

# Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children

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INTRODUCTION .....	624
I. BASIC FAMILY LAW BACKGROUND .....	627
II. GENERAL APPROACHES TO THE ANALYSIS OF SEXUALITY AND PARENTING. ....	632
<i>A. The Nexus Test</i> .....	635
<i>B. The Per Se Rule</i> .....	637
<i>C. The Permissible Determinative Inference</i> .....	639
III. MISAPPLICATION AND DISTORTION OF THE NEXUS TEST .....	641
<i>A. Speculation About Occurrence of Harm</i> .....	642
<i>B. Uncertainty Regarding What Constitutes Harm</i> .....	644
<i>C. Appellate Review</i> .....	645
IV. A REVIEW OF COURT CONCERNS REGARDING SEXUALLY PROBLEMATIC PARENTS AND THE SCIENTIFIC EVIDENCE REGARDING THOSE CONCERNS .....	646
<i>A. Social Science Literature and Judicial Concerns Regarding         Gender Roles, Sexual Identity, and Social Stigma</i> .....	650
<i>B. Judicial Concern About Moral Well-Being</i> .....	655
<i>C. Illegitimate Judicial Concern Grounded in Bias and Prejudice</i> .....	660
V. COMPONENTS OF A MEANINGFUL NEXUS TEST .....	664
<i>A. The Appropriate Areas of Judicial Inquiry</i> .....	666
1. The Sexual Activity .....	666
2. The New Person .....	667
<i>B. Clear Definition of Harm</i> .....	667
<i>C. Evidence of Harm and of a Link Between Harm and Conduct</i> .....	668
<i>D. Procedural Safeguards</i> .....	670
<i>E. Careful Appellate Review</i> .....	670
CONCLUSION .....	671

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## INTRODUCTION

It is an undeniable fact of life that most parents have sex lives. Yet as a society we are at least partially committed to shielding children from exposure to sexuality and sexual conduct.<sup>1</sup> For the most part, it is left to parents to determine how to carry on their sex lives while protecting their children's innocence.<sup>2</sup> But when parents separate and custody or visitation of the children is contested, courts are permitted, if not required, to review and assess each individual's performance as a parent. When this happens, courts may examine an adult's sex life and its relationship to that individual's suitability as a parent.

This judicial examination and assessment has proven to be particularly problematic for lesbian or gay parents and for their children. Many people, including many judges, perceive lesbians and gay men as exclusively sexual beings, while heterosexual parents are perceived as people who, along with many other activities in their lives, occasionally engage in sex.<sup>3</sup> The mere identification of a parent as lesbian or gay, quite apart from proof of any sexual conduct, may become a relevant factor for the court. Beyond questions of sexual identity, lesbian and gay sexual conduct frequently provokes special judicial concern. Conduct which would be deemed irrelevant to parenting abilities if engaged in by two adults of opposite sexes (holding hands, for example) may become determinative when it involves two adults of the same sex.<sup>4</sup>

This Article examines the approaches courts currently use in assessing the relevance of sexual identity and sexual conduct in determining parental entitlement to custody and visitation. It focuses primarily on the analysis of legally recognized<sup>5</sup> lesbian or gay parents.<sup>6</sup> These parents face the most searching analysis by courts, and their custody

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1. I view the commitment as partial because our commercial culture is highly sexualized and, as a result, children are constantly exposed to sexual imagery, much of it through advertising. See, e.g., Elizabeth Jensen, *It's 8 P.M. Your Kids Are Watching Sex on TV*, WALL ST. J., Mar. 27, 1995, at B1.

2. Under limited circumstances, the state, invoking its *parens patriae* power, may intervene and challenge the performance of a parent. See *infra* text accompanying notes 30-34.

3. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 537-46 (1992).

4. I am not concerned here with instances in which parents involve their children in sexual conduct, but only those in which the child is exposed to parental conduct which takes place without any participation by the child. Exposure may be direct, as when the child views the parents involved in affectionate or intimate sexual practices, or indirect, as when the child is simply aware that the parent is involved in a sexually intimate relationship.

5. By "legally recognized parents" I mean adults whose entitlement to claim legal status as a parent has been recognized by our judicial system. This includes individuals who have legally adopted a child, and, in most cases, the biological parents of a child. An unmarried father, though the biological parent of a child, may not be recognized as the legal father. See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (recognizing husband of mother rather than biological father as legal father of child); Lehr v. Robertson, 463 U.S. 248 (1983) (upholding constitutionality of denying any legal recognition to unmarried biological father); see also Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1391 n.54 (1994) (adopting terms "legal" and "nonlegal" to describe lesbian mothers). The distinction between legal and nonlegal parents has been critical and problematic for lesbian and gay couples raising children within their relationships. See Nancy D. Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L. J. 459 (1990); see also Robson, *supra*.

6. Custody cases reveal a striking pattern of differential treatment with regard to men and women. The vast majority of cases involving judicial scrutiny of nonmarital sexual relationships concern sexual activity of mothers. By contrast, few courts inquire into the sexual activities of fathers. This may reflect a differential standard—one that permits sexual activity for men, perhaps because it is a natural attribute of masculinity, but punishes the sexually active woman. Yet, any analysis must also take account of the fact that in most cases the mother is the children's primary custodian. Assignment of the primary custodial role to mothers, however, may itself be another aspect of differential treatment of men and women. Courts might be particularly concerned about sexual relationships the child will be consistently exposed to and learn from—those with which the child lives. Thus, the pattern noted above could result from heightened judicial supervision of custodial parents, most of whom happen to be women. While these questions are certainly interesting and important, they are well beyond the scope of this Article. For my purposes here, it is enough to note that, consistent with this pattern,

claims raise a wide array of concerns. Lesbian and gay parenting has become a controversial public topic within the last several years, as is evidenced by high-profile cases warranting extensive popular press coverage<sup>7</sup> as well as proposed legislation and ballot initiatives that have incorporated specific restrictions on the rights of lesbian and gay parents.<sup>8</sup>

The last twenty years have seen a marked shift in the approach taken towards lesbian and gay parents.<sup>9</sup> Courts have been increasingly unwilling to adopt rules which explicitly disadvantage all lesbian or gay parents involved in custody cases.<sup>10</sup> Instead, many courts have endorsed a more individualized approach, one that is linked more directly to an analysis of the best interests of the child. At first blush, this would appear to be both another example of our society's increased tolerance of lesbians and gay men as well as a source of reassurance for lesbian and gay parents.

Unfortunately, in many jurisdictions this shift has been largely superficial. While it may be true that not *all* lesbians and gay men are *automatically* disqualified in custody cases, individual lesbians and gay men routinely lose custody and instead receive restricted visitation simply because they are lesbian or gay. The promise of individualized consideration focused on the best interests of the child has not been fulfilled. Ignorance and prejudice too frequently combine to distort the analysis of custody cases.

To gain a broader understanding of the problem of parental sexuality in child custody cases, I also examine the treatment of unmarried, but sexually active, heterosexual parents.<sup>11</sup> While these parents do not share all of the concerns that arise with lesbian or gay parents, they do share many of the principal concerns that motivate courts. It is not unusual for courts to buttress their analysis in cases involving lesbian and gay parents with references to cases involving heterosexual parents who engage in nonmarital sex.<sup>12</sup>

At the same time, I do not wish to understate the difference between the positions of these two groups of parents. While discrimination against unmarried cohabiting heterosexual couples occurs,<sup>13</sup> it is far less widespread than discrimination against

the majority of cases discussing same-sex relationships involve lesbian mothers rather than gay fathers.

7. For example, dozens of newspapers and popular weeklies prominently featured coverage of Sharon Bottoms' custody dispute with her mother. *See, e.g.,* William A. Henry III, *Gay Parents: Under Fire and on the Rise*, TIME, Sept. 20, 1993, at 66; Bill Hewitt & Stephanie Siewka, *Fighting for Tyler: A Lesbian Loses Her Son to Her Own Mother*, PEOPLE, Sept. 27, 1993, at 71.

8. The voters of Nebraska, Oklahoma, South Carolina, and Washington considered legislative measures aimed at lesbian and gay parents during 1995. In addition, Initiative 167 in Washington would ban adoptions by all but married couples. Similar initiatives have been introduced in other states.

9. The shift parallels strides made in securing general civil rights for lesbians and gay men.

10. This is due in no small part to the concerted efforts of organizations like the National Center for Lesbian Rights and Lambda Legal Defense and Education Fund. *But see* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (holding that lesbian conduct is an important consideration in determining the parent's unfitness in a custody case).

11. If a parent remarries and engages in a sexual relationship with a new spouse, courts show little or no concern. Indeed, heterosexual parents who have engaged in nonmarital sex may redeem themselves by marrying their lovers. *See, e.g.,* Marriage of Simmons, 487 N.E.2d 450 (Ind. Ct. App. 1985). But heterosexuals who consistently engage in nonmarital sex may incur judicial scrutiny similar to that imposed on lesbians and gay men. Of course, since lesbians and gay men are not permitted to marry, all lesbian and gay sexual relationships involve nonmarital sex.

12. *See, e.g.,* Thigpen v. Carpenter, 730 S.W.2d 510, 512 (Ark. Ct. App. 1987) (citing Ketron v. Ketron, 692 S.W.2d 261 (Ark. Ct. App. 1985)); Fox v. Fox, 904 P.2d 66 (Okla. 1995) (citing Gorham v. Gorham, 692 P.2d 1375 (Okla. 1984)); Dailey v. Dailey, 635 S.W.2d 391, 394-95 (Tenn. Ct. App. 1982) (citing Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979)), *cert. denied*, 449 U.S. 927 (1980); Roe v. Roe, 324 S.E.2d 691, 693-94 (Va. 1985) (relying on Brown v. Brown, 237 S.E.2d 89 (Va. 1977)).

13. *See, e.g.,* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska) (holding that discrimination against unmarried couples is unlawful), *cert. denied*, 115 S. Ct. 460 (1994); Smith v. Fair Employment & Hous. Comm'n, 880 P.2d 111 (Cal. Ct. App. 1994) (upholding right of landlord to refuse to rent apartment to unmarried heterosexual couple).

lesbians and gay men.<sup>14</sup> Cohabitation by unmarried heterosexual adults is now widely accepted. No political movement has organized around a basic commitment to restrict the rights of cohabiting heterosexuals.<sup>15</sup> It is therefore not surprising that some courts that have deprived lesbians and gay men of custody or merely permitted restricted visitation may have been much more generous in cases involving heterosexual parents. This does not evidence any real difference in the abilities of individuals as parents. Instead, it is a reflection of the relatively greater acceptance of heterosexual cohabitation.

The failure of courts to analyze properly issues of sexual identity and sexual conduct unjustly and inappropriately penalizes lesbian and gay parents as well as some unmarried heterosexual parents. But parents are not the only ones harmed by the courts' failure to develop and apply consistently an appropriate analysis of sexuality, sexual conduct, and its relevance to parenting. When courts allow prejudice and anxieties about sexual morals to overwhelm other evidence in a custody case, they stray from the goal of determining the best interests of the child. The needs of the particular child are marginalized, distorted, or entirely obscured. Whether courts are motivated by a desire to enforce perceived societal norms, by stereotypical and uninformed views of lesbians and gay men, or by a sincere, if misguided, desire to protect a child, the result is the same: Children are unnecessarily removed from loving and secure homes where they have been thriving, or their contact with a caring and concerned parent is needlessly and unreasonably constrained. Thus, the failure of the judicial system to develop and adhere to the appropriate test harms not only the nonconforming parent but also the child. This Article is an effort both to illuminate the problem and to propose a solution.

Part I of this Article presents an overview of some general family law principles—reviewing the various circumstances under which a court may intervene in a parent-child relationship. These principles range from initial custody and visitation decisions, which typically occur at the time of separation or divorce, to termination of parental rights and adoption proceedings. It is in these varied legal contexts that the questions of sexual conduct and parental status arise.

Part II delineates the dominant tests used to assess parental sexuality and sexual conduct, as well as many other parental traits. Most authors and courts have identified two basic tests. One—a *per se* rule—disqualifies all parents found to engage in particular conduct or to exhibit particular characteristics. The other—a nexus test—requires individualized analysis of conduct in a particular case and its effect on the particular child with the ultimate result left to the trial judge's discretion. Closer examination of the case law reveals that there are actually three tests. Two distinct types of cases have been conflated within the *per se* rule. While both types disadvantage lesbian and gay parents and their children, one analysis obliges all trial courts to deny custody to these parents while the other merely permits that result. Part II discusses the three distinct approaches currently in use.

Part II concludes with an observation about the current problematic state of the law. Though most jurisdictions have moved away from rules which explicitly incorporate

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14. For example, victimization of lesbians and gay men, through verbal harassment or physical assault, is the most common kind of bias-related violence. Scott L. Hershberger & Anthony R. D'Augelli, *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay and Bisexual Youths*, 31 *DEVELOPMENTAL PSYCHOL.* 65, 65 (1995).

15. By contrast, in 1994, initiatives restricting the rights of lesbians and gay men were introduced in 10 states. Although none of the initiatives were successful, similar initiatives have been introduced or announced in a number of states this year. At least two 1996 presidential candidates—Pat Buchanan and Robert Dornan—made opposition to rights for lesbians and gay men a prominent part of their campaigns.

negative assumptions about lesbian and gay parents and have embraced the general principles of the nexus test, the nexus test is not consistently or effectively applied. Instead, many courts appear to engage in a free-form assessment with neither analytic rigor nor guiding principles, with results that are, even for family law, disturbingly arbitrary. Many lesbian and gay parents still lose custody or face restricted visitation simply because of their identity or conduct, without regard to its impact, or absence thereof, on their children. Countless more live in understandable fear that if they turn to the courts to seek custody or visitation, they will be treated harshly.

Part III examines in greater detail the particular problems with nexus-test cases. Close examination of the cases demonstrates that, in reality, many courts are not consistently and carefully applying a nexus test. This Part of the Article identifies ways in which courts subvert proper application of the nexus test.

Part IV considers the underlying concerns that motivate courts in cases involving parents who are lesbian or gay or who engage in nonmarital sex. These concerns drive courts to adopt *per se* rules which eliminate all parents in a particular category or deny custody even without evidence of harm or, in a less extreme form, render courts unwilling or unable to conform to the requirements of the nexus test. Some of these concerns are relevant only to lesbians and gay men, while others may relate to all parents who engage in nonmarital sex. After exploring each of the motivating concerns, this Part examines the extent to which that concern can be justified. In part, this requires review of the social science literature exploring the validity of the concerns. This Part concludes that, to the extent judicial concerns arise from a genuine interest in the welfare of children; there is no evidence to support them. They are, therefore, misguided. To the extent judicial concerns arise from bias or stereotypical images of particular types of people, they are illegitimate and should have no bearing on the determination of child custody.

The Article concludes that the correct approach to questions of parental sexual identity or sexual conduct is a carefully designed and applied nexus test focusing on the conduct in question and its relationship (if any) to the welfare of the child. Part V describes such a test in more detail, discussing each of the features that must be part of a meaningful nexus test and various procedural safeguards that should be adopted to make it work. These proposals are designed to ensure that a system intended to serve the best interests of children can achieve its goal in a wider variety of cases.

## I. BASIC FAMILY LAW BACKGROUND

At the outset, it is useful to review the different contexts in which the legal relationships between parents and children come before courts and the different legal standards that are generally utilized in each context. Issues concerning parental characteristics or conduct, including parental sexuality and parental sexual activity, may arise in each of these contexts, but the legal significance of characteristics or conduct may vary with the context.

First, and most prominently, when the legally recognized parents of a child separate and form separate households, a court may be called upon to determine which of the

parents should have custody of the child.<sup>16</sup> In making this determination, the court will conduct an inquiry<sup>17</sup> aimed at determining what is in “the best interests of the child.”<sup>18</sup> This inquiry generally compares the parents to determine who is “best,” though certain characteristics disqualify a parent by rendering that parent unfit.

There is a widespread and strong preference for awarding custody to a legally recognized parent.<sup>19</sup> This preference rests on two assumptions. First, there is a strong presumption that a child is better off with a biological or legally adoptive parent than with a more distant relative or stranger.<sup>20</sup> Therefore, consistent with the best interests of the child, custody with one of the child’s legal parents is preferred. Second, this preference may be understood as a recognition of a parental right to the custody and companionship of the child.<sup>21</sup> The only other individual who can claim a similar right is the other legal parent.<sup>22</sup> This results in a presumption in favor of the parents of the child as against others. In the event of a contested custody battle between a legally recognized parent and a nonrelative, no individualized inquiry into the best interests of the child is generally required.<sup>23</sup> Instead, the inquiry will focus on the fitness of the parent and whether the parent abandoned the child.<sup>24</sup> For the most part, the same approach is followed even when the custody battle is between a parent and a grandparent or other close relative.

16. Separating parents may determine custody of their children without the participation of a court. If the parents never married, they can dissolve their relationship and arrive at a private agreement as to custody of any children. If the parents cannot agree, however, either may bring the matter to a court. For married parents, the chances of relying solely on a private resolution of custody are, at least in theory, slender. If parents seek a legal decree of divorce, the court will inquire into the arrangements made for custody of any children. The fact that the parties may have reached an agreement regarding custody does not prevent court review of the arrangement. Practically, however, court review may be a formality in cases where the parties agree.

17. The court may conduct its inquiry through the ordinary adversarial process used in most civil proceedings. However, it is increasingly common for the court’s inquiry to be supplemented by appointment of an individual to represent the child’s interest, thus significantly altering the traditional adversary model.

18. *See, e.g., Faries v. Faries*, 607 So. 2d 1204, 1209 (Miss. 1992) (“[T]he polestar consideration in matters of child custody is the best interest and welfare of the child.”); *Rowsey v. Rowsey*, 329 S.E.2d 57, 60 (W. Va. 1985) (same); UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973).

19. *See, e.g., McIntyre v. Medaris*, 612 N.E.2d 1068 (Ind. Ct. App. 1993); *Rodgers v. Rodgers*, 274 So. 2d 671, 673 (Miss. 1973); *Stuhr v. Stuhr*, 481 N.W.2d 212, 216 (Neb. 1992); *Black v. Glawson*, 442 S.E.2d 79 (N.C. Ct. App. 1994); *Malpass v. Hodson*, 424 S.E.2d 470 (S.C. 1992); *In re Sedelmeier*, 491 N.W.2d 86 (S.D. 1992). *But see White v. Thompson*, 569 So. 2d 1181 (Miss. 1990) (affirming removal of child from lesbian mother’s custody in favor of grandparents); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (same).

20. *See, e.g., McIntyre*, 612 N.E.2d at 1068; *Stuhr*, 481 N.W.2d at 216; *Malpass*, 424 S.E.2d at 470. *But see Black*, 442 S.E.2d at 79 (holding that parental unfitness is not an appropriate inquiry in a dispute between a parent and a nonparent; instead, the court should determine best interests of the child, although there is a rebuttable presumption in favor of the parent); *Robson, supra* note 5, at 1389 n.52 (same); *Suzette M. Haynie, Note, Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705 (1986) (discussing limited instances in which parental privileges have not been recognized).

21. *Uhing v. Uhing*, 488 N.W.2d 366, 372 (Neb. 1992); *Sedelmeier*, 491 N.W.2d at 88. Under appropriate circumstances, this is a right of constitutional dimension. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983).

22. *Ruthann Robson* has demonstrated, in seeking to identify a child’s legal parents, that the law for the most part operates on the assumption that children have two parents, one male and one female. *Robson, supra* note 5, at 1392.

23. One jurisdiction utilizes a rebuttable presumption that the best interests of the child are served by custody with a natural parent, but requires court inquiry into the best interests of the child. *Black*, 442 S.E.2d at 80.

24. *See McIntyre*, 612 N.E.2d at 1068; *Bubac v. Boston*, 600 So. 2d 951, 956 (Miss. 1992); *see also* LA. CIV. CODE ANN. art. 133 (West 1993); *Westbrook v. Oglesbee*, 606 So. 2d 1142, 1146-47 (Miss. 1992) (stating that the child’s preferences for the grandmother as custodian does not overcome a presumption in favor of fit father). *But see Black*, 442 S.E.2d at 79 (stating that parental unfitness is not an appropriate inquiry in a dispute between parent and nonparent; instead, the court should determine the best interests of the child, although there is a rebuttable presumption in favor of the parent). This case may be part of a developing trend to elevate the importance of the best interests analysis over the commonly recognized entitlement of biological parents. *See discussion supra* note 20 and accompanying text.

At the same time a court determines custody, it generally determines visitation rights of the noncustodial parent. In most jurisdictions, visitation is not granted or denied based solely on consideration of the particular interests of the child. Courts generally presume that some visitation is in the best interests of the child and also recognize a parental right to visitation.<sup>25</sup> Thus, visitation is more a matter of right than is custody and cannot be denied as easily. Visitation usually will only be denied where it can be shown that it would be detrimental to the child.<sup>26</sup> Courts may, however, impose restrictions or limitations on visitation that are designed to shield a child from any perceived potential harm.<sup>27</sup> Supervised visitation is perhaps the most widely used limitation.

Once custody and visitation have been judicially determined, they can only be changed through a procedure for modification. Generally, a motion for modification can be filed at any time.<sup>28</sup> Because stability is crucial to a child's development, a moving party must frequently meet a higher standard to obtain modification than the initial custody or visitation decision. Courts usually require proof of both a material change in circumstances and proof that the proposed modification will serve the best interests of the child. The burden rests with the moving party, and it is sometimes greater than a mere preponderance of the evidence.<sup>29</sup> It is therefore generally more difficult to obtain custody via modification than it is to obtain custody in the first instance.

Unrelated to any separation of a child's parents, the state may initiate proceedings to terminate the parental rights of a particular individual or to remove a child from her or his custody.<sup>30</sup> Proceedings for termination or limitation of parental rights differ markedly from those involved in a clash between two parents or even between parents and other relatives.<sup>31</sup> The opposing parties are parent and state. Because the state has no legally established relationship with the specific child<sup>32</sup> and because termination and limitation proceedings bring the state within the protected sphere of the family, the state must satisfy a substantial burden before a child will be removed from the parent's home.<sup>33</sup>

25. *Lyons v. Lyons*, 591 N.E.2d 1006 (Ill. App. Ct. 1992). Visitation may also be a statutory entitlement. *See, e.g.*, ILL. REV. STAT. ch. 40, para. 607(a) (1989).

26. *Dunn v. Dunn*, 609 So. 2d 1277, 1286 (Miss. 1992) (stating that visitation of a child with husband and his lover cannot be restricted without evidence that visitation would be harmful). For cases dealing with custody, *see Bubac*, 600 So. 2d at 956 and *Malpass v. Hodson*, 424 S.E.2d 470, 470 (S.C. 1992). Indeed, interfering with a noncustodial parent's visitation may be a basis for changing custody of the child. *See In re Shanklin*, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992); *Blotske v. Leidholm*, 487 N.W.2d 607, 610 (N.D. 1992).

27. *See, e.g.*, *Pennington v. Pennington*, 596 N.E.2d 305 (Ind. Ct. App. 1992).

28. In some states the standard for assessing a motion for modification will vary depending on the amount of time that has passed since the original order was entered. *See, e.g.*, KY. REV. STAT. ANN. § 403.340(1) (Baldwin 1992).

29. The precise standards used may vary widely. *See Treutle v. Treutle*, 495 N.W.2d 836, 837 (Mich. Ct. App. 1992) (requiring a showing of clear and convincing evidence for modification); *Westbrook v. Oglesbee*, 606 So. 2d 1142 (Miss. 1992) (stating that modification requires the moving party to show material change in circumstances plus that a modification would serve the best interests of the child); *Ludwig v. Burchill*, 481 N.W.2d 464, 469 (N.D. 1992) (same); *Blotske*, 487 N.W.2d at 609 (requiring showing of "significant need" to modify custody); *Harris v. Harris*, 832 S.W.2d 352, 353 (Tenn. Ct. App. 1992) (requires showing material change of circumstances); *Griffin v. Stone*, 834 S.W.2d 300, 301 (Tenn. Ct. App. 1992) (requiring material change in circumstances). *But see McMillen v. McMillen*, 602 A.2d 845 (Pa. 1992) (allowing modification without change in circumstances if it is in the best interests of the child).

30. In one common scenario, the parent may be denied custody but still retain some parental rights. Typically, the state then designates an individual to provide foster care for the child.

31. Termination proceedings invoke state power via *parens patriae* rather than private dispute resolution. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 230-46 (1975).

32. The state intercedes by invoking its general *parens patriae* relationship with all children. *See id.* at 240-44.

33. This burden may well be constitutionally mandated.

[W]e have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

Typically, the state must show that the parent is unfit or has in some way neglected, endangered, or abandoned the child.<sup>34</sup>

On some occasions, an individual who is not a legally recognized parent may seek custody in opposition to a parent and unrelated to any legal separation of the parties. As one might expect, given the preference for custody with a legally recognized parent, it is generally much more difficult for a nonparent to obtain custody than it would be for a parent to do so.<sup>35</sup>

Finally, individuals may seek to establish a legally cognizable relationship with a child through adoption. In this circumstance, the court must determine whether the petitioning adult is qualified to be a parent.<sup>36</sup> Unlike a previously recognized parent, however, a prospective adoptive parent has no preexisting legal claim to the child. In addition, before any adoption can be finalized, the rights of any previously recognized parent must be curtailed or terminated.<sup>37</sup>

Consistent with the preference accorded to the legally recognized parents,<sup>38</sup> the prospective adoptive parents and the initially recognized parents are not compared, and the best interests of the child are not analyzed.<sup>39</sup> The first stage of the analysis is to consider the termination of the original parents' parental rights. This requires a showing of unfitness or some similar failing. Once this is done, the court will consider the qualifications of the adoptive parents.<sup>40</sup>

A parent's sexuality or sexual activities may be at issue in any of the proceedings discussed above. It may be considered a bar to custody or visitation, a factor to consider in designing custody and visitation orders, a circumstance justifying modification, proof of unfitness sufficient to justify removing a child from the home, or a factor which disqualifies one from being an adoptive parent.

Sexuality or sexual activities may be given different weight in different legal contexts within the same jurisdiction depending both on the strength of the preference in favor of

Quilloin v. Walcott, 434 U.S. 246, 255 (1978); see also Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (requiring clear and convincing evidence).

34. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In most circumstances the state will remove custody from a parent and wait for a period of time to allow the parent to attempt to rectify whatever problems led to the proceedings before seeking to terminate parental rights.

35. See *supra* text accompanying notes 19-24.

36. Note, however, that this is not an inquiry made when people simply have children.

37. An exception is made for stepparent adoptions, where the original parent retains parental rights and the new spouse also acquires them. Some courts have also permitted second parent adoptions—the equivalent of stepparent adoptions—with an unmarried (usually lesbian) couple. See *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Evan*, 583 N.Y.S.2d 997 (Surrogate's Ct. 1992); *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993). But see *In re Angel M.*, 516 N.W.2d 678 (Wis. 1994) (denying a second parent lesbian adoption).

38. See *supra* text accompanying notes 19-24.

39. Family law is constantly evolving and new standards replace old ones. This may be particularly true as to the relative rights of biological parents and adoptive parents. Within the last several years, two widely publicized cases have pitted adoptive or potential adoptive parents with whom a young child had resided for virtually its whole life against a biological father who asserted his parental rights due to the genetic contribution he had made to the child. See *DeBeer v. Schmidt (In re Clausen)*, 501 N.W.2d 193 (Mich. Ct. App.) (the "baby Jessica" case), *aff'd*, 502 N.W.2d 649 (Mich. 1993); *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) (same case in a different jurisdiction); see also *In re Kirchner*, 649 N.E.2d 324 (Ill.) (the "baby Richard" case), *cert. denied*, 115 S. Ct. 2599 (1995). In each case, the courts ultimately ruled in favor of the biological father and declined to conduct a best interests analysis. Particularly after the Illinois case, the public reaction to the court proceedings was immediate and sustained. The reaction contributed to passage of a statute altering the analysis that would apply in such a case and mandating that a best interests of the child analysis be conducted under these circumstances. Diane C. Lade, *Adoption Reform in Works; Legislators to Try Again to Reform State's Laws*, ORLANDO SENTINEL, Jan. 21, 1996, at B1.

40. There is no recognized right to become an adoptive parent, although considering classes of people as ineligible to adopt might raise Equal Protection problems. See Felicia Meyers, Note, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 851-53 (1993).

a biological parent and the status of the opposing party. For example, in *Doe v. Doe*, the Virginia Supreme Court considered a case in which the father sought to have his new wife adopt his child. The mother of the child was a lesbian. The court held that the mother's sexual identity and the fact that she lived with her lover did not, in and of themselves, justify terminating her rights.<sup>41</sup>

Four years later in *Roe v. Roe*, the same court was required to analyze the legal significance of the same factors (a parent's homosexuality and residence with a lover) in a custody case between two parents. In this context, the court concluded that these factors not only justified but actually *required* a denial of custody and an award of extremely restrictive visitation.<sup>42</sup>

The Virginia Supreme Court confronted the question of sexuality and parenting for a third time in *Bottoms v. Bottoms*,<sup>43</sup> a widely publicized custody dispute between Sharon Bottoms, a lesbian mother who lives with her lover, and Kay Bottoms, Sharon's mother. The trial court, invoking *Roe*, awarded custody to Kay Bottoms with restricted visitation to the lesbian mother. The Virginia Court of Appeals distinguished *Roe* as pertaining to disputes between two parents, rather than between parent and grandparent.<sup>44</sup> Since she was seeking to obtain custody from a parent, the court concluded that the grandmother was required to show, by clear and convincing evidence, that Sharon Bottoms was an unfit mother.<sup>45</sup> Following the lead of *Doe*, the appellate court concluded that the mother's sexual identity and the fact that she lived with her lover did not, in and of themselves, show that she was unfit.<sup>46</sup> Examining the specific evidence with regard to the child at issue, Taylor Bottoms, the court found that the grandmother could not satisfy her burden and hence, custody should remain with the mother.<sup>47</sup> On review, the Virginia Supreme Court reversed the appellate court, reinstating the trial court's order granting custody to the grandmother. The court relied on, and apparently expanded, the reach of *Roe*.<sup>48</sup> Thus, *Doe*, *Roe*, and *Bottoms*, all from the same jurisdiction and analyzing the same factors, demonstrate that the legal context in which questions arise may be important.<sup>49</sup>

This Article focuses mainly on how issues of parental sexuality or sexual conduct figure in custody disputes between parents.<sup>50</sup> Because of the preference accorded to legally recognized parents, a legally recognized parent involved in a custody dispute with a child's other legally recognized parent<sup>51</sup> is, as a general matter, in a weaker position

41. 284 S.E.2d 799 (Va. 1981).

42. 324 S.E.2d 691, 694 (Va. 1985). For a more detailed discussion of *Roe*, see *infra* text accompanying notes 77-84.

43. 457 S.E.2d 102 (Va. 1995).

44. *Bottoms v. Bottoms*, 444 S.E.2d 276, 280 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102.

45. *Id.* at 280.

46. *Id.* at 281.

47. *Id.* at 280-82.

48. *Bottoms v. Bottoms*, 457 S.E.2d 102, 108-09 (Va. 1995). *Bottoms* may expand *Roe* because it applies the presumption of favoring the parent in the context of a dispute between a parent and nonparent.

49. While the appellate court in *Bottoms* chose to harmonize *Roe* and *Doe*, the Supreme Court did not attempt to do so. The cases may be fundamentally inconsistent, in that *Doe* requires evidence of harm while *Roe* explicitly denies the need for any such evidence. See Stephen B. Pershing, "Entreat Me Not To Leave Thee": *Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289, 312-14 (1994); see also Yvonne A. Tamayo, *Sexuality, Morality, and the Law: The Custody Battle of a Non-Traditional Mother*, 45 SYRACUSE L. REV. 853 (1994).

50. It is increasingly rare for sexuality to be used to justify state termination of parental rights or parental custody. But see *In re Breisch*, 434 A.2d 815 (Pa. Super. Ct. 1981).

51. Generally, no more than two parents can be legally recognized at any given time. Courts have simply dismissed the idea that a child might have three or more parents. See Justice Scalia's opinion in the *Michael H. v. Gerald D.* case. 491 U.S. 110, 113 (1989); see also Robson, *supra* note 5, at 1385 (criticizing limitations on the number of parents who can be recognized).

than when in a custody dispute with the state or a nonparent.<sup>52</sup> Thus, it is in determining custody cases between legally recognized parents that courts make the most searching examination of parental characteristics and have the broadest discretion to intervene and define parental rights. A satisfactory analysis for consideration of sexuality and sexual conduct in custody disputes between legally recognized parents will equally apply to termination proceedings and actions involving individuals who are nonparents. The reverse is not necessarily true; for example, Virginia does not consider a mother's lesbian relationship to be a basis for terminating parental rights, but it does consider it a basis for determining custody between parents or between a parent and a grandparent.<sup>53</sup> Such an analysis could also be expanded to cover adoption proceedings.<sup>54</sup>

One additional procedural point deserves mention. In most family law cases, trial courts have broad discretion both as finders of facts and as assessors of the characters and needs of the individuals before the court. The guiding precedents often state principles only in general terms, like the best interests of the child. Thus, it is relatively unusual for a trial court to apply the wrong standard because, generally speaking, a trial court can justify any result in a custody case and is little constrained by the law. Further, the court's assessment of the facts is usually thought to be beyond appellate review. Hence, it is hardly surprising that appellate review is generally quite limited and that trial court discretion is correspondingly broad.<sup>55</sup>

## II. GENERAL APPROACHES TO THE ANALYSIS OF SEXUALITY AND PARENTING

In recent years, virtually all states have either judicially or legislatively recognized that an overarching goal of child custody proceedings is to advance the best interests of the child. While agreement on the desired end is nearly unanimous, agreement on the best means to achieve this end is notably lacking. Among the fundamental questions dividing courts, legislators, and particularly scholars is whether the interests of children are better served by adopting relatively rigid rules that constrain the discretion of individual judges or by granting the trial judge broad discretion in assessing the best interests of the child in each case.<sup>56</sup>

52. In selecting this focus I necessarily omit consideration of many critically important problems of lesbian and gay parents, including disputes between lesbian legal and nonlegal mothers and those between lesbian parents and sperm donors. See Robson, *supra* note 5, at 1391-1408.

53. See *supra* text accompanying notes 43-48.

54. For example, if lesbian parents are not uniformly unfit to be custodial parents of their own children, it follows that lesbians are not uniformly unfit to be adoptive parents.

55. See Mnookin, *supra* note 31, at 254; see also *Benson v. Benson*, 495 N.W.2d 72 (N.D. 1993); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 798 (2d ed. 1987) ("[C]ustody cases are largely won or lost in the trial court."); Kathryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 443-44 (1988).

56. See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (acknowledging the value of discretion but rejecting the formulation of the "best interests" standard); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987) (rejecting the indeterminacy of "best interests" given limitations on judicial capabilities in favor of automatic rules like determinative alternative); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1365 (1986) (supporting adoption of an automatic rule rather than the "best interests" test); Mnookin, *supra* note 31 (criticizing the indeterminacy of a highly discretionary system while discussing the difficulties of adopting any rule-based system); Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best Interest Standard*, 89 MICH. L. REV. 2215 (1991) (emphasizing the value of judicial discretion in child custody cases while proposing some limitations on it); see also Richard Neely, *The Primary Caretaker Parent Rule, Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984) (arguing in support of the primary caretaker test partly because

On a more concrete level, there is disagreement about how to assess the importance of particular parental conduct or characteristics. Recent controversies have included whether smoking cigarettes,<sup>57</sup> drug abuse, or spousal or child abuse should affect the issue of custody.<sup>58</sup> Assessment of the appropriate weight and meaning to be given to a parent's sexuality or sexual practices—including homosexual and heterosexual nonmarital sex—in a custody case has been a recurrent and high-profile problem.

Most commentators have identified two basic approaches to considering parental sexuality or sexual conduct in a custody case, sometimes terming them the nexus test and the *per se* rule.<sup>59</sup> Under a nexus test, questions about fitness, parenting, and the significance of specific characteristics or conduct are considered on an individual case-by-case basis. In each case the trial court is required to assess the relative merits of the two parents. The court must determine whether the particular characteristic or conduct makes the parent a less desirable custodial parent. Given the universal acceptance of the best interests of the child as the goal of custody jurisprudence, this question is typically resolved by examining whether the parent's sexuality or sexual conduct has an adverse impact on the child.<sup>60</sup> If it has no adverse impact, then it is not pertinent to determining the best interests of the child and is irrelevant in a custody contest. This approach is denominated a nexus test because it turns on the court finding a nexus between the characteristic or conduct at issue and the parenting abilities of the mother or father.

One alternative to applying a nexus test is a *per se* rule. Under a *per se* rule, *all* parents falling into a particular category—for example, all lesbian or gay parents, or more broadly, all parents cohabiting with another adult to whom they are not married—are necessarily considered unfit or undesirable. They are unfit or undesirable precisely because of their membership in the disadvantaged category. Therefore, any parent who is lesbian or gay or who is cohabiting is automatically disqualified in a custody contest.

of its constraint of discretion).

57. *See, e.g.*, *Division of Family Servs. v. Ellis*, 870 S.W.2d 453 (Mo. Ct. App. 1994) (affirming restrictions on grandmother's visitation based on smoking); *Unger v. Unger*, 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994) (affirming the relevance of cigarette smoking in custody disputes); *see also* Jeffrey L. Hall, *Secondhand Smoke as an Issue in Child Custody Visitation Disputes*, 97 W. VA. L. REV. 115 (1994); Victoria L. Wendling, Note, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities*, 42 CASE W. RES. L. REV. 1025 (1992).

58. A number of states have enacted statutes mandating a presumption that evidence of domestic violence is relevant in child custody hearings. FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1995) (mandating a rebuttable presumption where there is evidence of a parent's conviction for domestic violence); LA. REV. STAT. ANN. § 9:364 (West Supp. 1995); MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1995-96); MO. ANN. STAT. § 452.375(11) (Vernon Supp. 1995); N.D. CENT. CODE § 14-09-06.2(j) (1991).

59. In addition to these two main categories, most commentators identify one or occasionally two other categories. *See, e.g.*, Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L. Q. 71 (1988) (identifying a third category of rebuttable presumption); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1630-32 (1989) [hereinafter *Developments in the Law*] (identifying a third category where homosexuality occasions the need to place limits on any custody award); Maria W. Evans, *Parent and Child* M.J.P. v. J.G.P.: *An Analysis of the Relevance of Parental Homosexuality in Child Custody Determinations*, 35 OKLA. L. REV. 633, 641-42 (1982); Katz, *supra* note 55, at 447-48 (identifying four categories, including rebuttable presumption). In general, I disagree with the use of the additional categories. In my view, the irrebuttable and rebuttable presumptions are both versions of a *per se* rule. In either case, the lesbian or gay parent is automatically and always disadvantaged without any individualized analysis. Whether absolute disqualification or substantial disadvantage results from that initial assumption seems to me less crucial. Indeed, most of the commentators who adopt this division of the cases note that the rebuttable presumption appears to be rebuttable only in theory. *See also* Amicus Brief for American Ass'n of Matrimonial Lawyers at 2-3 & n.3, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (No. 941166) (identifying a third category as one involving cases imposing restrictions on parental activities).

60. Under a case-by-case analysis, many different approaches are possible. For example, instead of determining whether the parental conduct is harmful to the child, the court could determine whether, without regard to impact on the child, the parental conduct warrants some sanction. It could then determine that the appropriate sanction might be to deny or restrict that parent's custody of the child. Under this analysis, the restrictions might or might not be in the child's best interests.

Once a parent's membership in the undesirable category is determined, no further examination of the case's specific facts relating to that parent is required. The two parents are not compared. The particular characteristics or conduct of the other parent and the other parent's relationship to the child are only relevant if they demonstrate that the other parent is also unfit.<sup>61</sup> A true per se rule requires that all lesbian and gay parents, for example, *must* lose custody. It divests a trial court of all discretion to grant custody to any lesbian, gay, or nonmarital sexually active parent.

True per se rules arise when an appellate court reverses a grant of custody to, for example, a lesbian mother, despite the fact that the trial court has rendered a considered decision awarding her custody. When an appellate court takes this step, it effectively announces that a lesbian mother cannot be awarded custody of her child, even if the trial court believes it to be appropriate in a particular case. Despite the discretion generally granted trial courts in custody matters, only one decision will be affirmed on appeal—a denial of custody.

In fact, reported instances of true per se rules are quite rare.<sup>62</sup> Most of the opinions generally cited as adopting some form of a per se rule do not formally constrain the discretion of trial judges to find in favor of the lesbian or gay parent, should a judge choose to do so. Instead, most of the opinions grant the trial courts unbridled discretion to deny custody whenever they choose but also, potentially, to award custody if it is deemed appropriate.

Cases in which judges are given unbridled discretion appear in a procedural context significantly different from the true per se rule cases—appellate review of trial court *denials* of custody to a lesbian, gay, or cohabiting parent. An appellate affirmance of a denial of custody establishes that the trial court has reasonably found facts or has drawn a permissible and properly supported inference and has reached an acceptable conclusion, but the appellate court does not necessarily determine that the trial court's decision is the only permissible inference or the only acceptable conclusion.

In many of these instances, however, the original denials of custody are not based on any evidence of harm to the child. Affirmance in such a case establishes that a court may permissibly infer harm from the mere fact that a parent is lesbian or gay and base a determination on that inference, but it does not necessarily *require* that a court draw that inference. Therefore, these opinions do not dictate that all lesbian mothers must lose custody in all cases, but the opinions clearly make this result possible and even desirable.

It is critical to recognize the existence of a third approach, apart from the nexus test and the per se rule. This standard permits, but does not require, a trial court to infer harm to a child in the absence of any evidence of harm. Further, the permissible inference is one that, standing alone, can justify the court's decision to deny custody. Thus, it is a permissible determinative inference, and I will label this approach accordingly.

While permissible determinative inference cases are extremely problematic and possess some obvious similarities to per se cases, they also differ significantly.<sup>63</sup> Therefore, to categorize them as per se cases is to miss a crucial distinction. Per se cases completely

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61. A finding that the second parent is unfit does not rehabilitate the first parent. It also does not return the parents to equal footing or permit the court to take other factors into consideration. It simply means that the child will not be placed in the custody of either parent, and in all likelihood the child will be placed in the custody of another relative or in foster care.

62. See *infra* text accompanying notes 74-90.

63. The rhetorical devices employed in per se cases and permissible determinative inference cases are frequently similar, as are the underlying concerns which appear to motivate the courts.

constrain the discretion of trial courts. They embody rule-bound decisionmaking. Permissible determinative inference cases represent the opposite extreme. They invest a trial court with absolute and unreviewable discretion, for an inference is permitted even in the absence of supporting evidence: A court's decision to draw (or in theory not to draw) the inference can never be deemed incorrect on appeal.<sup>64</sup>

Although distinct from a *per se* rule, the deleterious effect of the permissible determinative inference approach should not be understated. It allows lower courts to adopt and to utilize their own *per se* rules. Further, the rhetoric that generally accompanies adoption of this approach encourages such action. Like a *per se* rule, this approach rests on a combination of inaccurate stereotypical images of lesbians, gay men, and cohabiting heterosexuals, unsupported and insupportable assumptions about the capacity of nonconforming individuals to raise children, and judicial and societal prejudice and bias. Ultimately, the permissible determinative inference approach constitutes an evasion of responsibility on the part of appellate courts which results in the subversion of the best interests of the child in custody cases.<sup>65</sup>

In the next Sections, I will examine the nexus test, the *per se* rule, and the permissible determinative inference approach in more detail. I focus on these analyses because they are the dominant alternatives in analyzing these types of characteristics and conduct.<sup>66</sup> An examination of selected cases typifying each approach will illuminate the challenges that currently confront lesbian and gay parents.

### A. The Nexus Test

Courts in a majority of the jurisdictions that have considered within the last twenty years a parent's homosexuality in assessing an individual's fitness as a parent have expressed approval of the basic principles of the nexus test.<sup>67</sup> A nexus test requires that

64. For a critique of trial court discretion overall, see Schneider, *supra* note 56, at 2249-52.

65. Just as the permissible determinative inference approach has features in common with a *per se* rule, so it bears some resemblance to (and hence may be confused with) a nexus test. Both rest on a finding of harm to the *particular* child. (This distinguishes the permissible determinative inference approach and the nexus test from the *per se* rule, which rests on a finding of harm to all children of parents in a particular category.) However, the nexus test at least theoretically requires a specific evidentiary basis for the finding of harm, while the inference approach permits the finding without any evidentiary support. When the nexus test is not scrupulously applied it may become little more than a version of the permissible determinative inference approach. See *infra* text accompanying notes 108-30.

66. One can readily imagine other variations on these approaches. For example, a court could decide that a lesbian parent is not automatically disqualified, but instead must overcome a presumption against an award of custody to her. Such an analysis bears close resemblance to the *per se* rule in that all lesbian mothers are automatically disadvantaged, although not as severely as with the *per se* rule. As is discussed above, some commentators consider this to be a separate approach, but I think it is more useful to conceptualize this as a minor variation on an existing theme.

67. Courts in 27 states have done so. They are Alabama, H.J.B. v. P.W., 628 So. 2d 753 (Ala. Civ. App. 1993); Alaska, S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985); Arizona, *In re Matter of Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830, 835 (Ariz. Ct. App. 1986); California, *In re Marriage of Birdsall*, 243 Cal. Rptr. 287 (Ct. App. 1988); Connecticut, Charpentier v. Charpentier, 536 A.2d 948 (Conn. 1988); Delaware, Gerald & Margaret D. v. Peggy R., No. 79-12-143-CV (Del. Fam. Ct. Nov. 17, 1980); Florida, Seebol v. Farie, 17 Fam. L. Rep. (BNA) 1331 (Fla. Cir. Ct. Mar. 15, 1991); Davis v. Davis, 335 So. 2d 857 (Fla. Dist. Ct. App. 1976); Illinois, *In re Marriage of Williams*, 563 N.E.2d 1195 (Ill. App. Ct. 1990); Indiana, D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981); Iowa, *In re Marriage of Wiarda*, 505 N.W.2d 506 (Iowa Ct. App. 1993); Hodson v. Moore, 464 N.W.2d 699 (Iowa Ct. App. 1991); Kentucky, S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); Maine, Whitehead v. Black, 2 Fam. L. Rep. (BNA) 2593 (Me. June 14, 1976); Massachusetts, Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983); Bezio v. Patenaude, 410 N.E.2d 1207, 1215-16 (Mass. 1980); Michigan, People v. Brown, 212 N.W.2d 55 (Mich. Ct. App. 1973); Missouri, S.E.G. v. R.A.G., 735 S.E.2d 164 (Mo. Ct. App. 1987); New Jersey, M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); New Mexico, A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); State *ex rel.* Human Serv. Dep't (*In re Jacinta M.*), 764 P.2d 1327 (N.M. Ct. App. 1988); New York, Anonymous v. Anonymous, 503 N.Y.S.2d 466 (App. Div. 1986); Guinan v. Guinan, 477 N.Y.S.2d 830 (App. Div. 1984); North Dakota, Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981);

some connection or nexus between an individual parent's homosexuality and harm to the particular child in question be established before the parent's homosexuality is considered relevant to the custody determination. Application of a nexus test to the question of a parent's homosexuality is consistent with the general family law principle that most parental characteristics are relevant only if they can be shown to have an impact on the child.

As with most traditional custody tests, a nexus test entrusts the determination of the proper custody arrangement in a particular case to the informed and reasoned judgment of the trial court. The test mandates an individualized determination of child custody for each case and does not dictate any particular result in all cases. This is the strength of the test as well as its weakness. If the nexus test is given appropriate content, if it is scrupulously applied, and if appellate courts carefully review its application, it can assist courts in determining the best interests of the child.<sup>68</sup>

A recent example of the nexus test is *Van Driel v. Van Driel*.<sup>69</sup> In *Van Driel*, Lori and James Van Driel originally agreed to joint legal and physical custody of their two children. Shortly after the divorce became final, James petitioned for a modification of custody, based on his fear that the children would be ridiculed by their peers and would react negatively in the future to their mother's sexual orientation. Despite James' motion, the trial court awarded physical custody to Lori. This determination was affirmed on appeal.<sup>70</sup>

Ohio, *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987); Oklahoma, *Fox v. Fox*, Nos. 79676, 83590, 1995 WL 422057 (Okla. July 18, 1995); Oregon, *In re Marriage of Ashling*, 599 P.2d 475 (Or. Ct. App. 1979); South Carolina, *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987); Tennessee, *In re Parsons*, No. O2A01-9403-JV-00037, 1995 WL 442587 (Tenn. Ct. App. July 27, 1995); Collins v. Collins, No. 87-238-II, 1988 Tenn. App. LEXIS 123 (Mar. 30, 1988); Utah, *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980); Vermont, *Nickerson v. Nickerson*, 605 A.2d 1331 (Vt. 1992); Washington, *In re Marriage of Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986); *Schuster v. Schuster*, 585 P.2d 130 (Wash. 1978). In addition, the District of Columbia has a statute mandating that custody shall be determined without reference to sexual orientation. D.C. CODE ANN. § 16-911(a)(5) (1981).

I do not mean to suggest that all of these jurisdictions have clearly adopted a nexus test. For example, I have included *Collins*, a Tennessee appellate decision which makes no explicit mention of the nexus test but seems to follow its basic principles.

68. The nexus test is frequently employed in cases involving heterosexually active but unmarried parents. See, e.g., *Pea v. Pea*, 498 N.E.2d 110 (Ind. Ct. App. 1986); *Robinson v. Robinson*, 615 A.2d 1190 (Md. 1992); *Bouchard v. Bouchard*, 422 N.E.2d 471 (Mass. App. Ct. 1981); *Feldman v. Feldman*, 358 N.Y.S.2d 507 (App. Div. 1974); *In re Rex*, 444 N.E.2d 482 (Ohio Ct. App. 1981); *Gorham v. Gorham*, 692 P.2d 1375 (Okla. 1984).

69. 525 N.W.2d 37 (S.D. 1994).

70. It is intriguing to contrast *Van Driel* with an earlier South Dakota Supreme Court opinion, authored by the same Chief Justice, *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992). In *Chicoine* the supreme court found that a trial court abused its discretion when it permitted unsupervised visitation with the lesbian mother on alternate weekends, even though visitation was allowed only on the condition that no unrelated women and no gay men be present during visitation. The court recited many failings of the lesbian mother in *Chicoine*, among them that she had experienced psychological problems "including . . . active homosexual relationships with several female partners," that she "openly admits that she is an active homosexual and that she had many sexual encounters with female partners during [her] marriage," that she and the children moved out of her marital home and into her lover's home, that she and her lover were "affectionate towards each other in front of the children, caressing, kissing and saying 'I love you,'" and that she and her lover discussed getting married. *Id.* at 893-94. In contrast, the lesbian mother in *Van Driel* was "discreet about the sexual aspects of their . . . relationship." *Van Driel*, 525 N.W.2d at 39. Although the lesbian couple in *Van Driel* had "exchanged vows," this seemed to count in their favor. Not surprisingly, the father in *Van Driel* relied heavily on *Chicoine*, but the court quickly dismissed his reliance, stating that the facts are "so wholly dissimilar as to render *Chicoine* irrelevant." *Id.*

*Chicoine* and *Van Driel* exemplify the law's good lesbian/bad lesbian dichotomy. The mother in *Van Driel* is a good lesbian—discreet, monogamous, apparently a homebody—and is therefore worthy to receive custody. By contrast, the mother in *Chicoine*, who is portrayed as a highly sexual figure, is a bad lesbian and even liberal visitation with her children is suspect. This division of lesbians into favored and disfavored categories and its consequences for the lesbian community have been observed and criticized by theorists. See, e.g., RUTHANN ROBSON, LESBIAN (OUT)LAW 132-34 (1992); Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 SIGNS 975, 989 (1994).

The South Dakota Supreme Court rejected James' argument that a per se rule should apply. It held that assertedly immoral conduct "must be shown to have had some harmful effect on the children."<sup>71</sup> Finding that there was no evidence that classmates or the larger community ridiculed the children or that the mother's living arrangements adversely affected the children, the court affirmed the trial court's decision.<sup>72</sup>

### B. The Per Se Rule

In its simplest form, a per se rule dictates that any parents in a particular category will not get custody. Such a rule is consistent with the best interests of the child only if it is assumed that all parents in that category necessarily damage or harm their children. Once that is assumed, it follows that it is always in the best interests of a child to be removed from the custody of that parent.<sup>73</sup>

This is essentially the reasoning utilized by courts that have adopted a per se rule denying lesbian and gay parents custody. These courts make a finding—explicitly or implicitly—that it is never in the interests of any child to be in the custody of a lesbian or gay parent, at least where there is a minimally adequate heterosexual parent (or sometimes, heterosexual relative) available as an alternative.<sup>74</sup> Analogous reasoning has been used to advance a maternal preference<sup>75</sup> or a preference for the primary caretaker<sup>76</sup> as consistent with the best interests of the child. This reasoning has also been used to advance a per se rule disqualifying parents who have physically abused members of their families.

The principle example of a per se rule as to lesbian and gay parents is *Roe v. Roe*.<sup>77</sup> In *Roe*, the child in question had resided with her father for over six years, beginning at a time when the mother was too ill to care for the child. The father was gay and lived with

71. *Van Driel*, 525 N.W.2d at 39.

72. Other opinions carefully applying a nexus test include: *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) and *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); see also *Fox v. Fox*, Nos. 79676, 83590, 1995 WL 422057 (Okla. July 18, 1995) (reversing the change of custody to husband and away from the lesbian mother because there was no evidence that her behavior adversely affected the children).

73. It does not necessarily follow from the application of the per se rule that it is in the best interests of the child to be placed with the parent who is not lesbian or gay. For various reasons, this individual might also be an inappropriate custodian. In such a case, the child might be placed in foster care or with another relative.

A per se rule may be justified by reference to goals other than the best interests of the child. For example, the use of a per se rule may be justified as a sanction for violation of adultery, sodomy, or fornication statutes. This approach has been much less useful since the advent of no-fault divorce. And, of course, both the sanction approach and the best interests approach can work together, particularly where the conduct in question is criminal.

74. For example, the trial court in *Nadler v. Nadler*, 63 Cal. Rptr. 352 (Ct. App. 1967), expressly found that the homosexuality of the mother "as a matter of law constitutes her not a fit or proper person" to have custody of her child. *Id.* at 353. The appellate court reversed the trial court, noting it had failed to exercise discretion and to determine the best interests of the child.

75. A maternal preference, sometimes called a "tender years" presumption, favors a child's mother over its father. It is based on the premise that it is in the best interests of children to live with their mothers. Though the constitutionality of a maternal preference has been called into question on Equal Protection grounds, it is still in limited use in a number of jurisdictions. See, e.g., *Wheeler v. Gill*, 413 S.E.2d 860, 864 (S.C. Ct. App. 1992) (stating that the tender years presumption is tie-breaker in the case of equally qualified parents); *Malone v. Malone*, 842 S.W.2d 621, 623 (Tenn. Ct. App. 1992) (stating that the court must give consideration to the tender years presumption although the controlling inquiry is best interests of the child). In addition, without regard to its lack of formal adoption, many believe that the preference is alive and well and frequently used by judges.

76. See *Neely*, *supra* note 56, at 169; see also *Lewis v. Lewis*, 433 S.E.2d 536 (W. Va. 1993).

77. 324 S.E.2d 691 (Va. 1985). *Roe* was generally reaffirmed in *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), though *Bottoms* may not be a true per se case since the supreme court reinstated the trial court's original ruling denying the lesbian mother custody. In addition, some Missouri appellate decisions are sometimes read as establishing a per se rule, although closer consideration shows they are technically permissible determinative inference cases. See *infra* note 118.

his lover. Despite this, the trial court found that each parent had been "a fit, devoted, and competent custodian."<sup>78</sup> The court also found that the child was happy, with "no evidence that the father's conduct had an adverse effect on the child."<sup>79</sup> Based on this record, the trial court awarded joint legal custody to both parents and ordered that the child live with the father during the school year and the mother during summer vacation, with extensive visitation to both parents. The trial court was not, however, without anxiety over the father's homosexuality. It conditioned the father's custody upon his "not sharing the same bed or bedroom with any male lover or friend while the child is present in the home."<sup>80</sup> While the trial court was concerned about potential problems that might arise as the child reached adolescence, it concluded that these problems could be dealt with "when and if they arose."<sup>81</sup>

The Virginia Supreme Court reversed the trial court's order. It determined that

The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law. . . . [W]e have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also 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. . . .

. . . The impact of such behavior upon the child, and upon any of her peers who may visit the home, is inevitable.<sup>82</sup>

Based on its finding of inevitable harm to the child, the court ordered custody with the mother and restricted visitation to prohibit visits in the father's home or in the presence of his lover "while his present living arrangements continue[d]."<sup>83</sup> The court held that "an award of custody to such a parent [who carries on an active homosexual relationship in the same residence as the child] constitutes an abuse of judicial discretion."<sup>84</sup>

By design, a *per se* rule applies to all parents who fall into a particular disadvantaged category. Most commonly, a court or a particular judge imposes a *per se* rule on all those who identify themselves publicly as lesbian or gay or on all those who have same-sex lovers, date others of the same sex, or engage in other specified conduct.<sup>85</sup> Typically public identity and conduct are of greater concern to the court than private or "discreet" conduct, since it is public identification as a lesbian or gay man that triggers the most prevalent concerns.<sup>86</sup>

The use of *per se* rules in custody cases is increasingly unpopular. *Per se* rules have been frequently, and apparently uniformly, criticized by commentators.<sup>87</sup> Many have assailed the rule's critical assumption that lesbian and gay parents invariably harm their children. There is a substantial and mounting body of social science literature that

78. *Roe*, 324 S.E.2d at 692.

79. *Id.*

80. *Id.*

81. *Id.* at 693.

82. *Id.* at 694.

83. *Id.*

84. *Id.* at 691. While *Roe* is an example of a court-adopted *per se* rule, a legislature could also adopt a *per se* rule. See FLA. STAT. ANN. § 63.042(3) (West 1985) (prohibiting adoption by lesbians and gay men); N.H. REV. STAT. ANN. § 170-B:4 (1994) (prohibiting adoption by a homosexual).

85. For example, the rule in *Roe* appears to apply to all parents who "carry on" an active homosexual relationship in the house where the child resides. *Roe*, 324 S.E.2d at 691; see also *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*5 (Mar. 30, 1988) (Tomlin, J., concurring).

86. See *infra* text accompanying notes 142-51.

87. See *Developments in the Law, supra* note 59, at 1636-42; David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994); Pershing, *supra* note 49, at 291-308.

demonstrates otherwise and no literature to support the assumption.<sup>88</sup> In addition, the constitutionality of a per se rule is suspect.<sup>89</sup> Moreover, cultural and societal attitudes toward nonmarital sex and toward lesbians and gay men have shifted over the past twenty-five years, with large sectors of the public expressing increased tolerance.

For whatever reason, courts seem to be moving away from per se rules disqualifying lesbian and gay parents. Courts in jurisdictions that have previously applied per se rules—or at least rules that are identified as per se rules—are reinterpreting cases to narrow or revise these interpretations, not only as applied to lesbians and gay men but also to nonmarried sexually active parents.<sup>90</sup>

### C. The Permissible Determinative Inference

Most commentators have settled on two categories—the nexus test and the per se rule. Nonetheless, some of the cases generally cited as examples of a per se rule are actually not that at all. Rather than require that all lesbian, gay, or unmarried but sexually active heterosexual parents lose custody, the cases permit this result without mandating it.

For example, *Thigpen v. Carpenter*<sup>91</sup> is sometimes identified as a case establishing a per se rule. Closer examination, however, reveals that this interpretation of the case is not necessarily correct. In *Thigpen*, the Arkansas Court of Appeals found there was no need for evidence that a lesbian mother's residing with her lover had a detrimental impact on her children. "[I]t has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children. Arkansas courts have presumed that it is."<sup>92</sup> As a consequence of this presumed impact, the court found that a change of custody<sup>93</sup>—from joint custody to paternal custody—was appropriate.<sup>94</sup>

One can fully understand the precedential significance of *Thigpen* only by examining its procedural context. The trial court in *Thigpen* modified the existing custody arrangement to restrict the rights of the lesbian mother. Technically, the issue on appeal

88. See *infra* part IV.A.

89. Either Equal Protection or procedural Due Process might form the basis for a constitutional attack. The possible equal protection analysis has been developed in several law review articles. See, e.g., *Developments in the Law*, *supra* note 59, at 1640-42; Pershing, *supra* note 49, at 308-11; Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

A procedural due process argument would flow from *Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley*, the United States Supreme Court found that an Illinois presumption that an unwed father was an unfit father violated the Due Process Clause. The statute was invoked upon the death of a mother to defeat the custody claims of the father. As a consequence, the children were declared wards of the state. The Supreme Court reasoned that Stanley had a protected interest in his relationship with his children and that he could not be deprived of this interest without a hearing on his fitness as a parent.

*Stanley* would most directly apply to a per se rule mandating termination of parental rights for particular sexual conduct or identity. Its application to custody cases depends on recognition of a protected liberty interest in a parent's custodial relationship with a child.

90. See *infra* note 107.

91. 730 S.W.2d 510 (Ark. Ct. App. 1987).

92. *Id.* at 513. The court was particularly concerned because the mother and her lover shared a bedroom while the children were visiting. There was no evidence that the mother had ever engaged in sexual conduct in the children's presence, and the court accepted that neither she nor her lover intended to do so. *Id.*

93. *Thigpen* is a modification case rather than an original custody case. Thus, the father (at least in theory) faced a more difficult task convincing a court to change custody than he would have persuading a court to grant him initial custody. If the presumption against a lesbian mother is strong enough to overcome a court's reluctance to change custody, it must also be strong enough to defeat the mother's initial claim for custody.

94. As is frequently the case, the appellate court hastened to add that the lesbian relationship was not the trial judge's sole justification for the change of custody. *Thigpen*, 730 S.W.2d at 513. The other factors discussed by the chancellor included the mother's enrollment in graduate school, the father's intent to remain in the same neighborhood where the children previously lived, the possibility that the children would be subjected to ridicule because of the mother's lesbian relationship, and the fact that the mother's conduct was contrary to the court's sense of morality.

was not whether custody should be changed, but rather whether the trial court was within its discretion in ordering that custody be changed. Given the deference shown to trial courts in custody matters, the affirmance of the trial court's decision can be understood to convey nothing other than that denying custody to a lesbian mother is permissible, but not mandatory.<sup>95</sup>

Viewed in this light, *Thigpen* may still be extremely problematic, but for different reasons than a per se rule. *Thigpen* stands for the proposition that a trial court may deny custody to a nonconforming parent at will, in the absence of any evidence, and that such a decision will not be disturbed on appeal. It lodges absolute and unreviewable discretion in the trial court to deny custody to certain parents as it sees fit. Consequently, trial courts, like the one in *Thigpen*, may systematically deny custody to lesbian and gay parents, but may also may award custody to a lesbian mother.

Unmarried heterosexual couples have encountered similar arbitrary rules. In *Jarrett v. Jarrett*,<sup>96</sup> the Illinois Supreme Court reinstated a trial court decision shifting custody<sup>97</sup> of three children from their mother to their father.<sup>98</sup> The father acknowledged that his daughters, who were twelve, ten, and seven at the time of the divorce, were "clean, healthy, well dressed and well nourished when he picked them up."<sup>99</sup> There was no evidence of harm to the children or defect in the mother's conduct or character, with one crucial exception: Jacqueline Jarrett chose to live with Wayne Hammon without being married to him.<sup>100</sup> The father felt that this "was not a proper [environment] in which to raise three young girls."<sup>101</sup>

On this basis alone, the trial court found that "it was 'necessary for the moral and spiritual well-being and development' of the children" that custody of the children be switched to the father.<sup>102</sup> The Illinois Supreme Court upheld this ruling. The court found that the state fornication statute, which criminalized cohabitation or sexual intercourse

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95. Other cases that might be interpreted to establish a permissible determinative presumption in the context of lesbian and gay parents include: *In re Marriage of Diehl*, 582 N.E.2d 281 (Ill. App. Ct. 1991); *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); *Mohrman v. Mohrman*, 565 N.E.2d 1263 (Ohio Ct. App. 1989) (holding that the trial court was not required to find that the mother's lesbian relationship had an adverse impact in order to award custody to the other parent). These cases are in contrast to the rule adopted in *Roe*. In *Roe*, the Supreme Court of Virginia reversed a trial court's award of custody to a gay father. Given the procedural setting, *Roe* can only be understood to establish a rule denying trial courts the discretion to award custody to gay parents in similar cases. Thus, the rule dictates the specific result in each case.

96. 400 N.E.2d 421 (Ill. 1979), *cert. denied*, 449 U.S. 927 (1980).

97. The Illinois Marriage and Dissolution Act governing modification of custody judgment was enacted during the pendency of the case. The supreme court noted that the new statute simply codified prior decisional law. *Id.* at 423. The statute provided that a court was obliged to continue custody unless "the child's present environment endangers seriously his physical, mental, moral or emotional health *and* the harm likely to be caused by a change of environment is outweighed by its advantages to him." ILL. REV. STAT. ch. 40, para. 610(b)(3) (1977) (emphasis added). In addition, the statute directed the court to disregard any "conduct of a present or proposed custodian that does not affect his relationship to the child." *Id.* para. 602(b).

98. *See also* *Beck v. Beck*, 341 So. 2d 580 (La. Ct. App. 1977) (holding that the best interest of a child would be served by changing custody from mother to father because mother was living in open concubinage).

99. *Jarrett*, 400 N.E.2d at 422.

100. Jacqueline Jarrett did not wish to marry because it was too soon after her divorce. She had spoken to her children about her living arrangements. She "explained to the children that some people thought it was wrong for an unmarried man and woman to live together but she thought that what mattered was that they loved each other." *Id.* The Illinois Court of Appeals found this candor to be a positive attribute. *Jarrett v. Jarrett*, 382 N.E.2d 12, 16 (Ill. App. Ct. 1978), *rev'd*, 400 N.E.2d 421 (Ill. 1979), *cert. denied*, 449 U.S. 927 (1980). For the Illinois Supreme Court, however, it demonstrated that her conduct was open and notorious and, hence, in violation of law. *Jarrett*, 400 N.E.2d at 424.

101. *Id.* at 422.

102. *Id.* (quoting the trial court).

"if the behavior [was] open and notorious,"<sup>103</sup> established the relevant standard of conduct.<sup>104</sup> Since the mother's conduct was illegal, it was presumed to be immoral. The court concluded that "the moral values which Jacqueline currently represents to her children, and those which she may be expected to portray to them in the future, contravene statutorily declared standards of conduct and endanger the children's moral development."<sup>105</sup> No actual evidence of injury to the children's moral well-being was required. The change of custody was justifiable as a measure to safeguard the children against the possibility of harm.<sup>106</sup>

*Jarrett* allows a trial court to adopt the premise that all cohabiting mothers (or perhaps cohabiting parents) will cause their children harm. For that reason, no specific inquiry into the well-being of the children is necessary. Properly interpreted, *Jarrett* suggests that a trial court could bar all parents who violate the fornication statute from obtaining custody, at least of young girls, without regard to the specifics of the particular case. Thus, in *Jarrett*, the Supreme Court of Illinois adopted a permissible determinative inference standard.<sup>107</sup>

Appellate courts may be drawn to the permissible determinative inference standard for purely pragmatic reasons. The standard allows them to deny custody to lesbian and gay parents without adopting the potentially problematic per se rule. In a case where the trial court has already denied custody or restricted visitation, there is no need for a per se rule.

### III. MISAPPLICATION AND DISTORTION OF THE NEXUS TEST

Over the past fifteen years, appellate courts in a number of states have reviewed many custody cases involving lesbian or gay parents. Very few have adopted a per se rule. Several have approved a permissible determinative inference standard. A far greater number have expressed approval for a nexus test.<sup>108</sup> This trend in favor of the nexus test would seem to be a success story for advocates of lesbian and gay rights, heralding the advent of a world where lesbian and gay parents are not disadvantaged in court.

Yet lesbian and gay parents are still denied custody and visitation simply because they are lesbians and gay men. Appellate court endorsement of the principles of the nexus test

103. ILL. REV. STAT. ch. 38, para. 11-8 (1977). The fornication statute has since been amended and the code reorganized. Illinois' current fornication statute is found at 720 ILCS 5/11-8 (1993). Cohabitation is no longer illegal, but sexual intercourse outside of marriage remains a crime if the behavior is open and notorious. *Id.*

104. *Jarrett*, 400 N.E.2d at 423-24.

105. *Id.* at 425.

106. *Id.* While discussing the children's moral well-being at great lengths, the court also expressed its concern for the children's mental and emotional health. *Id.* at 425-26. Among the causes for concern, the court noted that Wayne Hammon played with the Jarrett children and their friends in the Jarrett home. The children might be required to explain who Wayne is, which in turn might expose them to taunts and jibes.

107. The Supreme Court of Illinois has specifically declined to interpret *Jarrett* as establishing a per se rule. In *In re Marriage of Thompson*, 449 N.E.2d 88 (Ill.), cert. denied, 464 U.S. 895 (1983), the court affirmed an award of custody to a parent who had cohabited with a lover of the opposite sex. The court stated that "[t]he *Jarrett* case does not establish a conclusive presumption that, because a custodial parent cohabits with a member of the opposite sex, the child is harmed. No such presumption exists in this State." *Id.* at 93. Even before *Thompson*, some appellate courts had refused to read *Jarrett* as establishing a per se rule, instead confining it to its facts. See, e.g., *Brandt v. Brandt*, 425 N.E.2d 1251 (Ill. App. Ct. 1981) (affirming denial of motion to transfer custody from mother who lived openly with married man); *In re Marriage of Olson*, 424 N.E.2d 386 (Ill. App. Ct. 1981) (affirming denial of motion to transfer custody from mother involved in sexual relationship with another man); see also *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977) (affirming grant of custody to father under facts similar to *Jarrett*). As with *Jarrett*, the Virginia courts have explicitly denied that *Brown* establishes a per se rule. See *Ford v. Ford*, 419 S.E.2d 415, 417 (Va. Ct. App. 1992); *Sutherland v. Sutherland*, 414 S.E.2d 617, 618 (Va. Ct. App. 1992).

108. See cases cited *supra* note 67.

has not ensured them fair treatment.<sup>109</sup> The problems facing lesbian and gay parents are more serious than reading recent opinions suggests: due to their often accurate perception that courts may be hostile to them, lesbian and gay parents are disadvantaged in private resolution of custody disputes and are less able to adopt strong bargaining positions.<sup>110</sup>

Examination of recent opinions reveal several significant factors which have contributed and combined to produce these results. Viewed carefully, the tests being used in many jurisdictions are called nexus tests, but they lack the substance of a nexus test.

Three factors seem to be of particular importance. First, many courts engage in or permit speculation about potential future harm, rather than confining the inquiry to proven harm or even harm which is reasonably likely to occur. This dilutes the essential ingredient of a nexus test—the requirement that the parent's conduct cause harm.<sup>111</sup> Second, appellate opinions have not clearly defined and limited what counts as "harm" under the nexus test. This leaves trial judges and the appellate courts free to identify wide-ranging and ill-defined harms, including stigma and moral injury, without engaging in any careful analysis. By invoking such harms and indulging in unsupported speculation about their likely occurrence, courts can freely deny custody to lesbian and gay parents while claiming to employ a nexus test. A trial court that is free to speculate about an indeterminate range of possible harms that might (or might not) result at an unspecified time in the future is essentially free to disqualify a lesbian or gay parent at will, based on little or no specific evidence. These problems are exacerbated by a third factor, one common to most family law cases: appellate courts are extremely deferential to trial courts and hence affirm rulings on any ground possible. The following Sections will examine each of these factors.

#### *A. Speculation About Occurrence of Harm*

The nexus test requires that the parental characteristic or conduct in question be linked to a detrimental impact on the child.<sup>112</sup> Yet in many opinions which purport to adopt a nexus test, courts speculate about possible harm to the child at some time in the future.<sup>113</sup> Judicial speculation undermines the critical requirement of the nexus test. If a judge is permitted to freely speculate about possible harm, she or he can avoid the requirement that a link between conduct and harm be demonstrated.

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109. See ROBSON, *supra* note 70, at 131.

110. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Neely, *supra* note 56, at 177-79.

One indication of legal hostility's effect on private ordering may be the frequency with which lesbian mothers initially agree to either joint custody or father custody rather than seeking sole custody. See, e.g., Johnson v. Schlotman, 502 N.W.2d 831, 832 (N.D. 1993) (involving a mother who originally agreed to joint legal custody, with physical custody of children to the father). In addition, lesbian and gay parents, probably motivated by fear of the court's reaction, sometimes conceal their sexual identities during custody proceedings, only to face an even more hostile court on a motion for modification. See, e.g., Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (stating that the trial judge was unaware that mother was a lesbian at time of initial decision).

111. For a critique of a similar tendency to exaggerate the possible risk to children in the context of child protection proceedings, see Mnookin, *supra* note 31, at 277-81.

112. See S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) ("Consideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests."); see also Pea v. Pea, 498 N.E.2d 110, 113 (Ind. Ct. App. 1986) (declining to speculate about the possible harm caused by the mother's cohabitation with a man).

113. In addition to the cases discussed in the text and notes that follow, see Collins v. Collins, No. 87-288-II, 1988 Tenn. App. LEXIS 123, at \*4 (Mar. 30, 1988).

The problems of judicial speculation are rampant in child custody litigation since the best interests standard essentially requires a court to speculate about the future well-being of the individual child. See Mnookin, *supra* note 31, at 251-52.

For example, in *S.E.G. v. R.A.G.*, the Missouri Court of Appeals appeared to endorse and to apply a nexus test.<sup>114</sup> Yet, ultimately, the court denied a lesbian mother's request for custody without any evidence of harm to the child.<sup>115</sup> The court noted that it "wish[ed] to protect the children from peer pressure, teasing, and possible ostracizing they may encounter."<sup>116</sup> The court concluded the opinion by stating that it "[would] not ignore . . . conduct . . . which may have an effect on the children's moral development."<sup>117</sup> The court did not find that the children had been harmed in any way. In the end, no nexus between the mother's sexual orientation and harm to the child was proven, and none was required. Whatever the court's intentions, it did not apply a nexus test.<sup>118</sup>

Similarly, in *S. v. S.*,<sup>119</sup> the Kentucky Court of Appeals specifically declined to determine whether a lesbian relationship alone warranted a change of custody. Instead, the court examined only the case before it. This approach is consistent with the nexus test. Still, the court found an adequate basis to reverse the trial court and change custody to the father. The testimony of a court-appointed psychologist was critical to the reviewing court. The psychologist stated:

Without question, in my opinion, there is social stigma attached to homosexuality. Therefore Shannon will have additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts. Also, there is excellent scientific research on the effects of parental modeling on children. *Speculating* from such data, it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future.<sup>120</sup>

By contrast, the expert for the lesbian mother predicated his testimony on current conditions and found no harm to the child. Lacking any evidence of harm to the child or even a firm prediction of future harm, the appellate court nonetheless reversed the trial

114. 735 S.W.2d 164 (Mo. Ct. App. 1987). The court stated that "[t]here must be a nexus between harm to the child and the parent's homosexuality." *Id.* at 166. At the same time, other portions of the language in *S.E.G.* strongly suggest the adoption of a per se rule.

115. It is probably not sensible to insist that a court wait until actual harm to the child has occurred. Yet there is cause for concern regarding unbridled judicial discretion. It seems that in addition to actual harm, courts should be able to rely upon evidence that a specific situation makes specific harm to the child likely—not just possible. Courts should not, however, be free to speculate about mere possibilities of harm to a child. *See infra* text accompanying notes 266-69.

116. *S.E.G.*, 735 S.W.2d at 166 (emphasis added).

117. *Id.* (emphasis added).

118. In the end, the opinion could be read to establish a per se rule. After reviewing the evidence of the mother's conduct (which included sleeping in the same bed as her lover and showing affection toward her in the presence of the children), the court concluded that "[s]uch conduct can never be kept private enough to be a neutral factor in the development of a child's values and character." *Id.* at 166. This blanket condemnation obviously resembles a per se rule, leaving proper categorization of the case difficult. Judge Lowenstein went on to state that he would choose to recast the presumption as a rebuttable one. *See* G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1988) (Lowenstein, J., dissenting) (observing that "there would appear to be a judicial policy in this state to conclusively presume the detrimental impact on a child from the parent's homosexuality"); *see also* J.L.P. v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982) (restricting gay father's visitation); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982) (upholding custody award to heterosexual father rather than lesbian mother); N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980) (upholding change of custody from lesbian mother to heterosexual father, ostensibly under the nexus test).

119. 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981).

120. *Id.* at 66 (emphases added). There is, in fact, no research to support the witness' speculation that the child of a lesbian mother may have difficulty achieving a heterosexual identity. Speculation that a child may grow up to be lesbian or gay is, however, a frequent concern of courts. *See* cases cited *infra* note 157.

court and found that a change of custody was warranted.<sup>121</sup> Ultimately, the test applied by the Kentucky court does not require any meaningful nexus at all.<sup>122</sup>

*S. v. S.* also highlights a general problem with the court's concerns about stigma. In many cases, courts express concern about harm caused by the stigmatization of children of nonconforming parents, or alternatively, consider stigma in and of itself to constitute harm.<sup>123</sup> Yet not a single one of these decisions actually relies on evidence that a particular child has been harmed, and only one case includes any evidence of actual stigmatization.<sup>124</sup> Thus, decisions based on stigmatization almost always rest on inappropriate judicial speculation.

### *B. Uncertainty Regarding What Constitutes Harm*

Courts that have appeared to adopt a nexus test have not generally defined or limited what constitutes harm to the child. Judges are able to construct their own notions of what constitutes harm. Given a sufficiently flexible and expansive definition of harm, determinations against lesbian and gay parents can generally be justified as ostensibly consistent with a nexus test.

For example, many courts express concern that children of lesbian or gay parents<sup>125</sup> or of heterosexual parents involved in nonmarital relationships<sup>126</sup> may be stigmatized, embarrassed or subjected to teasing by their peers due to their parents' sexuality. Without further analysis, most courts go on to assume that stigmatization itself constitutes harm to the child<sup>127</sup> or to speculate that stigma will lead to some other unidentified harm.<sup>128</sup>

121. As is frequently the case, there is evidence that the court may have been influenced by an overall negative view of homosexuality. The court referred to lesbianism as "deviate practice" and assumed that the possibility that the child might not develop a heterosexual identity was an apparent harm. *S. v. S.*, 608 S.W.2d at 65.

122. The status of the law in Kentucky is in doubt. Kentucky may have stopped short of adopting a per se rule since the opinion turns on the evidence before the court. On the other hand, the evidence has nothing to do with the specific facts of the case. Assuming a willing expert witness was available, identical evidence could be produced in any case involving a lesbian or gay parent. Once produced, that evidence would determine the outcome of the case. This would seem to be a minor variation on a per se rule. It is hardly surprising that some argue that Kentucky has adopted a per se rule, while others claim that Kentucky applies a nexus test.

123. See *S. v. S.*, 608 S.W.2d at 64. For a more detailed discussion of stigma as a factor in custody cases and a review of the social science evidence regarding the effects of stigma, see *infra* notes 161-84.

124. Given the widespread bias against lesbians and gay men, it might seem paradoxical that little evidence exists of stigmatization of children of lesbian and gay parents and no evidence exists of harm to children from stigmatization. Perhaps the explanation is that all children are, to some degree, stigmatized by some characteristics of their parents, and stigmatization causes little or no harm. Or it may be that despite widespread stigmatization of lesbians and gay men generally, individual lesbian and gay parents and their children are accepted within their communities.

125. See, e.g., *Charpentier v. Charpentier*, 536 A.2d 948, 950 (Conn. 1988); *S. v. S.*, 608 S.W.2d at 66-67; *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987); *Johnson v. Schlotman*, 502 N.W.2d 831, 833 (N.D. 1993); *Collins v. Collins*, No. 87-288-II, 1988 Tenn. App. LEXIS 123, at \*5 (Mar. 30, 1988); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1982).

Concerns about stigma also figure into the per se rule and permissible determinative inference cases. See *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1989); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); *Roe v. Roe*, 324 S.E.2d 691, 693-94 (Va. 1985). In *Fox v. Fox*, Nos. 79676, 83590, 1995 WL 422057 (Okla. July 18, 1995), the Oklahoma Supreme Court reversed an appellate court ruling which rested on "the trauma which may result in the future because of community members' disapproval of or disagreement with the parent's sexual orientation."

126. See, e.g., *Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1979), cert. denied, 449 U.S. 927 (1980).

127. See *S. v. S.*, 608 S.W.2d at 64. *But see M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979.) The court in *M.P. v. S.P.* rejected the assumption that stigma leads to harm, and noted that as a result of exposure to community intolerance, children might be

better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

128. For a discussion of the problem of judicial speculation see *supra* text accompanying notes 113-18.

Since bias against lesbians and gay men is widespread, virtually any court can invoke the specter of bias and accompanying stigma, label it "harm," and use that basis to deny custody. This process effectively circumvents the protections offered by the nexus test.

Similarly, there is the frequently voiced concern that children raised by lesbians or gay men will not be able to develop an appropriate heterosexual identity of their own.<sup>129</sup> Courts which raise this concern assume that it is readily apparent that not being heterosexual would constitute harm to the child.<sup>130</sup> Having made the assumption, they may deny custody even though proper application of a nexus test would not permit them to do so.

### C. Appellate Review

The critical difference between a nexus analysis and a permissible presumption analysis is the presence of and reliance on competent evidence. Under a nexus test, a party must demonstrate, through introduction of competent evidence, harm to the child. Under a permissible conclusive presumption analysis, no evidence is required. Unless an appellate court carefully examines the record and the reasoning of the trial court, it may well approve decisions that rest on assumptions rather than on evidence, particularly when appellate courts stand ready to affirm on alternative grounds not relied on by the trial court.<sup>131</sup>

For example, in *D.H. v. J.H.*,<sup>132</sup> the Indiana Court of Appeals expressly rejected use of a per se rule to deny a lesbian mother custody of her children.<sup>133</sup> The trial court admitted extensive evidence concerning the mother's sexual activities. The appellate court initially concluded that the mother's lesbian affairs did not, in and of themselves, warrant denial of custody.<sup>134</sup> Nevertheless, it affirmed the trial court's award of custody. It did so based on evidence that the mother failed to put away the laundry and to wash the dishes in the sink, while the father prepared meals when the mother was out "running around" and assisted the children with their lessons. It seems very unlikely that these factors, taken alone, would have motivated or justified the trial court's custody award. Although it acknowledged that the trial court ultimately applied a per se rule, the appellate court left this seemingly tainted decision intact. The tendency of appellate courts to conduct deferential reviews allows trial courts to circumvent the nexus test.<sup>135</sup>

The problem of appellate review is even more striking when the appellate court discovers and relies on factual grounds to support the trial court's decision even though the trial court never relied on those facts. Thus, even though it appears that the trial court

129. See, e.g., *S. v. S.*, 608 S.W.2d at 66. Although it lacks supporting evidence, this concern is not uncommon.

130. The essence of the assumption is that there is something wrong with being lesbian or gay. By indulging in such an assumption, the court shows bias against lesbians and gay men.

131. See Mnookin, *supra* note 31, at 269-70. Affirmance on alternative grounds is, of course, a common appellate practice. Problems arise, however, when the questions before the trial court were issues of fact—the effect of various factors in a child's life—rather than law.

132. 418 N.E.2d 286 (Ind. Ct. App. 1981).

133. The mother did not acknowledge that she was a lesbian. However, the father called two women as witnesses who testified to their sexual relationships with the mother. The mother, in her own testimony, was never asked about her sexual conduct. It is a telling irony that although the lesbian mother lost custody of her children, *D.H.* is cited as a step forward for lesbian and gay parents because it rejects the use of a per se rule.

134. It is unclear whether her conduct was a factor that could be weighed against her, even in the absence of evidence of harm. The court seems to reject a permissible determinative inference.

135. See Mnookin, *supra* note 31, at 269-70 (noting potential for judges to "disguise" a decision based on an improper factor through vague references and general language).

relied solely on an inappropriate basis for awarding custody, the decision will be affirmed if the appellate court can construct an appropriate basis on which the trial court might have reached the same conclusion. In such a case, the appellate court effectively manufactures new grounds for the trial court's decision and, hence, never has to critique the trial court's application of the nexus test.

For example, in *Mohrman v. Mohrman*,<sup>136</sup> the trial court had awarded custody of a child to a father, stating, "The major issue that the court has to consider is the effect of the relationship which the [mother] had with Mrs. Hathaway, as it will affect the child."<sup>137</sup> The mother appealed, contending that the trial court had failed to follow Ohio law, which enumerates a five-factor test, but also provides that the court shall consider "all relevant factors."<sup>138</sup> Despite the trial court's own statement of the major issue, the appellate court affirmed. It reasoned that there was other evidence in the record (evidence that did not pertain to the mother's sexual conduct) that would have supported the trial court's decision, even though the trial court apparently did not indicate whether this other evidence played any part in its decision.<sup>139</sup> Appellate review like that described in these cases, which strives to affirm on any possible basis, even one constructed for the first time by the reviewing court, drains the nexus test of much of its meaning.

#### IV. A REVIEW OF COURT CONCERNS REGARDING SEXUALLY PROBLEMATIC PARENTS AND THE SCIENTIFIC EVIDENCE REGARDING THOSE CONCERNS

This Part seeks to extract and examine the concerns which motivate courts to adopt rules or to reach decisions that restrict the parenting rights of lesbian, gay, or cohabiting heterosexual parents. These concerns lead courts to distort and misapply the nexus test with regard to sexually nonconforming parents, to adopt per se rules, or to employ determinative permissible inferences which clearly disadvantage nonconforming parents.<sup>140</sup>

The most frequently enunciated concerns include fears that children raised in lesbian or gay households will suffer gender role confusion, will themselves become lesbian or gay, will be stigmatized and victimized by the intolerant members of the communities in which they live, or will not be morally fit because the household in which they are raised is morally suspect. These fears might be understood to reflect genuine (albeit groundless)

136. 565 N.E.2d 1283 (Ohio Ct. App. 1989).

137. *Id.* at 1285 (Abood, J., concurring). The court in *Mohrman* ultimately adopted a nexus test. The case is nevertheless problematic, for it was the appellate court's discovery of other grounds that allowed it to avoid a decision on whether to adopt a nexus test.

138. OHIO REV. CODE ANN. § 3109.04(C) (Anderson 1989).

139. *Mohrman*, 565 N.E.2d at 1285. The court also rejected the mother's complaint that there was no evidence of harm to the child from the relationship.

See also *White v. Thompson*, 569 So. 2d 1181 (Miss. 1990). In *White* the Mississippi Supreme Court affirmed a trial court ruling removing a child from the custody of a lesbian mother in favor of the child's grandparents. As the court stated,

Though the predominant issue in this case seems to have been Mrs. White's lesbian relationship, and the chancellor may have relied almost entirely on this, we find that a review of the entire record and the circumstances present . . . shows that the chancellor's decision that Mrs. White was an unfit mother, morally and otherwise, was not against the overwhelming weight of the evidence.

*Id.* at 1184. The record revealed conflicting evidence about whether the children were outside in cold weather without warm clothing. As the lone dissenting justice rightly observed, the evidence was "no more than one would expect to find in any case [of] a twenty-four year old mother with but a high school diploma and no independent means." *Id.* at 1185 (Robertson, J., dissenting).

140. See Polikoff, *supra* note 5, at 543-67.

concern for the well-being of the children whose lives are shaped by court decisions. As such, this Article refers to them as "genuine concerns."<sup>141</sup>

In addition to these genuine concerns, some judges appear to be motivated by general hostility towards lesbian and gay parents and a desire to punish these individuals for living in a manner which the court finds unacceptable. Because these concerns are grounded not in a genuine interest in the child's well-being, but rather, in prejudice and intolerance, they are illegitimate concerns. They cannot provide a principled basis for determination of child custody matters.

Restrictive rules applied to cohabiting heterosexual parents spring from some of the same sources. While concerns about gender identity and sexuality are not usually present with heterosexual parents, concerns about morality and stigma recur. To a lesser extent than lesbians and gay men, cohabiting heterosexual parents may also be victims of prejudice.

It is critical to carefully evaluate the genuine concerns that lead courts to disfavor sexually nonconforming parents. Inquiry into these concerns is compatible with the overarching goal of seeking the best interests of the child. The general public widely shares these concerns. Were the genuine concerns of the courts well-founded, it might be difficult to deny the necessity for special rules ensuring searching scrutiny for sexually nonconforming parents. But extensive social science research has shown that these concerns are, in fact, unwarranted. Children of lesbian and gay parents are like children of heterosexual parents. Thus, there is no justification for special rules or particular scrutiny for lesbian and gay parents.

Before turning to a more detailed review of the social science literature, one observation is in order: Typically, courts are especially critical of openly lesbian, gay, or cohabiting parents, contrasting them with those who are secretive, "discreet," or closeted.<sup>142</sup> Thus, a lesbian mother who shields her children from all knowledge of her sexual identity is seen as less problematic than a lesbian mother who is involved in a relationship of which her children are aware.<sup>143</sup> Most problematic of all is a lesbian

141. This is not to say I accept them as valid concerns. As I will demonstrate in this Part, there is no real basis for any of these concerns. They are born of ignorance. Nevertheless, since they may spring from a focus on the well-being of the child, they are at least potentially genuine.

142. Many courts disparagingly characterize lesbians and gay men who do not conceal their sexuality as "flagrant" or "notorious," as "flaunting" their sexuality. *See, e.g., Pleasant v. Pleasant*, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993) (noting that trial judge characterized mother as a "defiant and hostile admitted lesbian" in ordering only supervised visitation); *Dailey v. Dailey*, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1982) (stating that the mother "flagrantly flaunted" her relationship); *Roe v. Roe*, 324 S.E.2d 691, 693 (Va. 1985) (approvingly quoting the trial judge's observation that "sharing the same bed or bedroom with a child being in the home would be one of the greatest degrees of flaunting that one could imagine"); *see also S.E.G. v. R.A.G.*, 735 S.W.2d 164, 167 (Mo. Ct. App. 1987) (observing with apparent disapproval that the mother had "chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community"); *Chicoine v. Chicoine*, 479 N.W.2d 891, 893 (S.D. 1992) (noting with disapproval that "[o]n some occasions when the children were not present, Lisa publicly danced with females, kissing and caressing them on the dance floor"); *Fajer, supra* note 3, at 570-84 (citing numerous cases of public and private harassment and discrimination against lesbians and gays for "flaunting" their homosexuality by speaking openly about it or by openly having a relationship with a member of the same sex.). The same attitude is apparent in cases involving heterosexual couples. *See e.g., Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1979) (discussing the Illinois fornication statute in the context of nonmarital cohabitation), *cert. denied*, 449 U.S. 927 (1980); *Beck v. Beck*, 341 So. 2d 580, 582 (La. Ct. App. 1977). This same phenomena has been observed in Canada. *See Cynthia Peterson, Living Dangerously: Speaking Lesbian, Preaching Law*, 7 CANADIAN J. WOMEN & L. 318, 330 n.30 (1994).

143. This is at once predictable and ironic. It is predictable because when the parent is involved in an ongoing sexual relationship, the relationship and hence the parent's sexual identity will more likely come to the attention of the child and will probably eventually become a topic of conversation. Thus, the concerns about harm arise with greater force. But it is ironic because, as a general matter, many find sexual conduct in the context of long-term committed relationships less problematic than sex outside of any committed relationship. A parent picking up a complete stranger for sex in a car may generate less judicial concern because the child is not exposed to the relationship, and hence does not learn from it. *See*

mother who is open about her lesbianism, so that others in the community as well as her children are aware of her identification.

The reasons why courts find an open lesbian mother more problematic than one who is "discreet" are directly related to the underlying concerns that motivate the court. If, for example, neither the child nor the surrounding community is aware of the mother's sexual identity, then the mother's identity poses no problem in terms of the child's sexual identity, gender role, or potential exposure to stigma.<sup>144</sup> If the child is aware of the mother's sexual identity, but the surrounding community is not, then at least the problem of stigma may be nonexistent.<sup>145</sup> If the child and the community are aware of the mother's identity, then all of the potential problems may be implicated. Thus, the concerns may be seen to arise not from the mother's conduct (which at least theoretically could be kept sufficiently private) but from her identification as a lesbian.

The preference for complete discretion leads courts to penalize lesbian and gay parents for conduct that would be entirely unremarkable for heterosexual parents. Virtually any display of affection may remove a homosexual parent from the preferred "discreet" category. Thus, holding hands, hugging or kissing, occupying the same bedroom (or even the same house), and simple verbal expressions of affection may be the basis on which a lesbian mother or gay father is denied custody.<sup>146</sup> No similar results follow for heterosexual parents.<sup>147</sup>

The judicial preference for "discreet" lesbians and gay men also inclines courts, when they do award custody or visitation to a lesbian or gay parent, to impose restrictions designed to "shield" the child from evidence of their parent's sexual identity. These might include directives that a lover not be present in the home when the child is present or that no other lesbian or gay individuals be present, or that the child not be taken to any events where they would be exposed to lesbian and gay people.<sup>148</sup>

Lundin v. Lundin, 563 So. 2d 1273 (La. Ct. App. 1990) (expressing a clear preference for "clandestine" relationships).

144. This may also make a court more likely to award sexually problematic parents custody of or visitation with young children. The court's reason that the children and their friends are unable to understand the issues surrounding sexual identity and are therefore unaffected by them. See *Peyton v. Peyton*, 457 So. 2d 321 (La. Ct. App. 1984); see also *Rivers v. Rivers*, 322 N.W.2d 864, 865 (S.D. 1982) (barring overnight visitation with unmarried father who lived with woman not his wife because of the harmful effect the misconduct would cause a child "old enough to see and recognize it"); *Roe*, 324 S.E.2d at 693 (quoting the trial court's great concern about "what happened when child turns twelve or thirteen").

145. This too may lead to surprising results. In *Peyton*, 457 So. 2d at 321, the child's mother lived with a woman to whom she was not married as did the child's father. The court noted that society tends to make assumptions about a man and a woman who live together without the benefit of marriage that it does not make about two women. That is, the relationship between a man and a woman is assumed to be sexual, while no such assumption is made about the two women. Although the court did not identify it as such, this is one aspect of "lesbian invisibility." The court concluded that as long as the two women are not "notorious," the child would not likely suffer opprobrium while living with them. *Id.* at 324-25. Indeed, the court seemed to suggest that the child was safer there than in the father's household. Thus, in this case lesbian invisibility worked to the advantage of the particular lesbian mother involved.

146. For example, in *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123, at \* 3 (Mar. 30, 1988), the court observed that "[a]lthough the mother testified that the affection demonstrated between her partners and herself in the presence of her daughter was never inappropriate," the daughter's testimony showed that the mother and her lover slept in the same bed as well as the same bedroom, that they loved each other, and that they kissed. Many courts adopt a similar tone of thinly veiled contempt in discussing the activities of lesbian and gay parents. See also *Roe*, 324 S.E.2d at 693 (agreeing with the trial court that the father's behavior "flies in the face of . . . society's mores").

147. See, e.g., *French v. French*, 452 So. 2d 647 (Fla. Dist. Ct. App. 1984) (reversing the trial court which denied visitation to father because his children observed him having intercourse with his girlfriend).

148. See, e.g., *Pleasant v. Pleasant*, 628 N.E.2d 633, 637 (Ill. App. Ct. 1993) (reversing the trial court's condition that the lesbian mother not have the child in the presence of any person of known homosexual tendencies or take child to any gathering or place of a homosexual nature); *In re Marriage of Diehl*, 582 N.E.2d 281, 293-94 (Ill. App. Ct. 1991) (finding the "best interests of the child" standard inappropriate, and thus reversing the trial court's order that no visitation occur in the presence of any female with whom the mother was residing because the father failed to demonstrate threat of "serious endangerment"); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 167 (Mo. Ct. App. 1987) (restricting the mother from exposing elements of her "alternative life-style" to her children); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div.

However it is manifested, the preference for "discreet" lesbians and gay men and the restrictions spawned by this preference are deeply misguided and run counter to any interest in the well-being of children of lesbian and gay parents.<sup>149</sup> They encourage the isolation of lesbian and gay parents, cutting them off from their most significant sources of support.<sup>150</sup> Further, such preferences appear to be specifically designed to ensure the isolation of the children.<sup>151</sup>

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1974) (prohibiting cohabitation with anyone but lawful spouse while child present), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. Ch. Div. 1976); DiStefano v. DiStefano, 401 N.Y.S.2d 636 (App. Div. 1978) (prohibiting visitation with mother's lover present); *In re Jane B.*, 380 N.Y.S.2d 848 (App. Div. 1976) (ordering that the child may not stay overnight at the mother's home, prohibiting visitation with mother's lover or other homosexuals present, ordering that the child may not be taken where known homosexuals are present, and ordering that the child may not be involved in homosexual activities or publicity); Woodruff v. Woodruff, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979) (affirming the trial court's ruling that gay father not be permitted to have boyfriends visit him while his minor son is present); Roberts v. Roberts, 489 N.E.2d 1067 (Ohio Ct. App. 1985) (permitting visitation only on condition that children do not learn that father is gay); Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992) (reversing trial court decision allowing children visitation with lesbian mother on alternate weekends and holidays plus three weeks in the summer provided no unrelated women and no homosexual men were present, describing the trial court's visitation order as "liberal" and requiring a home study and adequate enforcement procedures); Dailey v. Dailey, 635 S.W.2d 391, 395-96 (Tenn. Ct. App. 1981) (restricting visitation sua sponte); Kallas v. Kallas, 614 P.2d 641 (Utah 1980) (reversing trial court order which prohibited lesbian mother from doing or saying anything in the presence of children "which directly or indirectly touches upon her lifestyle or sexual preference," *id.* at 646, so that lower court could enter *more* restrictive order); Roe, 324 S.E.2d at 694 (reversing the trial court award of custody to the father on the condition that he not share his bed or bedroom with any male lover or friend while child is present and instead denying custody and allowing visitation only outside of the father's home and outside the presence of the father's lover). By imposing visitation or custody conditions, many court's effectively force lesbian and gay parents to choose between their lovers and their children. *See, e.g., Pleasant*, 628 N.E.2d at 637; Lundin v. Lundin, 563 S.W.2d 1273, 1276 (La. Ct. App. 1990).

149. Even where courts award custody to a nonlesbian or gay parent, the child still has a lesbian or gay parent. Unless courts intend to terminate all contact between the parent and child, the parent will continue to be a significant figure in the child's life. If that relationship is to be a positive one, it must be based on trust and respect. The judicial orders described above promote neither.

150. Eileen F. Levy, *Strengthening the Coping Resources of Lesbian Families*, 73 FAMILIES SOC'Y 23, 28-29 (1992). *See also* Catherine Rand et al., *Psychological Health and Factors the Court Seeks to Control in Lesbian Mother Custody Trials*, 8 J. HOMOSEXUALITY 27 (1982) (stating that the lesbian mother's sense of well-being correlates with the extent to which she is open about her identity with employers, ex-husbands, and children); Suzanne Slater & Julie Mencher, *The Lesbian Family Life Cycle: A Contextual Approach*, 61 AM. J. ORTHOPSYCHIATRY 372, 380 (1991) (noting the value of a sense of community for lesbian families).

Restrictions on the mother's conduct may well have an effect on the child. For example, at least one small study has shown that daughters of lesbians who live with their lovers have higher self-esteem than daughters of lesbian mothers who do not live with their lovers. Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 18 J. HOMOSEXUALITY 123, 132-33 (1989).

151. The disparate treatment of discreet versus open lesbian parents also contributes to the law's domestication of lesbians generally. "Domestication" is a concept employed by lesbian legal theorist Ruthann Robson. *See* ROBSON, *supra* note 70, at 18-19. The law domesticates when it induces conformity to particular roles, without regard for one's true nature. The law concerning child custody creates and reinforces categories of "good" and "bad" lesbians. "Good lesbians," who are more socially acceptable and temperate, are favored over "bad lesbians," who are disruptive and threatening. The more effectively a lesbian conforms to the monogamous heterosexual model (and in so doing, obscures the potentially subversive nature of lesbianism) the more favorably she will be treated. *See supra* note 70 and accompanying text. This at once encourages lesbian mothers to conform to the monogamous heterosexual model and divides the lesbian community into the socially acceptable (and hence legally privileged) lesbians and the socially unacceptable lesbians. *See* ROBSON, *supra* note 70, at 132-34. Ultimately, domestication may be antithetical to lesbian survival. *See, e.g., Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*15 (Mar. 30, 1988) (Tomlin, J., concurring) (supporting award of custody to a lesbian only on condition that she completely suppresses her identity as a lesbian); *see also* Nancy Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986) (advocating recognition of legal parenthood of both mothers).

*A. Social Science Literature and Judicial Concerns  
Regarding Gender Roles, Sexual Identity,  
and Social Stigma*

Estimates of the number of lesbian and gay parents and their children vary widely, ranging from one to five million lesbian mothers, one to three million gay fathers, and six to fourteen million children of lesbian and gay parents.<sup>152</sup> In recent years a substantial number of studies of children of lesbians and, to a lesser extent, children of gay men have been conducted. There is now an extensive body of social science literature on the well-being of these children. The literature emphatically demonstrates that there is no basis for any generalized concern about harm to children from being raised by lesbian and gay parents. A review of recent studies shows that there are *no* reported negative effects on children resulting directly from their parent's sexual orientation.<sup>153</sup>

This Section will consider separately each of the genuine concerns for which there is relevant social science research. After illustrating the way in which the concerns motivate courts in their development of restrictive custody rules, this Section will review the social

152. Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 *CHILD DEV.* 1025, 1026 (1992); see also Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFF. L. REV.* 691 (1976); Laura Lott-Whitehead & Carol T. Tully, *The Family Lives of Lesbian Mothers*, 63 *SMITH C. STUD. SOC. WORK* 265, 265 (1993).

153. Patterson, *supra* note 152. After conducting a detailed review of the available studies, Patterson concludes that [t]here is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.  
*Id.* at 1036; see J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 29 *DEVELOPMENTAL PSYCHOL.* 124 (1995); Patricia J. Falk *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 *AM. PSYCHOL.* 941 (1989); David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 *DEVELOPMENTAL PSYCHOL.* 105 (1995); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 *J. CHILD PSYCHOL. & PSYCHIATRY* 551 (1983) (finding no significant differences on gender role measures between children of lesbian mothers and control group children); Julie S. Gottman, *Children of Gay and Lesbian Parents*, 14 *MARRIAGE & FAM. REV.* 177 (1989); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 *ARCHIVES SEXUAL BEHAV.* 167 (1986); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 *AM. J. PSYCHIATRY* 692, 696 (1978) (finding no significant difference in gender role identity); Beverly Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 *AM. J. ORTHOPSYCHIATRY* 536 (1981); Mary E. Hotvedt & Jane B. Mandel, *Children of Lesbian Mothers*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 275 (William Paul et al. eds., 1982); Huggins, *supra* note 150, at 132-33; Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 *AM. J. ORTHOPSYCHIATRY* 545 (1981) (finding no significant difference in gender role identity); Karen G. Lewis, *Children of Lesbians: Their Point of View*, 25 *SOC. WORK* 198 (1980) (describing how children of lesbian mothers talk about their adjustment to knowledge of their mothers' lesbianism); Lott-Whitehead & Tully, *supra* note 152, at 265 (demonstrating that there is no negative effect on self-esteem and social adjustment); Ann O'Connell, *Voices from the Heart: The Development Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 *SMITH C. STUD. SOC. WORK* 281 (1993) (finding no correlation between parents' sexual orientation and sexual orientation of child); Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity*, in *LESBIAN AND GAY PSYCHOLOGY* 156 (Beverly Greene & Gregory M. Herek eds., 1994) (examining children born to or adopted by lesbian mothers) [hereinafter Patterson, *Lesbian Baby Boom I*]; Charlotte J. Patterson, *Families of the Lesbian Baby Boom: Parents' Division of Labor and Children's Adjustment*, 31 *DEVELOPMENTAL PSYCHOL.* 115 (1995) [hereinafter Patterson, *Lesbian Baby Boom II*]; Charlotte J. Patterson, *Sexual Orientation and Human Development: An Overview*, 31 *DEVELOPMENTAL PSYCHOL.* 3 (1995) [hereinafter Patterson, *Overview*]; see also Elizabeth D. Gibbs, *Psychosocial Development of Children Raised by Lesbian Mothers: A Review of Research*, 8 *WOMEN & THERAPY* 65 (1989) (reviewing literature).

Those problems that did emerge for the studied children related more to society's rejection of homosexuality than to poor parent-child relationships. Additionally, most of the observed social adjustment problems also occurred in the control groups because children from both groups had a history of divorce in their family. Gottman, *supra*, at 186.

science literature relevant to those concerns. In all cases, this review shows that the particular concerns, while perhaps genuine, are in fact unfounded.

Some courts have restricted visitation or denied custody to a lesbian mother or gay father because of concerns about the impact of exposure to the parent's community on the child's development of an appropriate gender role<sup>154</sup> or gender identity.<sup>155</sup> Judicial concern about gender roles is unwarranted. Recent surveys of gender role studies of children show no significant differences between children of lesbian mothers and children in a control group.<sup>156</sup> There is no support in social science research for restricting custody for lesbians or gay men out of concern for a child's gender identity as the parent's sexual orientation has no discernible impact.

Another recurrent theme in many judicial decisions restricting custody or visitation is that the child will grow up to be lesbian or gay, like their parent.<sup>157</sup> The sexual orientation of children of lesbian mothers is often of concern to the children themselves, to extended family members, to society generally, and to the courts as well.

The general consensus among researchers is that there is no correlation between a parent's sexual orientation and the sexual orientation of the child.<sup>158</sup> The incidence of same-sex orientation among children of homosexual parents occurs as frequently and in the same proportion as in the general population. Most adolescents—including, but by no means limited to, children of lesbian and gay parents—have some concern about being gay or lesbian.<sup>159</sup> Thus, there is no basis for restrictive rules based on concerns about development of sexuality.<sup>160</sup>

Many courts are concerned about possible stigmatization of a child raised by a lesbian or gay parent or by a heterosexual parent living with someone to whom they are not married.<sup>161</sup> Courts either conclude that the stigma is, in and of itself, harm or that it may lead to harm. The issue of stigma may arise from genuine concern for the well-being of the child. At the same time, courts frequently invoke the specter of stigmatization as a

154. "Gender role" refers to behaviors and attitudes that society positively sanctions for members of one sex and negatively sanctions for members of the opposite sex. Gottman, *supra* note 153, at 180.

155. *See, e.g., Pleasant v. Pleasant*, 628 N.E.2d 633, 637 (Ill. App. Ct. 1993); *Lundin v. Lundin*, 563 So. 2d 1273, 1275-77 (La. Ct. App. 1990).

156. Gottman, *supra* note 153, at 180; Patterson, *supra* note 152, at 1030-31; *see also Gibbs, supra* note 153, at 70; Golombok et al., *supra* note 153, at 551; Green, *supra* note 153, at 696; Hoeffler, *supra* note 153, at 536; Kirkpatrick et al., *supra* note 153, at 551; Patterson, *Lesbian Baby Boom I, supra* note 153, at 156.

157. *See, e.g., Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); *Chicoine v. Chicoine*, 479 N.W.2d 891, 893-94 (S.D. 1992); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123, at \*7 (Mar. 30, 1988); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1982).

158. O'Connell, *supra* note 153, at 285; Patterson, *supra* note 152, at 1031-32. While many of the individual studies may be small, in all, more than 300 children of lesbian and gay parents have been assessed in 12 different samplings and "no evidence has been found for significant disturbances of any kind in the development of sexual identity among these individuals." *Id.* at 1032. These findings should not be surprising since most lesbians and gay men are the children of heterosexual parents.

159. Children of lesbians sometimes attribute their anxiety over sexuality to the presence of a lesbian mother, but their anxieties are not different from those of children with heterosexual parents. Attribution of the anxiety to having a lesbian mother reflects the fact that children of lesbians may be unaware that children of heterosexual parents share their concerns. O'Connell, *supra* note 153, at 295. In general, anxiety generated by isolation was less problematic for children who had contact with other children of lesbians. *Id.* at 294.

160. This should not be allowed to obscure an underlying fundamental question: Even if it were established that children of lesbian or gay parents are more likely to grow up to be lesbian or gay, would that constitute evidence that these parents harm or damage their children?

161. *See S. v. S.*, 608 S.W.2d 64. Courts usually fear that stigmatization would manifest itself in teasing or harassment of the children by their peers or by members of the community at large. Some courts express concern that the child will feel embarrassed.

makeweight when they have already concluded the parent's sexual orientation is disqualifying.<sup>162</sup>

It is easy to understand how a court might legitimately be concerned about how the larger community receives the children of lesbian or gay parents. Lesbians and gay men themselves are the targets of violence motivated solely by their sexual identification. On a lesser scale, they are subjected to discrimination, both blatant and subtle, in many aspects of their lives. In recent years lesbians and gay men have become the focus of organized political campaigns to restrict their rights.<sup>163</sup> For all these reasons, a compassionate judge might well be concerned about the prospect of placing a child within a lesbian or gay household.<sup>164</sup>

Still, the general concern about societal treatment of lesbians and gay men does not justify custody decisions limiting the rights of lesbian and gay parents. A court should only conclude that stigma justifies a denial of custody after satisfying four independent requirements. First, there must be proof that there is in fact some perceptible stigma against a particular child. The fact that lesbians and gay men may be stigmatized generally, or even that the particular lesbian mother or gay father might be stigmatized in other aspects of her or his life, does not demonstrate that a child is or will be stigmatized. Second, it must be shown that there is a connection between the stigma the child experiences and some harm to the child. Stigma is not, in and of itself, harm. Third, the court must consider whether an award of custody to the more conforming parent will in fact affect the degree of harm caused by stigma, for no matter who has custody, the child will still have a sexually nonconforming parent. Fourth, a court should consider whether an award of custody premised on societal bias is sound or even acceptable policy. Each step in this progression must be examined separately.

First, courts readily assume that there will be stigmatization without any apparent evidence. It seems adequate for the contesting parent to point out that the parent is sexually nonconforming. From that, the actual fact of stigmatization follows.<sup>165</sup> In fact, research shows that fear of stigmatization is far in excess of the actual incidence of stigmatization.<sup>166</sup> There has been only one reported opinion in which evidence of teasing was offered.<sup>167</sup> Although social science research on this question is limited, it also has revealed little evidence of harassment or other stigmatization of children of lesbian, gay, or otherwise nonconforming parents.<sup>168</sup> Thus, the very first assumption that a child will be subjected to some form of harassment or teasing is questionable.

Second, the simple fact of teasing, or other manifestations of stigmatization, should be irrelevant unless it can be shown that the stigmatization results in harm to the child. Thus, even if a court is satisfied that a particular child will be stigmatized, the court should consider whether that stigmatization will lead to harm. Many courts have simply assumed

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162. See, e.g., *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987); *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979), cert. denied, 449 U.S. 927 (1980); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

163. See *supra* note 8 and accompanying text.

164. Similar concerns may be expressed in cases involving cohabiting heterosexual couples, although the level of societal tolerance of cohabitation makes these cases unusual.

165. This is inappropriate judicial speculation. See *supra* text accompanying notes 112-24.

166. See Golombok et al., *supra* note 153, at 565-67; Hotvedt & Mandel, *supra* note 153, at 282; Huggins, *supra* note 150, at 152.

167. Flaks, *supra* note 87, at 363; see also Courtney R. Baggett, *Sexual Orientation: Should it Affect Child Custody Rulings*, 16 LAW & PSYCHOL. REV. 189 (1992).

168. See Green, *supra* note 153, at 695-96 (finding that only three of 21 children studied were subjected to teasing); see also Lewis, *supra* note 153, at 200 (discussing the fear of negative peer reaction among children of lesbian mothers).

that stigmatization based on the sexual identity of a parent generally leads to harm to the child, usually in the form of low self-esteem. This is not a proposition that is so transparently obvious as to obviate the need for authority. In fact, the social science literature offers no support for this proposition.<sup>169</sup> In the absence of scientific support, courts should not simply assume there will be harm to each child.

Social adjustment and self-esteem are interrelated for children. Children of lesbian mothers must often cope with the disruption of divorce as well as the potential effects of the social stigma of having a lesbian mother. For the children studied, divorce was far more significant in terms of its effect on the children than their mother's sexuality.<sup>170</sup> Lesbians' children who experience divorce exhibit the same behaviors as children of heterosexual parents who divorce: vulnerability, concern that basic needs will not be met, concern for the parent's well-being, anger, and conflicted loyalties.<sup>171</sup>

The effects of homosexuality's social stigma on children can take the form of a desire for secrecy and isolation if the children cannot express their feelings to their mothers, other family members, and peers. Research indicates that the more comfortable a mother is in disclosing her sexuality, the fewer problems the children will have because they will be able to ask questions and express their feelings.<sup>172</sup> Another study found that the younger the child at the time of disclosure, the greater the level of comfort and acceptance.<sup>173</sup> The mother's comfort level with her sexual orientation and access to children of other lesbians decreased the children's sense of isolation and correlated with the children's ability to talk to someone about their experiences.<sup>174</sup>

As to self-esteem, there is no significant difference between the self-esteem of children of lesbian mothers compared to children of heterosexual mothers.<sup>175</sup> Among children of lesbian mothers, those with the highest self-esteem also reported positive feelings about their mother's lesbianism and about the fact that their mothers had a long-term partner who lived in the home.<sup>176</sup> Intimacy modeled in the home during a daughter's life benefited her sense of security and well-being, regardless of the sex of the mother's partner.<sup>177</sup>

In fact, children of lesbian mothers had strengths differentiating them from children of heterosexual mothers. The children felt that their mothers were more open, easier to talk to, and more respectful.<sup>178</sup> Children were proud of their mother's strength in standing up for their beliefs.<sup>179</sup> The most frequently reported benefit was an increased understanding of prejudice and a heightened ability to think critically about the impact of discrimination.<sup>180</sup> The Superior Court of New Jersey, Appellate Division, in a case

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169. See Patterson, *supra* note 152, at 1034 (summarizing studies revealing that "children of lesbian and gay parents have normal relationships with peers and . . . their relationships with adults of both sexes are also satisfactory").

170. Gottman, *supra* note 153, at 186; Lewis, *supra* note 153, at 199; O'Connell, *supra* note 153, at 294.

171. O'Connell, *supra* note 153, at 287.

172. Lewis, *supra* note 153, at 199.

173. O'Connell, *supra* note 153, at 287.

174. *Id.* at 289-90.

175. Gottman, *supra* note 153, at 183; Green et al., *supra* note 153, at 180; Huggins, *supra* note 150, at 131-34; Patterson, *Lesbian Baby Boom I*, *supra* note 153, at 167-68.

176. Gottman, *supra* note 153, at 183.

177. *Id.* at 190. Thus, orders which permit custody or visitation only if a lesbian mother or gay father does not live with a lover work to the child's detriment.

178. O'Connell, *supra* note 153, at 293.

179. Lewis, *supra* note 153, at 203.

180. O'Connell, *supra* note 153, at 296.

involving a lesbian mother's custody request, eloquently addressed the problem of stigmatization:

If [the lesbian mother] retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Taking the children from [the mother] can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.<sup>181</sup>

There is no basis on which a court can assume that harm must follow from stigma.

Third, even when there is evidence of some harm from teasing or harassment, courts should assess it in the overall context of the child's life, rather than in isolation.<sup>182</sup> Virtually all children are, from time to time, embarrassed by their parents and teased by their peers. Few, if any, suffer lasting or significant harm. Courts must conduct their analysis with the understanding that unless parental rights are terminated, the child will continue to have a lesbian, gay, or cohabiting parent and may well suffer the same stigma. Thus, even if custody is awarded to the more conforming parent, the child may experience the same stigmatization.

Finally, courts must consider whether the unfortunate reality of societal intolerance should be legitimized and reified by the court. The United States Supreme Court has explicitly prohibited reliance on racial prejudice as a justification for decision in a child custody case, even though that prejudice is quite real.<sup>183</sup> Similarly, courts have refused to rely on the continued existence of religious intolerance in deciding custody cases.<sup>184</sup> These cases recognize that if we seek to construct a society free of prejudice and discrimination, then we cannot rely on prejudice and discrimination as the basis for our judicial decisions. A court should consider the overall cost of its endorsement of the intolerance of others before allowing the possibility of stigma to become a relevant factor in deciding custody.

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181. *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979); see also *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (rejecting reliance on social stigma as the basis for a finding of harm).

182. One study of children of lesbian mothers revealed that the children reported more reactions to stress but also a greater sense of well-being. See Patterson, *Lesbian Baby Boom I*, *supra* note 153, at 169-70. The increased stress reactivity might be attributable to stigma or it might be attributable to a greater willingness to report negative emotions. In any event, concern about stigma must be tempered by the enhanced sense of overall well-being. Interestingly, both phenomena might be explained by a greater willingness on the part of children of lesbians to report emotions. *Id.*

183. See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

184. See cases cited *infra* note 265.

### B. Judicial Concern About Moral Well-Being

One common reason for restricting custody or visitation of lesbian and gay parents is concern for the moral fitness of the parent and the moral well-being of the child.<sup>185</sup> Moral fitness arguments are often raised against parents who are engaged in nonmarital heterosexual relationships as well.<sup>186</sup>

On its surface, a moral fitness argument may appear to be simple and straightforward. Suppose the mother is a lesbian involved in a sexual relationship. The father may argue that the mother or her conduct is immoral. If the court accepts this premise, the father can then continue by reasoning that if the child resides with the mother, the mother will inevitably teach the child that the mother's conduct is in fact acceptable.<sup>187</sup> Assuming the premise that the mother's conduct is immoral, this must be recognized as an injury to the child's moral well-being, because the child will grow up with the understanding that the mother's immoral conduct is moral. In sum, if the mother raises the child, the child will have no proper sense of right and wrong. Hence, the child ought not be placed with the mother because to do so would cause moral harm to the child.<sup>188</sup>

The moral unfitness argument rests entirely on the court's acceptance of the premise that the lesbian mother's conduct is immoral.<sup>189</sup> A critical question that must be explored is how a court might reach such a conclusion. In fact, there is no legitimate, principled basis on which a court can make this determination, and hence, it is not an appropriate determination for a trial court to make. Without such a determination, the arguments concerning parental morality do not assist the resolution of custody questions.

How is a judge to determine whether a lesbian mother's sexual conduct is moral? A principled judge should not simply enforce her or his own personal morality. There is no social consensus about the morality of homosexual conduct or even nonmarital

185. See, e.g., *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987); *White v. Thompson*, 569 So. 2d 1181, 1183-84 (Miss. 1990); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 165-66 (Mo. Ct. App. 1987); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*9-30 (Mar. 30, 1988) (Tomlin, J., concurring); *Dailey v. Dailey*, 635 S.W.2d 391, 394-95 (Tenn. Ct. App. 1981); *Roe v. Roe*, 324 S.E.2d 691, 893-94 (Va. 1985).

Despite the misgivings discussed in this section, I have included moral fitness as one of the genuine concerns a court might have. I do so because concerns for the moral well-being of the child may be motivated by real concern for the welfare of a particular child.

For an extended discussion of morality with regard to sexuality in child custody cases, see Katz, *supra* note 55.

186. See, e.g., *Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1979), *cert. denied*, 449 U.S. 927 (1980); *Beck v. Beck*, 341 So. 2d 580, 582 (La. Ct. App. 1977); *Whaley v. Whaley*, 399 N.E.2d 1270, 1275 (Ohio Ct. App. 1978). *But see* *Fletcher v. Fletcher*, 504 N.W.2d 684 (Mich. Ct. App. 1993) (stating that the mother's two extramarital affairs, though immoral, were improper factors to consider where no evidence of harm to the child), *rev'd in part*, 526 N.W.2d 988 (Mich. 1994).

187. In adopting this reasoning, one court remarked that "[i]t is within common knowledge and experience that a child learns by example, especially from its parents." *Beck*, 341 So. 2d at 582.

188. This reasoning could be used to justify a *per se* rule denying custody to all sexually nonconforming parents, a permissible determinative inference against such parents, or any other form of legal disadvantage in a custody determination. Taken to its extreme, it could even justify cutting off all contact with the mother, since even if the child is not raised by the mother, regular contact with the mother would convey the same moral lesson. This partially explains the frequency of restrictions on visitation. See, e.g., *Lundin v. Lundin*, 563 So. 2d 1273 (La. Ct. App. 1990).

189. I do not propose to argue the morality of lesbian conduct in this Article, although I believe it to be moral. Others have effectively presented this perspective. See Polikoff, *supra* note 5, at 549-57. Instead, I argue that courts lack a legitimate basis for any assessment of morality.

heterosexual conduct;<sup>190</sup> instead, the morality of much sexual conduct is both contested and unsettled.<sup>191</sup> Under these conditions, invocation of universally accepted standards of morality is unpersuasive.<sup>192</sup>

Most commonly, judges who have attempted to address this challenge have supported their conclusions about immorality through reference to criminal law. For example, where homosexual conduct is criminalized, a judge concludes that homosexual conduct is immoral.<sup>193</sup>

A court can properly rely on criminal law to identify immoral conduct under either of two arguments. First, a court might assert that all criminal conduct is necessarily immoral conduct. This argument rests on the premise that criminalization of an activity reflects a judgment that it is immoral. If such an argument were accepted, then it could support the conclusion that where homosexual conduct is illegal, it is also immoral. Second, and less sweeping, a court could assert that although not all criminal conduct is immoral, some systematically defined subset of criminal conduct also constitutes immoral conduct. A court must offer some general rationale for separating those activities which are both criminal and immoral from those activities which are criminal but not immoral. That is, there must be a reason why some crimes constitute immoral conduct and others do not. If the court cannot articulate a rationale, then the fact that a particular activity may be subject to criminal penalties proves nothing. A court cannot pick through the criminal code and identify some criminal activity as immoral without offering a justification for its choices.<sup>194</sup>

The complete equation of illegality with immorality has never been accepted in custody cases. It is neither a feasible nor desirable approach. If a parent who breaks the law is to

190. For different perspectives on this issue, see John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994) (arguing that homosexual conduct is always immoral); Michael J. Perry, *The Morality of Homosexual Conduct: A Reply to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995) (arguing that homosexual conduct may be moral); Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (1995) (rejecting Finnis' thesis while critiquing Perry's argument). Finnis argues that all sexual activity, save for marital noncontracepted intercourse, is immoral. Finnis, *supra*, at 1068 n.50. Thus, his definition of immoral conduct encompasses nonmarital heterosexual intercourse as well.

The lack of consensus is also reflected in the varying legal treatment of homosexual and nonmarital heterosexual conduct. In some states sodomy (defined in many varied ways, some of which include heterosexual and perhaps even marital sexual activity) is illegal, although not frequently prosecuted. Other states and many municipalities have adopted laws protecting the civil rights of lesbians and gay men. See generally Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994). This presumably reflects a judgment that the conduct of these citizens is not immoral. In response, still other jurisdictions have adopted voter initiatives that reflect a critical view of the morality of lesbian or gay male sexual conduct. See, e.g., *supra* note 8.

191. It might be tempting to argue that particular lesbian sexual conduct is moral—for example, sexual conduct in the context of a long-term, committed, monogamous relationship. But to make such an argument is to suggest that other lesbian sexual conduct is not moral—for example, nonmonogamous, anonymous sex. This invites the good lesbian/bad lesbian problem noted by Robson. See generally ROBSON, *supra* note 70; Robson, *supra* note 70.

192. Although this speculation is beyond the scope of this Article, I would nevertheless suggest that where there is societal consensus on the morality of certain conduct, a judge might rely on that consensus. Of course, even under those circumstances it might be difficult for a judge to determine the precise content of the agreed upon moral standard. Furthermore, I would not necessarily agree that when a parent's conduct is deemed immoral by reference to a consensus standard it is appropriate to take that into account at a custody determination. See *infra* note 193 and accompanying text.

193. Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987); Collins v. Collins, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*9 (Mar. 30, 1988) (Tomlin, J., concurring); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1995). This reasoning may rest on the assumption that lesbians and gay men must engage in the prohibited activity, even though it may not be proved in court. See Pershing, *supra* note 49, at 294-95. In any given case, this assumption may be entirely unwarranted. See ROBSON, *supra* note 70, at 47-57. This is not to say, however, that the existence of a sodomy statute is conclusive as to custody. Massachusetts, Michigan, and South Carolina all have sodomy statutes yet apply a nexus test. See Bezio v. Patenaude, 410 N.W.2d 1207 (Mass. 1980); Michigan v. Brown, 212 N.W.2d 55 (Mich. Ct. App. 1973); Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987).

194. In doing so, a judge does little more than substitute her or his own judgments of morality.

be judged immoral, vast numbers of parents must be so judged. Countless parents violate traffic laws, laws prohibiting photocopying of copyright materials, or taperecording records or compact discs. Indeed, it is widely recognized that the law criminalizes a wide range of activities in which most citizens engage.<sup>195</sup> No one would seriously suggest that the fact that a parent made a cassette recording of a favorite record so that it could be played in the car demonstrates that the parent is immoral and, therefore, should be generally relevant at a custody hearing.<sup>196</sup> The assertion that the criminal law provides a guide for determining immoral conduct simply proves too much and is therefore untenable.

This leaves the second argument—that although the criminal law generally does not define immorality, some subset of those laws do define immorality. The problem then becomes identifying the subset of criminal laws which define immorality. Any resolution of this problem faces two challenges—constructing a principled basis for distinguishing between criminal laws which define morality and those which do not, and justifying the authority of the court to draw the distinction.

If the distinction chosen were a well-recognized and widely shared one, then the problem of justifying the court's authority would be diminished. For example, if offenses deemed *malum in se* were considered to be immoral, then the authority of a court to make that distinction might be less problematic. The recognition of some offenses as *malum in se* is widely shared. Yet the *malum in se/malum prohibitum* distinction turns out to be unsatisfactory. Theft and assault are considered *malum in se*, and yet whether parents have ever committed these acts is not generally a subject for inquiry as moral issues in custody cases.<sup>197</sup>

If the distinction between immoral and moral criminal conduct is not widely shared, then the justification for judicial authority to draw the distinction becomes critical. If judges lack authority simply to define morality as they choose, then they also lack authority to define morality as they choose by picking among various criminal statutes.

None of the opinions cited offer any explanation for the court's identification of criminal laws that define morality. When courts rely on criminal law as a codification of morality in custody cases, they rely on a very small subset of criminal law—some (but not all) offenses concerning consensual sexual activities. Thus, the trial court may condemn Sharon Bottoms because she engaged in illegal, and hence, immoral conduct: oral sex.<sup>198</sup> That Sharon Bottoms' mother, the opposing party in the custody case, also violated Virginia law regarding consensual sexual activities<sup>199</sup> was of no significance to

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195. See Stephen J. Adler & Wade Lambert, *Common Criminals: Just About Everyone Violates Some Laws, Even Model Citizens*, WALL ST. J., Mar. 12, 1993, at A1, A6. The article discusses a wide range of laws that are commonly violated, including tax laws (failing to report tips, for example, constitutes tax evasion), prohibitions on gambling, copyright laws, and drug and alcohol laws.

196. Were such conduct generally relevant in a custody hearing, the discovery that would follow would be a nightmare.

197. See *Mason v. Moon*, 385 S.E.2d 242, 245 (Va. Ct. App. 1973) (granting custody to a mother married to a man who murdered the child's father because there was no evidence that "the potential for harm [was] great or long lasting or that the [mother could] not adequately help the child confront and accept the situation"). *Moon* is particularly noteworthy given Virginia's willingness to assume harm in the context of lesbian and gay parents. See *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); *Roe*, 324 S.E.2d at 691.

The fact that these types of crimes are not typically considered to show immorality does not mean that a court could not adopt a standard that included them. But this might take us far from the best interests of the child. The fact that a mother brought supplies home from her office for personal use (probably theft by deception) or that a father may have gotten into a fight at some time (potentially an assault) does not pertain to their general capacity as parents.

198. VA. CODE ANN. § 18.2-361 (Michie 1995) (prohibiting crimes against nature).

199. *Id.* § 18.2-344 (prohibiting sexual intercourse between two people who are not married).

the court. It offered no explanation for its concern with some criminal consensual conduct and its complete lack of interest in other equally criminal conduct.<sup>200</sup> Many heterosexual Virginians violate the same statute that Sharon Bottoms might have violated, yet this does not matter in their custody cases.<sup>201</sup>

All of this points out one of the underlying problems with allowing inquiry into, and judicial determination of, the moral fitness of a parent in a custody case. Short of selecting all of criminal law—an alternative no one would accept—there is no legitimate principled basis on which a court can assess morality. Therefore, including morality in the consideration of parental fitness may amount to giving a court free-range to make its own judgments.<sup>202</sup>

There is a second, and perhaps even more serious, problem raised by cases determining custody based on moral concerns. Even if a court can properly conclude that particular conduct is immoral, this would generally not be relevant to a custody case unless the immorality of the parent is somehow related to harm to the child. Where courts reveal their reasoning, the “harm” identified is that the child will fail to develop a proper moral sense. In short, the decisions turn not only on assessment of a parent’s immorality, but also judicial assessment of what a parent chooses to teach her or his child.<sup>203</sup>

Yet a parent’s entitlement to teach the parent’s own child right and wrong as the parent sees fit lies at the core of the parental right to raise a child. The mere fact that a parent raises a child to believe in a particular set of values cannot be the basis for state interference with parental rights, unless it can further be shown that some real harm—harm apart from the assertedly injurious belief system—will follow. In fact, we recognize and protect the right of parents to teach their children religious beliefs of their own choosing, to teach them the language they chose, and to teach them ideas as they choose.<sup>204</sup>

200. For example, the court did not judge that homosexuality was more immoral than fornication. This suggests that the trial court’s motivation was not in fact a genuine concern for the child, but rather bias against lesbians. See *infra* text accompanying notes part IV.C.

201. If participation in consensual oral sex is a legitimate factor in determining custody cases in Virginia, then the scope of inquiry into parental activity must be dramatically enlarged and notions of sexual privacy must be suspended during custody cases. See Pershing, *supra* note 49, at 294-95 (noting that studies estimate that up to 90% of heterosexual couples engage in oral sex).

202. See, e.g., Mnookin, *supra* note 31, at 260-61; see also Fox v. Fox, Nos. 79676, 83590, 1995 WL 422057, at \*2 (Okla. July 18, 1995) (noting that “it is not the function of this Court to enter a judgment based solely upon individualized conceptions of morality”).

203. See, e.g., Collins v. Collins, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*7 (Mar. 30, 1988) (Tomlin, J., concurring). After quoting extensively from trial testimony, Judge Tomlin notes, with apparent distaste, that “[m]other informed her daughter that she was a homosexual, stating that homosexual love is the same as heterosexual love.” *Id.* at \*28. Judge Tomlin then concluded by stating:

The courts of this state have a duty to perpetuate the values and morals associated with the family and conventional marriage, inasmuch as homosexuality is and should be treated as errant and deviant social behavior. I would have this Court declare . . . that a practicing homosexual parent be disqualified from obtaining legal custody of one’s minor child or children.

*Id.* at \*28-29. Judge Tomlin focused on “practicing” homosexuals because it was through “practice” that the mother taught her child. Indeed, Judge Tomlin allowed that,

this Court would not be deciding that [m]other could never obtain custody of the child. . . . Just as an alcoholic overcomes the habit and becomes a nondrinker, so this mother should attempt to dissolve her ‘alternative lifestyle’ of homosexual living. Such is not too great a sacrifice to expect [sic] of a parent in order to gain or retain custody of his or her child.

*Id.* at \*29.

204. See Wisconsin v. Yoder, 406 U.S. 205 (1971); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control”); Meyer v. Nebraska, 262 U.S. 390 (1923).

It is hard to imagine that a judge confronted with two heterosexual parents in a custody determination would be permitted to rely on the fact that one parent might teach a child that same-sex relationships are deserving of respect and

The difficulties discussed above suggest that until courts adopt a satisfactory analysis, concerns about moral well-being ought not to be directly at issue in custody cases.<sup>205</sup> Yet some state statutes specifically identify moral fitness of the parent or moral well-being of the child as a factor relevant in the court's determination of custody.<sup>206</sup> In other jurisdictions, courts have stated that "morality is always a factor" in child custody actions.<sup>207</sup> Therefore, there will be many instances in which the law compels judges to consider morality in custody cases. In doing so, however, courts should exercise extreme caution when determining what constitutes immorality.<sup>208</sup>

When immoral conduct is carefully identified, it should be relevant only to the extent that it causes harm to the child, apart from harm in the form of diminished moral judgment. "The law does not attend to traditional concepts of immorality in the abstract, but only to whether the child is a party to, or is influenced by, such behavior."<sup>209</sup> Thus,

acceptance. Yet, lesbian and gay parents are frequently penalized for teaching this same lesson. The deeply rooted prejudices that lesbians and gay men must overcome are evidenced by judicial conduct, seemingly grossly wrong, which is unprotested and accepted in cases involving lesbians and gay men.

205. I do not mean to suggest that morality is irrelevant to the rearing of children. Although it is important, it appears to be beyond the authority of the state to assess generally what moral teaching a parent can provide for her or his child.

206. Eighteen states have provisions requiring the consideration of the moral fitness of the parent, the moral well-being of the child, or both, in statutes governing custody, visitation, modification of existing orders, and other related matters. Five states require the consideration of morality in child custody determinations during divorce or separation proceedings: Alabama, ALA. CODE § 30-3-1 (1989); Massachusetts, MASS. GEN. L. ch. 208, § 31 (1994); Oklahoma, OKLA. STAT. tit. 43, § 109 (1990); South Dakota, S.D. CODIFIED LAWS ANN. § 25-4-45 (Supp. 1995); Utah, UTAH CODE ANN. § 30-3-10 (1995). Four states require the consideration of morality in motions to modify existing custody decrees: Arizona, ARIZ. REV. STAT. ANN. § 25-332 (1994); Idaho, IDAHO CODE § 32-1115 (1983); Illinois, ILL. REV. STAT. ch. 5, para. 610 (1994); Kentucky, KY. REV. STAT. ANN. § 403.340 (Michie/Bobbs-Merrill Supp. 1994). Four states require the consideration of morality in the determination of the noncustodial parent's visitation rights: Illinois, ILL. REV. STAT. ch. 5, para. 607(a) (1994); Kansas, KAN. STAT. ANN. § 60-1616 (1994); Kentucky, KY. REV. STAT. ANN. § 403.320(1) (Michie/Bobbs-Merrill Supp. 1994); Montana, MONT. CODE ANN. § 40-4-217(1) (1993). Three states require the consideration of morality in the modification of the noncustodial parent's visitation rights: Illinois, ILL. REV. STAT. ch. 5, para. 607(c) (1994); Kentucky, KY. REV. STAT. ANN. § 403.320(3) (Michie/Bobbs-Merrill Supp. 1994); Montana, MONT. CODE ANN. § 40-4-217(3) (1993). Three states list the moral fitness of all parties as one factor to consider in determining the best interest of the child: Louisiana, LA. CIV. CODE ANN. art. 134 (West 1995); Michigan, MICH. COMP. LAWS § 722.23 (Supp. 1995); North Dakota, N.D. CENT. CODE § 14-09-06.2 (1993). Florida uses a moral fitness standard for purposes of determining shared parental responsibility and primary residence. FLA. STAT. ch. 61.13 (Supp. 1995). Hawaii allows the testimony of any person or expert to be heard in a custody proceeding if that testimony is relevant to the moral well-being of the child. HAW. REV. STAT. § 571-46 (1995). Illinois has a statute which presumes that the maximum involvement and cooperation of both parents regarding the child's moral well-being is in the best interest of the child. ILL. REV. STAT. ch. 5, para. 602 (1994). Montana has a statute which gives the court discretion to modify prior custody decrees if the child's moral health is endangered. MONT. CODE ANN. § 40-4-219 (1993). Nebraska has a statute which allows the court, in a divorce proceeding, to terminate parental rights based on the potential moral detriment to the child if the pleadings or evidence place termination in issue. NEB. REV. STAT. § 42-364 (1986). Nevada has a statute which allows the court to grant visitation rights to parents, grandparents, and siblings when a child's parents have divorced, separated, or relinquished their parental rights, and takes into account the moral fitness of the party seeking visitation. NEV. REV. STAT. § 125A.330 (1993).

207. *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 165 (Mo. Ct. App. 1987); see also *Hutchison v. Hutchison*, 649 P.2d 38, 41 (Utah 1982) (directing trial courts to consider parents' moral character).

208. See discussion *infra* part IV.C.

209. Neely, *supra* note 56, at 181; see *Van Driel v. Van Driel*, 525 N.W.2d 37 (S.D. 1994). In rejecting the father's suggestion that the court take the mother's immoral relationship into consideration, the court observed:

We are called upon to make a judicial review of the trial court's decision rather than a moral evaluation of the parties' conduct. As judicial officers, ruling on a legal controversy, we must be guided by principles of law. Personal conceptions of morality held by the members of this Court have no place in the resolution of this controversy.

*Id.* at 39. Although the opinion does not address the relevance of the trial judge's view of morality, it seems reasonable to conclude that evaluation does not have a place in the resolution either. See also *Developments in the Law, supra* note 59, at 1639 (arguing that judges should avoid legislating their own sense of morality).

A number of courts have shown caution in evaluating morality in the context of heterosexual parents. See, e.g., *In re Rex*, 444 N.E.2d 482, 484 (rejecting reliance on mother's immorality unless it is established that there is some damage to the child and requiring that damage be significant in character); *Whaley v. Whaley*, 399 N.E.2d 1270, 1277 (Ohio Ct. App. 1978) (stating that "immoral impact must be shown to have a direct or probable adverse impact on the welfare of

judicial concern for the moral well-being of a child, even if mandated by the legislature, cannot be used to support a blanket rule disadvantaging parents who engage in nonmarital sex. While concern for a child's moral well-being may be understandable and genuine, it is not within the power of a court to mandate that a child be raised with a particular moral value system. Nor does a court have the authority to choose between the competing value systems of the parents.<sup>210</sup> A court should only consider this factor when the asserted immorality results in some other harm, or some real prospect of other harm, to the child.

### *C. Illegitimate Judicial Concern Grounded in Bias and Prejudice*

Often there are other, sometimes unarticulated concerns that motivate a judge's decision in a custody case. Some judges are deeply biased against lesbians and gay men, or less commonly, against individuals who engage in nonmarital heterosexual sex.<sup>211</sup> For these judges, taking children away from lesbian and gay parents may be perceived as necessary without regard for any evidence. Denying custody or visitation may also serve the additional purpose of punishing the parent for immoral or improper conduct.<sup>212</sup> Other judges may be fearful of the reaction of the electorate or of specific communities within the electorate or within which they live.<sup>213</sup> Whether it is the judge's personal prejudice or personal interpretation of community bias, neither is a legitimate basis for any judicial decision, and both are particularly lamentable when the decision shapes the life of a child.

In some instances it is not hard to detect judicial prejudice. For example, in *Pleasant v. Pleasant*<sup>214</sup> the Illinois Court of Appeals reversed a trial judge's order that harshly restricted a lesbian mother's visitation with her child.<sup>215</sup> During the course of the proceedings, the post-decree judge heard testimony (consisting largely of hearsay) on the father's motion to restrict visitation before the mother had been served. Following that ex parte hearing, the judge issued an order suspending visitation because he was concerned about "this lesbian stuff."<sup>216</sup> At a subsequent hearing, the judge argued with the mother about the presence of "unmasculine" men at a gay pride parade (which presumably the judge had not attended).<sup>217</sup> The judge ordered supervised visitation, but offered the mother unsupervised visitation on the condition that the child was not in the

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the child").

210. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

211. Bias and prejudice are by no means the special province of the judiciary. Lesbians and gay men are the subject of widespread bias and prejudice. See *supra* note 7-8 and accompanying text; see also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Ca. 1982) (noting an abundance of "[w]holly unfounded and degrading stereotypes"), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990). Bias leads judges to ignore evidence contrary to their beliefs or to reach conclusions in the absence of evidence.

212. See, e.g., *Whaley*, 399 N.E.2d at 1273 (reversing the trial court order modifying custody in favor of father where mother lived with a married man, and finding that the trial court's decision "demonstrates that the change in custody was ordered to punish Mrs. Whaley for conduct the court considered morally wrong").

213. For example, the nomination of Judith McConnell to be a U.S. District Court judge was withdrawn after it came to light that in 1987 she had awarded custody of a 16-year-old boy to his deceased father's male lover rather than his mother. Tony Perry, *2 Sponsored by Boxer for U.S. Judgeships Withdraw from Consideration*, L.A. TIMES, Jan. 21, 1995, at B3.

214. 628 N.E.2d 633 (Ill. App. Ct. 1993).

215. The father had been awarded custody following a trial at which a child psychiatrist, suggested by a mediator, recommended that the child remain in his mother's custody. Apparently no other expert offered an opinion as to custody. *Id.* at 635. The mother openly acknowledged that she was a lesbian during the trial. *Id.*

216. *Id.* at 636 (quoting the post-decree judge).

217. *Id.* at 637 (quoting the post-decree judge).

presence of any person of "known homosexual tendencies."<sup>218</sup> The mother explained that she could not comply with this condition, and the judge terminated her visitation.<sup>219</sup> Ultimately, the judge permitted only supervised visitation.

The appellate court also felt it was necessary to ensure that a different judge resolved any future disputes in the case.<sup>220</sup> The appellate court concluded that

in making his findings, the judge improperly relied on his personal belief that homosexuality creates serious endangerment. In his memorandum . . . he included a section entitled "HOMOSEXUALITY," which was based on a book that was not introduced into evidence or even mentioned during the proceedings. . . . We are disturbed by the judge's numerous homophobic comments. His personal beliefs improperly clouded his judgment. Consequently, for the last four years, a little boy has been deprived of unrestricted visits with his mother.<sup>221</sup>

The appellate court concluded that "[t]he record is replete with homophobic statements that indicate that the judge was prejudiced . . . and acted according to that prejudice."<sup>222</sup>

If *Pleasant* is unusual, it is only because the trial judge made so little effort to hide his bias.<sup>223</sup> More typically, the bias of courts is less apparent, though no less real. *In re Marriage of Martins*,<sup>224</sup> for example, involved a motion for modification in a custody dispute between a lesbian mother and a heterosexual father. The original custody decree had awarded the mother physical custody of the children during the week. Some time after learning that the mother was a lesbian, the father filed a motion to modify the decree. At trial on the motion to modify, the father and mother each offered testimony supportive of their own parenting relationship and critical of the other parent's.<sup>225</sup> The father testified that he believed homosexuality to be wrong, but that what people did behind closed doors was their own business. He acknowledged that he had appeared on Oprah Winfrey because "he did not want other people who might not know what their sexual preference was to get into a marriage with a heterosexual and ruin the lives of their spouse and children."<sup>226</sup> He also admitted that he left a derogatory message on the mother's answering machine, knowing that the children had access to the machine.<sup>227</sup> After the mother informed him she was a lesbian, he arranged for the children, two girls, then five and three, to receive counseling without the mother's knowledge.<sup>228</sup> The court-

218. *Id.* The custody proceedings had already caused the mother to terminate her relationship with her lover. *Id.* at 637.

219. *Id.* Supervised visitation was restored two months later after a hearing where the mother explained that most of her personal friends were lesbian or gay. *Id.* at 638.

220. *Id.* at 643.

221. *Id.* at 642.

222. *Id.* at 643.

223. See *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring in part) (stating, with reference to the lesbian mother, that "for years, [the lesbian mother] has followed a life of perversion" and suggesting that [the lesbian mother] wants visitation so that she can teach the children to be homosexuals and that "[u]ntil such time that she can establish . . . that she is no longer a lesbian living a life of abomination (see Leviticus 18:22), she should be totally estopped from contaminating these children"); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*9 (Mar. 30, 1988) (Tomlin, J., concurring) (stating that "homosexuality is and should be treated as errant and deviant social behavior" and comparing lesbian mother to an alcoholic who "should attempt to dissolve her 'alternative life style' of homosexual living").

224. 645 N.E.2d 567 (Ill. App. Ct. 1994), cert. denied, 648 N.E.2d 418 (Ill. 1995).

225. *Id.* at 570-72. The father was supported by his mother and the mother was supported by several long-term friends, one of whom had also been her lover. *Id.* at 571.

226. *Id.* at 571.

227. *Id.*

228. *Id.* at 569. The counselor was called to testify by the father at trial. She discussed various statements the children had made concerning their residential preferences, but apparently did not discuss any difficulties that the children experienced. *Id.* at 570.

appointed guardian testified in support of the father, based largely on the expressed preferences of the children.<sup>229</sup> Finally, the trial judge interviewed the children in camera. The younger child told the judge that she had no preference for residence with one parent or the other, while the older child expressed some preference for the father, noting she preferred her father's babysitter to that of her mother.<sup>230</sup>

Based on this evidence, the trial court denied the motion to modify. Although the court found a change in circumstances, it concluded that modification of custody was not necessary to serve the best interests of the children.<sup>231</sup>

Given the discretion allotted to trial courts in custody matters,<sup>232</sup> the contested and conflicting evidence before the court, and the trial court's unique ability to interview the children, this would appear to be a decision warranting routine affirmance. Yet the Illinois Court of Appeals reversed, granting the father's motion. The court reasoned that "the trial court failed to evaluate fully the impact of the petitioner's lesbianism on the children."<sup>233</sup> Unlike the trial court, the appellate court found clear and convincing evidence that "[t]he petitioner's lifestyle had adversely affected the children. Since the petitioner admitted her lesbianism, she had not spent as much time with or rendered the same care to the minor children as she had prior to pronouncement of her gay lifestyle."<sup>234</sup>

Although the appellate court recites that the trial court's determination was against the manifest weight of the evidence, this is insupportable given the many conflicts in the evidence of the record. Indeed, the appellate court never discusses the weight of the evidence, but instead substitutes its own judgment of the facts and of what is best for the children.<sup>235</sup> Even viewed as a *de novo* opinion on child custody, the court's opinion is lacking, as the court fails to articulate ways in which the change of custody will advance the interests of the children. The appellate court's failure to adhere to the proper standard of review requires some explanation.

At least one explanation might lie in the bias of the appellate judges against lesbians and gay men. Although it is subtle, there is evidence of consistent, though not necessarily conscious, bias. For example, the court characterizes the mother's decision to acknowledge to her family that she was a lesbian as her "pronouncement of her gay lifestyle."<sup>236</sup> This suggests that, in the court's view, the mother's decision was a trivial and

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229. *Id.* By the time of trial the children were seven and five years old. *Id.* at 569.

230. *Id.* at 572.

231. *Id.* at 573.

232. As the appellate court noted, Illinois law provides that a trial court determination should be affirmed unless it is against the manifest weight of the evidence or constitutes a clear abuse of discretion. *In re Marriage of Seymour*, 565 N.E.2d 269 (Ill. App. Ct. 1990).

233. *Martins*, 645 N.E.2d at 573.

234. *Id.* at 574.

235. The court apparently resolves factual disputes without any justification. For example, the evidence showed that the father arranged for his children to enter counseling because he thought it necessary. The mother thought that counseling was appropriate because the parents were unable to get along. When called to testify, the counselor did not offer testimony as to any problems the children had encountered. Instead, she testified to several statements the children made to her concerning where they preferred to live. Faced with this inconclusive and conflicting evidence, the appellate opinion conclusorily states that "the children required counseling as a result of their mother's pronouncement of her lesbianism." *Id.* at 574.

236. *Id.* In the same sentence the court states that the mother "admitted her lesbianism"—a formulation which clearly implies that lesbianism is a bad thing. *Id.*

selfish one.<sup>237</sup> Yet a lesbian mother's decision to openly acknowledge her sexuality is neither trivial nor selfish. To the contrary, it is a difficult and irrevocable determination which can have, as this case demonstrates, very serious legal consequences.<sup>238</sup> The court's trivialization of the mother's conduct demonstrates ignorance at best and intolerance at worst.<sup>239</sup>

The court's deviation from its ordinary role of appellate review in custody cases, combined with its failure to specifically articulate the basis for its conclusions about the welfare of the children and the textual evidence suggestive of bias discussed above, raises the clear possibility that the court's determination was based, at least in part, on prejudice. At a minimum, any genuine concerns for the well-being of the children are inextricably intertwined with suggestions of bias against lesbians. This is deeply troubling. A decision based on bias and prejudice is an invalid one. More generally, decisions which appear to be based on bias and prejudice, as well as those which are in fact based on such factors, rob the courts of their legitimacy as decisionmakers.<sup>240</sup>

Custody decisions involving lesbian, gay, or unmarried heterosexual parents are often replete with stereotypical images of the parties. One common stereotypical image of gay men fixates on rapacious and uncontrolled sexual appetites. While the concern about uncontrollable sex drives is more commonly associated with gay men, it also applies to

237. This view is further supported by the court's earlier discussion of the mother's conduct. The court first observes that the mother "chose to disclose her lesbianism despite the effect it might have on the children." *Id.* at 571. The sentence continues stating that "she had been afraid that the minor children were going to hear it from other children on the street." The court seems unable or unwilling to grant that the mother's fear coupled with her concern for her children might have led her to make the difficult disclosure. *See also* Fajer, *supra* note 3, at 532 (noting use of the word "lifestyle" by opponents of gay rights).

The language in *Martins*, 645 N.E.2d at 567, bears striking similarities to that employed by the trial court in *Palmore v. Sidoti*, 466 U.S. 429 (1984). In *Palmore*, a unanimous Supreme Court reversed an order transferring custody to a father because the mother had married an African-American man. (The mother and father of the child were both white.) The mother had also lived with her new husband before they married. In ordering the change in custody, the trial court stated: "The wife . . . has chosen for herself and for her child, a life-style unacceptable to the father and to society. . . . It is of some significance . . . that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare."

*Id.* at 431 (quoting the trial court) (emphasis in original).

238. *See* Celia Kitzinger & Sue Wilkinson, *Transitions from Heterosexuality to Lesbianism: The Discursive Production of Lesbian Identities*, 31 DEVELOPMENTAL PSYCHOL. 95, 101 (1995) (noting that "[b]ecoming a lesbian involves taking a leap into the unknown, claiming an outlaw identity" and noting costs of the decision). The risks incurred by revealing one's sexual identity where custody of children may be at issue is widely known within the lesbian and gay community.

239. Other portions of the *Martins* opinion also evidence bias, though perhaps not conscious bias. In discussing the mother's roommates, two of whom were witnesses for her, the court identified them as "a lesbian by the name of Brook" and "a heterosexual named Helen." The court also noted that "two other lesbians, Michelle and Theresa, frequented the home, but had not lived there." *Martins*, 645 N.E.2d at 569. Identification of the women as lesbian or heterosexual is of no apparent importance to the resolution of the case, and the court does not discuss the sexual identities of any of the father's witnesses. The evidence on which the court offers no comment is also noteworthy. For example, while the mother's "pronouncement of her gay life-style" obviously troubles the court, the father's nationally televised appearance on Oprah Winfrey—the subject of which was the mother's "life-style"—apparently does not.

Comparing the *Martins* case and *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993), also highlights a subsidiary issue. Both cases were decided in Illinois by the intermediate appellate court, but they convey vastly different messages to lesbian and gay parents. Together they create uncertainty and confusion.

240. Careful reading of many opinions reveals that prejudice may be at work. *See, e.g., In re Marriage of Williams*, 563 N.E.2d 1195, 1199 (Ill. App. Ct. 1990) (characterizing the mother's conduct as showing her "propensity to feed her sexual appetite without regard to morals, ethics, or law"); *S. v. S.*, 608 S.W.2d 64, 65 (Ky. Ct. App. 1980) (labelling lesbianism a "deviate practice"), *cert. denied* 451 U.S. 911 (1981); *White v. Thompson*, 569 So. 2d 1181 (Miss. 1990); *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985). It is not uncommon for courts to combine condemnation for a lesbian mother's sexual conduct with tolerance and sometimes even sympathy for a heterosexual father's anti-gay bias. *See, e.g., Williams*, 563 N.E.2d at 1196; *Johnson v. Schlotman*, 502 N.W.2d 831, 833 (N.D. 1993). This combination is strongly indicative of judicial bias.

lesbians.<sup>241</sup> Lesbians and gay men are frequently portrayed as obsessed with sex, unable to control their sexual desires.<sup>242</sup> This oversexualized image is particularly damaging in the context of custody cases because of our overwhelming anxiety about children and sexuality—at least nonmarital sexuality.<sup>243</sup>

In sum, bias and prejudice, whether rooted in ignorance or in intolerance, appear to play a substantial role in many custody cases involving lesbian and gay parents. Judges disregard overwhelming and virtually uncontradicted evidence from the social sciences and, in the absence of any case-specific evidence or even in the presence of contrary evidence, rely on their own preexisting assumptions. The frequent invocations of concern for a child's moral well-being—concerns premised on the initial conviction that the parent is engaged in immoral conduct—support the inference that the adverse custody decisions are primarily explicable in terms of judicial bias.

## V. COMPONENTS OF A MEANINGFUL NEXUS TEST

The nexus test is the appropriate test for analyzing parental sexual conduct in custody cases. The alternatives—a per se rule disqualifying or disfavoring lesbian and gay parents without regard to their performance as parents or a permissible determinative inference approach which allows the same results—do not serve the best interests of the child. Far from it, these approaches often sacrifice the interests of particular children in order to express judicial disapproval of parental conduct.<sup>244</sup> There is no support in the scientific literature for treating sexuality differently than any other parental characteristic. Other approaches should be discarded in favor of an effective nexus test.

Parental sexuality remains a controversial and divisive topic, particularly for lesbian and gay parents. Therefore, to be effective the nexus test must incorporate explicit restrictions that serve to provide careful guidance to trial courts.<sup>245</sup> It must constrain freewheeling judicial discretion and focus the court's inquiry narrowly on the facts and issues relevant to the well-being of the child.<sup>246</sup> Likewise, it must preclude consideration of extraneous and potentially prejudicial matters.<sup>247</sup>

241. See, e.g., *Williams*, 563 N.E.2d at 1199 (noting the mother's "propensity to feed her sexual appetite without regard to morals, ethics, or law").

242. See, e.g., *Fajer*, *supra* note 3, at 538-39.

243. The prospect that a custodial parent might remarry and have a sexual life with a new spouse would never form a basis for concern about continuing custody.

244. To the extent that adoption of approaches disadvantaging lesbian and gay parents reflects a desire to penalize lesbian or gay sexual conduct, this desire would be better served by direct imposition of criminal penalties for such conduct. Many states do just this through sodomy statutes. Yet sodomy statutes are rarely enforced, suggesting at least ambivalence toward the appropriateness of sanctioning sexual conduct. Against this background, it is inappropriate for a court to sanction indirectly (at considerable cost to a child) what could be sanctioned directly.

245. Professor Mnookin reached a similar conclusion—that indeterminate and discretionary standards should be replaced by more clearly defined legal standards—in his groundbreaking article analyzing child custody determinations. Mnookin, *supra* note 31, at 277-81. Professor Mnookin offers a series of proposals aimed at reformulating the standards by which the state may intervene to restrict or terminate parental rights. This is a distinct problem, related to but different from a parental custody fight. Professor Mnookin's specific suggestions are nonetheless valuable and I have drawn on them in formulating the proposals put forth here.

246. *Id.* at 268-72, 281-91 (outlining the dangers of indeterminacy and the need for clear standards).

247. In addition, systematic programs aimed at the education of judges are essential. Much of the bias and prejudice experienced by lesbian and gay parents in custody cases can be traced to judicial ignorance. Judicial education can encourage judges to eschew reliance on myths and stereotypical images in favor of reasoned assessment of the facts of each case. See Nancy D. Polikoff, *Educating Judges About Lesbian and Gay Parenting: A Simulation*, 1 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 173 (1991).

The appropriate scope of judicial inquiry in a custody case where parental sexuality is at issue must be clearly defined. Two distinct areas of inquiry are potentially permissible: The sexual conduct of a parent to which a child is directly exposed and certain characteristics of any other adult who will play a substantial role in a child's life as a result of that adult's relationship with the parent. This is not to suggest that parental sexual conduct or all characteristics of other adults should be open generally to judicial investigation and assessment. To the contrary, consideration of parental conduct should be sharply limited by the central principle of the nexus test; that is, conduct is relevant only to the extent that it is linked to the well-being of the child. Similarly, characteristics of other adults should be relevant only if they satisfy the nexus test.

In addition, if it is to function properly, the nexus test should clearly and narrowly define what constitutes harm to the child. It should also require evidence of a specific connection between the parental factor and the properly defined harm. The harm should be shown to have occurred or to be reasonably likely to occur in the future. Courts should not be left free to speculate about possible harm that might occur at some indefinite time in the future.<sup>248</sup>

Finally, trial courts should control the admission of evidence to minimize the extent to which irrelevant evidence, which may be prejudicial, is admitted. Appellate courts should stand ready to review applications of the nexus test by the lower courts carefully and critically.

The following sections will detail the various components that comprise this Article's proposed solution. Most of these components can be found in some cases, but no case combines all of them, and no jurisdiction systematically demands them.

In several respects, the proposed analysis is similar to the analysis used by many courts when the parental characteristic at issue is religion. Courts are extremely cautious when a parent claims that custody or visitation of a child should turn, even in part, on the other parent's religious beliefs and/or practices. In general, courts have been unwilling to place restrictions on visitation or custody because of religious beliefs or practices absent "a clear, affirmative showing that those religious activities will be harmful to the child."<sup>249</sup>

The legal justification for judicial concern about custody decisions based on religious belief and practice is rooted, in part, in the First Amendment protections afforded religion. In that regard, the parental religion cases are readily distinguishable, for the First Amendment provides a constitutional justification for the courts' critical assessment of custody cases involving religion.

Yet, there are also compelling reasons for critical assessment of custody claims involving parental sexuality. As this Article has argued, there is no legitimate basis for general judicial hostility toward lesbian and gay parents. Nevertheless, cases involving lesbian and gay parents are often decided not on their merits but on other, less desirable grounds. Judges rely on stereotypical images of lesbians and gay men or base their decisions on bias. In so doing, they compromise the best interests of the child. The commitment to attaining the best interests of the children who are involved in custody cases warrants particularly critical scrutiny of claims involving parental sexuality.

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248. See Mnookin, *supra* note 31, at 258-62.

249. *In re Marriage of Murga*, 163 Cal. Rptr. 79, 82 (Ct. App. 1980); see also *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass. 1981) (stating that "harm to the child from conflicting religious instructions or practices, which would justify . . . limitation [on the family relationship], would not be simply assumed or surmised; it must be demonstrated in detail" (citations omitted)).

In addition, the arguments presented by parents seeking to restrict custody or visitation of religious parents bear some striking similarities to the arguments presented by parents seeking to restrict custody or visitation of sexually nonconforming parents—that the children will suffer moral injury, that they will be stigmatized, or that they may suffer some ill-defined future harm. As with sexuality, a parent's religion usually has two elements: belief or identity and practice or conduct. Thus, the analysis developed in the religion and custody cases is useful in addressing the same problems when they arise in a different context.<sup>250</sup>

### *A. The Appropriate Areas of Judicial Inquiry*

#### 1. The Sexual Activity

Direct exposure to a parent's intimate sexual conduct may be detrimental to the child's well-being. Thus, consideration of the conduct to which the child has been directly exposed may be appropriate under the nexus test.<sup>251</sup> In evaluating the significance of particular conduct to which a child has been exposed, a court must discriminate between intimate sexual conduct, exposure to which might harm a child, and gestures of affection, exposure to which may contribute to a child's understanding of human relationships and thus to the child's well-being.

This distinction may be difficult to articulate.<sup>252</sup> But most critically, courts must recognize that it is a distinction that turns on the specific conduct involved and not on the sex of the participants engaged in the conduct. Conduct which would be inappropriate for a married heterosexual couple is also inappropriate for a lesbian or gay couple. Conversely, conduct in which a married heterosexual couple may engage in front of their children should also be appropriate for a lesbian or gay couple. Given a focus on a child's well-being, there is simply no basis for a determination that it is acceptable for a child to be in the presence of a man and a woman holding hands but unacceptable to be in the presence of two women holding hands. No evidence supports such disparate treatment. Lesbian and gay parents and heterosexual parents should be held to the same standards of conduct. A requirement of uniform standards would do much to improve the position of children of lesbian and gay parents as well as the parents themselves, for the conduct at issue in most cases is conduct which is readily seen as innocuous if engaged in by a heterosexual couple.

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250. For example, courts generally agree that harm to the child will justify restrictions on religious instruction or practices, despite the protections afforded by the Constitution. The constitutional protection of religion mandates, however, that harm which would justify limitations should not be assumed or surmised, but must instead be demonstrated in detail. *See, e.g., Felton*, 418 N.E.2d at 607. This same requirement—that harm should not be presumed or surmised but must instead be demonstrated in detail—is warranted by a genuine concern for the best interests of the child in any area where prejudice and ignorance may otherwise lead a court to hasty and ill-founded conclusions.

I do not wish to overlook the irony of relying on cases involving religious belief to improve the position of lesbian and gay parents. Religious beliefs are far more frequently invoked to justify inequitable treatment of lesbians and gay men. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

251. At the same time, the mere fact that a parent identifies herself as a lesbian is not generally relevant to a determination of custody. This is precisely the distinction accepted in cases revolving around a parent's religion.

252. This project is beyond the scope of this Article. Presumably, in determining where to draw the line a court might rely on available social science literature which in turn might depend in part on prevailing cultural norms.

## 2. The New Person

If a parent establishes a relationship with a new person such that the new person will have significant contact with the child, it is appropriate for the court to take note of this situation.<sup>253</sup> The court may properly consider some characteristics of the new person. For example, if a parent's new partner or roommate<sup>254</sup> is a drug addict, or perhaps even a cigarette smoker, a court may have some legitimate basis for inquiry. The child's exposure to a person with those characteristics might, depending on the evidence, be shown to present the appropriate level of risk to the child.<sup>255</sup> But characteristics such as race, religion, or sexual identity provide no basis for generalized court concern. There is no potential for harm to the child from exposure to these characteristics.

In addition, in some cases the specific relationship between the child and the new person may be a legitimate focus of judicial concern. If the new person and the child have an antagonistic or abusive relationship, judicial inquiry is obviously warranted. But as long as the relationship between the new person and the child is not shown to be detrimental to the child, the court should not intervene on that basis.<sup>256</sup>

### *B. Clear Definition of Harm*

The nexus test should require that harm be narrowly and specifically identified. It should explicitly preclude courts from relying on nebulous allusions to ill-defined harm. This is consistent with the social science research, which demonstrates that no generally identifiable harm afflicts the children of lesbian and gay parents. The research establishes that harm does not generally follow from a lesbian mother associating with other lesbians, from a lesbian mother being open and honest with her children about her sexual identity, or from a mother having an intimate and loving relationship with another woman in the home. To the contrary, social science studies suggest that genuine concern with the best interest of the child should lead courts to foster situations where: (1) a child is aware of his or her parent's sexual identity; (2) the parent is open and comfortable with her or his sexual identity; (3) the child and parent are part of the lesbian and gay community and know other children of lesbians and gay men; (4) the child is able to talk to peers, family members, and outsiders about the parent's sexual identity; and (5) the parent is open and emotionally intimate with a long-term partner, if a partner is living in the home. The court should adopt a narrow definition of harm so that behavior that is in fact in the best interest of the child cannot be used against a parent in a custody suit.

A narrow definition of harm will also prevent the imposition of custody or visitation conditions that impair a parent's ability to care for her or his children.<sup>257</sup> Because of misconceptions about what harms children, lesbian mothers and gay fathers have often

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253. This is particularly true where the parent proposes to live with the new person.

254. The relationship need not be a sexual one.

255. It might also be that the child's interests could be served by carefully crafted court orders—limiting the child's exposure to cigarette smoke, for example.

256. While recognizing the legitimacy of judicial concerns in this area, appellate courts must also remain vigilant against pretext and bias. A court cannot insist on perfect relationships, and some deference to the judgment of the parent about the appropriateness of the relationship is warranted.

257. It is sad and ironic that many state courts, in their haste assertedly to protect children, impose conditions on custody or visitation that are actually likely to cause the children harm. *See supra* notes 148-51 and accompanying text.

been placed in the precarious position of balancing what their children need against what society and the courts will allow.<sup>258</sup> A court should require a specific showing of particular harm, not general conclusions or speculation.<sup>259</sup>

The definition of harm should make explicit that stigma is not, in and of itself, harm. Though children of lesbian mothers and gay fathers must deal with the issue of social stigma, there is generally no distinguishable negative effect on the children's self-esteem and social adjustment. In fact, children may gain greater tolerance for differences and respect for their parents' willingness to stand up for their beliefs. The available studies demonstrate that lesbian and gay parents are cognizant of their sexual orientation's impact on their children and attempt to shield their children from negative societal messages; they are vigilant about maintaining the integrity of their families.<sup>260</sup>

While physical and emotional harm are proper subjects for court inquiry,<sup>261</sup> courts should be extremely wary of reliance on moral injury or harm to justify custody or visitation orders. Parents have a fundamental right to educate their children, including the right to communicate their moral and religious values to them.<sup>262</sup> The fact that a particular judge, or even a majority of a state's citizens, would choose to raise their own children with a different set of moral or religious beliefs, or that the judge or the citizens do not approve of a parent's moral or religious beliefs should not constitute harm to a child. Courts should be scrupulous in restricting the definition of harm to exclude this rationale. Cases concerning sexual morality should be governed by those concerning religious belief, as the overlap between the two concerns is clear.<sup>263</sup>

### *C. Evidence of Harm and of a Link Between Harm and Conduct*

The nexus test should require that the party seeking to restrict custody on the basis of sexuality bear the burden of producing clear and positive evidence of harm or of some specific future harm to the child. General testimony or findings about unspecified harm that might occur are not sufficient to justify reliance on sexuality as a factor in

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258. See Lott-Whitehead & Tully, *supra* note 152, at 275.

259. See, e.g., Robertson v. Robertson, 575 P.2d 1092, 1093 (Wash. Ct. App. 1978) (finding the record inadequate when it contained only an affidavit of the mother stating that religious teachings "confuse and alarm" children and "have a detrimental and confusing impact upon [their] welfare" and noting that courts must require a "factual showing, not mere conclusions and speculations" (emphasis in original)).

260. See Lott-Whitehead & Tully, *supra* note 152, at 276.

261. *But see* Mnookin, *supra* note 31, at 277-79 (advocating that the consideration of danger to a child's health be limited to physical health, precluding consideration of emotional harm).

262. Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

263. See Pater v. Pater, 588 N.E.2d 794 (Ohio 1992). In *Pater*, the Ohio Supreme Court considered a custody fight between parents of differing religions. The court accepted the assumption that the mother, a Jehovah's Witness, would prevent the child from participating in various extracurricular activities and from socializing with non-Witnesses. The father argued that this would harm the child because it might subject the child to ostracism and because it would interfere with proper socialization of the child. The court rejected the father's arguments because it recognized that the arguments essentially recapitulated the underlying dispute over appropriate moral and religious beliefs. The court concluded that "[a] showing that a child's mental health will be adversely affected requires more than proof that a child will not share all of the beliefs or social activities of the majority of his or her peers." *Id.* at 799. Interestingly, the court relied on a case arising out of concerns about parental sexuality. Whaley v. Whaley, 399 N.E.2d 1270 (Ohio Ct. App. 1978).

determining custody.<sup>264</sup> Instead, a court should require a clear and affirmative showing of harm.<sup>265</sup>

Neither should unfounded speculation about future harm be used to justify a court's decision. Proof of an immediate and substantial risk of harm<sup>266</sup> or, at a minimum, proof that the conduct has or reasonably will have an adverse impact on the child<sup>267</sup> should be required. To permit judicial action on a more speculative basis is to risk the best interests of the child. Custody decrees are, after all, subject to modification. In the event that some harm which was not originally immediate or reasonably likely becomes imminent, modification might be appropriate. Prediction of harm in the future is difficult, if not impossible.<sup>268</sup> Allowing a court to rely on the possibility of future harm simply opens the door to judicial speculation, speculation which is often tainted by bias and prejudice.

Courts should also be diligent in attempting to separate harm that might be caused by one parent's sexual conduct from harm which is caused by the other parent's reaction to the sexual conduct. If it can be shown that there is harm attributable to a parent's sexual conduct, then that may be taken into account in determining custody. But if in fact the harm is caused by the other parent's reaction to the sexual conduct, that is appropriately considered as a factor weighing against the reacting parent. A parent can control his or her reaction and therefore, in appropriate cases, that reaction may properly be considered conduct which harms the child.

264. *See, e.g.*, *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985). In *S.N.E.*, the Alaska Supreme Court explained that "the scope of judicial inquiry is limited to facts directly affecting the child's well-being." *Id.* at 878. While there was extensive evidence that the mother was a lesbian, there was no suggestion that this had an adverse impact on the child. Under these circumstances, the lower court's reliance on the fact that the mother was a lesbian was impermissible.

265. Here again, the standard I propose is similar to that used in cases involving religion. *See In re Marriage of Mentry*, 190 Cal. Rptr. 843, 846-47 (Ct. App. 1983) (citing cases requiring a clear, affirmative showing that religious activities will harm the child); *Compton v. Gilmore*, 560 P.2d 861 (Idaho 1977) (requiring that harm from religious upbringing be demonstrated by a clear, affirmative showing); *Kirchner v. Caughey*, 606 A.2d 257 (Md. 1992) (using the same standard as *Compton*, although upholding restrictions based on trial record); *Felton v. Felton*, 418 N.E.2d 606 (Mass. 1981) (using the same standard as *Compton* but also requiring that the harm to the child from conflicting religious instructions of the parents be demonstrated in detail and not assumed or surmised); *Khalsa v. Khalsa*, 751 P.2d 715 (N.M. Ct. App.) (using the same standard as *Compton* but noting that general testimony that child is upset or confused is insufficient), *cert. denied*, 751 P.2d 700 (N.M. 1988); *Hanson v. Hanson*, 404 N.W.2d 460 (N.D. 1987) (using the same standard as *Compton*); *Pater*, 588 N.E.2d 794; *Munoz v. Munoz*, 489 P.2d 1133 (Wash. 1971) (using the same standard as *Compton*).

In a number of these cases, the courts reverse trial court rulings on the basis of insufficient evidence of the harm and links between the harm and the parental characteristics or conduct in question. *Mentry*, 190 Cal. Rptr. 843, is exemplary. In reversing the trial court, the appellate court noted that

the evidence is manifestly insufficient. Boiled down, it simply consists of testimony by the mother concerning her distress at appellant's religious activities with the children and speculative testimony by a counselor who had never seen or interviewed the children. There was evidence that the boy had social adjustment problems in school for which he had received psychological counseling, but no evidence relating these problems, or periodic stomach aches which both children assertedly suffered, to conflict over religion. . . . The record contains no competent evidence that the children will in the future be harmed by the parental religious conflict.

*Id.* at 847. The appellate court's close scrutiny of the evidence advanced in support of restricting parental rights is noteworthy. It is far more rigorous than that generally employed in cases involving parental sexuality. Notably, the dissent in *Mentry* criticizes the majority for overstepping the bounds of judicial review. *See id.* at 850 (Miller, J., dissenting).

266. This standard is similar to that advocated by Professor Mnookin as the appropriate standard for removing the child from the home. Mnookin, *supra* note 31, at 277-79. Professor Mnookin suggests that the court must find "an immediate and substantial danger to the child's health" and limits health to physical health. *Id.* He proposes this very restrictive standard for cases involving state termination or restriction of parental rights, not for use in custody disputes. The same standard would be inappropriate. Nonetheless, the reasoning identified by Professor Mnookin justifies adoption of a similar, even if weaker, standard here. As with termination cases, lesbian and gay parents face judicial discrimination and ignorance generated, in part, by the personal values of many in the judiciary.

267. *S.N.E.*, 699 P.2d at 879.

268. Mnookin, *supra* note 31, at 277-79, 287.

To the extent that a link between parental sexual conduct and harm to the child is established, any order restricting custody or visitation should be designed so as to eliminate the harmful conduct without restricting conduct not shown to be harmful.<sup>269</sup> That is, orders must be narrowly tailored in view of the specific harms established.

#### *D. Procedural Safeguards*

Typically, rules of evidence may be informally applied in custody cases. This poses particular dangers in custody matters centering on parental sexuality. Evidence of a parent's specific sexual practices is not generally relevant to any inquiry under a well-defined nexus test.<sup>270</sup> Such evidence may, however, inflame the prejudices of a particular judge. Beyond that, the search for such evidence is both highly intrusive and potentially offensive and intimidating. Therefore, any effective nexus test must strictly limit the admissible (and hence discoverable) evidence.<sup>271</sup>

#### *E. Careful Appellate Review*

As is noted above, appellate review of custody determinations is, for the most part, extremely deferential. Appellate courts generally affirm trial courts when alternative grounds supporting the trial court's decision exist. cursory review compounds existing problems in custody cases. Appellate courts must signal their willingness to perform detailed reviews of custody cases in order to ensure effective application of the nexus test.

To permit effective appellate review and to ensure proper application of the nexus test, the trial court should be required to provide detailed findings supporting each of the factors required under the nexus test.<sup>272</sup> An appellate court should begin its review with careful scrutiny of these findings as well as the supporting evidence.

The appellate court should also examine the lower courts' attitudes towards the nonconforming parent. This requires an appellate court to look beyond findings or opinions of the lower courts to an examination of the record,<sup>273</sup> for in some instances the record itself may reveal significant bias not apparent from the court's formal conclusions. Appellate courts should take note of reliance on stereotypical images of lesbians, gay men, and unmarried but sexually active heterosexuals.

Reviewing courts should be alert to the appearance of subtle prejudice as well as to its blatant manifestations. This is particularly important where a lower court has relied on concerns about a child's moral well-being. A decision that rests on a judge's conclusion that a lesbian mother will endanger the moral well-being of her child typically rests on the judge's presupposition that a lesbian mother is immoral or that lesbians are immoral,

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269. See *Kirchner*, 606 A.2d 257 (holding that limitations imposed by the trial court are at once too broad and too narrow because they do not correspond to conduct shown to be harmful).

270. For example, the number of times per week a parent might engage in particular sexual practices is of no significance unless it is established that the child is directly exposed to or involved in that conduct.

271. *Pater v. Pater*, 588 N.E.2d 794, 800-01 (Ohio 1992) (noting that the scope of the inquiry into the religious beliefs and practices of the mother was improper and an abuse of discretion).

272. See *Mnookin*, *supra* note 31, at 279; *Schneider*, *supra* note 56, at 2294.

273. In the context of religion, courts have observed a judge's predisposition or bias from the record. See, e.g., *Felton v. Felton*, 418 N.E.2d 606 (Mass. 1981) (noting the trial judge's apparent predisposition); *Pater*, 588 N.E.2d at 801 ("The isolated statements of the trial judge that he would not decide custody on the basis of the mother's religious beliefs will not insulate the court's decision from review.").

as opposed to a specific judgment of the particular lesbian mother formed during the trial. A presupposition that one of the parties is immoral is the essence of judicial bias.

Where a trial court has evidenced bias against one of the parents, appellate courts should engage in extremely critical review. To do less is an abdication of appellate responsibility. A biased factfinder cannot be relied upon to find unbiased facts. When the mother simply being a lesbian offends a court, or when a court adjudges her immoral, its assessment that the mother is a less than adequate parent for other reasons—for example, because she failed to do the dishes or was an inadequate housekeeper—cannot be accepted at face value. The demonstrated bias of the court renders these subsidiary findings suspect.<sup>274</sup> Unless a reviewing court can be confident that the lower court's biases have not infected the deliberative process, it should not affirm the judgment of those courts.<sup>275</sup> An appellate court should assert its authority to correct such an abuse of discretion or to remand the case for appropriate proceedings, if necessary, before an unbiased trial court.<sup>276</sup>

### CONCLUSION

Given the widespread public and political controversies surrounding lesbian and gay parenting, courts should take special care to ensure that lesbian and gay parents are treated fairly in custody cases. The general trend towards adoption of a nexus test governing lesbian and gay parents is one step towards this goal. But adoption of the basic principles of the nexus test does not guarantee fair treatment.

Courts should do more than endorse the general principles of the nexus test. They should adopt a carefully crafted and detailed version of the nexus test and insist upon its rigorous application. Skewed judicial consideration motivated by prejudice or by ill-defined and ill-founded concerns that lesbian and gay parents may somehow harm their children must be replaced by reasoned and fact-based analysis. Nothing less will protect the interests of children of lesbian and gay parents, who may otherwise be separated needlessly from their parents, as well as the interests of lesbian and gay parents themselves.

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274. See Mnookin, *supra* note 31, at 268-70 (noting the problem of bias in the child custody context).

275. In cases involving religion, the trial court's failure to demand a clear, affirmative showing of harm constitutes an abuse of discretion warranting appellate intervention. See *Munoz v. Munoz*, 489 P.2d 1133, 1135-36 (Wash. 1971).

276. *Id.* at 1135 (noting that it is a manifest abuse of discretion when the trial court does not show a compelling reason for failing to follow the established rule of noninterference in religious matters in child custody).

