amounts to little more than a desire to minimize the number of gay and lesbian adults in the world—the pursuit of a fantasy that gay and lesbian *people* will cease to exist.⁵²⁸

523. See *supra* Part I.D.2 and note 71 (describing limitations of focusing on explicit stereotypes).

524. Stacey & Biblarz, *supra* note 304, at 177.

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

526. 517 U.S. 620 (1996).

527. *Id.*

528. Sedgwick writes:

The renaturalization and enforcement of gender assignment is not the worst news about the new psychiatry of gay acceptance, however. The worst is that it not only fails to offer, but seems conceptually incapable of offering, even the slightest resistance to the wish endemic in the culture surrounding and supporting it: the wish that gay people *not exist*. There are many people in the words we inhabit, and these psychiatrists are unmistakably among them, who have a strong interest in the dignified treatment of any gay people who may happen to already exist. But the number of persons or institutions by whom the existence of gay people is treated as a precious desideratum, a needed condition of life, is small. The presiding asymmetry of value assignment between hetero and homo goes unchallenged everywhere: advice on how to help your kids turn out gay . . . is less ubiquitous than you might think. On the other hand, the scope of institutions whose programmatic undertaking is to prevent the development of gay people is unimaginably large. There is no major discourse that offers a firm resistance to that undertaking.

I do not mean to predict that by relying on *Romer*, gay and lesbian parents would win more custody and visitation cases involving recruiting and role modeling stereotypes. In light of the constitutional protections historically afforded to gay men and lesbians, such a prediction would be hopelessly naïve. In the short term, it does not seem likely that many judges will be persuaded by this argument—especially those judges who are already inclined to rule against gay and lesbian parents based on homophobic or heterosexist stereotypes.⁵²⁹

Nor do I mean to suggest that gay and lesbian parents should advance a long-shot claim for the long-term good, without regard to the profound interests at stake in custody and visitation cases. When gay and lesbian parents confront homophobic and heterosexist litigants, experts, and judges, they are often asked to balance the fight for a parent-child relationship against the broader fight for gay and lesbian parenthood. In such circumstances, strategic decisions are often painful and difficult. I have no magic recipes for making such tradeoffs; I leave them to individual parents and lawyers to make for themselves.

But law professors are another matter. As scholars, we have an obligation to make claims that are not only useful but truthful, and we have the freedom to develop arguments that may not be advanced or accepted for years. My hope is that sooner or later—the sooner, the better—parents, lawyers, and judges will be ready to stand up not only for parents who are gay men and lesbians, but for children who may grow up to be gay men and lesbians, too.

CONCLUSION

In the past several years, the Family Pride Coalition of Washington, D.C., has launched “OUTSpoken Families,” a national training campaign for gay and lesbian parents.⁵³⁰ The campaign’s goal is “to create a speakers bureau of people available to appear in the media and before lawmakers,” so that the speakers can present “the most convincing case” for gay and lesbian parenthood to the public.⁵³¹ During day-long seminars, gay and lesbian parents are given a 162-page handbook, and they are taught about research on gay and lesbian people who raise children and on the terminology that most appeals to

Sedgwick, *supra* note 244, at 161.

529. Federal courts have generally declined to read *Romer* as a broad prohibition against state action targeting gay men and lesbians. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006) (upholding sexual orientation classification under rational basis review and distinguishing *Romer*); *Lofton v. Sec’y of Dept. Children & Fam. Servs.*, 358 F.3d 804, 826 (11th Cir. 2004) (same). There have, however, been some encouraging decisions from state courts in recent years. *See, e.g.*, *State v. Limon*, 122 P.3d 22, 30 (Kan. 2005) (invalidating sexual orientation classification under rational basis review and citing *Romer*); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (same).

530. Wyatt Buchanan, *Training Helps Gay Families Win Hearts*, S.F. CHRON., Jan. 29, 2007, at A1.

531. *Id.*

heterosexual Americans.⁵³² Early this year, Family Pride reported that “815 people in 45 states and three countries have volunteered to be trained and speak on behalf of gay and lesbian families.”⁵³³

The OUTSpoken project is funded in part by the Gill Foundation, one of the nation’s largest philanthropy organizations devoted to lesbian, gay, bisexual, and transgender rights.⁵³⁴ In a recent interview about the OUTSpoken project, Robert MacFarlane, the Foundation’s Executive Director, reported that the Foundation’s marketing research shows that “women—and mothers in particular—are most effective in speaking for the movement.”⁵³⁵ He explained: “‘When we’re looking for common ground and looking for Americans to understand us, they have to see us and know us, and right now women and moms are more persuasive.’ . . . People still tend to react negatively to images of gay fathers with children.”⁵³⁶

There you have it—the gender of homophobia in a nutshell, from a leading advocate for gay and lesbian parenthood, a leading opponent of homophobia itself. MacFarlane may well be correct: In this moment, lesbian mothers may make better “poster parents” than gay fathers. It is my belief, however, that we will not defeat homophobia until we confront the gender of homophobia in a more straightforward manner. I look forward to a day when we no longer feel compelled to ignore, hide, or apologize for our differences—a day when we can insist that regardless of our differences, we should all be respected.

APPENDIX

This Appendix lists 191 opinions from custody and visitation cases involving a gay, lesbian, or bisexual parent and a heterosexual parent reported in the United States since the 1950s. I would like to thank Kimberly D. Richman of the University of San Francisco for generously sharing her collection of family law opinions involving LGBT parents.⁵³⁷ I supplemented Richman’s list with my own research by conducting additional Westlaw and Lexis searches and checking citations in cases, casebooks, law review articles, and internet sources. To the best of my knowledge and effort, this collection includes every custody and visitation case involving a gay, lesbian, or bisexual parent and a heterosexual parent reported in the United States since the 1950s.

532. *Id.*

533. *Id.*

534. See GILL FOUNDATION, 2007 ANNUAL REPORT, available at <http://www.gillfoundation.org/gillresources>.

535. Buchanan, *supra* note 530, at A1 (reporting Interview of Robert MacFarlane, Executive Director of Gill Foundation).

536. *Id.*

537. See KIMBERLY D. RICHMAN, COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW 179-87 (2009).

A. *Reported Custody and Visitation Opinions Involving Gay Fathers and Heterosexual Mothers, 1950-2007*

1. Luley v. Luley, 48 N.W.2d 328 (Minn. 1951)
2. Commonwealth ex rel. Bachman v. Bradley, 91 A.2d 379 (Pa. Super. Ct. 1952)
3. Evans v. Evans, 8 Cal. Rptr. 412 (Cal. Ct. App. 1960)
4. A. v. A., 514 P.2d 358 (Or. Ct. App. 1973)
5. *In re* J.S. & C., 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974)
6. *In re* J.S. & C., 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976)
7. *In re* Marriage of Teepe, 271 N.W.2d 740 (Iowa 1978)
8. Neal v. White, 362 So. 2d 1148 (La. Ct. App. 1978)
9. Woodruff v. Woodruff, 260 S.E.2d 775 (N.C. Ct. App. 1979)
10. Jilek v. Chatman, 613 S.W.2d 558 (Tex. App. 1981)
11. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982)
12. Sweet v. White, 432 N.E.2d 1098 (Ill. App. Ct. 1982)
13. *In re* Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983)
14. Wolff v. Wolff, 349 N.W.2d 656 (S.D. 1984)
15. Gottleib v. Gottleib, 108 A.D.2d 120 (N.Y. Sup. Ct. 1985)
16. Roberts v. Roberts, 489 N.E.2d 1067 (Ohio Ct. App. 1985)
17. Roe v. Roe, 324 S.E.2d 691 (Va. 1985)
18. *In re* Marriage of Cabalquinto, 718 P.2d 7 (Wash. Ct. App. 1986)
19. M.A.B. v. R.B., 510 N.Y.S.2d 960 (Sup. Ct. 1986)
20. Pascarella v. Pascarella, 512 A.2d 715 (Pa. Super. Ct. 1986)
21. Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987)
22. Jane W. v. John W., 519 N.Y.S.2d 603 (Sup. Ct. 1987)
23. *In re* Marriage of Birdsall, 243 Cal. Rptr. 287 (Ct. App. 1988)
24. Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988)
25. J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989)
26. Glover v. Glover, 586 N.E.2d 159 (Ohio Ct. App. 1990)
27. *In re* Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990)
28. Pennington v. Pennington, 596 N.E.2d 305 (Ind. Ct. App. 1992)
29. H.J.B. v. P.W., 628 So. 2d 753 (Ala. Civ. App. 1993)
30. *In re* Marriage of Salmon, 519 N.W.2d 94 (Iowa Ct. App. 1994)
31. North v. North, 648 A.2d 1025 (Md. Ct. Spec. App. 1994)
32. *In re* R.E.W., 471 S.E.2d 6 (Ga. Ct. App. 1996)
33. *In re* R.E.W., 472 S.E.2d 295 (Ga. 1996)
34. *In re* Wicklund, 932 P.2d 652 (Wash. Ct. App. 1996)
35. Pulliam v. Smith, 476 S.E.2d 446 (N.C. Ct. App. 1996)
36. Boswell v. Boswell, 701 A.2d 1153 (Md. Ct. Spec. App. 1997)
37. Inscoe v. Inscoe, 700 N.E.2d 70 (Ohio Ct. App. 1997)
38. Boswell v. Boswell, 721 A.2d 662 (Md. 1998)

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39. K.T.W.P. v. D.R.W., 721 So. 2d 699 (Ala. Civ. App. 1998)
40. Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998)
41. Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998)
42. T.K.T. v F.P.T., 716 So.2d 1235 (Ala. Civ. App. 1998)
43. Santiago J. v. Pamela J., No. CN98-06021, 1999 WL 1456949 (Del. Fam. Ct. Aug. 12, 1999)
44. Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999)
45. *In re* Marriage of Kraft, No. 99-1719, 2000 WL 1289135 (Iowa Ct. App. Sept. 13, 2000)
46. Pamela J. v. Santiago J., No. CN98-06021, 2000 WL 1279443 (Del. Fam. Ct. May 4, 2000)
47. Price v. Price, No. E1999-00102, 2000 WL 704596 (Tenn. Ct. App. May 31, 2000)
48. *In re* Marriage of Dorworth, 33 P.3d 1260 (Colo. Ct. App. 2001)
49. Jenkins v. Jenkins, No. 05-98-01849, 2001 WL 507221 (Tex. Ct. App. May 15, 2001)
50. Santiago J. v. Pamela J., No. CN98-06021, 2002 WL 31453319 (Del. Fam. Ct. July 10, 2002)
51. Strome v. Strome, 60 P.3d 1158 (Or. Ct. App. 2003)
52. Hogue v. Hogue, 147 S.W.3d 245 (Tenn. Ct. App. 2004)
53. McGriff v. McGriff, 99 P.3d 111 (Idaho 2004)
54. Soteriou v. Soteriou, No. FA0307332435, 2005 WL 3471472 (Conn. Super. Ct. Nov. 23, 2005)
55. Isch v. Isch, No. FA0540020635, 2006 WL 1230270 (Conn. Sup. Ct. Apr. 20, 2006)
56. T.D. v. T.A.J., No. CN01-09889, 2006 WL 4041946 (Del. Fam. Ct. Mar. 3, 2006)
57. A.O.V. v. J.R.V., Nos. 0219-06-4, 0220-06-4, 2007 WL 581871 (Va. Ct. App. Feb. 27, 2007)

B. Reported Custody and Visitation Opinions Involving Lesbian Mothers and Heterosexual Fathers, 1950-2007

1. Immerman v. Immerman, 1 Cal. Rptr. 298 (Ct. App. 1959)
2. Nadler v. Super. Ct., 63 Cal. Rptr. 352 (Ct. App. 1967)
3. Anagnostpoulous v. Anagnostpoulous, 317 N.E.2d 681 (Ill. App. Ct. 1974)
4. DiStefano v. DiStefano, 51 A.D.2d 885 (N.Y. Sup. Ct. 1976)
5. *In re* Jane B., 380 N.Y.S.2d 848 (Sup. Ct. 1976)
6. Lewis v. Lewis, No. 626, 1976 Ohio App. LEXIS 6024 (Ohio Ct. App. July 1, 1976)
7. Adams v. Adams, 357 So. 2d 881 (La. Ct. App. 1978)

8. DiStefano v. DiStefano, 60 A.D.2d 976 (N.Y. Sup. Ct. 1978)
9. Scarlett v. Scarlett, 390 A.2d 1331 (Pa. Super. Ct. 1978)
10. Schuster v. Schuster, 585 P.2d 130 (Wash. 1978)
11. *In re* Marriage of Ashling, 599 P.2d 475 (Or. Ct. App. 1979)
12. M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979)
13. Hall v. Hall, 291 N.W.2d 143 (Mich. Ct. App. 1980)
14. Irish v. Irish, 300 N.W.2d 739 (Mich. Ct. App. 1980)
15. Kallas v. Kallas, 614 P.2d 641 (Utah 1980)
16. N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980)
17. S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980)
18. D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981)
19. Dailey v. Dailey, 635 S.W.2d 391 (Tenn. Ct. App. 1981)
20. Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981)
21. L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982)
22. M.J.P. v. J.G.P., 640 P.2d 966 (Okla. 1982)
23. Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983)
24. Guinan v. Guinan, 102 A.D.2d 963 (N.Y. Sup. Ct. 1984)
25. Peyton v. Peyton, 457 So. 2d 321 (La. Ct. App. 1984)
26. Zaller v. Zaller, No. 10-035, 1984 WL 7417 (Ohio Ct. App. June 29, 1984)
27. Bark v. Bark, 479 So. 2d 42 (Ala. Civ. App. 1985)
28. Bennett v. O'Rourke, 1985 WL 3464 (Tenn. Ct. App. Nov. 5, 1985)
29. Brownell v. Brownell, No. 1233, 1985 WL 17450 (Ohio Ct. App. Nov. 19, 1985)
30. Constant A. v. Paul C.A., 496 A.2d 1 (Pa. Super. Ct. 1985)
31. S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985)
32. T.C.H. v. K.M.H., 693 S.W.2d 802 (Mo. 1985)
33. Anonymous v. Anonymous, 120 A.D.2d 983 (N.Y. Sup. Ct. 1986)
34. Charpentier v. Charpentier, 536 A.2d 948 (Conn. 1988)
35. G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987)
36. S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987)
37. Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987)
38. Thigpen v. Carpenter, 730 S.W.2d 510 (Ark. Ct. App. 1987)
39. Black v. Black, 1988 WL 22823 (Tenn. Ct. App. Mar. 10, 1988)
40. Collins v. Collins, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988)
41. Henry v. Henry, 372 S.E.2d 104 (S.C. Ct. App. 1988)
42. Miller v. Hawkins, 549 So. 2d 102 (Ala. Civ. App. 1989)
43. Mohrman v. Mohrman, 565 N.E.2d 1283 (Ohio Ct. App. 1989)
44. T.C.H. v. K.M.H., 784 S.W.2d 281 (Mo. Ct. App. 1989)
45. Boucher v. Boucher, No. L-89-646, 1990 WL 751138 (Va. Cir. Ct. Apr. 30, 1990)

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46. Hodson v. Moore, 464 N.W.2d 699 (Iowa Ct. App. 1990)
47. *In re* Marriage of Williams, 563 N.E.2d 1195 (Ill. App. Ct. 1990)
48. Lundin v. Lundin, 563 So. 2d 1273 (La. Ct. App. 1990)
49. Barron v. Barron, 594 A.2d 682 (Pa. Super. Ct. 1991)
50. *In re* Marriage of Diehl, 582 N.E.2d 281 (Ill. App. Ct. 1991)
51. Blew v. Verta, 617 A.2d 31 (Pa. Super. Ct. 1992)
52. Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992)
53. Kelly v. Klein, 827 S.W.2d 609 (Tex. App. 1992)
54. Nickerson v. Nickerson, 605 A.2d 1331 (Vt. 1992)
55. T.G.S. v. D.L.S., 608 So. 2d 743 (Ala. Civ. App. 1992)
56. Collins v. Collins, 1993 WL 177159 (Tenn. Ct. App. May 26, 1993)
57. Flowers v. Flowers, No. 01A01-9307-CH-00300, 1993 WL 542086 (Tenn. Ct. App. Dec. 30, 1993)
58. *In re* Marriage of Wiarda, 505 N.W.2d 506 (Iowa Ct. App. 1993)
59. Johnson v. Schlotman, 502 N.W.2d 831 (N.D. 1993)
60. Large v. Large, No. 93AP-735, 1993 WL 498127 (Ohio Ct. App. Dec. 2, 1993)
61. Pleasant v. Pleasant, 628 N.E.2d 633 (Ill. App. Ct. 1993)
62. Paul C. v. Tracy C., 209 A.D.2d 955 (N.Y. Sup. Ct. 1994)
63. Tucker v. Tucker, 881 P.2d 948 (Utah Ct. App. 1994)
64. Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994)
65. D.B. v. R.B., 652 A.2d 1254 (N.J. Super. Ct. App. Div. 1995)
66. Fox v. Fox, 904 P.2d 66 (Okla. 1995)
67. Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995)
68. *In re* Marriage of Cupples, 645 N.E.2d 567 (Iowa Ct. App. 1995)
69. *In re* Marriage of Martins, 645 N.E.2d 567 (Ill. App. Ct. 1995)
70. Larson v. Larson, 902 S.W.2d 254 (Ark. Ct. App. 1995)
71. *In re* Parsons, 914 S.W.2d 889 (Tenn. Ct. App. 1995)
72. Phillips v. Phillips, No. CA94-03-005, 1995 WL 115426 (Ohio Ct. App. Mar. 20, 1995)
73. Scott v. Scott, 665 So. 2d 760 (La. Ct. App. 1995)
74. *In re* Marriage of McKay, No. C6-95-1626, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996)
75. *In re* Marriage of R.S., 677 N.E.2d 1297 (Ill. App. Ct. 1996)
76. Maradie v. Maradie, 680 So. 2d 538 (Fla. Dist. Ct. App. 1996)
77. Tucker v. Tucker, 910 P.2d 1209 (Utah 1996)
78. Ward v. Ward, 742 So. 2d 250 (Fl. Dist. Ct. App. 1996) (withdrawn)
79. Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. Ct. App. 1997)
80. J.B.F. v. J.M.F., 730 So. 2d 1186 (Ala. Civ. App. 1997)
81. Packard v. Packard, 697 So. 2d 1292 (Fla. Dist. Ct. App. 1997)
82. R.W. v. D.W.W., 717 So. 2d 790 (Ala. Civ. App. 1997)

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83. Delong v. Delong, No. WD-52726, 1998 WL 15536 (Mo. Ct. App. Jan. 20, 1998)
 84. Dorn v. Dorn, 724 So. 2d 554 (Ala. Civ. App. 1998)
 85. *Ex parte* D.W.W., 717 So. 2d 793 (Ala. 1998)
 86. *Ex Parte* J.M.F., 730 So. 2d 1190 (Ala. 1998)
 87. Glaze v. Glaze, No. HJ-1323-4, 1998 WL 972306 (Va. Cir. Ct. Aug. 31, 1998)
 88. J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998)
 89. J.B.F. v. J.M.F., 730 So. 2d 1197 (Ala. Civ. App. 1998)
 90. Knotts v. Knotts, 693 N.E.2d 962 (Ind. Ct. App. 1998)
 91. Piatt v. Piatt, 499 S.E.2d 567 (Va. Ct. App. 1998)
 92. Schroder v. Anfinson, No. C4-97-1841, 1998 WL 268007 (Minn. Ct. App. May 26, 1998)
 93. Eldridge v. Eldridge, No. 03A01-9904-CH-00146, 1999 WL 994099 (Tenn. Ct. App. 1999)
 94. Pryor v. Pryor, 709 N.E.2d 374 (Ind. Ct. App. 1999)
 95. Pryor v. Pryor, 714 N.E.2d 743 (Ind. Ct. App. 1999)
 96. Jacoby v. Jacoby, 763 So. 2d 410 (Fl. Dist. Ct. App. 2000)
 97. Lyle v. Kersey, No. CA99-11-031, 2000 WL 895268 (Ohio Ct. App. June 30, 2000)
 98. Uvlund v. Uvlund, No. 224566, 2000 WL 33407372 (Mich. Ct. App. Aug. 22, 2000)
 99. Boot v. Boot, No. 227252, 2001 WL 766115 (Mich. Ct. App. Jan. 30, 2001)
 100. D.H. v. H.H., 830 So. 2d 16 (Ala. Ct. Civ. App. 2001)
 101. Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001)
 102. Hollon v. Hollon, 784 So. 2d 943 (Miss. 2001)
 103. Morris v. Morris, 783 So. 2d 681 (Miss. 2001)
 104. Rieder v. Rieder, No. M2000-02466-COA-R3, 2001 WL 1173279 (Tenn. Ct. App. Oct. 5, 2001)
 105. S.B. v. L.W., 793 So. 2d 656 (Miss. Ct. App. 2001)
 106. Taylor v. Taylor, 47 S.W.3d 222 (Ark. 2001)
 107. Downey v. Muffley, 767 N.E.2d 1014 (Ind. Ct. App. 2002)
 108. *Ex parte* H.H., 830 So. 2d 21 (Ala. 2002)
 109. Fulk v. Fulk, 827 So. 2d 736 (Miss. Ct. App. 2002)
 110. *In re* Marriage of Collins, 51 P.3d 691 (Or. Ct. App. 2002)
 111. *In re* Marriage of Faulhaber, No. 2001-P-0110, 2002 WL 1401066 (Ohio Ct. App. June 28, 2002)
 112. Lacey v. Lacey, 822 So. 2d 1132 (Miss. Ct. App. 2002)
 113. Damron v. Damron, 670 N.W.2d 871 (N.D. 2003)
 114. E.N.B. v. G.H.C., No. CN00-09162, 2003 WL 21435041 (Del. Fam. Ct. Feb. 14, 2003)

