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## The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear.

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# THE CHILDREN OF HOMOSEXUAL PARENTS: THE VOICES THE COURTS HAVE YET TO HEAR

EILEEN P. HUFF\*

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## INTRODUCTION

As we begin a new millennium, it is time to take a fresh look at a legal phenomenon that has been tearing families apart for over a century. Far too often, family law courts fail to hear the voices of the children involved in custody disputes.<sup>1</sup> Judges profess to act in the

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\*J.D., American University, Washington College of Law, 2001. My motivation for writing this Comment is that in 1980, my parents were divorced in the state of Pennsylvania. My mother, a lesbian who was just discovering her sexuality, was instructed by her lawyer not to divulge her sexual orientation. My father tried to bring her sexuality into court and threatened to challenge the custody order on the grounds that, because she was a lesbian, she was per se an unfit parent. My father's threats were idle; he never challenged the custody order. My mother raised my brother and me, and we have both grown into well-adjusted, loving adults. I dedicate this Comment to my mother for her never-ending supply of love and encouragement. I would also like to thank Professor Nancy Polikoff for her support and guidance while I wrote this Comment.

1. Heidi C. Doerhoff, Note, *Assessing the Best Interests of the Child: Missouri Declares that a Homosexual Parent is Not Ipso Facto Unfit for Custody* J.A.D. v. F.J.D., 64 MO. L. REV. 949, 949 (1999).

Because the children, especially the very young have no adequate basis for making judgments about their long-term well-being, the state acts as *parens patriae* . . .

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“best interests of the child”<sup>2</sup> but impose their own moral values on the families involved.<sup>3</sup> This practice is most prevalent in custody battles in which one parent is a homosexual.<sup>4</sup> It is time for courts and state legislatures to re-examine how their jurisdictions apply the “best interests of the child” standard and come to the realization that a homosexual parent is as able as a heterosexual parent to raise a well-adjusted child.<sup>5</sup> Further, courts should not find a distinction between homosexual and heterosexual parenting.<sup>6</sup> Homosexual parents relate to their children as parents, not as homosexuals.<sup>7</sup>

The purpose of this Comment is to analyze court orders in child custody cases that involve one heterosexual parent and one homosexual parent. The legal issue of the rights of homosexual parents is not new; scores of law review articles, books, and newspaper and magazine articles have been devoted to this topic.<sup>8</sup> This Comment, however, sheds new light on the topic of homosexual parenting by addressing the issue from the perspective of the rights

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Through its laws and decision makers, the state attempts to ensure that the final custody arrangement is guided by the best interests of the child.

*Id.*

2. See *id.* at 985 n.35 (noting that in the majority of states the “best interests of the child” standard was incorporated into the law by state legislatures in one of two ways: explicitly by statute or by legislative recognition of a list of factors courts should consider when making custody decisions in the child’s best interests).

3. See Mark Strasser, *Fit To Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 842 (1997) (observing that courts often make custody decisions based on their own moral values but under the guise of acting in the children’s best interest).

4. See *id.* at 843 (noting that gay and lesbian parents face a higher burden of parental fitness in child custody cases).

5. See Joseph R. Price, Comment, *Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 WM. & MARY BILL RTS. J. 643, 648 (1997) (commenting that since the 1980s there has been a surge in the publication of academic research finding no developmental difference between children of heterosexual parents and children of homosexual parents). There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect to that among offspring of heterosexual parents. *Id.* Despite long-standing legal presumptions against gay and lesbian parents in many states, dire predictions about their children based on well-known theories of psychosocial development, and the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. *Id.* Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children’s psychological growth. Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992). But see Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 *passim* (arguing that homosexuals do not deserve the same parental rights as heterosexuals).

6. See Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 339 n.8 (disagreeing with Professor Wardle’s assumption that homosexual parenting is a distinct form of parenting).

7. See *id.* (noting that homosexuals do not have a distinct form of parenting).

8. See Wardle, *supra* note 5, at 837 n.13 (listing publications published since 1990 that address issues pertinent to homosexual parenting).

of children of lesbian and gay parents.<sup>9</sup> With those rights in mind, this Comment analyzes the legal reality of eliminating or limiting a gay or lesbian parent's parental rights because of his or her sexuality.

The first section of this Comment examines how various jurisdictions approach custody disputes between heterosexual and homosexual parents. The second section analyzes the assumptions courts use to deny a gay or lesbian parent custody of his or her child. The third section assesses the factual evidence most detrimental to a lesbian or gay parent's child custody claim. The fourth section focuses on the children of gay and lesbian parents and is broken into two parts. The first subsection discusses the rights of children. The second subsection attempts to integrate voices of children of gay and lesbian parents with the "best interests of the child" standard relied on by the courts. The fifth section of this Comment analyzes the flaws in the nexus standard and makes suggestions for how it should be amended. Finally, the Comment concludes by arguing that a court should not consider a parent's sexuality when deciding what is in the best interests of a child.

#### I. THE HISTORY OF CUSTODY DISPUTES FOR HOMOSEXUAL PARENTS: "JUDICIAL HOMOPHOBIA"

While incarcerated under sodomy charges, Oscar Wilde expressed the pain of being separated from his children when he wrote: "[M]y two children are taken from me by legal procedure. That is and always will remain to me a source of infinite distress, of infinite pain. . . . [T]he disgrace of prison is as nothing compared with it."<sup>10</sup> Today, nearly 100 years later, courts continue to remove and restrict the parental rights of homosexual parents.<sup>11</sup>

9. See Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1 (1984) (arguing for the due process rights of children which includes the right to have a relationship with that child's biological or functional parent). Previously, advocates of homosexual parental rights asserted three arguments in their favor. Wardle, *supra* note 5, at 841-52. The constitutional argument contends that considering the sexuality of a parent as a negative factor when making a custody decision improperly causes gender classification, burdens a suspect class, infringes upon the fundamental rights of privacy and association, and violates the Establishment Clause. *Id.* at 841. The public policy arguments assert, *inter alia*, that the state should not enforce prejudicial social stigma, and that homosexual parents are just as good at raising children as heterosexual parents. *Id.* Finally, some advocates for the rights of homosexual parents rely on social science to prove that children raised by gay and lesbian parents are not ill effected. See *id.* at 844 (citing law review literature that discusses various studies relating to homosexual parents and their children).

10. David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395 (1989/1990) (citing Robert Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71 (1988) (quoting O. WILDE, DE PROFUNDIS 34 (R. Ross ed., 1909))).

11. See J.B.F. v. J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (finding that the mother's open

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The Supreme Court recognizes that the right to have and raise children is fundamental.<sup>12</sup> Parental rights, therefore, may only be terminated if the state proves by clear and convincing evidence that there are compelling circumstances, such as parental unfitness.<sup>13</sup> However, when parents divorce or separate and form separate households, a determination must be made whether one parent will have sole custody or if the parents will share joint custody.<sup>14</sup> When parents cannot agree on a custody arrangement for their children, they submit their claims for adjudication by the court.<sup>15</sup> After considering all the relevant evidence, the court makes a custody determination in the “best interests of the child.”<sup>16</sup>

The “best interests of the child” standard is almost universally

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lesbian relationship was proper grounds for modifying custody and granting the father full custody of the daughter); *Knotts v. Knotts*, 693 N.E.2d 962, 965 (Ind. Ct. App. 1998) (affirming the trial court’s determination that it was in the children’s best interest to grant custody to the father based in part on the mother’s homosexuality); *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 340 (Mo. 1998) (affirming the trial court’s decision to award custody to the father based in part on the mother’s homosexuality); *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998) (concluding that the trial court’s decision to change custody was properly based, in part, on the fact that the defendant-father regularly engaged in homosexual acts with his same-sex partner in the father’s home while the children were present in the house); *Caroll J. Miller*, Annotation, *Visitation Rights of Homosexual or Lesbian Parents*, 36 A.L.R.4th 1997 *passim* (1985) (analyzing state and federal cases, current through September 1999, in which courts discussed visitation rights of gay and lesbian parents and the restrictions that may be placed on these rights).

12. See *Lassiter v. Dep’t of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 38 (1981) (Burger, C.J., concurring).

At stake here is “the interest of a parent in the companionship, care, custody, and management of his or her children.” This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. “[F]ar more precious . . . than property rights,” parental rights have been deemed to be among those “essential to the orderly pursuit of happiness by free men,” and to be more significant and priceless than “liberties which derive merely from shifting economic arrangements.” Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life have long been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent’s interest both in controlling the details of the child’s upbringing, and in retaining the custody and companionship of the child.

*Id.* (alterations in original) (citations omitted).

13. See *Strasser*, *supra* note 3, at 841 nn.2-4 (noting that constitutional protections for parental rights are less robust than they might first appear because states are given immense discretion to determine criteria for parental fitness and because custody awards are often based on trial courts’ opinions of the “credibility, temperaments, and personalities, of those vying for custody”); *Doerhoff*, *supra* note 1, at 984 n.5 (agreeing with *Strasser* that parental rights are often at the discretion of state legislatures and trial court judges).

14. See *Doerhoff*, *supra* note 1, at 953 (listing several determinations that must be made when parents separate or divorce).

15. See *id.* at 954 (explaining the process courts must go through in child custody cases).

16. See *id.* at 956 (“Unlike most other forms of adjudication, child custody determinations under the best interests standard require courts to assess the ‘attitudes, dispositions, capacities, and shortcomings’ of the parties in order to predict how they will act in the future.”).

applied.<sup>17</sup> The standard, however, is vague enough to provide courts with immense discretion as to what evidence is considered and how much weight that evidence is accorded.<sup>18</sup> “Child custody cases pack more emotion than almost any other area of the law . . . . And for judges, custody cases bring forth more of their emotion and personal background than almost any other type of case they deal with.”<sup>19</sup> The cumulative effect of the previously mentioned factors is that a court may treat a gay or lesbian parent differently than it would treat a heterosexual parent.<sup>20</sup>

Generally, courts approach the issue of how a parent’s homosexuality affects parental fitness under the “best interests of the child” standard in one of three ways.<sup>21</sup> First, courts applying the per se rule hold that a parent’s homosexual conduct renders her an unfit parent as a matter of law.<sup>22</sup> Second, some courts use a middle ground approach<sup>23</sup> allowing the court to presume that a child will in some way be adversely affected by placement in the custody of a parent who is, or has been involved in, a homosexual relationship.<sup>24</sup> Third, courts using the “nexus test” require evidence that the parent’s homosexual conduct affects or will likely affect the child[ren] involved before a court may limit a homosexual parent’s rights.<sup>25</sup>

In jurisdictions where the per se approach is used, sufficient evidence of a parent’s homosexual conduct is enough for a court to disqualify him or her from being granted custody<sup>26</sup> and is often

17. See Katja M. Eichinger-Swainston, Note, *Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families*, 32 TULSA. L.J. 57, 58 (1996) (noting that most courts apply the “best interests of the child” standard).

18. See *id.* at 74 n.9 (listing various factors courts use to determine what is in the best interests of the child).

19. Atkinson, *supra* note 9, at 3.

20. See Eichinger-Swainston, *supra* note 25, at 58 (observing that courts often apply the “best interests of the child” standard differently in custody cases that involve a homosexual parent).

21. See Felicia Meyers, Note, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 840-43 (1993) (summarizing the three different approaches in determining child custody disputes that involve a homosexual parent).

22. See *id.* at 840 (noting that courts using the per se standard deny a gay or lesbian parent custody of his or her child based solely on sexual orientation).

23. Some authors refer to this as the “presumption of harm” approach. See Eichinger-Swainston, *supra* note 25, at 58 (referring to the presumption of harm and middle ground approaches as one in the same).

24. See Doerhoff, *supra* note 1, at 960 (stating that the middle ground approach allows the trier to presume that placing a child in the custody of a parent who has been involved in a homosexual relationship will adversely affect the child).

25. See Meyers, *supra* note 29, at 842 (noting that the nexus approach “requires proof that the parent’s homosexuality will demonstrably harm the child”).

26. See Jacobson v. Jacobson, 314 N.W.2d 78, 82 (N.D. 1981) (denying a lesbian mother custody of her child without regard to the trial court’s determination that both parents were

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sufficient grounds to restrict a homosexual parent's visitation rights.<sup>27</sup> A court applying this standard is not required to consider any other factors in the best interest of the child, but may deny custody to a homosexual parent based on sexual orientation alone.<sup>28</sup> Today, however, courts rarely use the per se approach.<sup>29</sup>

In jurisdictions that utilize the middle ground approach, the trier may presume without evidence that a homosexual parent's conduct adversely affects the child to some extent.<sup>30</sup> Courts in these jurisdictions hold that it is improper to determine that a homosexual parent is per se unfit and that it must consider other factors in the best interests of the child.<sup>31</sup> Using the middle ground approach, a homosexual parent is not considered to be per se unfit; however, the court may find a homosexual parent unfit because the social stigma attached to homosexuality may harm the child.<sup>32</sup> The middle ground approach is often used to find homosexual parents unfit without actually finding clear evidence of any detriment to the child.<sup>33</sup> Finally, it is important to note that the middle ground approach gives a lesbian or gay parent some opportunity to retain custody of his or her child; however, this opportunity is granted "at the expense of the [homosexual] parent's sexual privacy."<sup>34</sup>

The nexus standard takes the parent's homosexuality into account as one of many factors in determining what is in the best interests of

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fit).

27. See Price, *supra* note 5, at 649-50 (noting that more traditional jurisdictions "weigh parents' 'moral fitness' in their determination of . . . visitation and consequently routinely find that the homosexual parents' 'immoral lifestyle' warrants . . . restricting substantially their visitation rights").

28. See Meyers, *supra* note 29, at 841 ("The per se approach to gay custody cases . . . exemplifies the broad discretion courts have when applying the best interests standard.").

29. See Doerhoff, *supra* note 1, at 959 (remarking that while jurisdictions that apply the per se approach are rare, "it has continuing vitality" in Virginia).

30. See S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (holding that to protect children from the possibility of peer pressure or teasing they might sustain as a result of their mother's open lesbian relationship, the father should have sole custody and the mother's visitation rights should be restricted).

31. See Doerhoff, *supra* note 1, at 961 (noting that a trier of fact in courts that apply this approach "may presume a significant quantum of harm is likely to result from placing the child in [a homosexual] parent's custody").

32. See Eichinger-Swainston, *supra* note 25, at 58-59 (contending that the middle ground approach is often used to deny a homosexual parent custody because the child may be stigmatized).

33. See *id.* at 59 (remarking that the middle ground approach can be used to find a homosexual parent unfit without actual evidence of detriment to the child).

34. Meyers, *supra* note 29, at 842 (citing Collins v. Collins, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. 1988), in which the court stated that loss of privacy was "not too great a sacrifice to expect of a parent in order to gain or retain custody of his or her child").

the child.<sup>35</sup> Further, the parent's homosexuality will be held against the parent only if there is a clear nexus between his or her conduct and any harmful effects on the child.<sup>36</sup> "The nexus standard does not consider homosexuality of a parent itself or the homosexual behavior as a valid consideration for denying custody; it only considers the parent's sexual orientation when it has an adverse effect on the child's best interest."<sup>37</sup>

## II. WITHOUT EVIDENCE: FIVE ASSUMPTIONS USED TO DENY A LESBIAN OR GAY PARENT CUSTODY

Courts employing the per se and middle ground approaches frequently rely on five assumptions for denying custody to a homosexual parent.<sup>38</sup> First, courts argue that the child's peers will tease or ostracize her.<sup>39</sup> Second, courts fear that the child will become a homosexual if raised by a homosexual parent.<sup>40</sup> Third, they contend that the child will have a standard of morality not generally accepted by society.<sup>41</sup> Fourth, courts rely on the fact that many states have sodomy statutes that prohibit homosexual activity.<sup>42</sup> Fifth, some courts succumb to the contention that homosexual parents are more

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35. See *Mardie v. Mardie*, 680 So. 2d 538, 540 (Fla. Dist. Ct. App. 1996) (finding that the mother's homosexuality was not a proper subject of judicial notice); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980).

A finding that a parent is unfit to further the welfare of a child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children 'simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average.'

*Id.* (alteration in original) (citations omitted).

36. See *Meyers*, *supra* note 29, at 843 (observing that courts employing this method often treat sexuality the same for a homosexual parent as a heterosexual parent).

37. *Eichinger-Swainston*, *supra* note 25, at 59.

38. See *Meyers*, *supra* note 29, at 843 (commenting that courts tend to advance these five factors when denying a homosexual parent custody; however, none of these are grounded in any evidence).

39. See generally *Eichinger-Swainston*, *supra* note 25, at 70 (contending that courts should give little weight to stigma and social condemnation attached to living with a homosexual parent, because "[c]hildren will inevitably learn that discrimination exists in a not-so-perfect world, and they can be taught to deal with the experience of discrimination in a constructive way").

40. See generally *id.*, at 67 (citing numerous studies finding that children who have homosexual parents are no more likely to become gay than are children with heterosexual parents).

41. See *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (observing that if the child were placed with his lesbian mother, he would have no idea that society did not generally accept this form of behavior, and this would not be in his best interests).

42. See *Dooley*, *supra* note 18, at 396 (noting that because state sodomy statutes outlaw many forms of homosexual conduct, active homosexual parents are engaged in criminal activity and are considered per se unfit).



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likely to molest their children.<sup>43</sup>

Not one of the aforementioned reasons is supported by factual evidence.<sup>44</sup> The fear that the children of homosexual parents will be harassed or ostracized is often “based on the presumption that children of gay parents will be stigmatized by societal indignation of homosexuality.”<sup>45</sup> However, in *Palmore v. Sidoti*,<sup>46</sup> the United States Supreme Court held that denying a parent custody of her child based on the possibility of social stigmatization is unconstitutional.<sup>47</sup>

The second justification, that homosexual parents will produce homosexual children, is also unfounded.<sup>48</sup> Studies prove that a homosexual parent is no more likely to raise a homosexual child than a heterosexual parent is likely to raise a homosexual child.<sup>49</sup> “Therefore, there is . . . no ‘inherent danger’ of transmitting homosexuality to the child if the child is raised by homosexual parents, and such an upbringing . . . will not affect the best interests of the child in a negative manner, perceived or real.”<sup>50</sup>

The third justification, that the child’s morality will be adversely affected by granting custody to a homosexual parent, is based entirely on the court’s conception of morality.<sup>51</sup> It “is simply a judicial interposition of its own views of what is moral [and] [s]ocietal intolerance of differing lifestyles should not be transformed into judicial mandates of morality.”<sup>52</sup>

43. See *J.B.F. v. J.M.F.*, 730 So. 2d 1190, 1193 (Ala. 1998) (setting forth, without evidence, the possibility that the child had been sexually abused as one of the factors for denying her lesbian mother custody).

44. See Meyers, *supra* note 29, at 843.

45. *Id.* at 843-44; see also Eichinger-Swainston, *supra* note 25, at 69 (“But studies on the issue of stigmatization have shown that there is much less actual stigmatization than feared by the courts and there is rarely any evidentiary support of harassment of children.”).

46. 466 U.S. 429, 434 (1984).

47. See *id.* at 432-33 (holding that the equal protection clause of the Fourteenth Amendment prevented denial of custody based on “the possibility of injury” that private biases might inflict).

48. See Dooley, *supra* note 18, at 421-22 (asserting that the presumption that homosexual parents raise homosexual children is untrue because the majority of homosexuals have heterosexual parents); *Students and Researchers*, at <http://www.colage.org/research/index.html> (last visited Jan. 19, 2000) (“Kids with gay parents are no more likely than kids with straight parents to be gay themselves. Although in our opinion this begs the question ‘so what if we were?’”). See also J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 REV. PSYCHOL. 124, 124 (1995) (finding that ninety percent of sons of gay fathers are heterosexual).

49. See Eichinger-Swainston, *supra* note 25, at 67 (observing that the general consensus in the scientific community is that sexuality is not a learned behavior).

50. *Id.* at 67.

51. See *id.* at 66 (noting that this assumption by courts implies that the court believes homosexuality is immoral).

52. Meyers, *supra* note 29, at 844.

Fourth, courts' reliance on state sodomy statutes to deny homosexual parents custody is unsupported, and any connection between committing an act of sodomy and acting in the child's best interests is nugatory.<sup>53</sup> Moreover, sodomy statutes condemn both homosexual and heterosexual activity, so the predicate should be applied to all parents regardless of sexual orientation.<sup>54</sup>

Finally, there is no evidence to support the contention that homosexual parents are more prone than heterosexual parents to molest their children.<sup>55</sup> In fact, empirical data shows that most child molesters are heterosexual males.<sup>56</sup>

### III. TELLTALE SIGNS: EVIDENCE COURTS USE TO GRANT CUSTODY TO THE HETEROSEXUAL PARENT

Courts that do not apply a per se approach must examine the factual circumstances of a particular case.<sup>57</sup> A review of reported opinions in child custody decisions reveals factual evidence that courts rely on in order to deny custody.<sup>58</sup>

Courts often deny custody or restrict visitation rights when a homosexual parent allows the child to see the parent engaged in what the court perceives as sexual activity with the same-sex partner.<sup>59</sup> This is also true if the parent has ever made sexual advances toward a minor or behaves in what some might consider a sexually deviant manner.<sup>60</sup>

Courts, however, are split as to custody decisions when the homosexual parent displays mere kissing, hugging, and other forms

53. See *id.* at 844 (arguing that state sodomy statutes are an insufficient predicate to deny a homosexual parent custody).

54. See Eichinger-Swainston, *supra* note 25, at 72 (observing, however, that states generally do not question heterosexual parents about their sexual activity).

55. See *id.* at 71 (remarking that courts should not entertain groundless claims of child molestation based solely on a homosexual parent's sexuality).

56. See Meyers, *supra* note 29, at 845.

57. See Doerhoff, *supra* note 1, at 962-64 (observing that jurisdictions that do not apply a per se rule are more concerned with the particular facts of each case).

58. See *id.* at 963-71 nn.68-108 (citing numerous cases where courts relied on various aspects of the homosexual parent's sexual history or habits to deny custody).

59. See *Chicoine v. Chicoine*, 479 N.W.2d 893, 893-94 (S.D. 1992) (holding that the lesbian mother was an unfit parent because she allowed her son to see her naked in bed with her lover); *Dailey v. Dailey*, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1981) (awarding custody to the father when evidence showed that the mother allowed her five-year-old child to lie in bed with her while she and her same-sex partner embraced in the nude).

60. See *Marriage of Williams*, 563 N.E.2d 1195, 1200 (Ill. App. Ct. 1990) (affirming the trial court's decision to use the mother's abuse of her position as a nurse in a drug rehabilitation center by beginning a homosexual relationship with a minor drug addict as a factor in determining custody).

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of affection toward her same-sex partner in front of the child.<sup>61</sup> Nevertheless, regardless of jurisdiction, the parent will almost certainly lose a custody claim if the child displays a familiarity with details of homosexual sex.<sup>62</sup>

Additionally, homosexual parents are often disfavored when they involve the child in a gay community.<sup>63</sup> Courts are split in their treatment of evidence that the homosexual parent is committed to their same-sex partner.<sup>64</sup> Further, homosexual parents are customarily denied custody when the court perceives that they make their homosexual relationship a greater priority than their child<sup>65</sup> or that they engage in numerous casual relationships.<sup>66</sup>

Finally, there is a clear split of authority pertaining to the role other societal reactions should play in custody determinations.<sup>67</sup> Some jurisdictions place great emphasis on any factual evidence that a child of a homosexual parent has been teased because of his or her

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61. *Compare Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (holding that the mere fact that two adults hug and kiss affectionately is not detrimental to the child), *with Pulliam*, 501 S.E.2d at 900 (allowing the use of evidence that the father kissed his same-sex partner on the mouth and on the cheek in front of the children as a factor in denying the father custody), *and M.J.P.*, 640 P.2d at 967 (finding that the mother was an unfit parent evidenced by the fact that she hugged, kissed, and held hands with her same-sex partner in the child's presence). *See also Doerhoff*, *supra* note 1, at 964.

62. *Doerhoff*, *supra* note 1, at 964 (citing *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 283 (Mo. Ct. App. 1989)).

63. *See J.B.F.*, 730 So. 2d at 1195-96 (finding that it is inappropriate for a mother and her same-sex partner to have homosexual couples as guests in their house); *Hertzler v. Hertzler*, 908 P.2d 946, 951 (Wyo. 1995) (upholding trial court's finding that the mother's visitation rights should be restricted because she both involved the children in a same-sex commitment ceremony and took them to a gay and lesbian rights parade). *But see Pleasant*, 628 N.E.2d at 636-42 (finding error in restricting mother's visitation rights after taking her son to a gay pride parade because there was no evidence to support the contention that the boy was harmed by the parade and, in fact, he said he enjoyed himself).

64. *Compare Blew v. Verta*, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (finding the fact that the mother and her same-sex partner had a committed relationship for six years was a positive factor and indicative of a stable home environment), *with J.B.F.*, 730 So. 2d at 1195 (finding it socially and morally repugnant that a mother would raise her daughter in "a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage").

65. *See Charpentier v. Charpentier*, 536 A.2d 948, 950 (Conn. 1988) (upholding custody award to father when evidence showed that the children felt neglected by their mother because of her new same-sex relationship); *Hall v. Hall*, 291 N.W.2d 143, 144 (Mich. Ct. App. 1980) (affirming custody award to the father upon the assumption that, given a conflict, the mother would choose her homosexual relationship over her children).

66. *See Knotts v. Knotts*, 693 N.E.2d 962, 965-66 (Ind. Ct. App. 1998) (finding evidence that the mother had been involved in two heterosexual affairs, was currently involved in a homosexual relationship, and placed her own interests before that of her children detrimental to her custody claim); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (denying the mother custody upon showing that she had engaged in two same-sex relationships since her separation from the father).

67. *Doerhoff*, *supra* note 1, at 968 (noting that jurisdictions are split as to how other people's opinions should affect a custody determination).

parent's homosexuality.<sup>68</sup> Citing *Palmore v. Sidoti*,<sup>69</sup> other jurisdictions hold that consideration of the effect third parties have on the child is unconstitutional.<sup>70</sup>

#### IV. THE VOICE OF A CHILD

In most child custody cases, "the court has the final say, the parent next, and the child last."<sup>71</sup> The general presumption is that parents act in the best interests of their children.<sup>72</sup> It is further presumed that children do not have the ability to care for themselves.<sup>73</sup> "[C]hildren are assumed to be subject to the control of their parents, and failing that, of the state as *parens patriae*."<sup>74</sup> Unfortunately, when courts decide whether a lesbian or gay parent should be awarded custody based on the best interests standard, they have too much discretion and often allow their personal stereotypes to interfere with a determination that is truly in the child's best interests.<sup>75</sup> Moreover, courts rarely reference the child's point of view; they refer only to what professionals think is in the child's best interest.<sup>76</sup> The first part of this section discusses the rights of children.<sup>77</sup> The second section

68. See *S.E.G.*, 735 S.W.2d at 166 ("We wish to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative lifestyle' their mother has chosen."); *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (affirming trial court's denial of the mother's petition to change custody based in part, on the findings that the children had been teased about their mother's sexuality); *M.J.P.*, 640 P.2d at 969 (finding, *inter alia*, that the children would have to protect their homosexual mother from their peers as sufficient grounds to uphold trial court's custody award to the father).

69. 466 U.S. 429 (1985).

70. See *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 964 (N.Y. Sup. Ct. 1986) (relying on *Palmore* to hold that it is impermissible as a matter of law to consider the father's sexuality when deciding child custody); *Inscoc v. Inscoc*, 700 N.E.2d 70, 82 (Ohio Ct. App. 1997) (holding that it is improper for the court to be swayed by the unpopularity of homosexuality when it is the court's duty to facilitate and guard a fundamental parent-child relationship). But see *S.E.G.*, 735 S.W.2d at 166 ("We do not agree that *Palmore* applies to the situation at hand. Homosexuals are not offered the constitutional protections that race, national origin, and alienage have been afforded.") (citations omitted).

71. Raymond C. O'Brien, *Solomon's Dilemma: Exploring Parental Rights: An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1218 (1994).

72. See *id.* (noting that since the Supreme Court decision in *Santonsky v. Kramer*, 445 U.S. 745 (1982), the presumption is that parents act in the best interests of the child).

73. See *id.* (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1985)).

74. See *id.*

75. See Eichinger-Swainston, *supra* note 25, at 58 (remarking that the ambiguity of the best interests of the child standard allows courts to apply the standard differently in child custody cases that involve a heterosexual and a homosexual parent).

76. See KAREN GAIL LEWIS, *CHILDREN OF LESBIANS: THEIR POINT OF VIEW* 198-99 (1980) (relaying the findings from interviews with twenty-one children ranging in age from nine to twenty-six, from eight families with lesbian mothers and heterosexual fathers. In the interviews, the children expressed the problems they experienced during their parents' divorce and from the disclosure of their mother's homosexuality).

77. See *infra* notes 87-101 and accompanying text.

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integrates the voices of children of lesbian or gay parents into the best interests standard with the hope that all courts will finally understand that sexuality should not be a factor in deciding child custody cases.<sup>78</sup>

#### A. *Children Have Rights, Too!*

In nearly every U.S. jurisdiction, trial court judges are free to grant custody in accordance with their personal belief of which custodial arrangement will serve the best interests of the child at present and in the future.<sup>79</sup> This open-ended standard gives judges tremendous authority to order whichever custody arrangement seems most appropriate to them.<sup>80</sup> Therefore, judges are often willing to award custody to one parent if they disapprove of the lifestyle of the other parent.<sup>81</sup>

Some advocates for children's rights believe that in order for the best interests of a child to be served in a divorce or a child custody proceeding, the child must be represented by a competent and independent attorney who advocates for the child and the child's wishes regarding the future of her relationship with her parents.<sup>82</sup> However, this solution is obviously not practical for toddlers and infants who cannot speak let alone express their preference as to which parent should have custody.<sup>83</sup> Furthermore, children who are old enough to express their desires might feel as though the court or their parents are forcing them to decide between their parents.<sup>84</sup>

Other children's advocates criticize the notion of parental rights.<sup>85</sup>

78. See *infra* notes 102-126 and accompanying text.

79. See Mary Becker, *Judicial Discretion in Child Custody: The Wisdom of Solomon?*, 81 ILL. B.J. 650, 651 (1993) (observing that the best interests of the child standard allows courts a dangerous amount of discretion).

80. See *id.* (noting that judges often make custody orders without full consideration of the numerous factors that may contribute to or affect a child's best interests).

81. See *id.* (referring to situations where courts award custody to the father because they disapprove of maternal sexuality outside of marriage).

82. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1550-58 (1994) (advocating for the right of children to have independent representation when their parents are battling for custody in a divorce).

83. See Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 93-107 (1984) (contending that as a general rule very young children should not be appointed an attorney in a divorce proceeding).

84. But see Federle, *supra* note 90, at 1562-63 (noting that while there may be a down side to allowing a child to voice her preference, it is outweighed by the benefits: "[E]ven very young children can articulate a preference if they so choose").

85. See Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 163 (1988) (critiquing the notion of parental rights).

They contend that the focus should be solely on children's rights.<sup>86</sup> These advocates argue that because children are so vulnerable, the judicial system should regard child welfare as the primary aim of custody rules.<sup>87</sup> Generally, while it is true that courts should give greater deference to the rights of children, they should not do so at the total elimination of the rights of the parent.<sup>88</sup>

These issues are complicated enough in a "simple" child custody case, but are further complicated when one parent is a homosexual.<sup>89</sup> It has not been the purpose of this paper to discuss child custody law or children's rights in the broad sense.<sup>90</sup> The focus of this Comment is to determine a way that the rights of a child to be raised by her parent<sup>91</sup> are not interfered with because the parent is homosexual, and the court believes that giving a homosexual parent custody is not in the best interests of the child.<sup>92</sup> It is important for courts to commit to equality for gay and lesbian parents and find that the social stigma attached to homosexuality is irrelevant in making a custody determination between a homosexual and heterosexual parent.<sup>93</sup>

It is time for jurisdictions to integrate the social science studies of

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86. See *id.* (positing that if we overstate the importance of children's rights, it prevents courts from overlooking them).

87. See O'Brien, *supra* note 79, at 1209-11 (advocating for greater deference to be given to the rights of children).

88. See Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325, 346 (1996) (noting that child welfare is not necessarily the only goal in determining custody, and therefore parental rights should not be ignored); see also *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (establishing the widely accepted notion that parents have a constitutional right to raise and nurture their children).

89. See Becker, *supra* note 87, at 651 (noting that issues surrounding children's rights and judicial bias are particularly unfortunate when they involve a divorce between a heterosexual parent and a lesbian or gay parent).

90. See generally Altman, *supra* note 96, at 328 (advocating for more judicial weight to be given to child's needs); Becker, *supra* note 87, at 650-53 (discussing children's rights generally in divorce and child custody cases); Federle, *supra* note 90, at 1523-25 (advocating for more stringent recognition of children's rights while expressing the importance of empowering children in all areas of the law, especially child custody cases); O'Brien, *supra* note 79, at 1209 (comparing the due process rights of children versus parents).

91. See Federle, *supra* note 90, at 1564 (noting that "children have a right to the custody of their parents").

92. See Deirde Larkin Runnette, Comment, *Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should be Considering a Parent's Sexual Orientation in Contested Custody Cases*, 57 MONT. L. REV. 177, 178 (1996) (criticizing the best interests of the child standard, particularly in the context of child custody cases with one homosexual parent, because the standard is inadequate to protect the rights of children).

93. See Altman, *supra* note 96, at 328 (interpreting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), to hold that equality is more important than the risk of social stigma to child welfare decisions).

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children raised by a gay or lesbian parent post-divorce and the stories of adult children of homosexual parents into their understanding of the law. It is not always appropriate for courts to explicitly ask for a particular child's voice; however, it is proper for judges to take into account the stories of other children who have been in that particular child's place.

### B. *Letting the Child Be Heard*

Children of Lesbians and Gays Everywhere (COLAGE) is an international organization working to promote a more celebratory and accepting world for sons and daughters of lesbian, gay, bisexual, and transgendered ("lgbt") parents.<sup>94</sup> The following quote is from Joshua, a fourteen-year-old member of COLAGE whose mother is a lesbian:

I grew up in the gay community and it was never kept from me. I was always around gay and straight couples. It never seemed strange to me. It was my life. My mom's sexuality of same-sex attraction has not been imposed upon me.

I have been brought up as an individual, not a follower. My mother is a lesbian and I'm proud of her for not being afraid to show it. She's been a great mother for the last fourteen years, and she's always been there when I needed her. She has kept us both alive and well as the only source of money. She is my best friend. I don't know what I think about being the son of a lesbian, but I know I'm damn lucky to have a mom like mine.<sup>95</sup>

In his narrative, Joshua expresses the pride he has for his mother because she does not hide her sexuality.<sup>96</sup> Unfortunately, many children of homosexual parents never have the opportunity to feel this pride.<sup>97</sup> It is common for lesbian and gay parents to conceal their

94. See Letter from Felicia Park-Rogers, Director COLAGE, to Eileen Huff, Junior Staff Member, *American University Journal of Gender, Social Policy and the Law* (Feb. 1, 2000) (on file with author) ("We are the only international organization dedicated to serving this constituency; furthermore, we actively affirm the rights of all children and their families. . . . COLAGE has over thirty affiliates across North America with whom we provide support, education, and advocacy for kids of all ages, backgrounds, and needs.").

95. See *Students and Researchers*, available at <http://colage.org/research/index.html> (last visited Jan. 19, 2000) (providing information about social science studies focused on children of gay and lesbian parents).

96. See *id.* (quoting Joshua's story).

97. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (denying a lesbian mother custody and ordering that visitations occur outside the presence of the mother's same-sex partner and that no contact either physical or verbal occur between the child and the mother's partner); *In re Marriage of Cabalquinto*, 718 P.2d 7, 7-8 (Wash. Ct. App. 1986) (denying a gay father custody and permitting him visitation in his home only if he does not associate with his partner in any manner that would suggest that they were more than "casual friends"); see also Price, *supra* note 5, at 650-54 (discussing how courts deny custody and restrict visitation rights of

sexuality from their children. This secrecy is frequently based on two reasons. First, homosexual parents are aware that they are at risk of losing custody of their children by court order.<sup>98</sup> The risk is especially acute if the homosexual parent's heterosexual spouse is not supportive of gay rights.<sup>99</sup> Second, homosexual parents can be ordered by the court to hide their sexuality from their children.<sup>100</sup>

This silence is truly unfortunate because it hinders a child's emotional development with her gay or lesbian parent and impedes her ability to seek out a support group.<sup>101</sup> Furthermore, it is important for homosexual parents to teach their children about acceptance before society teaches their children about homophobia.<sup>102</sup> "Speaking from experience, the younger children are when they learn [their parent is lesbian or gay], the more

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lesbian and gay parents).

98. See *J.B.F.*, 730 So. 2d at 1196 (finding that the trial court did not abuse its discretion by awarding sole custody to the father based on the fact that the mother's homosexual relationship evolved from a discreet affair to the creation of an openly homosexual household); see also SUSAN GOLOMBOK ET AL., CHILDREN IN LESBIAN AND SINGLE-PARENT HOUSEHOLDS: PSYCHOSEXUAL AND PSYCHIATRIC APPRAISAL 551 (1983) (finding that lesbian mothers are more often denied custody when they have an open relationship with another woman); MARTHA KIRKPATRICK, MD, CLINICAL IMPLICATIONS OF LESBIAN MOTHER STUDIES 201 (1987) (noting that the fear of losing one's children keeps lesbian mothers isolated).

99. See *Straight Spouse Network*, available at <http://www.ssnetwork.org/purpose.htm> (last visited Jan. 19, 2000) (providing support to heterosexual spouses of lesbian, gay, bisexual, and transgendered mates and noting the importance of acceptance). Often the homosexual parent divulges her sexuality to her child but demands that the child does not tell the heterosexual parent, for fear that the heterosexual parent will challenge the custody order. *Id.* This common scenario places the child in an awkward position and causes the relationship with the non-custodial, heterosexual parent to suffer; see also LEWIS, *supra* note 84, at 201 (asserting that it is in the child's best interests for the homosexual parent to be honest to the child, and that the heterosexual parent should accept the homosexual parent's sexuality out of love for the child).

100. See *Jacobson*, 314 N.W.2d at 81 (alluding to the fact that if the mother discontinued involvement in a sexual relationship with her same-sex partner she would not lose custody of her children); *Bottoms*, 457 S.E.2d at 108 (granting custody to the maternal grandmother and instructing that visitations occur outside the presence of the mother's same-sex partner); *Cabalquinto*, 718 P.2d at 7-8 (forcing father, during visitation, to associate with his partner only in a manner that would suggest that they were merely "casual friends"); see also Price, *supra* note 5, at 650-54 (commenting on the court's authority to deny homosexual parents custody of their children and to further limit their visitation rights so that the child has no exposure to the parent's homosexual lifestyle).

101. See KIRKPATRICK, *supra* note 107, at 209 (finding that the lack of a peer group with whom to share the experience of having a gay or lesbian parent exacerbates the child's pain and isolation).

102. See Ann O'Connell, *Voices from the Heart: The Developmental Impact of a Mother's Lesbianism on her Adolescent Children* (1990) (subsequently published in 63 SMITH COLLEGE STUDIES IN SOC. WORK 281 (1993)) (finding that the younger the child is at the time the parent discloses her homosexuality the greater the child's level of acceptance and understanding); *Families Like Mine*, available at <http://www.familieslikemine.com> (last visited Feb. 20, 2000) (noting that because Abigail had learned of her father's homosexuality before she could be taught homophobia, she had an easier time accepting it).



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accepting they are.”<sup>103</sup>

When children of gay and lesbian parents speak about their experiences growing up, they often express embarrassment or anger about their parent’s homosexuality.<sup>104</sup> These emotions, however, usually result from the social stigma of homosexuality and are neither a representation of a lesbian or gay parent’s parental fitness nor an indication of the amount of love the child feels for the parent.<sup>105</sup> Furthermore, the embarrassment or anger is not cured by denying the homosexual parent custody because the emotions do not stem from living with a gay or lesbian parent; rather, they come from having a homosexual parent.<sup>106</sup> In *M.P. v. S.P.*, the New Jersey Supreme Court recognized this truth.<sup>107</sup> The New Jersey Superior Court reversed the trial court’s finding that, because the mother was a lesbian, the father should be awarded full custody of his two daughters.<sup>108</sup> The court found that the mother, who had raised the children for approximately the last seven years, was evidently capable and that her sexuality should not be a factor.<sup>109</sup> The court disagreed with the father’s contention that the change of custody order was

103. *Families Like Mine*, available at <http://www.familieslikemine.com> (last visited Feb. 20, 2000); see also LAURA BENKOV, *REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS* 188-98 (1994) (noting that because children raised from birth or from a very young age by lesbian or gay parents are steeped in acceptance rather than homophobia, they tend to have less difficulty in dealing with a parent’s homosexuality than a child whose parent entered into a same-sex relationship after divorce).

104. See KIRKPATRICK, *supra* note 107, at 209 (noting that homosexual parents of younger children, who often disfavor being different, stress secrecy; occasionally this interferes with the child’s ability to relate to her peers); LEWIS, *supra* note 84, at 199 (noting that several of the children she interviewed reacted with anger toward their mother and her same-sex partner upon disclosure of their mother’s homosexuality).

105. See *Families Like Mine*, available at <http://www.familieslikemine.com> (last visited Feb. 20, 2000).

My difficulties were not because my dad was gay, but because of how our anti-gay society views him and views my family. It’s not easy to listen to messages everyday from the media, political leaders, religious leaders, teachers and neighbors who say gay people are bad or sinful or wrong. When they talk about gay people like that, they offend and anger me as well as my father and his partner, two men I love and respect.

*Id.*

106. See *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979) (refusing to modify a custody award because the children might be teased about their homosexual mother). But see *Jacobson*, 314 N.W.2d at 79 (dismissing the contention that “the children suffer from the ‘slings and arrows’ of a disapproving society,” regardless of which parent has custody).

107. See *M.P.*, 404 A.2d at 1262 (finding that whichever parent has custody, the children might face hardship due to societal ignorance surrounding the rights of homosexuals).

108. See *id.* at 1263 (“Taking the children from defendant 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.”).

109. See *id.* (finding the mother to be a loving parent and discerning no reason to alter custody).

proper because the children might be embarrassed by their mother's homosexuality.<sup>110</sup> The court reasoned that the possibility that the children would be embarrassed "is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of living with defendant, but because she is their mother, because she is a lesbian, and because the community will not accept her."<sup>111</sup>

Furthermore, when courts allow evidence of speculative harms that living with a lesbian or gay parent can have on a child, the court "reinforces derogatory stereotypes about [homosexuals] and places a seal of approval on the very prejudice that creates an environment which fosters harassment."<sup>112</sup> It is improper for a judge to enforce unsupported prejudices against lesbians and gays.<sup>113</sup>

In custody disputes, heterosexual spouses regularly advance to a higher court, where judges often accept the argument that the child will become morally maladjusted if placed in the custody of the homosexual parent.<sup>114</sup> The New Jersey Superior Court in *M.P. v. S.P.*,<sup>115</sup> however, refused to agree with the father's contention that his daughters would become morally injured if they continued to live with their mother.<sup>116</sup>

#### V. AMENDING THE NEXUS STANDARD: SUGGESTIONS FOR CHANGE

As previously addressed, there are generally three different standards courts employ when making a child custody decision in a case involving a homosexual parent and a heterosexual parent.<sup>117</sup> By

110. *See id.* at 1262 (noting that the mother's homosexuality was not a proper ground for denying her custody, despite the possibility that the children might be teased).

111. *Id.*

112. Brief for Plaintiff at 20, *Martin v. Martin*, No. 94-103654, slip op. (Fam. Ct. Parish of E. Baton Rouge La. 1994).

113. *See id.* (asserting that unsupported prejudices of homosexuals in child custody cases are not entitled to judicial enforcement).

114. *See M.J.P.*, 640 P.2d at 969 (contending that if the child is placed with his lesbian mother, his standard of morality would not be akin to that of society's standard because he would not understand that homosexual behavior is generally unacceptable).

115. 404 A.2d 1256.

116. *See id.* at 1263.

It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right or 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.

*Id.*

117. *See Meyers, supra* note 29, at 840-43 (explaining the per se, middle ground, and nexus approaches courts have used to make custody awards).

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far, the nexus approach is the most lenient judicial standard and gives lesbian and gay parents the greatest opportunity for retaining or being granted custody or unrestricted visitation rights.<sup>118</sup> The nexus standard, however, still leaves open the possibility of judicial abuse.<sup>119</sup> The “nexus test directs courts to determine whether a parent’s identity has any adverse affect on the child. By focusing on parental identity rather than conduct, this formulation misleadingly suggests that the sexual identity of a parent may be relevant to a child’s well being in and of itself.”<sup>120</sup> The nexus standard is, therefore, inherently flawed because a gay or lesbian parent’s homosexuality, in and of itself, can never cause harm to the child.<sup>121</sup>

Section three of this Comment discussed some factual evidence that courts tend to find most detrimental to a homosexual parent’s case.<sup>122</sup> When courts fail to see the distinction between a parent’s “deviant behavior” and a parent’s sexuality, they set a dangerous precedent.<sup>123</sup> For example, the court in *In re Marriage of Williams*<sup>124</sup> denied a lesbian mother custody of her children because she used her position as a nurse in a rehabilitation center to start a lesbian relationship with a minor.<sup>125</sup> This type of activity in a parent is rarely in the best interests of the child and is not at all related to the parent’s homosexuality.<sup>126</sup> Further, numerous courts have denied

118. See Eichinger-Swainston, *supra* note 25, at 59 (asserting that “the nexus standard resolves many of the problems and detrimental effects of the per se . . .” and middle ground approaches); Meyers, *supra* note 29, at 843 (noting that some courts that apply the nexus standard treat sexuality the same way, regardless of the parents’ sexual orientation).

119. See Brief for Plaintiff at 11, *Martin* (No. 94-103654) (stating that the nexus test fails to state with sufficient certainty that the focus of a court’s determination in a child custody case should be on the parent’s conduct and ability, not on the parent’s sexuality).

120. *Id.*

121. Interview with Nancy Polikoff, Professor of Law at American University, Washington College of Law in Washington, D.C. (Mar. 8, 2000) (notes on file with author) (articulating the flaw in the nexus standard by asserting the argument that a lesbian or gay parent’s homosexuality itself is never detrimental to the child).

122. See *supra* notes 65-78 and accompanying text (discussing the factual evidence courts use to deny a homosexual parent custody).

123. See Brief for Plaintiff at 13, *Martin* (No. 94-103654) (conveying that there is no basis to assume that a parent’s sexual identity is relevant to a custody order made in the child’s best interests and that courts applying the nexus standard should do so in a way that takes into account only the parent’s conduct).

124. 563 N.E.2d 1195 (Ill. App. Ct. 1990).

125. See *In re Marriage of Williams*, 563 N.E.2d 1195, 1196 (Ill. App. Ct. 1990) (holding that awarding custody to a lesbian mother was living with her eighteen-year-old lover, a recovering drug addict who had dreamed about killing the mother’s three-year-old daughter, would not be in the best interests of the child; thus the trial court’s custody award to the father was affirmed).

126. Interview with Nancy Polikoff, *supra* note 131 (commenting that judges often say they are denying a homosexual parent custody when actually they are denying the parent custody of the child because of conduct that rendered placement with that parent not in the child’s best interests).

lesbian and gay parents custody of their children because the parent openly engaged in explicit sexual activities in front of the child.<sup>127</sup> Once again, this behavior could be found detrimental to the child even if the parent involved is heterosexual.<sup>128</sup>

Some courts applying the nexus standard apply it to mean that a parent's homosexuality should never be a factor in determining the best interests of the child in custody cases.<sup>129</sup> Nevertheless, there is room in the standard for judicial homophobia and abuse.<sup>130</sup>

Judges applying the nexus standard, as it is construed in many jurisdictions, can award a gay or lesbian parent custody of the child; however, the judge is not required to do so if she is not so inclined.<sup>131</sup>

Children of lesbian and gay parents often suffer in some way because of their parents' homosexuality.<sup>132</sup> The child might have feelings of embarrassment or anger as a result of the parent's homosexuality.<sup>133</sup> There is a threat that courts will use these feelings

127. See generally *Chicoine v. Chicoine*, 479 N.W.2d 891, 893-94 (S.D. 1992) (holding that a lesbian mother was an unfit parent because she allowed her son to see her naked in bed with her lover); *Dailey v. Dailey*, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1981) (awarding custody to the father when evidence showed that the mother allowed her five-year-old child to lie in bed with her while she and her same-sex partner embraced in the nude).

128. Interview with Nancy Polikoff, *supra* note 131 (agreeing that certain sexual activity is inappropriate in front of children regardless of the parent's sexuality). She further expressed that allowing a child to see her parent engaged in certain sexual activity should be weighted equally for heterosexual and homosexual parents. *Id.*

129. See *Bezio*, 410 N.E.2d at 1215-16 ("[M]any other issues influence child rearing. Sexual preference per se is typically not one of them' . . . A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child.") (quoting the testimony of Dr. Alexandra Kaplan); *M.P.*, 404 A.2d at 1260 (holding that consideration of the mother's sexuality as a factor in a child custody case was improper).

130. See *Lundin v. Lundin*, 563 So. 2d 1273, 1277 (La. Ct. App. 1990) (applying the nexus standard to overturn the trial court's award of custody to a lesbian mother). The court found that joint custody with greater custodial time awarded to the father was more appropriate because the mother's relationship was open, and the child was at an age where gender identity was being formed. *Id.*

131. See Brief for Appellant at 29 n.36, *North v. North*, No. 93-1362, slip op. (Md. Ct. Spec. App. 1993) ("In states where the nexus test has been formally adopted but is not actually being used, a trial judge may award custody to a [homosexual] parent, if . . . she is inclined to do so. Thus, while the nexus test does not compel fair procedure, it nevertheless allows a fair outcome."); see also *S.E.G.*, 735 S.W.2d at 166 (claiming to use the nexus standard to deny custody to a lesbian mother and protect the children from peer pressure and possibly being ostracized).

132. See KIRKPATRICK, *supra* note 107, at 209 ("While children of lesbian mothers appear to develop as well psychologically as their counterparts and without confusion in their sense of the gender role, that is not say that there is no pain or struggle.").

133. See BENKOV, *supra* note 112, at 198-211 (recounting the stories of children raised by lesbians and expressing how, during adolescence, many of the children were cautious as to whom they disclosed their mother's sexuality); KIRKPATRICK, *supra* note 107, at 209 (observing that some children of homosexual parents first react with denial, then shame, and finally acceptance); FIONA L. TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY* 63-76 (1997) (concluding that while children raised in lesbian post-divorce families generally had adolescent feelings of opposition or embarrassment about having a lesbian mother, these

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to find that there has been harm to the child as a result of the parent's homosexuality.<sup>134</sup> This approach should not be permitted.<sup>135</sup>

The nexus standard should be amended to prevent courts from giving credence to evidence that a parent's homosexuality has been or could be detrimental to the child.<sup>136</sup> Custody orders should be grounded in credible evidence that there is harm to the child.<sup>137</sup> Courts should define harm under the nexus standard to reflect the results of social science research that indicate that a child is not harmed by the mere fact that the child's parent is gay or lesbian,<sup>138</sup> or that the parent associates with other homosexuals,<sup>139</sup> or that the parent is open and honest about his or her sexuality.<sup>140</sup> Finally, the child is not injured by the parent's having a loving and intimate relationship with a same-sex partner in the home.<sup>141</sup>

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feelings did not hinder their development. In retrospect, the children stated that they had positive feelings about their family identity.). My own story is a good illustration of this point. As I began to write this Comment, I discussed the phases of acceptance of my mother's homosexuality that I experienced as a child and then as a teenager. I expressed to my faculty mentor, Professor Nancy Polikoff, that at one point I lied to my friends about where Carole, my mother's partner, slept. At the end of my story Professor Polikoff said something that has remained with me throughout the writing of this paper. She said, "What if that was the point [at which] your parents were getting a divorce, and you told the judge exactly what you told me?" I fully understood what Professor Polikoff was saying. At that point, I realized that if we give courts the discretion to determine what constitutes a nexus between a lesbian or gay parent's homosexual conduct and *any* harmful effects on the child, then the best interests of the child can never be met in a prejudicial court.

134. See Brief for Appellant at 29, *North* (No. 93-1362) (acknowledging that if judges are permitted to depart from the evidentiary record and supplement it with own beliefs, a decision in the child's best interests is not likely to result).

135. See Brief for Plaintiff at 32, *Martin* (No. 94-103654).

Marginalization is not harm. Though children of [homosexual parents] sometimes deal with community heterosexism . . . there is generally no distinguishable negative effect on the children's self-esteem and social adjustment. In fact, children gain greater tolerance for differences and a respect for their [parents'] willingness to stand up for their beliefs.

*Id.*

136. See *id.* at 29 ("A clear and restrictive statement of the test is a necessary precaution. Anything less will allow judges to substitute their own moral judgments, which may well be born of prejudice or ignorance, for a carefully reasoned analysis.").

137. See *id.* (noting that a true, evidence-based nexus test would guide courts to make custody decisions that are in the child's best interests because they would be based in credible evidence and not speculations and prejudices surrounding the parent's homosexuality).

138. See *generally supra* note 5 and accompanying text (explaining that social science research has proven that children raised by a lesbian or gay parent develop normally).

139. See Brief for Plaintiff at 31, *Martin* (No. 94-103654) (maintaining that generally the tests that courts apply do not take into account the current information regarding the mental development of children of lesbian and gay parents).

140. See *id.* at 11-12 & 31 (noting that the nexus test, which was developed nearly two decades before the surge of social science studies providing conclusive evidence that children raised by homosexual parents are not detrimentally affected, should be amended to reflect more recent research findings).

141. See *id.* at 31 (asserting that it has been well established that children are not harmed by

To the contrary, the studies described earlier indicate that the “best interests of the child” would prescribe that:

1. a child be aware of her [parent’s] sexual identity early;
2. the [parent] be open and comfortable with [his or] her sexual identity;
3. the child be a part of [a lesbian or gay] community and know other children of lesbians [or gays];
4. the child be able to talk to peers, family members, and outsiders about the [parent’s] sexual identity; and
5. if the [parent] is living with or committed to a long-term partner, the couple model healthy nonsexual intimacy and affection, to ensure the child’s sense of security and well-being.<sup>142</sup>

Ultimately, courts need to define harm under the nexus standard to prevent its being used to deny a lesbian or gay parent custody of a child based on behavior that is, in fact, in the best interests of the child.<sup>143</sup>

### CONCLUSION

A judicial ruling that gives custody to a heterosexual parent over a lesbian or gay parent solely on the grounds of sexual orientation ignores the purpose of the best interests of the child standard.<sup>144</sup> Courts applying the best interests standard should focus on the child’s general necessities and not on the parent’s identity as lesbian, gay, or heterosexual.<sup>145</sup> Further, judges should disregard their own personal morals, prejudices, or political beliefs.<sup>146</sup> “In the best interests of the child, custody cases must not be decided on the basis of speculation or stereotypes, but on reasoned analysis of the facts of each case.”<sup>147</sup> The nexus test, if amended and applied in accordance

being raised in a house with two same-sex parents).

142. *Id.*

143. *See id.* at 31-32 (asserting that a narrow definition of harm under the nexus standard will protect lesbian mothers from the threat of judicial imposition and allow them to care for and nurture healthy relationships with their children).

144. *See* Brief for Appellant at xii-xiii, *North* (No. 93-1362) (“A rule disallowing gay fathers . . . custody of their children would cause children like myself irrevocable harm . . . . If I could not have . . . lived with my father because of a . . . rule, I would have suffered greatly.”).

145. *See* Brief for Plaintiff at 1, *Martin* (No. 94-103654) (noting that in order to comply with the purpose of the best interests of the child standard, the court should focus on the specific, daily needs of the child—not on the parent’s sexuality).

146. *See id.* (explaining that judges may base their custody decision on the “individual realities of the child’s life and experiences, [but] not on personal preconceptions, biases, or political beliefs”).

147. *Id.*

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with this Comment, would act to safeguard children of lesbian and gay parents against judicial homophobia.<sup>148</sup> Moreover, a stricter nexus test would enable lesbian and gay parents to live without the fear of losing custody of their children.<sup>149</sup> This regained self-esteem would further enable parents to nurture their children and teach them acceptance and pride.<sup>150</sup> Finally, if courts begin to tune in to the voices of children of lesbian and gay parents, the courts will realize that we are demanding acceptance and equality for our families.<sup>151</sup> It is important for every judge who is forced to make a child custody decision to understand that love makes a family.<sup>152</sup>

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148. See *id.* at 7-9 (noting that courts that apply the nexus test in a manner that does not consider the parent's sexuality truly protect the best interests of the child).

149. See *id.* at 7 (citing Laura Lott-Whitehead & Carol T. Tulley, *The Family Lives of Lesbian Mothers*, 63 SMITH COLLEGE STUDY IN SOC. WORK 265, 275-76 (finding that lesbian mothers are often put in a position of having to balance the needs of their children with what courts and society will allow)).

150. See Brief for Plaintiff at 31-32, *Martin* (No. 94-103654) (noting that if the nexus test is amended, lesbian and gay parents will be able to be honest with themselves, society, and their children, which would ultimately serve the best interests of the child).

151. See *Students and Researchers*, available at <http://www.colage.org/research/index.html> (last visited Jan. 19, 2000) (supporting the children of lesbian and gay parents in their quest to express themselves and support their families).

152. See BENKOV, *supra* note 112, at 1-15 (telling stories of love between lesbian and gay parents); TASKER, *supra* note 143, at 1-14 (discussing the families in their study and the love and acceptance the children feel toward their families); *Families Like Mine*, available at <http://www.familieslikemine.com> (last visited Feb. 20, 2000) (focusing on decreasing isolation for children with parents who are gay and giving voice to the family experience).