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Notes and Comments

Gay Parenting: Myths and Realities*

*Between the idea
And the reality
Between the motion
And the act
Falls the Shadow¹*

I. Introduction

Of all parents who seek child custody, perhaps the least visible and least studied is the gay father.² As fathers in general,³

* The author would like to thank Grace and Christopher O'Toole for fostering in the author a deep respect for individual difference. The author is also deeply appreciative of the patience and support of David John Varoli.

1. T.S. ELIOT, *The Hollow Men*, in *THE COMPLETE POEMS AND PLAYS, 1909-1950* 58 (1952).

2. Skeen & Robinson, *Family Background of Gay Fathers: A Descriptive Study*, 54 *PSYCHOLOGICAL REP.* 999 (1984). The unique situation of the gay father has been largely ignored in research done on fathering. *Id.* at 999. For New York cases considering parental homosexuality, see *Anonymous v. Anonymous*, 120 A.D.2d 983, 503 N.Y.S.2d 466 (4th Dep't 1986) (bisexual mother); *Gottlieb v. Gottlieb*, 108 A.D.2d 120, 488 N.Y.S.2d 180 (1st Dep't 1985) (gay father); *Guinan v. Guinan*, 102 A.D.2d 963, 477 N.Y.S.2d 830 (3d Dep't 1984) (alleged lesbian mother); *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978) (lesbian mother); *M.A.B. v. R.B.*, 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. Suffolk County 1986) (gay father); and *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. Onondaga County 1976) (lesbian mother).

For discussions of child custody decisions involving homosexual parents, see Basile, *Lesbian Mothers I*, 2 *WOMEN'S RTS. L. REP.* 3 (1974); Bozett, *Gay Fathers: Evolution of the Gay Father's Identity*, 51 *AM. J. ORTHOPSYCHIATRY* 552-561 (July 1981); Note, *In the "Best Interests of the Child" and the Lesbian Mother: A Proposal for Legislative Change in New York*, 48 *ALB. L. REV.* 1021 (1984) (authored by Margaret Clemens); Hitchens, *Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases*, 5 *J. OF HOMOSEXUALITY* 89 (1979-1980); Jacobs, *Divorce and Child Custody Resolution: Conflicting Legal and Psychological Paradigms*, 143 *AM. J. PSYCHIATRY* 192 (Feb. 1986); Kleber, *The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature*, 14 *BULL. AM. ACAD. PSYCHIATRY & L.* 81 (1986); Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 *N.Y.U. REV. L. & Soc.*

and gay fathers⁴ in particular, however, become more assertive and vocal in seeking custody,⁵ the legal community will necessarily become extensively involved in the resolution of those emotionally charged child custody disputes in which one parent is an acknowledged gay father.

This Comment discusses the rights of a gay father seeking child custody in a New York court and potential challenges to his assertion of those rights. Part II of this Comment offers a comprehensive analysis of the historical evolution of social, legislative, and judicial proscriptions against homosexual expression, with the objective of examining the social stigma associated with certain sexual acts that have formed societal and judicial assumptions about homosexuality. The legal reasoning behind child custody determinations based on the "best interest of the

CHANGE 907 (1986); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties*, 11 U. DAYTON L. REV. 275, 327 (1986); Sheppard, *Lesbian Mothers II: Long Night's Journey Into Day*, 8 WOMEN'S RTS. L. REV. 219 (1985); and Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward A Rational Custody Standard*, 32 UCLA L. REV. 852 (1985) (authored by Steve Susoeff).

3. The number of single custodial fathers almost tripled between 1970 and 1983.

In 1983 the number was estimated to be nearly 600,000 fathers with sole responsibility of at least one child 18 years old or younger. There is every indication that this number, which has almost tripled since 1970, will continue to rise as men seek out the role of sole parent following a marital breakup and as women continue to define themselves in ways that are less "maternally oriented."

Greif, *Single Fathers Rearing Children*, J. MARRIAGE & FAM. 185 (Feb. 1985) (quoting Bureau of the Census, U.S. Dep't of Commerce, Series P-20, No. 388 Current Population Rt. Series, *Household and Family Characteristics: March 1983* 7 (May 1984)).

4. The exact number of gay fathers in the United States is unknown but "approximately four million homosexual men and women in the United States can be projected to have entered matrimony . . . [and] about forty percent of all homosexual spouses have had children from their unions." SLOAN, *HOMOSEXUAL CONDUCT AND THE LAW* 31 (1987). Extrapolating from these figures, there are approximately 1.6 million homosexual parents in the United States.

Weinberg estimated that one in five homosexual males has been married and "[i]t is believed that up to a quarter of self-identified gay men father children." Skeen & Robinson, *supra* note 2, at 999.

5. In recent years, lesbians and gay parents have become more willing to risk the disclosure of their sexual orientation in an attempt to obtain child custody. Hitchens, *supra* note 2, at 89. Roberta Achtenberg, Directing Attorney of the Lesbian Rights Project, has observed that "[t]he most commonly litigated conflict involving the issue of sexual orientation involves the rights of lesbians and gay men to the custody of and visitation with their children . . . born to them as a result of heterosexual relationships and marriages." ACHTENBERG, *SEXUAL ORIENTATION AND THE LAW* 1-7 (1987).

child" standard⁶ is discussed in Part III. Part IV describes obstacles as well as the implicit assumptions traditionally encountered by a homosexual parent seeking child custody. A review of the decisional authority for the determination of the "best interest of the child" where one parent is a gay father is presented in Part V.

A conclusion is offered in Part VI that New York's decisional law on the resolution of child custody disputes represents a progressive trend in legal reasoning. This Comment further concludes that a parent's sexual orientation should become a factor in a custody dispute only where that orientation has a demonstrated adverse effect on a child's best interest.⁷ This Comment categorically rejects the holdings implicit in certain court decisions that a parent's homosexual orientation renders that parent unfit.

II. Historical Background

One cannot begin to understand judicial determinations of child custody where a homosexual parent is involved without an adequate appreciation of the social and cultural attitudes underlying biases toward individuals with a same sex orientation. A comprehension of the effect of stereotypical attributions on these decisions is also necessary.⁸

A. *The Evolution of Anti-Homosexual Attitudes*

Modern intolerance to homosexuality is premised on ancient Judeo-Christian proscriptions against the odious and "sinful"⁹

6. See *infra* notes 49-80 and accompanying text.

7. See *infra* notes 197-221 and accompanying text.

8. "Our own is one of the comparatively few societies which condemns homosexuality in all forms." Basile, *supra* note 2, at 3 n.1. WEST, *HOMOSEXUALITY RE-EXAMINED* 133-36 (1977) (cross-cultural studies).

9. Religious justification for sanctioning homosexual expression is based on the assumption that homosexuality is detrimental to society because it is nonprocreative and unnatural. See J. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 8-16 (1980) (general authority pro and con). West, *supra* note 11, at 119-32. Others have characterized homosexual behavior as immoral and point to the Scriptures of the Bible for validation. See generally MAGNUSON, *ARE GAY RIGHTS RIGHT?* 59-60 (1985) (biblical references purportedly condemning homosexuality). See also Gilbert, *Conceptions of Homosexuality and Sodomy in Western History*, 6 J. OF HOMOSEXUALITY 57, 62-63 (1980-1981) (condemnations of sodomy in the writings of clergy and penitentials). *Contra*

act of sodomy.¹⁰ While homosexuality is not synonymous with particular sex acts, historically the social stigma attached to these acts has been assigned to individuals with a same sex orientation.¹¹

It has been observed that "homosexuality" and "homosexual" are modern terms, having originated in the late nineteenth century.¹² Indeed, the word "homosexual" was itself devised by nineteenth century doctors who combined the Greek word for "same" and the Latin word for "sex."¹³ "This linguistic development stemmed not from some arbitrary desire to find a new word to replace the earlier ones, but rather from the recent creation by society of a new class of deviants."¹⁴ The distinction is an important one, as it "marks the beginning of the treatment of a segment of the population as a race apart."¹⁵

Over a protracted period of time, mental health professionals embraced *in toto* religious proscriptions against homosexual contact and equated homosexuality with mental illness.¹⁶ Psychological and social science research focused almost exclusively

Tivnan, *Homosexuals and the Churches*, N.Y. Times, Oct. 11, 1987, § 6 (Magazine), at 89 ("[t]here is no condemnation of loving homosexual actions anywhere in Scriptures.'").

10. The words 'sodomy' and 'sodomite' had dual meanings. On the one hand sodomy referred to unspecified sexual relations between males, and on the other it meant a particular mode of sexuality, usually anal sex." Gilbert, *supra* note 9, at 62. West, *supra* note 8, at 120 (origins of the word sodomite).

11. D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 918 (1986) (highlighting distinctions between sexual acts and sexual identity).

12. Gilbert, *supra* note 9, at 61.

13. Tivnan, *supra* note 9, at 89.

14. Gilbert, *supra* note 9, at 61. Deviant behavior is that which "violates social norms." A. CRIDER, G. GOETHALS, R. KAVANAUGH, & P. SOLOMON, *PSYCHOLOGY* 517 (1983). "Deviance itself then can be seen as a moralistically created category made by the majority for that minority of which it disapproves." Basile, *supra* note 2, at 8.

15. Gilbert, *supra* note 9, at 61. "Sex becomes the distinguishing characteristic that describes the essential nature of some men and women. No longer simply an act, homosexual behavior instead serves as a marker of identity. That identity encompasses personality, emotional state, sexual desire, and even according to some, physical characteristics." D'Emilio, *supra* note 11, at 917.

16. Basile, *supra* note 2, at 4, 7. "Ancient Judeo-Christian prohibitions against homosexuality were based on homophobia, and present-day psychiatrists and other mental health 'experts' have grounded their research on the same biased point of view." *Id.* at 3. See also Hudson & Ricketts, *A Strategy For The Measurement of Homophobia*, 5 J. OF HOMOSEXUALITY 357 (Summer 1980) (homosexuality equated with physiological and psychological illness).

on ascertaining the etiology of homosexuality¹⁷ without questioning the underlying premise that homosexual behavior is disordered behavior.¹⁸ Following a period of gay activism,¹⁹ the American Psychiatric Association voted unanimously in 1974 to remove homosexuality per se from the Association's list of psychiatric disorders.²⁰ Today, the Association's Diagnostic and Statistical Manual III clearly states that homosexuality does not constitute a mental disorder.²¹

B. *The Legal Posture Towards Homosexuality*

The treatment of homosexuals by the American legal system parallels and in many instances reflects the religious²² and psychological epithets of homosexuality as immoral²³ and patho-

17. Contradicting theories have been proposed to explain the origins of homosexual behavior. Freud and subsequent psychoanalysts proceeded under the assumption that homosexuality was a sexual aberration and attributed homosexual behavior to unresolved Oedipal conflicts. See SOCARIDES, *HOMOSEXUALITY* 1-191 (1978) (general discussion of Freud's contribution to the understanding of the etiology of homosexual behavior). Social learning theorists explained homosexual behavior as the outcome of early childhood conditioning and role-modeling. See WEST, *supra* note 8, at 110-15 (review of social learning theory). Still other research correlates homosexual behavior with genetic and prenatal factors. See Green, *The Best Interests of the Child with a Lesbian Mother*, 10 AM. ACAD. PSYCHIATRY & L. 7, 7-9 (1982) (brief discussion of genetic, prenatal, Freudian, and social learning explanations of homosexual behavior).

18. Sheppard, *supra* note 2, at 220.

19. The gay activists emphasized liberation in the 1960's and this emphasis shifted to a struggle for gay rights in the 1970's and 1980's. See E. RUEDA, *THE HOMOSEXUAL NETWORK* 75-239 (1982) (thorough discussion of the ideology, organization, and goals of the gay movement from its inception); J. KATZ, *GAY AMERICAN HISTORY* (1976) (compilations of writings and poems on the history of the homosexual experience in America).

20. Green, *supra* note 17, at 9-10.

21. AMERICAN PSYCHIATRIC ASSOCIATION, *DSM-III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 380 (3d ed. 1980).

22. "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847 (1986) (Burger, J., concurring).

23. For example, the United States Supreme Court summarily affirmed a district court upholding the constitutionality of Virginia's criminal sodomy statute premised on the showing that homosexuality "is likely to end in a contribution to moral delinquency." *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). "[T]he State is not required to show that moral delinquency actually results from homosexuality. It is enough for upholding the legislation to establish that the conduct is likely to end in a contribution to moral delinquency." *Id.*

logical.²⁴ In Colonial America "buggery" statutes were enacted which criminalized certain sexual acts between men.²⁵ These statutes imposed inordinate penalties when contrasted with the penalties imposed for other sexual offenses.²⁶ Remnants of these buggery statutes are still present in many states today.²⁷ Twenty eight states²⁸ still have sodomy statutes which criminalize

24. Basile, *supra* note 2, at 11. See also Knutson, *Homosexuality And The Law*, 5 J. OF HOMOSEXUALITY 4 (1979-1980) (the United States has "the most fervently anti-homosexual laws in the Western World.").

25. Virginia passed the first buggery statute in 1792 which provided in pertinent part: "[I]f any do commit the detestable and abominable vice of Buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without benefit of Clergy." Oaks, *Perceptions of Homosexuality By Justices of the Peace in Colonial Virginia*, 5 J. OF HOMOSEXUALITY 35, 38 (1979-80) (quoting *A Collection of All Such Acts of the General Assembly of Virginia . . . Now in Force* 179 (Richmond 1803)).

"In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws." Bowers v. Hardwick, 106 S. Ct. 2841, 2844-45 n.6 (1986).

26. The penalty for sodomy was one to ten years in prison. Bigamy carried the penalty of six months to two years. Adultery was punishable by a fine of twenty dollars. Fornication resulted in a ten dollar fine. Oaks, *supra* note 25, at 39-40.

27. See, e.g., GA. CODE ANN. § 16-6-2 (1984). The Georgia criminal sodomy statute provides:

- (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.
- (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

Id.

Similar criminal sodomy statutes are introduced at child custody proceedings as indicia that the gay parent seeking custody is unfit. See *Fort v. Fort*, 12 Mass. App. Ct. 411, 425 N.E.2d 754 (1981) (violation of criminal sodomy statute immaterial); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982) (Missouri criminal sodomy statute introduced in assessing gay father's fitness); *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 637 (4th Dep't 1978) (criminal sodomy statute did not render parent unfit per se); *Constant A. v. Paul C.A.*, 344 Pa. Super. 49, 56, 496 A.2d 1, 4 (1985) (Pennsylvania criminal sodomy statute used to define homosexual relationships as "deviant"); *Doe v. Doe*, 222 Va. 736, 746, 284 S.E.2d 799, 805 (1981) (Virginia criminal sodomy statute does not provide basis to render parent unfit). But in such cases, the criminalization of consensual sodomy has been viewed as one factor bearing on fitness, not a reason sufficient, in itself, to find a parent unfit per se. E.g., *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d at 869.

28. The following states still have criminal sodomy statutes: Alabama (ALA. CODE §§ 13A-6-63, 13A-6-64 (1975)); Arizona (ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1978)); District of Columbia (D.C. CODE ANN. § 22-3502 (1981)); Florida (FLA. STAT. ANN. §

sodamous conduct between consenting adults.²⁹

It is important to note, however, that a few states have legislatively decriminalized private consensual sexual expression between competent adults.³⁰ Moreover, a handful of state courts have invalidated consensual sodomy statutes on state constitutional grounds.³¹ *People v. Onofre*³² involved a New York statute

800.02 (West 1976)); Georgia (GA. CODE ANN. § 16-6-2 (1988)); Idaho (IDAHO CODE § 18-6605 (1987)); Kansas (KAN. STAT. ANN. § 21-3505 (1981)); Kentucky (KY. REV. STAT. ANN. §§ 510.070-510.100 (Michie/Bobbs-Merrill 1985)); Louisiana (LA. REV. STAT. ANN. § 14.89 (West 1986)); Maryland (MD. ANN. CODE art. 27, §§ 553, 554 (1987)); Massachusetts (MASS. GEN. L. ch. 272, § 34 (1986)); Michigan (MICH. COMP. LAWS ANN. § 750-158 (West 1968)); Minnesota (MINN. STAT. ANN. § 609.293 (West 1987)); Mississippi (MISS. CODE ANN. § 97-29-59 (1972)); Missouri (MO. REV. STAT. § 566.090.1(3) (1979)); Montana (MONT. CODE ANN. § 45-5-505 (1987)); Nevada (NEV. REV. STAT. § 201.190 (1987)); New York (N.Y. PENAL LAW § 130.38 (McKinney 1987)) (New York Court of Appeals declared unconstitutional in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981)); North Carolina (N.C. GEN. STAT. § 14-177 (1987)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 886) (West 1983)); Pennsylvania (PA. CONS. STAT. ANN. § 18-3124 (Purdon 1983 & Supp.)) (Pennsylvania Supreme Court declared unconstitutional in *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980)); Rhode Island (R.I. GEN. LAWS § 11-10-1 (1981)); South Carolina (S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985)); Texas (TEX. PENAL CODE ANN. § 21.06 (Vernon 1974)) (federal district court declared Texas criminal sodomy statute unconstitutional in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982)); Utah (UTAH CODE ANN. § 76-5-403 (1978 & Supp. 1988)); and Virginia (VA. CODE ANN. § 18.2-361 (1988)) (constitutionality of Virginia's criminal sodomy statute upheld in *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976)).

29. These sodomy statutes have been primarily enforced against homosexual males. AM. CIV. LIBERTIES UNION, CIVIL LIBERTIES IN REAGAN'S AMERICA 49 (Oct. 1982) (special two-year report on ACLU's defense of the Bill of Rights).

30. The following states have decriminalized sodomy between consenting competent adults: Alaska (ALASKA STAT. § 11.40.120 (1985) (repealed 1978)); California (CAL. PENAL CODE § 286 (West 1988) (amended 1986)); Connecticut (CONN. GEN. STAT. § 53a-66 (1985) (repealed 1975)); Hawaii (HAW. REV. STAT. §§ 707-733, 707-734, 707-735 (1985) (amended 1986)); New Jersey (N.J. STAT. ANN. § 14-2 (West 1982 & Supp. 1988) (amended 1983)); Ohio (OHIO REV. CODE ANN. §§ 163.385, 163.395, 163.405 (Anderson 1987)); Oregon (OR. REV. STAT. § 167.040 (1987) (repealed 1971)); and Wisconsin (WIS. STAT. ANN. § 944.01 (West 1982) (repealed 1976)).

31. *E.g.*, *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947, *cert. denied*, 451 U.S. 987 (1981) (declaring New York State's criminal sodomy statute unconstitutional); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (Pennsylvania Supreme Court declared criminal sodomy statute unconstitutional). *Cf. Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) (precedential value of holding unclear where district court declared Texas criminal sodomy law unconstitutional). *Contra Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (Virginia's criminal sodomy statute upheld as constitutional by federal district court and affirmed by United States Supreme Court).

32. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S.

which criminalized private consensual sexual acts between nonmarried persons but permitted the same sodomous conduct between married persons.³³ The New York Court of Appeals, with one judge dissenting, ruled that the law had no rational relationship to any legitimate government interest where the statute served no purpose "other than [to] restrict individual conduct and impose a concept of private morality chosen by the State."³⁴ The majority further found the New York statute violated the equal protection mandate of the fourteenth amendment since "the Penal Law on its face discriminates between married and unmarried persons"³⁵

The Supreme Court was most recently called upon to consider the constitutional validity of a state's criminal sodomy statute in *Bowers v. Hardwick*.³⁶ The Court, in an opinion by Justice White, found the Constitution does not confer upon homosexuals a fundamental right to engage in sodomy.³⁷ Justice

987 (1981).

33. N.Y. PENAL LAW § 130.38 (McKinney 1987). The New York consensual sodomy statute provides: "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." *Id.* Deviate sexual intercourse is defined as: "[S]exual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." *Id.* § 130.00(2).

34. 51 N.Y.2d at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 952. The majority opinion concluded that

the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality [T]here has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct.

Id.

One commentator has, however, questioned the precedential value of this decision in light of the AIDS epidemic. "The emergence of AIDS as a widespread disease among men who practice homosexual sex which is essentially sodomistic raises the public health issue which always gives the state power to regulate even personal conduct." SLOAN, *supra* note 4, at 9.

35. 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.

36. 106 S. Ct. 2841 (1986) (5-4 decision considering the constitutionality of Georgia's criminal sodomy statute). See *supra* note 29.

37. 106 S. Ct. at 2843. Justice White narrowly defined the issue presented in *Bowers*. The Court expressly reserved the "question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds." *Id.*

In the opinion of Justice Blackmun, dissenting, the majority "distorted" the issue

White's opinion³⁸ cited historical proscriptions against sodomy as proof that homosexual activity is not a private and intimate association protected by the federal constitution.³⁹ The majority concluded that the Georgia statute bore a rational relationship to the state's interest in precluding "immoral and unacceptable" sexual expression.⁴⁰ While gay rights activists had sought a decision recognizing the rights of a homosexual minority,⁴¹ the United States Supreme Court upheld the Georgia statute criminalizing sodomy between consenting adults in private.⁴²

Homosexuality still meets with enmity on the part of the law in several different contexts. In addition to criminal penalties for sexual expression, homosexuals have been denied legal protections in the military,⁴³ employment,⁴⁴ and immigration.⁴⁵

before the Court and "almost obsessive[ly] focus[ed] on homosexual activity." *Id.* at 2848-49 (Blackmun, J., dissenting). According to the dissent, this case did not present the question of whether homosexuals have a fundamental right to engage in sodomy, but rather whether an individual's right to privacy (heterosexual or homosexual) or right to intimate association is unconstitutionally encroached upon when the Georgia criminal sodomy statute is enforced. *Id.* at 2849.

38. Chief Justice Burger and Justice Powell each filed separate concurring opinions. Justice Blackmun, Justice Brennan, Justice Marshall, and Justice Stevens dissented.

39. *Id.* at 2844. "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights." *Id.*

As with the majority opinion, Chief Justice Burger's concurrence relied heavily on historical proscriptions against sodomy in concluding that the act of homosexual sodomy is not a protected fundamental right. Justice Burger reasoned "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 2847 (Burger, C.J., concurring).

Justice Blackmun and Justice Stevens, in their respective dissents, argued that the evidence of historical condemnations of sodomy as immoral should not become the constitutional standard for evaluating state statutes regulating private consensual sexual behavior among adults. *Id.* at 2848, 2857 (Blackmun, J., and Stevens, J., dissenting). According to Justice Blackmun:

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved . . . cannot provide an adequate justification for [Georgia's sodomy statute]. . . . The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.

Id. at 2854-55.

40. *Id.* at 2846.

41. Rothberg, *Preface to Symposium: Sex, Politics & The Law: Lesbian & Gay Men Take The Offense*, 14 N.Y.U. REV. L. & SOC. CHANGE 891 (1986).

42. 106 S. Ct. at 2843.

43. *E.g.*, *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir.), *reh'g denied*, 746 F.2d 1579 (1984) (Naval officer discharged for homosexual behavior and discharge upheld). For a discussion of homosexuality and the military, see SLOAN, *supra* note 4, at 27. "U.S. mili-

Homophobia⁴⁶ has been a source of confusion and contradictions in the American legal system. "It is blatant in providing criminal penalties for homosexual activities. It is subtle and confusing when manifested in the failure to report cases dealing with homosexuality. More often it is thinly disguised in legal 'reasoning' and general maxims like fitness, best interest and moral character."⁴⁷

III. The Best Interest of the Child Standard

Married persons enjoy equal powers and rights as joint guardians of their children.⁴⁸ Upon dissolution of the marriage, these powers and rights become secondary to the needs and interests of their children.⁴⁹ While courts have limited authority to interfere with parental decisions regarding the welfare of children during marriage,⁵⁰ upon dissolution of the marriage, courts are often asked to determine which of the two competing cus-

tary regulations prohibit servicemen and women from engaging in private consensual homosexual relations. Such activity in the military can be a court-martial offense as a violation of Article 125 of the Uniform Code of Military Justice (UCMJ)." *Id.*

Article 125 of the Uniform Code of Military Justice provides:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C. § 925 (1983).

44. For a thorough discussion of sexual orientation and employment practices, see ACHTENBURG, *supra* note 5, at 5-1. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (discrimination based on sexual orientation not covered by Title VII, Civil Rights Act of 1964).

45. *E.g.*, *Hill v. I.N.S.*, 714 F.2d 1470 (9th Cir. 1983) (considered exclusion based on admitted homosexuality); see generally SLOAN, *supra* note 4, at 45-49 (discussing homosexual aliens and immigration discrimination).

46. Homophobia "is defined as an irrational fear or intolerance of homosexuality or homosexual persons." Herek, *On Heterosexual Masculinity*, 29 AM. BEHAV. SCIENTIST 563 (1986).

47. Basile, *supra* note 2, at 5.

48. N.Y. DOM. REL. LAW § 81 (McKinney 1988). Section 81 provides: "A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." *Id.*

49. N.Y. DOM. REL. LAW § 240 (McKinney 1986). See, e.g., *In re Jane B.*, 85 Misc. 2d 523, 527, 380 N.Y.S.2d 848, 853 (Sup. Ct. Onondaga County 1976).

50. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (state may only terminate a parent's rights when it establishes by clear and convincing evidence that the parental relationship harms the child).

tody contestants can best foster and encourage the growth and welfare of the offspring of the marriage.⁵¹

A. *The Common-Law Development*

At common law a father enjoyed a *prima facie* right to child custody.⁵² With the advent of urbanization, the suffragette movement, and Freudian psychology in the early twentieth century,⁵³ the primacy of the paternal right to custody was challenged.⁵⁴ In a 1912 decision, *Ullman v. Ullman*,⁵⁵ the common-law rule favoring paternal custody was overruled.⁵⁶ The court reasoned that "[t]he child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give."⁵⁷ Thus, a judicial presumption arose that unless proven unfit, a mother could best provide for and nurture a child of "tender years."⁵⁸

51. N.Y. DOM. REL. LAW § 240(1) (McKinney 1986). The Supreme Court of the State of New York possesses jurisdiction pursuant to N.Y. DOM. REL. LAW § 70 (McKinney 1977). Section 70 provides: "Where a minor is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court [for a custody determination]." *Id.* For a discussion of the New York Supreme Court's jurisdictional basis for consideration of custody cases, see S. WOHL KRAM & N. FRANK, *THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW* 1-13 (1982).

52. "If the husband is in all respects fit and proper to have the care of the child and to superintend its education, and other things are equal between the two, the recognized paramount right of the father must prevail over the otherwise equal claims of the mother." *Ullman v. Ullman*, 151 A.D. 419, 424, 135 N.Y.S. 1080, 1082 (2d Dep't 1912) (quoting *People ex rel. Brooks v. Brooks*, 35 Barb. 85 (1861)).

53. Greif, *supra* note 3, at 186.

54. In *People ex rel. Sinclair v. Sinclair*, 91 A.D. 322, 86 N.Y.S. 539 (1st Dep't 1904), the New York Supreme Court considered a challenge to a father's *prima facie* right to child custody. The court specifically confirmed "the undoubted rule that the husband is regarded in the law as the head of the household and the law awards to him the care and the custody of the children, and charges upon him the duty of their proper care and maintenance . . ." *Id.* at 325, 86 N.Y.S. at 541. Nonetheless, the court still retained the authority "to award the care and custody of young infants to the wife [mother], as against the paramount right of the husband [father] where the wife has shown herself to be a proper person and is able to fully discharge her duty toward the child." *Id.*

55. 151 A.D. 419, 135 N.Y.S. 1080 (2d Dep't 1912).

56. *Id.* at 424-25, 135 N.Y.S. at 1083.

57. *Id.*

58. A preference for maternal custody for a child of tender years emerged subsequent to the *Ullman* decision. In *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. N.Y. County 1973), decided some 60 years after *Ullman*, the vitality of the tender years presumption was considered. The court commented on the

New York unequivocally rejected a presumption in favor of either parent in *State ex rel. Watts v. Watts*⁵⁹ in 1973. The court stated "the 'tender years presumption' should be discarded because it is based on outdated social stereotypes rather than on rational and up-to-date consideration of the welfare of the children involved."⁶⁰ The court in *Watts* further concluded this sex-based presumption violated the equal protection guarantee of the Constitution.⁶¹ The proper consideration, the court stressed, is the welfare of the child.⁶²

B. *The Statutory Standard*

Today, a New York court making a child custody determination derives broad discretionary power from the "best interest of the child" standard⁶³ embodied in New York's Domestic Relations Law, sections 70 and 240.⁶⁴ Both sections 70 and 240 provide in part: "In all cases there shall be no prima facie right to

"pattern of at least cursory invocation by the courts in New York and elsewhere, of the presumption that children of tender years, all other things being equal, should be given into the custody of their mother." 77 Misc. 2d at 179-80, 350 N.Y.S.2d at 287. This court recognized that "in well over 90% of the cases adjudicated, the mother is awarded custody." *Id.* at 179, 350 N.Y.S.2d at 286.

59. 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. N.Y. County 1973).

60. *Id.* at 181, 350 N.Y.S.2d at 288. The court reasoned that "[t]he simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide." *Id.* at 181, 350 N.Y.S.2d at 289.

61. *Id.* at 182, 350 N.Y.S.2d at 290. The court reasoned that such an arbitrary presumption based on gender was "suspect" and subject to judicial scrutiny. *Id.* at 182-83, 350 N.Y.S.2d at 290 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

62. 77 Misc. at 182, 350 N.Y.S.2d at 290.

63. The best interest standard was first articulated by Judge Cardozo in *Finlay v. Finlay*, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925). "The chancellor . . . acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate and careful parent,' and make provision for the child accordingly." *Id.* (citation omitted). See also, *DiStefano v. DiStefano*, 60 A.D.2d 976, 977, 401 N.Y.S.2d 636, 638 (4th Dep't 1978) (applying best interest standard). Cf. *Guinan v. Guinan*, 102 A.D.2d 963, 963-64, 477 N.Y.S.2d 830, 831 (3d Dep't 1984) (discretion of judges must have "sound and substantial basis in the record examined in light of 'the best interest of the child.'" (emphasis added).

64. N.Y. DOM. REL. LAW §§ 70, 240 (McKinney 1988 & 1986). Section 240, dealing with child custody in matrimonial proceedings, provides in part: "[T]he court must give such direction . . . for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." *Id.* § 240.

the custody of the child in either parent.”⁶⁵ Section 70 further provides that “the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness and make award accordingly.”⁶⁶

The goal of a *nisi prius* court making a child custody determination is to interpret the construction of these sections to ascertain and effectuate the intention of the legislature. Indeed, case law would support the proposition that the New York Legislature intended to protect the interests and needs of children.⁶⁷ The court, in making a custody determination, acts as *parens patriae*⁶⁸ for the child, rendering the interests of the competing adults meaningful only to the extent that those interests reflect the best interest of the child.⁶⁹

C. Judicial Interpretations of the Statutory Standard

Since section 70 and section 240 provide a broad standard for child custody determinations, a judicial standard has evolved for determining which set of factors and policy considerations is pertinent in assessing the best interests of the child. There is no fixed formula, however, for weighing the multitude of facts presented by competing parents.⁷⁰

A New York court examines the totality of the circumstances surrounding the case,⁷¹ including the circumstances of

65. *Id.* § 240.

66. *Id.* § 70. Section 70 deals with child custody in habeas corpus proceedings. *Id.*

67. See, e.g., *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982); *Pawelski v. Bucholtz*, 91 A.D.2d 1200, 459 N.Y.S.2d 190 (4th Dep’t 1983); *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep’t 1978); *Saunders v. Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3d Dep’t 1977); *Feldman v. Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507 (2d Dep’t 1974); *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. Onondaga County 1976).

68. *Parens patriae*, in this limited context, refers to the court’s power to protect children who are deemed unable to protect themselves. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 787 (2d ed. 1988).

69. “The Court, with respect to custody disputes, acts as ‘parens patriae.’ It looks at the total picture and attempts to consider and weigh all factors in determining what is for the best interest of the child.” *In re Jane B.*, 85 Misc. 2d at 526, 380 N.Y.S.2d at 859 (citation omitted).

70. See, e.g., *Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893. “The only absolute in the law governing custody of children is that there are no absolutes.” *Id.* at 93, 432 N.E.2d at 767, 447 N.Y.S.2d at 895.

71. *Id.* at 95, 432 N.E.2d at 768, 447 N.Y.S.2d at 896.

the respective parents, and anticipates which parent can best provide for the child's emotional and intellectual development, care, and guidance.⁷² While no single factor is determinative in evaluating the best interest of the child,⁷³ a number of factors and judicial preferences emerge from New York case law.

Factors considered relevant in evaluating the best interest of the child include

the care and affection shown; the stability of the respective parents; the atmosphere of the homes; the ability and availability of the parents; the morality of the parents; the prospective educational opportunities; the possible effect of custodial change on the children; the financial standing of the parents; and parents' past performance⁷⁴

The sexual lifestyle of a parent is deemed to be one *among several* pertinent factors to be considered when awarding custody.⁷⁵ The issue of the effect of a parent's sexual lifestyle upon

72. *Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 477 N.E.2d 1091, 488 N.Y.S.2d 637 (1985).

73. *See supra* note 70.

74. *Saunders v. Saunders*, 60 A.D. 2d 701, 400 N.Y.S.2d 588 (3d Dep't 1977). For cases discussing some of the factors considered relevant to evaluating the child's best interest, see *Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 477 N.E.2d 1091, 488 N.Y.S.2d 637 (1985) (considering quality of home environment and ability of parent to provide for child's intellectual development); *Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982) (considering mother's involvement in adulterous relationship contrary to the tenets of Orthodox Judaism); *Obey v. Degling*, 37 N.Y.2d 768, 337 N.E.2d 601, 375 N.Y.S.2d 91 (1975) (custodial relationship should be maintained on a long-term basis); *Jacobs v. Jacobs*, 117 A.D.2d 709, 498 N.Y.S.2d 852 (2d Dep't 1986) (court considered that while both parents were employed, mother had more time to spend with children); *Pawelski v. Bucholtz*, 91 A.D.2d 1201, 459 N.Y.S.2d 190 (4th Dep't 1983) (mother's "warm" and "loving" relationship with son considered); *Wallinger v. Wallinger*, 96 A.D.2d 988, 466 N.Y.S.2d 826 (3d Dep't 1983) (financial status of each parent relevant); *Thomas J.D. v. Catharine K.D.*, 79 A.D.2d 1015, 435 N.Y.S.2d 338 (2d Dep't 1981) (court noted that mother suffered from manic depressive episodes); *Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588 (relevant that custodial mother and children live in home of mother's male companion with whom mother had adulterous relationship); *Feldman v. Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507 (2d Dep't 1974) (noting custodial mother's sexual relations with a married man); *State ex rel. Rodolfo "CC" v. Susan "CC,"* 37 A.D.2d 657, 322 N.Y.S.2d 388 (3d Dep't 1971) (moral turpitude of mother who had male visitors); *M.A.B. v. R.B.*, 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. Suffolk County 1986) (considering that mother's severe health problems caused her to be hospitalized 80 times over a ten-year period); *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Family Ct. N.Y. County 1973) (past performance of parent considered).

75. *KRAM & FRANK*, *supra* note 53, at 43-45.

that parent's fitness to have the care and custody of a minor child has been addressed in many cases.⁷⁶ Despite the fact that New York courts will consider a parent's extramarital heterosexual activity, such activity alone does not constitute sufficient grounds for the denial of custody.⁷⁷

The determination of the best interest of the child reflects the court's evaluation of many diverse factors, yet a trial court's custody award is virtually final.⁷⁸ Deference is given to court decisions "[s]ince the trial court is in the best position to assess the testimony, observe the conduct and demeanor of the parties and witnesses and resolve credibility"⁷⁹ Appellate review is limited to those instances in which a litigant can establish that the trial court's findings "lack a sound basis or are contrary to the weight of the credible evidence."⁸⁰

76. *Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588, (custodial mother and children lived in home of mother's male companion); *Repetti v. Repetti*, 50 A.D.2d 913, 377 N.Y.S.2d 571 (2d Dep't 1975) (father lived with woman whom he intended to marry following divorce); *Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507 (custodial mother's sexual relations with a married man); *State ex rel. Rodolfo "CC,"* 37 A.D.2d 657, 322 N.Y.S.2d 388 (conduct of mother who had overnight male visitors did not render her unfit for custody).

77. *E.g.*, *Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507. "[A]morality, immorality, sexual deviation and what we conveniently consider aberrant sexual practices do not *ipso facto* constitute unfitness for custody." *Id.* at 322, 358 N.Y.S.2d at 510.

Cases from foreign jurisdictions also uphold the general rule that a parent who engages in an adulterous relationship is not automatically deprived of custodial rights by virtue of this conduct. Cases dealing with the issue of extramarital heterosexual relationships include: *Claughton v. Claughton*, 344 So. 2d 944 (Fla. Dist. Ct. App. 1977) (one factor considered among several); *Burris v. Burris*, 70 Ill. App. 3d 503, 388 N.E.2d 811 (1979) (must prove conduct has adverse effect upon child to modify a custodial provision); *Buchanan v. Buchanan*, 256 Ind. 119, 267 N.E.2d 155 (1971) (adulterous wife not deprived of custody by virtue of such conduct); *Tapal v. Tapal*, 448 S.W.2d 560 (Tex. Civ. App. 1969) (extramarital heterosexual activity relevant but not controlling factor); and *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978) (parent's heterosexual relationship is not relevant unless the relationship reflects on parenting ability). See generally 24 AM. JUR. 2d *Divorce and Separation* § 966 (1983); and 23 A.L.R.3d 38 (1969).

78. *Rivera*, *supra* note 2, at 329. "Custody cases are fact intensive Because [custody] cases are so fact intensive, appeal is difficult and success on appeal is unlikely. Few issues of law really exist, and appellate courts are loathe to overturn lower court decisions unless a 'gross abuse of discretion' is shown." *Id.* at 854-55. Generally federal courts will not take jurisdiction of custody matters. See Comment, *supra* note 2, at 854-55.

79. *Anonymous v. Anonymous*, 120 A.D.2d 983, 503 N.Y.S.2d 466, 467 (4th Dep't 1986).

80. *Id.* See also *State ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952).

IV. The 'Case' Against Gay Parenting

A. *Introducing the Gay Parenting Issue*

Historical assumptions and attitudes⁸¹ regarding both homosexuality and homosexual parents have taken many forms in child custody proceedings.⁸² The issue of a parent's homosexuality may arise in a custody dispute in one of two ways. First, a parent's sexual orientation may be introduced as one factor to be considered in assessing the best interest of the child in the initial custody dispute.⁸³ Second, a parent may petition for a change of custody based on changed circumstances when that parent learns of the competing parent's same sex orientation.⁸⁴

B. *Debunking Myths About Gay Parenting*

A number of arguments are proffered to trial courts to justify the denial of child custody to homosexual parents. These arguments are premised on the assumption that homosexual lifestyles generate the following: "(1) an increased likelihood for the child to become homosexual; (2) a likelihood for social stigma or child-peer rejection due to parental homosexuality; (3) a likelihood for the homosexual liaison to allow little time for ongoing [parent]-child interaction; and (4) the increased likeli-

81. See *supra* notes 8-47 and accompanying text.

82. For related views on homosexual parenting, see Basile, *supra* note 2, at 4-11; Note, *supra* note 2, at 1034-39; Comment, *supra* note 2, at 876-92; Rivera, *supra* note 2, at 329; and Sheppard, *supra* note 2, at 236-37.

83. See Comment, *supra* note 2, at 857-58; and Rivera, *supra* note 2, at 328.

84. *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. Onondaga County 1976) (father successfully petitioned for change of custody due to mother's suspected and later confirmed homosexuality); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (father successfully moved to modify divorce decree awarding custody to mother living openly in lesbian relationship); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982) (mother's open lesbian relationship constituted a sufficient change of circumstances to warrant change of child custody order and transfer custody to father).

While some courts have concluded that the disclosure of a parent's homosexual orientation constitutes a sufficient change of circumstance to order a transfer of custody, other courts have rejected efforts to transfer custody based on the same disclosure. *E.g.*, *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256 (Super. Ct. App. Div. 1979) (mother's sexual preference did not support transfer of custody where there was no showing of changed circumstances affecting the welfare of the child); and *Schuster v. Schuster*, 90 Wash. 2d 626, 585 P.2d 130 (1978) (trial court order denying a change of custody based on custodial mother's homosexuality affirmed).

hood for child psychopathology.”⁸⁵

1. *The Homosexual Offspring Myth*

The first argument is based on the assumption that children raised by homosexual parents will develop a homosexual orientation themselves.⁸⁶ The empirical research, however, indicates “that gay fathers and lesbian mothers do not negatively affect the sexual identity of their offspring.”⁸⁷ One well-controlled comparison study⁸⁸ revealed that no statistically significant difference exists between the sexual identity of children raised by lesbian mothers and those raised by heterosexual mothers.⁸⁹ In fact, many researchers have determined that the gender identity and sex role behavior of children raised by homosexuals is fundamentally heterosexual.⁹⁰

85. Kleber, *supra* note 2, at 82.

86. Note, *supra* note 2, at 1035-36; Gottsfeld, *Child Custody and Sexual Lifestyle*, 23 CONCILIATION CTS. REV. 43, 44 (June 1985); Hitchens, *supra* note 2, at 90; Kleber, *supra* note 2, at 82; and Rivera, *supra* note 2, at 329. See, e.g., *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (fear that child might “emulate” her mother’s homosexual lifestyle).

Inherent in this argument is the societal belief that a heterosexual lifestyle is preferable to a homosexual lifestyle. This argument rejects by negative implication the notion that a homosexual lifestyle is an equally viable alternate lifestyle. Hitchens, *supra* note 2, at 91.

87. Skeen & Robinson, *supra* note 2, at 1000.

88. Green, *supra* note 17, at 7.

89. *Id.* at 14.

90. For example, a study was conducted contrasting the gender identity of children raised by heterosexual and homosexual mothers and found no significant differences between the two groups. Kirkpatrick, Smith & Roy, *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. OF ORTHOPSYCHIATRY 545 (July 1981) (hereinafter Kirkpatrick). Kirkpatrick, et. al., discovered that “lesbian mothers and heterosexual mothers were very much alike in their marital and maternal interests, current life-styles, and child-rearing practices.” *Id.* at 550.

In 1979, psychiatrist Richard Green conducted a preliminary descriptive study to assess the sexual identity of children raised by homosexual parents. Dr. Green noted that in virtually all cases, the children developed a heterosexual orientation. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (June 1978). See also Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 544-52 (1979) (no evidence that gay fathers negatively affect their children’s gender identity); and Kleber, *supra* note 2, at 81-86 (review of the literature pertinent to the sexual identity of children raised by homosexuals).

2. *The Alienation of Peers Myth*

The next contention raised by opponents of child custody awards to homosexual parents is that children in the custody of homosexual parents will be ostracized and rejected by their peers.⁹¹ Studies indicate that in households headed by divorced lesbian and divorced heterosexual mothers, no significant difference exists between the level of peer teasing and the rejection experienced by children.⁹²

Even if a child did experience peer rejection due to parental homosexuality, the denial of custody to the homosexual parent would not abate the problem.⁹³ Such stigmatization or peer rejection is not associated with the fact that the child resides with the homosexual parent, but with the fact that the child has a homosexual parent.⁹⁴ One New York court has held that peer "taunting, teasing and ostracism"⁹⁵ does not provide an adequate basis for denying child custody since it is not the role of any court to give effect to private bias and societal prejudice.⁹⁶

91. *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (court concerned with peer teasing about mother's homosexual orientation and affirmed award of custody to father); *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982) (children teased about lesbian mother and court added new restrictions to mother's visitation privileges); and *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (children might suffer from "slings and arrows" of disapproving society). See also, *Kleber*, *supra* note 2, at 82; and *Hitchens*, *supra* note 2, at 90.

92. *Green*, *supra* note 17, at 7, 12, 14. Psychiatrist Richard Green contends that any difficulty experienced by the children in the two samples can be attributed to their mother's divorced status, rather than their mother's sexual identity. *Id.* at 14. The children interviewed by Green "were able to comprehend and verbalize the atypical nature of their parents' lifestyles and to view that atypicality in the broader perspective of the cultural norm." *Green*, *supra* note 90, at 696.

93. *M.A.B. v. R.B.*, 134 Misc. 2d 317, 323-24, 510 N.Y.S.2d 960, 964 (Sup. Ct. Suffolk County 1986) (citing *M.P. v. S.P.*, 169 N.J. Super. 425, 436-39, 404 A.2d 1256, 1262-63 (1979)).

94. 134 Misc. 2d at 323-24, 510 N.Y.S. 2d at 964..

95. *Id.* at 323, 510 N.Y.S.2d at 963.

96. *Id.* at 323-26, 510 N.Y.S.2d at 964-66. Cf. *Palmore v. Sidoti*, 466 U.S. 429 (1984). In *Palmore* the state could not remove a child from custody of natural mother where she had married a person of a different race.

The court stated that

"[the issue is] whether . . . private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or

3. *The Parental Distraction Myth*

The third proposition posited by opponents of child custody awards to homosexual parents is that a parent's homosexual relationship will necessarily detract from one's parenting ability.⁹⁷ This proposition is without merit, as a general rule, since a similar heterosexual extramarital relationship does not *ipso facto* provide a basis for denying custody in the absence of a proven adverse effect on the child.⁹⁸ It follows that a homosexual relationship places no greater time constraints or limitations on a child-parent relationship than a heterosexual relationship.⁹⁹

According to experts in the field of child psychology, the quality of the parent-child relationship . . . is the single most important criterion which should be used in determining the best interests of the child Heterosexuality is no guarantee of good parenthood, just as homosexuality is no guarantee of bad parenthood.¹⁰⁰

4. *The Potential Future Harm Myth*

Finally, even in cases where the child of a homosexual has not experienced difficulty, judges and psychiatrists have denied homosexual parents custody, based on a future propensity for child psychopathology.¹⁰¹ Yet researchers conclude that there is no statistical difference between the psychopathology of children raised in homosexual home environments and children raised in

indirectly, give them effect."

Id. at 433.

97. *Cf. Kleber, supra* note 2, at 82 (status as lesbian mother detracts from ability to care for her children).

98. *See supra* notes 75-77 and accompanying text.

99. *Cf. Bozett, supra* note 2, at 553 (gay fathers have a long-term emotional investment in their children).

100. Basile, *supra* note 2, at 18.

101. *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) ("[T]he potential for physical and emotional harm exists if the restrictions on visitation are not imposed."); *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (probable devastating effect of lesbian life style upon children had been established); *Cabalquinto v. Cabalquinto*, 100 Wash. 2d 325, 328, 669 P.2d 886, 888 (1983) (trial court found that visitation with homosexual parent might cause "some harm"); and *Pascarella v. Pascarella*, 355 Pa. Super. 5, 9, 512 A.2d 715, 717 (1986) (homosexual relationship might affect child's emotional well-being). *See generally* Comment, *supra* note 2, at 876-84 (general discussion of myths concerning gay and lesbian parents).

heterosexual home environments.¹⁰²

C. *The Effects of Myths on Judicial Decisions*

The above arguments manifest themselves in the denial of child custody to homosexual parents¹⁰³ and in judicially restricted visitation and custody rights.¹⁰⁴ Frequently a homosexual parent's visitation award will include restrictive provisions:

that the child not remain overnight or visit at the parent's home while his or her lover or other homosexuals are present; that the child not be taken to any places where known homosexuals are present; that the parent not engage the child in any organizations, activities or publicity involving homosexuals; and, that the parent not encourage the homosexual lifestyle.¹⁰⁵

Consider, for instance, *In re Jane B.*,¹⁰⁶ decided by the New York Supreme Court in 1976. The court granted a change in custody to the father of a ten-year old child based on the disclosure of the mother's involvement in a lesbian relationship.¹⁰⁷ In awarding the change in custody to the father, the court categorized the mother's homosexual relationship as "clandestine devi-

102. Kleber, *supra* note 2, at 81. "While custody decisions have tended to reflect stereotyped beliefs or fears concerning the detrimental effects of homosexual parenting practices on child development, a review of the research consistently fails to document any evidence substantiating these fears." *Id.*

103. New York decisional law supporting this conclusion can be found in: *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (1976) (mother who lived with lesbian lover denied custody); and *In re Mara*, 3 Misc. 2d 174, 150 N.Y.S.2d 524 (N.Y. Dom. Rel. Ct. Queens County 1956) (mother's custody conditioned on exclusion of lesbian friend). For discussion on the denial of custody to homosexual parents, see Note, *supra* note 2, at 1035-37; Rivera, *supra* note 2, at 329; and Comment, *supra* note 2, at 859.

104. New York cases supporting this proposition include: *Anonymous v. Anonymous*, 120 A.D.2d 983, 503 N.Y.S.2d 466 (4th Dep't 1986) (trial court imposed conditions on bisexual mother's custody and appellate division remitted to trial court for modifications); *Gottlieb v. Gottlieb*, 108 A.D.2d 120, 488 N.Y.S.2d 180 (1st Dep't 1985) (trial court conditioned father's visitation on the total exclusion of his lover or any other homosexuals and precluded the child from being involved in any homosexual activities or publicity); *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978) (mother's visitation conditioned on the total absence of her lesbian friend); and *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (lesbian mother's visitation conditioned on the exclusion of her lover or any other homosexuals).

105. Gottsfield, *Child Custody and Sexual Lifestyles*, 23 CONCILIATION CTS. REV. 43 (June 1985).

106. 85 Misc. 2d 515, 380 N.Y.S.2d 848.

107. *Id.* at 527-28, 380 N.Y.S.2d at 860.

ate conduct"¹⁰⁸ and, as such, contrary to the best interests and welfare of the child.¹⁰⁹ The court concluded that this homosexual relationship created an improper home environment and that the totality of the circumstances warranted a change in custody.¹¹⁰ Moreover, the court severely circumscribed the mother's visitation rights, forbidding her either to keep the child overnight or to see the child if the mother was in the company of other homosexual persons.¹¹¹

In other jurisdictions, as in New York, courts view restrictions on gay parents' custodial or visitation privileges as necessary.¹¹² The reasoning of the Superior Court of Pennsylvania in *Constant A. v. Paul C.A.*¹¹³ is typical: "The controlled partial custody and visitation order proposed by the trial court will assure a minimum of harm to the children, while permitting the mother and children to have reasonable contact with each other."¹¹⁴

In cases where custodial or visitation privileges have been vested in a gay parent, those privileges are predicated on judicially imposed restrictions. "Judges who restrict gay and lesbian parents' access to their children often voice suspicions about the parent's mental health and the quality of their relationship with their children. Alternatively the judges focus on presumed harm-

108. *Id.* at 520, 380 N.Y.S.2d at 854.

109. *Id.* at 527, 380 N.Y.S.2d at 860.

110. *Id.*

111. *Id.* at 528, 380 N.Y.S.2d at 860-61.

112. For cases imposing custodial and visitation conditions, see *Irish v. Irish*, 102 Mich. App. 75, 300 N.W.2d 739 (1980) (overnight visitation conditioned on absence of gay partner); *L. v. D.*, 630 S.W.2d 240 (Mo. Ct. App. 1982) (mother's lesbian lover or other lesbian roommate not permitted in shared residence during mother's visits with children); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982) (restrictions on homosexual father's visitation); *Woodruff v. Woodruff*, 44 N.C. App. 350, 260 S.E.2d 775 (1979) (visitation conditioned on absence of homosexual lover); *In re J.S. & C.*, 129 N.J. Super. 486, 324 A.2d 90 (Super. Ct. Ch. Div. 1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (Super. Ct. App. Div. 1976) (court imposed several restrictions on the visitation rights of gay father); *Constant A. v. Paul C.A.*, 344 Pa. Super. 49, 496 A.2d 1 (1985) (restrictions on lesbian mother's custody); *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1981) (visitation privileges preclude visits to home of mother and lesbian lover); and *Cabalquinto v. Cabalquinto*, 43 Wash. App. 518, 718 P.2d 7 (court of appeals expunged certain portions of visitation decree).

113. 344 Pa. Super. 49, 496 A.2d 1 (1985).

114. *Id.* at 68, 496 A.2d at 10.

ful effects on the children's life with those parents."¹¹⁵

There is only one reported case in which restrictions on parental visitation privileges were categorically rejected. In a 1979 decision, the Court of Appeals of Oregon, in *Ashling v. Ashling*,¹¹⁶ deleted as "too restrictive" conditions on a homosexual parent's visitation privileges.¹¹⁷ The court reasoned that "[s]o long as the mother's sexual practices remain discreet — a requirement whatever the sexual preferences of the parties might be . . . — the restriction is inappropriate."¹¹⁸ The view expressed by this Oregon court appears to be the minority view.¹¹⁹

V. A Comparative Review: The Impact of a Parent's Sexual Orientation

All courts making custody determinations are guided by the best interest of the child standard as codified in state statutes and embodied in judicial decisions.¹²⁰ Very often, however, courts have not identified the weight to be given to the sexual orientation of a parent when evaluating the best interest of the child. The circumstances which have been deemed sufficient to consider the impact of a parent's sexual orientation upon the welfare of the child vary among jurisdictions.

A. *The Presumptive Approach*

A parent's sexual orientation alone has rarely been identified by the courts as a basis for denying a parent custody.¹²¹ The court in at least one jurisdiction, however, has recognized a pre-

115. Comment, *supra* note 2, at 869.

116. 42 Or. App. 47, 599 P.2d 475 (1979).

117. *Id.* at 50, 599 P.2d at 476.

118. *Id.* (citation omitted).

119. Dranoff, *Homosexuality as a Factor in Determining Custody (An Overview)*, 19 FAM. L. REV. 7, 13 (Dec. 1987).

120. Comment, *supra* note 119, at 853 n.5.

121. See Dranoff, *supra* note 131, at 7. The following cases have held that homosexuality does not render a parent unfit per se: *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 525, 63 Cal. Rptr. 352, 354 (1967); *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. App. 1981); *Bezio v. Patenaude*, 381 Mass. 563, 578-79, 410 N.E.2d 1207, 1215-16 (1980); *Doe v. Doe*, 16 Mass. App. Ct. 499, 502, 452 N.E.2d 293, 296 (1983); *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978); *Constant A. v. Paul C.A.*, 344 Pa. Super. 49, 66, 496 A.2d 1, 9 (1985); *Doe v. Doe*, 222 Va. 736, 748, 284 S.E.2d 799, 806 (1981); *Cabalquinto v. Cabalquinto*, 100 Wash. 2d 325, 329, 669 P.2d 886, 888 (1983).

sumption in favor of awarding custody to the nonhomosexual parent in a custody dispute. The Superior Court of Pennsylvania, in *Constant A. v. Paul C.A.*,¹²² affirmed the denial of a mother's petition for expanded custody premised primarily on her acknowledged lesbian relationship.¹²³

The Superior Court of Pennsylvania reasoned that "where there is a custody dispute between members of a traditional family environment and one of homosexual composition, *the presumption of regularity applies to the traditional relationship.*"¹²⁴ In effect, the court shifted the burden of proof to the homosexual parent by requiring the homosexual parent to establish that her sexual orientation had no adverse affect on the child in question.¹²⁵

B. *The Multi-Factor Approach*

A parent's sexual orientation alone has rarely provided a basis for denying a parent custody.¹²⁶ Most often when a criterion for evaluating the sexual orientation of a parent has been identified, courts have held that this factor is but one among several to be considered in making the final custody determination.¹²⁷

The Supreme Court of Washington in *Cabalquinto v. Cabalquinto*¹²⁸ adopted this legal standard. Citing the decisions of other state courts, the court held "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation."¹²⁹ The rationale behind this rule is that priority must be given to the best interest of the child after careful consideration of all the relevant facts.¹³⁰

In *Doe v. Doe*,¹³¹ the Virginia Supreme Court refused to sever maternal custody rights premised on a mother's lesbian re-

122. 344 Pa. Super. 49, 496 A.2d 1.

123. *Id.* at 53, 496 A.2d at 3.

124. *Id.* at 58, 496 A.2d at 5 (emphasis in original).

125. *Id.*

126. *See supra* note 121.

127. Rivera, *supra* note 2, at 330-69 (chronicle of over 50 cases considering a parent's sexual preference in a custody dispute); Comment, *supra* note 2, at 893-96 (typical court holdings on homosexual parenting).

128. 100 Wash. 2d 325, 669 P.2d 886 (1983).

129. *Id.* at 329, 669 P.2d at 888.

130. *Id.*

131. 222 Va. 736, 284 S.E.2d 799 (1981).

lationship. Here the court "decline[d] to hold that every lesbian mother or homosexual father is *per se* an unfit parent."¹³²

Today, a majority of state courts have recognized that a parent's homosexuality is not determinative in fixing custody.¹³³ These courts have adopted the approach that a parent's sexual preference is one pertinent factor to be considered in determining custody, but not the controlling factor.¹³⁴ Yet these same courts adopt somewhat divergent views when evaluating whether custody of children should vest in a homosexual parent.

A review of representative state court decisions reveals that the sexual preference factor is given varying weight in the best interest of the child equation. One court, purportedly adhering to this approach, expressed the view that a parent's sexual preference is a "significant factor" to be examined in awarding custody.¹³⁵ In *Jacobson v. Jacobson*¹³⁶ the Supreme Court of North Dakota overruled the trial court award of custody to the mother, citing the homosexuality of the mother as the "overriding factor."¹³⁷ The court's rationale for this view was expressed as follows:

[W]e believe that because of the mores of today's society, because [the mother] is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the best interests of the children will be better served by placing custody of the children with [their father].¹³⁸

There is no shortage of case law, however, which emphasizes the importance of considering a parent's sexual preference as one factor among many.¹³⁹ For example, in the case of *Hall v. Hall*,¹⁴⁰ the Court of Appeals of Michigan affirmed a judgment

132. *Id.* at 748, 284 S.E.2d at 806.

133. *See supra* note 121 and accompanying text.

134. *See supra* notes 75-77, 121 and accompanying text.

135. 314 N.W.2d 78, 80 (N.D. 1981).

136. *Id.*

137. *Id.* at 80.

138. *Id.* at 82.

139. *See supra* notes 75-77, 121 and accompanying text considering a parent's sexual preference in a custody dispute; and Comment, *supra* note 2, at 893-96 (typical court holdings on homosexual parenting).

140. 95 Mich. App. 614, 291 N.W.2d 143.

of divorce denying custody to a lesbian mother. The court was persuaded "that the trial court correctly regarded plaintiff's homosexuality as only one factor in its determination of moral fitness."¹⁴¹

C. *The Nexus Approach*

While most courts consider a parent's homosexuality as one factor among several when fixing custody, a few courts have gone so far as to require a nexus between a parent's sexual orientation and an adverse effect on the child.¹⁴² In such courts, a proposed custodial parent's sexual orientation is appropriately considered only if it can be shown to have a direct and adverse impact on a child. This nexus approach is utilized to provide trial courts with some method of weighing the sexual preference factor with all other relevant factors in order to advance the best interest of the child.

In adhering to the nexus approach, the Supreme Judicial Court of Massachusetts in *Bezio v. Patenaude*¹⁴³ reversed a lower court decision severing a mother's custodial rights. Remanding the case for further proceedings, the court stated that "[t]he State may not deprive parents of custody of their children 'simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average.'"¹⁴⁴ Moreover, the court concluded that the trial court did not sufficiently support its conclusion that custody should remain in a guardian.¹⁴⁵ "In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without

141. *Id.* at 615, 291 N.W.2d at 144.

142. The following state courts have given no consideration to the sexual preference of the parent unless concrete harm to the child is proven: *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); *Doe v. Doe*, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983); *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256 (1979); *Guinan v. Guinan*, 102 A.D.2d 963, 477 N.Y.S.2d 830 (3d Dep't 1984); and *Doe v. Doe*, 222 Va. 736, 284 S.E.2d 799 (1981).

143. 381 Mass. 563, 410 N.E.2d 1207 (1980).

144. *Id.* at 579, 410 N.E.2d at 1216 (citations omitted).

145. *Id.* at 578, 410 N.E.2d at 1215.

basis in the record.”¹⁴⁶

While the *Bezio* decision involved the termination of custodial rights, the opinion did provide a standard for other Massachusetts courts deciding custody disputes between two natural parents. In *Fort v. Fort*¹⁴⁷ and *Doe v. Doe*,¹⁴⁸ this nexus criterion was employed by the Appeals Court of Massachusetts to evaluate the impact of parental heterosexual and homosexual involvements on the welfare of children.

The *Fort* court warned trial court judges to be cautious not to impart their own moral judgments in determining relative fitness between two natural parents.¹⁴⁹ The court recognized “that such judgments are appropriate only when it can be shown that a parent’s lifestyle has a direct and articulable adverse impact on the child, or where there can be no real dispute . . . that the behavior of the custodial parent is related to his or her parenting ability.”¹⁵⁰

The decision of the Supreme Judicial Court of Massachusetts in *Bezio* comports with a trend in other jurisdictions to award custody to gay parents where such an award is in the children’s best interest.¹⁵¹ It would not be fair to conclude, however, that the trend in the United States is away from requiring a greater showing of parental fitness when a homosexual parent seeks child custody. Some jurisdictions, while tending to de-emphasize a parent’s sexual orientation, have been more reluctant than others to award custodial or visitation privileges to homosexual parents.¹⁵²

D. *The New York Approach*

Under New York statutory law, custodial or visitation privileges may be awarded to either parent based on the best interest of the child standard, according to the court’s discretion.¹⁵³ New

146. *Id.* at 579, 410 N.E.2d at 1216.

147. 12 Mass. App. Ct. 411, 425 N.E.2d 754 (1981) (father cohabitating with unmarried woman).

148. 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983) (lesbian mother had live-in lover).

149. 12 Mass. App. Ct. at 415, 425 N.E.2d at 757.

150. *Id.*

151. See *infra* notes 190-196 and accompanying text.

152. See *supra* notes 103-115 and accompanying text.

153. See *supra* notes 63-80 and accompanying text.

York courts have recognized that a parent's homosexual lifestyle does not render a parent unfit per se.¹⁵⁴ But while the New York courts have adopted this rule unequivocally, they have not articulated a formula for weighing a parent's homosexuality relative to other factors.

For example, in a 1977 decision, *DiStefano v. DiStefano*,¹⁵⁵ the Appellate Division reiterated the trial court's finding that homosexuality does not render a parent unfit per se.¹⁵⁶ The court espoused the view that a parent's sexual orientation may be one relevant factor considered among several when fixing custody.¹⁵⁷ Apparently the court paid only lip service to this rule since the mother's sexual preference became the pivotal factor in awarding custody to the father. The court concluded that the mother's lesbian relationship interfered with her parenting abilities and affirmed the award of primary physical custody to the father.¹⁵⁸

In recent years New York courts have taken a more progressive approach when evaluating the best interest of the child in a custody dispute in which one parent is gay.¹⁵⁹ The relevance of a parent's homosexuality upon the determination of fitness was

154. The rule in New York is that a parent's sexual preference does not render a parent unfit per se. *E.g.*, *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978).

This author's case law analysis includes New York decisions involving lesbian mothers, as well as gay fathers. Cases involving lesbian mothers are relied upon for their precedential value since there are few reported cases concerning gay fathers. At least one commentator has suggested that a gay father's sexual orientation would be considered to the same extent as a lesbian mother's sexual orientation has been considered in custody conflicts. Hitchens, *supra* note 2, at 89.

155. 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978).

156. *Id.* at 976-77, 401 N.Y.S.2d at 637-38. The *DiStefano* court relied on the precedential value of cases in which a divorced parent was involved in an adulterous heterosexual relationship. *Id.* (citing *e.g.*, *Feldman v. Feldman*, 45 A.D.2d 320, 324, 358 N.Y.S.2d 507, 512 (2d Dep't 1974) (mother's involvement with a married man did not render her unfit)).

157. 60 A.D.2d at 976-77, 401 N.Y.S.2d at 637-38. The Appellate Division determined that "[w]hile the sexual lifestyle of a parent may properly be considered in determining what is best for the children, its consideration must be limited to its present or reasonably predictable effect upon the children's welfare." *Id.* at 977, 401 N.Y.S.2d at 637 (citations omitted).

158. *Id.* at 977, 401 N.Y.S.2d at 638. The *DiStefano* court also affirmed the mother's restrictive visitation award premised on the exclusion of her lesbian lover. *Id.*

159. Rivera, *supra* note 2, at 359-61; Redinger, *Gay Father Prevails*, 73 A.B.A. J. 75 (Apr. 1, 1987).

again considered in 1984, in *Guinan v. Guinan*.¹⁶⁰ In *Guinan* the alleged lesbian mother was awarded primary custody of her three children and the father appealed, asserting that the mother was lesbian.¹⁶¹

In affirming the trial court's award of custody, this New York court adopted the nexus test¹⁶² for determining when a parent's sexual lifestyle should be an issue in a custody dispute. The court emphatically held that "[a] parent's sexual indiscretions should be a consideration in a custody dispute only if they are shown to adversely affect the child's welfare."¹⁶³ Since all evidence adduced at trial indicated that the mother was "a fit, competent and loving parent,"¹⁶⁴ the court concluded that the mother's alleged lesbianism had no adverse affect on her children.

The best interest standard adopted in New York was interpreted in *Gottlieb v. Gottlieb*¹⁶⁵ to preclude certain restrictive provisions in a gay father's visitation award. In *Gottlieb*, the court expunged two restrictive provisions from the custody agreement which predicated the father's visitation privileges on the exclusion of his life partner or any other homosexuals.¹⁶⁶ The court modified a third provision to read "the child will not

160. 102 A.D.2d 963, 477 N.Y.S.2d 830 (3d Dep't 1984).

161. *Id.*

162. *Id.* at 964, 477 N.Y.S.2d at 831. The result reached in *Guinan* cannot be clearly viewed as a victory for lesbian and gay parents, since in *Guinan* there existed a factual dispute as to whether the mother had engaged in homosexual relations as alleged. Accordingly, the result achieved in *Guinan* can be distinguished from the result achieved in *DiStefano*.

Nevertheless, the nexus test articulated in *Guinan* is the test preferred by gay rights litigators. Rivera, *supra* note 2, at 330. "[T]he homosexuality of a parent should only be an issue insofar as the parent's sexual orientation can be proven to have harmed the child." *Id.*

163. 102 A.D.2d at 964, 477 N.Y.S.2d at 831.

164. *Id.*

165. 108 A.D.2d 120, 488 N.Y.S.2d 180 (1st Dep't 1985).

166. *Id.* at 121, 488 N.Y.S.2d at 181. The two excised provisions provided:

[10] ORDERED AND ADJUDGED that defendant's visitation privileges at his home are conditioned on the total exclusion of his lover or any other homosexuals during such visitation periods; and it is further

[11] ORDERED AND ADJUDGED that defendant's visitation privileges not limited to his home are conditioned upon the total exclusion of his lover and any other homosexuals from any contact with defendant and child

Id. at 122, 488 N.Y.S.2d at 182 (as set forth in the concurring opinion of Kupferman, J.)

be involved in any homosexual activities or publicity.”¹⁶⁷ In spite of this, the court did not fix a criterion for determining which types of restrictive conditions should be eliminated from custody decrees.

The court’s holding in *Gottlieb* represents an advancement in legal thought. In addition to requiring a positive showing that a parent’s homosexuality has a direct and adverse impact on the child,¹⁶⁸ the majority established that certain visitation privileges may far exceed anything necessary to protect the best interest of a child.

While the *Gottlieb* opinion may represent a change in judicial perspective, the court stopped short of accepting the Oregon view that all restrictive provisions are impermissible. Judge Sandler, in his dissent,¹⁶⁹ maintained that the third provision of the visitation award should also have been deleted.¹⁷⁰ He urged the court to consider “the unpleasant connotations inherent in the special restriction”¹⁷¹ imposed on the homosexual parent when contrasted with the absence of a similar limitation on the heterosexual parent.¹⁷²

The intrinsic value of conditional visitation privileges was further challenged in *Anonymous v. Anonymous*.¹⁷³ The court did not decide whether conditional visitation provisions were permissible, but held simply that “some condition should be imposed for the child’s protection, such as prohibiting the child’s

167. *Id.* at 121, 488 N.Y.S.2d at 181. Prior to the modification this provision read: “[12] ORDERED AND ADJUDGED that during defendant’s periods of visitation the child will not be taken to any place where known homosexuals are present nor will defendant involve the child in any homosexual activities or publicity.” *Id.* at 122, 488 N.Y.S.2d at 182 (as set forth in the concurring opinion of Kupferman, J.).

168. See *supra* notes 162-164 and accompanying text.

169. 108 A.D.2d at 123, 488 N.Y.S.2d at 183.

170. *Id.* at 123, 488 N.Y.S.2d at 183. The dissenting judge reasoned that:

It of course goes without saying that a small child should not be involved in sexual activities or publicity of any character, homosexual or heterosexual. We are unable to discern from the record a basis for the assumption that the defendant would expose his child to such inappropriate activities sufficient to justify such a direction.

Id.

171. *Id.* at 124, 488 N.Y.S.2d at 183 (Sandler, J., dissenting).

172. *Id.* The dissenting judge would not have tolerated any but the most necessary restrictions to promote the best interest of the child. *Id.*

173. 120 A.D.2d 983, 503 N.Y.S.2d 466 (4th Dep’t 1986).

presence during, or involvement with, homosexual contact or conduct"¹⁷⁴ Nevertheless, this court found that the trial court had abused its discretionary powers by restricting a bisexual mother's "right to maintain her life-style and privacy well beyond that necessary to protect the child from reasonably predictable effects."¹⁷⁵

Although conditional visitation provisions may not be used to unnecessarily interfere with a parent's right to maintain his or her lifestyle and privacy, trial courts would appear to have some authority to impose restrictive custody provisions following the decision in *Anonymous*. Thus, it would appear that an individual jurist could inadvertently give effect to societal bias¹⁷⁶ and myths about gay parenting.¹⁷⁷ At least it is clear that a trial court could force a gay father to choose between his life partner and his child, if a court prohibited the child from being present in the father's residence which he shared with his life partner.

A homosexual father seeking child custody in a New York court will no longer be automatically rendered unfit by virtue of his gay lifestyle.¹⁷⁸ A gay father's lifestyle becomes an issue in a custody contest only when a competing party can establish a nexus between the parental conduct in question and some specific harm to the child.¹⁷⁹ Notwithstanding the nexus criterion, a gay father's custody award or visitation privileges may be conditioned to protect the child from reasonably predictable effects.¹⁸⁰

The New York Supreme Court was most recently called upon to consider a custody dispute involving a gay father in *M.A.B. v. R.B.*¹⁸¹ The court found that for the purposes of New York's Domestic Relations Law Section 240¹⁸² and consistent with *Guinan* and its progeny,¹⁸³ a father's homosexuality did not disqualify him from obtaining custody of his child.

174. *Id.* at 984, 503 N.Y.S.2d at 467.

175. *Id.*

176. *See supra* notes 8-47 and accompanying text.

177. *See supra* notes 85-119 and accompanying text.

178. *See supra* notes 153-158 and accompanying text.

179. *See supra* notes 159-164 and accompanying text.

180. *See supra* notes 165-175 and accompanying text.

181. 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. Suffolk County 1986).

182. N.Y. DOM. REL. LAW § 240 (McKinney 1986).

183. *See supra* notes 171-182, 184-190 and accompanying text.

The court, applying the nexus test articulated in *Guinan*,¹⁸⁴ held that a father was not an unfit or improper custodian merely because he was homosexual.¹⁸⁵ The court concluded that the determinative consideration in the award of custody must be the selection of the home environment that will promote the best interest of the child.¹⁸⁶ The court stated that a parent's sexual orientation should be considered only to the extent that a nexus exists between the homosexuality of a parent and a directly deleterious effect on the child.¹⁸⁷

In making the determination of custody, the court found that the father's homosexuality had no adverse effect on the child.¹⁸⁸ The court awarded primary physical custody of the child to the gay father, reserving liberal visitation rights to the mother.¹⁸⁹

The supreme court's decision in *M.A.B. v. R.B.* is consistent with the decisional law of other jurisdictions that have embraced the nexus criterion.¹⁹⁰ Similar decisions have been reached by courts in Alaska,¹⁹¹ California,¹⁹² Massachusetts,¹⁹³ New Jersey,¹⁹⁴ Oregon,¹⁹⁵ and Virginia.¹⁹⁶

184. See *supra* notes 160-164 and accompanying text.

185. 134 Misc. 2d at 331, 510 N.Y.S.2d at 969.

186. *Id.*

187. *Id.* at 326, 510 N.Y.S.2d at 965.

188. 134 Misc. 2d at 331, 510 N.Y.S.2d at 969. The court found R.B. to be a "caring and worthy father." *Id.*

189. *Id.*

190. See *supra* notes 142-152 and accompanying text.

191. *S.N.E. v. R.L.B.*, 699 P.2d 875, 878-79 (Alaska 1985) (court invoked nexus test and found no evidence that mother's lesbianism would adversely affect the child).

192. *Nadler v. Superior Court*, 255 Cal. App.2d 523, 525, 63 Cal. Rptr. 352, 354 (1967) (finding trial court failed to exercise discretion when it found lesbian mother unfit).

193. See *supra* notes 143-150 and accompanying text.

194. *M.P. v. S.P.*, 169 N.J. Super. 425, 439, 404 A.2d 1256, 1263 (1979) (homosexual parent awarded custody based on no showing of harm to child).

195. *E.g.*, *A. v. A.*, 15 Or. App. 353, 514 P.2d 358 (1973) (gay father). *Cf.* *Ashling v. Ashling*, 42 Or. App. 47, 599 P.2d 475 (1979) (restrictive provisions in visitation award inappropriate where mother's lesbian relationship caused no harm to children).

196. *Doe v. Doe*, 222 Va. 736, 284 S.E.2d 799 (1981) (child not adversely affected by the conduct of lesbian mother).

VI. Analysis

The extent to which the homosexuality of a father will reflect on the final award of custody remains uncertain. This uncertainty is in part the result of the highly individualized nature of custody disputes,¹⁹⁷ inadequate¹⁹⁸ and anonymous case reporting,¹⁹⁹ sealing of records,²⁰⁰ judges' idiosyncratic decisions,²⁰¹ fear among some gays to fight for custody,²⁰² and limited appellate review.²⁰³ Compounding this uncertainty is the fact that some gay and lesbian parents are reluctant to reveal their sexual orientation during a custody hearing due to their fear that this revelation will become the focal point of the proceeding,²⁰⁴ preclude them from obtaining custody,²⁰⁵ or provide a basis for the court to impose conditions on visitation and custody.²⁰⁶

A. *The Underlying Ambiguity in the Statutory Standard*

The primary legal consideration in awarding child custody is the best interest of the child.²⁰⁷ Problems arise when the judiciary tries to resolve the ambiguity inherent in such an evanescent standard. These problems are further exacerbated when the best interest of the child standard is applied to a factual situation where one parent is a homosexual father.

The idealized standard of the best interest of the child is based on the proposition that the judiciary can make appropri-

197. Sheppard, *supra* note 2, at 229.

198. *Id.* (case reporting is inadequate due to selective and truncated recitations of the facts). See also Basile, *supra* note 2, at 5 (cases are "often entirely omitted or severely truncated.").

199. Rivera, *supra* note 2, at 329.

200. *Id.* at 329-30.

201. *Id.* at 330.

202. D.H. v. J.H., 418 N.E.2d 286, 292 (Ind. Ct. App. 1981) ("hesitancy on the part of the homosexual parent to reveal sexual preference for fear of retaliation by employers and public disapproval."). Gay parents, however, are becoming more vocal in fighting for custody. See *Family Feuds: Gays Fight For Custody*, A.B.A. J. 38 (Dec. 1984); and Hitchens, *supra* note 2, at 89.

203. See *supra* notes 78-80 and accompanying text.

204. For discussion on how a parent's homosexuality becomes a central concern of courts, see Sheppard, *supra* note 2, at 223; Basile, *supra* note 2, at 13; and Hitchens, *supra* note 2, at 92.

205. See Polikoff, *supra* note 2, at 907-08; Hitchens, *supra* note 2, at 92, 93, 94.

206. See *supra* notes 103-115 and accompanying text.

207. See *supra* notes 48-80 and accompanying text.

ate factual judgments about what children need. This standard offers no assurances that the judges and attorneys applying this standard are not imposing anything other than their own sentimental values about child rearing.

With regard to homosexuality, many decisions based on the best interest of the child presuppose that a child whose parent is socially devalued is injured by placement with that parent.²⁰⁸ At the very least, in many cases judges and attorneys have intimated that a child raised in a homosexual home environment is necessarily worse off than a child raised in a heterosexual home environment.²⁰⁹ The more subtle issue in these cases is to what extent the court has given tacit approval to social and moral proscriptions against homosexual expression.

Although courts do grant custodial and visitation privileges to homosexual parents, these privileges are often conditioned on the exclusion of other homosexuals or preclude overnight visits.²¹⁰ Such conditions are at least suspect when contrasted with the absence of similar limitations on heterosexual parents.²¹¹

B. *A Suggested Statutory Revision*

A national review of judicial decisions reveals that the determination of the best interest of the child may be achieved in one of three diverse ways where a homosexual parent seeks custody. The first approach, adopted by one court,²¹² recognizes a presumption of regularity in favor of an award of custody to a nonhomosexual parent in a custody dispute.²¹³ The prevailing approach, though, is that a parent's sexual orientation alone does not provide a sufficient basis for denying child custody. Jurisdictions adopting this approach hold that a parent's sexual orientation is one factor to be considered among several.²¹⁴ Finally, in a handful of jurisdictions including New York, the courts have required that a nexus be shown between the sexual orientation of a parent and an adverse effect on a child before

208. See *supra* notes 85-102 and accompanying text.

209. *Id.*

210. See *supra* notes 103-115 and accompanying text.

211. See *supra* notes 169-172 and accompanying text.

212. See *supra* notes 121-125 and accompanying text.

213. *Id.*

214. See *supra* notes 126-141 and accompanying text.

such an orientation will be considered relevant at all.²¹⁵

Both the presumptive approach and the multifactor approach permit the introduction of evidence of private sexual behavior without the slightest showing that this behavior has any negative impact on the welfare of the child.²¹⁶ These approaches, in essence, shift the burden of proof to lesbian and gay parents. Instead of receiving evenhanded treatment, lesbian and gay parents struggle to overcome time-honored biases and assumptions about the adversity of homosexual orientations on the welfare of children.²¹⁷

The nexus approach reflects an attempt by some jurisdictions to afford homosexual parents the opportunity to litigate custody on the same footing as heterosexual parents. Here, courts have required a positive showing that a parent's homosexuality has a present, direct, and adverse impact on a child's welfare before such an orientation will be considered relevant.²¹⁸ This heightened evidentiary criterion is analogous to that employed where a parent is involved in an extramarital heterosexual relationship.²¹⁹ The intended purpose of this approach is to prevent the introduction of a parent's sexual orientation to distract from the real issue, namely, serving the best interests of the child.

In an attempt to assure that this nexus test is fairly and consistently applied in New York, the Domestic Relations Law should be revised to reflect this case law criterion.²²⁰ Although evidence concerning a parent's same-sex orientation should not be excluded in all custody cases, such evidence should not be permitted to be introduced as a red herring when difficult deci-

215. See *supra* notes 142-164 and accompanying text.

216. See *supra* notes 121-141 and accompanying text.

217. See *supra* notes 85-119 and accompanying text.

218. See *supra* notes 142-150 and accompanying text. Consistent with the nexus test "the homosexuality of a parent should only be an issue insofar as the parent's sexual orientation can be proven to *have harmed* the child." Rivera, *supra* note 2, at 330 (emphasis added).

219. See *supra* notes 75-77 and accompanying text.

220. A comparable criterion has been enacted by the Oregon legislature. The nexus standard codified in Oregon provides in part: "[T]he court shall consider the conduct, marital status, income, social environment or lifestyle of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child." OR. REV. STAT. § 107.137(4) (1987).

sions are being made about the future welfare of minor children.

It would be helpful if the state legislature would formally adopt the nexus criterion for assessing the impact of sexual orientation upon child custody proceedings.²²¹ This statutory provision would promote a certain level of objectivity in an otherwise subjective and emotionally charged child custody proceeding. Furthermore, this heightened evidentiary standard would give lesbian and gay parents a legal basis to appeal lower court decisions when their sexual orientation has been accorded undue weight in the child custody equation.

Having defined this nexus criterion for awarding child custody according to the best interest of the child standard, there remains some doubt as to how this criterion will be refined and effectively applied. The nexus criterion will not dispel societal myths about homosexuality, but may provide some legal protection to homosexual parents seeking to preserve continuity in their relationships with their children and in their chosen lifestyle.

C. *Time for Judicial Consciousness*

There is probably no better way of protecting the rights of homosexual fathers, and serving the best interests of their children, than to raise individual consciousness concerning homophobic attitudes in our society. Individual jurists, attorneys and child custody litigators should examine societal assumptions and historical proscriptions concerning homosexuality when they approach the facts of a particular case. Recognition must be given to the fact that a parent's same-sex orientation is often evaluated within a larger legal framework that is historically homophobic. An effort should be made to set aside personal values that may conflict with the judiciary's responsibility of best providing for the child's custody, care, education, and maintenance.

221. One commentator has suggested that "[t]he application of the 'nexus' test is problematic in those states that do not statutorily require a showing of present harm . . . to the child." Rivera, *supra* note 2, at 330.

VII. Conclusion

A gay father seeking child custody must overcome societal and judicial assumptions about the adverse impact of his homosexual orientation on the welfare of minor children. Although homosexuality is rarely in and of itself a sufficient basis for denying custody, a parent's sexual orientation has been accorded considerable weight in the child custody equation.

Gay consciousness is a relatively new phenomenon and New York courts have expanded their understanding of homosexual parenting. New York decisional law comports with a current movement to encourage the award of custody to the party who can best meet the child's needs, irrespective of that parent's sexual preference. In New York, a proposed custodial parent's sexual orientation is appropriately considered only when it can be shown in fact to have an adverse impact on a child's welfare. But the question still remains whether the judicial standard developed by New York courts can be fairly and consistently applied, even if codified, in light of the history of homophobia in American society.

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