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Stigmatization and Discrimination: Visitation Rights of Noncustodial Homosexual Parents and the Effect of Parental Deprivation on Children

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STIGMATIZATION AND DISCRIMINATION: VISITATION RIGHTS OF NONCUSTODIAL HOMOSEXUAL PARENTS AND THE EFFECT OF PARENTAL DEPRIVATION ON CHILDREN

INTRODUCTION

The division of a family following a divorce and the subsequent reordering of legal relationships present numerous difficulties for courts determining custodial and visitation issues. Courts are frequently called upon to resolve such sensitive issues as which parent is better suited to serve as the child's custodian, and whether visitation with the child should be granted to the noncustodial parent. These issues are further complicated when one parent is homosexual[1] but has a child from a heterosexual marriage.[2] In this situation, many courts deny custody to the gay parent and severely restrict or deny visitation with the natural child.[3]

This Note examines the legal status of homosexual parents seeking post-divorce visitation. In many jurisdictions, parental rights are denied on the basis of prejudicial and false judicial rationales. This Note argues that children are harmed more by deprivation of parental contact when

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1. The terminology regarding individuals who are sexually oriented toward persons of the same gender is often imprecise. The terms "homosexual" and "gay" are used either synonomously, to refer only to males, or are used to refer to both males and females. According to one historian, the word "homosexual" is a relatively new term, and has been criticized because of its "bastard origin and vague connotations." JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 43 (1980). Boswell asserted that "gay" is a more accurate and useful word, in that it refers to "persons who are conscious of erotic preference for their own gender." *Id.* The term "homosexual" is broader, and "comprises all sexual phenomena between persons of the same gender, whether the result of conscious preference, subliminal desire, or circumstantial exigency." *Id.* at 44.

This Note follows contemporary usage and employs the terms "gay" and "homosexual" to refer to both men and women who are sexually and emotionally oriented toward persons of the same gender and "lesbian" to refer exclusively to gay females. However, "homosexual" is used as an adjective, rather than a noun. Boswell noted:

> The word 'homosexual' implicitly suggests that the primary distinguishing characteristic of gay people is their sexuality. . . . Sexual interest and expression vary dramatically in the human population, and a person's sexual interest may be slight without precluding the realization that he or she is attracted to persons of the same gender and hence distinct in some way from the majority.

Id. at 45. *See also* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 804 (1979) ("[U]sing 'homosexual' as a noun . . . implies a being whose sole dimension is an erotic one.").

2. A related issue beyond the scope of this article is whether a lesbian woman is entitled to parental rights following the termination of her relationship with another woman when her companion has borne a child conceived through artificial insemination. *See* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), *aff'g* 552 N.Y.S.2d 321 (App. Div. 1990) (woman could not be considered a parent and had no visitation rights); *In re* Interest of Z.J.H., 471 N.W.2d 202 (Wis. 1991), *aff'g* 459 N.W.2d 602 (Wis. Ct. App. 1990) (same). *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (arguing that parenthood should be redefined to include anyone in a functional parent-child relationship).

3. *See* cases cited *infra* notes 20-21, 23-27.

visitation is denied than by the alleged adverse effects caused by exposure to a parent's homosexuality. The child's best interests are served when courts engage in unbiased inquiry regarding gay parents and acknowledge that parental contact is important for the child's psychological development.

Part I of this Note examines visitation actions and the standards that courts use to evaluate such disputes. Part II reveals the approaches courts use in visitation cases involving homosexual parents. Part III scrutinizes the factors courts advance to support presumptions of gay parents' unfitness. Part IV surveys the psychological research regarding the effects on a child deprived of post-divorce visitation and argues that the child's best interests are served by continued visitation with the noncustodial parent, absent an affirmative showing of harm as a result of exposure to the parent's homosexuality.

I. POST-DIVORCE VISITATION

Post-divorce visitation awards are generally decided simultaneously with custody determinations.[4] The typical visitation order occurs after sole custody[5] is awarded to a party in the divorce. Courts usually grant the noncustodial parent visitation with the child, absent any evidence of parental unfitness. The concept of "best interests of the child" is the primary consideration in both custody and visitation adjudications.[6]

4. Commonwealth *ex rel.* Williams v. Miller, 385 A.2d 992, 994 (Pa. 1978). Visitation decisions are usually made in the context of custody determinations between natural parents, although visitation disputes also occur in situations involving nonparents. More states are awarding visitation rights to nonparents. *See, e.g.*, COLO. REV. STAT. § 19-1-117 (Supp. 1991); HAW. REV. STAT. § 571-46(7) (1985 & Supp. 1990). *See generally* Henry H. Foster & Davis J. Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U. L.J. 643 (1979); Samuel V. Schoonmaker III et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95 (1991); Richard S. Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19 (1991); Howard G. Zaharoff, *Access to Children: Towards a Model Statute for Third Parties*, 15 FAM. L.Q. 165 (1981); Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L.J. 191 (1984) (arguing that visitation rights should be granted to any third party if such visitation would benefit the child).

5. Sole custody is not the only possible award; increasingly, courts are granting joint custody to parents. Joint custody has been defined as "co-parenting" following a divorce. H. Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 528-29 (1979). "Its distinguishing feature is that both parents retain legal responsibility and authority for the care and control of the child . . . ." *Id.* Joint custody differs from sole custody in that the parents share legal custody of the child, and are jointly responsible for making major decisions regarding the child's welfare. Physical custody may be split between the parents or retained primarily by one parent. *See, e.g.*, MINN. STAT. § 518.003(3) (1990). Over half of the states currently authorize joint custody awards by statute. *See, e.g.*, CAL. CIV. CODE § 4600.5 (West 1983 & Supp. 1992). Courts may award joint custody even if not authorized by statute. *See generally* David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979); Holly L. Robinson, *Joint Custody: An Idea Whose Time has Come*, 21 J. FAM. L. 641 (1982-1983); Sheila F.G. Schwartz, *Toward a Presumption of Joint Custody*, 18 FAM. L.Q. 225 (1984).

6. The concept of the "best interests of the child" is not new. Judge Turley stated in 1843: "It is to be observed that in all cases the interest and welfare of the child is the great leading object to be attained . . . ." Paine v. Paine, 23 Tenn. 523, 535 (4 Hum.) (1843). Judge Cardozo expanded upon the best interests standard in Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) ("[A judge] acts as parens patriae to do what is best for the interest

Virtually every jurisdiction requires courts to award custody and visitation rights based on each jurisdiction's adaptation of this standard.[7] In visitation cases, courts often presume that some form of continued access by the noncustodial parent is in the child's best interests.[8] Visita-

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of the child."). Cardozo recognized that in a custody proceeding a court is not determining rights as it does in an adversary proceeding. Rather, the court is seeking to place the child in the best environment in which to mature.

The best interests standard is by nature indeterminate. Although some custody statutes list relevant factors that a court must consider, these guidelines are open to considerable interpretation. California's custody statute states:

> In making a determination of the best interests of the child . . . the court shall, among any other factors it finds relevant, consider all of the following: (a) The health, safety and welfare of the child[,] (b) [a]ny history of abuse by one parent against the child . . . [and] (c) [t]he nature and amount of contact with both parents.

CAL. CIV. CODE § 4608(a)-(c) (West Supp. 1992).

Some commentators have criticized decisions made under the best interests standard as biased and often irrational. One commentator noted:

> Custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past. In most other litigation, the result will depend upon the court's determination that some event did or did not take place at an earlier time. Aside from possibly bearing on credibility, the litigants' personality, priorities, lifestyle, financial resources, emotional stability, and other personal attributes have no relevance to the outcome. In custody litigation . . . those very factors will determine the result in large measure, with the court making a judgment as to whether the child is likely in the future to be "better off" with one parent than with the other. Not surprisingly, decisions made in this framework are less a product of reasoned application of precedent than of the personality, temperament, background, interests, and biases of the trial judge or the community that elected him.

Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985) (footnotes omitted). Another author stated that "neither legislatures nor custom has provided judges with a coherent framework for thinking about what children's interests are. [An] equally serious [flaw] has been the inability of judges to make accurate determinations . . . of the quality of most individual children's relationships with their parents or of parents' skills at childrearing." David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 568 (1984). *See also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (discussing the consequences of indeterminate custody standards).

7. This standard gives courts a great deal of discretion in the determination of parental fitness as it relates to the child's best interests. Steve Susoeff, Note, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 853 (1985). The best interests standard is mandated by statute in most states for custody disputes. Many statutes list the factors that a judge must consider in determining the child's best interests. *See, e.g.*, CAL. CIV. CODE § 4608(a)-(c) (West Supp. 1992); COLO. REV. STAT. § 14-10-124 (1987) (listing factors to be considered in custody determinations). Other statutes only require that the best interests standard be applied and give no guidance to judges. *See, e.g.*, WYO. STAT. § 20-2-113 (1990) (specifying application of best interests test without listing factors). *See generally* HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19.4, at 797 & nn.3-4 (2d ed. 1988) (citing statutes and cases employing the best interests standard). In other states, case law requires that judges award custody based on the child's best interests. *See, e.g.*, Wolff v. Wolff, 349 N.W.2d 656, 658 (S.D. 1984).

In visitation cases, the best interests standard is also frequently required by statute. *See* CAL. CIV. CODE § 4601 (West Supp. 1992); CONN. GEN. STAT. § 46(b)-59 (1991); D.C. CODE ANN. § 16-914 (1989); HAW. REV. STAT. § 571-46(7) (1985 & Supp. 1991); IND. CODE ANN. § 31-1-11.7.3 (Burns Supp. 1991); MINN. STAT. § 518.175(1) (1990); N.Y. DOM. REL. LAW § 70 (McKinney Supp. 1991). If not mandated by statute, case law may require that the child's best interests prevail in visitation actions. *See, e.g.*, Allen v. Allen, 385 So. 2d 1323 (Ala. Civ. App. 1980).

8. In many states, the presumption of visitation by the non-custodial parent is man-

tion is typically restricted only if there is evidence that the child will be harmed by contact with the parent.[9]

Visitation awards vary in the degree of circumscription imposed.[10] Courts prefer to grant "reasonable" or "general" visitation rights to the

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dated by statute. *See, e.g.*, NEV. REV. STAT. ANN. § 125.460 (Michie 1986); 23 PA. CONS. STAT. ANN. § 5301 (Supp. 1991). *See also In re* Marriage of Matthews, 161 Cal. Rptr. 879, 886 (Ct. App. 1980) (stating that courts should attempt to preserve visitation rights whenever possible). In some states, joint custody is presumed to be in the child's best interests by statute. *See supra* note 5. In these states, the term "visitation" might not be not used because each parent possesses legal custody of the child. Rather, such statutes use other terms to express the concept of visitation with each parent for a period of time. *See, e.g.*, N.M. STAT. ANN. § 40-4-9.1(F) (Michie 1989) (authorizing a "period of responsibility" to each parent).

9. Many states follow the Uniform Marriage and Divorce Act's visitation provision, which states, "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." UNIF. MARRIAGE AND DIVORCE ACT § 407(a), 9A U.L.A. 612 (1987). *See* ARIZ. REV. STAT. ANN. § 25-337(A) (Supp. 1991); COLO. REV. STAT. § 14-10-129 (1987 & Supp. 1991); ILL. ANN. STAT. ch. 40, para. 607(a) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 31-1-11.5-24 (Burns 1987); KAN. STAT. ANN. § 60-1616(a) (Supp. 1991); MO. ANN. STAT. § 452.400(1) (Vernon 1986 & Supp. 1992); MONT. CODE ANN. § 40-4-217(1) (1991); N.D. CENT. CODE § 14.05.22(2) (1991); WASH. REV. CODE § 26.09.240 (1989).

Another group of states has modified the Uniform Marriage and Divorce Act provision while still retaining the basic intent of the Act. *See* DEL. CODE ANN. tit. 13, § 727 (Supp. 1990); IOWA CODE § 598.41(1) (1991); OHIO REV. CODE ANN. § 3109.05(A) (Anderson 1989 & Supp. 1990); 23 PA. CONS. STAT. ANN. § 5301-5310 (1991); R.I. GEN. LAWS § 15-5-16 (1988 & Supp. 1991); UTAH CODE ANN. § 30-3-5(4) (1989 & Supp. 1990); W. VA. CODE § 48-2-15(b)(1) (1986 & Supp. 1991).

Other states have no statute dealing specifically with visitation, implicitly leaving visitation awards to the discretion of the court. *See* ALA. CODE § 30-3-1 (1989); ALASKA STAT. § 25.24.150 (1991); ARK. CODE ANN. § 9-13-101 (Michie 1991); GA. CODE ANN. § 74-107 (Michie 1991); IDAHO CODE § 32-717 (1983); KY. REV. STAT. ANN. § 403.270 (Baldwin 1984); LA. CIV. CODE ANN. art. 131, 134 (West Supp. 1992); MD. FAM. LAW CODE ANN. § 1-201(b)(1) (1991); MASS. GEN. L. ANN. ch. 208, § 28 (West 1987 & Supp. 1991); NEB. REV. STAT. § 42-364 (1988 & Supp. 1991); NEV. REV. STAT. § 125.480 (1986 & Supp. 1989); N.H. REV. STAT. ANN. § 458.17(I) (1983 & Supp. 1991); N.J. REV. STAT. § 2a:34-23 (West 1987 & Supp. 1991); OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 1991); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-4-45 (1984); TENN. CODE ANN. § 36-6-101 (1991); VA. CODE ANN. § 20-107.2 (Michie 1983 & Supp. 1991); WYO. STAT. § 20-2-113 (1977 & Supp. 1991).

10. A radical alternative to the traditional visitation award was proposed by Goldstein, Freud, and Solnit. *See* JOSEPH GOLDSTEIN ET AL; BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979). The authors opposed legally enforceable visitation altogether and contended that all decisions regarding visitation should be left to the discretion of the custodial parent. *Id.* at 38. Thus, the noncustodial parent would have no legally enforceable right whatsoever and visitation could be completely foreclosed by the custodial parent. The authors stated:

> Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.

Id. (footnotes omitted).

The authors based their conclusion upon the theory that the relationship between the child and the "psychological parent" is crucial. The psychological parent, as opposed to the biological parent, is the one who meets the child's emotional and psychological needs, as well as providing physical care. *Id.* at 17. The authors argue that even a short absence by the psychological parent may harm the child. Thus, continuity of the relationship with the psychological parent and child must be maintained to the greatest extent possible. *Id.* at 31-34. If the parents do not have positive contact with each other, visitation may disrupt

noncustodial parent. "General" visitation awards impose no specific time or place for the visit, leaving the details of the visit to the divorced parents.[11] Such an award presumes the parents are capable of cooperation and can arrange a mutually acceptable schedule.[12] If the parents cannot cooperate to arrive at an agreement, the court may impose "specific" visitation. Conditions regarding the date, day of the week, time, location and circumstances of visitation may be judicially imposed.[13]

II. SEXUAL ORIENTATION, CUSTODY, AND VISITATION

Custody and visitation disputes involving homosexual parents and their children arise frequently.[14] As in any custody or visitation determination, courts must decide whether a gay parent is fit to serve as the child's custodian, or, alternatively, if the parent is fit to have visitation with the child.[15] The crucial analysis is the court's perception of the

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the needed continuity with the psychological parent because of the inherent loyalty conflicts of the child. *Id.* at 37-38.

The implications of the Goldstein, Freud, and Solnit thesis extend beyond visitation rights. The authors assert that recognizing the primacy of the psychological parent-child relationship compels many profound changes in the legal ordering of the family relationship. They contend that the time periods involved in custodial and adoptive decisionmaking be sharply reduced. Thus, infants should be placed even before birth and custody decisions should be made prior to the divorce. Correspondingly, post-divorce custody modification would be eliminated. *Id.* at 42-47.

Courts have not adopted the Goldstein, Freud, and Solnit approach to visitation, and commentators have strongly criticized their thesis. The book was criticized for failing to provide any empirical data supporting the underlying presumptions. *See* Daniel Katkin et al., *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOC. REV. 669 (1974). The Goldstein, Freud, and Solnit thesis has also been criticized on policy grounds. Commentators have pointed out that the practical effects of giving one parent complete control over visitation would be vengeful behavior and extortion. *See* Henry H. Foster, *A Review of Beyond the Best Interests of the Child*, 12 WILLIAMETTE L. REV. 545, 551 (1976); Steven L. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 160-65 (1983). Given the accepted view that children should have continued contact with noncustodial parents (so long as neither parent is homosexual), it seems unlikely that the Goldstein, Freud, and Solnit approach to visitation will be adopted by any court.

11. *See, e.g., In re* Marriage of Dirnberger, 773 P.2d 330 (Mont. 1989).

12. Judith A. Fournie, Note, *Post-Divorce Visitation: A Study in the Deprivation of Rights*, 27 DE PAUL L. REV. 113, 114-15 (1977).

13. *See, e.g.*, Ward v. Sams, 391 S.E.2d 748 (W. Va. 1990) (visitation order was amended to include specific times, days, and holidays, and also provided that visitation was to take place away from the mother's former sister-in-law).

14. There are approximately three million homosexual parents in the United States, and between eight and ten million children are raised in these households. Note, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989). Custody issues are the most litigated of gay and lesbian issues. *See* Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 327 (1980-1981).

Suits in which gay parents fight to gain custody or visitation of their children have increased in recent years and are expected to increase further. This is probably due to growing pride on the part of gay parents as well as a growing support system to help them in these cases. *See* Rivera, *supra* note 1, at 886.

15. A parent's same-sex orientation usually becomes an issue only when that parent is at the time involved in a relationship with a person of the same gender. A parent's sexual orientation in the abstract may not necessarily provide adequate grounds for a denial of custody or visitation. Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 618-19 & n.9 (1989).

impact that the parent's homosexuality has or will have upon the child.[16] In visitation disputes, courts use two different approaches to make this evaluation.[17] Some courts create an irrebuttable presumption that a gay parent is unfit to have custody or visitation.[18] Other courts reject that presumption and rule that visitation may only be denied upon an affirmative showing of a nexus between the parent's sexual orientation and any adverse effect upon the child.[19]

A. *Irrebuttable Presumption Jurisdictions*

Courts adopting an irrebuttable presumption of parental unfitness for homosexual parents generally hold that custody of the child shall not be granted to that parent. Custody is denied whether or not the child would suffer any adverse effect from the parent's homosexuality and regardless of any evidence that the heterosexual parent is unfit.[20] The same approach is used to determine visitation, although outright denial of visitation is rare.[21] Instead, courts commonly impose a variety of restrictions upon the gay parent's visitation. Most commonly, the homosexual parent is not allowed to have the child overnight[22] or have the same-sex companion present during the visitation period.[23] Some courts have ordered that the child cannot be in the presence of other "known homosexuals"[24] or even be in the presence of any unrelated member of the parent's sex.[25] The effect of these restrictions is that the

16. Custody and visitation statutes in nearly half of the states list relevant factors for determining the child's best interests; many of these factors can be interpreted to allow judges to consider the parent's sexual orientation. For example, Alabama law allows consideration of a parent's "moral character." ALA. CODE § 30-3-1 (1989). *But see* D.C. CODE ANN. §§ 16-911(a)(5), 16-914(a) (1989) (only jurisdiction with a statute declaring sexual orientation irrelevant in determining custody or visitation). *See generally* Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian—An Empirical Study*, 23 SUFFOLK L. REV. 711 (1989) (survey of 81 family law attorneys regarding their impressions of custody cases involving homosexual parents).

17. In custody disputes, a third approach is also used. These courts impose a rebuttable presumption which places the burden on the gay parent to prove that his or her sexual orientation will not harm the child. *See* Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987); Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1981); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. Super. Ct. 1985).

18. *See* cases cited *infra* notes 20-21, 23-27.

19. *See* cases cited *infra* notes 60-62.

20. *See* S v. S, 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980); Bennett v. O'Rourke, No. 83D1327, 1985 WL 3464, at *3 (Tenn. Ct. App. Nov. 5, 1985); Dailey v. Dailey, 635 S.W.2d 391 (Tenn. Ct. App. 1981); Roe v. Roe, 324 S.E.2d 691, 693 (Va. 1985).

21. *See* Irish v. Irish, 300 N.W.2d 739, 742 (Mich. Ct. App. 1980); White v. Thompson, 569 So. 2d 1181, 1185 (Miss. 1990); S.E.G. v. R.A.G., 735 S.W.2d 164, 167 (Mo. Ct. App. 1987); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (court rejected expert testimony that stated no harm had or would occur to the child).

22. *See, e.g.*, *In re* Jane B., 380 N.Y.S.2d 848, 860 (N.Y. Sup. Ct. 1976).

23. *See, e.g.*, *Irish*, 300 N.W.2d at 741; L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982); DiStefano v. DiStefano, 401 N.Y.S.2d 636, 638 (App. Div. 1978); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *2 (Tenn. Ct. App. March 30, 1988).

24. *See Jane B.*, 380 N.Y.S.2d at 861.

25. *See* Roberts v. Roberts, 489 N.E.2d 1067, 1069 (Ohio Ct. App. 1985).

homosexual parent is often effectively prevented from visiting or having meaningful contact with his or her child.

A typical case utilizing an irrebuttable presumption of unfitness is *J.P. v. P.W.*[26] In *J.P.*, the Missouri Court of Appeals considered an action to modify a child custody decree.[27] The father and mother in the action married and had a daughter in 1986.[28] The wife left her husband and commenced divorce proceedings after learning that he was involved in a homosexual relationship during the marriage.[29] The father continued this relationship after the separation and moved in with his companion.[30] The court granted the divorce[31] and ruled that the father could have visitation with the child for ten days every other month.[32] Pursuant to an interim visitation order, the child visited the father for ten days following the divorce.[33]

The mother moved to modify the custody order in 1988 to restrict visitation.[34] At the hearing, the mother testified that the child's behavior negatively changed and physical abuse was present following the visit.[35] The mother stated that she was concerned about the child's exposure to the AIDS virus as a result of contact with the father.[36] The trial court ruled that the evidence did not establish a change of circumstances and, therefore, visitation could not be denied.[37] However, the trial court modified the visitation order by ruling that neither the father's lover nor any other live-in companion could be present in the home during the visitation period. Additionally, the father's companion could not exercise any discipline over the child nor accompany the father when visiting the child outside the home.[38] Following the trial court's ruling, the mother appealed to the Missouri Court of Appeals, contending that the restrictions were inadequate.[39] The father cross-appealed, asserting that the restrictions were improperly imposed.[40]

The *J.P.* majority ruled that a change had occurred in the circum-

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26. 772 S.W.2d 786 (Mo. Ct. App. 1989).
27. *Id.* at 786-87.
28. *Id.* at 787.
29. *Id.*
30. *Id.*
31. The parties stipulated to the terms of the original divorce decree. Brief for Cross-Appellant at 3, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (No. 15981-2).
32. *J.P.*, 772 S.W.2d at 786.
33. *Id.* at 788.
34. *Id.* at 786, 788.
35. The mother asserted that the child exhibited "clinging" and insecure behavior after the visit. She also noticed vaginal swelling after examining the child. *Id.* at 788.
36. *Id.* at 788-89.
37. *Id.* at 789. MO. ANN. STAT. § 452.410 (Vernon Supp. 1991) provides in part:
> [T]he court shall not modify a prior custody decree unless . . . it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child.

38. Brief for Cross-Appellant at 8-9, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (No. 15981-2).
39. *J.P.*, 772 S.W.2d at 787.
40. *Id.*

stances of the parties, thus allowing modification of the earlier custody decree because it was in the child's best interests.[41] The court first stated that Missouri had a state interest against the practice of homosexuality and in protecting minors from influence by gay men or lesbians.[42] Noting that Missouri law prohibited deviate sexual intercourse with a person of the same sex,[43] the court concluded that unrestricted visitation with the gay father would threaten the child's physical and emotional welfare.[44] It cited holdings establishing that homosexual relationships are immoral and illicit, and render the parent an unfit custodian.[45] Missouri law states that no child may be placed or remain in the custody of a homosexual parent, and visitation rights must be restricted or terminated.[46]

The *J.P.* majority stated that it need not wait for a child to be harmed before removing him or her from a gay parent.[47] Furthermore, expert testimony is not necessary for the court to find that the child would be harmed by exposure to the same-sex relationship.[48] The court noted, however, that there was evidence in *J.P.* that the child was harmed by the visit. The child's swollen vaginal area indicated there may have been sexual abuse.[49] The fact that the child's behavior had

41. The court found that the change in the child's behavior, her swollen vaginal area and the fact that the father and his companion kissed and held hands in the child's presence constituted a sufficient change of circumstances to modify the earlier decree. *Id.* at 793.

42. *Id.* at 792 (quoting Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985)).

43. MO. ANN. STAT. § 566.090.1 (Vernon 1979). *See also* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a sodomy statute and refusing to grant a fundamental right to consensual homosexual sodomy); Darryl R. Wishard, Note, *Out of the Closet and Into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401, 405 & n.23 (1989) (noting that approximately half of the states have statutes prohibiting consensual homosexual acts).

44. *J.P.*, 772 S.W.2d at 794. *See also* S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982).

45. *J.P.*, 772 S.W.2d at 793. *See* Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1981) (holding that a lesbian woman living with her same-sex companion is not a fit custodian); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("The father's continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law.").

46. *J.P.*, 772 S.W.2d at 793.

47. *Id.* at 792. *See also In re* Marriage of P.I.M., 665 S.W.2d 670, 672 (Mo. Ct. App. 1984) (holding that court need not wait for manifestation of harmful consequences in child when mother engages in adulterous relationships and smokes marijuana).

48. *J.P.*, 772 S.W.2d at 793. *See J.L.P.(H.)*, 643 S.W.2d at 869 (holding that court may determine adverse effect of homosexual father upon child).

49. The court did not explicitly state that the father or Reed had sexually abused the child. However, it mentioned the child's swollen vaginal area and stated that "sexual abuse need not be established by direct evidence." *J.P.*, 772 S.W.2d at 793. The inference by the court that the father or Reed sexually abused the daughter is absurd. Even if the assertion is accepted that homosexual men are more likely to molest children, the Court overlooked the fact that the child in this case is a female, and presumably is not attractive to gay men. *See infra* notes 110-14 and accompanying text. The dissent noted that no evidence supported the abuse claim. *Id.* at 795 (Prewitt, J., dissenting). The father's brief pointed out that the child was in the process of toilet training when the impairment occurred; furthermore, the mother did not call the daughter's physician to testify to the cause of the injury. Brief for Cross-Appellant at 18, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (No. 15981-2).

changed indicated that she may have been emotionally disturbed by the visitation or the alleged sexual abuse.[50] Because of the likely harm to the child, the court ruled that the father could have only supervised visitation in the presence of a responsible adult and no overnight or extended visits would be permitted.[51]

The *J.P.* dissent disagreed with the majority's ruling that no homosexual parent should be allowed custody or unrestricted visitation.[52] Judge Prewitt argued that each custody case should be determined on its own facts, rather than creating a per se rule of unfitness for gay parents.[53] The dissent contended that the trial court had reached a reasonable result in the case and did not abuse its discretion.[54] No proof indicated the father ever physically abused his daughter or allowed any abuse to happen.[55] Moreover, the evidence failed to show that the child would suffer emotional harm from visitation with her father.[56] The dissent emphasized that it was important for the child to receive paternal guidance and love.[57] Furthermore, the restrictions imposed by the majority would effectively result in little or no visitation, a result not in the child's best interests.[58]

B. *Nexus of Harm Jurisdictions*

A majority of states reject the presumption that a homosexual parent is unfit and require that a nexus of harm[59] be shown between a parent's sexual orientation and any adverse effect upon the child before denying custody to a gay parent.[60] Similarly, the mere fact of a parent's

50. *J.P.*, 772 S.W.2d at 793 (quoting State v. Burke, 719 S.W.2d 887, 890 (Mo. Ct. App. 1986) ("Common experience teaches us a sexual offense can cause behavioral and personality changes in the complainant.")).

51. *Id.* at 794.

52. *Id.* at 795 (Prewitt, J., dissenting). *See* G.A. v. D.A., 745 S.W.2d 726, 729 (Mo. Ct. App. 1987) (Lowenstein, J., dissenting) (arguing that Missouri's irrebuttable presumption of harm should be abandoned in favor of a rebuttable presumption).

53. *J.P.*, 772 S.W.2d at 795 (Prewitt, J., dissenting).

54. *Id.* at 794-95.

55. *Id.*

56. *Id. Cf.* Shepherd v. Shepherd, 719 S.W.2d 115, 116 (Mo. Ct. App. 1986) (holding that restrictions on visitation rights could not be upheld absent evidence that child's stress was due to visit).

57. *J.P.*, 772 S.W.2d at 795 (Prewitt, J., dissenting).

58. *Id.*

59. The first case to explicitly apply the nexus test was Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980). The court held that the mother's sexual orientation was irrelevant to her fitness as a parent; custody would only be denied if a nexus could be established between the mother's lesbianism and harm to the child. *Id.* at 1216. *See also* Barbara A. Smart, Note, Bezio v. Patenaude: *The "Coming Out" Custody Controversy of Lesbian Mothers in Court*, 16 NEW ENG. L. REV. 331 (1981).

60. *See* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985); *In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 289 (Ct. App. 1988); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981); Hodson v. Moore, 464 N.W.2d 699, 701 (Iowa Ct. App. 1990) (awarding joint legal custody and primary physical custody to lesbian mother); Peyton v. Peyton, 457 So. 2d 321, 324 (La. Ct. App. 1984) (awarding joint custody); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983); *In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 54 (App. Div. 1976); M.A.B. v. R.B., 510 N.Y.S.2d 960, 969 (Sup. Ct. 1986); A. v. A., 514 P.2d 358, 360, (Or. Ct. App. 1973); Stroman v. Williams, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987); Medeiros v. Medeiros, 8 Fam. L. Rep. (BNA) 2372 (Vt. Super. Ct.

same-sex orientation is not sufficient to deny visitation to a homosexual parent; affirmative evidence of harm or likely harm to the child must be shown.[61]

A typical case using the nexus of harm approach is *In re Marriage of Birdsall*.[62] In *Birdsall*, the California Court of Appeals considered an action to restrict a homosexual father's visitation rights. Greg and Linda Birdsall separated after eight years of marriage, having had one son during the marriage.[63] At the initial hearing to show cause, the parties stipulated to joint legal custody of the child with the mother having physical custody and the father being granted specific visitation of one weekend per month and alternating legal holidays.[64] The mother requested a temporary restraining order to deny the father visitation at his residence because of his acknowledged homosexuality. The father stipulated to this request.[65]

At trial, the parties reiterated that physical custody of the child would be awarded to the mother,[66] but the issue of visitation was submitted to the court for determination. The father testified that he was leasing an apartment with two other gay men. He had never engaged in sexual relations with either of the men, but he was currently in a relationship with a man who visited his home approximately twice a month. The father testified that he had no intention of raising the child to be homosexual.[67] The mother testified that the child's behavior after previous visitation with the father was rude, insolent and unaffectionate and that the child was depressed for several days following visits.[68] The trial court ruled that the father could have visitation consisting of one weekend per month, Monday afternoons, alternate legal holidays and two weeks during the summer. However, the court ruled that the father was prohibited from visitation with the child in the presence of a known homosexual.[69] On appeal, the father contended that the trial court erred in imposing the restrictions.[70] He argued that the evidence was insuffi-

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1982); *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. Ct. App. 1983); Rowsey v. Rowsey, 329 S.E.2d 57, 60-61 (W. Va. 1985); *see also* State *ex rel.* Human Servs. Dep't, 764 P.2d 1327 (N.M. Ct. App. 1988) (stating that the homosexuality of child's mother was not sufficient to deny custody).

61. *See Birdsall*, 243 Cal. Rptr. at 290-91; *In re* Marriage of Walsh, 451 N.W.2d 492, 497 (Iowa 1990); *J.S. & C.*, 324 A.2d at 94; DiStefano v. DiStefano, 401 N.Y.S.2d 636, 638 (App. Div. 1978); Woodruff v. Woodruff, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979); Conkel v. Conkel, 509 N.E.2d 983, 985 (Ohio Ct. App. 1987); *In re* Marriage of Ashling, 599 P.2d 475, 477 (Or. Ct. App. 1979); *Cabalquinto*, 669 P.2d at 888.

62. 243 Cal. Rptr. 287 (Ct. App. 1988).

63. *Id.* at 288. In his petition to dissolve the marriage, the father requested joint legal custody and primary physical custody with visitation rights for the mother. In her response, the mother requested sole legal and physical custody of the child. *Id.*

64. *Id.*

65. *Id.* The parties also agreed to psychological examinations for themselves and the child. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The order forbade the father from having overnight visitation "in the presence of any friend, acquaintance or associate who is known to be homosexual." *Id.*

70. *Id.*

cient to support the finding that unrestricted visitation was not in the child's best interests.[71]

The *Birdsall* court first recognized that California law mandates continuing contact with both parents following a divorce or separation, unless visitation is detrimental to the child's best interests.[72] The court then addressed the issue of same-sex orientation and its effect on child custody determinations and noted that courts in California may not determine custody on the basis of sexual orientation alone.[73] The issue of sexual orientation and visitation rights, however, was a question of first impression.[74] The court reviewed public policy concerns regarding visitation restrictions by examining cases in another context, noting that restraints on expression of religious views were also invalidated.[75]

Basing its conclusion on the premise that judges' moral values should not influence decisions, the *Birdsall* majority ruled that an affirmative showing of harm or likely harm is necessary to restrict parental visitation.[76] The court reviewed the trial court's conclusions and found no evidence of detriment to the child.[77] No evidence supported the trial court's finding that the father's sexual practices were indiscreet.[78] The father's stipulation to restricted visitation could also not be used as evidence that he recognized his lifestyle as harmful to the child.[79] Similarly, the father's statement that he would not raise his child to be homosexual failed to support an inference that he believed his lifestyle was harmful to the child.[80] Because there was no evidence of past or future harm to the child, the court vacated the portion of the judgment prohibiting visitation in the presence of any known gay man or lesbian.[81]

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71. *Id.*

72. *Id.* *See* CAL. CIV. CODE § 4600(a) (West 1983) ("[I]t is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."). *See also In re* Marriage of Matthews, 161 Cal. Rptr. 879, 883 (Ct. App. 1980) ("[T]he courts will attempt to preserve visitation rights whenever possible.") (citation omitted).

73. *Birdsall*, 243 Cal. Rptr. at 289 (citing Nadler v. Superior Court, 63 Cal. Rptr. 352, 354 (Ct. App. 1967)). However, the court recognized that a parent's sexual orientation may be considered. *Id.* (citing Chaffin v. Frye, 119 Cal. Rptr. 22, 25 (Ct. App. 1975)).

74. *Id.*

75. *Id.* (citing *In re* Marriage of Mentry, 190 Cal. Rptr. 843 (Ct. App. 1983) and *In re* Marriage of Murga, 163 Cal. Rptr. 79, 82 (Ct. App. 1980)).

76. *Birdsall*, 243 Cal. Rptr. at 290.

77. *Id.*

78. *Id.* The trial court concluded that the father's sexual practices had "hardly been discreet" as evidenced by the fact that "his church membership was terminated due to it." *Id.* The court rejected this bald assertion, noting there was no evidence linking the father's departure from the church with his homosexuality. *Id.*

79. *Birdsall*, 243 Cal. Rptr. at 290 (quoting *In re* Marriage of Lewin, 231 Cal. Rptr. 433, 436 (Ct. App. 1986) (quoting Burchard v. Garay, 724 P.2d 486, 490 n.4 (Cal. 1986)).

80. *Id.*

81. *Id.* at 291. The court stated:

> The unconventional lifestyle of one parent, or the opposing moral positions of the parties, or the outright condemnation of one parent's beliefs by the other parent's religion, which may result in confusion for the child, do not provide an adequate basis for restricting visitation rights. Evidence of one parent's homosexuality, without a link to detriment to the child, is insufficient to constitute

III. Analysis of Factors Used to Restrict or Deny Gay Parents' Visitation Rights

In disputes involving homosexual parents, courts often employ discriminatory generalizations and stereotypes regarding homosexuality[82] and its effect upon the children, rather than engage in an analysis of the fitness of the parents and the best interests of the child. One commentator noted, "widespread prejudice and discrimination against homosexuals and lesbian parents, as well as widespread misunderstanding about these parents, are apparent in child custody decisions to this day, despite studies supporting the suitability of gay individuals as parents."[83] Gay parents often have parental rights restricted or denied on the basis of these false assumptions. For example, courts have denied custodial or visitation rights to gay parents due to the following fears: A child may become homosexual through exposure to the parent;[84] a child may be molested by the gay parent;[85] a child may be exposed to the AIDS virus;[86] a child may be harassed by peers;[87] or a child's moral values may somehow be adversely affected through exposure to homosexuality.[88] These rationales are often the result of judges' lack of current knowledge. These judicial rationales may, however, reflect judicial homophobia, heterosexism and prejudice.[89] One commentator has characterized these stereotypes as "discriminatory ideologies disguised as scientific truth to serve as the basis for judicial and statutory activism in the area of child rearing."[90] Empirical analysis of these judicial pre-

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harm. In the absence of any indication of harm, the restraining order is unreasonable and must be vacated.

Id.

82. *See generally* RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 22-27 (1988) (discussion of anti-gay stereotypes and generalizations).

83. Stone, *supra* note 16, at 739-40.

84. *See* cases cited *infra* note 92.

85. *See* cases cited *infra* notes 110-11.

86. *See* cases cited *infra* notes 116-17.

87. *See* cases cited *infra* notes 127-28.

88. *See* cases cited *infra* notes 143-44.

89. Homophobia is defined as fear and pathological hatred of individuals sexually oriented toward persons of the same gender. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, WIS. L. REV. 187, 195 (1988). *But see* BOSWELL, *supra* note 1, at 46 n.11 (asserting that the derivation of "homophobia" actually suggests the meaning of "fear of what is similar," rather than "fear of homosexuality."). One commentator asserted that the bias against gay men and lesbians by the American judiciary merely reflects the prejudices held by the public. Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIBERTIES REV. 19, 22 (1979). Professor Law suggests that the underlying roots of homophobia are found in societal "heterosexism." Heterosexism embodies "[t]he pervasive cultural presumption and prescription of heterosexual relationships—and the corresponding silencing and condemnation of homosexual erotic, familial and communitarian relations . . . ." Law, *supra* at 195. Another author defined heterosexism as "a world-view, a value system that prizes heterosexuality, assumes it is the only appropriate manifestation of love and sexuality, and devalues homosexuality and all that is not heterosexual." Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986). Pervasive heterosexist attitudes, structured into basic societal relationships, may affect judges dealing with gay and lesbian issues.

90. Polikoff, *supra* note 2, at 545.

sumptions reveals no factual or scientific basis to support them.[91] Visitation denials based on these assumptions bear no relation to the child's best interests, and such restrictions will likely harm the child if they result in deprivation of parental contact. Absent any affirmative showing that the child will or has been harmed as a result of the parent's sexual orientation, full visitation rights should be granted to homosexual parents. Outdated myths regarding homosexual parenting must be discarded to truly serve the best interests of the child.

Courts have based custody and visitation denials on a fear that the child will become homosexual through contact with the gay parent.[92] These courts rely upon the preconceived assumption that children develop their sexual orientation by modeling themselves after their parents. Courts seek to prevent this by limiting the contact the child has with the homosexual parent.[93] This rationale is premised on the belief that sexual orientation is primarily influenced by environmental, rather than biological or genetic factors.[94] This assumption is contradicted by recent research indicating that sexual orientation may be, to a great extent, biologically determined.[95]

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91. *See generally* Law, *supra* note 89 (arguing that negative legal attitudes toward homosexuality are a reaction to the violation of gender norms, rather than scorn for the sexual practices of gay men and lesbians).

92. *See* S v. S, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 872 (Mo. Ct. App. 1982); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980); *In re* J.S. & C., 324 A.2d 90, 96-97 (N.J. Super. Ct. Ch. Div. 1974), *aff'd* 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1988); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

93. "Young people form their sexual identity partly on the basis of models they see in society. If homosexual behavior is legalized, and thus partly legitimized, an adolescent may question whether he or she should 'choose' heterosexuality." *Collins*, 1988 WL 30173 at *6.

94. One court rejected expert testimony that stated that sexual orientation is biologically, not environmentally, influenced by pointing out that the father of the child must have developed his homosexuality after marriage, because he had previously engaged in heterosexual relationships.

> The father in this case is himself an example of the weakness of the [biological] theory espoused by the expert witnesses, since the father has engaged in a heterosexual relationship with the mother of this child and produced a child. He has engaged in heterosexual activity with, admittedly, one other woman since the divorce. He has, during the course of his marriage and subsequent to it, developed homosexual tendencies. . . .
>
> . . . .
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> . . . Whatever the father's rights may be . . . concerning his own *choice* of "lifestyle," those rights do not extend to activities designed to induce in a child similar behavior.

J.L.P.(H.), 643 S.W.2d at 868-69 (Mo. Ct. App. 1982) (emphasis added). This reasoning ignores the possibility of a bisexual father or suppressed sexual orientation. Instead, the court relied upon anecdotal evidence and its own presumption to disregard scientific testimony.

95. A recent study found that a region in the brain that influences sexual behavior is structurally different in homosexual and heterosexual men. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034 (1991). Dr. LeVay, a researcher at the Salk Institute, discovered that certain groups of nerve cells in the anterior hypothalamus of the brain were more than twice as large in heterosexual men than in homosexual men or women, suggesting that sexual orientation may be biological in nature. *Id.* at 1035. However, Dr. LeVay stated that the study is very preliminary and

Whether or not one accepts the hypothesis that sexual orientation is totally or partly biological in nature, a large body of research shows there is no correlation between a parent's and a child's sexual orientation. Virtually every comparative study of heterosexual and homosexual parents has found that homosexual parents are no more likely to have gay children than are heterosexual parents,[96] and that children develop their sexual orientation independent from parental influences.[97] One study compared fifty lesbian-mother families and forty heterosexual-

should not be viewed as conclusive. *Id.* at 1036. Further research, including a study of lesbian and heterosexual women's brains, is planned.

Dr. LeVay's findings have sparked a great deal of controversy in both the gay and heterosexual communities. Robert Bray, spokesperson for the National Gay and Lesbian Task Force, stated, " 'Some will say society could 'cure' or 'fix' gays if we just tweak this chromosome or zap that cell.' " Charlene Crabb, *Are Some Men Born to be Homosexual?*, U.S. NEWS & WORLD REP. Sept. 9, 1991, at 58. One commentator attacked the research as impliedly "legitimizing" homosexuality:

> Suppose some scientist does find the gene or the section of the brain that "controls" hotheadedness? Does that mean that we should cease urging hotheads to calm down? Does that mean that we must regard hotheadedness as morally equivalent to even-temperedness? No. We are all born with countless innate tendencies — to violence, to sloth, to selfishness — that we are socialized to control.

Mona Charen, *Copping Out: 'My Brain Made Me Do It'*, NEWSDAY, Sept. 4, 1991, at 86. One person attacked the study as biased: "[Dr. LeVay] is a professed gay who would have, I think, every reason to want to find some kind of finding as he is now reaching out for, but I would simply say that as a Christian minister, we look on homosexuality as we do any sin . . . ." Jerry Falwell, *on Nightline: Is Homosexuality Biological?* (ABC television broadcast, Aug. 30, 1991).

Another recent study also concluded that sexual orientation is biologically determined. Professors Michael Bailey and Richard Pillard studied the rate of homosexuality in identical and fraternal twin and adoptive brothers. They found that 52% of the identical twin brothers were gay, 22% of the non-identical twin brothers were gay, and only 11% of the adoptive brothers were gay. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21. *See also* Neil Buhrich et al., *Sexual Orientation, Sexual Identity, and Sex-Dimorphic Behaviors in Male Twins*, 21 BEHAV. GENETICS 75 (1991) (finding significantly higher rate of homosexuality in identical twin brothers than in fraternal twins). *But see* Elke D. Eckert et al., *Homosexuality in Monozygotic Twins Reared Apart*, 148 BRIT. J. PSYCHIATRY 421 (1986) (study suggested that female homosexuality may be an acquired trait, but genes may play some part in male homosexuality).

96. *See* Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551, 562-63 (1983) (finding no difference between children raised in lesbian or heterosexual single parent households and concluding that rearing a child in a lesbian household did not lead to atypical psychosexual development); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 167, 179-83 (1986) (same); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (1978) (finding typical psychosexual development in children raised by lesbian or transsexual parent); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 551 (1981) (reporting no difference in gender identity development in children studied); Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 551 (1979) (concluding that gay fathers do not have a higher percentage of gay children than heterosexual fathers). *See generally* David Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. COUNSELING & DEV. 504, 504-05 (1986) (reviewing studies of sex role development of children raised by a homosexual or lesbian parent).

97. Homosexual men and women are raised predominantly in heterosexual couples, thus disputing the notion that parental influence is the primary factor in sexual identity development. Donna J. Hutchens & Martha J. Kirkpatrick, *Lesbian Mothers/Gay Fathers*, *in* EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 115, 121 (Diane H. Schetky & Elissa P. Benedek eds., 1985).

mother families and found no significant differences in the sexual identity of the children studied.[98] The authors stated, "boys and girls raised from early childhood by a homosexual mother without an adult male in the household for about 4 years do not appear appreciably different on parameters of psychosexual and psychosocial development from children raised by heterosexual mothers, also without an adult male present."[99] A denial of visitation rights based upon the premise of a child's emulation of the parent's sexual orientation simply ignores current scientific knowledge and can only reflect judicial prejudice and homophobia.

Even if it is assumed arguendo that sexual orientation is learned or chosen behavior and not biologically determined, the underlying premise is that being gay is inherently harmful and not in the best interests of the child.[100] This reflects the common prejudice that gay men and lesbians are psychologically maladjusted[101] and unhappier[102] than the heterosexual population. Indeed, many still view homosexuality as a mental illness.[103] This conclusion, however, is not accepted by the scientific community nor supported by research.[104] The American Psychiatric Association no longer regards homosexuality as a mental disorder or sexual deviation[105] and announced this resolution: "The sex, gender identity, or sexual orientation of natural or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases."[106] Research has shown that homosexual men and women are no more unstable, immature, or unhappy than comparable groups of heterosexuals.[107] Indeed, several studies have found that lesbians may be emotionally more well-adjusted than heterosexual women.[108] A judicial presumption based on the mental instability of gay

98. Green et al., *supra* note 96, at 179-82.

99. *Id.* at 182.

100. Note, *supra* note 14, at 1639.

101. Hutchens & Kirkpatrick, *supra* note 97, at 117.

102. Note, *supra* note 14, at 1639.

103. *See* Susoeff, *supra* note 7, at 870 & n.120 ("[T]he judiciary has been slow to recognize that homosexuality is no longer regarded as a mental or emotional illness.").

104. *See* Susoeff, *supra* note 7, at 870-74 (reviewing research regarding same-sex orientation and mental illness).

105. "In December 1973, the Board of Trustees of the American Psychiatric Association voted to eliminate homosexuality per se as a mental disorder . . . ." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d ed. 1980). *See also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 296 (3d ed. rev. 1987).

106. John J. Conger, *Proceedings of the American Psychological Association Incorporated, for the Year 1946: Minutes of the Annual Meeting of the Counsel of Representatives*, 32 AM. PSYCHOLOGIST 408, 432 (1977).

107. *See* ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF HUMAN DIVERSITY (1978); Marcie R. Adelman, *Comparison of Professionally Employed Lesbians and Heterosexual Women in the MMPI*, 6 ARCHIVES SEXUAL BEHAV. 193 (1977); Marvin Siegelman, *Adjustment of Male Homosexuals and Heterosexuals*, 2 ARCHIVES SEXUAL BEHAV. 9 (1972); Norman L. Thompson et al., *Personal Adjustment of Male and Female Homosexuals and Heterosexuals*, 78 J. ABNORMAL PSYCHOL. 237 (1971). *See generally* Law, *supra* note 89, at 202-06, 212-14.

108. *See* Andrea K. Oberstone & Harriet Sukoneck, *Psychological Adjustment and Lifestyles of Single Lesbians and Single Heterosexual Women*, 1 PSYCH. WOMEN Q. 172 (1979) (finding that lesbian women were more satisfied in their relationships than heterosexual women); Mar-

men and lesbians is contradicted by a significant body of reseach and cannot logically justify visitation restrictions.[109]

Courts have denied custody or visitation to homosexual parents because of the fear that the parent or the parent's friends may sexually molest the child.[110] A good example of the judicial reluctance to abandon this stereotype is the statement in *J.L.P.(H.) v. D.J.P.*: "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."[111] This rationale is usually raised only in cases involving a gay father, thus perpetuating the myth that gay men are attracted to and may take advantage of children.[112] There is no scientific evidence to support this view. Research shows that almost all child abusers are heterosexual men.[113] Visitation restrictions based upon the supposed inclination of gay men to "prey" on young boys are not supported by scientific knowledge and embody judicial heterosexism and homophobia.[114]

The issue of the child's possible exposure to the Human Immu-

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vin Siegelman, *Adjustment of Homosexual and Heterosexual Women*, 120 BRIT. J. PSYCH. 477 (1972) (noting that lesbians were better adjusted than heterosexual women in certain areas).

109. Some courts recognize this point. For example, one court stated, "homosexuality is not a 'disease,' and it is not, in and of itself, a mental disorder." Baker v. Wade, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). The court added, "homosexuality in society does not adversely affect the growth and development of children." *Id.* at 1131.

110. *See* Newsome v. Newsome, 256 S.E.2d 849, 851 (N.C. Ct. App. 1979); *In re* J.S. & C., 324 A.2d 90, 96-97 (N.J. Super. Ct. Ch. Div. 1974) (quoting expert testimony, " 'it is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction . . . .' "), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976).

111. 643 S.W.2d 865, 869 (Mo. Ct. App. 1982). Judge Dixon continued:

> A few minutes research discloses the following [seven] appellate decisions involving such molestation. 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.

Id. (citations omitted). This analysis would be almost comical, if not for the tragic consequences of such flawed reasoning. The judge ignored uncontradicted expert evidence and instead based his conclusion on the existence of seven cases involving child molestation by gay men, thus illustrating some judges' absolute refusal to acknowledge empirical data that rebuts long-held assumptions. One commentator pointed out that the generalization concerning the alleged predilection of gay men toward child abuse is perpetuated by judges' tendency to take "tacit" or "unconscious" judicial notice of this false stereotype. Susoeff, *supra* note 7, at 880.

112. *See* cases cited *supra* note 111. One student Note pointd out that because women, either lesbian or heterosexual, rarely molest children, "[i]f courts were making custody decisions based solely on the risk of molestation, therefore, they would award custody to the mother, whether or not she were a lesbian." Note, *supra* note 14, at 1640.

113. *See* ROBERT L. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 75 (1979); Marny Hall, *Lesbian Families: Cultural and Clinical Issues*, 23 SOC. WORK 380, 383 (1978) (noting that child abuse is disproportionately heterosexual in nature); Miller, *supra* note 96, at 546 (same). *See generally* Susoeff, *supra* note 7, at 880-81 & nn.183-86 (reviewing research showing that homosexual men are unlikely to be child molesters).

114. At least one court has recognized that this generalization is unfounded. "The vast majority of sex crimes committed by adults upon children are heterosexual, not homosexual. Homosexuals do not have a criminal propensity simply because they are homosexuals, any more than heterosexuals do." Baker v. Wade, 553 F. Supp. 1121, 1130-31 (N.D.

nodeficiency Virus (HIV)[115] from a homosexual parent has arisen in several states and may become a significant factor as the disease spreads.[116] Despite greater public awareness about AIDS, many parents may oppose visitation by gay parents because of the fear that the child will contract the virus through contact with that parent, even though the parent may not be HIV-positive.[117] Two separate issues are raised by the AIDS virus in regard to visitation. First, should visitation be denied solely on the assumption that a homosexual parent is more likely to contract HIV than a heterosexual parent? Second, should visitation be restricted or denied when a parent is actually HIV infected?

The mere *possibility* of HIV infection from a homosexual parent cannot logically be used to deny or restrict visitation with a child. The assumption that gay parents are more likely than heterosexual parents to contract AIDS is not logically or scientifically justified. First, AIDS can no longer be thought of as exclusively a gay disease. Because the disease has spread to the heterosexual population as well as the homosexual population, the possibility exists that either gay or heterosexual parents may be HIV infected.[118] Moreover, if a court bases custodial decisions on the statistical probability of HIV infection, then lesbian mothers should never be denied parental rights, because lesbians have the lowest rate of AIDS and HIV infection of all demographic groups.[119] The second issue—whether courts are justified in denying visitation

Tex. 1982) (footnote omitted), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

115. HIV is the virus that causes Acquired Immune Deficiency Syndrome (AIDS). AIDS is the final, invariably fatal stage of the immune system deterioration caused by the HIV virus. The virus impairs the human body's immune system, rendering a person vulnerable to various infections and diseases. An individual can also become sick and die of AIDS Related Complex (ARC) without progressing to AIDS. Edward P. Richards, *Communicable Disease Control in Colorado: A Rational Approach to AIDS*, 65 DENV. U. L. REV. 127, 127 n.3 (1988). HIV is transmitted by three methods: sexual intercourse, sharing contaminated syringes and blood or blood-product transfusions. Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 141 (1988).

116. *See* Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988); Doe v. Roe, 526 N.Y.S.2d 718 (Sup. Ct. 1988); "Jane" W. v. "John" W., 519 N.Y.S.2d 603 (Sup. Ct. 1987); Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987).

117. *See, e.g.*, *J.P. v. P.W.*, 772 S.W.2d 786, 788-89 (Mo. Ct. App. 1989).

118. While any statistical breakdown is necessarily imprecise, current numbers indicate that approximately 23% of reported AIDS cases involved heterosexual men and women. Apparently, 19% of those contracted the virus through intravenous drug abuse, while the other 4% were exposed to the virus through heterosexual intercourse. CENTER FOR DISEASE CONTROL, WEEKLY SURVEILLANCE REP. (June 6, 1988), *quoted in* Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1018 n.5 (1989). *See also* James W. Curran et al., *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCI. 1352 (1985). The incidence of heterosexual cases will likely increase if effective programs to reduce transmission through the use of contaminated syringes are not implemented. Homosexual transmission of AIDS may decrease due to changed gay sexual practices adopted in response to the threat of the disease. John L. Martin, *The Impact of AIDS on Gay Male Sexual Behavior Patterns in New York City*, 77 AM. J. PUB. HEALTH 578, 580 (1987).

119. Law, *supra* note 89, at 195. Professor Law noted that "AIDS poses no risk to gay men in relationships that are affectionate but not sexual, or to monogamous, uninfected gay couples." *Id.* *See also* Mark S. Senak, *The Lesbian and Gay Community*, *in* AIDS AND THE LAW 290, 292 (Harlon L. Dalton et al. eds., 1987).

based on a parent's *actual* HIV infection—is more troublesome.[120] Judges understandably wish to protect the child's best interests by minimizing the inadvertent risk of HIV transmission from the parent. This concern is unfounded, however, because current research shows the AIDS virus cannot be transmitted through casual contact.[121] No documented cases of HIV transmission through casual contact exist—not even while a household is shared with an infected person.[122] Common household practices such as sharing silverware and towels with an HIV infected person do not present any risk of contracting HIV.[123] One court acknowedged that casual transmission of HIV is highly unlikely and stated, "[t]he overwhelming weight and consensus of medical opinion is clear; the HIV virus is not spread casually."[124] Several courts have addressed the issue of visitation rights when a parent is HIV infected and have ruled that parental rights cannot be terminated solely on the basis of parental HIV infection.[125] HIV infection alone should not be used as the sole basis for denial of visitation or custody, because the medical risk to the child is virtually nonexistent and greater harm may result to the child from parental deprivation.[126]

Denial of custody or visitation has been based on a fear that the child may be harassed or subject to community prejudice because of the parent's homosexuality.[127] One court stated that it was compelled "to

120. *See* cases cited *supra* note 116.

121. *See* Gerald H. Friedland et al., *Lack of Transmission of HTLV/LAV-III Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 NEW ENG. J. MEDICINE 344, 348 (1986) (study indicating that household members who have no sexual contact with AIDS carriers are at minimal risk). *See generally* Nancy B. Mahon, Note, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. REV. 1092, 1101-02 (1988) (reviewing studies).

122. *See* Margaret A. Fischl et al., *Evaluation of Heterosexual Partners, Children, and Household Contacts of Adults with AIDS*, 257 J.A.M.A. 640, 644 (1987) ("Of 90 HTLV-III/LAV-seronegative children at entry into the study, there was no evidence of horizontal transmission. . . . These observations are important and suggest that contact in other settings (for example, schools) is not likely to transmit HTLV-III/LAV.").

123. *Id.* at 642.

124. Doe v. Roe, 526 N.Y.S.2d 719, 725 (Sup. Ct. 1988).

125. *See* Stewart v. Stewart, 521 N.E.2d 956, 965 (Ind. Ct. App. 1988) (visitation could not be terminated because of father's AIDS infection); *Doe*, 526 N.Y.S.2d at 726 (father's AIDS would not justify removal of child from his custody); "Jane" W. v. "John" W., 519 N.Y.S.2d 603, 605 (Sup. Ct. 1987) (visitation could not be terminated because of father's AIDS); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (court stated that only minimal risk of exposure existed even if father had tested positively for the virus).

126. *See* Mahon, *supra* note 121, at 1138-41 (arguing that denial of custody or visitation because of parent's HIV infection ignores medical knowledge about the disease and endangers the child's psychological development). *But see* Amy R. Pearce, Note, *Visitation Rights of an AIDS Infected Parent*, 27 J. FAM. L. 715, 731 (1988-89) (suggesting that visitation precautions or supervised visitation with an HIV infected parent is appropriate to protect the child).

127. *See* L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982); Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) ("[W]e cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to 'suffer from the slings and arrows of a disapproving society' . . . ."); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("[W]e have no hesitancy in saying that the conditions under which this child must live . . . impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.").

protect the children from peer pressure, teasing, and possible ostracizing" resulting from the mother's homosexuality.[128] The possibility of societal homophobia, however, is not sufficient to justify the abridgment of parental rights. First, courts should not assume that such social pressures inevitably exist when a parent is homosexual.[129] Such logic inherently presumes that gay parents openly display their sexual orientation, thus subjecting the child to ridicule and taunting.[130] Homosexual parents, however, can be as discreet as heterosexual parents regarding sexual and familial issues. Moreover, even if the child is subjected to prejudice and ridicule from peers, courts should not assume that this harassment will necessarily harm the child.[131] Available research indicates that children are often able to withstand peer pressure regarding their parent's homosexuality.[132] Indeed, children are frequently taunted by peers for reasons unrelated to their parents' sexuality. The possibility of this harassment does not justify visitation restrictions or termination of parental rights.[133] Furthermore, courts should recognize

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

129. *See* Susoeff, *supra* note 7, at 877 & n.158 (citing research showing that only about five percent of children living with an openly gay parent had been harassed by other children).

130. *See* Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 532 n.147 (1984) ("The stigma rationale rests in part on the untested assumption that children have extensive knowledge of the lifestyles of their playmates' and schoolmates' parents.").

131. One court has recognized that the child's moral values may actually be strengthened by standing up to prejudice. M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979) ("It is . . . reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, [and] better able to perceive that the majority is not always correct in its moral judgments . . . .").

132. One study reported that no significant differences were found in peer group relationships between children of homosexual and heterosexual parents.

> Eighty percent of the daughters of lesbian mothers and 75% of the heterosexuals' daughters said that they were liked "much more," "somewhat more," or "as much" by their same-sex peer group as other girls in their class. More than 80% of the sons of lesbian mothers and of the heterosexual mothers reported corresponding self-ratings of popularity with their male classmates. . . . The lesbian mothers rated 90% of their daughters and 96% of their sons as leaders or good mixers, compared to the heterosexuals' ratings of 92% for their daughters and 85% for their sons.

Green et al., *supra* note 96, at 178. Another study found that a majority of children of lesbian mothers were not conscious of any societal prejudice against their mothers. The children who were aware of the prejudice supported their mothers and rejected stereotypes. "[T]he majority of children combine any embarassment of initial uncomfortableness with an understanding that society has created the prejudice; that it is society, and not their mothers, that should re-examine its position." Lonnie G. Nungesser, *Theoretical Bases for Research on the Acquisition of Social-Sex Roles by Children of Lesbian Mothers*, 5 J. HOMOSEXUALITY 177, 184 (1980) (quoting Barbara S. Bryant, Lesbian Mothers 73A (1975) (unpublished manuscript, on file at Lymar Associates, 330 Ellis St., Room 401, San Francisco, Cal.). *See generally* Polikoff, *supra* note 2, at 561-66 (reviewing research showing that children of homosexual parents are psychologically well-adjusted).

133. "Children whose families are in some way different from the norm may have to confront distressing reactions from others. These differences can include, among other things, the family's ethnic traits and practices, race, religious affiliation, the parent's country of origin, physical appearance, or occupation." Polikoff, *supra* note 2, at 567-68. Professor Polikoff also noted, "it is unwarranted to assume that . . . harassment based on a parent's sexual orientation will be more troubling than harassment based on other reasons." *Id.* at 569.

that the child may be subject to harassment by peers merely because the parent is homosexual.[134] Reducing contact with the gay parent would have no effect on the possibility of peer pressure and prejudice.[135]

Even if the possibility of harassment is acknowledged, courts may not give judicial effect to this form of societal prejudice or stigmatization. In *Palmore v. Sidoti*,[136] the Supreme Court ruled that a mother could not be denied custody of her child because community prejudice could result following her interracial remarriage.[137] The Court acknowledged: "There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."[138] The Court recognized that custody determinations based on the best interests of the child are a substantial governmental interest, but ruled that the denial of custody based upon the effects of racial prejudice was a violation of the Equal Protection Clause.[139] The Court stated, "[t]he Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[140] Although *Palmore* involved potential racial discrimination, the principle applies equally to discrimination based on sexual orientation.[141] One court re-

134. One court acknowleged this fact and stated:

> [T]he children's exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of living with defendant, but because she is their mother, because she is a lesbian, and because the community will not accept her.

M.P., 404 A.2d at 1262. *See also* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 730-31 (1976) ("[I]f the mother is known in the community as a lesbian, counsel can point out that the children may be harassed, if at all, regardless of with whom they live.").

135. *See M.P.*, 404 A.2d at 1262 ("Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody."). *See also* Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U. L. REV. 451, 469 (1978-1979) ("Denying custody does not eliminate the mother's lesbianism. The child still has a lesbian mother and possibly faces a greater stigmatization as a result of having a mother who is considered so immoral or dangerous that she is denied the custody of her children."). *M.P.* involved an action for change of custody, but the argument used in a visitation context is even stronger. Limiting visitation with a homosexual parent to spare the child harassment or embarrassment will not affect existing community prejudice, and may threaten the child's best interests by decreasing necessary contact with the noncustodial parent. *See infra* part IV.

136. 466 U.S. 429 (1984) (unanimous decision).

137. *Id.* at 434. The father of the child sought to modify the earlier decree granting custody to the mother. He based his petition on changed conditions; the change was that the mother, a Caucasian, was living with and later married an African-American man. *Id.* at 430. The trial court, in an unpublished opinion, ruled that the child's best interests would be served by changing custody to the father and stated, "it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." Palmore v. Sidoti, 466 U.S. 429, 431 (1984) (quoting from Application to Petition for Certiorari at 26-27).

138. *Id.* at 433.

139. *Id.* at 433-34.

140. *Id.* at 433.

141. For discussions of homosexual individuals as a class entitled to heightened protection under the Equal Protection Clause, see Harris M. Miller II, Note, *An Argument for the*

lied on *Palmore* to deny a father's motion for change of custody based on the mother's homosexuality.[142] It follows that judicially imposed visitation denials are similarly invalid, if premised on the possibility of discrimination or prejudice resulting from a parent's sexual orientation.

Courts often deny custody or restrict visitation because of the supposed danger to the child's morals from exposure to the parent's homosexuality.[143] Illustrative is the statement by the court in *S.E.G. v. R.A.G.*: "Such [homosexual] conduct can never be kept private enough to be a neutral factor in the development of a child's values and character. We will not ignore such conduct by a parent which may have an effect on the children's moral development."[144] To be sure, the promotion of a child's moral development is a legitimate parental concern. However, it is impermissible for a court to impose majoritarian standards of morality on families.[145] Given the subjective nature of morality, it is difficult even to determine what prevailing standards of morality exist in a community.[146] Courts often point to state laws forbidding consensual sodomy as evidence of community standards condemning homosexuality as immoral.[147] The existence of these laws, however, does not support the premise that homosexuality is immoral.[148] The majority of these stat-

Application of Equal Protection Heightened Scrutiny to Classification Based on Homosexuality, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985). For discussions of custody decisions and equal protection, see David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395 (1990); Note, *supra* note 15.

142. *See* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985). The court stated, "Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian." *Id. But see* S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (holding that *Palmore* does not apply to custody disputes involving homosexual parents).

143. *See, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987); L. v. D., 630 S.W.2d 240, 243-44 (Mo. Ct. App. 1982); Constant A. v. Paul C.A., 496 A.2d 1, 10 (Pa. Super. Ct. 1985); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985).

144. 735 S.W.2d at 166.

145. *See generally* Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405 (1988) (arguing that fundamental parental rights should not be abridged because of community standards).

146. Religious doctrine may be invoked to establish that a community disapproves of homosexuality. Professor Polikoff noted, however, that "contemporary mainstream religious thought does not uniformly hold that homosexuality is immoral." Polikoff, *supra* note 2, at 550. Polikoff further pointd out that biblical references to homosexuality are open to interpretation: "Diversity of biblical interpretation defies the concept of a universally held religious conviction that homosexuality is immoral." *Id.* at 549.

147. *See, e.g.*, *Thigpen*, 730 S.W.2d at 514 (Cracraft, J., concurring) ("The people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct."). For an example of a sodomy statute that specifically prohibits only same-sex contact, see NEV. REV. STAT. ANN. § 201.190 (Michie 1986) ("[E]very person of full age who commits the infamous crime against nature shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years. . . . The 'infamous crime against nature' means anal intercourse, cunnilingus or fellatio between consenting adults of the same sex."). In 1986, the Supreme Court held that the enforcement of sodomy statutes did not violate the Due Process Clause because there is no right of privacy for acts of consensual homosexual sodomy. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

148. Sexual conduct alone is not determinative of morality. Professor Katz notes that, "There are moral choices other than sexual behavior. The decision to nurture, care for and protect one's child is also a moral choice, a choice entitled to encouragement and support." Katz, *supra* note 145, at 468-69 (footnote omitted).

utes do not specifically prohibit only homosexual sodomy, but rather prohibit all heterosexual and homosexual consensual sodomy.[149] One commentator noted, "[i]n those states that have sodomy statutes, neither the derivation nor the language of the statutes reflects a belief in the immorality of homosexuality. This is because sodomy and homosexuality cannot be equated."[150] Even if a court is able to determine that sodomy statutes are indicative of community standards condemning homosexuality as immoral, these standards do not justify visitation denials to gay parents. First, courts cannot presume that *all* homosexual parents engage in the prohibited sexual conduct. A significant percentage of gay parents do not engage in any form of sodomy.[151] A denial of parental rights, without any affirmative evidence that the gay parent has violated the sodomy law, is illogical and prejudicial.[152] Moreover, even if the sodomy law has been violated by the gay parent and is affirmatively proved, this breach does not render the parent immoral. The existence of a law does not necessarily mean that the infringement of that law is immoral. Laws against slavery and racial intermarriage are but two examples of laws that were immoral in themselves; violating these laws was not an immoral act and did not confer immorality upon the violators.[153] Furthermore, courts act selectively and prejudicially to focus on violations of sodomy laws by gay parents, while ignoring the violation of laws by heterosexual parents.[154] Denying a child parental visitation because

149. *See* Note, *supra* note 15, at 1520 (noting that, of the 25 jurisdictions that have sodomy laws, only seven specifically prohibit homosexual sodomy).

150. Polikoff, *supra* note 2, at 551.

151. *See* Note, *supra* note 15, at 635 (citing studies showing that many lesbians and gay men do not engage in sodomy). *See also* Martin, *supra* note 118, at 580.

152. Courts' homophobia and heterosexism is expressed when this reasoning is used to deny custody or visitation to gay parents. The majority of sodomy statutes apply to *both* homosexuals and heterosexuals, yet courts do not automatically assume that all heterosexuals engage in sodomy, without affirmative evidence.

153. *See* Polikoff, *supra* note 2, at 553 ("[T]he criminal law does not provide proof of morality or immorality, but instead expresses dominant values designed to preserve a particular social order."). One author noted that social mores do not confer morality on laws:

> Sometimes by "morality" is meant the overall beliefs affecting behavior in a society—its current mores, norms, and customs. On this understanding, gays certainly are not moral: lots of people hate them and social customs are designed to register widespread disapproval of gays. The problem here is that this sense of morality is merely a *descriptive* one. On this understanding of what morality is, *every* society has a morality—even Nazi society, which had racism and mob rule as central features of its popular "morality." What is needed in order to use the notion of morality to praise or condemn behavior is a sense of morality that is *prescriptive* or *normative* . . . .
>
> Moral thinking that carries a prescriptive or normative force has certain basic ground rules to which all people consent when attention is drawn to them. First, normative moral beliefs are not merely expressions of feelings. Rather we . . . are expected to be able to give reasons or justifications for them. . . . Second, moral thinking must be consistent and fair . . . . Third, we must avoid prejudice and rationalization . . . .

MOHR, *supra* note 82, at 31.

154. One commentator noted,

> The judiciary's concern with public policy and its concomitant fear of "condoning" illicit and immoral behavior seems highly selective, given the wide range of immoral behavior, (some of it even criminal) in which most parents engage at one time or another. The depth of the hatred and irrationality of the condemnation evoked by the sexual practices of parents, for example, is in sharp contrast to

of the gay parent's "immoral" violation of sodomy laws ignores the child's best interests. The morality or immorality of the homosexual parent's sexual practices is irrelevant to the child's need for parental care and guidance.[155]

IV. Analysis of Effect on Children from Lack of Visitation

Parental separation and divorce are invariably traumatic for the children involved. After a divorce, the child experiences feelings of grief, fear, guilt and rejection.[156] One study noted, "[w]hatever its shortcomings, the family is perceived by the child at this time as having provided the support and protection he needs. The divorce signifies the collapse of that structure, and he feels alone and very frightened."[157] When courts restrict visitation because of a parent's sexual orientation, the trauma may be exacerbated by the subsequent denial of parental contact. Courts should recognize the psychological implications on the child from deprivation of parent-child contact, and deny visitation with a gay noncustodial parent only when a clear nexus of harm to the child exists.[158]

A large body of psychological research shows that the noncustodial parent's visitation is vital to the child. The most extensive study of children of divorce was conducted by Wallerstein and Kelly and involved an examination of sixty families over a five-year period.[159] The authors found that soon after the divorce "children expressed the wish for increased contact with their fathers with a startling and moving intensity. . . . Complaints about insufficiency of parental visits were heard not just from those youngsters who rarely saw the absent parent, but from many who were being visited rather frequently as well."[160] In the year following the divorce, only twenty percent of the children were reasonably content with their individual visiting situations.[161] Wallerstein and

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the legislative and judicial condonation of abusive physical behavior toward spouses and children by their rejecting or ignoring it as a factor in custody and visitation decisions.

Katz, *supra* note 145, at 461.

155. *See* Note, *supra* note 15, at 635 ("Surely, assuming the child is not present during the sexual activity, the difference between the child's parent receiving sexual gratification through oral or manual stimulation will not affect the child's well-being.").

156. JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP—HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-50 (1980).

157. *Id.* at 35.

158. *See* Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) ("If the courts are concerned with the best interests of the child, then visitation by the non-custodial parent must be recognized as necessary to the child's well-being.").

159. WALLERSTEIN & KELLY, *supra* note 156, at 134. Wallerstein conducted a ten year follow-up study and found that the conclusions made in the book were still valid. *See* Judith S. Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-Up of Young Children*, 54 AM. J. ORTHOPSYCHIATRY 444 (1984). *But see* Carol S. Bruch, *Parenting At and After Divorce: A Search for New Models*, 79 MICH. L. REV. 708, 708 (1981) (reviewing JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP—HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-50 (1980) (suggesting that Wallerstein and Kelly's research should be viewed as suggestive and not conclusive)).

160. WALLERSTEIN & KELLY, *supra* note 156, at 134.

161. *Id.* at 143. The authors found that nearly 40% of the children who were visited by

Kelly examined the same children five years after the divorce and discovered that thirty-four percent of the children had adjusted successfully to the divorce.[162]

Regular and frequent visitation was found to be an important factor in the children's psychological health.[163] Twenty-nine percent of the children were classified as exhibiting "adequate and uneven functioning."[164] The authors classified a third group of children as extremely unhappy and dissatisfied with their lives.[165] The study revealed that lack of visitation played a large role in the children's maladjustment.[166] Children who were not visited by the noncustodial parent felt rejected and unloved,[167] suffered severe psychological damage[168] and experienced difficulties in school.[169]

Other studies show that visitation by the noncustodial parent is important to a child's psychological adjustment.[170] One study found that

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the noncustodial parent experienced feelings of intense excitement and eagerness for the visit to occur. *Id.* Not surprisingly, "[d]isappointment was most intense when the visits were, in fact, few and far between or when a father failed to keep a scheduled appointment." *Id.* at 144. However, the authors found that reluctance to visit occurred in 11% of the children studied, mostly preadolescent girls. *Id.* at 146.

162. *Id.* at 209. The authors found that these children had high self-esteem and were coping well with the tasks of school and home. *Id.*

163. *Id.* at 219. The authors noted that "[t]he trio of good father-child relationship, high self-esteem, and absence of depression appeared . . . to hold for all age groups." *Id.*

164. *Id.* at 212-13. No data was given for this group on the effect of visitation upon the children. The children were considered uneven in their overall ego functioning; teachers considered the children average.

165. *Id.* at 211. Over one-third of the children studied fit into this group five years after the separation. These children were found to be moderately to severely depressed, and emotionally needy. *Id.*

166. *Id.* at 248.

167. *Id.* at 218. "The negative effect of irregular, erratic visiting was clear. The father's abandonment, relative absence, infrequent or irregular appearance, or general unreliability, which disappointed the child repeatedly, usually led the child to feel rejected or rebuffed and lowered the child's self-esteem." *Id.*

168. *Id.* at 248.

169. *Id.* at 283. One pair of authors, relying heavily on Wallerstein and Kelly's data, proposed that the noncustodial parent's visitation with the child be enforced by law following separation prior to the divorce.

> We propose that where one parent serves as the primary, day-to-day caretaker of the child, minimum standards of child visitation and child support be established by law, to go into effect immediately upon the separation of the parents. For either parent to fail to abide by at least the minimum standards of support and visitation, without court approval, would be a violation of the law.

Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 27 FAM. L.Q. 327, 356-57 (1983).

170. *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 232-40 (1989) (study showed that a strong father-son relationship following a divorce was crucial to the overall psychological adjustment of the children); William F. Hodges, *The Effect of Divorce on Children: Developmental Stages and Implications for Visitation*, *in* CHILD CUSTODY CONFERENCE: VISITATION—FROM CHAOS TO COOPERATION 30, 39 (1982) (reviewing research suggesting that the greater the time lost with the father as a function of divorce, the greater the maladjustment of the child); Gerald F. Jacobson & Doris S. Jacobson, *Impact of Marital Dissolution on Adults and Children: The Significance of Loss and Continuity*, *in* THE PSYCHOLOGY OF SEPARATION AND LOSS 316, 329-31 (Jonathon Bloom-Feshbach et al., eds., 1987) (reviewing research on visitation and its effect on children). *But see* James H. Bray & Sandra H. Berger, *Noncustodial Father and Paternal Grandparent Relationships in Stepfamilies*, 39 FAM. REL. 414, 418 (1990) (study found conflicting data regarding the effect of frequent visitation by the non-custo-

children exhibited severe "distress symptoms" following withdrawal of visitation by the noncustodial parent.[171] One researcher conducted in-depth interviews with forty children and teenagers who had experienced a divorce and found that children preferred flexible and unrestricted visitation arrangements.[172] The author stated, "[t]he children who were more content were those who maintained contact with the non-custodial parent on a continuous and flexible basis. . . . Our findings repeatedly single out the significance that children attach to maintaining relations with [noncustodial] fathers."[173]

Another study suggested that denial of visitation imposed by the custodial parent may hinder children's psychological health. The author commented, "[w]hen mothers had cut off fathers from parenting, it was reflected in children's poorer adjustment in the home."[174] Another researcher reported that, "visitation patterns of low frequency . . . and inconsistency are predictive of maladjustment in the child. . . . [B]ecause of the relationship of consistency of visitation to child adjustment, courts and parents might attempt as much as possible to provide predictible patterns of visitation for the preschool child."[175]

Lack of visitation with the noncustodial parent may have a detrimental effect on a child's psychological and social functioning. Courts should take these factors into account when analyzing parental fitness and sexual orientation. The child's best interests are served by requiring a showing of direct harm from a parent's homosexuality before imposing visitation restrictions or denying visitation with the child altogether.

CONCLUSION

Traditionally, gay parents have encountered great difficulty in securing parental rights. Many courts have restricted post-divorce visitation on the basis of outdated stereotypes and misconceptions regarding sexual orientation and gay parenting. This Note shows that homosexu-

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dial father on the children); Joseph M. Healy, Jr. et al., *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531, 540-41 (1990) (study showed that although frequent visitation was beneficial to male children, frequent visits correlated with low self-esteem in female children).

Goldstein, Freud, and Solnit contend that visitation is not always necessary for the child. "Visits under favorable circumstances are, at best, a poor substitute for a parent in the family. Weekend visits do not compensate the child for parental absence at crucial moments in his life." GOLDSTEIN ET AL., *supra* note 10, at 118-19 n.*; *see also supra* note 10. *But see* Novinson, *supra* note 10, at 146-62 (criticizing Goldstein, Freud, and Solnit's conclusions regarding visitation).

171. JANET R. JOHNSON & LINDA E. G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 253-54 (1988).

172. R. Neugebauer, *Divorce, Custody, and Visitation: The Child's Point of View*, 12 J. DIVORCE 153, 166-67 (1988-89).

173. *Id.*

174. Anne H. Fishel, *Children's Adjustment in Divorced Families*, 19 YOUTH & SOC'Y 173, 194 (1987).

175. Carol W. Tierney, Visitation Patterns and Adjustment of Preschool Children of Divorce 132, 138 (1983) (unpublished Ph.D. dissertation, University of Colorado (Boulder)).

ality alone is not a permissible basis for visitation denial or restriction. If a child is denied regular contact with and affection from the noncustodial parent, greater harm will likely result from the deprivation of parental contact than from any possible adverse effect of a parent's sexual orientation. Absent an affirmative showing of harm to the child from the parent's homosexuality, courts should acknowledge the fundamental rights of gay and lesbian parents and allow unrestricted visitation.

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