

FIT TO BE TIED: ON CUSTODY, DISCRETION, AND SEXUAL ORIENTATION*

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INTRODUCTION

The Supreme Court long has recognized that parents have a fundamental right to raise and care for their children.¹ Parental rights should be terminated, therefore, only if the state can prove by clear and convincing evidence that the parents are unfit,² that the children are neglected,³ or that other compelling circumstances exist.⁴ In practice, however, the constitutional protections afforded parental rights are less robust than first might appear, in part because states have much discretion in determining the criteria for actual or presumed unfitness. Further, because custody and visitation awards often depend on the credibility, temperaments, and personalities of those vying for custody, trial courts are given much discretion when applying the relevant criteria, which creates even more potential for abuse. Regrettably, as *Bottoms v. Bottoms*⁵ and other cases illustrate, gay or lesbian parents and their children are among those who have been victimized both by states' adopting custody criteria that punish the parents *rather than* promote the children's best interests and by

1. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion) (stating that constitutional protection is afforded to family relationships and child rearing); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (holding that termination of parental rights interferes with fundamental liberty interest and state must provide fundamentally fair procedures when destroying familial bonds); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (concluding that freedom of choice in family matters long has been regarded as "fundamental liberty interest protected by Fourteenth Amendment"); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944) (recognizing certain private areas of family life with which state cannot interfere); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that act requiring parents to send children to public schools "interfere[d] with liberty of parents . . . to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding right to raise children is liberty interest guaranteed by Fourteenth Amendment).

2. See *Paul v. Steele*, 461 N.E.2d 983, 985 (Ill. 1984) (holding that parental rights of nonconsenting parent can be terminated only when parent found unfit); *Sheppard v. Sheppard*, 630 P.2d 1121, 1127 (Kan. 1981) (determining that natural parent's right to custody of child is fundamental right that cannot be disturbed unless parent is found unfit); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1214 (Mass. 1980) (finding that natural parents should be denied custody only when found unfit to provide for welfare of children); *In re Michael B.*, 604 N.E.2d 122, 127 (N.Y. 1992) (recognizing biological parent's right to care and custody of child as superior to that of others unless parent is proven unfit or has abandoned child); *In re Kristina L.*, 520 A.2d 574, 582 (R.I. 1987) (finding that natural parents' right to raise children in less than perfect manner is superior to rights of foster parents who may be outstanding nurturers, unless natural parents are unfit); *Psaty v. Psaty*, 789 P.2d 96, 101 (Wash. 1990) (holding that to terminate parental rights of nonconsenting parent, court must find parent unfit); see also Kristin Brandon, Comment, *The Liberty Interests of Foster Parents and the Future of Foster Care*, 63 U. CIN. L. REV. 403, 412 (1994) (noting that clear and convincing evidence of parental unfitness is necessary to terminate parental rights).

3. See *infra* Part II.B.

4. See *Carvalho v. Lewis*, 274 S.E.2d 471, 472 (Ga. 1981).

5. 457 S.E.2d 102 (Va. 1995).

courts that impose their own prejudices under the guise of exercising discretion.

Part I of this Article discusses the fundamental right of parents to the care and companionship of their children. Although this right is not absolute, parental rights can be terminated only under certain specified conditions. Part II discusses the conditions under which children will be removed from their parents, comparing what is required when lesbian or gay parents are involved with what is required when no lesbian or gay parents are involved. Although courts in some states apply the relevant criteria in an evenhanded manner, regardless of the sexual orientation of the parents, courts in other states only pretend to operate impartially. Still other courts, unfortunately, do not even pretend to act equitably, apparently choosing instead to base their decisions on their own prejudices. Part III discusses the types of harm to the child that the courts consider when deciding on parental custody. Part IV concludes that unless the current system in some states is changed, innocent parents and children will continue to be harmed and faith in the objectivity and fairness of the courts will continue to erode.

I. RIGHTS OF THE PARENT

Whenever discussing individual rights, it is important to establish the nature of the particular right under discussion—whether it is a mere liberty interest or, instead, a fundamental right. A mere liberty interest may be regulated or abridged by the state so long as the state does so in a way that is rationally related to the promotion of a legitimate state goal.⁶ A fundamental right, however, cannot be abridged by the state unless the state can bear “especially high burdens of justification for the infringement.”⁷ Thus, before an analysis of the right of lesbians and gays to parent their children can be offered, the relative importance of that right first must be established.

A. *The Fundamental Right to Parent*

The Supreme Court has recognized the right to have and raise children as being fundamental.⁸ Although stated in a variety of ways

6. See *Williams v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955) (noting that law does not need to be logically consistent with its aims in every respect to be constitutional as long as it is rationally based to correct evil at hand). But see Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 430-32 (1995) (discussing rational basis test which is less deferential than *Lee Optical* test).

7. See GERALD GUNTHER, CONSTITUTIONAL LAW 446 (12th ed. 1991).

8. See cases cited *supra* note 1.

and applied in many different situations, the Court's position on the importance of preserving family integrity is clear. In *Meyer v. Nebraska*,⁹ for example, the Supreme Court described the right of individuals to have a home and to raise children as essential to the pursuit of happiness.¹⁰ In *Prince v. Massachusetts*,¹¹ the Court made clear that "the custody, care and nurture of the child reside first in the parents."¹² In *Santosky v. Kramer*,¹³ the Court discussed the fundamental right of natural parents to the custody, care, and supervision of their child.¹⁴ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵ the plurality made clear that choices involving family matters are central to the liberty protected by the Fourteenth Amendment.¹⁶ The Court explained in *Lassiter v. Department of Social Services*¹⁷ that its "decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"¹⁸

State courts also have expressed their appreciation of the great importance of parent-child relationships.¹⁹ The Supreme Court of Utah describes the right of the parent to maintain a relationship with his or her child as "transcend[ing] all property and economic rights . . . [and being] rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct."²⁰ The Utah court recognized that parents' rights to raise their own children have been fundamental to Anglo-American culture and presupposed by our social, political, and

9. 262 U.S. 390 (1923).

10. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

11. 321 U.S. 158 (1944).

12. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

13. 455 U.S. 745 (1982).

14. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (holding that parents have fundamental liberty interest in care, custody, and management of their child and that interest cannot be abridged without due process).

15. 505 U.S. 833 (1992).

16. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

17. 452 U.S. 18 (1981).

18. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

19. See, e.g., *Reed v. Norwalk Hosps.*, No. CV-950146525, 1996 WL 502491, at *3 (Conn. Super. Ct. 1996) (discussing importance of parent-child relationship); *Pitts v. Johnson Co. Dep't of Pub. Welfare*, 491 N.E.2d 1013, 1015 (Ind. Ct. App. 1986) (considering "fundamental importance of the parent-child relationship at stake"); *Prince v. Prince*, No. A-95-205, 1996 WL 331142, at *6 (Neb. Ct. App. June 18, 1996) (presuming "critical importance" of parent-child relationship); *In re Kovacs*, 854 P.2d 629, 633 (Wash. 1993) (en banc) (discussing "fundamental importance of the parent-child relationship to the welfare of the child").

20. *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982).

legal institutions.²¹ Other state supreme courts also have recognized the importance of the right of parents to the custody and companionship of their children.²²

If indeed the Utah Supreme Court is correct in suggesting that family relationships are "as fundamental to the purpose and enjoyment of life as the freedoms of speech and press are to the preservation of our political order,"²³ then states must have compelling interests at stake if they are to be justified in terminating an individual's parental rights. As Justice Blackmun pointed out in his dissent in *Lassiter*, "there can be few losses more grievous than the abrogation of parental rights."²⁴ The interest that a parent has in maintaining a relationship with her child, Justice Blackmun explained, "occupies a unique place in our legal culture given the centrality of family life as the focus for personal meaning and responsibility."²⁵

The parent's right to custody and companionship, however, is not absolute.²⁶ Parental rights may be forfeited if the parent is

21. See *id.*

22. See, e.g., *In re Kirchner*, 649 N.E.2d 324, 333 (Ill. 1995) (recognizing that natural parent's interest in care, custody and control of his or her child long has been recognized and is constitutionally protected); *Sheppard v. Sheppard*, 630 P.2d 1121, 1127 (Kan. 1981) ("It is clear under our decisions and those of the United States Supreme Court that a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed . . . absent a showing that the natural parent is unfit."); *In re Michael B.*, 604 N.E.2d 122, 128 (N.Y. 1992) (finding that foster parents have no right to seek permanent custody unless parental rights have been terminated); *In re Kristina L.*, 520 A.2d 574, 579 (R.I. 1987) ("Absent a finding of unfitness, the natural parents' right to bear and raise their child in a less than perfect way remains superior to the rights of foster parents who may be exemplary nurturers.").

23. 648 P.2d at 1376.

24. *Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); see also *Paul v. Steele*, 461 N.E.2d 983, 987 (Ill. 1984) (noting that judgment of parental unfitness is "one of the most devastating of judicial decisions").

25. *Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting).

26. See *Ysla v. Lopez*, 684 A.2d 775, 782 n.8 (D.C. 1996) ("[T]he parent's right is not absolute, even in the absence of a finding of unfitness, and it is subordinate to the best interest of the child."); *Collins v. Galbreath*, 403 N.E.2d 921, 923 (Ind. App. 1980) ("Although the legal right of a parent to custody of a child is superior to the legal right of all others, this right is not absolute."); *State v. Siemer*, 454 N.W.2d 857, 862 (Iowa 1990) ("A parent's right to custody and control of a child is not absolute."); *Strenski v. Owens*, 734 P.2d 1152, 1155 (Kan. 1987) ("A parent has a liberty interest under the Fourteenth Amendment Due Process Clause in the custody and control of his or her child, but this does not translate to an absolute right custody."); *Lee v. Lee*, 595 A.2d 408, 412 (Me. 1991) ("The right of a parent to the physical custody of the child . . . is not absolute."); *In re C.G.*, 747 P.2d 1369, 1371 (Mon. 1988) ("The right to maintain the family unit is not absolute."); *Foster v. B.J.C.*, 277 N.W.2d 281, 284 (N.D. 1979) ("The right of a parent to the custody of his child is not absolute and under extraordinary circumstances, custody of a child may be awarded to a non-parent over the objections of a parent."); *Reynolds v. Goll*, 661 N.E.2d 1008, 1010 (Ohio 1996) ("The right of custody by the biological parents is not absolute and can be forfeited."); *In re J.M.J.*, 379 N.W. 2d 816, 819 (S.D. 1986) ("Although parents have a fundamental right to their children, it is not an absolute and unconditional right.") (citation omitted); *In the Interest of J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994) ("The rights of natural parents are not absolute; protection of the child is paramount."); *In re Sumey*, 621 P.2d 108, 110 (Wash. 1980) (en banc) ("The parent's constitutional rights . . . do not afford an absolute protection against state interference with the family relationship.").

unfit²⁷ or is unable to care for the child.²⁸ Sometimes, other "compelling circumstances" will justify severing the tie between parent and child,²⁹ such as if the child and parent have been separated for a very long period of time.³⁰ At the very least, for custody to be awarded to a third party over a parent, it must be shown that continued custody with the parent actually would be detrimental to the child.³¹

When analyzing the standard for awarding custody to a third party over a parent, it is important to note who qualifies as a third party. Such a third party may be a stranger to the child, someone who knows the child, or a relative of the child.³² Generally, anyone who is not a biological or adoptive parent of the child will be considered a third party unless that individual is a *de facto* parent³³ or has *in loco parentis* standing.³⁴

It is extremely difficult for a nonparent to wrest custody away from a parent. Because the nonparent "bears a heavy burden of persua-

27. See *supra* note 2.

28. See *Sporleder v. Hermes*, 471 N.W.2d 202, 205 (Wis. 1991) (concluding that non-parent may bring action to obtain custody only if parent is unfit, unable to care for child, or other compelling reasons exist).

29. See *Carvalho v. Lewis*, 274 S.E.2d 471, 472 (Ga. 1981) (holding that "a finding of unfitness must center on the parent alone," and not merely on whether child may gain advantages elsewhere).

30. See *Juvenile Appeal v. Commissioner of Children & Youth Servs.*, 420 A.2d 875, 884-85 (Conn. 1979) (finding that length of time child and mother were separated justified not returning child to mother); *In re Michael B.*, 604 N.E.2d 122, 130 (N.Y. 1992) (holding that prolonged separation from parent may be considered as factor allowing court to determine what situation would be best for child).

31. See *Vlasta Z. v. San Bernardino County Welfare Dep't*, 523 P.2d 244, 246 (Cal. 1974) (en banc) (holding that to award custody to non-parent, express finding that parental custody would be detrimental to child supported by evidence that parental custody would actually harm child must be made); *In re Higby*, 611 N.E.2d 403, 406 (Ohio Ct. App. 1992) (determining that fit parent may be denied custody when award of custody would be detrimental to the child); *Bottoms v. Bottoms*, 444 S.E.2d 276, 278 (Va. App. 1994) (holding that non-parent will be granted custody over parent if continued custody with parent is detrimental to child), *rev'd*, 457 S.E.2d 102 (Va. 1995); *In re Allen*, 626 P.2d 16, 22 (Wash. Ct. App. 1981) (reasoning that parental rights might be outweighed if placement with parent would detrimentally affect child's growth and development).

32. See *Bowie v. Arder*, 490 N.W.2d 568, 578 (Mich. 1992) (holding that relatives of child do not have greater right to custody than other persons because of their close biological relationship); *In re Townsend*, 427 N.E.2d 1231 (Ill. 1981) (half-sister treated like other third parties); see also *Commonwealth ex rel. Zaffarno v. Genaro*, 455 A.2d 1180 (Pa. 1983) (grandparent treated like other third parties).

33. See *Zack v. Fiebert*, 563 A.2d 58, 63 (N.J. Super. Ct. App. Div. 1989) (stating that if third parties can show they stand in shoes of parent, status of parent should be accorded them for purposes of determining standard to apply for custody).

34. See *Simpson v. Simpson*, 586 S.W.2d 33, 35 (Ky. 1979) (holding that visitation should be granted to person standing *in loco parentis* in custody proceeding when it is in child's best interest to do so); *State ex rel. Williams v. Juvenile Court*, 204 N.W. 21, 22 (Minn. 1925) (determining that stepmother placed herself *in loco parentis* to child).

sion,³⁵ it may not even suffice to establish that the parent intentionally abused or neglected the child.³⁶ Thus, grandparents, who have no greater claim to custody than other third parties,³⁷ usually will be unable to establish that they, rather than either of the parents, should have custody.³⁸ To bring about a change in custody, third parties must do more than establish that they would provide a more loving and nurturing environment for a child than would the child's parents.³⁹ Nor will third parties be awarded custody merely because the child might gain financial, educational, or moral advantages with them.⁴⁰ Because of what one court described as the "sacredness of parental rights,"⁴¹ third parties must prove parental unfitness or other very unusual conditions to wrest custody from the parents.⁴²

B. Parental Rights Termination

The New York Court of Appeals spelled out what some of those unusual conditions might be, explaining that a state may terminate parental rights "if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child."⁴³ It is precisely because very important rights are at risk that courts establish a high threshold before severing parent-child

35. *Gerald D. v. Peggy R.*, Nos. C-9104, 79-12-143-CV, 1980 WL 20452, at *8 (Del. Fam. Ct. Nov. 17, 1980); see also *Burke v. Poope*, 531 A.2d 782, 784 (Pa. Super. Ct. 1987) (discussing "heavy burden of persuasion" that must be met if parent is to lose her right to custody to non-parent).

36. See *In re J.J.B.*, 390 N.W.2d 274, 278 (Minn. 1986) (concluding that termination of parental rights is appropriate when neglect will continue for long or indefinite period).

37. Grandparents may be given special visitation rights by statute. See *Ruppel v. Lesner*, 364 N.W.2d 665, 668 (Mich. 1984) (discussing right of grandparents to bring action seeking visitation rights in limited circumstances pursuant to Michigan's Child Custody Act). But see *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995) (striking statute giving grandparents special visitation rights); *Painter v. Bannister*, 285 Iowa 1390 (1966) (awarding custody to maternal grandparents over natural father on basis of doctor's testimony that grandparents were psychological parents).

38. See *Ruppel*, 364 N.W.2d at 668 (noting that grandparents, relatives, and other persons have equal claims to custody).

39. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 280 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).

40. See *Carvalho v. Lewis*, 274 S.E.2d 471, 472 (Ga. 1981); see also *DeBoer v. Schmidt*, 114 S. Ct. 1, 2 (1993) (holding that unrelated persons are not authorized under Iowa, Michigan, or federal law to retain custody of child simply because they may be better able to provide for child's future, unless natural parents have been found unfit).

41. *Champagne v. Welfare Div.*, 691 P.2d 849, 854 (Nev. 1984).

42. *Bottoms*, 444 S.E.2d at 280; see also *In re Christina H.*, 618 A.2d 228, 229 (Me. 1992) (recognizing clear and convincing standard as appropriate test for terminating parental rights).

43. *Bennett v. Jeffreys*, 356 N.E.2d 277, 283 (N.Y. 1976); see also *In re Kirchner*, 649 N.E.2d 324, 328 (Ill. 1995) (stating that parental rights may be terminated if there is finding of abuse, abandonment, neglect, or unfitness).

ties. Because courts want to avoid the devastating effects resulting from the termination of these rights, the evidence of parental unfitness sufficient to separate a child from his parents permanently must be clear and convincing.⁴⁴

The Nevada Supreme Court cautioned that courts must be exceedingly careful in finding that a parent is unsuitable due to fault or incapacitation.⁴⁵ Courts accordingly may require a showing of very harmful activity before they will conclude that the parent is unfit. In *In re P.L.C. & D.L.C.*,⁴⁶ for example, a Minnesota court refused to find a father unfit despite evidence that the father had physically abused his wife and children and was involved in an adulterous relationship.⁴⁷ In *Alsager v. District Court*,⁴⁸ a court considered the fitness of parents who "sometimes permitted their children to leave the house in cold weather without winter clothing on, 'allowed them' to play in traffic, to annoy neighbors, to eat mush for supper, to live in a house containing dirty dishes and laundry, and to sometimes arrive late at school."⁴⁹ The *Alsager* court concluded that these parents were not unfit.⁵⁰

C. Parental Autonomy

Parental rights are afforded such great protection for several reasons. First, because courts presume that parents have the best interests of their children at heart, the state is willing to give parents substantial authority over their children.⁵¹ Second, courts have recognized the right of parents to raise their children in an environ-

44. See *In re Syck*, 562 N.E.2d 174, 183 (Ill. 1990) (finding termination of parental rights to be devastating because parent whose rights are terminated will not have visitation rights, so evidence of unfitness must be established by clear and convincing standard); *In re Christina H.*, 618 A.2d 228, 229 (Me. 1992) (stating that clear and convincing evidence is necessary to support decision to terminate parental rights); *Bottoms*, 444 S.E.2d at 280 (holding that child's right to care and support of parent and parent's right to custody and companionship should be severed only by compelling reasons established by clear and convincing evidence).

45. See *Champagne*, 691 P.2d at 857; see also *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975) ("Termination is a drastic, final step which . . . can be fraught with danger. Accordingly, to preserve the best interests of both parents and children . . . terminations must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them.").

46. 384 N.W.2d 222 (Minn. Ct. App. 1986).

47. *In re P.L.C. & D.L.C.*, 384 N.W.2d 222, 227 (Minn. Ct. App. 1986).

48. 406 F. Supp. 10 (S.D. Iowa 1975).

49. *Alsager v. District Court*, 406 F. Supp. 10, 22 (S.D. Iowa 1975).

50. *Id.* at 22 (holding that home situation did not justify termination of parental rights even if allegations involving lack of care and supervision were assumed to be true).

51. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (asserting that tradition of parental authority is consistent with tradition of individual authority).

ment without government interference.⁵² Furthermore, some courts, like *Alsager*, believe that unless parents are given a wide zone of latitude, there will be a chilling effect on what parents will do with and for their children.⁵³ Precisely because courts do not want to inhibit parents in exercising their fundamental right to family integrity, courts tend to give much deference to parents to decide how their children should be raised.⁵⁴

The state entrusts parents with the responsibility to guide and inspire their children by precept and example.⁵⁵ Not only are parents better able to respond to the particularized needs of their children, but parents will be able to provide a bulwark against the standardization and homogenization of children.⁵⁶ As the Supreme Court of Utah has observed, family autonomy helps to assure the diversity that is characteristic of a free society like ours.⁵⁷ Indeed, the court explained that allowing parents much latitude in rearing their children is one of the best ways of preserving pluralism because much "of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma."⁵⁸ The court found that a state threatens diversity when it terminates the rights of parents merely because they do not share

52. See *In re Kersey*, 124 So. 2d 726, 730 (Fla. Dist. Ct. App. 1960) ("Particularly should it be true . . . that individuals may confidently look to the courts to fulfill their historic role of guardians of the rights and liberties of the people, one of which is to rear . . . their children, without the threat of unreasonable interference of governmental authority."); *In re H.H.*, 528 N.W.2d 675, 677 (Iowa Ct. App. 1995) ("The state's interest in protecting children must be balanced against the parents' countervailing interest in being able to raise their children in an environment free from government interference." (citing *Alsager*, 406 F. Supp. at 22)); *Frame v. Nehls*, 550 N.W.2d 739, 747 (Mich. 1996) (discussing "parents' fundamental right to raise a child without interference from the government").

53. See *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1982) ("To allow a court to decide who can best provide a child with intellectual stimulation could chill the propagation and perpetuation of disfavored political, philosophical, and religious views within the privacy of the family circle."); cf. *Arnold v. Board of Educ.*, 880 F.2d 305, 313 (11th Cir. 1989) (discussing "parental right to structure the education and religious beliefs of one's children"); *Alabama & Coushatta Tribes v. Trustees of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1334 (E.D. Tex. 1993) ("[T]he right of parents to participate and direct their children's education and religious upbringing is firmly established in constitutional doctrine." (citing *Wisconsin v. Yoder*, 405 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925))); *Lewis v. Spaulding*, 85 N.Y.S.2d 682, 690 (Sup. Ct. 1948) ("Fundamental is the right of the parent to rear his child in a particular religious faith, or to rear him as a non-believer if he so elects.").

54. See *id.*

55. See *Bellotti*, 443 U.S. at 638 (recognizing state's deference to parental control over children).

56. See *Franz v. United States*, 707 F.2d 582, 598 (D.C. Cir. 1983) (holding that society is not well-equipped to be sensitive to changing needs and drives of children in order to provide them with necessary support and guidance).

57. See 648 P.2d at 1376.

58. *Id.*

officially approved values.⁵⁹ Thus, the Utah Supreme Court suggested that even parents who "contradict officially approved values" may in fact benefit society.⁶⁰ The court made clear that the protection of parental rights promotes values that are essential to the preservation of human freedom and dignity.⁶¹ Indeed, the court bestowed on the family a rather exalted status by deeming the family essential for the conservation and transmission of cherished values and traditions.⁶²

II. PARENTAL UNFITNESS AND THE NEEDS OF THE CHILD

Despite a strong presumption that parents have a right to care for their children and to instill within them those values that the parents believe appropriate, the state has the power to protect children and act for their welfare by terminating a harmful parent-child relationship.⁶³ Children will not be forced to endure great and unnecessary risks and hardships at the hands of anyone, including their parents.⁶⁴ Because a parental rights termination is such a drastic step, however, the proof must be clear and convincing that such a step is necessary.⁶⁵

A. *Unfitness*

Unfitness is not to be measured in degrees—either the parent is fit or unfit.⁶⁶ Moreover, isolated instances of less-than-adequate care will not establish a parent's unfitness nor justify termination of parental rights.⁶⁷ Rather, to "provide a jurisdictional basis for termination, neglect must be serious and persistent and be sufficiently harmful to the child so as to mandate a forfeiture of parental rights."⁶⁸ The question when determining fitness is not whether one party would be a better parent, but whether continued custody by the parent actually would be harmful to the child.⁶⁹ Were courts to

59. *See id.*

60. *Id.*

61. *See id.* at 1375-76.

62. *See id.* at 1376.

63. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (discussing finding by trial court that parental presumption has been rebutted).

64. *See* Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (determining that state has wide latitude to limit parental freedom to affect child's welfare adversely).

65. *See* Bottoms v. Bottoms, 444 S.E.2d 276, 280 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995); *In re* Christina H., 618 A.2d 228, 229 (Me. 1992).

66. *See In re* Matzen, 600 So. 2d 487, 490 (Fla. Dist. Ct. App. 1992).

67. *See* Champagne v. Welfare Div., 691 P.2d 849, 855 (Nev. 1984).

68. *Id.*

69. *See id.* (noting circumstances under which parent may be found "unsuitable" to maintain parental status).

terminate parental rights merely because other parents would be more loving, supportive, or understanding or because other parents could provide better educational or financial opportunities for the children,⁷⁰ parental rights terminations might be quite frequent.

As the Illinois Supreme Court pointed out in *In re Syck*,⁷¹ when courts are determining parental unfitness, they must do so *without* considering whether awarding custody to someone else would better promote the child's best interests.⁷² The best interests of the child will be considered only *after* a finding of parental unfitness has been made.⁷³ Indeed, courts or statutes that declare a parent unfit solely because the child's best interests would be promoted better by placement elsewhere may violate the parent's constitutional rights.⁷⁴

Unfitness analysis is complicated because a parent can be unfit in a variety of ways. Among other things, courts will consider whether the parent can provide for the physical needs of the child.⁷⁵ For example, in considering the child's physical needs, courts may investigate whether the child is well-fed and well-clothed,⁷⁶ in a clean home,⁷⁷ and free from physical abuse.⁷⁸ Further, a parent may be

70. See *Carvalho v. Lewis*, 274 S.E.2d 471, 472 (Ga. 1981) (determining that parental rights will not be terminated merely because other parents could provide better financial or educational opportunities); see also *DeBoer v. Schmidt*, 509 U.S. 1301, 1302 (1993) (holding that unrelated persons cannot retain custody merely because they are better able to provide for future and education); cf. *Bottoms*, 444 S.E.2d at 280 ("All too frequently, foster parents or third parties would be more willing and better able to provide a loving and nurturing environment for a child than would the child's parents."), *rev'd*, 457 S.E. 2d 102 (Va. 1995).

71. 562 N.E.2d 174 (Ill. 1990).

72. See *In re Syck*, 562 N.E.2d 174, 183 (Ill. 1990); see also *In re J.C.P.*, 307 S.E.2d 1, 3 (Ga. Ct. App. 1983) (maintaining that finding of unfitness must be based on parent alone).

73. See *In re Doe*, 638 N.E.2d 181, 189 (Ill. 1994) (Heiple, J., in support of denial of rehearing) (stating that rights of child's natural parents must be terminated before child is available for adoption); *In re D.*, 293 A.2d 171, 175 (N.J. 1972) (stating that parental rights must be terminated prior to determining child's best interest).

74. See *In re J.P.*, 648 P.2d 1364, 1374 (Utah 1982) (holding that parents' constitutionally protected rights are violated when terminated solely on basis of child's best interest).

75. See *Gerald D. v. Peggy R.*, Nos. C-9104, 79-12-143-CV, 1980 WL 20452, at *8 (Del. Fam. Ct. Nov. 17, 1980) (determining that mother can provide for physical needs of her child); *State v. D.B.*, 740 P.2d 11, 15-16 (Colo. 1987) (*en banc*) (terminating parental rights, at least in part, because of parent's inability to meet physical needs of child consistently); see also *Spurlock v. Texas Dep't of Protective Servs.*, 904 S.W.2d 152, 158 (Tex. App. 1996) (terminating parental rights in part because parent could not meet physical needs of children).

76. See *White v. Thompson*, 569 So. 2d 1181, 1184 (Miss. 1990) (looking at evidence of whether child was clothed or fed adequately in determining whether parent is unfit).

77. See, e.g., *J.F.R. v. R.R.*, 482 S.W.2d 543, 545 (Mo. Ct. App. 1972) (listing clean and orderly home as evidence of maternal care); *In re Kristina L.*, 520 A.2d 574, 576 (R.I. 1987) (noting as evidence of poor parenting that mother's "house was cluttered, with dirty dishes in the sink and a pile of dirty laundry in the living room"); *Brown v. Brown*, 237 S.E.2d 89, 90 (Va. 1977) (detailing testimony regarding mother's inability to keep house clean).

78. See *In re Burrell*, 388 N.E.2d 738, 738 (Ohio 1979) (listing factors in determining well-being of child, such as whether evidence of abuse or neglect exists, child's performance at school, and whether child is properly dressed and behaved).

held responsible for failing to protect the child from others.⁷⁹

In considering the child's emotional needs, courts may examine the rapport between parent and child,⁸⁰ and, depending upon the age of the child, the child's preferences regarding who will have custody,⁸¹ although those preferences will not be followed if they would be contrary to the child's best interests.⁸² At the very least, the court will examine whether the child is happy and well-adjusted.⁸³ If the child is thriving,⁸⁴ courts will *tend* not to modify custody,⁸⁵ as the relevant criteria are whether the child is well behaved and who would best care for the child.⁸⁶ Regrettably, even if a child is "well behaved and cared for," the child may be removed from a parent who is gay or lesbian.⁸⁷

When courts consider the moral needs of the child, they may have any of a number of concerns in mind. Some courts have held that the repeated exposure of a child to an illicit relationship makes the

79. See *In re Angelia P.*, 623 P.2d 198, 207 (Cal. 1981) ("Child abuse includes more than a parent's physical abuse . . . the term may involve a failure to protect the child from harm caused by others.").

80. See, e.g., *Christian v. Randall*, 516 P.2d 132, 134 (Colo. Ct. App. 1973) (citing Delta County Family and Children's Services' conclusions regarding nature of relationship between children and their mother); *In re Kristina L.*, 520 A.2d at 574 (discussing child's attachment to her foster parents and lack of such relationship with her natural parents); *Bottoms v. Bottoms*, 444 S.E.2d 276, 279 (Va. Ct. App. 1994) (finding that mother and child have had close, loving mother-child relationship), *rev'd*, 457 S.E.2d 102 (Va. 1995).

81. See *Buness v. Gillen*, 781 P.2d 985, 989 (Alaska 1989) (deciding that child's emotional response to learning about his removal from custody by non-parent was indicative of strong bond that had developed between them).

82. See *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 165 (Mo. Ct. App. 1987) ("Minor children's preference will be followed only if that preference is consistent with the best interests and welfare of the child.") (citing *L. v. D.*, 630 S.W.2d 240, 242 (Mo. Ct. App. 1982)).

83. See, e.g., *Brandt v. Brandt*, 425 N.E.2d 1251, 1256 (Ill. App. Ct. 1981) (reviewing facts pertaining to children's general health and ability to function in school and at home); *Sartoph v. Sartoph*, 354 A.2d 467, 472 (Md. Ct. Spec. App. 1976) (concluding that child "was happy, healthy, well-adjusted and emotionally stable"); *In re Larry & Scott H.*, 192 N.E.2d 683, 684 (Ohio 1963) (describing children as being healthy, happy, and out-going).

84. See *S. v. J.*, 367 N.Y.S.2d 405, 409 (N.Y. App. Div. 1975) (finding facts that "the child has thrived under her care and guidance, is doing very well at school academically and socially [and] has fully adjusted to his surroundings" persuasive).

85. See *Cupples v. Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995) (stating that in custody cases, court tries to determine where child is "most likely to thrive") (citing *In re Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993)).

86. See *S. v. J.*, 367 N.Y.S.2d at 410. But see Marie Weston Evans, Note, *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, 635 (1982) (analyzing case in which court removed child from mother although evidence "indicated that the child was happy, intelligent, and normal . . . and would suffer trauma if he were to be separated from her").

87. See *M.J.P. v. J.G.P.*, 640 P.2d 966, 967-68 (Okla. 1982) (regarding lesbian mother who lost custody despite child's being happy and healthy); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988) (explaining that lesbian mother loses custody although she "has done a good job in raising her [daughter] to be a normal, well-adjusted child, and there has been no proof that the Mother's lifestyle has adversely affected the child's growth or development").

parent per se unfit.⁸⁸ Other courts fear that a parent who acts immorally may set an example that the child later will attempt to emulate.⁸⁹ Still others are concerned that the child will not understand the moral views of society⁹⁰ or, perhaps, that some other kind of unspecified harm will occur.⁹¹

When courts presume that exposure to an illicit relationship will cause harm without specifying what that harm will be, it will be difficult, if not impossible, to overcome that presumption. Further, the very vagueness of the standard invites different judges to apply it differently, even in relevantly similar factual situations. Partially because of the potential unfairness and inconsistency that likely will occur if a vague standard of harm is used, courts *tend* to require that the harm be described with some specificity, and further, that there be a showing of actual or likely harm, before they will find a parent morally unfit to raise children.⁹² Nonetheless, the moral needs of the child, even without further elaboration, have been used to justify a number of restrictions on custody and visitation, especially when gay or lesbian parents are involved.

B. Moral Needs

The Virginia Supreme Court has pointed out that in custody decisions, the "moral climate in which the child is to be raised"⁹³ is an "important consideration."⁹⁴ States have good reason to pause, however, before making decisions based on their own version of the "proper" moral climate. As the Supreme Court of Utah has suggested, parents may enrich their children's lives even when contradicting "officially approved values."⁹⁵ Further, as the Supreme Court explained in *Bellotti v. Baird*,⁹⁶ the state's affirmative sponsorship of

88. See *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (finding that child's continuous exposure to his father's same-sex relationship rendered father unfit as a matter of law).

89. See *Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1979) (finding that mother's "disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them, and could well encourage the children to engage in similar activity in the future") (citations omitted); *Brandt v. Brandt*, 425 N.E.2d 1251, 1263 (Ill. Ct. App. 1981) (concluding that mother's "disregard for existing [social] standards" of conduct by living with married man, could influence children to engage in similar activity).

90. See *M.J.P.*, 640 P.2d at 969 (recounting expert testimony regarding important role parent play in teaching children societal values).

91. Cf. *Thigpen v. Carpenter*, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (presuming that parents' illicit sexual conduct will result in harming their child).

92. See *infra* notes 286-308 and accompanying text (discussing moral harm).

93. *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995) (citing *Brown v. Brown*, 237 S.E.2d 89, 91 (Va. 1977)).

94. *Brown*, 237 S.E.2d at 91.

95. *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1983).

96. 443 U.S. 622 (1979).

particular ethical, religious, or political beliefs is something the state should not attempt in a "society constitutionally committed to the ideal of individual liberty and freedom of choice."⁹⁷

Even were there no impropriety in the state's affirmatively sponsoring particular ethical beliefs about which there is a consensus, there still would be difficulties in the state's affirmatively sponsoring ethical beliefs about which no consensus exists.⁹⁸ A variety of issues are debated hotly precisely because there is no consensus about their moral permissibility. For example, the morality of abortion is something about which reasonable people disagree.⁹⁹ Similarly, the moral permissibility of same-sex relations is a controversial issue.¹⁰⁰ Unless states are careful, they will assume a moral consensus about particular practices that do not in fact exist.¹⁰¹

Historically, courts were less concerned about whether there was a societal moral consensus¹⁰² and were more willing to say, for example, that individuals who committed adultery were morally unfit to raise children as a matter of law.¹⁰³ Today, however, courts no longer view adultery as establishing the per se unfitness of the parent,¹⁰⁴ although the existence of an ongoing adulterous relation-

97. Bellotti v. Baird, 443 U.S. 622, 638 (1979).

98. See Juliet A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*, 59 MO. L. REV. 775, 794 (1994) ("Because of the diversity of views attached to the moral implications of homosexual behavior, courts should abstain from basing judgments on such reasoning and defer to the parents' views of right and wrong in raising their children.").

99. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stages.").

100. See *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting) ("Reasonable people may disagree about whether particular sexual acts are moral or immoral.").

101. See *Whaley v. Whaley*, 399 N.E.2d 1270, 1275 (Ohio Ct. App. 1978) (rejecting "immoral conduct" test as unworkable "in light of the diversity of religious and moral practice in this country"); see also *Florida Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1215 (Fla. Dist. Ct. App. 1993) (discussing widespread disagreement on whether homosexual activity is different in nature than sexual orientation "as a matter of scientific fact and as a matter of moral, religious, and legal opinion").

102. The lack of a consensus does not imply a moral relativist position, although it may imply that government should not choose between two contradictory positions, each of which claims to represent a moral certainty. See Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 371 (1995) ("[T]he principle of radical skepticism must be imposed on the government to protect the individual citizen's right to act with moral certainty.").

103. See *Wolpa v. Wolpa*, 153 N.W.2d 746, 748 (Neb. 1967) (stating that adulterous act renders one unfit, as matter of law, to be parent); see also *Davis v. Davis*, 372 A.2d 231, 235 (Md. 1977) (noting that strong presumption of parental unfitness arises if person has engaged in adultery).

104. See *Hansen v. Hansen*, 169 N.W.2d 12, 15 (Minn. 1969); *Feldman v. Feldman*, 358 N.Y.S.2d 507, 511 (App. Div. 1974) ("The law is well established that even adulterous acts do not ipso facto present a sufficient basis for denying continued custody . . .") (citations omitted).

ship may enter into a court's parental fitness calculation.¹⁰⁵ Numerous courts, however, have suggested that *past* adultery alone will not establish unfitness.¹⁰⁶ Courts reason that if the immoral relationship is over, it no longer poses a threat to the children and thus does not justify preventing that parent from having custody.¹⁰⁷ Because custody decisions should not be used by the states to punish wayward parents,¹⁰⁸ past indiscretions may be ignored as long as the children are not adversely affected by them.¹⁰⁹

Courts seem unconcerned about why the adulterous relationship ended. If the individuals no longer are seeing each other and there is little likelihood that the relationship will be renewed, the court probably will decide that the past adulterous relationship does not pose a threat to the children, and thus does not justify preventing the parent from having custody.¹¹⁰ If the individuals marry each other once they are legally free to do so, the adulterous relationship ceases to exist and is supplanted by a legal relation. In this situation, the court probably will suggest that the past adulterous relationship does not bar the parent from having custody.¹¹¹ Thus, whether the adulterous relationship has ended because the *relationship* no longer exists (and no other adulterous relationship has taken its place) or because the *illicit aspect* of the relationship no longer exists (because the individuals are now legally married), the court likely will no longer view the adultery as establishing parental unfitness or as justifying the denial of custody.¹¹²

105. See *Petit v. Holifield*, 443 So. 2d 874, 878 (Miss. 1984) (suggesting that continued promiscuity would contribute to court's finding of parental unfitness).

106. See *Oliver v. Oliver*, 140 A.2d 908, 911 (Md. 1958) ("The cessation of the adulterous affair is an important [mitigating] factor."); *Sartoph v. Sartoph*, 354 A.2d 467, 471 (Md. Ct. Spec. App. 1976) ("The presumption of unfitness is overcome by a showing that the adulterous party has repented, has terminated the adulterous relationship, and has changed his or her errant ways so that there is little likelihood of a recurrence of past indiscreet behavior.") (footnote omitted); *Petit*, 443 So. 2d at 878 ("The mere fact that a natural parent has had a prior adulterous relationship is insufficient to warrant a finding that the parent is unfit."); *J.F.R. v. R.R.*, 482 S.W.2d 543, 545 (Mo. Ct. App. 1972) ("But past moral lapses do not in themselves make a parent unfit, and are to be measured by the effect, if any, they have on the children's welfare.").

107. See *Sartoph*, 354 A.2d at 472 (reversing lower court and holding that mother's termination of illicit relationship was sufficient to grant her custody of child in light of fact that, in all other respects, mother was fit parent).

108. See *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (stating that purpose of custody decision is not to punish parent).

109. See *infra* notes 110-17 and accompanying text.

110. See *Sartoph*, 354 A.2d at 472.

111. See *Petit*, 443 So. 2d at 878 (suggesting that marriage and cessation of promiscuity will permit continuance of parental rights).

112. Cf. *Ward v. Virginia Depute of Soc. Serv.*, 408 S.E.2d 921, 923 (Va. Ct. App. 1991). To terminate parental rights, the state must show *inter alia* that "it is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated

Even an *ongoing* adulterous relationship will not result necessarily in the parent being declared unfit.¹¹³ Courts now tend to view "the issue of guilt in causing a divorce and the issue of fitness for the custody of minor children [as] separate and distinct."¹¹⁴ Even a parent whose conduct provides grounds for divorce may not necessarily be deemed unfit and stripped of his or her custodial rights.¹¹⁵ The primary concern of the court will be to determine whether the parent's relationship does, in fact, impact negatively on the child.¹¹⁶ Absent clear adverse effects on the child, the parent will not be denied custody based solely on the adultery.¹¹⁷

1. Fornication

Individuals who have a sexual relationship and are not married either to each other or to third parties are committing the act of "fornication" rather than adultery.¹¹⁸ Historically, individuals committing fornication also were viewed as morally unfit to raise children.¹¹⁹ Today, fornication, like adultery, will not, in itself, be a bar to custody, as long as the children are not adversely affected by the relationship.¹²⁰

The distinction between adultery and fornication is an important one.¹²¹ Society today generally views sex between two unmarried

so as to allow the child's safe return to his parent or parents within a reasonable time." *Id.* Once the adulterous relationship has ended, the offending condition presumably will have been corrected or eliminated.

113. See *Sutherland v. Sutherland*, 414 S.E.2d 617, 618 (Va. Ct. App. 1992) (upholding decision to allow ex-wife to retain custody despite "live-in, adulterous relationship"); *Bickler v. Bickler*, 344 S.E.2d 630, 632 (W. Va. 1986) (noting that continuation of adulterous conduct was not so grossly immoral as to justify denial of custody).

114. *Anonymous v. Anonymous*, 475 P.2d 268, 269 (Ariz. 1970).

115. See *id.*; *Wendland v. Wendland*, 138 N.W.2d 185, 189-90 (Wis. 1965) ("[I]mmoral conduct *per se* does not make a wife 'unfit' to have the custody of her children. Where a woman has been a bad wife she nevertheless may be a good mother.").

116. See *Anonymous*, 475 P.2d at 270 (affirming mother's custody of child because illicit relationship did not affect child adversely).

117. See *id.*; see also *D.H. v. J.H.*, 418 N.E.2d 286, 291 (Ind. Ct. App. 1981) (stating that parent's conduct must affect child's welfare adversely to deprive parent of custody).

118. See BLACK'S LAW DICTIONARY 653 (6th ed. 1990) (defining fornication as "[s]exual intercourse other than between married persons"); *id.* at 51 (defining adultery as "[v]oluntary sexual intercourse with a married person with a person other than the offender's husband or wife, or by a person with a person who is married to another").

119. See *Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1980) (depriving woman of custody, concluding that open and continuous fornication renders mother morally unfit and "endanger[s] the children's moral development").

120. See discussion *infra* Parts II.C, III (explaining how courts use nexus test and consider variety of harms to child before terminating relationship).

121. See *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1475 n.16 (D. Utah 1995) (noting that fornication and adultery are not of same nature nor do they have same social consequences).

people as less objectionable than adultery.¹²² Although some believe that all sexual relationships outside the bonds of matrimony are immoral,¹²³ others believe that it is morally permissible to live with someone without benefit of marriage so long as no promises to an unknowing spouse are being broken.¹²⁴

2. Same-sex relationships

Same-sex relationships are more analogous to opposite-sex relationships without benefit of marriage than to adulterous relationships, assuming that neither member of the same-sex couple is married to someone else.¹²⁵ Of course, same-sex couples and unmarried, opposite-sex couples are different in an important respect. In most cases, unmarried, opposite-sex individuals who cohabit may marry, whereas same-sex cohabitants do not have that option.¹²⁶ Insofar as unmarried cohabitants are subject to criticism for failing to avail themselves of the option to marry, same-sex couples are not criticized appropriately. Individuals should not have their failure to marry held against them when the law does not afford them that option.¹²⁷

Presumably, one of the reasons that courts may be reluctant to award custody to a parent living with a partner to whom he or she is

122. See *S. v. J.*, 367 N.Y.S.2d 405, 409-10 (App. Div. 1975) (distinguishing between case involving divorced parent and cases in which parties are not formally separated or divorced).

123. See *Hann v. Housing Auth. of Easton*, 1990 WL 102804, at *1 (E.D. Pa. July 16, 1990) (stating that Housing Authority of Easton denied family benefits because mother and father never had married and thus were living in sin).

124. See, Editorial, *Why Same-Sex Marriages Should Be Banned*, THE PLAIN DEALER, Oct. 6, 1996, at 4C.

125. *Accord Tucker v. Tucker*, 881 P.2d 948, 951 (Utah Ct. App. 1994) (equating same-sex cohabitation with "cohabitation with a member of the opposite sex without benefit of marriage"), *rev'd*, 910 P.2d 1209, 1217 (Utah 1996). But see *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (refusing to treat same-sex and opposite-sex unmarried relationships equally).

126. See *In re Jacob*, 660 N.E.2d 397, 406 (N.Y. 1995) (noting that opposite-sex partners have option to marry whereas same-sex partners do not); see also Hara Jacobs, *A New Approach for Gay and Lesbian Domestic Partners: Legal Acceptance Through Relational Property Theory*, 1 DUKE J. GENDER, L. & POL'Y 159, 159 (1994) (discussing how gay and lesbian relationships are not legally recognized and thus fall outside scope of marital dissolution statutes); Barry H. Parsons, Note, *Bottoms v. Bottoms: Erasing the Presumption Favoring a Natural Parent over Third Parties—What Makes This Mother Unfit?*, 2 GEO. MASON INDEPENDENT L. REV. 457, 487 (1994) ("Unlike heterosexual couples who can get married and thereby end the 'adulterous relationship', gay relationships can not yet be recognized by legal marriage.").

127. If Hawaii comes to recognize same-sex marriages, then this argument will lose some force, depending, among other things, on whether the domiciliary state would recognize a same-sex marriage validly celebrated in Hawaii. For a discussion of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), in which the Hawaii Supreme Court held that the state of Hawaii must present compelling reasons to justify its refusal to recognize same-sex marriages, see Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995).

not married is the belief that children need a stable home and that people living together without a long-term commitment would be less likely to provide such a home.¹²⁸ For present purposes, it is unimportant to establish whether people who can marry but choose not to do so can provide sufficiently stable homes (although there is no reason to doubt that they can). What is important to note is that a parent who manifests an intention to have a committed, long-term relationship with a same-sex partner is, all else equal, *less* likely to be awarded custody in certain states.¹²⁹ Indeed, courts seem especially offended when same-sex individuals manifest their commitment to each other.¹³⁰ This attitude is rather surprising, given the importance of a stable parental relationship for children and given that states are beginning to recognize *both* members of same-sex couples as legal parents of the same child or children in certain circumstances.¹³¹

It may be that courts simply do not believe that same-sex couples can have long, stable, monogamous, committed relationships.¹³² In *Bottoms*, for example, the Virginia Supreme Court seemed to disbelieve that the mother had a "lifetime commitment" to her partner.¹³³ The court noted that the mother's partner supported the family,¹³⁴ but then worried about the *mother's* job skills,¹³⁵ as if the court could not accept that the two partners were committed to each other.

The refusal to consider seriously the ability of same-sex couples to have stable, committed relationships may explain partially the Court's

128. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.4 at 806 (2d ed. 1988) (discussing need for courts to consider stability and continuity of parent/child relationship when awarding custody).

129. See, e.g., *Jacobson v. Jacobson*, 314 N.W.2d 78, 80 (N.D. 1981) (expressing concern that mother would be living with her same-sex partner); *M.J.P. v. J.G.P.*, 640 P.2d 966, 969-70 (Okla. 1982) (affirming custody transfer to father as result of mother's moving in with same-sex lover).

130. See *S v. S*, 608 S.W.2d 64, 65 (Ky. Ct. App. 1980), (discussing "mock" wedding ceremony); *M.J.P.*, 640 P.2d at 967 (denying custody to mother who "invite[d] forty friends to a 'Gay-la Wedding' in a church, performed by a minister"). But see *Van Driel v. Van Driel*, 525 N.W.2d 37, 38 (S.D. 1994) (permitting mother to retain custody of children despite having "exchanged vows" with her lesbian partner with the intent to enter into a permanent and monogamous relationship").

131. See, e.g., *In re Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (allowing unmarried same-sex cohabitants to adopt child); *Jacob*, 660 N.E.2d at 397-98 (construing purpose of New York adoption statute as ensuring best possible home for child irrespective of adoptive parent's sexual orientation); *In re B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993) (approving adoption by unmarried same-sex couple).

132. See RICHARD MOHR, *GAYS AND JUSTICE* 25 (1988) (discussing "the stereotype of gays as sex-crazed maniacs").

133. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 106 (Va. 1995).

134. See *id.* at 108.

135. See *id.* (discussing guardian's view that mother's future in job market was "bleak").

decision in *Bowers v. Hardwick*.¹³⁶ In *Bowers*, the Court refused to declare that the right to privacy encompasses homosexual sodomy between consenting adults.¹³⁷ The Court implied that if it did, there would be no non-arbitrary way to exclude adultery from the right to privacy.¹³⁸ Yet, such a claim is specious. In the paradigmatic case of adultery, one of the parties breaks his or her agreement to be faithful unbeknownst to the other party; whereas, in situations involving consenting same-sex adults, no agreements are broken and no one is harmed. Further, same-sex relations between committed partners may help promote a stable, durable bond just as opposite-sex relations do for opposite-sex couples.¹³⁹ The same cannot be said of most adulterous relations. In *Bowers*, the Supreme Court's failure to appreciate that same-sex individuals can have committed, long-term relationships may have undermined its ability to understand why sodomitic relations are protected by the right to privacy even if adulterous relations are not. Perhaps if the Court had understood that lesbians and gays can have committed, long-term relationships, it would not have denied so cavalierly the "connection between family, marriage, or procreation on the one hand and homosexual activity on the other."¹⁴⁰ If the Court is unable to distinguish between same-sex and adulterous relations within the context of the right to privacy, notwithstanding these points, then the foundations of domestic relations jurisprudence are very shaky indeed.

Although some judges seem to believe otherwise,¹⁴¹ no consensus exists about the morality of same-sex relations.¹⁴² Even if a portion of the population believes that same-sex relations are immoral,¹⁴³ that does not establish that such relations are, in fact, immoral. If that rationale were permissible, interracial relationships would be

136. 478 U.S. 186 (1986).

137. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

138. See *id.* at 195-96 ("[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery . . .").

139. The difficulties for couples that are posed by the lack of sexual relations have been recognized in the law. See Robert Heady, *Personal Business Smart Banking: Dollar's Drama Leaves Investors Perplexed About What to Do*, ATLANTA J. & CONST., Mar. 13, 1996, at E2 (stating that sexual problems had been primary reason for divorce).

140. *Bowers*, 478 U.S. at 191.

141. See Cox, *supra* note 98, at 786 (contrasting society's move toward viewing homosexuality as morally neutral behavior with that of judiciary that has not decided conclusively whether to follow trend in society to accept individual differences or to force conformity among primary caretakers).

142. See *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 3, 1988) (Tomlin, P.J., concurring) ("Homosexuality . . . has been and is considered to be an unnatural, immoral act").

143. See *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (acknowledging that many believe same-sex relationships are immoral).

immoral, as a significant minority believes that such unions are morally impermissible.¹⁴⁴

The point is not that interracial relationships are immoral; on the contrary, such relationships are morally permissible, views to the contrary notwithstanding. Just as interracial couples have been burdened unfairly because of societal prejudice masked as moral indignation, same-sex couples have been burdened unfairly because of societal prejudice masked as moral indignation.¹⁴⁵

Regardless of whether same-sex relations are morally permissible in an absolute sense, it might seem permissible to enforce the moral code of the majority, and at least in some states, it seems safe to assume that the majority of the populace does not approve morally of same-sex relationships.¹⁴⁶ Yet, if all state courts ruled according to majority views in the region, interracial relationships would be at risk.¹⁴⁷ Fortunately, the Supreme Court has made it clear that states cannot prohibit interracial unions, moral views of the populace notwithstanding.¹⁴⁸

Even were there universal agreement that same-sex unions were immoral, that would not settle the matter. Many of those who believe morality a legitimate basis for law do not claim that the state has a compelling interest in the promotion of morality.¹⁴⁹ Lacking a

144. See Cox, *supra* note 98, at 785 ("Forty-five percent of white Americans responding to a 1991 Gallup poll disapproved of interracial marriages and twenty percent believed such marriages should be illegal."); see also David 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, 416 (1990) (commenting that presumption that majority of public believed interracial marriage was immoral was not sufficient to uphold antimiscegenation statutes).

145. See Strasser, *supra* note 127, at 970 (discussing antimiscegenation laws). See generally Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991); see also 142 CONG. REC. 510, 124 (Sept. 10, 1996) (statement of Sen. Bradley) (discussing individuals who hide behind scripture to disguise their underlying intolerance of gays and lesbians).

146. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (declaring that sodomy laws are reflection of majority sentiments and therefore should not be invalidated); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 192 ("most people disapprove of people who engage in homosexual conduct."); Arthur A. Murphy et al., *Gays in the Military: What About Morality, Ethics, Character, and Honor?*, 99 DICK. L. REV. 331, 343 (1995) ("The majority of Americans disapprove of homosexuality.").

147. See *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964) (striking down Florida law that punished interracial coupling more severely than intra-racial coupling). Presumably, the Florida populace believed the former worse than the latter. If the general views of the populace were dispositive in these matters, then the Florida law would have to have been upheld.

148. See *Loving v. Virginia*, 388 U.S. 1, 1 (1967) (holding that states may not prohibit interracial marriage).

149. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (suggesting that moral concerns are not "particularly 'important' or 'substantial', or amount[] to anything more than a rational basis for regulation") (emphasis added); David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*,

compelling state interest, however, states are not justified in interfering with a gay or lesbian's fundamental parental rights, absent some showing of harm to the child.¹⁵⁰

As inappropriate as it may be to use the presumed moral view of the *populace* to justify the abridgement of fundamental rights, it is even worse to base decisions on the moral view of an individual *judge*.¹⁵¹ As a Massachusetts appellate court pointed out, allowing individual judges to determine the moral fitness of the proposed custodian according to their personal, moral, and religious views would result in different determinations by different judges.¹⁵² Although courts may not wish to be told that they should not appoint themselves as ultimate moral arbiters,¹⁵³ they nonetheless are not particularly well-equipped to decide moral issues.¹⁵⁴ As an Ohio appellate court explained, a judicial standard requiring the court to make a distinction between moral and immoral conduct is unworkable.¹⁵⁵

Some courts and commentators have suggested that judges should refrain from passing moral judgment on proposed custodial parents' lifestyle choices and should make such judgments only when there is a "direct and articulable" causal link between the parent's lifestyle and an adverse impact on the child.¹⁵⁶ The requirement that a causal connection be established between the parent's "failing" and an adverse impact on the child is called the nexus test.

C. The Nexus Test

The nexus test requires that a connection between parental conduct and harm to the child be established if the parent is to be

49 TENN. L. REV. 537, 557 (1982) (asserting that relationship between legislation and public welfare is more tenuous when laws ascribe to particular views of morality than when laws are prompted by concern for public safety and security).

150. See *supra* notes 8-42 and accompanying text (discussing fundamental nature of right to parent).

151. See *infra* notes 152-55 and accompanying text (discussing difficulties posed by allowing judges to make such decisions).

152. See *Fort v. Fort*, 425 N.E.2d 754, 757 (Mass. App. Ct. 1981).

153. See *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (noting that appellant's plea for courts to refrain from regulating on basis of morality is "astonishing").

154. See *Jarrett v. Jarrett*, 400 N.E.2d 421, 427 (Ill. 1979) (Goldenhersh, C.J., dissenting) (asserting that courts are equipped to decide legal but not moral issues); Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 209 (1990) (arguing that personal moral position of judge toward same-sex intimacy should not be enforced as law).

155. See *Whaley v. Whaley*, 399 N.E.2d 1270, 1274 (Ohio Ct. App. 1978) (finding moral norm impossible to define given "the diversity of religious and moral practice in this country").

156. See *Fort*, 425 N.E.2d at 757 (stating that judge's personal moral judgments should not be exercised in determining fitness of custodial parents unless direct and articulable adverse impact on child can be demonstrated as result of parents' lifestyle).

deprived of custody because of that conduct.¹⁵⁷ Without that nexus, there will be insufficient grounds to deny custody.¹⁵⁸ Theoretically, use of the nexus test limits the extent to which the personal biases of judges play a role in custody determinations.¹⁵⁹ Courts may espouse the nexus test, however, and nonetheless deny custody, even when there is no evidence of harm.¹⁶⁰ Indeed, the mere unsubstantiated claim that a child will be affected adversely by awarding a gay parent custody sometimes is held to constitute a sufficient nexus to justify the deprivation of custody.¹⁶¹ A willingness to accept that such a claim provides a sufficient nexus, however, is simply to ignore the nexus requirement while pretending to accept it.¹⁶²

The nexus requirement is designed to prevent courts from depriving parents of custody based on the mere possibility of harm,¹⁶³ but *not* to force courts to wait until harm to the child actually has occurred before depriving a parent of custody.¹⁶⁴ The nexus test strikes a balance between these two poles and limits judicial determinations of harm to present or reasonably predictable future effects upon the child.¹⁶⁵ Thus, harm need not have occurred in

157. See Felicia Meyers, Note, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 842-43 (1993) (explaining that nexus approach rejects "presumption of unfitness" and requires proof that parent's homosexuality will harm child in demonstrable way).

158. See *id.* at 843.

159. See David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 63-64 (1993) (pointing out that nexus test ensures that courts and agencies will ignore myths and personal biases that stigmatize gay parenting, unless connection is established between parent's homosexuality and adverse effects on child).

160. See Marie Weston Evans, Note, *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, 653-54 (1982) (discussing court's reasoning in *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982), in which Oklahoma Supreme Court espoused use of nexus requirement but nevertheless upheld custody modification based on mother's lesbianism absent any evidence of detriment to child resulting from mother's lifestyle).

161. See Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 714 (1976) (expressing frustration that courts enunciate nexus requirements but fail to define requisite strength of causal connection by accepting proof of lesbian activity or of mere claim of harm as sufficient showing of "adverse effect").

162. See *supra* note 160 (discussing situations in which courts espouse use of nexus test but denied custody absent showing of harm to child).

163. See *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (holding that harmful effect on child must be established before fundamental parental right of custody or visitation may be curtailed based on parent's sexual activity); *Rowsey v. Rowsey*, 329 S.E.2d 57, 61 (W. Va. 1985) (stating that mere speculation of potential, future harm is impermissible basis for change of custody).

164. See *Jarrett v. Jarrett*, 400 N.E.2d 421, 425 (Ill. 1979) (arguing that law should not postpone remedy until manifestations of harm become apparent); *Bottoms v. Bottoms*, 444 S.E.2d 276, 282 (Va. Ct. App. 1994) (instructing that nexus rule does not require that harm to child occur before judicial intervention); *rev'd*, 457 S.E.2d 102 (Va. 1995).

165. See *In re P.I.M.*, 665 S.W.2d 670, 672 (Mo. Ct. App. 1984) (recognizing that it is sensible to change child's custody at outset if reasonable likelihood of adverse effect is present); *DiStefano v. DiStefano*, 401 N.Y.S.2d 636, 637 (App. Div. 1978) (stating that although sexuality

order for a parent to be deprived of custody, but harm must be reasonably predictable and not merely possible.

III. HARM TO THE CHILD

When considering whether custody by a parent would be harmful to a child, courts consider several different types of harm including, *inter alia*, physical harm, emotional harm, and moral harm. Indications of any of these types of harms may provide sufficient grounds for a parent to be deprived of custody.

A. Physical Harm

Given the growing number of reported child abuse cases,¹⁶⁶ courts must be sensitive to concerns that children can be hurt severely or even killed by their parents.¹⁶⁷ When a parent in a custody case is gay or lesbian, however, courts are more likely to consider the possibility of sexual molestation than other kinds of physical abuse.¹⁶⁸ This occurs because many judges still labor under the misconception that gay men and lesbians are more likely to molest children than are heterosexual men and women,¹⁶⁹ even though current empirical data demonstrate that this is not true.¹⁷⁰ Indeed, much evidence suggests that gays and lesbians are *less* likely than heterosexual parents to molest children.¹⁷¹ Notwithstanding these

of parent properly may be considered in determining best interest of child, such considerations must be limited to "present or reasonably predictable effect" on child's welfare).

166. See *Child Abuse Statistics Challenge Us to Do Better*, GREENSBORO NEWS & REC., Mar. 20, 1996, at A10 ("Of all the problems facing communities today, none is more disturbing than the growing number of child abuse cases.").

167. See *id.* ("Statistics suggest that even more small children than ever before are being mistreated—even dying—at the hands of their parents or others who are supposed to look after them.").

168. See *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 867-69 (Mo. Ct. App. 1982) (basing denial of custody on court's own beliefs about molestation by homosexual fathers).

169. See Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1013-21 (1989) (discussing judicial misconceptions about gays and lesbians); Evans, *supra* note 160, at 649-50 (exposing judicial misconceptions of homosexual parenting, including myth that gays and lesbians are more likely than heterosexual parents to molest their children).

170. See David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 360 (1994) (reporting that homosexuals are no more likely than heterosexuals to molest or to commit crimes against children).

171. See Ali, *supra* note 169, at 1019 (urging courts to consider data that suggests homosexuals are less likely than heterosexuals to molest children); Darryl Robin Wishard, Comment, *Out of the Closet and into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401, 411 (1989) (reporting that studies suggest heterosexual men are more likely than homosexual men to be culprits of child molestation); see also Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER, L. & POL'Y 207, 216-17 (1995) (citing studies revealing that sex abuse offenders are disproportionately heterosexual men); David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*,

facts, courts continue to restrict the custodial or visitation rights of gay or lesbian parents because they fear that such parents will molest their children.¹⁷²

One explanation for these continued restrictions is that courts are unaware of the relevant data. Some courts, however, blatantly *ignore* the relevant data even when it is presented at trial.¹⁷³ Regrettably, those courts appear less concerned with preventing molestation than with punishing gay or lesbian parents. In *In re Diehl*,¹⁷⁴ for example, an Illinois trial court awarded custody to the heterosexual father over the lesbian mother, despite some evidence of child abuse.¹⁷⁵ The court did not find conclusively that the father had molested his daughter, even though there was evidence that the father had engaged in inappropriate parenting practices that the court concluded fell "in the area of poor judgment and should be stopped."¹⁷⁶ For example, after watching a television show warning children not to allow adults to "touch them in inappropriate places,"¹⁷⁷ the child had complained, "Daddy still touches me on the butt and it hurts."¹⁷⁸ Furthermore, the father was advised to let his daughter bathe in private and to stop sleeping with her while he was dressed in his undershorts.¹⁷⁹

The *Diehl* trial court believed the lesbian mother to be a fit parent,¹⁸⁰ but ruled, "[B]ecause of Jennifer's tender years . . . it is in her best interest not to be exposed to a lesbian relationship."¹⁸¹ The court apparently feared that a child's exposure to an alleged lesbian relationship might be too harmful¹⁸² and felt more comfortable awarding custody to the father, evidence of "inappropriate behavior" notwithstanding.

36 VILL. L. REV. 1665, 1684 (1991) (citing studies revealing that majority of child molestations are committed by heterosexuals with female victims).

172. See *J.L.P.(H.)*, 643 S.W.2d at 867-69 (ignoring expert evidence of psychologists and instead relying on court's own beliefs about likelihood of molestation by homosexual father).

173. See *id.*; see also *M.P. v. S.P.*, 404 A.2d 1256, 1261 (N.J. Super. Ct. App. Div. 1979) (criticizing trial judge for rejecting expert testimony that fully supported lesbian mother's continued custody).

174. 582 N.E.2d 281 (Ill. App. Ct. 1991).

175. See *In re Diehl*, 582 N.E. 2d 281, 283 (Ill. App. Ct. 1991).

176. *Id.* at 285 (citing report of court-appointed clinical psychologist investigating allegation of sexual abuse).

177. *Id.*

178. *Id.*

179. See *id.*

180. See *id.* at 288 (finding that both parents exhibited "requisite parenting skills").

181. *Id.* at 289.

182. See *id.* (explaining that, given child's young age, she may be incapable of making choices and understanding differences in sexual preferences).

In *Bottoms v. Bottoms*,¹⁸³ a Virginia court awarded custody of a child to a grandmother whose live-in boyfriend had been accused by the child's mother of having molested her when she was a child.¹⁸⁴ Although the grandmother conceded that the accusations against her companion "were not altogether unfounded,"¹⁸⁵ the trial court nevertheless awarded custody to the grandmother primarily because the mother was "living in an open lesbian relationship" with her partner.¹⁸⁶ The court also focused on the fact that the child's mother and her partner engaged in the illegal act of sodomy in the home they shared with the child,¹⁸⁷ although never in the child's presence.¹⁸⁸ The Court of Appeals reversed the lower court's decision, finding insufficient evidence of parental unfitness to award custody of the child to a nonparent.¹⁸⁹ The Supreme Court of Virginia, however, accepted the trial court's findings that the mother was unfit and that custody of the child should be awarded to the grandmother.¹⁹⁰ It seems that both the trial court and the state supreme court were less concerned about protecting the child than they were about punishing the mother.

B. Emotional Harm and Psychological Damage

The potential for emotional harm to the child is another important consideration in custody disputes.¹⁹¹ Emotional harm may be indicated by the child's being depressed,¹⁹² having few friends,¹⁹³

183. 444 S.E.2d 276 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).

184. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 278-79 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).

185. *Id.*

186. See *id.* at 280.

187. See *id.* at 281 (noting that only significant factors considered by trial judge in determining parent's fitness were mother's open lesbian relationship and her illegal sexual activities).

188. See *id.* at 279 (accepting testimony of mother that she never had exposed child to any type of sexual activity).

189. See *id.* at 276.

190. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995) (stating that court of appeals failed to give proper deference to trial court's factual findings), *rev'g* 444 S.E.2d 276 (Va. Ct. App. 1994).

191. See *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 966-67 (App. Div. 1986) (stating that parent's activities with romantic companion, whether homosexual or heterosexual, cannot be deemed improper in custodial context unless child is affected emotionally).

192. See *White v. Olson*, No. C3-95-1194, 1995 WL 536420, at *4 (Minn. Ct. App. Sept. 12, 1995) (indicating that evidence of children's depression to point of discussing suicide warrants custodial change).

193. See *Brandt v. Brandt*, 425 N.E.2d 1251, 1256, 1264 (Ill. App. Ct. 1981) (citing testimony by child that she had no friends and indicating court's unwillingness to place child in living situation that might compound child's psychological problems).

or perhaps, by the child not fulfilling his or her potential in school.¹⁹⁴ In extreme cases, gross physical symptoms can be a manifestation of emotional difficulties.¹⁹⁵

Courts must be careful, however, not to make assumptions about the cause of the unhappiness when confronted by a child who is emotionally upset.¹⁹⁶ A depressed child whose custodial parent is divorced and in a committed, same-sex relationship might be upset, in fact, by his or her parents' divorce and the loss of the noncustodial parent, rather than by the custodial parent's subsequent same-sex relationship.¹⁹⁷ This type of situation is heavily fact-dependent and requires an objective, unbiased judge to determine where the best interests of the child lie. Although cases exist in which a modification of custody would improve the child's emotional situation, in other cases a change in custody would only cause further harm by subjecting the child to further upheaval.¹⁹⁸ A judge who assumes that any emotional irregularity must have been caused by the same-sex relationship of one of the parents might well sacrifice the child's interests by refusing to consider the other possibilities.

Yet another danger is that judges will assume that a parent's same-sex relationship will harm the child emotionally, *even when no evidence is available*. In *Pennington v. Pennington*,¹⁹⁹ for example, an Indiana court used the mother's unsubstantiated testimony speculating about the father's "possible homosexuality" and photographs of a Valentine's Day card exchanged between the father and a male friend as grounds for restricting the father's visitation.²⁰⁰ The father denied that the relationship was homosexual and the mother admitted that she had never witnessed any "impropriety" between the two.²⁰¹ A court's restricting visitation would be reasonable in certain circumstances, for example, if the parent were exposing the child to

194. See *In re Jane B.*, 380 N.Y.S.2d 848, 851-52 (N.Y. Sup. Ct. 1976) (referring to diagnosis of child who was not fulfilling her potential at school as emotionally upset and concluding that because home environment caused emotional problems, change in custody was warranted).

195. See *Castorr v. Brundage*, 674 F.2d 531, 534 (6th Cir. 1982) (stating that absence of emotional interaction and bonding between parent and child may result in deficiencies in child's physical development, such as subnormal height and weight).

196. See *Whaley v. Whaley*, 399 N.E.2d 1270, 1275 (Ohio Ct. App. 1978) (noting that courts may grant changes of custody when child is troubled and custodial parent engages in "immoral" conduct without establishing causal connection between two situations).

197. See *Jane B.*, 380 N.Y.S.2d at 852 (recognizing that parents' divorce itself could be causing child's troubled emotional state).

198. For example, given that the mother and child in *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994), had a close loving relationship, see *id.* at 279, it would not be surprising for the child to have been affected detrimentally by the change in custody.

199. 596 N.E.2d 305 (Ind. Ct. App. 1992).

200. See *Pennington v. Pennington*, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992).

201. See *id.*

explicit sexual activity. Such an approach is *not* reasonable, however, when a court bars *all* contact between the child and the father's friend when there has been *no* evidence of *any* impropriety or *any* emotional harm.²⁰²

The *Pennington* court concluded that the father's friend's potential presence during the child's visits would be emotionally harmful to the child based on the mother's suspicions about the father's relationship with his friend²⁰³ and on the father's "demeanor" as observed by the court.²⁰⁴ Given that there was no evidence of harm to the child, the court simply could have ordered that no sexual practices take place in front of the child (despite the utter lack of evidence that such an order would be necessary).²⁰⁵ The court's claim that the child's emotional health justified the limitation was likely a pretext for imposing a limitation on the father and his friend rather than a genuine concern based on an independent factual basis.²⁰⁶

1. *Exposure to sexual practices*

Although generally agreeing that explicit sexual behavior should not take place in front of children, courts have been less than clear about which behaviors are permissible displays of affection rather than proscribed sexual activities.²⁰⁷ For many courts, the line of demarcation between sexual activity which is inappropriate in front of a child²⁰⁸ and that which merely involves a harmless demonstration of affection²⁰⁹ is a hazy one. Some courts explicitly reject the idea that

202. See *id.* (pointing out that no evidence of impropriety between father and his male friend was presented).

203. See *id.* at 305-06 (discussing mother's suspicions). But see *id.* at 307 (Robertson, J., dissenting) (objecting to majority's reliance on suspicions without any showing of endangerment to child).

204. See *id.* at 307.

205. See *id.* (Robertson, J., dissenting) (discussing the "far too weak" evidentiary basis upon which trial court's decision was based).

206. See *id.* (deferring to trial court's assessment of father's testimony and demeanor and failing to cite any independent factual basis in support of its decision).

207. See *Peyton v. Peyton*, 457 So. 2d 321, 324 (La. Ct. App. 1984) (explaining decision to affirm joint custody award by pointing out that sex play involving parents never occurred in child's presence); *Bottoms v. Bottoms*, 444 S.E.2d 276, 283 (Va. Ct. App. 1994) (emphasizing absence of evidence that lesbian mother had engaged in illegal sexual behavior in child's presence to support trial court's decision to grant mother custody).

208. See *Chicoine v. Chicoine*, 479 N.W.2d 891, 894 (S.D. 1992) (describing intimate acts performed by mother and lover which court believed clearly were inappropriate in front of child).

209. See *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (stating that witnessing two consenting adults hug and kiss one another is not harmful to child). But see *Flaks*, *supra* note 170, at 352 (providing examples of courts that are especially disapproving of custodial situations in which homosexual partners display affection toward each other in children's presence).

casual hugging and kissing in a friendly manner is inappropriate;²¹⁰ other courts have disapproved of such displays of affection and have used evidence of such acts to deny custody.²¹¹

A further distinction should be made. Some kinds of affection are *not* inappropriately displayed in front of a child,²¹² even though people who are just friends might not choose to express their affection for each other in that manner.²¹³ For example, in *Bottoms*, the mother and her partner "displayed some affection in the child's presence by hugging, kissing, or patting one another on the bottom."²¹⁴ This kind of display will not harm the child and, presumably, the court would have had no qualms about the display of such behavior if the individuals had been married to one another.²¹⁵ Sometimes, a court's disapproval of such affection in a child's presence is not that the display itself would harm the child, but rather that it is affection between unmarried individuals and thus represents "immoral" behavior.²¹⁶

When a court chastises a couple for exposing a child to a display of affection that would have been perfectly acceptable had the couple been married, it clearly is not the activity but rather the relationship of the parties that is objectionable. Perhaps the best illustration of the personal moral biases of some judges is the weight given to evidence that nonmarried partners merely *said* that they loved each other in front of a child.²¹⁷ One court questioned the child involved about such *verbal* exchanges in an attempt to prove the

210. See *Pleasant*, 628 N.E.2d at 642 ("Seeing two consenting adults hug and kiss in a friendly manner is not harmful . . .").

211. See *Scott v. Scott*, 665 So. 2d 760, 764 (La. Ct. App. 1995) (finding that mother's hugging and kissing her female partner in front of her son was harmful and an appropriate basis for changing custody).

212. See *Bottoms*, 444 S.E.2d at 279 (implying that "hugging, kissing, or patting one another on the bottom" are permissible). But see *Scott v. Scott*, 665 So. 2d 760, 764 (La. Ct. App. 1995) (noting that affection displayed by mother and her partner "in the presence of the children went beyond the casual exchange of affections which might be expected in close female friendships").

213. See *Scott*, 665 So. 2d at 764 (noting that affection displayed by mother and her partner went beyond exchange that might be expected in close friendship).

214. *Bottoms*, 444 S.E.2d at 279.

215. See *id.* at 281 (justifying denial of custody to parent with non-marital live-in companion by "explaining" that parental behavior influences children's "values and views" as to what is "acceptable" behavior and conduct).

216. See *Lasseigne v. Lasseigne*, 434 So. 2d 1240, 1242 (La. Ct. App. 1983) (implying that signs of affection between defendant and woman who is not his wife represent immoral behavior).

217. See *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, P.J., concurring) (relating child's testimony in which court questions child about whether mother and lesbian lover hug, kiss, and "tell each other that they love each other" to determine whether child was exposed to homosexual "activities").

existence of homosexual *acts*. To classify such *statements* as inappropriate sexual *activity* is simply to conflate two different activities.²¹⁸

Courts make a further distinction when examining whether the sexual behavior of parents is appropriate. Some courts consider only behavior that the child sees to be relevant,²¹⁹ although other courts object even if the child does not see or hear the activity but merely is in the same house where the behavior occurs.²²⁰ Certainly, the two situations are quite different and should not be treated in the same way. This inconsistency may mean that relatively similar situations might be treated quite differently because one court interprets the sexual activity factor to include any activity that occurs while the child is in the home and another court limits the factor to include only activity seen by the child.²²¹

2. *Housing*

Historically, courts have imposed numerous visitation restrictions when a parent cohabits with a nonmarital partner regardless of the parent's sexual orientation.²²² Some courts even have prohibited the partner from staying overnight while the children are visiting, even though the partner permanently resides there.²²³ Other times, courts have required not only that the parent's same-sex partner not be there during visitation, but also that the partner move out

218. See Strasser, *supra* note 6, at 397 (discussing individuals who were punished for what they said rather than what they did).

219. See *A. v. A.*, 514 P.2d 358, 360 (Or. Ct. App. 1973) (articulating absence of evidence that children were "exposed to deviant sexual acts"); *Stroman v. Williams*, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987) (pointing out that daughter has her own bedroom and is not exposed to "deviant sexual acts").

220. See *Roe v. Roe*, 324 S.E.2d 691, 691 (Va. 1985) (concluding that child's best interests are not advanced by awarding custody to parent who "carries on an active homosexual relationship in the same residence as the child"); *Brown v. Brown*, 237 S.E.2d 89, 92 (Va. 1977) (justifying shift in custody because couple was "openly cohabiting in the presence of her two young children"). But see *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (stating that only relevance of custodial parent living with homosexual partner is whether child is adversely affected by that cohabitation).

221. See *supra* note 220.

222. See *infra* notes 223-25.

223. See *Irish v. Irish*, 300 N.W.2d 739, 741 (Mich. Ct. App. 1981) (affirming trial court's order that children could not stay overnight at mother's house if her lesbian lover also spent night); *Conkel v. Conkel*, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987) (precluding father from allowing live-in homosexual partner to visit overnight during visitation by children); *Carrico v. Blevins*, 402 S.E.2d 235, 237 (Va. Ct. App. 1991) (ordering mother to refrain from having live-in male partner sleep overnight during visitation).

entirely.²²⁴ At least one court went so far as to specify that the parent not live with *any* adult of the same sex.²²⁵

Courts do not consider only current housing arrangements, but also may consider whether the parent has future plans to move in with a nonmarital partner.²²⁶ Courts claim that by factoring nonmarital housing arrangements into custody determinations, they prevent children from harm caused by exposure to "immoral" conduct,²²⁷ although they may be inconsistent with respect to whether they will prevent such exposure. For example, a court deciding who shall have custody may consider a parent's plan to live with a partner a neutral factor if that person is of the opposite sex and a negative factor if that person is of the same sex, even when there is no plan to marry in either case.²²⁸ In *Bottoms*, the mother lost custody because of her "immoral" and "illegal" relationship with her same-sex partner.²²⁹ Ironically, the grandmother who gained custody also had an immoral and illegal²³⁰ relationship—she lived with a male companion without benefit of marriage.²³¹ This case is but one example in which the laws were not applied equally, as a child was removed from one household where "immoral" and "illegal" conduct took place and placed in another household where "immoral" and "illegal" conduct took place.

224. See *Larroquette v. Larroquette*, 293 So. 2d 628, 629 (La. Ct. App. 1974) (dictating that no visitation should be allowed in home of father who lives with "concubine" and noting that "hypocritical removal" of partner at visitation time does not transform home into "respectable place of residence"); see also Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 867-69 (1985) (discussing restrictions placed on homosexual parents' intimate associations by court-ordered custody arrangements).

225. See *In re Diehl*, 582 N.E.2d 281, 294 (Ill. App. Ct. 1991) (criticizing overbreadth of trial court's order that visitation shall take place without presence of "any other female" with whom mother may be residing).

226. See *Jacobson v. Jacobson*, 314 N.W.2d 78, 80-81 (N.D. 1981) (citing trial court's finding that mother has future plans to live with lesbian partner in support of its decision to deny custody).

227. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995) (discussing trial court's wish to prevent child from being exposed to "immoral" conduct).

228. Compare *Jacobson*, 314 N.W.2d 78 (mother deprived of custody because she lived with same-sex lover), with *Lapp v. Lapp*, 336 N.W. 2d 350 (N.D. 1983) (father not deprived of custody despite living with woman to whom he was not married). In *Lapp*, the court expressly distinguished *Jacobson* by pointing out that the mother in that case had been involved in a same-sex relationship. See *Lapp*, 336 N.W.2d at 352.

229. See *Bottoms*, 457 S.E.2d at 107 (referring to mother's lesbian relationship).

230. Fornication is illegal in Virginia. See VA. CODE ANN. § 18.2-344 (Michie 1996) ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication."). Lewd and lascivious cohabitation also is illegal. See VA. CODE ANN. § 18.2-345. The latter statute is violated when the openness and notoriety of the conduct affront the public conscience. See *Everett v. Commonwealth*, 200 S.E.2d 564, 566 (Va. 1973).

231. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 278-79 (Va. Ct. App. 1994).

Indeed, *Bottoms* illustrates just how unequal the application can be. There, a *third party* living in an allegedly immoral, illegal relationship nonetheless was able to bear the "heavy burden of persuasion"²³² necessary to convince a court that the natural parent should be denied custody.²³³ The only apparent difference was that the parent had a same-sex partner and the third party had an opposite-sex partner.²³⁴

Courts not only impose visitation restrictions in situations involving a parent's current or planned cohabitation, but also occasionally bar unmarried partners who maintain separate residences from staying overnight while the child is visiting.²³⁵ Yet, it should be clear that this can result in great abuse. For example, in *Commonwealth ex rel. Drum v. Drum*,²³⁶ a mother did not want her children to visit their father (her estranged husband) at times when her husband's mistress (the mother's former friend) was present.²³⁷ Certainly, it was not surprising that the wife bore her ex-friend ill will.²³⁸ There was no evidence, however, that the father's mistress had harmed the children by her presence,²³⁹ and it was not at all clear that the children's best interests were promoted by preventing contact.²⁴⁰ Further, because the mistress and husband had planned to marry when the divorce was final,²⁴¹ it was doubtful that the restriction would have been particularly effective or long-lasting.

The willingness of courts to impose visitation restrictions on nonmarital partners, even absent any evidence of harm, poses special difficulties for gay and lesbian parents.²⁴² Because same-sex partners cannot marry, such restrictions may prevent a partner from ever

232. *Gerald D. v. Peggy R.*, No. C-9101, 79-12-143-CV, 1980 WL 20452, at *5 (Del. Fam. Ct. Nov. 17, 1980).

233. *See Bottoms*, 444 S.E.2d at 278 ("A non-parent is granted custody over a parent only when the parent is unfit to have custody of the child or when continued custody with the parent will be deleterious to the child.").

234. *See Bottoms*, 457 S.E.2d at 105.

235. *See Commonwealth ex. rel. Drum v. Drum*, 397 A.2d 1192, 1194 (Pa. Super. Ct. 1979) (affirming lower court order that visitations occur outside company of unmarried partner).

236. 397 A.2d 1192 (1979).

237. *See Drum*, 397 A.2d at 1195 (Spaeth, J., dissenting).

238. *See id.* at 1196 (Spaeth, J., dissenting) ("[I]t would be astonishing if she were not resentful of someone who, while purportedly her best friend, has, as she must see it, stolen her husband and destroyed her family.").

239. *See id.* at 1199 (Spaeth, J., dissenting) (noting that there was no evidence of lover's presence adversely affecting children).

240. *See id.* (Spaeth, J., dissenting).

241. *See id.* at 1195 (Spaeth, J., dissenting).

242. *But see Diehl v. Diehl*, 582 N.E.2d 281, 292 (Ill. App. 1991) (arguing that approach is "sexual orientation neutral").

getting to know the parent's child, even when the partner played no role in the break-up of the marriage.²⁴³

Regrettably, courts might welcome the fact that such restrictions may prevent the partner and the parent's child from getting to know each other and thus from deriving the mutual benefits that might arise from such contact. Many courts do not appear interested solely in shielding the child from reasonably predictable harm.²⁴⁴ Indeed, courts sometimes bar any gay or lesbian adult,²⁴⁵ or perhaps, any same-sex nonrelative,²⁴⁶ from being in the child's presence.

It would be unfair to say that courts fashion overbroad restrictions only when gays or lesbians are involved.²⁴⁷ For example, a visitation order preventing a man from having his children at night in the presence of any woman not his wife obviously is overbroad, because it might preclude the fathers from taking the children to their grandmother's house for a weekend visit.²⁴⁸ If the objective of the courts truly were to prevent actual or likely harm to the child,²⁴⁹ the order would reflect that goal by limiting visitation with the particular person whose presence the court found would be harmful to the child.²⁵⁰

For gay and lesbian parents, there is little comfort in learning that courts have imposed similarly overbroad restrictions on other classes of people. Knowledge that unfair burdens are imposed on more than

243. See *Dailey v. Dailey*, 635 S.W.2d 391, 396 (Tenn. App. 1981) (prohibiting mother from having child in presence of any homosexual with whom she may have lesbian relationship).

244. See *supra* notes 173-90 and accompanying text (discussing cases in which "best interests" standard was not used).

245. See *Gottlieb v. Gottlieb*, 488 N.Y.S.2d 180, 182 (App. Div. 1985) (Kupferman, J., concurring) (noting that lower court conditioned visitation privileges on complete exclusion of parent's partner and other homosexuals from contact with child); *In re Jane B.*, 380 N.Y.S.2d 848, 860-61 (Sup. Ct. 1976) (requiring that child not be taken where known homosexuals were present). See generally Susoeff, *supra* note 224, at 867 (observing that child often is required to be kept out of presence of parent's lover and homosexual friends).

246. See *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (approving of trial court's decision to condition custody on mother ending cohabitating with non-related females).

247. See *Wilson v. Wilson*, 341 P.2d 780, 783 (Cal. Ct. App. 1959) (affirming trial court's order forbidding visitation when unmarried friend was present); *Fulwiler v. Fulwiler*, 538 P.2d 958, 960 (Or. Ct. App. 1975) (affirming trial court's order prohibiting visitation when unmarried partner was present).

248. See *Duplantier v. Monteaux*, 412 So. 2d 215, 218 (La. Ct. App. 1982) (noting that order of trial court could prevent visitations from taking place at night in the presence of child's grandmother and close relatives). But see *Palmer v. Palmer*, 416 A.2d 143, 145 (Vt. 1980) (pointing out that reading visitation limitations so narrowly would violate clear intent of order).

249. See *Pleasant v. Pleasant*, 628 N.E.2d 633, 640 (Ill. Ct. App. 1993) (finding that parent seeking restriction has burden of showing by preponderance of evidence that current visitation is harmful to child).

250. See *Gallo v. Gallo*, 440 A.2d 782, 787 (Conn. 1981) (modifying overnight visitation restriction to apply only to particular woman with whom defendant was living at time of hearing).

one class does not somehow lessen the burden. As the Supreme Court has stated, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."²⁵¹

The fact that courts impose overly broad restrictions on several classes may help allay fears that gays and lesbians are being subjected to invidiously discriminatory restrictions.²⁵² Regrettably, such fears are well-founded, as the overbroad restrictions sometimes are different in kind when gays or lesbians are involved. For example, when courts prevent nonrelatives of the opposite sex from being present when children visit an unmarried heterosexual parent, the court presumably is attempting to prevent the child from exposure to meretricious relationships by limiting contact with a potential sex partner of the parent. Orders involving gay or lesbian parents, however, sometimes go much further and prohibit exposure to *all* "known homosexuals" regardless of whether the parent would be physically attracted to those individuals.²⁵³ Some courts, for example, have prohibited a child from being present when a lesbian has contact with gay male friends or a gay man has contact with a lesbian.²⁵⁴ This shows that when gays or lesbians are involved, courts may be concerned not only with preventing exposure to the parent's relationships, but also with preventing all contact with people who identify themselves as homosexual. These judges apparently believe that exposure to gays and lesbians somehow will "contaminate" the children despite evidence to the contrary.²⁵⁵

3. Alienation

One reason that courts may restrict the presence of a parent's nonmarital partner during visitation is the fear that a relationship with

251. *Shelley v. Kramer*, 334 U.S. 1, 22 (1948).

252. For a discussion of whether gays and lesbians are subjected to invidiously discriminatory treatment and whether they should be held to constitute a suspect class, see Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 *TEMPLE L. REV.* 937 (1991) (questioning court's reluctance to recognize homosexuals as suspect class).

253. See *Gottlieb v. Gottlieb*, 488 N.Y.S.2d 180, 182 (App. Div. 1985) (Kupferman, J., concurring) (reinforcing trial court's order that child not be taken where "known homosexuals" were present).

254. See *Pleasant*, 628 N.E.2d at 637 (discussing lower court opinion that precluded mother from visiting her son in presence of any person of "known homosexual tendencies"); *J.L.P.(H.) v. D.L.P.*, 643 S.W.2d 865, 872 (Mo. 1992) (suggesting that it would be appropriate to prohibit "father's exercise of visitation in presence of known homosexuals"); *In re Jane B.*, 380 N.Y.S.2d 848, 861 (Sup. Ct. 1976) (allowing mother to visit child so long as child was not taken anywhere where "known homosexuals are present").

255. See *infra* notes 168-206 (discussing misconceptions about alleged harmful effects that gays and lesbians will have on children).

the partner will supplant the one the child has with the other parent.²⁵⁶ Courts generally believe that it is in the best interest of the child to have a relationship with both parents, and that partners who impede the relationship with the other parent adversely affect that interest.²⁵⁷ As an Oregon appellate court observed, "[I]t is essential that the parents do nothing to intentionally interfere with the bonds of love and affection the child may develop for each parent."²⁵⁸ Regrettably, however, courts do not enforce this obligation uniformly.

Although courts may accept that a divorced parent generally has a duty not to alienate the child from the other parent,²⁵⁹ they may make an exception if the alienation "has its foundation in the conduct of the complaining parent."²⁶⁰ Because many parents who alienate their children from the other parent believe the other parent is responsible, for example, because he or she is a bad person,²⁶¹ the question then may become whether the alienation is justified,²⁶² although this exception must be properly understood. As the North Dakota Supreme Court pointed out, "[A] custodial parent should, in the best interests of the children, nurture the children's relationship with the noncustodial parent" "[n]otwithstanding the [latter's] perceived imperfections."²⁶³ Interference with custody will not be justified merely because one parent suspects the other parent of wrongdoing.²⁶⁴

256. See *DiStefano v. DiStefano*, 401 N.Y.S.2d 636, 638 (App. Div. 1978) (modifying custody order after determining that mother's nonmarital partner made repeated efforts to alienate children from their father).

257. See *Schutz v. Schutz*, 581 So. 2d 1290, 1293 (Fla. 1991) (emphasizing importance of child's frequent and continuous contact with both mother and father after marriage dissolves).

258. *In re Birge*, 579 P.2d 297, 299 (Or. Ct. App. 1978).

259. See *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982) (finding that child's alienation as result of custodial parent's intentional conduct demonstrates major breach of parental responsibility). But see Nancy Polikoff, *Educating Judges About Lesbian and Gay Parenting: A Simulation*, 1 L. & SEXUALITY 173, 190-91 (1991) (discussing how one parent's portraying the other parent negatively solely because of the latter's sexual orientation can be used to undermine the former's deserving custody).

260. 630 S.W.2d at 243.

261. See *Birge*, 579 P.2d at 299 (finding that father used child as weapon in his attempt to punish mother for supposed transgressions).

262. See *Kahn v. Kahn*, 252 A.2d 901, 902 (D.C. 1969) (modifying custody order after finding that mother had tried to alienate child from father without justification); see also *In re Downing*, 432 N.W.2d 692, 694 (Iowa Ct. App. 1988) (discussing Iowa law that makes "denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangements" (citing IOWA CODE § 598.41(1) (1987))).

263. *Johnson v. Schlotman*, 502 N.W.2d 831, 834 (N.D. 1993).

264. See *Kerby v. Kerby*, 792 S.W.2d 364, 365 (Ark. Ct. App. 1990) (asserting that behavior of mother who deliberately alienated her child by interfering with visitation based on her unfounded suspicion of child abuse, would not be condoned).

In *McAdams v. McAdams*,²⁶⁵ the ex-wife “admitted she let air out of a moving van’s tires when [her ex-husband] moved” and the trial court found that “she may have ransacked [her ex-husband’s] apartment after he left.”²⁶⁶ Further, evidence was presented that she had physically abused one of the children.²⁶⁷ Nonetheless, the ex-husband was not justified in subsequently convincing his older son to sever his relationship with his mother.²⁶⁸ Furthermore, the father was not permitted to benefit from his acts by gaining custody. As the North Dakota Supreme Court explained, a “parent who willfully alienates a child from the other parent may not be awarded custody based on that alienation.”²⁶⁹

Ironically, the *McAdams* court cited with approval a case it had decided two years earlier, *Johnson v. Schlotman*.²⁷⁰ In *Schlotman*, the court awarded custody to the father over a lesbian mother despite evidence that he had expressed in front of the children his views that the mother’s homosexual lifestyle was “deviant and . . . not to be tolerated.”²⁷¹ Certainly, if a parent has a duty to nurture the relationship with the other parent, one would expect a court neither to tolerate the inculcation of such attitudes of hate nor to allow a parent to benefit from such a breach of his or her parental duty, especially because the court in the same opinion recognized that a parent has a duty not to turn a child away from the other parent. Nonetheless, the court was persuaded that because the view was not the ex-husband’s view “exclusively,”²⁷² his expression of intolerant views to his children did not breach his duty to “nurture the children’s relationship with the noncustodial parent.”²⁷³ Further, the court accepted the trial court’s finding that the husband had not “poisoned the children’s minds,” because he was not the “sole cause of the children’s discomfort” with their mother and her partner.²⁷⁴ Apparently, the court overlooked that such a rule would imply that a parent who was even partially responsible for causing a child to have bad feelings about him or her thereby would immunize the other

265. 530 N.W.2d 647 (N.D. 1995).

266. *McAdams v. McAdams*, 530 N.W.2d 647, 649 (N.D. 1995).

267. *See id.*

268. *See id.* at 650.

269. *Id.*

270. *See id.* (citing *Johnson v. Schlotman*, 502 N.W.2d 831, 834 (N.D. 1993)).

271. *Schlotman*, 502 N.W.2d at 834.

272. *Id.*

273. *Id.*

274. *Id.* (emphasis added).

parent from charges of parental alienation.²⁷⁵ For example, if the ex-wife in *McAdams* were responsible at all for alienating her own children, then *Schlotman* would seem to require that the husband *not* be penalized for contributing to the children's alienation from their mother, although the North Dakota Supreme Court cited *Schlotman* for the opposite proposition.²⁷⁶

It also is instructive to compare *Schlotman* to *In re Birge*,²⁷⁷ in which an Oregon court awarded a mother custody because the father had alienated the child, even though the mother did not have an "exemplary" home life.²⁷⁸ After the couple's divorce, the mother had lived with her new fiancé during the time the child would visit and "[o]n occasion, she, her fiancé and the child all share[d] the same bed."²⁷⁹ Presumably, many members of the community would not have approved of the sleeping arrangements or of the relationship. In this case, however, the court declined to "pass moral judgment."²⁸⁰ Had the Oregon court adopted a *Schlotman*-like analysis and ignored the father's actions because of the mother's questionable living arrangements, the result would have been quite different.

When a court holds that parental conduct was not in fact alienating, it is difficult to determine whether the court has assessed the situation accurately. One can look at other cases to see if similar conduct constituted alienation,²⁸¹ but such determinations are extremely fact-specific.²⁸² In *L. v. D.*,²⁸³ the Missouri Court of Appeals upheld the lower court, finding the aggrieved parent responsible for the child's alienation.²⁸⁴ When a trial court finds

275. *But see* *Ward v. Ward*, 353 P.2d 895, 900 (Ariz. 1960) (noting significance of mother and new husband's efforts to undermine child's respect for his father).

276. *Accord* *McAdams v. McAdams*, 530 N.W.2d 647, 650 (N.D. 1995) (holding that parent who willfully alienates child from other parent may be denied custody on that basis).

277. 579 P.2d 297 (Or. App. 1978).

278. *See In re Birge*, 579 P.2d 297, 299 (Or. App. 1978).

279. *Id.* *But see* *Larroquette v. Larroquette*, 293 So. 2d 628, 629 (La. Ct. App. 1974) (finding visitation harmful when father lived in "open concubinage" and child shared bed with father and his partner on overnight visits).

280. *Birge*, 579 P.2d at 299.

281. *Compare* *L. v. D.*, 630 S.W.2d 240, 241 (Mo. Ct. App. 1982) (finding insufficient evidence of alienation when father moved without notifying mother and neglected to give her his new residential phone number), *with In re Quirk-Edwards*, 509 N.W.2d 476, 479 (Iowa 1993) (finding sufficient evidence of alienation when mother failed to notify ex-husband of her address or telephone number).

282. In *L. v. D.*, for example, the mother knew the father's office number. *See* 630 S.W.2d at 241. It is likely, however, that the mother still was unable to speak to her children. In *Quirk-Edwards*, the mother's failure to consult with the noncustodial parent before her move was a significant factor that indicated she was alienating the child from her father. *See* 509 N.W.2d at 479.

283. 630 S.W.2d 240 (Mo. Ct. App. 1982).

284. *See id.* at 242-43 (suggesting that children may have been alienated by mother's own actions).

that "*any contact* between [the mother's current lover] or any other lesbian lover of the appellant and the children *would, in fact, impair their emotional development*,"²⁸⁵ however, one cannot be confident of the court's objectivity when finding that the mother rather than the father was responsible for the alienation of the children.

C. Moral Harm

Courts may limit the exposure of children to nonmarital partners based on the fear that the child will suffer present or future moral harm.²⁸⁶ A Missouri appellate court, for example, argued that courts "cannot ignore the effect which the sexual conduct of a parent may have on a child's moral development."²⁸⁷ Similarly, in *Bottoms v. Bottoms*,²⁸⁸ a Virginia appellate court pointed out that a "parent's behavior and conduct in the presence of a child influences and affects the child's values and views as to the type of behavior and conduct that the child will find acceptable."²⁸⁹ Yet the relevant question is whether or how the parent's effect on the child's views and values might constitute harm.

Deprivation of custody is understandable when there is evidence that the child is suffering.²⁹⁰ In many cases, however, a child who is doing well²⁹¹ nonetheless will be removed from the parent because of the parent's same-sex relationship.²⁹² At least one court has suggested that even if the majority of society disapproves of the parent's relationship, that fact alone may not justify a *denial* of

285. *Id.* at 245 (emphasis added).

286. See *Jarrett v. Jarrett*, 400 N.E.2d 421, 425 (Ill. 1979) (discussing dangers posed by waiting several years to determine child's home environment).

287. *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987); see also *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 285 (Mo. Ct. App. 1989) (emphasizing that mother's sexual orientation never will be a neutral factor in development of child's character).

288. 444 S.E.2d 276 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).

289. *Bottoms v. Bottoms*, 444 S.E.2d 276, 281 (Va. Ct. App. 1994), *rev'd*, 457 S.E.2d 102 (Va. 1995).

290. See *In re Jacinta M.*, 764 P.2d 1327, 1330 (N.M. Ct. App. 1988) (finding parent's sexual conduct relevant in deciding custody when compelling evidence was presented that such conduct affected child's best interests).

291. See *Bottoms*, 444 S.E.2d at 279 (acknowledging that child and mother had close, loving relationship and that mother provided adequate food, clothing, and shelter); *Collins v. Collins*, No. 87-238, 1988 WL 30173, at *1 (Tenn. Ct. App. Mar. 30, 1988) (recognizing that mother provided sufficiently for her daughter).

292. See, e.g., *Collins*, 1988 WL 30173, at *1 (modifying custody order despite mother's admirable parenting efforts); *Tucker v. Tucker*, 881 P.2d 948, 953 (Utah 1994) (disapproving of trial court's custody despite fact that child was "thriving" in care of her mother during temporary custody); *Bottoms*, 457 S.E.2d at 107 (awarding custody to grandparent despite loving relationship between mother and child).

custody.²⁹³ It thus is surprising that courts may modify custody because the parent is in a relationship that is morally controversial.²⁹⁴ It is even more surprising when rights that are described as fundamental²⁹⁵ and as rooted in "nature and human instinct"²⁹⁶ suddenly are described as mere "technical" rights²⁹⁷ when gay or lesbian parents are involved.

Courts recognize that one parent's wishes alone should not be used to limit the custody or visitation of the other parent.²⁹⁸ Further, some courts have stated that "[e]vidence of one parent's homosexuality, without a link to detriment to the child, is insufficient to constitute harm."²⁹⁹ Thus, in many states, courts will look to see whether a same-sex relationship has an adverse effect on the child before denying custody on that account,³⁰⁰ because determinations of custody generally are not based on sexual preference alone.³⁰¹ The requirement that there be an adverse effect would have little meaning, however, if the confusion that might result from one parent's condemning the other parent's relationship would suffice to establish harm.³⁰² Recognizing this difficulty, a California appellate court clearly stated that "the opposing moral positions of the parties, or the outright condemnation of one parent's beliefs by the other

293. See *Brandt v. Brandt*, 425 N.E.2d 1251, 1262 (Ill. App. Ct. 1981) (stating that affront to public morality is only additional element to be considered when assessing child's best interests).

294. See *supra* notes 93-101 and accompanying text (discussing lack of consensus regarding morality of same-sex relations).

295. See *supra* notes 9-42 and accompanying text (discussing fundamental nature of right to parent).

296. *In re J. P.*, 648 P.2d 1364, 1373 (Utah 1982).

297. *Bottoms*, 457 S.E.2d at 108.

298. See *Duplantis v. Monteaux*, 412 So. 2d 215, 221 (La. Ct. App. 1982) (Foret, J., dissenting) (rejecting notion that restriction should be imposed for no reason other than because mother insisted on it); *DeVita v. DeVita*, 366 A.2d 1350, 1354 (N.J. Super. Ct. App. Div. 1976) (observing that parent's personal wishes do not govern conditions of custody).

299. *Birdsall v. Birdsall*, 243 Cal. Rptr. 287, 290-91 (Ct. App. 1988); see also *Large v. Large*, No. 93AP-735, 1993 WL 498127, at *5 (Ohio Ct. App. Dec. 2, 1993) (pointing out that, despite mother's lesbian relationship, loving and nurturing atmosphere helped children deal with situation). But see *Dailey v. Dailey*, 635 S.W.2d 391, 393-94 (Tenn. Ct. App. 1981) (finding sufficient showing of harm even without specific evidence that child was harmed by living with lesbian mother).

300. See *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980) (concluding that determination of whether parent is unfit must be based on harmful parental behavior); *In re Adoption of Child by J.M.G.*, 632 A.2d 550, 554 (N.J. Super. Ct. App. Div. 1993) (commenting that prior to denying custody, several states require proof that parent's sexual orientation adversely affects child).

301. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 281 (Va. Ct. App. 1994) (finding that parent's homosexuality does not create presumption of unfitness for custody), *rev'd*, 457 S.E.2d 102 (Va. 1995); *Birdsall*, 243 Cal. Rptr. at 289 (noting that, as a matter of law, parents are not unfit merely because they are homosexual); see also *Evans, supra* note 86, at 651 (stating that fundamental rights of parents should not be denied or restricted on basis of sexual orientation alone).

302. See *supra* notes 270-76 and accompanying text (discussing case in which ex-husband disapproved of his ex-wife's lesbian relationship).

parent's religion, which may result in confusion for the child, do not provide an adequate basis for restricting visitation rights."³⁰³

If disagreement between the parents about the morality of same-sex relationships does not constitute harm, then it is important to establish what does constitute harm to the child, if only to provide a check on courts that seem determined to find harm regardless of the underlying facts.³⁰⁴ For example, in *Pleasant v. Pleasant*,³⁰⁵ an Illinois trial court "found that having [the child] in the presence of gays and lesbians was endangering his gender identity and morals and not in his best interests."³⁰⁶ The appellate court, however, reversed because there was no factual basis for such a finding.³⁰⁷ Further, the appellate court in this case decided that sexual orientation is irrelevant unless it "directly harms" the child.³⁰⁸

In general, courts require detriment to the child before depriving the parent of custody, whether the "illicit" relationship involves a same-sex or an opposite-sex unmarried couple.³⁰⁹ Nevertheless, some courts refuse to see the analogy between same-sex and opposite-sex unmarried couples and continue to deny gay or lesbian parents custody or visitation rights without indications of harm.³¹⁰ For example, in *Constant A. v. Paul C.A.*,³¹¹ a Pennsylvania court recognized that in a custody dispute between two parents, the "paramount consideration is the welfare of the children."³¹² The court, however, refused to limit its consideration to "the best interest of the children, as it related to the [lesbian] mother's parenting capacity,"³¹³ as if use of that standard somehow would be unrelated to the "paramount consideration" of promoting the children's welfare. Indeed, the court in *Constant A.* rejected the nexus test,³¹⁴ although the court arguably

303. *Birdsall*, 243 Cal. Rptr. at 290-91.

304. See, e.g., *L. v. D.*, 630 S.W.2d 240, 245 (Mo. Ct. App. 1982) (concluding that child's contact with any lesbian lover will in fact cause harm).

305. 628 N.E.2d 633 (Ill. App. Ct. 1993).

306. *Pleasant v. Pleasant*, 628 N.E.2d 633, 638 (Ill. App. Ct. 1993).

307. See *id.* at 642-43; see also *infra* notes 401-48 and accompanying text (discussing judicial discretion).

308. *Pleasant*, 628 N.E.2d at 642.

309. See, e.g., *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980) (explaining that same-sex relationship does not make parent unfit to further welfare of child unless parental behavior adversely affects child); *In re Burrell*, 388 N.E.2d 738, 739 (Ohio 1979) (declaring that opposite-sex relationship between unmarried people does not warrant denial of custody unless detrimental impact on child is demonstrated).

310. See *Constant A. v. Paul C.A.*, 496 A.2d 1, 2 (Pa. Super. Ct. 1985) (holding that homosexuality is relevant in any custody dispute).

311. 496 A.2d 1, 2 (Pa. Super. Ct. 1985).

312. *Id.* at 9.

313. *Id.* at 2-3.

314. See *id.* at 5; see also *supra* notes 157-65 and accompanying text (explaining "nexus test").

would have reached the same result even if it had accepted that test, because the court found it "inconceivable" that the children could be "exposed to [the mother's lesbian] relationship and not suffer some emotional disturbance, perhaps severe."³¹⁵ Thus, even if the court had limited its consideration to the promotion of the children's welfare, the court presumably still would have refused to allow the mother to have custody, given the court's inability to imagine that the mother's relationship would not be detrimental to her children.

If the *Constant A.* court had required evidence of actual or likely harm as the other courts have done,³¹⁶ then the result would have been different. As a general matter, it should be very difficult to deprive parents of the custody of their children when those children are thriving,³¹⁷ especially if there is no reason to believe that something terrible would befall the children sometime in the future. Certainly, if there is reason to think that something terrible will occur in the future, courts should not wait until the harm has occurred. Because there is ample evidence that children of gay or lesbian parents are as healthy as those with heterosexual parents,³¹⁸ however, it will not suffice to assume that a detrimental effect will manifest in the child sometime in the future. Further, even if there were empirical evidence to that effect, courts should be wary of using statistical evidence in determining custody cases,³¹⁹ particularly because courts are supposed to determine which of the individuals seeking custody in *this* case would best promote the interests of the children before the court.

315. *Constant A.*, 496 A.2d at 8.

316. See, e.g., *Birdsall v. Birdsall*, 243 Cal. Rptr. 287, 290 (Ct. App. 1988) (explaining that court's decision to intervene must be based on affirmative showing of harm or likelihood thereof).

317. See *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980) (finding that parental unfitness depends on harmful parental behavior); see also *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (finding lesbian mother acceptable as parent because child's development was superb).

318. See *Flaks*, *supra* note 170, at 355 (finding no evidence suggesting that homosexual-reared children are inferior to children raised by heterosexual parents); 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, 309 (1994) (finding no data showing that children raised by homosexual parents are harmed relative to their heterosexually-raised counterparts); Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent Is Homosexual or Lesbian—An Empirical Study*, 23 SUFFOLK U. L. REV. 711, 739 (1989) (concluding that gays and lesbians are emotionally and psychologically equivalent to heterosexuals); Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1055 (1995) (concluding that children raised by lesbian parents develop normally).

319. See *Branson v. Branson*, 411 N.W.2d 395, 400 (N.D. 1987) (reversing custody award that was based on statistical probability that one parent was less desirable parent because of her childhood experiences).

Regrettably, courts often are more interested in implementing their own prejudices than in promoting the welfare of children. The court in *Constant A.*, for example, decided that because there was *no* showing of harm to the child,³²⁰ the lesbian mother merely should have her visitation rights *limited*, rather than abrogated entirely.³²¹ Apparently, some courts are willing to abridge the fundamental rights of parents without any evidence of actual or likely harm to their children.³²²

Courts may have irrational fears that a child who is raised by a gay or lesbian parent may be harmed in any number of ways, empirical evidence notwithstanding. For example, courts may fear that allowing the child to be raised by a gay or lesbian parent will increase the likelihood that the child will grow up to be gay or lesbian.³²³ Yet, there is nothing wrong with being gay or lesbian, and courts should not make decisions on that basis.³²⁴ In any event, children of gay or lesbian parents are no more likely to be gay or lesbian than are children of heterosexual parents.³²⁵ Indeed, many experts have found that children raised by lesbian or gay parents cannot be distinguished from children raised by heterosexual parents with respect to their gender identity.³²⁶

320. See *Constant A.*, 496 A.2d at 67-68.

321. See *id.* at 3 (considering mother's lesbian relationship only when considering whether to limit, rather than to deny, visitation).

322. See Pershing, *supra* note 318, at 299 (noting that courts often rely on morality rather than on factual showing of harm).

323. See *Bennett v. O'Rourke*, 1985 WL 3464, at *3 (Tenn. Ct. App. Nov. 5, 1985) ("In light of the fact that here the homosexual parent and the minor child are both female, we consider this factor particularly important because of the increased chance of role-modeling."); see also Flaks, *supra* note 170, at 357 (pointing out that judges often fear that children raised by homosexual parents will themselves become homosexual); Rosenblum, *supra* note 171, at 1673 (discussing court's concern that children will become gay or lesbian).

324. See Strasser, *supra* note 127, at 977 (stating that same-sex relationships are not immoral, just as interracial relationships are not, possible majority views notwithstanding).

325. See State Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1222 (Fla. Dist. Ct. App. 1993) (stating that incidence of homosexuality in children is same regardless of parents' sexual orientation); Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (taking judicial notice that there is no consensus on cause of homosexuality, but that substantial consensus exists that being raised by homosexual parent does not increase likelihood that child will become homosexual); see also Flaks, *supra* note 170, at 369 (1994) (concluding that gay and lesbian parents are no more likely to have gay or lesbian children than are heterosexual parents); Stone, *supra* note 318, at 742 (arguing that homosexuality among children of gay and lesbian parents is proportional to percentage in general population); Yvonne Tamayo, *Sexuality, Morality and the Law: The Custody Battle of a Non-Traditional Mother*, 45 SYRACUSE L. REV. 853, 860 (1994) (examining survey data indicating no correlation between sexual preference of parents and that of their children); Ali, *supra* note 169, at 1017 (observing that parents' sexual preference has no bearing on that of their children); Dooley, *supra* note 144, at 421 (noting that children raised by homosexual parents are no more likely to become homosexual than are children raised by heterosexual parents).

326. See *Cabalquinto v. Cabalquinto*, 669 P.2d 886, 890 (Wash. 1983) (en banc) (Stafford, J., concurring in part and dissenting in part) (acknowledging psychologist's testimony that sexual

Other fears that courts may hold simply are unfounded. Children of gay or lesbian parents are not more likely to be molested than are children raised by heterosexual parents.³²⁷ Nor are such children more likely to be harmed psychologically.³²⁸ Further, such children are no less morally mature than are children of straight parents.³²⁹ In fact, courts have every reason to believe that the children of gay and lesbian parents will develop as successfully as will the children of heterosexual parents.³³⁰

Although courts may realize that the children themselves are no more likely to be gay or lesbian if raised by a gay or lesbian parent, they may fear that such children will be taught the "wrong" values; however, there is no reason to believe that the values lesbian or gay parents teach their children are inappropriate. Commitment, loyalty, tolerance, and respect for self and others are appropriate values for

preference of child develops early in life and therefore would not be affected by father's homosexuality); Elovitz, *supra* note 171, at 212 (finding that parent's sexual orientation has no significant influence on gender role behavior); Tamayo, *supra* note 325, at 859-60 (examining studies indicating that children of lesbian and heterosexual parents are equally as stable in terms of gender identity).

327. See Elovitz, *supra* note 171, at 216-17 (noting that sexual abuse of children is perpetrated disproportionately by heterosexual men); Flaks, *supra* note 170, at 360 (observing that homosexuals are no more likely than heterosexuals to molest children); Ali, *supra* note 169, at 1019 (suggesting that homosexuals are less apt to molest their children); Marilyn Riley, Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799, 853 (1975) (stating that experts have abandoned myth about homosexuals and child molestation); Rosenblum, *supra* note 171, at 1684 (stating that most child molestations are committed by heterosexual men with female victims); Wishard, *supra* note 171, at 411 (pointing out that heterosexual men are more likely than homosexual men to molest children).

328. See Flaks, *supra* note 170, at 371 (reviewing social science literature demonstrating that homosexuals can raise psychologically healthy children); Parsons, *supra* note 126, at 473 (1994) (noting that, according to recent studies, children are not psychologically harmed by fact that parents are homosexual).

329. See Flaks, *supra* note 170, at 357 (finding that children raised by gays or lesbians had perfectly normal moral maturity).

330. See Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 189 (1995) (noting that social science and medical studies indicate no ill effects in children raised in homosexual households); Charlotte Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER, L. & POL'Y 191, 191 (1995) (observing no difference in development of children raised by homosexual parents and those raised by heterosexual parents); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 561-62 (1990). As Professor Polikoff notes:

Research now exists on the psychological well-being of children raised by lesbian mothers. This literature consistently points to two conclusions: (1) little difference exists in the overall mental health of children raised in lesbian-mother households and children raised in heterosexual-mother households; and (2) the quality of mothering, not the mother's sexual orientation, is the most crucial factor for a child's healthy growth and development.

Id.

children to be taught.³³¹ Even if there were reason to think that questionable values were being taught in the home,³³² family autonomy considerations presumably would prevent a denial of custody on that basis.³³³

Surprisingly, some courts seem worried that gay and lesbian parents will *not* teach their children bigoted values and explicitly reject the idea that tolerance toward gays and lesbians should be promoted.³³⁴ Indeed, a parent may be penalized for *not* indicating a preference that his or her child be heterosexual,³³⁵ even though parents cannot determine their children's sexual orientation, assuming they desire to do so.³³⁶ It goes without saying that a parent who indicates that it would be desirable for his or her child to be gay or lesbian will not be viewed with favor by many courts.³³⁷ Some courts do not seem satisfied with gay or lesbian parents who express a preference that the child be heterosexual,³³⁸ however, especially if the judge disapproves of the parent's rationale behind the preference. A Missouri appellate court, for example, was incredulous that the "only reason that [a gay father] would prefer for his daughter to be heterosexual is because of the attitude of society toward homosexuality."³³⁹

D. Teasing

Courts sometimes will consider whether the child's living with a parent and that parent's same-sex partner would subject the child to

331. See Strasser, *supra* note 127, at 961.

332. See *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985) (suggesting that father would impart questionable values such as belief that homosexuality was socially acceptable alternative lifestyle).

333. See *supra* notes 51-62 and accompanying text (discussing family autonomy).

334. See *Cabalquinto v. Cabalquinto*, 669 P.2d 886, 890 (Wash. 1983) (en banc) (Stafford, J., concurring in part and dissenting in part) ("[A] child should be led in the way of heterosexual preference, not be tolerant of [homosexuality]."); see also Dooley, *supra* note 144, at 415-16 (explaining that many courts feel gay parents adversely affect morality of their children by teaching them that being gay is not immoral).

335. See *Roberts*, 489 N.E.2d at 1069-70 (condemning father for his insistence that his children need not be shielded from his alternative lifestyle, which he believed was socially acceptable); see also Flaks, *supra* note 170, at 371 (noting that homosexual parents do not necessarily prefer their children to be homosexual). But see Pershing, *supra* note 318, at 298 (contending that states should not require parents, as condition of entrustment with their children's care, to teach children particular views on sexuality).

336. See Troy R. Holroyd, *Homosexuals and the Military: Integration or Discrimination?*, 8 J. CONTEMP. HEALTH L. & POL'Y 429, 447 (1992) (emphasizing that individual's sexual orientation is forged early and is nearly impossible to alter).

337. See, e.g., *J.L.P. (H.) v. D.J.P.*, 643 S.W.2d 865, 872 (Mo. Ct. App. 1982) (criticizing father's attempt to persuade child of "desirability" of his lifestyle).

338. See *J.P. v. P.W.*, 772 S.W.2d 786, 788 (Mo. Ct. App. 1989).

339. *Id.*

teasing or social condemnation.³⁴⁰ Courts, however, have rejected social disapproval as a consideration in custody cases involving interracial couples,³⁴¹ and it is not clear why consideration of public opinion is any more appropriate in this situation.³⁴² Courts should not take into account the popularity of a social group of which the individual is a member when deciding something as important as custody or visitation, although they sometimes do precisely that when same-sex couples are involved.³⁴³ Fortunately, some courts have recognized that the bigotry of others toward gays and lesbians should not be permitted to affect adversely a gay or lesbian parent's custody of his or her child.³⁴⁴

Studies indicate that children of gay and lesbian parents tend *not* to be teased about their parent's sexual orientation, and further, any teasing that does occur is manageable by parent and child.³⁴⁵ Nonetheless, courts deny custody based on the speculation that such

340. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (stating that social stigma attached to lesbianism may burden children raised in such environments).

341. See, e.g., *Kramer v. Kramer*, 297 N.W.2d 359, 361 (Iowa 1980); *Commonwealth ex rel. Myers v. Myers*, 360 A.2d 587 (Pa. 1976); *Commonwealth ex rel. Lucas v. Kreischer*, 299 A.2d 243 (Pa. 1973).

342. See *Cox*, *supra* note 98, at 784 (arguing that just as prejudice should not be a "driving force" in custody determinations that involve interracial couples, it should not be a driving force in custody determinations that involve gay or lesbian couples).

343. See *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (refusing to consider unpopularity of homosexuality as factor in awarding of custody). But see *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (fearing that social stigma of homosexuality may affect child negatively). Unfortunately, courts often do consider the social popularity of parents. See *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (noting that community disapproval of lesbian mother caused child to experience feelings of secrecy and isolation); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (hoping to protect children from peer pressure, teasing, and ostracizing as result of mother's alternative lifestyle); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988) ("[I]f the child remains with her mother, she faces a life that requires her to keep the secret of her mother's lifestyle, or face possible social ostracism and contempt.").

344. See *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979) (suggesting that community prejudice should no more adversely affect lesbian mother's right to custody than rights of interracial couple); *Blew v. Verta*, 617 A.2d 31, 35 (Pa. Super. Ct. 1992) (finding that merits of custody arrangement should not be based on community's prejudice against same-sex relationships just as it should not be based on community's prejudice against interracial relationships); see also *State Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1220 n.10 (Fla. 1995) (refusing to accept possibility of teasing as appropriate reason for banning lesbian or gay adoption).

345. See *Elovitz*, *supra* note 171, at 215 (explaining that occasional incidents of teasing and other forms of harassment have not been found to have significant impact on children involved); *Flaks*, *supra* note 170, at 363 (noting that teasing of homosexually-reared children generally is minimal); *Stone*, *supra* note 318, at 741 (contending that harassment of such children is minimal and rarely has impact).

teasing will occur³⁴⁶ or that the child will be forced to keep a secret and thus be isolated from peers.³⁴⁷

Courts should not allow their policies on child custody to be determined by private bigotry.³⁴⁸ Doing so sends exactly the wrong message to the children involved³⁴⁹ and to society as a whole.³⁵⁰ Unfortunately, children are teased for a variety of reasons.³⁵¹ As far as the child's best interests are concerned, the most important element is not whether the child will be teased, because most children are teased in some way, but in how the teasing is handled.³⁵²

E. Criminal Behavior

Some courts continue to use the fact that sodomy technically remains a "crime" in many states as an excuse for denying custody to gay and lesbian parents.³⁵³ The same courts, however, deliberately may look the other way when the "illegal" activity is heterosexual in

346. See Dooley, *supra* note 144, at 417 (pointing out that courts usually assume homosexually reared child will be victim of prejudice); Meyers, *supra* note 157, at 843-44 (stating that fear of harassment is mostly result of assumptions rather than grounded on actual evidence); see also 608 S.W.2d at 66 (predicting that teasing will occur). But see Doe v. Doe, 452 N.E.2d 293, 296 (Mass. Ct. App. 1983) (finding that teasing does not occur).

347. See 608 S.W.2d at 66 (noting that lesbianism of mother forces child to feel isolated and secretive). But see Peyton v. Peyton, 457 So. 2d 321, 325 (La. Ct. App. 1984) (finding that unless parent's single-sex relationship is known to public, child likely will not suffer from societal harassment).

348. See Wishard, *supra* note 171, at 418 (arguing that courts should not "legalize private bias").

349. See 404 A.2d at 1263. The court in *M.P. v. S.P.* observed:

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. 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.

Id.

350. See Parsons, *supra* note 126, at 471 (contending that courts should not allow personal biases to affect custody decisions).

351. See Elovitz, *supra* note 171, at 215 (suggesting that children with unique personal or familial characteristics often are more likely to be teased); Polikoff, *supra* note 330, at 567-68 (explaining that children with unique physical and cultural traits often face adversity).

352. See Tamayo, *supra* note 325, at 861 (pointing out that support of parent-in-care is crucial to teased child); see also 404 A.2d at 1263 (noting that children raised in same-sex households may be better equipped to make moral choices).

353. See, e.g., Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Cracraft, J., concurring) (stating that illegal acts of sodomy may factor into child custody decisions); Bottoms v. Bottoms, 444 S.E.2d 276, 281 (Va. Ct. App. 1994) (pointing out that trial judge based finding of parental unfitness on fact that mother carried on open lesbian relationship in which she engaged in illegal act of sodomy).

nature.³⁵⁴ The *Bottoms* court, for example, felt justified in questioning the lesbian mother and her partner about their sexual activity, because sodomy was a crime in the state of Virginia. That court, however, declined to ask the grandmother challenging custody about her sexual relationship with a live-in boyfriend, even though fornication also was illegal in Virginia.³⁵⁵ Furthermore, the court completely ignored the fact that many opposite-sex couples engage in sodomitic practices,³⁵⁶ and that most states, including Virginia, that criminalize sodomy, make it a crime whether it is performed by same-sex or opposite-sex couples.³⁵⁷ Although it was likely that the grandmother also had committed "criminal behavior," the court found only the lesbian mother's "criminal behavior" relevant to consider.

Ironically, the Virginia Supreme Court already had considered and rejected the notion that one's status as a lawbreaker for committing voluntary sodomitic acts made one per se unfit to be a parent.³⁵⁸ The court feared that if people who had sodomitic relations were unfit as a matter of law, the court also might have to declare anyone who was a convicted murderer, rapist, robber, burglar, and so forth, unfit as a matter of law.³⁵⁹ Thus, the Virginia Supreme Court apparently believes that it is worse for a gay or lesbian parent than for a convicted murderer or rapist to have custody of a child, fearing that it cannot offer a principled distinction to protect the latter but not the former.³⁶⁰

Courts are at best inconsistent with respect to which lawbreakers should be prevented from retaining or acquiring custody. In *Brown v. Kittle*,³⁶¹ for example, the Virginia Supreme Court awarded custody to a father who had kidnapped his son from the child's

354. See *Cox v. Florida Dep't of Health & Rehabilitative Servs.*, 656 So. 2d 902, 904 (Kogan, J., concurring in part and dissenting in part) (Fla. 1995) (finding it puzzling that, although particular statute did not single out homosexuals, it was applied only to homosexuals).

355. See *Tamayo*, *supra* note 325, at 867 n.56 (pointing out that, although fornication was illegal under Virginia law, trial judge failed to consider that behavior relevant).

356. See *Pershing*, *supra* note 318, at 295 (offering data stating that more than 90% of heterosexual couples engage in oral sex).

357. See Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 209-10 (1990) (noting that most states prohibit both opposite-sex and same-sex sodomy).

358. See *Doe v. Doe*, 284 S.E.2d 799, 805 (Va. 1981).

359. See *id.*

360. Other courts suggest that as far as the child's welfare is concerned, it is as bad for the parent's partner to be of the same sex as to be a child abuser. For example, a Missouri appellate court compared a same-sex partner to "an habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher," and reasoned that "to cut off association with such a person as a condition to the child custody would be entirely reasonable." The court required the parent to sever the relationship with her same-sex partner, despite there being no evidence of wrongdoing. See *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980).

361. 303 S.E.2d 864, 865 (Va. 1983).

mother who had had legal custody.³⁶² The court justified its holding by pointing to the father's "genuine belief" that he was protecting the child.³⁶³ The court chose to ignore evidence that the father may have forced himself upon one of his sixteen-year-old stepdaughters, explaining that there had been some evidence that the sexual relations had been "consensual."³⁶⁴

Although some courts believe that there are crimes that "without more, prove a person to be unfit to have the custody of his or her minor children,"³⁶⁵ these courts are surprisingly strict with respect to which crimes render a parent per se unfit. A California court, for example, stated that even "[s]econd degree murder is not necessarily among those,"³⁶⁶ *even if the victim is the mother of the children*, unless "the killing [was] accomplished in the presence of a child."³⁶⁷ In *In re Lutgen*,³⁶⁸ an Illinois court awarded custody to a father who had been convicted of voluntary manslaughter in the death of the child's mother,³⁶⁹ despite evidence suggesting that he also had physically abused his children.³⁷⁰ Here, the court gave great weight to the fact that the children did not see their father kill their mother because he had told the children to stay out of the living room so that they could not watch.³⁷¹

In *Mason v. Moon*,³⁷² a Virginia appellate court reversed a lower court's decision awarding custody to a mother who was married to the man who had killed the child's father. Despite a counselor's report expressing concern about the potential adverse psychological effect on the child, the appellate court held that, absent extraordinary evidence to the contrary, a mother's custody of her child should not be severed.³⁷³ Two years later the same Virginia court, in *Walker v. Fagg*,³⁷⁴ upheld a custody award to a man who had shot and killed his wife.³⁷⁵ The father "had a history of alcohol abuse, spousal

362. See *Brown v. Kittle*, 303 S.E.2d 864, 865 (Va. 1983).

363. See *id.* at 867.

364. See *id.* at 865; see also *In re L*, 526 P.2d 491, 493 (Or. Ct. App. 1974) (rejecting assertion that husband was unfit to have custody for arguably having had consensual sexual relations with 16-year-old daughter).

365. *Detrich v. Sergio M.*, 135 Cal. Rptr. 222, 228 (Ct. App. 1976).

366. *Id.* at 229.

367. *Id.*

368. 532 N.E.2d 976 (Ill. App. Ct. 1988).

369. See *In re Lutgen*, 532 N.E.2d 976, 985 (Ill. App. Ct. 1988).

370. See *id.* at 978-79.

371. See *id.* at 978.

372. 385 S.E.2d 242 (Va. Ct. App. 1989).

373. See *Mason v. Moon*, 385 S.E.2d 242, 245 (Va. Ct. App. 1989).

374. 400 S.E.2d 208 (Va. Ct. App. 1991).

375. See *Walter v. Fagg*, 400 S.E.2d 208, 209 (Va. Ct. App. 1991).

abuse, unemployment and general family neglect,³⁷⁶ but the court nonetheless was willing to award him custody. Thus, the state of Virginia does not believe that killing a child's mother is a sufficient reason to deny custody,³⁷⁷ although it is willing to remove a child from the custody of a lesbian mother without evidence that the mother's lesbianism would harm the child,³⁷⁸ even if the child thereby would be awarded to the grandmother who was living in an "immoral" relationship with a man who had been accused of molesting her daughter.³⁷⁹

Laws prohibiting consensual conduct between adults rarely, if ever, are enforced.³⁸⁰ A Massachusetts appellate court argued that for adoption purposes "a criminal statute [that] is wholly ignored is the same as no statute at all."³⁸¹ The court then recommended that the custodial award be based solely on the best interests of the child, ignoring the illicit aspect of the parent's conduct just as it would "if the statutes were removed from the books."³⁸²

There is no reason to believe that Virginia is any different from most states in which sodomy laws "are never, or substantially never, made the subject of prosecution."³⁸³ Such laws might be enforced if a minor is involved,³⁸⁴ if force is used,³⁸⁵ or if payment is tendered.³⁸⁶ Enforcement of sodomy laws against adults who engage in consensual sodomy, however, is extremely rare.³⁸⁷ Virginia,

376. *Id.* at 210.

377. *See* Parsons, *supra* note 126, at 464 (discussing Virginia ruling in favor of natural parent who had married murderer of child's father).

378. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 109 (Va. 1995) (Keenan, J., dissenting) (disagreeing with court's finding because record failed to show that mother's homosexual conduct was harmful to child).

379. *See* Bottoms v. Bottoms, 444 S.E.2d 276, 278-79 (Va. Ct. App. 1994) (explaining that mother was sexually abused by grandmother's live-in boyfriend as child), *rev'd*, 457 S.E.2d 102 (Va. 1995).

380. *See* Fort v. Fort, 425 N.E.2d 754, 758 (Mass. App. Ct. 1981) (pointing out that fornication, adultery, and lewd and lascivious cohabitation statutes rarely are enforced).

381. *Id.* at 758-59. *But see* Chaffin v. Frye, 119 Cal. Rptr. 22, 26 (Ct. App. 1975) (noting that absence of criminal enforcement of homosexual acts does not mean that children should be exposed to homosexuality in their formative years). The *Chaffin* court was laboring under a variety of misapprehensions. *See supra* notes 323-39 and accompanying text (discussing typical misconceptions under which courts decide).

382. *Fort*, 425 N.E.2d at 758-59.

383. *Id.* at 758.

384. *See* Shull v. Commonwealth, 440 S.E.2d 133 (Va. 1994) (affirming conviction of woman found to have engaged in oral sex with minor boy).

385. *See* Love v. Commonwealth, 441 S.E.2d 709 (Va. Ct. App. 1994) (upholding forcible sodomy conviction).

386. *See* Shurbaji v. Commonwealth, No. 1822-92-4, 1994 WL 102179 (Va. Ct. App. Mar. 29, 1994) (affirming defendant's conviction for pandering).

387. A possible example involves an individual convicted of consensual sodomy. *See* Yeatts v. Commonwealth, 410 S.E.2d 254, 266 (Va. 1991) (mentioning felony conviction of consensual sodomy). Because the conviction was mentioned in a case involving only the individual's

therefore, has used a law that rarely, if ever, is enforced to deprive a mother of custody when the mother had neither been charged nor convicted of that offense and when no evidence was presented that her relationship caused or will cause harm to the child.³⁸⁸ The same state, however, may award custody of children to the person convicted of having killed their mother.

F. Presumptions

Many states take the position espoused by a New York appellate court with respect to custody and orientation. In *Anonymous v. Anonymous*,³⁸⁹ the court held that, without proof that a child has been affected adversely, sexual preference does not render an individual unfit to be a parent.³⁹⁰ Some states, however, use a different standard. Although not holding that gay or lesbian individuals are per se unfit to parent,³⁹¹ some states employ a rebuttable presumption that a gay or lesbian parent should not have custody of a child.³⁹²

A presumption that is rebuttable in theory might be treated in fact as if it were a per se ban.³⁹³ By the same token, a court that claims to treat orientation as one factor among many in a custody determination may consider it, in fact, the sole relevant factor. For example, in *G.A. v. D.A.*,³⁹⁴ a Missouri appellate court held that the mother's lesbianism "tipped the scales" to indicate that the child's best interests would be served by awarding custody to the father,³⁹⁵ although there is reason to believe that the mother's lesbianism was considered so weighty that very few things could have outweighed it.³⁹⁶ The dissent compared the two would-be homes. The mother had a steady nursing job, provided the child with his own room in a well-kept

murder conviction, the case was not described in full detail. Further, given the individual's violent history, he may have been convicted of consensual sodomy because it would have been too difficult to prove the lack of consent. See *Greene v. United States*, 571 A.2d 218 (D.C. 1990) (affirming sodomy conviction despite acquittal for rape).

388. See *supra* notes 372-73 and accompanying text.

389. 503 N.Y.S.2d 466 (App. Div. 1986).

390. *Anonymous v. Anonymous*, 503 N.Y.S.2d 466, 467 (App. Div. 1986).

391. See *Conkel v. Conkel*, 509 N.E.2d 983, 985 (Ohio Ct. App. 1987) (refusing to find that gay father is per se unfit).

392. *Constant A. v. Paul C.A.*, 496 A.2d 1, 7 (Pa. Super. Ct. 1985) (finding presumption in favor of traditional heterosexual relationship); see also *Parsons*, *supra* note 126, at 472 (explaining how homosexuality often creates rebuttable presumption of parental unfitness).

393. *Bottoms v. Bottoms*, 457 S.E.2d 102, 109 (Va. 1995) (Keenan, J., dissenting) ("The record plainly shows that the trial court made a per se finding of unfitness based on the mother's homosexual conduct").

394. 745 S.W.2d 726 (Mo. Ct. App. 1987).

395. *G.A. v. D.A.*, 745 S.W.2d 726, 727 (Mo. Ct. App. 1987).

396. See *id.* at 729 (Lowenstein, J., dissenting).

house, and enrolled him in pre-school.³⁹⁷ On the other hand, the father lived in a one room cabin, had limited education, survived on a \$6500 yearly income, and provided the child with a fold-up cot and a play area littered with beer cans.³⁹⁸ The dissent concluded, "If there has been any doubt as to the issue of homosexuality being an absolute or conclusive presumption of detriment, the result in this case on these facts dispels that doubt."³⁹⁹

Courts seem not to appreciate that their willingness to discriminate on the basis of sexual orientation, despite the absence of any actual or likely harm to the child, will have foreseeable negative consequences for the very children whose best interests the courts are supposed to be promoting. Children may suffer in two ways: (1) a much worse parent may get custody; or (2) the lesbian or gay parent may fail to bring serious matters of concern to the attention of the courts for fear that the court will modify custody or visitation.⁴⁰⁰

IV. JUDICIAL DISCRETION

It is not hard to understand why trial courts are given a great deal of discretion in custody cases. As a North Carolina appellate court observed, "The trial judge has the opportunity to see the parties in person and to hear the witnesses."⁴⁰¹ The court "can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges."⁴⁰² The appellate court concluded that unless there is a clear showing of abuse of discretion, the trial court's decision should not be reversed.⁴⁰³ An Illinois appellate court referred to the trial court's "superior vantage point, which cannot be reproduced from the cold record to observe and judge the witnesses' demeanor and credibility."⁴⁰⁴ Because the appellate court can review only the record, the trial court is "in a better position to

397. *See id.* at 729 (Lowenstein, J., dissenting).

398. *See id.* (Lowenstein, J., dissenting).

399. *Id.* at 728 (Lowenstein, J., dissenting).

400. Clearly, gay or lesbian parents have good reason to believe that they have much to lose, even if their cause is just, if their orientation will be held against them despite its having no adverse effect on the child. *See, e.g.,* M.P. v. S.P., 404 A.2d 1256, 1260 (N.J. Super. Ct. App. Div. 1979) (mother files to compel father to pay owed support and father counters by moving for change in custody); *Blew v. Verta*, 617 A.2d 31, 32 (Pa. Super. Ct. 1992) (mother charges abuse and father counters with motion to modify custody); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at *1 (Tenn. Ct. App. Mar. 30, 1988) (mother seeks to compel payment of support and father counters for change in custody).

401. *Newsome v. Newsome*, 256 S.E.2d 849, 855 (N.C. Ct. App. 1979).

402. *Id.*

403. *See id.*

404. *In re Marriage of Diehl*, 582 N.E.2d 281, 291 (Ill. Ct. App. 1991).

evaluate the credibility, temperaments, personalities, and capabilities of both parents."⁴⁰⁵

Custody should not be used to penalize or reward parents for their conduct.⁴⁰⁶ Yet, trial courts may be punishing gay and lesbian parents by awarding custody of their children to others, the best interests of the children notwithstanding, and appellate courts are unwilling to overturn these judgments out of deference to judicial discretion. In *D.H. v. J.H.*,⁴⁰⁷ for example, an Indiana appellate court upheld a lower court's award of custody to the father over a lesbian mother, despite evidence of clear error by the trial court.⁴⁰⁸ There was no properly admitted evidence of homosexual activity by the mother in the presence of her children, nor was there evidence that the children were adversely affected by her homosexuality.⁴⁰⁹ The trial court, however, admitted inadmissible hearsay evidence regarding the mother's alleged homosexual activity⁴¹⁰ and made disparaging remarks about homosexuality.⁴¹¹

Although recognizing that "homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child,"⁴¹² the appellate court found that the trial court *might* have made the same decision on different grounds, namely, the contested testimony⁴¹³ that the wife's housekeeping standards were not "proper," that the husband sometimes had fixed meals for the children, and that the husband sometimes had assisted the children with their lessons.⁴¹⁴ The court gave substantial deference to the trial judge's ability to exclude extraneous and irrelevant evidence,⁴¹⁵ and refused to consider that the trial court's obvious animus toward lesbians and gays could be a sufficient reason to remand the case to a different judge for a new trial, because it "is only when the trial

405. *Id.*

406. See *Whaley v. Whaley*, 399 N.E.2d 1270, 1273 (Ohio Ct. App. 1978) (stating that child must not be used to punish or reward conduct); *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (asserting that custody is not used to reward or punish parents for their conduct).

407. 418 N.E.2d 286 (Ind. Ct. App. 1981).

408. See *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. Ct. App. 1981).

409. See *id.*

410. See *id.* at 294.

411. See *id.* at 293-94.

412. *Id.* at 293.

413. See *id.* at 289.

414. See *id.* at 296.

415. See *id.* at 293.

judge's judgment has apparently or obviously been infected by erroneously admitted evidence that we will set it aside."⁴¹⁶

Appellate courts, however, should be *less* deferential when there is evidence that a trial judge has allowed his or her personal prejudices to bias the application of the "best interest" standard.⁴¹⁷ Had a lower court manifested prejudice on the basis of race, the court presumably would have remanded the case for a new trial by a different judge.⁴¹⁸

It is eminently clear that some judges enforce their own stereotypes and prejudices,⁴¹⁹ best interests of the child notwithstanding.⁴²⁰ In *M.P. v. S.P.*,⁴²¹ the trial court reassigned custody from the mother to the father because the mother was a lesbian.⁴²² The record indicated that the mother had "done all that can be expected of a dutiful mother."⁴²³ Indeed, working part-time so that she could meet with various specialists to help her daughter, she had more than met that standard.⁴²⁴ Even though the father had at one point falsely denied paternity of one of his daughters,⁴²⁵ the trial court nonetheless was willing to award him custody.

In *In re Cabalquinto*,⁴²⁶ a Washington state trial judge expressed his personal bias against homosexual living arrangements, suggesting that "a child should be led in the way of heterosexual preference, not be tolerant of [homosexuality]" and that "it can[not] do the boy any good to live in such an environment [and] might do some harm."⁴²⁷ As a result of these references to homosexuality, the Washington Supreme Court remanded the case—but to the same judge.⁴²⁸ Certainly, the appellate court should not have allowed the opinion to stand, given the judge's obvious bias. But, by remanding the case to the

416. *Id.* at 294.

417. See Rosenblum, *supra* note 171, at 1666 (noting that judges often inject biases about societal norms and morality into formulation of "best interest of child" standard); see also Patricia Leitch, Note, *Custody: Lesbian Mothers in the Courts*, 16 GONZ. L. REV. 147, 152 (1980) (describing factors courts use in determining child's best interest).

418. See *Edel v. Edel*, 293 N.W.2d 792 (Mich. Ct. App. 1980) (remanding case to new judge because of inappropriate consideration of race).

419. See Ali, *supra* note 169, at 1012 (explaining that courts, by possessing broad discretion in applying "best interests" test, often allow prejudices and misconceptions to factor into decisions); Evans, *supra* note 301, at 649-50 (discussing misconceptions).

420. See Cox, *supra* note 98, at 782 (arguing that courts, by relying on moral imperatives, not only enforce stereotypes but also may fail to provide for child's best interests).

421. 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979).

422. See *M.P. v. S.P.*, 404 A.2d 1256, 1259 (N.J. Super. Ct. App. Div. 1979).

423. *Id.* at 1258.

424. See *id.*

425. See *id.*

426. 669 P.2d 886 (Wash. 1983) (en banc).

427. *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) (en banc).

428. See *id.*

same judge, the appellate court gave the lower court an opportunity to reach the same result, *for the same reason*, although this time perhaps being more careful in what was expressed in the written opinion. Certainly, it is not desirable to have judges secretly allowing their bias to shape results.⁴²⁹ Yet, a mere winking or, worse, approval of such comments is hardly appropriate. Rather, judges should be condemned for homophobic statements,⁴³⁰ and remand in such circumstances should be to a different judge.⁴³¹ Given the wide discretion afforded judges in custody disputes, judges should be required to justify their rulings in terms of specified factors.⁴³² That way, gay or lesbian parents who lose their children in custody disputes will not have to wonder whether they have been victimized by a quietly biased judge.⁴³³

Appellate courts do not always defer to a trial court's judgment. For example, in *Glover v. Glover*,⁴³⁴ an Ohio appellate court rejected a trial court's custodial award, holding that the mother should be the custodial parent.⁴³⁵ Perhaps the mother should have had custody,⁴³⁶ although the court implied that whenever two fit individuals vie for custody, the award always should be made to the heterosexual rather than the homosexual parent.⁴³⁷ This does not inspire confidence in the court's objectivity or in its commitment to the promotion of the child's interests, *especially when the appellate court had to overturn the trier of fact about who would make a better parent*.

The opinions of various trial and appellate courts give reason to believe that gay and lesbian parents will not be treated fairly in the courts. For example, a Missouri appellate court reassured a lesbian mother that although it recognized that "homosexual practices have been condemned since the beginning of recorded history,"⁴³⁸ the

429. See *Constant A. v. Paul C.A.*, 496 A.2d. 1, 5 (Pa. Super. Ct. 1985) (preferring that trial judge express, rather than conceal, moral beliefs).

430. See *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (expressing unhappiness with trial judge's homophobic comments).

431. See *id.* at 643 (reversing trial court's denial of mother's motion for change of venue).

432. See *Russman*, *supra* note 159, at 42-43 (discussing state attempts to limit courts to certain factors); see also *In re William S.*, 75 Ohio St. 3d 95, 98-99 (1996) (finding that parental rights may not be terminated unless at least one statutory condition is met).

433. See *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995) (rejecting lesbian mother's contention that district court placed undue emphasis on sexual orientation).

434. 586 N.E.2d 159 (Ohio Ct. App. 1990).

435. See *Glover v. Glover*, 586 N.E.2d 159, 164 (Ohio Ct. App. 1990) (concluding that trial court abused discretion by failing to consider wife's role as primary caretaker). But see *id.* (discussing expert's recommendation that husband be granted custody).

436. See *id.*

437. See *id.* at 165 (noting that, unlike situation in which gay man was permitted to adopt child when no alternative existed, this case contained viable custodial alternatives).

438. *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982).

court viewed homosexuals with "bewildered compassion."⁴³⁹ It would be difficult to believe that a lesbian or gay party appearing before such a court would receive equal treatment, bewildered compassion notwithstanding.

Apparently, some judges do not believe that gays and lesbians should be treated equally by the courts. In *Chicoine v. Chicoine*,⁴⁴⁰ one South Dakota Supreme Court judge, citing the *Bible* and the *Egyptian Book of the Dead*,⁴⁴¹ openly disapproved of what he referred to as "a transitory phenomenon on the American scene that homosexuality is okay."⁴⁴² This concurring judge would have curtailed all of the mother's visitation rights until she was "no longer a lesbian living a life of abomination."⁴⁴³

In *Chicoine*, the trial court had granted unsupervised, overnight visitation provided that no gay or lesbian individuals were in the children's presence.⁴⁴⁴ On appeal, the state high court thought the visitation restrictions too liberal.⁴⁴⁵ In what might be described charitably as an unusual requirement, the state high court insisted that, should the trial court persist in granting overnight visitation, that court also should provide adequate enforcement measures to ensure compliance.⁴⁴⁶

The point here is not that every parent has a right to unsupervised, overnight visitation, but merely that limitations should be rationally related to the existing conditions⁴⁴⁷ and should not be motivated by clear prejudice.⁴⁴⁸ When a court cares more about imposing its own moral views than about promoting the best interests of the children, which it has a duty to protect, all stand to lose.

439. *Id.*

440. 479 N.W.2d 891 (S.D. 1992).

441. See *Chicoine v. Chicoine*, 479 N.W.2d 891, 897 (S.D. 1992) (Henderson, J., specially concurring in part and dissenting in part) (citing *Leviticus* 18:22).

442. *Id.* (Henderson, J., specially concurring in part and dissenting in part).

443. *Id.* at 896 (Henderson, J., specially concurring in part and dissenting in part).

444. See *id.* at 892-93.

445. See *id.* at 894.

446. See *id.*

447. See *North v. North*, 648 A.2d 1025, 1032 (Md. Ct. Spec. App. 1994) (explaining that visitation and overnight restrictions should reflect facts contained in record).

448. See *Johnson v. Schlotman*, 502 N.W.2d 831, 838 (N.D. 1993) (Levine, J., concurring) ("There is no-one who would disagree that our courtrooms should be safe havens from the glut of prejudice that festers in the outside world. Accordingly, homophobia has no place in our system or in our jurisprudence."); Note, *supra* note 357, at 205 (observing that homophobia is widespread throughout legal system).

CONCLUSION

Parents have a fundamental right to the care and companionship of their children. Absent a showing of unfitness, neglect, or abandonment, courts are extremely reluctant to terminate parental rights. When lesbian or gay parents are involved, however, some state courts are remarkably willing to limit or terminate parental rights, even absent a showing of probable harm.

Courts limiting or terminating lesbian or gay parental rights claim to be preventing likely future emotional or moral harm to the children; however, empirical data belie those claims. Further, if courts really were interested in preventing probable future harm, they would be much less willing, for example, to grant custody of children to the individual who had killed their mother.

Appellate courts sometimes are remarkably deferential when considering trial court custodial awards, even when the record shows that the trial judge made prejudicial comments. When trial courts award custody or liberal visitation rights to lesbian or gay parents, some appellate and supreme courts suddenly are much less willing to adopt a deferential stance.

Courts making or countenancing biased comments or custodial awards help bring about a variety of negative consequences. They may: (1) harm innocent parents and children by causing the wrong parent to have custody; (2) undermine confidence in those decisions that have been decided correctly by planting the seeds of suspicion that courts cannot be disinterested and objective in certain types of cases; and (3) induce parents to avoid the courts to contest inappropriate visitation or custody arrangements, for example, for fear that even worse arrangements would be made. Courts that implicitly claim that these foreseeable negative consequences are outweighed by the benefit of promoting prejudice and intolerance will succeed only in further undermining public confidence in the courts and in promoting divisiveness in society. These judicial attitudes, messages, and practices must stop—for the sake of innocent parents and children, the judicial system, and society as a whole.

