CAN YOU REALLY BE A GOOD ROLE MODEL TO YOUR CHILD IF YOU CAN'T BRAID HER HAIR? THE UNCONSTITUTIONALITY OF FACTORING GENDER AND SEXUALITY INTO CUSTODY DETERMINATIONS

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I. INTRODUCTION

The best way to defend your constitutional rights as a parent may be to enroll in beauty school. One trial court[1] implied that the ability of a parent to style a child's hair is a relevant consideration in the determination of a child custody dispute.[2] While family courts make decisions about what traits children should learn from their parents with respect to gender and sexuality, the constitutional dimensions of these role model arguments remain murky.[3] Court decisions that consider the gender and sexuality of the parents and child have threatening constitutional implications. A parent's ability to be a parent and specifically, style their child's hair, has little or nothing to do with the gender and sexuality of the parent or child. If courts do want to make constitutionally sound custody determinations based on gender and sexuality, then it should not be done on such flimsy grounds, such as hair braiding.

Over the past fifty years courts have grappled with how parents' gender and sexuality affects childhood development and whether or not it should be considered as a factor in child custody

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1 Many of the cases cited in this article refer to trial court decisions. Although higher courts later overturned some family court decisions, trial court judges' opinions provide an insightful glimpse into family court judges' perspective on gender and sexuality during child custody determinations.

2 Dalin v. Dalin, 512 N.W.2d 685, 691 (N.D. 1994) (Sandstrom, J., dissenting). Through testimony, the court considered the father's ability to style his child's hair because it perceived hairstyling as one of the important traits that parents must possess as a role model for their children in custody disputes.

3 The father in *Dalin* appealed the trial court's custody decision, claiming that the trial court based its decision on improper gender bias. However, there were no constitutional issues raised. The appeal did not include a constitutional argument, and as such, the appellate court applied the gender standard but did not discuss its constitutionality. *Dalin*, 512 N.W.2d at 687.

disputes.[4] While some courts are now attempting to settle custody disputes without employing gender and sexuality as determining factors, not all courts do so. When courts take this liberal approach, gender and sexuality may still have an effect, even indirectly, on custody determinations. For example, gender had an implied effect on the custody decision of Roland W. Dalin's daughter, after the court asked how he fixed his three year-old daughter's hair in the morning.[5] Mr. Dalin responded to the judge by saying,

> Um, I normally just pull it back and put it in a pony tail. I haven't gotten to the point where I can learn how to braid. So I have my mother assist me in helping her getting her hair braided. And I comb it. I wash it. And I generally just kind of put it in a pony tail.[6]

Was it because he could not braid his daughter's hair, or show her how to braid her own hair, that Mr. Dalin lost custody of his daughter?[7] Is he less of a parent for not being able to fix his daughter's hair? Is a mother less of a parent if she cannot provide a heterosexual stepparent?

In another example, sexuality was a prominent and explicit factor in the decision regarding a custody dispute when the court ruled in favor of the heterosexual father and his new wife.[8] The lesbian mother lost custody because she was not considered a nurturing caretaker, even though her partner regularly attended the child's field trips and ate lunch with the child at school twice a month.[9] On the other hand, the heterosexual stepmother was considered an appropriate caretaker, despite the fact that the opinion does not mention anything about her having shared these same activities with the child.[10]

When deciding custody or visitation, judges will sometimes invoke a role model argument looking at which parent is better suited for their child's psychosexual development.[11] Some role

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4 *See* Heidi C. Doerhoff, *Assessing the Best Interest of the Child: Missouri Declares that a Homosexual Parent is Not Ipso Facto Unfit for Custody*, 64 MOR. L. REV. 949, 950 (1999). *See also* Michael S. Wald, *Adults' Sexual Orientation and State Determination Regarding Placement of Children*, 40 FAM. L.Q. 381 (2005).

5 *Dalin*, 512 N.W.2d at 691 (Sandstrom, J., dissenting) (discussing trial court testimony regarding gender).

6 *Id.* (quoting the father's testimony at the trial court).

7 *Id.* (Sandstrom, J., dissenting) (discussing trial court testimony regarding gender).

8 *See Ex parte* J.M.F., 730 So. 2d 1190, 1194–96 (Ala. 1998).

9 *See id.*

10 *See id.* at 1195.

11 *See generally* Krotoski v. Krotoski, 454 So. 2d 374, 376 (La. Ct. App. 1984); Weber

model arguments are gender focused, such as the notion that a boy needs a strong male role model or a girl needs to learn feminine activities from her mother.[12] Others are sexual, specifically heterosexual: this child needs an opposite-sex parent or parents in a heterosexual relationship, as a role model so that the child can develop as a heterosexual.[13] Judges can be both implicit and explicit in making a role model argument. However, whether based on gender or sexuality, explicit or implicit, this paper demonstrates that such determinations are based on outmoded ideas that are harmful to families. Moreover, while family courts consider the intersection of custody with gender and sexuality, the Supreme Court has ruled on issues of gender and sexuality. After *Craig v. Boren*, states cannot employ traditional gender roles,[14] and homosexuality is protected by the privacy rights of the Fourteenth Amendment in *Lawrence v. Texas*.[15] This paper explores the effects of *Craig v. Boren* and *Lawrence v. Texas* on custody decisions based on issues of gender and sexuality and argues that these two cases render some custody decisions unconstitutional. Ideally, family courts should use the decisions of *Craig* and *Lawrence* as a new basis for future attitudes toward gender and sexuality in custody determinations. This paper argues that judges act unconstitutionally when they make gendered or heterosexist role model arguments, thus violating *Craig* and *Lawrence*.[16]

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v. Weber, 512 N.W.2d 723, 725 (N.D. 1994); *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974).

12 *E.g.*, Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004); Harris v. Harris, 647 A.2d 309, 312, 314 (Vt. 1994).

13 *E.g.*, Pleasant v. Pleasant, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993); S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

14 Craig v. Boren, 429 U.S. 190, 198 (1976).

15 Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The Texas statute [criminalizing homosexual conduct] furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

16 For the purposes of this paper, I use the terms "gender" and "sexuality" in a postmodern context, which "understand[s] 'sexuality' and 'gender' predominantly as productions of human discourse rather than as natural phenomena." WILLIAM N. ESKRIDGE & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 584 (2nd ed. 2004). In particular, when I use the terms "gender" and "sexuality" I use them as they are socially constructed by the legal system, as changing ideological reflections. For example, when citing to law and custody cases, I rely on the terms "sex" and "gender" (and use them somewhat interchangeably) to reflect the gender identity that the court has assigned to mothers and fathers based on "male" and "female" identities. I use the term "sexuality" to mean the heterosexual or homosexual orientation of the parent as described by the court in each particular case. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 21–23 (1995) (discussing

In Part II of this paper, I offer a brief history of how courts have treated sexuality and gender in relation to custody disputes. Part III describes the role model argument used by courts, based on which parent's gender and or sexual orientation is appropriate for the child's development. Part IV demonstrates how the role model argument is unconstitutional based on the Supreme Court's decisions in *Craig v. Boren* and *Lawrence v. Texas*. Finally, Part V concludes that gender and sexuality should not be used as a substitute for evaluating parenting skills in custody cases. The state's only interest should be supporting safe and healthy sexuality and gender development for all children and families.

II. A Brief History of Sexual Orientation, Gender and Custody

The concepts of sexuality and gender are often intertwined in the realm of child custody disputes.[17] The gender of the parent or their child has been raised as an issue by judges in cases of both same-sex and different-sex families. A major reason for the intermingling of gender and sexuality in child custody disputes is that child custody laws have traditionally reflected heterosexual assumptions and models of parenthood.

The roots of this traditional legal doctrine stem from models of heterosexual marriage and reflect patriarchal viewpoints of parenthood.[18] In family law, the basis for recognizing individuals as

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how the words "sex" and "gender" have, somewhat mistakenly, evolved). Sex refers to biophysical traits of "men" and "women," and gender indicates a socially constructed notion of "male," "female," "masculine," and '"feminine." Nevertheless, this "physical/social distinction" is often ignored, confused or conflated. Legal doctrine has not thus far provided for a set definition of "sex" and "gender."

17 *See* Pleasant v. Pleasant, 628 N.E.2d 633, 637 (Ill. App. Ct. 1993). *See also* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 Yale J.L. & Feminism 257, 343 (2009) (identifying how common it is for courts in custody and visitation cases to conflate gender and sexual development stereotypes).

18 Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."); *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) ("While much study, and even more controversy, continue to center upon the effects of homosexual parenting, the inestimable developmental benefit of a loving home environment that is anchored by a successful [heterosexual] marriage is undisputed."); Marvin v. Marvin, 18 Cal. 3d 660, 684 (Cal. 1977) ("Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage."); Ruthann Robson, Lesbian (Out)Law: Survival Under the Rule of Law 130 (1992); Nadine A. Gartner, *Lesbian (M)otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 Law & Sexuality Rev. 45, 48, 54 (2007).

parents is the institution of heterosexual marriage.[19] For example, "the law's emphasis on the formal link and status of parenthood was essentially secondary to and derived from the formal relationship of marriage."[20] The doctrinal framework of child custody law began with a patriarchal idea of a father's absolute rights to the custody of children based on property rights. Under common law, a father's right to ownership and control of his children was analogous to having title, which included the legal duty to support them.[21] Later, courts shifted towards the gender biased standard in favor of the mother—the tender years doctrine.[22] This doctrine was based on the idea that *mother love* is natural and better than a father's love.[23] Following the tender years doctrine[24] and in response to second-wave feminism,[25] courts have now applied a more gender-neutral custody standard, referred to as the primary caretaker presumption.[26] This standard takes into account factors such

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19 *In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974) ("The right of a natural parent to its child must be included with the bundle of rights associated with marriage, establishing a home and rearing children."); Lehr v. Robertson, 463 U.S. 248, 256–57 (1983) ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society."). Because marriage has played such a central role in society, state courts typically favor *formal families* when determining the best interests of the child. *See* Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting) ("The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children. . . . The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages."). Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interest*, MICH. L. REV. 463, 464 (1983) ("The way family relationships are defined has significant legal consequences because our laws bestow great benefits upon families.").

20 Kath O'Donnell, *Lesbian and Gay Families: Legal Perspectives, in* CHANGING FAMILY VALUES 77, 86 (Caroline Wright & Gill Jagger eds., 1999).

21 MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 76 (1995) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769) 452–53 (1869)).

22 *See generally* Gartner, *supra* note 18, at 55.

23 Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916) ("Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's."). *See also* ROBSON, LESBIAN (OUT)LAW, *supra* note 18.

24 *See also Ex parte* Devine, 398 So. 2d 686, 689 (Ala. 1981) (noting that tender years presumption developed from an 1830 case in Maryland where the court reviewed policy considerations regarding why a child should remain with the mother).

25 *See generally* Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004) (discussing second-wave feminism as beginning in the 1960s and 1970s, a movement for women's rights and liberation that consisted largely of white, middle-class women).

26 ROBSON, LESBIAN (OUT)LAW, *supra* note 18; *In re* the Marriage of Petersen, 2010

as which parent feeds, bathes, and grooms the child; it was often applied with a gender bias that favored the mother.[27]

WL 4484445 (Iowa Ct. App. 2010) (showing a gender neutral application where Supreme Court upheld lower court's decision to award joint custody to both parents after determining that the father was the primary caretaker, including pre- and post-daycare activities, during the marriage). *See, e.g., In re* Marriage of Davis, WL 4493049 (Cal. Ct. App. Nov. 10, 2010) (noting that the emotional bond between the child and the primary caretaker is an important factor to maintain custody arrangement); *In re* Marriage of Zigler, 529 S.W.2d 909 (Mo. Ct. App. 1975) (awarding custody to mother, who as the primary caretaker was responsible for the child's health, personal and educational needs, created a "proper home environment" for the child, and made day-care arrangements, in contrast to father who had not found a school near his home for the child).

> In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (describing the application of the primary caretaker custody doctrine).

[27] *See, e.g., Garska*, 278 S.E.2d at 363 (discussing how in some families the father may perform the role of the primary caretaker, but in *traditional* families, the mother did not work "and performed the traditional and honorable role of homemaker" while the father "played the traditional role of breadwinner, working eight to ten hours a day," and updating the tender years doctrine to the newer primary caretaker doctrine by simply substituting the words "mother" and "maternal" with "primary caretaker parent"). *See also* Gartner, *supra* note 18, at 55 n.10; *In re* Marriage of Burgess, 913 P.2d 473, 479 (Cal. 1996) ("Although they saw their father regularly, their mother was, by parental stipulation and as a factual matter, their primary caretaker."). Gordon v. Gordon, 577 P.2d 1271 (Okla. 1978), illustrates how courts began to take the role of the primary caretaker into consideration when facing constitutional attacks on the statutory tender years presumption from the father. The custody determination still favors mothers, where court awarded custody to mother, noting she had been the primary caretaker of the child since birth:

> It is indeed an old notion that a child of tender years needs a mother more than a father, but defendant has not persuaded us that this notion is either unsound or unconstitutional. We believe that consideration of the cultural, psychological and emotional characteristics that are gender related make this custodial preference one of "those instances where the sex-centered generalization actually (comports) to fact." Craig v. Boren, supra, 429 U.S. at 199. The statute's additional provision that children who are of an age to require education and preparation for labor or business should be placed in the father's custody further reinforces our decision. This provision makes clear the essential fact that this statute is not concerned entirely with the "rights" of parents to

Starting in the 1960's when courts first began hearing lesbian and gay custody disputes, courts categorically discriminated against gay and lesbian parents.[28] At the time, a parent's sexuality was applied as a *per se* ban on custody. For example, a California court ordered a gay father to move out of the home that he shared with his partner, and "immediately . . . take up residence in the home of his parents."[29] The court required the paternal grandmother to accompany the children during any visitation with their father, and ordered psychiatric treatment for his homosexual behavior "until further order of the Court."[30] Thirteen years later, the Supreme Court of Georgia upheld the trial court's decision to award custody of an eight-year-old girl to her paternal grandparents, reasoning that the mother, who "lived an immoral life," left her daughter in the custody of her female friends, who "taught the child about 'the gay life.'"[31] The *per se* ban on custody continued well into the 1980's when the Supreme Court of Virginia held that the father's "exposure" of his homosexual relationship to his child rendered him as "an unfit and improper custodian as a matter of law."[32]

Beginning in the 1970's, in an effort to transition away from the outright gender bias of the "primary caretaker presumption" and sexual orientation discrimination of the *per se* ban on custody

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> their children. In addition to, and far beyond, their rights, the paramount purpose of the statute is to serve the welfare and best interests of children.

Id. See also Dodd v. Dodd, 93 N.Y.S.2d 401 (N.Y. Sup. Ct. 1978) (holding that mother should be awarded custody of children because she was primary caretaker, was more sensitive to their needs, and provided a better role model for the children).

28 Evans v. Evans, 8 Cal. Rptr. 412, 414 n.1 (Cal. Ct. App. 1960) (discussing trial court's visitation order that required homosexual father to leave his home that he shared with his partner to instead reside with his parents and seek psychiatric help); Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981) (noting that mother's homosexuality was the overriding factor even though the trial court determined both parents as "fit, willing and able" to assume custody of the children), *overruled by* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003). The Supreme Court was concerned that the mother Sandra would be living with Sue after she admitted to a sexual relationship with Sue prior to the termination of the marriage. The Court acknowledged that Sandra's children would be affected once they become aware of their mother's homosexuality. *Jacobson*, 314 N.W.2d at 80–81. Commonwealth *ex. rel.* Bachman v. Bradley, 91 A.2d 379 (Pa. Super. Ct. 1952) (holding that it was proper for the trial court to limit father's custody because of his homosexual tendencies and immoral conduct); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *1 (Tenn. Ct. App., Mar. 30, 1988) (holding that "[a]fter hearing all the evidence, the trial court found that the lifestyle of the [m]other was not conducive to the best interests of the child. She therefore awarded custody to [f]ather").

29 *Evans*, 8 Cal. Rptr. at 414 n.1.

30 *Id.*

31 Bennet v. Clemens, 196 S.E.2d 842, 843 (Ga. 1973).

32 Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985).

for gay and lesbian parents, courts started to apply "the best interest of the child standard."[33] Currently, the best interest of the child test consists of various factors, based on state statutes[34] and case law, which are weighed by a judge to determine which parent can act in the best interest of the child.[35] For example, according to the New York State Court of Appeals, "primary among the circumstances to be considered in determining the best interests of the child are the ability to provide for the child's emotional and intellectual development, the quality of the home environment and the parental guidance provided."[36] Thus, courts will include a variety of factors when crafting their own best interest of the child test.

A parent or child's sexuality or gender could be considered as factors among many within the "best interest test," and given varying degrees of importance by judges on a case-by-case basis.[37] For example, in Alabama, the child custody statute states that, "the court may give custody . . . having regard to . . . the age and sex of the child."[38] However, when sexuality and gender are considered as factors in custody disputes, judges have relied on harmful myths about same-sex parents that have produced negative outcomes regarding the child's custody.[39] Commonly used arguments against

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[33] J.A.D. v. F.J.D., 978 S.W.2d 336, 339 (Mo. 1998). This Court applied the "guiding star" legal standard for determining custody disputes—the "best interest of the children" test. *Id.* It stated that a homosexual parent is not "ipso facto unfit for custody," even though it is permissible for the court to consider a parent's homosexual misconduct. *Id. In re* Marriage of Teepe, 271 N.W.2d 740, 742 (Iowa 1978); ROBSON, LESBIAN (OUT)LAW, *supra* note 18.

[34] *See generally* WIS. STAT. ANN. § 767.41(2)(2) (West 2011); ALA. CODE § 30-3-1 (1998).

[35] *See, e.g.*, Blew v. Verta, 617 A.2d 31, 35 (Pa. Super Ct. 1992) ("The standard 'best interest of the child' requires us to consider the full panoply of a child's physical, emotional, and spiritual well-being."). *See also* ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130.

[36] Louise E.S. v. W. Stephan S., 477 N.E.2d 1091, 1092 (N.Y. 1985).

[37] *Compare* J.L.P. v. D.J.P., 643 S.W.2d 865, 870 (Mo. Ct. App. 1982) ("The case law indicates . . . that homosexual parents' rights may be restricted if, under the circumstances, the imposition of certain restrictions is in the best interests of the children."), *with In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974) The court concluded that a parents' homosexuality "does not *per se* provide sufficient basis for a deprivation of visitation rights." *Id.* at 92.

[38] ALA. CODE §30-3-1 (1998).

[39] *See, e.g.*, J.L.P. v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) ("Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated."); Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1981), *overruled by* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003). The Court in *Jacobson* discussed that, despite the increased acceptance of homosexuality, homosexuality is still not *normal*, and thus it cannot ignore sexuality as a factor. "It is not inconceivable that one day our society will accept homosexuality as 'normal.' Certainly it is more accepted today than it was

awarding custody to gay and lesbian parents include the fear that children will be molested by their gay parents,[40] develop homosexual preferences,[41] suffer psychological harm,[42] become infected by HIV/AIDS,[43] or experience harassment and stigmatization for hav-

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only a few years ago. We are not prepared to conclude, however, that it is not a significant factor to be considered in determining custody of children, at least in the context of the facts of this particular case. Because the trial court has determined that both parents are 'fit, willing and able' to assume custody of the children we believe the homosexuality of Sandra is the overriding factor." Bottoms v. Bottoms, 457 S.E.2d 102, 108 (1995) (holding that even though mother's lesbianism does not *per se* make her an unfit parent, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody."). The trial judge in *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) said, "a child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality]" and that "it can[not] do the boy any good to live in such an environment. It might do some harm." The Supreme Court wrote, "[i]n reviewing the entire record before us, we cannot tell what standards of law the trial court followed in reaching its decision on visitation rights. While the findings and conclusions of law suggest the homosexuality of the father was not the determining factor the unfortunate and unnecessary references by the trial court to homosexuality generally indicate the contrary." *Id.* at 888.

[40] J.L.P. v. D.J.P., 643 S.W.2d 865, 867, 869 (Mo. Ct. App. 1982) (denying gay father custody for fear that his son would be molested by him or his homosexual friends despite expert psychologist testimony that most sexual molestation occurs among heterosexuals).

[41] S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (expressing concern that the child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future."); J.L.P. v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) ("The father directly testified that he thought it would be 'desirable' for his child to become a homosexual . . . . The whole tenor of the father's appeal and his conduct in the trial and appellate stages demonstrate that he is oriented towards the 'cause' of homosexuality. The trial court could take into consideration the fervor of the father's beliefs concerning homosexuality in assessing the possibility of harm to the child arising from that conduct which the trial court characterized as 'seductive in nature.'"); *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (finding persuasive psychologist's testimony in favor of the heterosexual parent that "the total environment to which the father exposed the children could impede healthy sexual development in the future . . . [T]he father's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development . . . . [I]t is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development."); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (concluding that awarding custody to lesbian mother would harm the child because homosexuality is a harmful, socially unacceptable, learned practice that will only damage the child's future).

[42] N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980) (noting the husband's argument that custody modification removing daughter from lesbian mother's custody was warranted due to concern that mother's lesbian relationship would have an "unwholesome" and "unhealthy" effect upon daughter's mental health); *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (expert psychologist testified that limiting subject children's exposure to father's homosexual lifestyle was considered to be "good preventative psychiatry").

[43] Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (seeking custody modifi-

ing gay parents.[44]

When applying the best interest of the child standard, some courts strive for a neutral application while other courts still retain traces of gender-biased notions of child rearing and homophobia.[45] This reality is not surprising, considering that the best interest of the child standard stems from heterosexual legal traditions.[46] Heterosexual marriage has historically played a central role in determining legal parenthood doctrines, thereby infusing child custody doctrine with heterosexism.[47]

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cation because of custodial father's sexuality and HIV-positive status); J.P. v. P.W., 772 S.W.2d 786, 786–89 (Mo. Ct. App. 1989) (mother sought to supervise child's visit with his father to protect child from exposure to AIDS); *In re* Adoption of Charles B., 50 Ohio St. 3d 88, 95 (1989) (Resnick, J., dissenting) (discussing that child should not be adopted by a homosexual parent due to the increased risk of contracting HIV). *See also* David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Reality*, 3 WM. & MARY BILL RTS. J., 345, 361 (1994) (discussing a case where a mother was not allowed to kiss her daughter for fear of infecting her daughter with AIDS.). *See also* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009).

[44] Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981), *overruled by* Damron v. Damron, 670 N.W.2d 871 (noting court's observation that children will "suffer from the slings and arrows of a disapproving society" when determining custody); Blew v. Verta, 617 A.2d 31, 35 (Pa. Super Ct. 1992) (overturning trial court decision to limit lesbian mother's custody based on other people's reaction to her sexuality. "The trial court based a finding of detriment not on the mother's homosexual relationship itself but rather on other individuals' reaction to the mother's relationship."); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988) ("[S]he faces a life that requires her to keep the secret of her mother's lifestyle, or face possible social ostracism and contempt. This adds tremendous pressure to a young child's life."); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (noting that "the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.").

[45] *Compare* Blew v. Verta, 617 A.2d 31, 36 ("In Nicholas' case, one of life's realities is that one of his parents is homosexual . . . . Nicholas' best interest is served by exposing him to reality and not fostering in him shame or abhorrence for his mother's nontraditional commitment."), *with* Dailey v. Dailey, 635 S.W.2d 391, 396 (Tenn. Ct. App. 1981) (noting best interest standard warranted removal of unlimited visitations with lesbian mother because, "[t]o permit this small child to be subjected to the type of sexually related behavior that has been carried on in his presence in the past under the proof in this record could provide nothing but harmful effects on his life in the future."). *See also* ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130-31.

[46] *See* O'Donnell, *supra* note 20, at 77.

[47] *See* J.P. v. P.W., 772 S.W.2d 786, 787 (Mo. Ct. App. 1989) (describing how father had oral sex regularly with his male partner, in contrast to the "normal" sex he had with his wife); O'Donnell, *supra* note 20, at 77 (writing about how the legal notions of parental rights have been constructed around the institution of heterosexual marriage, O'Donnell expressed "concern about the perceived decline of the family and urgings to return to 'family values,' [which] are firmly based in an ideology of family life [and] can be described as highly traditional and which revolves around a nuclear unit based in heterosexual marriage."). *See also* Gartner, *supra* note 18, at 53–54 (not-

The best interest of the child standard provides judges broad discretion to determine what type of family structure is most suitable for the child's development.[48] Moreover, judges use their wide latitude to assert their own homophobic notions[49] and gender bias into the standard.[50] The best interest of the child test, therefore, "often is applied as if it is the best-interest-of-the-state-test, especially where judges reason that it is in the best interests of a child to grow up in a conventional state-approved family."[51]

The ability of judges to apply the best interest of the child standard according to their own perceptions of gender is evidenced by a 1989 study, conducted by the Massachusetts judiciary to determine if the best interest of the child standard was applied with any sort of gender bias from the judge.[52] The results from this study showed that "in 24,000 divorce cases involving child custody issues, the courts found for the biological mother 93.4% of the time, the biological father 2.5% of the time and some form of joint custody 4% of the time."[53] Although this study was conducted twenty-two years ago, divorcing couples still face the same innate stigma placed on them by the judicial system, which is further complicated by complex familial constructs.[54]

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ing that when settling child custody cases, courts apply legal doctrines that "stem from models of heterosexual marriage and embody stark gender biases that do not translate when applied to [homosexual] couples").

48 J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998) ("The trial court has broad powers . . . to impose restrictions and requirements upon visitation for the health and well-being of the children."); N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (noting that judges possess "wide latitude" when making custody decisions as to the best interest of the child). *See also* Wald, *supra* note 4 at 423.

49 *See* N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (analogizing mother's lesbian partner to social deviants, thereby justifying visitation decree that protects child from mother's lesbian partner). In an example of a judge's tendency to insert his or her own homophobic notions, one judge analogized mother's lesbian partner to a social deviant stating that "[s]uppose the persona non grata were an [sic] habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher? To cut off association with such a person as a condition to the child custody would be entirely reasonable." *Id.* at 183. *See also* Gartner, *supra* note 18, at 56.

50 N.K.M. v. L.E.M., 606 S.W.2d 179, 183–84, 189 (Mo. Ct. App. 1980) (noting that court determined mother is a lesbian based on evidence that she is "servient," and has a close friend who has a "powerful, dominant" personality, and does most of the driving for the two women, further asserting that teenage daughters need a "mother figure").

51 ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130.

52 Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989), *reprinted in* 24 NEW ENG. L. REV. 745 (1990).

53 Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Mediation*, 44 FAM. CT. REV. 87, 96–97 (2006) (referring to a study conducted by Massachusetts Supreme Judicial Court).

54 Sandlin v. Sandlin, 906 So. 2d 39, 41–42 (Miss. Ct. App. 2004) (determining that

When applied to custody disputes between gay parents, some applications of the best interest of the child standard included an inquiry into the "morality" of homosexuality.[55] Also considered were the effects that homophobic reactions from third parties would have on the child in question.[56] Such an analysis further demonstrates the ability of judges to apply the best interest of the child standard according to their own ideas of sexuality. Using this analysis, both lines of inquiry are clearly biased to favor the heterosexual parent.[57]

Today, courts often apply the best interest of the child as a balancing test by weighing the parents' sexuality as one factor among many in custody hearings such as visitation.[58] Even when courts attempt to balance a parent's sexuality as one factor among many in the best interest of the child test, judicial bias often results in a limitation of parental rights, as was done in the following Missouri Court of Appeals case.[59]

> We are not forbidding the parent from being a homosexual . . . . We are restricting the parent from exposing these elements of her 'alternative life style'. . . . We fail to see how these restrictions impose or restrict the parent's equal protection or privacy rights, where these restrictions serve the best interest of the child.[60]

In this case, the court considered the displays of affection and sleeping arrangements between the mother and her lesbian partner in order to determine the mother's visitation rights. The court found that "[a]ll of these factors present an unhealthy environment for minor children. Such conduct can never be kept private enough to be a neutral factor in the development of a child's values and character."[61] The court further stated that it "will not ig-

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daughter needs mother's care and advice and son needs male role models); ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130; Massachusetts Supreme Judicial Court, *supra* note 52.

55 *In re* Marriage of Teepe, 271 N.W.2d 740 (Iowa 1973) (considering father's homosexuality to be "sexual misconduct," as one factor, among many, in making custody determination); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

56 *Blew*, 617 A.2d at 35 (vacating the lower court's order based in part on the fear of third-party homophobic reactions).

57 *See generally* ESKRIDGE & HUNTER, *supra* note 16. Eskridge and Hunter assert that when an inquiry is made into either the morality of sexual orientation or how third parties relate to parents' sexuality, the inquiry is "slanted" in favor of heterosexual parents, leaving homosexual parents at a disadvantage.

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

59 *Id.* at 167.

60 *Id.*

61 *Id.*

nore such conduct by a parent which may have an effect on the children's moral development."[62] Thus, the court restricted the mother's visitations rights because it determined that such factors had a negative impact on the child.

Many courts still apply the best interest of the child test with a heterosexual bias, in a way that discriminates against gay parents. For example, one court rejected a lesbian mother's suggestion that a broader best interest of the child standard be used, preferring a narrower test where homosexuality could never be a neutral factor in determining the best interest of the child.[63] This court explained its reason for applying a narrow best interest of the child test by writing, "[s]ince it is our duty to protect the moral growth and the best interests of the minor children, we find Wife's arguments lacking. Union, Missouri is a small, conservative community with a population of about 5,500. Homosexuality is not openly accepted or widespread."[64]

The sex of the child in relation to the sex of the parent can also be identified as a factor to be considered when courts apply the best interest of the child test to custody or visitation cases.[65] Judges have employed this factor in an implicit and explicit fashion. Implicitly, judges may rely on what they perceive to be commonly understood notions of gender and sex;[66] or explicitly, when the parents' gendered behavior is so outside normative boundaries that judges feel compelled to identify it as such.[67]

Explicitly, in *Bark v. Bark*, an Alabama case, the court began by stating the elements of the standard that facially incorporate a gender classification: "In making its determination of where the best interests of a child may lie, the court should be guided by such factors as the sex and age of the children."[68] The court then goes on to elaborate on other factors that implicate gender, including, "the respective home environment of the parties, the characteristics of those seeking custody, and the capacity and interest of each parent to provide for the varying needs of the children."[69] These

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62 *Id.*

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

64 *Id.*

65 *See* Bark v. Bark, 479 So. 2d 42 (Ala. Civ. App. 1985).

66 *See* N.K.M. v. L.E.M., 606 S.W.2d 179, 183, 186 (Mo. Ct. App. 1980) (wherein an expert witness asserted that teenage daughters need a "mother figure").

67 *See id.* at 186 (restricting mother's custody because mother was 'subservient' to a close female friend who had a "powerful . . . dominant" personality, and did most of the driving for the two women).

68 *Bark*, 479 So. 2d at 43.

69 *Id.*

factors were applied in such a way as to operate as a proxy for facial gender categorization, by favoring a heterosexual father who conforms to paternal gender norm stereotypes, and disfavoring the lesbian mother who does not.[70] When applying the best interest of the child standard, the court looked at the following evidence: "[T]he mother, besides working, is devoting a great deal of her time to her female lover, who spends the night with her frequently . . . . Based on this evidence . . . the trial court could have reasonably concluded that . . . the mother's primary concern was not her children but her lover; therefore, the children's best interest would be served by placing their custody with their father."[71] This analysis relies heavily on gender stereotypes of mothers being bottomless wells of affection and care for their children, and anything less, especially a diversion that could be identified as sexual, is a catastrophic blow to her natural mothering abilities, rendering her unnatural and unfit to parent. Tellingly, the court here mentions nothing about the father's sexuality, whether he does or does not have a relationship, how much time he devotes to his job or new partner, or even what kind of parent he is. It says only that when the "burden" of childrearing "shift[ed]" to the father, he "very willingly assumed the child caring burden and has done an outstanding job."[72] The court leaves the impression that a mother has the assumed and unquestionable duty of taking care of her children, and if she dares object, then she will face punishment. For a father, however, childrearing is a "burden" but one that he must heartily bear if his ex-wife is a lesbian. Rather than actually relying on which parent can better meet the child's developmental needs, or even striving for a equal division of childrearing responsibilities, the *Bark* court begins with the premise that it is the mother's role to do so, a job that a woman must do full time, completely absent of any outside work or sexual interests. And if she cannot meet this high standard, then the court will punish the mother by awarding custody of her children to the father.

Often times the distinction between implicit and explicit use of gender or sexuality is blurred, depending on the particular judge's notions and personal beliefs about gender and sexuality.[73] In other words, even when judges believe their custody determinations do not employ gender or sexuality as a factor, they are in fact

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70 *See id.*

71 *Id.*

72 *Id.*

73 *See* Dalin v. Dalin, 512 N.W.2d 685, 688–89 (N.D. 1994).

doing just the opposite: making a determination that the child is better off with one parent due to their gender or sexuality.[74] For example, the Supreme Court of North Dakota offered the following as a defense of the court's judgment that the father who could not braid his daughter's hair was better off with her mother:

> Gender bias in judicial proceedings is wholly unacceptable . . . . We agree that if the trial court assumed that fathers, as a group, are incapable of adequately raising their daughters, it would be relying on an improper factor to determine custody . . . . However, we do not believe the above exchange evidences that the trial court based its custody determination on the misguided, stereotypical assumption that daughters require female caregivers . . . [t]he trial court merely followed up Roland's attorney's inquiry as to who did the cooking and Roland's disclosure that he relied on his mother for tasks such as potty training and hair braiding . . . Under the circumstances, we conclude that the trial court's questions were not motivated by or evidence of gender bias.[75]

As courts have become more aware of issues of sexuality in particular, some courts have adopted the "nexus test."[76] The "nexus test" is an attempt at a more neutral approach to the application of the parent's sexuality as a factor in the best interest of the child test in custody disputes.[77] In some jurisdictions judges look for a nexus between the parent's sexual orientation and the harm to the child when weighing a parent's sexuality as a factor.[78] The nexus test re-

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74 *See id.*

75 *Id.* at 689.

76 *See* Constant A. v. Paul C. A., 496 A.2d 1, 12 (Pa. Super. Ct. 1985) (Beck, J., dissenting) (arguing for the use of the nexus test, whereas the majority adopted the best interest of the child standard). Judge Beck wrote:

> I would hold that a parent's homosexuality is a relevant consideration *if* it can be shown that the parent's homosexual behavior adversely affects the child(ren). In order for homosexuality to be relevant there must be a clear factual showing of a connection between the parent's homosexuality and its adverse effect on the well-being of the child(ren). *Id.* (Beck, J., dissenting).

77 *See* Delong v. Delong, 1998 WL 15536, at *11 (Mo. Ct. App. Jan 20, 1998). ("[A]n irrefutable presumption, where a parent's homosexual conduct is, alone, determinative, is inherently inconsistent with the best interests of the child standard. . . . Accordingly, a nexus approach is adopted in custody cases involving the issue of a parent's sexual conduct.").

78 *See id. See also, e.g.*, T.C.H. v. K.M.H., 784 S.W.2d 281, 284–85 (Mo. Ct. App. 1989) (rejecting the *per se* approach to determining parental unfitness, but nevertheless finding a nexus between a lesbian mother's homosexual conduct and adverse effects on the 'morality' and 'well-being' of her children.); M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979) (noting lack of evidence that a lesbian mother's homosexuality would adversely affect her daughters.); Wald, *supra* note 4, at 427.

quires the court to find a relationship between parental sexuality and harm to the child.[79] "Under the 'true' nexus approach, the burden of persuasion is allocated so that there must be proof that parental sexuality will have an adverse impact on the child."[80] However, despite the more evenhanded intent of the nexus test, some courts still find it appropriate to apply the test in such a way that requires the homosexual parents to prove an absence of harm to the children.[81] For example, judges often consider factors such as whether the gay parent is "discreet" versus "flamboyant" when making custody determinations between heterosexual and homosexual parents.[82]

While the nexus test is based on the best interest of the child standard and considers homosexuality as only a factor, it is not the sole factor in awarding custody unless the homosexual conduct of the parent harms the child.[83] The homosexual orientation of a parent is not by itself evidence that the parent is unfit.[84] Sexual orientation can also be considered as a secondary factor by a court even if there is a statute that establishes a list of primary factors (not including sexuality) to be considered in awarding custody, because all factors need to be considered.[85]

Courts have explained and applied the nexus test thusly:

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79 S.N.E. v. R.L.B., 699 P.2d 875, 878 (Alaska 1985).

80 Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 916, 919 (2001).

81 *See Delong*, 1998 WL 15536, at *12 (R 10.9(a)(ii) (ordering trial court to apply the nexus test and determine what effect, if any, mother's homosexuality has on children"). *See also, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 513–14 (Ark. Ct. App. 1987) (adopting nexus test with the presumption that "illicit sexual conduct on the part of the custodial parent is detrimental to the children" and determining that "homosexuality is generally socially unacceptable"); McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004) (noting that court applied nexus test); T.C.H. v. K.M.H., 784 S.W.2d 281 (Mo. Ct. App. 1989) (upholding the application of the nexus test); Robson, *Our Children*, *supra* note 80, at 919.

82 M.A.B. v. R.B., 510 N.Y.S.2d 960, 963 (N.Y. Sup. Ct. 1986) (granting custody to a gay father on the ground that the "father's behavior has been discreet, not flamboyant."); Clifford R. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 270 (2009).

83 Pryor v. Pryor, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999) (relying on precedent to hold that "sexual orientation as a single parental characteristic is not sufficient to render that parent unfit to retain physical custody of a child"); Paul C. v. Tracy C., 622 N.Y.S.2d 159, 160 (App. Div. 1994) (citing state case law to hold that "[w]here a parent's sexual preference does not adversely affect the children, such preference is not determinative in a child custody dispute").

84 Hodson v. Moore, 464 N.W.2d 699, 701 (Iowa Ct. App. 1991) (finding that a "discreet homosexual relationship" is not a *per se* bar to custody of a child).

85 Hassenstab v. Hassenstab, 570 N.W.2d 368, 372 (Neb. Ct. App. 1997) (holding that sexual acts are interpreted as sexual misconduct, but that adverse effects or damage by reason of the sexual acts must be shown to justify a change in custody).

> [I]ndiscreet behavior, such as living with someone of the opposite sex without the benefit of marriage, is only a factor to be considered, and our case law requires that there be evidence presented showing that such misconduct is detrimental to the child. . . . Such misconduct is not evidence in itself of a substantial detrimental effect on a child despite the absence of any proof of harm to the child.[86]

Even when finding that homosexuality by itself cannot be a basis for custody modification, one court has found that it was a valid concern of the heterosexual mother's that the father was insensitive when communicating with his daughters about his sexuality.[87] Here, the trial court judge held that the father's decision to "openly co-habit[ate]" with his male partner should be communicated in an appropriate manner because it will spark questions from the children and their friends, and be an issue in the "conservative culture and morays (sic) in which the children live. Father has shown some insensitivity to the girls' needs regarding his lifestyle, even contrary to the recommendations of the Court-appointed evaluator."[88] While the Supreme Court of Idaho went on to clarify that it was not basing a change in custody on the father's sexuality, it nevertheless acknowledged that *how* a parent communicates their homosexuality to their children was relevant for custody determinations.[89] The Court even went so far as to say the mother's request that a professional counselor assist both parents in explaining the father's homosexuality was reasonable.[90] Even though the court believed it did not use homosexuality alone as a basis for modifying custody, it clearly placed great weight on the father's sexuality, stating that,

> [w]hile we acknowledge that homosexuality is a sensitive issue and that a parent may feel he or she has a valid concern about the way in which the other parent communicates this to their children; whether or not a parent's sexual orientation will, in and of itself, support a change in custody of the children is a different issue altogether.[91]

It is doubtful, that it is a "different issue altogether" though, when there is no mention of whether the mother's lifestyle required appropriate explanation to the children, or required the assistance of

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86 Jones v. Haraway, 537 So. 2d 946, 947 (Ala. Civ. App. 1988).
87 McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).
88 *Id.* at 117.
89 *Id.*
90 *Id.* at 118.
91 *Id.* at 117.

a professional counselor. One might argue that *all* divorcing couples would do well to employ the assistance of a professional when explaining the new divorce arrangement to their children, or when introducing new partners into the children's lives. However, the court reserved that special standard only for the homosexual parent, indicating that the father's sexuality did in fact have some bearing on the court's custody determination.[92]

Key to the application of the nexus test is the requirement that parents show how the other parent's sexuality will have a harmful effect on the child.[93] Appellate courts sometimes differ from trial courts in their evaluation of the evidence offered to show such harm.[94] The Supreme Court of Alabama reversed a Court of Civil Appeals application of the nexus test, after the trial court found that there was no evidence indicating that a mother's lesbian relationship had a detrimental effect upon the child.[95] The Supreme Court, however, agreed with the trial court's application of the nexus test, which, after hearing evidence from counselors that the child "touch[ed] herself 'excessively' in the genital area . . . might have issues of anger and sexuality" and might be the victim of sexual abuse (a suspicion stemming from the father's concern over the mother's sexuality), granted the father's motion to change custody.[96] The Supreme Court also found the testimony from the child's appointed guardian *ad litem* to be persuasive: "studies suggest that a child reared by homosexual parents could suffer exclusion, isolation, a drop in school grades, and other problems."[97] The Supreme Court granted custody to the father because, even though evidence showed the mother loved the child, "she has chosen to expose the child continuously to a lifestyle that is 'neither legal in this state, nor moral in the eyes of most its citizens.'"[98] Instead, the Court favored the father and stepmother, because they "have established a two-parent home environment where hetero-

92 *Id.* at 118.

93 The nexus test is not uniformly used or applied in all jurisdictions. Even when it is applied, there are often a lot of variations in its applications due to the nature of family courts. When considering the parent's sexuality in a custody determination, the nexus test requires that there is a relationship or connection between a parent's sexual conduct, homosexual or heterosexual, and the harm to the child. Delong v. Delong, 1998 WL 15536, at *11 (Mo. Ct. App. Jan 20, 1998); M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979); T.C.H. v. K.M.H., 784 S.W.2d 281, 284–85 (Mo. Ct. App. 1989).

94 *Ex parte* J.M.F., 730 So. 2d 1190, 1194 (1998).

95 *Id.* at 1194.

96 *Id.*

97 *Id.*

98 *Id.* at 1196.

sexual marriage is presented as the moral and societal norm."[99]

As demonstrated in all of these cases, judges have wide latitude to enforce custody orders based on myths about homosexuals as parents and gender bias.[100] Charlotte Patterson, a psychologist specializing in childhood development in the context of family, writes that "[o]ne issue underlying . . . judicial decision making in custody litigation . . . has been questions concerning the fitness of lesbians and gay men to be parents."[101] Patterson identifies four major categories of fear about the effects of lesbian or gay parents on children reflected in judicial decision-making about child custody and in public policies: 1) disturbances in sexual identity; 2) psychological health; 3) difficulty in social relationships; and 4) heightened risk of sexual abuse.[102] In sum, for gay and lesbian parents, sexuality takes center stage above all other factors, including their parenting abilities. They are considered risks for no reason other than being perceived as overtly sexual and promiscuous, regardless of what type of parent they may actually be.

III. THE ROLE MODEL ARGUMENT

An argument against awarding custody to homosexual parents based on notions of gender and sexuality is that children will not develop well without normative gender[103] and sexual role models.[104] This role model argument is often based on psychological and sociological theories[105] asserting that children benefit from and deserve a role model of each gender in order to develop properly.[106] Courts have applied the role model argument to both heterosexual and homosexual families. For example, a judge can

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99 *Id.* at 1195.

100 *See generally* WIS. STAT. ANN. § 767.41(2)(2) (West 2011); ALA. CODE § 30-3-1 (1998).

101 Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 5, 1025, 1029 (1992).

102 *Id.*

103 Harris v. Harris, 647 A.2d 309, 312, 314 (Vt. 1994) (upholding the trial court's determination that, though ostensibly not based on gender bias, the boy should remain in the custody of this father because they enjoy hunting, fishing and playing softball together and his father could teach him "things a young boy should know").

104 *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (finding persuasive psychologist's testimony that "the total environment to which the father exposed the children could impede healthy sexual development in the future . . . the father's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development . . . it is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development.").

105 Patterson, *supra* note 101, at 1027–28.

106 *See In re J.S. & C.*, 324 A.2d at 96.

apply the role model argument in custody disputes involving a homosexual parent when the judge determines that the children need to learn about both gender and sexuality from heterosexual parents as role models.[107] Additionally, the role model argument can be used to award custody between two heterosexual parents by matching the child's gender to the parent's gender, such as the father-daughter hair braiding example mentioned in the Introduction.[108] In applying the role model argument between two heterosexual parents in a custody dispute, one court awarded custody of the daughter to the mother, and custody of the son to the father because "the health and sex of Corey favored Ricky, considering the need for a strong father figure to act as a role model, but the health and sex of Rikkita favored Sandra, considering the need for her mother's guidance and advice."[109] One court explicitly justified considering the parents' sex during custody disputes by writing,

> [t]he problem is that man and woman were not created alike or even equal in all respects, and all the laws and constitutional amendments in the world cannot change that fact. Can you really say to a trial judge who decides custody of a baby who is being breast-fed that he should not consider the sex of the parents?[110]

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107 S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (expressing concern that the child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future.").

108 Dalin v. Dalin, 512 N.W. 2d 685, 691 (N.D. 1994). *See also Harris,* 647 A.2d at 314.

109 Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004) *citing* Moore v. Moore, 183 S.E.2d 172, 174 (Va. 1971) (holding that custody of the girls is awarded to the mother because the mother is universally recognized as the natural guardian and custodian of her children and is a fit and proper person); Wallace v. Wallace, 420 So. 2d 1326, 1328 (La. Ct. App. 1982) (upholding trial court's decision to award custody of boy to father, and custody of girl to mother); Giffin v. Crane, 351 Md. 133 (Md. 1998) (holding that the trial court's gender-based classification violated state constitution). The Court of Appeals of Maryland remanded the custody case back to the trial court after it reviewed the lower court's unambiguous record that custody of the daughter should go to the mother because the daughter needed a "female hand." *Id.* at 155. In the dissenting opinion, Judge McAuliffe explained that he does not agree with the appellate court's decision arguing that the trial court's references to gender was relevant to the custody determination: "I do not understand the majority to hold that consideration of gender is always inappropriate in a custody case. . . . Judges should be precluded from concluding that a special relationship, bonding, or ability to communicate between a parent and a child exists solely on the basis that the parent and child are of the same sex; judges should not be precluded from finding the existence of such a relationship from the facts of the case, even though that relationship may have resulted in part from the reality that the parent and child are of the same sex." *Id.* at 156–7 (McAuliffe, J., dissenting).

110 Gay v. Gay, 737 S.W.2d 94, 95 (Tex. App. 1987).

As such, this court applied the role model argument based on its own unverified assumptions that men and women are not equals.

One court, employing the role model argument, presumed that parents' gender largely defines the home environment that they provide their children.[111] For example, a state appellate court in Louisiana wrote that the "difference between the [mother's home and the father's home] is psychologically based. As the child is approaching puberty, both experts testified that it would be more beneficial to the child to be with a same-sex parent during the difficult puberty transitional years."[112] In other words, the Louisiana court linked gender with certain pubescent psychological needs, which it determined could only be found in the home of a same-sex parent.

In some instances, courts have considered expert testimony from child psychologists who base their custody recommendations solely on parents' gender, even without having interviewed both parents.[113] As a witness, one psychologist stated that, "if both parents are equally capable of parenting, if both parents love the child, the boy is still better off with the father."[114] In a report entered into evidence, the same psychologist wrote:

> [The father] is an excellent model for sex appropriate development. . . . If the assumption could be made that the mother is equally capable of parenting [the child], the data obtained in the area of child development become relevant in helping to made [sic] a decision in this case. This child is more likely to experience normal healthy development if placed in the primary custody of his father.[115]

Despite its application to both same-sex and different-sex families, the role model argument is particularly damaging—and unconstitutional—for same-sex families because it often conflates gender roles and sexuality. In fact, it relies even more heavily on harmful stereotypes of gender and sexuality. According to one scholar,

> [a]lthough judicial fears of 'inherent' damage to the child, such

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111 Krotoski v. Krotoski, 454 So. 2d 374, 376 (La. Ct. App. 1984).

112 *Id.*

113 Weber v. Weber, 512 N.W.2d 723, 725 (N.D. 1994); *Giffin*, 351 Md. at 142-144 (hearing expert testimony at trial that psychologically, daughters need to bond with their mothers, and that it is not uncommon for children to communicate more effectively with their same-sex parent); Scott v. Scott, 665 So. 2d 760, 765 (La. Ct. App. 1995) (considering a clinical psychologist's testimony that seeing two adult women being affectionate together would be a "destructively emotional event" for a child who believed that only males and females are supposed to be intimate with each other).

114 *Weber*, 512 N.W.2d at 725.

115 *Id.*

> as impairment of emotional or moral development, are faced by many parents because of . . . sexual behavior, the homosexual parent is met with judicial concerns that the child will be gay . . . or that the parent will be a poor role model.[116]

When explicitly making the role model argument, opponents of gay parenting articulate a number of concerns over how parents' sexuality will potentially (negatively) influence their children's sexual and gender development. For example, some of the fears that underlie the role model argument include: "the fear that the sons of lesbians and gay men will be less masculine and more feminine than the sons of heterosexual parents and that the daughters of lesbian and gay men will be less feminine and more masculine than the daughters of heterosexual parents";[117] the "argument that male children can best learn from their male parents what it means to be a complete man and a good father and that female children can best learn from their mothers what it means to be a complete woman and a good mother";[118] and "the idea that men as fathers and women as mothers have unique and complementary skills and attributes that are absent whenever a woman tries to father a child and a man tries to mother a child."[119] Thus, the role model argument is often used to address the court's concern that same-sex parenting will negatively affect the child's sexual and gender development.

Lynn Wardle is a major proponent of the belief that gay parents will negatively influence their children's sexual and gender development. In fact, his writing is often cited by those making arguments against gay and lesbian parenthood. In his writings, Wardle emphasizes that parents are important as role models for their children of the same gender because

> [c]hildren learn to be adults by watching adults. Children are generally more compliant with the parent of the same sex. The importance of the opposite-gendered parent for the complete emotional and social development of the child is now recognized as well: Boys and girls build their notions of their sex roles from experience with both sexes. The loss of cross-gender parenting may have severe emotional consequences for the

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116 Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 448 (1988).

117 Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 717 (2003).

118 *Id.* at 716 (citing Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 854 (1997)). *See also* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 861-62 (1997).

119 Ball, *supra* note 117, at 710.

> child. For example, the absence of a father in the home may result in a daughter having trouble relating to men throughout her adult life. Indirectly, it is also best for children to be raised by both a father and a mother because men mature and become most responsible and relate better to children when they have raised children. This is true in part because the transition from adult male to father is a much more complex task than some imagine.[120]

The Supreme Court of Alabama, quoting Wardle, noted that "the record contains evidence from which the trial court could have concluded that '[a] child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development."[121] The Court focused on a doctor's testimony that "a child is best served by having both a male and female role model in the house, rather than two male, or two female, role models."[122]

Courts have generally accepted sociological and psychological theories that assume children need male and female role models, which same-sex families cannot provide.[123] "Theories of psychological development have traditionally emphasized distinctive contributions of both mothers and fathers to the healthy personal and social development of their children. As a result, many theories predict negative outcomes for children who are raised in environments that do not provide these two kinds of inputs."[124] These social learning theories are concerned about the possibility that a child with lesbian or gay parents will not develop according to norms for his or her own sex, or will be without a same-gender role model entirely.[125] This is a typical argument used against gay and lesbian parents seeking custody of their children.

The prominence of a parent's homosexual relationships in custody decisions often seems to reflect judges' personal prejudice against homosexuality as much as their fear of wayward childhood development. In *Cook v. Cook*, the "crux of the case," according to the judge, was the mother's lesbian relationship with a woman

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120 Wardle, *supra* note 118, at 860–61.

121 *Ex Parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (Wardle, *supra* note 118, at 860–61).

122 *Id.* at 1193.

123 *See, e.g.*, S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); *Ex Parte J.M.F.*, 730 So. 2d at 1196; Weber v. Weber, 512 N.W.2d 723, 725 (N.D. 1994).

124 Patterson, *supra* note 101, at 1027–28.

125 Carlos A. Ball, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 305 (1998).

named Shannon.[126] At trial, when drafting the joint custody agreement, the court inserted a "Shannon Clause," which read, "[n]either parent shall allow Shannon Maloney to be associated with the minor children and thereby not allowing her to live or visit in the home at 2961 Highway 4, Ringgold, Louisiana."[127] Though the court apparently found that Shannon's "athletic . . . build" was relevant, it did not include any description of any of the other parents' physicality.[128] A mental health counselor, who testified on the merits of the 'Shannon Clause,' "warned that the children would suffer greatly if brought up in a homosexual environment. This view was informed by his belief that a lesbian partner would distort the children's (especially the girls') perception of female role models."[129]

In some cases, the sexual activity of both parents can be an issue in custody disputes.[130] One mother made allegations that the father "is involved in adulterous relationships with women to which the minor child is subjected," while the father alleged that "[t]he mother has been and plans to continue to live in a lesbian relationship."[131] After a "careful consideration," which included noting that the father admitted to "adultery and/or fornicating with various women," and using illegal drugs, and warning that the court did not "condone his actions," the court considered the impact the father's behavior might have on his three year-old daughter:[132]

> As yet, this conduct does not seem to have affected Cynthia. Indeed, nothing in the record indicates that she is even aware that such conduct occurs. The father has taken care to insure that the child remains unaware of both the illegal drug use and the adultery. Thus far, he has been successful.[133]

Here, the court gave the father the benefit of the doubt by assuming that he would be able to "successfully" carry on his "fornicating" without his daughter noticing and made no mention of his sexual activity possibly affecting his daughter. The lesbian mother, however, did not receive a similar vote of confidence. The court concluded that the mother's sexuality *per se* would indeed harm her daughter as she approaches "young womanhood":

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126 Cook v. Cook, 965 So. 2d 630, 632 (La. Ct. App. 2007).
127 *Id.*
128 *Id.* at 633.
129 *Id.*
130 *See, e.g.*, Bennett v. O'Rourke, 1985 WL 3464, at *4 (Tenn. Ct. App. Nov. 5, 1985); Peyton v. Peyton, 457 So. 2d 321, 322 (La. App. 2d Cir. 1984).
131 *Bennett*, 1985 WL 3464, at *1.
132 *Id.* at *2.
133 *Id.*

> Admittedly, Cynthia has been examined and found to be normal, well adjusted, and unaffected as yet by the fact that her mother is a lesbian. However . . . '[t]he Court does not need to wait, though, till the damage is done. If the child's situation is such that damage is likely to occur as her sexual awareness develops with the approach of young womanhood, the court may in a proper case remove her from the unwholesome environment.' In light of the fact that here the homosexual parent and the minor child are both female, we consider this factor particularly important because of the increased chance of role-modeling.[134]

In response to such cases that remove children from the custody of their homosexual parents,[135] gay and lesbian scholars have downplayed the correlation between the sexual orientation of the parent and the development of their children. As a defensive posture against attacks from lawyers and judges who believe that homosexuality negatively impacts children, some scholars assert that there is simply no correlation between a parent's sexuality and their children's development.[136] As Judith Stacey and Timothy J. Biblarz note, "[b]ecause anti-gay scholars seek evidence of harm, sympathetic researchers defensively stress its absence."[137] They found that

> [t]his body of research, almost uniformly, reports findings of no notable differences between children reared by heterosexual parents and those reared by lesbian and gay parents, and that it finds lesbian and gay parents to be as competent and effective as heterosexual parents. Lawyers and activists struggling to defend child custody and adoption petitions by lesbians and gay men . . . have drawn on this research with considerable success. Although progress is uneven, this strategy has promoted a gradual liberalizing trend in judicial and policy decisions.[138]

However, other research has shown a connection between sexual orientation and child development.[139] Some lesbian and gay scholars and legal theorists strive to use such a connection as an argu-

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134 *Id.* at *3 (*quoting* L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982)).

135 *See Ex Parte* J.M.F., 730 So. 2d 1190, 1196 (noting Wardle's research that children need two heterosexual parents for proper development).

136 Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases, in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT, 131–56 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994).

137 Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* 66 AM. SOC. REV. 160 (2001).

138 *Id.* at 160.

139 *See* Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 GEND. & SOC'Y. 11 (2000).

ment in favor of awarding lesbian and gay parents custody. Judith Stacey has written that some sociological data "implies that lesbian parenting may free daughters and sons from a broad but uneven range of traditional gender prescriptions. It also suggests that the sexual orientation of mothers interacts with the gender of children in complex ways."[140] Stacey believes that lesbian and gay family advocates should explore these differences but must not trivialize gay and lesbian parents' fear of losing their parental rights.[141] Stacey does not believe, however, that such "social science research provides . . . grounds for taking sexual orientation into account in the political distribution of family rights and responsibilities."[142]

If such data is to be used by homosexual parenting advocates, then it is also important to examine the interplay between the concepts of sexuality and gender used by courts. Often times the notions of gender and sexuality are unintentionally co-mingled or arbitrarily separated.[143] This is again, due in large part to the wide amount of discretion afforded family court judges, and a result of each judge relying on their own personal knowledge of, or education about, gender and sexuality. Whatever the cause, when judges conflate sexuality and gender in a custody determination, the result is often debilitating to the custody claims of gay and lesbian parents in particular.[144]

As Clifford Rosky notes,"[f]or opponents of gay and lesbian parenthood, concerns about gender development are rarely expressed by themselves, and they are often expressed as synonyms or euphemisms for concerns about sexual development."[145] Argu-

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140 Stacey & Biblarz, *supra* note 137, at 168–170.

141 *Id.* at 170. Researchers who are sympathetic to the right of gays and lesbians to become parents stress the absence of any connection between the parents' sexuality and any negative impact on their children. Because they are defending the parental rights of gays and lesbians against attacks from anti-gay scholars, their research only focuses on the absence of any negative connections, rather than focusing on the presence of positive outcomes for children of gay and lesbian parents.

142 *Id.* at 179.

143 Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1998) (Tomlin, P.J., concurring) ("While we are dealing with lesbianism, there is no ground for a gender-based distinction. Therefore, I shall speak to this issue solely in terms of homosexuality. Homosexuality has been considered contrary to the morality of man for well over two thousand years.").

144 Pleasant v. Pleasant, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993) (using an inquiry about a display of the male gender at a gay pride parade as a substitute for making inquiries about sexuality, when judge asked the Respondent mother about the masculinity of the participants in a gay pride parade). *See also* Valdes, *supra* note 16, at 20 (discussing how the conflation of sex and gender affects the entire legal system).

145 Rosky, *supra* note 17, at 345.

ments about improper gender role-modeling are often veiled anxieties about children not learning the appropriate gender role, which in turn might affect, or even harm, their sexual development, because they might *become* gay. In *Pleasant v. Pleasant*, the court found that a ten-year-old child whose lesbian mother brought him to a gay pride parade had a "gender identity problem." The judge, concerned about the level of masculinity exhibited by men at the parade, asked if there were "men who [were] not masculine in the parade," in order to make the custody determination.[146] Other times, courts' concern over the sexual identity of the child is more explicit. Such fears were articulated by one psychological expert who testified that a four-year-old boy should live with parents in "a normal relationship wherein males and females adhere to their roles," because "homosexuality is a learned trait and it would be very difficult for [the child] to learn and approximate sex role identification from a homosexual environment."[147] Whether courts state it explicitly or implicitly, the role model argument is often used in cases where the judge, not the parent, is concerned that the child will become a homosexual or develop gender identity problems.

Clifford Rosky, in *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia,* explores the intersection of gender and sexuality in child custody cases by analyzing the gender of homophobia expressed by litigants, experts, and judges. Rosky accomplishes this "[b]y conducting a comparative analysis of reported family law opinions, showing that gay and lesbian parents are subjected to gender-influenced stereotypes in custody and visitation cases—stereotypes that are influenced by the parent's gender, the child's gender, and the judge's gender."[148] Instead of "lump[ing]" together gay fathers and lesbian mothers, or sons and daughters, Rosky pulls apart each unique relationship and compares cases.[149]

Rosky's research uncovered a pattern whereby even though judges apply the role model argument equally to lesbian moms and gay dads, there is an unequal application to sons and daughters.[150] Rosky identifies that family courts express concern over gay parents raising sons, more often than daughters, when deciding custody

146 *Pleasant*, 628 N.E.2d at 637, 639.

147 Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

148 Rosky, *supra* note 17, at 260.

149 *Id.*

150 *Id.* at 297.

and visitation disputes.[151] Rosky posits that one explanation for more concern over the role modeling and sexual development of sons can be attributed to theories about sexual development that assumes children's relationships with their gay parents will affect their sexuality. He notes that, "conventional assumptions about the process of sexual development [are] that before puberty, children have both homosexual and heterosexual tendencies, and that during puberty, they develop sexual relationships based on models provided by adults, especially parents."[152]

Rosky refines his point by comparing old and new theories of childhood sexual development.[153] The old theory considers homosexuality to be a mental disorder and attributes its development in boys to domineering mothers.[154] The new theory has traded homosexuality for "Gender Identity Disorder of Childhood" (GIDC).[155] The new theory is more specifically focused on the gender development of boys. The theorists still blames "over-involv[ed]" or "over-protective[ ]" mothers for their sons' effeminacy. Most importantly, the theory finds that gender identity disorders are "precursor[s] to homosexuality in adulthood" mostly for boys.[156] Rosky theorizes that such a disproportionate focus on homosexual parents, as gay role models to sons that may become gay, reveals the gendered homophobia of judges, experts and litigants who are more fearful of male homosexuality than female homosexuality.[157]

Rosky's hypothesis leads one to speculate what, if any, interest the state has in monitoring the gender and sexuality development of children. Rosky suggests that such a gendered and heterosexist application of the role model argument belies the state's true interest in promoting the "fantasy" that gay and lesbian children do not, or should not, exist, and if they do, then they do not matter or should cease to exist.[158]

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151 *Id.*

152 *Id.* at 295.

153 *Id.* at 301 (citing Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys, in* TENDENCIES 154 (1993)).

154 Rosky, *supra* note 17, at 301–02.

155 *Id.* at 303.

156 *Id.* at 303–04 (citing Kenneth J. Zucker & Robert L. Spitzer, *Was the Gender Identity Disorder of Childhood Diagnosis Introduced into DSM-III as a Backdoor Maneuver to Replace Homosexuality? A Historical Note*, 31 J. SEX & MARITAL THERAPY 31, 32 (2005); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV-TR, at 576–82 (4th ed., text rev., 2000)).

157 *Id.* at 349.

158 *Id.* at 347.

IV. THE ROLE MODEL ARGUMENT AS UNCONSTITUTIONAL

Whether or not the state's true interest is actually to ignore or discourage the presence of gay children, the state does have an interest in protecting the welfare of children and families.[159] According to the best interest of the child doctrine, the court's role is to determine which parent will have custody of their child in a way that benefits the child, without unconstitutionally infringing upon their protected familial rights.[160]

In the past, advocates have employed a number of arguments to challenge the constitutionality of custody determinations focusing on parents' and children's rights to equality and liberty.[161] To do so, proponents of gay parents' rights have made challenges based on the Supreme Court's decisions in *Palmore v. Sidoti*, *United States v. Virginia*, and *Romer v. Evans*.

The Supreme Court's decision in *Palmore v. Sidoti* demonstrates the unconstitutionality of certain custody factors, by holding that race cannot be used as a factor in custody determinations.[162] At issue in *Palmore* was whether a white mother, married to a black man, could retain custody of her white daughter. The Court held that it is not permissible under the Equal Protection Clause of the Constitution for courts to consider private biases (such as racism), or the effects of the private bias upon the child, when making custody determinations.[163] The *Palmore* case offers a helpful defense

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159 Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) ("We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child.").

160 *See generally In re* J.S. & C., 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974). The Court first acknowledged parents' rights to visitation with and custody of their children. However, the court opined that the court may trump these rights if doing so would protect the best interest of their child. Parental "rights will fall in the face of evidence that their exercise will result in emotional or physical harm to a child or will be detrimental to the child's welfare . . ." *Id.* at 95.

161 *See generally id.* The Court concludes that all parents, hetero- and homosexual alike, have constitutionally protected fundamental rights to their children, rights that may not be restricted on the basis of sexual orientation. The court holds that "[t]he right of a parent, including a homosexual parent, to the companionship and care of his or her child, insofar as it is for the best interest of the child is a fundamental right protected by the First, Ninth, and Fourteenth Amendments to the United States Constitution. That right may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child." *Id.* at 92. Wald, *supra* note 4, at 391.

162 Palmore v. Sidoti, 466 U.S. 429, 434 (1984).

163 *Id.* at 433. The Court concluded that it is impermissible to allow private biases and consider speculative injuries when determining custody. The Court raised the issue as "whether the reality of private biases and possible injury they might inflict are not permissible considerations for removal of an infant child from custody of its natural mother . . . . The Constitution cannot control such prejudices but neither can it

against opponents who argue that children of gay parents will grow up to be stigmatized or harassed.[164] *Palmore* held that even if harassment can be shown to exist, the harassment is nevertheless a private bias of homophobic or heterosexist people, and as such, it is not a factor that can be constitutionally considered in a custody case.[165]

Carlos Ball discusses the strength of a constitutional challenge to bans on gay adoption based on *United States v. Virginia*, an argument that is analogous to an argument against bans on gay and lesbian custody.[166] Ball contends that because the Supreme Court held in *United States v. Virginia* that laws based on overbroad gender stereotypes violate the Equal Protection Clause, laws prohibiting gays and lesbians from adopting are unconstitutional because they cannot withstand heightened scrutiny.[167] Citing *United States v. Virginia*, Ball writes,

> [i]t is constitutionally impermissible for the state to be in the business of promoting the perpetuation of traditional gender roles from one generation to the next. The idea that women (in this case mothers) are better able to provide children with certain benefits and that men (in this case fathers) are better able to provide *distinct* benefits is exactly the kind of impermissible reliance on traditional gender stereotypes that the Supreme Court, in other contexts, has rejected.[168]

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tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

164 Katharine T. Bartlett identifies an issue of gender underlying the issue of race in *Palmore*, which received no attention from the Supreme Court except to note that the white mother began living with her African-American boyfriend before they were married. On this subject, the Court wrote that the mother's "'see[ing] fit to bring a man into her home and carry[ing] on a sexual relationship with him without being married to him' showed that she 'tended to place gratification for her own desires ahead of her concern for the child's future welfare.'" Bartlett hypothesizes this judgment as an example of how courts discriminate against women by "penalizing" mothers who cohabitate outside of marriage more severely than fathers are penalized for similar living arrangements. Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 881 (2000) (quoting *Palmore*, 466 U.S. at 431).

165 *Palmore*, 466 U.S. at 429.

166 Ball, *supra* note 117, at 731, citing United States v. Virginia, 518 U.S. 515 (1996) ("It is easy to foresee a state's possible response to the use of sex discrimination arguments as a way of challenging a ban on adoption by lesbian and gay couples. The first likely response would be that the ban is not sex discrimination because . . . [t]here is . . . no burden imposed on women that is not imposed on men and vice-versa. The same kind of argument proved to be unsuccessful in *Loving v. Virginia*.")

167 Ball, *supra* note 117, at 732 ("[I]t is . . . interesting to explore whether, assuming a court were to apply heightened scrutiny, the state's interest in having children raised by a man and a woman in order to provide children with appropriate gender role modeling could survive that form of scrutiny. I do not believe it could.").

168 *Id.*

Rosky raises a possible defense using *Romer v. Evans*, where the Supreme Court held that the Equal Protection Clause does not permit state action based solely on "animus" toward gay men and lesbians.[169] "After all, the state's interest in preventing the development of gay and lesbian children amounts to little more than a desire to minimize the number of gay and lesbian adults in the world—the pursuit of a fantasy that gay and lesbian *people* will cease to exist."[170] Rosky reveals the weakness of this constitutional challenge arguing it would be "naïve" to rely on *Romer* alone to protect the rights of gay and lesbian parents where they would not be subjected to role model stereotyping in custody disputes, given that there are barely any "constitutional protections historically afforded to gay men and lesbians."[171] Despite the lack of historical precedent afforded to the parental rights of homosexual parents,[172] significant groundwork can, and should, be laid in order to demand constitutional protections for all homosexual families; such progress can be made by employing arguments based on *Lawrence* and *Craig*.

When judges make gendered role model arguments they rely on overbroad gender stereotypes,[173] which are prohibited by the 1976 Supreme Court case, *Craig v. Boren*.[174] In *Craig*, the court held that a law prohibiting the sale of 3.2% beer to males under the age of 21, while allowing sales to females over the age of 18, denied 18- to 20-year-old males equal protection of the laws in violation of the Fourteenth Amendment.[175] To survive constitutional challenge,

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169 Rosky, *supra* note 17, at 347 (citing Romer v. Evans, 517 U.S. 620 (1996)).

170 *Id.* at 347 (citing Eve Kosofsky Sedgwick, *in* TENDENCIES 154, 161 (1993)).

171 *Id.* at 348.

172 *Id.*

173 Craig v. Boren, 429 U.S. 190, 198 (1976). In *Craig*, the Court discusses cases that "provide[ ] the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification." *Id.* at 198. Specifically, *Craig* references the term "overbroad" and relies on the *Schlesinger* decision, which states in part,

> [i]n both *Reed* and *Frontiero* the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In *Reed*, the assumption underlying the Idaho statute was that men would generally be better estate administrators than women. In *Frontiero*, the assumption underlying the Federal Armed Services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

Schlesinger v. Ballard, 419 U.S. 498, 507 (1975).

174 *Craig*, 429 U.S. at 210.

175 *Id.* at 210 ("We conclude that the gender-based differential contained in Okla. Stat., Tit. 37, § 245 (1976 Supp.) constitutes a denial of the equal protection of the laws to males aged 18–20 and reverse the judgment of the District Court.").

the Court ruled that gender classifications must withstand intermediate scrutiny: they "must serve important governmental objectives and must be substantially related to achievement of those objectives."[176] In *Craig*, the court said that even though traffic safety is an important government interest, gender discrimination was not substantially related to that objective.[177] By making sex a suspect classification under the Equal Protection clause, requiring intermediate scrutiny, the court provided greater protections to individuals harmed by sex-based discrimination. In summary, after *Craig*, the state may not inculcate traditional gender roles for either men or women, unless the sex or gender classification can pass intermediate scrutiny.[178]

When judges make custody determinations based on gendered role model arguments, they rely on unconstitutional stereotypes of gender in violation of *Craig*.[179] The most blatant violation of *Craig* occurs when courts apply a best interest of the child standard that explicitly lists "the sex of the child" among the factors to be considered such as health and age of the child.[180] In *Sandlin v. Sandlin*, the court based its custody decision, in part, on the belief that the daughter, because of her sex, needed her mothers "guidance and advice."[181] With no further explanation

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176 *Id.* at 197 (holding that gender-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives and that evidence of differences between drunken driving incidents between male and females is insufficient to support the gender-based classification contained in the statute in question).

177 *Id.* at 199–200. The Court noted the presence of an important government interest where "[c]learly, the protection of public health and safety represents an important function of state and local governments." *Id.* However, the Court ultimately held that gender discrimination was unconstitutional because "appellees' statistics in [the Court's] view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge."

178 *Id.* at 210.

179 *Id.*

180 *See, e.g.*, Hagen v. Hagen, 226 N.W.2d 13, 16 (Iowa 1975) (noting that the court gives serious consideration to a parent's moral misconduct in addition to other factors, including, but not limited to, the child's age and sex and the child's current home environment and the petitioner's home environment); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) ("We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child. . . . Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child").

181 Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004) (finding that the male subject child required a strong father figure to act as a role model and the female subject child required her mother, considering her need for her mother's "guidance and advice").

from the court as to what kind of "guidance" and "advice" the daughter required, it is clear the decision was based on a stereotype of women and girls, and especially mothers and daughters, as close, intensely communicative "friends." Gendered role model "arguments are based on a notion that there are two distinct sexes—indeed, biologically distinct—each with different skills to be learned, manners (and mannerisms) to be absorbed, habits to be ingrained, desires to be reinforced."[182] Furthermore, opponents of gay parenting "use gender as a proxy" for parenting, believing that a family comprised of both a male and a female parent, will provide specific, gendered benefits to their offspring.[183]

This raises serious doubts as to how the court is equipped to know whether mothers and fathers provide benefits to their own same-sex offspring. It is highly unlikely that judges are aware of some ideal concept of male and female children and can identify the necessary missing ingredient that one parent can provide better than the other, on account of their sex or gender. It is more likely that, rather than secret knowledge, courts fall back on generalized stereotypes based on their own experiences or education.[184] In *In re Marriage of Cabalquinto*, the Appellate Court noted that the trial judge expressed "strong antipathy to homosexual living arrangements" and concerns that the child "should be led in the way of the heterosexual preference."[185] Some judges, due to the wide latitude to make custody determinations, display their heterosexist bias by making unnecessary references to parents' sexuality where

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182 Bartlett, *supra* note 164, at 890. *See also* Weber v. Weber, 512 N.W.2d 723, 725–27 (N.D. 1994) (determining that the trial court award of custody of son to father was not clearly erroneous, even though based in part on testimony by expert, who had not met with the mother, that boys are better off with their fathers).

183 Ball, *supra* note 117, at 718. *See also* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (discussing whether a lesbian mother would increase the likelihood that her son would also become a homosexual).

184 *See, e.g.*, N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (noting that judges possess "wide latitude" when making custody decisions as to the best interest of the child); *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983); *In re* Marriage of Balashov, No. 62378-8-I, 2010 Wash. App. LEXIS 185 (Wash. Feb. 1, 2010). Although "[t]he court did not find that Dimitri's sexual orientation would be harmful to his relationships with his children[, it still] noted it as a factor that *may affect* his relationships in general." (emphasis added). *Id.* at 20. The court stated that it "did not consider Dimitri's sexual orientation in a negative light but simply as one of several changes to which the children were going to have to adjust, a process the court intended to facilitate by allowing them to remain in familiar surroundings for [only one] year." *Id.* at 21. The court ordered that the homosexual father have custody of his children for one year because it was in the best interest of the children to finish the school year with their respective schools and then ordered that their heterosexual mother retain legal custody of the children. *Id.* at 18.

185 *In re* Marriage of Cabalquinto, 669 P.2d at 888.

it has no bearing on the best interest of the child.[186] The Supreme Court of Washington commented that a trial court judge had no legal standards for denying the homosexual parent custody when it made unnecessary references to the father's homosexuality.[187] Although the Supreme Court of Washington recognized that "[v]isitation rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent," trial courts continue to incorrectly apply gender and sexual orientation in the best interests of the child standard.[188] The lower court failed to do a true "best interest of the child analysis" when it chose to rely on such broad and vague assumptions instead of probing further into how the child communicated with both of her parents and on what issues, in order to determine which parent could best meet those particular needs.[189]

In addition to the *straightforward* gender classification that some judges apply in resolving custody disputes that make sex of the parent and child an explicit factor in the best interest of the child analysis,[190] there exists another, perhaps more subtle, gender classification that occurs when judges make custody determinations involving homosexual parents.[191] In cases like this, the courts' decisions are not so explicitly linked to the sex of the parent or

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186 *See id.*

187 *Id.*

188 *Id.* (remanded back to trial court to determine whether the homosexual father should have visitation rights, stating that "[t]he best interests of the child remain paramount.").

189 *Cf.* Ball, *supra* note 117, at 718 (discussing how family law courts should focus on parents' ability to provide children with life's "basic necessities," rather than focusing on the parties' gender).

190 *See* N.K.M.v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (affirmed the lower court's modification of the original decree because there was a changed circumstance: a homosexual woman in the mother's home); *see also* Bark v. Bark, 479 So. 2d 42, 43 (Ala. Civ. App. 1985); Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004).

191 *See* M.A.B. v. R.B., 134 Misc. 2d 317, 331 (N.Y. Sup. Ct. 1986) (noting that homosexual father is a worthy parent, because "[h]is homosexuality is not flaunted."). *See also N.K.M.*, 606 S.W.2d at 185. The Missouri Court of Appeals interpreted the evidence of the trial court through its own lens of normative heterosexist stereotypes when it described the mother's lesbian partner, Betty, using negative terms, such as 'powerful and dominant.' *Id.* at 186. Further, it falsely depicted Betty's relationship with the child, Julie, as one motivated by Betty's lecherous desire to indoctrinate the child into the undesirable lifestyle of lesbianism:

> There emerges from the evidence a picture of Betty as a powerful, a dominant personality. She had befriended Julie and had won her affection and her loyalty. She had broached the idea of homosexuality to the child. Allowing that homosexuality is a permissible life style—an "alternate life style", as it is termed these days—if voluntarily chosen, yet who would place a child in a milieu where she may be inclined toward it?

child (as they are in the case where the daughter needed her mother as a female role model), but are more based on implicit notions of gender, sexuality and child development.[192]

According to Rosky, the underlying concern shifts to gendered role models reflecting a deeper fear that, without a heterosexual role model, kids will grow up to mirror their gay parents, especially a gay parent of the same sex.[193] Rosky argues that when courts link gender identity disorder to sexuality, they are interpreting certain non-conforming gendered behavior as an early indicator of homosexuality, assuming "effeminate" boys will grow up to be gay men, and "masculine" girls will grow up to be lesbians.[194]

Such a chain of inferences can be seen when courts compare the post-divorce relationships of a heterosexual father and lesbian mother. Courts often do this by relying on a gender stereotype of the heterosexual step-mother as a nurturer and caretaker and favoring her over the mother's new same-sex partner.[195] Conjuring up images of Donna Reed,[196] one court wrote,

> The trial court also heard evidence indicating that the father is no longer a single parent, but has now established a happy marriage with a woman who loves the child, assists in her care, and has demonstrated a commitment to sharing the responsibility of rearing the child should the father gain custody of her.[197]

In contrast, the child's lesbian step-mother (G.S.) is not described in such loving and devoted fashion. Her relationship with the child is described matter-of-factly as testimony, instead of being inter-

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> She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness.

Id.

192 *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (deciding that mother's lesbian relationship will never be considered a "neutral factor" in her children's development).

193 Rosky, *supra* note 17, at 345 n.517.

194 *See id.* at 343 (citing Valdes, *supra* note 16, arguing that courts generally conflate sex, gender, and sexual orientation).

195 *See, e.g.*, *Ex parte* J.M.F., 730 So. 2d 1190, 1195 (Ala. 1998). In that case, the court heard testimony from an expert witness, Dr. Collier, who testified that after reviewing at least 50 studies on the effect on children of growing up in a homosexual household, he consistently found that there is no evidence of any harm to the children. *Id.* at 1193. Studies revealed "that a homosexual couple with good parenting skills is just as likely to successfully rear a child as is a heterosexual couple." *Id.* at 1195. The court still awarded custody in favor of the heterosexual father.

196 Donna Reed, an actress who stared in the 1950's family sitcom, *The Donna Reed Show*, came to symbolize the quintessential suburban American wife and mother. *Donna Reed Biography*, BIOGRAPHY.COM, http://www.biography.com/articles/Donna-Reed-9542105 (last visited Mar. 24, 2011).

197 *Ex parte* J.M.F., 730 So. 2d at 1195.

preted by the court as proof of a home where the child's emotional and physical needs could be met.[198] Despite the fact that "G.S. shares in the child's upbringing in the way of a devoted stepmother and that . . . G.S. regularly attends school functions and meetings with the mother, accompanies the child on school field trips, and eats lunch with the child at school twice a month," the court does not decide she has demonstrated enough of a commitment to sharing the responsibility of child rearing as the heterosexual stepmother.[199] Because of her sexuality, and despite all the specifics the court can point to, G.S. is only acting "in the way of a . . . stepmother." On the other hand, the heterosexual stepmother, because of her sexuality, is automatically considered to be the true, ideal stepmother for the child, enough so that her presence in the father's life tips the custody scale in his favor.[200]

While it is clear that family courts often rely on overbroad gender stereotypes when making custody determinations, the next question, according to *Craig*, is whether the government can pass intermediate scrutiny by demonstrating important governmental objectives and show a substantially related means tailored to the important governmental interest. While the government has never been required to state its objective for using gender classifications in custody cases, a reasonable assumption would be that the most obvious objective it has in making such gender classification is the children's protection and their well-being. While protecting children is recognized as a legitimate government interest,[201] gender classifications for custody cases still would not pass intermediate scrutiny because the means are not substantially related to the important objective. There is little evidence in the field of childhood development indicating that children are harmed when they lack a role model of the same sex.[202] Research does demonstrate, however, that children are harmed when they are separated from healthy parents and families.[203]

Charlotte Patterson, a psychologist specializing in childhood

198 *Id.* at 1192.

199 *Id.*

200 *Id.*

201 Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (accepting the need to protect children as an important government interest, in which the means must be substantially related to that interest).

202 *See* Falk, *supra* note 136, at 143–46.

203 *See* Michael Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 994 (1975) ("Removing a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent."). *See also* Robson, *Our Children*, *supra* note 80, at 920

development in the context of family, has studied the children of lesbian and gay men in custody disputes and found that, "in the resolution of custody disputes . . . the legal system in the United States has frequently operated under strong but unverified assumptions about difficulties faced by children of lesbians and gay men, and there are important questions about the veridicality of such assumptions."[204] Patterson has researched and empirically tested these assumptions and concludes that, "There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Despite longstanding legal presumptions against gay and lesbian parents in many states . . . not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents."[205]

For example, Patterson reviews studies measuring gender identity and gender role behavior of children of lesbian mothers compared to that of children of single heterosexual mothers.[206] The tests explored the children's gender identity and gender role behavior based on stick figure drawings they were asked to make. Of the few children who drew an opposite sex figure, only three exhibited gender issues during clinic interviews. Among those three children, only one child has a lesbian parent.[207] Patterson cites other tests, such as picking a "sex-typed toy" that is consistent with conventional gender ideas, or identifying vocational choices within typical limits for conventional sex roles.[208] Patterson concludes, from a survey of such studies, that "[r]esults for both children of lesbian and heterosexual mothers were closely in accord with those for the general population, and there were no differ-

("In fact, much greater harm is caused by judicial decisions that deprive a child of the care and companionship of his or her parent.").

204 Patterson, *supra* note 101, at 1026. Patterson, a child psychiatrist, surveys studies conducted by social scientists about children of lesbian and gay parents. Her studies focus on the sex, identity, personal development, and social relationships of children raised in a homosexual household. Martha Kirkpatrick, Catherine Smith, & Ron Roy, *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 545–551 (1981) (comparing children of lesbian mothers to children of single heterosexual mothers is relevant to custody cases).

205 Patterson, *supra* note 101, at 1036.

206 *Id.* at 1030 (citing Kirkpatrick et al., *supra* note 204).

207 Kirkpatrick et al., *supra* note 204, at 548.

208 Patterson, *supra* note 101, at 1030 (citing Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692–97 (1978)).

ences between children of lesbian and heterosexual mothers."[209]

While the role model argument is based on overbroad gender stereotypes, gender classification in custody disputes using the role model argument does not necessarily discriminate based on gender because courts rely equally on stereotypes of men and women and do not actually favor one gender over the other. While there is some concern, based on a study of California residents, that the best interest of the child test makes a discriminatory gender classification by preferring mothers to fathers,[210] there is less support for the conclusion that the role model argument (as an element of the best interest of the child test) discriminates between men and women. This holds true for the cases when the determining factor is that children need *both* male and female role models. However, by making such a gender classification and determining children need both male and female role models, courts are discriminating based on sexuality against same-sex couples who cannot provide parents of both genders in the same household.[211] Katharine T. Bartlett argued in her article that there is also a concern that fathers suffer gender discrimination in custody cases where judges favor fathers over mothers.[212] "Another set of discrimination claims concerns the complaint of fathers that the sex-based double standard works against them, not in their favor."[213]

In *Lawrence v. Texas,* the U.S. Supreme Court held that the state cannot enforce sexual conformity by prohibiting private sexual activity between consenting adults of the same sex.[214] At issue in *Lawrence* was a Texas statute that prohibited "deviate sexual intercourse" that was applied to sexual activity between same sex couples.[215] The Court held the statute unconstitutional and reaffirmed the constitutional protection for privacy, applying that privacy right to consensual homosexual activity.[216] *Lawrence* is a

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209 Patterson, *supra* note 101, at 1030.

210 Bartlett, *supra* note 164, at 886. *See* ELEANOR E. MACCOBY AND ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 99–103 (1992) (identifying disproportional results where women obtain custody in 80% to 90% of cases in California).

211 *In re* Marriage of Dorworth, 33 P.3d 1260 (Colo. Ct. App. 2001) (discussing trial court modification application where mother sought to restrict father's visitation rights to visit their daughter because his sexuality would confuse the child, who was raised to believe a family consisted of only a mother, a father, and a child).

212 Bartlett, *supra* note 164.

213 MACCOBY AND MNOOKIN, *supra* note 210, at 99–103.

214 Lawrence v. Texas, 539 U.S. 558 (2003).

215 *Id.* at 563.

216 *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

landmark decision because it recognizes a liberty interest in private, consensual, homosexual conduct.[217]

Lawrence is a powerful tool with which to attack state discrimination against gays and lesbians because it is the closest the Supreme Court has come to recognizing the equal right of homosexuals under the Constitution.[218] It does so, however, without labeling the liberty interest as a fundamental right, which would require strict scrutiny.[219] This leaves the standard of scrutiny to be applied open for debate, and allows states room to prefer or prohibit different forms of sexual orientation.[220] Despite the lack of strict scrutiny, however, *Lawrence* can still be applied to family law, with implications for how courts use role model arguments when making custody determinations for same-sex parents.[221]

In the context of family law, *Lawrence* reinforces that privacy is a constitutionally protected right under the liberty clause of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[222] It analogized the privacy at stake in *Lawrence* to the privacy rights recognized in the birth control case, *Griswold v. Connecticut*,[223] and the abortion rights cases, *Roe v. Wade*[224] and *Planned Parenthood of Southern Pa. v. Casey*,[225] from which the concept of

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217 *Id.*

218 *See id.* In explaining why the Constitutional right to liberty applies equally to all people, regardless of sexuality, the Court stated "adults may choose to enter upon [a same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.* at 567.

219 *See id.* Justice Scalia expressed his preference for strict textualism when he stated that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" *Id.* at 586. (Scalia, J., dissenting).

220 ESKRIDGE & HUNTER, *supra* note 16, at 94.

221 *See* McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).

222 Lawrence v. Texas, 539 U.S. 558, 564–65 (2003).

223 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (identifying privacy as a fundamental right that protects the use of contraception among married couples, based on the privacy interest that exists within the institution of marriage and within the protected space of the marital bedroom).

224 Roe v. Wade, 410 U.S. 113 (1973) (holding that a women's right to privacy within the concept of liberty of the Equal Protection Clause of the Fourteenth Amendment includes the fundamental right to abortion).

225 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the right to privacy is located within the concept of liberty of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and includes the right to abortion).

family privacy stems.[226]

In all of these privacy cases, including *Lawrence*, the Court recognized that the government was infringing on "fundamental personal interests relating to family."[227] By correlating *Griswold*, *Roe*, and *Lawrence*, the Court in *Lawrence* paints a trajectory of Constitutional privacy rights, from *Griswold* to *Lawrence*, excluding *Bowers*[228] as a mistakenly decided case that should be overruled.[229] *Bowers* is excluded from this line of privacy cases[230] because it did not identify consensual homosexual relationships as a privacy right.[231] Conversely,[232] *Lawrence* makes a strong link from family, marriage, and procreation to homosexuality.[233] "In calling for a more generous characterization of the liberty interest at stake, the Court analogized directly to the marital privacy right vindicated in *Griswold*."[234] Thus, the Court acknowledged the connection between the right to homosexuality and the fundamental rights of privacy and liberty

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226 *Lawrence*, 539 U.S. at 564. *Lawrence* discussed the "broad" definition of liberty in cases from the early twentieth century, such as *Pierce v. Society of Sisters* and *Meyer v. Nebraska*. These cases are relevant to the *Lawrence* decision because of how its discussion of liberty ultimately gave rise to the recognition of privacy as a substantive due process right within the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, which occurred in *Griswold v. Connecticut*.

227 David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 550 (2008).

228 Bowers v. Hardwick, 478 U.S. 186 (1986).

229 Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

230 Meyer, *supra* note 227, at 549–50.

231 *Bowers*, 478 U.S. at 190–191 ("[A]ccepting the decisions in these [privacy] cases . . . we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation . . . and homosexual activity . . . has been demonstrated").

232 Meyer, *supra* note 227, at 550 ("Whereas *Bowers* had seen '[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other,' *Lawrence* saw plenty." (citing *Bowers*, 478 U.S. at 191)).

233 *Lawrence*, 539 U.S. at 566–67. The Court discussed the connection between the rights to family and the rights to homosexuality.

> The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.

Lawrence, 539 U.S. at 566–67 (internal citations omitted).

234 Meyer, *supra* note 226, at 550 (citing Lawrence v. Texas, 539 U.S. 558, 567).

within the Constitution.[235]

In *Lawrence*, the Court emphasized that the question was not the legality of sexual acts, but the protection of private intimacy.[236] Justice Kennedy wrote, "the . . . statutes . . . purport to do no more than prohibit a particular sexual act . . . . The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[237] Finally and most significantly for family law, *Casey* held that, "our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[238] and *Lawrence* followed by concluding that, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[239]

Given the privacy protection extended to homosexuals in *Lawrence*, the role model custody standard applied in custody cases intrudes upon the privacy rights of same-sex parents to raise their children and have a family. One court grappled with the implications of *Lawrence* when making a custody determination between a gay father and his heterosexual ex-wife by recognizing that, after *Lawrence*, homosexuality was essentially "a protected practice under the Due Process Clause of the United States Constitution" and that "[t]his decision . . . has at least some bearing on the degree to which homosexuality may play a part in child custody proceedings."[240]

When judges deny custody or visitation to lesbian or gay parents because the parents are not heterosexual and cannot provide both a "male" and a "female" role model, they are infringing upon the constitutionally protected privacy rights of lesbian and gay par-

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235 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

236 *Id.* at 567.

237 *Id.*

238 *Id.* at 573–74. The Court strengthens the connection between the privacy right in *Casey* and the privacy right in *Lawrence* by quoting the following from *Casey*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

239 *Lawrence*, 539 U.S. at 574.

240 McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).

ents, in violation of *Lawrence.* For example, in *Ex Parte J.M.F,* the Court stated that its decision was *not* based solely on the mother's sexual conduct, but was instead based on the following:

> Rather, it is a custody case based upon two distinct changes in the circumstances of the parties: (1) the change in the father's life, from single parenthood to marriage and the creation of a two-parent, heterosexual home environment, and (2) the change in the mother's homosexual relationship, from a discreet affair to the creation of an openly homosexual home environment.[241]

Under *Lawrence,* the above custody determination is an unconstitutional violation of the mother's rights because it uses her sexuality to deny her privacy rights to family and child-rearing.

V. CONCLUSION

Ideally, the father in *Dalin* and the mother in *Ex Parte J.M.F.,* should not have lost custody of their children because they could not braid hair or provide a heterosexual step-mother, respectively. Both parents lost custody in courts that used gender and sexuality as a stand-in for parenting skills, in violation of their constitutional rights. However, both cases should serve as incentive for courts to create a definition of family that evaluates parents less on their sexuality and gender and more on their ability to provide for their children.

When making custody determinations, the state should have no interest in limiting or guiding the gender and sexuality development of children, but should support and encourage safe and healthy sexuality and gender development for all children and families. Children and their parents deserve no less than to have courts protect, rather than attack, their rights to a healthy and secure family.

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241 *Ex parte* J.M.F., 730 So. 2d 1190, 1194 (Ala. 1998).