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Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity

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Comment

Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*

I. INTRODUCTION

When parents divorce, courts are forced to determine which parent should obtain custody of the children. The applicable standard in all states for deciding who should receive custody is the "best interest of the child."[1] The "best interest of the child" is a broad standard which of necessity takes into account many varying characteristics of those vying for custody. The child's best interest is served by balancing the positive and negative characteristics of one party against those of all opposing parties and placing the child with the party best able to serve the child's needs.

One factor courts balance in making this determination is the morality of the parent, often judged by reference to behaviors deemed to implicate morality. The concept of morality itself, although rather nebulous, implicates a wide range of behaviors and characteristics. In judging morality, courts sometimes target specific behaviors or characteristics to indicate pervasive immorality in a parent. Courts which engage in such simplistic judgments often give disproportionate weight to these characteristics in balancing the best interest of the child. Without considering the competing "moral infirmities" of opposing parties, some courts go so far as to conclusively establish that parents possessing any such targeted behaviors or characteristics are *per se* unfit to obtain custody of their children.

To the extent a parent's views or behaviors can be shown to negatively impact a child, they are a proper factor to be weighed in balancing the best interest of the child. However, when a court attaches harm to a behavior or characteristic based merely on a stereotype, the best interest of the child is often sacrificed in favor of enforcing a moral imperative.

It is commonly recognized that "courtrooms should be safe havens from the glut of prejudice that festers in the outside world."[2] However, throughout history the courts have sanctioned private prejudice in child custody cases by

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1. HOMER J. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19.4 (1988).

2. Johnson v. Schlotman, 502 N.W.2d 831, 838 (N.D. 1993) (Levine, J., concurring).

denying parents the right to raise their children in accordance with their own moral standards if those standards clash with the views enforced by the court.[3] The ones who suffer from this courtroom battle to define morality are the children who are denied a relationship with their parents.

Society generally accepts the court's judgment of right and wrong when that judgment corresponds to prevailing moral standards. However, as the prevailing view of society changes, the court's view of morality is often scrutinized and criticized and ultimately changes as societal pressure to do so increases.[4] This Comment will analyze the historical shift in moral judgment of interracial relationships, the judicial response to the changing public view and the effect of the changing public view on child custody decisions. It will then juxtapose that history with the current change in societal judgment of gay and lesbian relationships and the corresponding judicial response with respect to custody disputes.

II. JUDICIAL RESPONSE TO INTERRACIAL RELATIONSHIPS

A. Anti-Miscegenation Laws[5] Reflected Popular Moral Beliefs

In 1943, the United States Supreme Court recognized that laws are largely based on prevailing morality and ultimately change when society's morals change.[6] The Court stated, "We set up government by consent of the governed.... Authority here is to be controlled by public opinion, not public opinion by authority."[7] The law represents the boundaries of majoritarian social acceptance, defining permissible actions and reflecting what society deems permissible attitudes. The boundaries are formed by every statute, court decision, and action of authority, and are constantly shifting as the tides of change sweep across America. When the moral attitudes of society begin

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3. *See, e.g., infra* part II.C.

4. This is evidenced by the changing rules governing custody awards to parents engaged in interracial relationships (*See infra* part II.C.), fathers of infant children (*See* 24 AM. JUR. 2D *Divorce and Separation* § 785 (1966)); Thomas R. Trenkner, Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3D 262 (1976)), and parents accused of spousal abuse. At the forefront of the moral debate in child custody determinations today is whether homosexual parents are morally fit to be awarded custody of their children.

5. Anti-miscegenation laws are laws enacted to prohibit racial mixing, usually by outlawing interracial marriage.

6. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (affirming holding which enjoined enforcement of a West Virginia regulation "requiring children in public schools to salute the American flag").

7. *Id.*

to clash with the boundaries that define permissible perspectives, change is imminent. The battle to define these boundaries should not be one simply of might, but one where the scales of justice respond sensitively to the plea of the oppressed. In order to maintain freedom, American jurisprudence must remember history by reflecting on how the boundaries have changed, not by examining the specifics of where they once stood.

The historical battle over judicial acceptance of interracial sexual relationships illustrates the proposition that laws reflect prevailing morality and change when society's concept of morality changes. With the abolition of slavery came an influx of a new breed of free Americans—American Negroes. Because Blacks had no legal rights, society and its boundaries were defined by the white majority. A "natural order" of white superiority was morally espoused and legally enforced. However, "human sexual behavior did not respect the 'natural order' and mixed race children invariably sprang up wherever the races had contact."[8] Anti-miscegenation laws quickly followed in an attempt to legally enforce the prevailing moral standard which natural relations between humans "did not respect."[9] Such laws were introduced "to prevent what [white legislators] saw as the 'abominable mixture and spurious issue' by penalizing whites who engaged in interracial sex."[10]

The state of Virginia has been called "the 'mother' of American slavery and a leader in the gradual debasement of blacks."[11] When slavery was abolished, Virginia was among the first to find alternate legal methods to perpetuate its exaltation of Whites and degradation of Blacks by instituting anti-miscegenation laws to preserve the purity of the white race.[12] A total of thirty-eight states adopted legislation at one time or another outlawing interracial marriage.[13] Those who defended these laws did so by relying on moral imperatives. In upholding the Virginia law banning interracial marriages, the Court in *Loving v. Virginia*[14] stated, "Almighty God created the races [different colors] and placed them on [different] continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that God separated the races shows that he did not intend

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8. Barbara K. Kopytoff and A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1970 (1989).

9. *Id.*

10. *Id.*

11. *Id.* at 1967.

12. *Id.*

13. James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 97 (1993).

14. 388 U.S. 1 (1967).

for the races to mix."[15] The "moral" foundation on which laws governing intermingling of the races were built has since been exposed to be one of fear and ignorance.[16]

An 1878 Virginia Supreme Court opinion articulated the moral justifications to which many adhered in support of anti-miscegenation statutes:

> The purity of public morals, [and] the moral and physical development of both races . . . require that [the races] should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion.[17]

Laws banning interracial sexual relationships were actively enforced to regulate behavior. In 1630, a white Virginian was ordered "to be soundly whipt before an assembly of negroes and others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro."[18]

The fear of a social uprising fueled the passion with which many fought to legally subdue Blacks and to keep the ghost of social change from haunting American neighborhoods. In a debate over the Civil Rights Act of 1875, a member of the House of Representatives argued:

> Now, what does all this mean but mixed schools and perfect social equality? It is nothing more or less; and the next step will be that [Blacks] will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social

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15. *Id.* at 3 (citing trial court).

16. The very word "miscegenation" is an Americanism referring to interracial sexual relations and literally means "the mixing of different species." Victoria Neufeldt & David B. Guralnik, Eds., WEBSTER'S NEW WORLD DICTIONARY 866 (3d College ed. 1988); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 159 (1988).

17. Kinney v. Virginia, 30 Gratt. 858, 869 (Va. 1878) (holding that an interracial couple married outside the state violated Virginia's anti-miscegenation law when they entered Virginia).

18. Kopytoff, *supra* note 8, at 1989 (quoting Minutes of the COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 479 (H.R. McIlwaine 1st ed. 1924)). In a 1772 lawsuit concerning unjust enslavement, the slave owner's lawyer appealed to the moral standard of the court when he argued:

> [S]ocieties of men could not subsist unless there were a subordination of one to another, and that from the highest to the lowest degree. . . . [T]his was conformable with the general scheme of the Creator, observable in other parts of his great work.

Id.

> intercourse with your unmarried sons and daughters. It is bound to come to that—there is no disguising the fact; and the sooner the alarm is given and our people take heed the better it will be for our civilization.[19]

Judicial acceptance of the moral philosophy that Blacks and Whites should not mix was a direct result of the philosophical beliefs of those propelled into powerful, influential positions. In the struggle to legally define the boundaries of social acceptance, those who capture authority have an inherent advantage over those not in power. Those wishing to maintain a certain boundary invoke their concept of morality "to define 'deviance' in ways that produce stigma, excluding people from respectable membership in the community. . . . This exclusionary function of law is understood not only by those who are stigmatized but also by those who are using the law to draw the community's boundaries."[20]

The next set of laws that emerged to deal with the changing face of American society dealt with the offspring of mixed race couples. Legal definitions of race were adopted to categorize children with multi-colored ancestry.[21] Such laws not only defined the labels these children wore, but defined their legal status as well. Commentators have suggested that such legislation was "an effort to bring the law into line with social practice."[22] Anti-miscegenation laws and laws defining race did not arise until they were necessary for whites to maintain control.[23] As society changed with the influx of interracial couples and mulatto offspring, those wishing to maintain disintegrating social stigmas used their political power to impose legal stigmas. Historically, such legal stigmas have stood only to fall in the same way they were built—by a society choosing to define its boundaries of moral acceptance consistent with its experience.

B. Anti-Miscegenation Laws Were Banned Following a Change in Moral Climate

Laws outlawing interracial marriage were challenged on constitutional grounds and were repeatedly upheld for over one hundred years before their

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19. Trosino, *supra* note 13, at 101.

20. Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677, 690 (1991).

21. Kopytoff, *supra* note 8, at 1967 n.4, 1976.

22. Kopytoff, *supra* note 8, at 1978; *See also* JAMES HUGO JOHNSTON, RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH, 1776-1860, at 209-14 (1970).

23. Kopytoff, *supra* note 8, at 1989.

eventual downfall.[24] In 1882, the United States Supreme Court first addressed the constitutionality of anti-miscegenation laws in *Pace v. Alabama*.[25] The *Pace* Court found that such laws did not violate the Fourteenth Amendment.[26] It was not until eighty-five years later, when the Supreme Court revisited the issue in *Loving v. Virginia*[27] that laws outlawing interracial marriage were found to violate the Constitution.[28] This varied result from applying the same constitutional standards to the same law is largely explainable by the change in moral climate between 1882 and 1967. "As social conditions changed and legal barriers to segregation fell in the 1960s,"[29] the legal response to personal relationships between Blacks and Whites changed.

In 1967, when the United States Supreme Court declared anti-miscegenation laws unconstitutional, fourteen states had recently repealed laws outlawing interracial marriages, and sixteen states, including Missouri, maintained such laws.[30] Clearly, the political climate with respect to relations between Blacks and Whites was in flux. "A political issue comes into being—a situation becomes a 'problem,' in the political sense—when different groups define events and behavior differently, giving them rival meanings."[31] Laws surrounding interracial relationships became a "political problem" in the sixties when groups rose up challenging the separation of races as a moral standard. Highly publicized protests to traditional standards, such as student sit-ins, the Freedom Rides, and the Montgomery Bus Strikes, were instrumental in awakening the conscience of society and influencing court decisions.[32] Prior to the *Loving* decision, interracial marriages were punished by imprisonment in many states.[33] Tearing down anti-miscegenation laws allowed natural relations to proceed without legal impediment when consistent with an individual's moral constructs.[34]

Few legal scholars today would disagree that laws banning interracial marriage violate the Fourteenth Amendment. Yet such laws were consistently

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24. Trosino, *supra* note 13, at 18.

25. 106 U.S. 583 (1882).

26. *Id.* at 585.

27. 388 U.S. 1 (1967).

28. *Id.* at 12.

29. Jo Beth Eubanks, Comment, *Transracial Adoption in Texas: Should the Best Interest Standard be Color-Blind?*, 24 ST. MARY'S L.J. 1225, 1254 (1993).

30. *Loving*, 388 U.S. at 6, n.5.

31. Karst, *supra* note 20, at 687.

32. HOWELL RAINES, MY SOUL IS RESTED (Penguin Books 1977).

33. Trosino, *supra* note 13, at 18.

34. *Id.* at 93 ("[B]y 1992 more than a thousand interracial marriages [were] performed annually in a new and more tolerant Virginia.").

upheld under the Fourteenth Amendment for over one hundred years prior to *Loving*. One commentator stated that:

> [o]n a symbolic level, any resort to a race-matching policy means that the state and social agencies assume the responsibility of deciding what 'the appropriate racial composition of families' is, rather than the families themselves. The state should not actively discourage the creation of interracial families, because such units may reinforce a 'positive good' of racial and cultural understanding.[35]

When does an issue become a sufficiently significant "political problem" that the judicial response is to allow individual choice rather than impose societal uniformity? It was not the government's role to design families in 1967, nor was it their role in 1882. However, it took a change in the moral standards of a portion of society to realize that government was designing families through anti-miscegenation laws by denying individuals legal freedom to pursue chosen relations. Legal mandates of acceptable family composition are still not purged from the law, nor is it likely they ever will be.[36] However, it is the legal duty and challenge of the court to draw boundaries within the sanctity of the family only where necessary for the protection of society and its children, and not as a means of arbitrary enforcement of a hypothetical norm.

C. Moral Judgment of Interracial Relationships Stigmatizes Parents in Custody Disputes

As a direct consequence of interracial sexual relationships came the next tide of moral contention through which individuals attempted to advance their moral agenda through judicial sanction. Many courts used society's lingering antipathy toward interracial couples to justify denying custody to parents involved in these relations. Because the "best interest of the child" is the standard used in child custody determinations, defining interracial sexual relationships as immoral provided a reason to deny custody to parents engaged in such relationships. Living with a parent whose actions are labeled immoral is rarely held to be in the best interest of a child. Unfortunately, many moral imperatives incorporated into the legal structure have proven to be nothing more than fear of change disguised as a menacing monster of moral infirmity threatening to destroy the purity and integrity of children exposed to parents

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35. Eubanks, *supra* note 29, at 1255.

36. In order to regulate disputes arising out of family relationships, it is necessary to legally define what constitutes a family. Therefore, the law will always define the boundaries of acceptable family composition.

with such interests. When courts sanction diversity by relying on moral imperatives to deny custody to a parent, courts not only enforce stereotypes, but they risk abandoning their duty to provide for the best interest of the child.

Morality implies a sense of knowing right and wrong.[37] Yet there is often a blurred distinction between right and wrong which for years has drawn philosophers and theologians to test their premises by measuring them against some indicia of goodness. For example, the familiar maxim, "Do unto others as you would have them do unto you,"[38] is one such indicator of "moral" action to which behavior may be juxtaposed. Clearly, determining right from wrong is not an easy task. Right and wrong behavior, and thus moral behavior, exists on a continuum. There is a range of behavior for which no clear societal consensus distinguishing right from wrong exists.[39] As members of society battle over the definition of right and wrong, the legal response should be one of caution to uphold justice,[40] while holding at abeyance personal opinions in the ongoing debate over moral implications of personal choice.

A central concern of child custody determinations is avoiding harm to the child.[41] Therefore, the court must balance the possible harm to a child from

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37. WEBSTER'S NEW WORLD DICTIONARY, *supra* note 16 at 882.

38. Matthew 7:12 (King James).

39. For example, passionate debates occur daily over the moral appropriateness of behaviors such as abortion, premarital sex, use of alcohol and other drugs, interracial relationships, possession of guns, distribution of condoms to teenagers, corporal punishment, and homosexuality. Although legal constraints are placed on the unbridled commission of all of these behaviors, engaging in them is, for the most part, left up to the discretion of adults.

40. To uphold justice in the context of legal sanctions on behavior, courts must balance the discernable harm which would result from allowing a behavior with the discernable harm which would result from prohibiting it, taking into consideration all those affected by the behavior. For a prospective harm to be considered, it should be more probable than not that it will manifest itself. The weight given to a prospective harm should be proportional to its probability of occurrence, adjusted by the gravity of the harm as assessed by a consensus of experts in the area in which the harm might occur. For example, if corporal punishment is allowed in public schools, some children may be physically abused by school officials. Additionally, children who are physically abused at home may associate corporal punishment with abuse and fear adults from whom they might otherwise seek help. On the other hand, if corporal punishment is not allowed, school authorities may be unable to effectively discipline some children with behavior problems. These considerations must be balanced to determine whether the goal of effective education is better served by allowing corporal punishment in public schools.

41. Clark, *supra* note 1, § 19.4.

exposure to a parent engaged in a gray area of moral behavior[42] against the harm of judicial extinguishment of intimate parental bonds. By using moral justification to stigmatize and punish parents for their nontraditional choices, it is the children who ultimately suffer when relationships are severed.

Courts approaching custody issues where a child's parent has remarried or become intimately involved with a member of another race have utilized three options: (1) a presumption favoring placement of the child with members of the same race only; (2) a preference for placing the child with members of the same race if all other factors are equal; and (3) no racial preference.[43] The problem implicated by giving effect to either the first or second judicial response is that it replaces consideration of the best interest of an individual child with a desire to enforce societal homogeneity. A presumption that living in a racially diverse family is not in the best interest of a child "presents the danger of perpetuating historical prejudices against interracial families and reduces the question of the significance of race to a matter of mere personal intuition."[44]

In 1984, the United States Supreme Court addressed the propriety of racial considerations in child custody determinations in *Palmore v. Sidoti*.[45] The *Palmore* Court reviewed a Florida decision which transferred custody from the natural mother to the father[46] based on the changed circumstance that the mother, a white woman, was living with a black man.[47] The Florida court emphasized that the mother appeared to place her needs in front of the child's, as evidenced by the fact that she lived with the man before marrying him.[48] However, the Florida court hinted at a deeper consideration when it stated:

> [T]his Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the child] will, if allowed to remain [living with her white mother and black stepfather] . . . suffer from the social stigmatization that is sure to come.[49]

The United States Supreme Court determined that the racial issue was central to the decision to change custody and therefore overruled the Florida

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42. See *supra* notes 37-40 and accompanying text.

43. Eubanks, *supra* note 29, at 1252-53.

44. Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 64 (1990/1991).

45. 466 U.S. 429 (1984).

46. *Id.* at 434.

47. *Id.* at 430.

48. *Id.* at 431.

49. *Id.* at 431 (quoting App. to Pet. for Cert. 26-27).

decision.[50] Despite the possibility that the child might suffer social pressure due to her mother's interracial marriage, the Supreme Court stated, "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[51]

Undeniably, certain children are more sensitive than others to the social stigmatization attached to interracial relationships. In order to properly focus on the needs of the child, such sensitivity should not be overlooked if it manifests itself in a manner harmful to the child. Nor, however, should such sensitivity be presumed before any sign of it arises when that presumption will force a parent and a child to be physically separated.

The mere fact that some characteristic of the parent may expose the child to the tauntings of other children should never be the driving force behind a custody determination. Such a consideration would favor a wealthy parent who is able to materially provide for the child over a poor parent who may struggle to support the child's basic needs, and a physically able parent over a disabled parent. Presuming that living in an interracial household will bring more harm to a child than the benefit that could be derived from that home and, conversely, that it will be more harmful than living in any other home in which the child might be placed merely reinforces the stereotype that those involved in interracial relationships are morally corrupt and socially inept.

The practical effect of the *Palmore* holding on racial issues in custody determinations is unclear.[52] While it is clear that the Court precluded a presumption of harm attaching to racial considerations, "[i]t remains unclear whether the Court intended that a showing of actual injury to a child would permit race to be a controlling consideration in a custody dispute."[53] After considering the holding in *Palmore*, the Kentucky Supreme Court allowed consideration of the actual impact of a custodial parent's interracial marriage on a child in a custody modification hearing.[54] The court explained that a "child's emotional reaction to her [parent's] marital circumstances may enter into deciding what is in the best interest of the child if it is significant and severe, and, if it does, this is a consideration whatever the cause."[55] While issues relating to a parent's interracial relationship may enter a custody dispute to the extent they are shown to cause harm to a child, *Palmore* precludes the presumption of harm as a determining factor.[56] The elimination of race from

50. *Id.* at 433.
51. *Id.* at 432.
52. Perry, *supra* note 44, at 56.
53. Eubanks, *supra* note 29, at 1246.
54. Holt v. Chenault, 722 S.W.2d 897, 898 (Ky. 1987).
55. *Id.*
56. *Palmore*, 466 U.S. at 434.

the forefront of custody disputes "protects the child from the damaging impact of litigation of an issue about which there is limited empirical knowledge, but which may be approached with unwarranted assumptions, racial prejudice, and troubling value judgments."[57]

D. Social Stigmas Outlive Legal Change

The "perceived natural order" of society, which in part accounted for legal sanction of interracial relations, is still a reality in the minds of many Americans.[58] The legal reaction to increased tolerance of interracial sexual relations has yet to uproot many deeply held beliefs that such relations are immoral and not intended by God.[59] Forty-five percent of white Americans responding to a 1991 Gallup poll disapproved of interracial marriages and twenty percent believed such marriages should be illegal.[60] While this is a decrease from the 1972 statistic reporting that forty percent of white Americans believed interracial marriages should be illegal,[61] it illustrates the fact that societal change is a slow moving process. To preserve freedom, however, the judiciary must be at the forefront of recognizing individual rights, not at the tail. Individual prejudice may be a reality, "but the law cannot, directly or indirectly, give [private prejudice] effect."[62]

III. JUDICIAL RESPONSE TO HOMOSEXUAL PARENTS

A. Homosexual Parents Face Legal Battles Analogous to Those Endured By Interracial Couples

Gay men and lesbians are not afforded the right to marry their partners in any state.[63] In several states, homosexual sodomy is still criminalized.[64] Despite the lack of legal recognition of same sex commitments, courts have been forced to acknowledge that such relationships do exist when dealing with child custody issues. Unlike race, the public debate over whether homosexual

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57. Perry, *supra* note 44, at 127.

58. Trosino, *supra* note 13, at 93 n.2.

59. *Id.* at 114.

60. Trosino, *supra* note 13, at 120 nn.2-3.

61. *Id.* at 120 n.3.

62. *Palmore*, 466 U.S. at 433.

63. Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993) (holding that restricting marital partnerships to relations between males and females establishes a sex-based classification subject to strict scrutiny in an equal protection challenge and remanding the case to determine if the state has a compelling reason for this classification.).

64. *See infra* notes 85-86 and accompanying text.

behavior is the result of an unchangeable genetic characteristic or a moral defect has not been conclusively decided. However, an increasing portion of society is viewing homosexual acts as morally neutral behavior.[65] In the United States, there are currently an estimated three million homosexual parents who are the primary caretakers of between eight and ten million children.[66] As courts continue to grapple with the moral significance of homosexuality, the issue arises, as it did in 1984 with parents of different races, whether courts should deny custody to homosexual parents. Once again, society and the judiciary have come to a crossroads, facing the choice to accept individual differences or to force conformity among primary caretakers by banning homosexual parents from raising their natural children on the basis that lesbians and gay men are morally unfit to raise their natural children. The court must determine whether allowing a child to be raised by a gay or lesbian parent is more harmful than severing the child's relationship with that parent by giving custody to a parent who may possess characteristics harmful to the child while at the same time severely restricting the time, place, and manner of visitation available to the lesbian or gay parent. In deciding whether a lesbian could adopt her partner's natural child,[67] a New Jersey Superior Court opined that American society is currently

> at a time of great change and a time of recognition that, while the families of the past may have seemed simple formations repeated with uniformity (the so called "traditional family") families have always been complex, multifaceted, and often idealized. . . . [F]amilies differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.[68]

While racial differences are readily apparent, sexual orientation is not physically discernable. No external standard of social stratification applies to

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65. *See, e.g.*, William A. Henry III, *Pride and Prejudice*, TIME, June 27, 1994, at 54-59. "The rapid pace of change for gays owes much to the trails blazed by blacks and women, and the success of those groups gives gays hope that in a generation or so they will have attained full acceptance as just another piece fitting into the mosaic of national life." *Id.* at 55.

66. *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989).

67. The child was conceived through artificial insemination. In re Adoption of a Child by J.M.G., 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993).

68. *Id.* at 554-55.

homosexuals as a group.[69] Therefore, those desiring to keep gay men and lesbians in a subordinated status rely on artificial constructs of morality to stratify and debase gays and lesbians because of their sexual relationships without inquiry into the basis of their behavior. By legally enforcing this moral stratification, the court system has "rel[ied] on a social group's subordinated status as a justification for further governmental action that intensifies the subordination."[70] Reliance on a group's socially inferior status to create and enforce laws which further debase that group is "constitutionally impermissible."[71] Stated another way, it defies logic, freedom and notions of equality to deny natural parents custody of their children because of the court's desire to "require [the children] to be inculcated in society's antipathy toward gay people."[72]

Just as when the caste hierarchy morality of the slave era was waning, many people today believe that "what was once a 'natural' and 'self-evident' ordering [is] an artificial and invidious constraint on human potential and freedom."[73] Similar to miscegenation statutes, the purpose of laws based on abstract morality which restrain individuals' rights to raise their children "is to support a regime of caste that locks some people into inferior social positions at birth."[74] By creating a moral hierarchy to induce stratification between "traditional" and "non-traditional" families, society, lead mainly by the ideals of the once powerful voice of mainstream religion,[75] has forced a segment of itself to cower under the scrutinizing eye of the politically powerful. Legal sanctions have served to legitimize this artificially induced

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69. This is in sharp contrast to other groups which have traditionally been subjected to political debasement such as Blacks, women, and many citizens of foreign descent. While stereotypical modes of dress, hairstyles and gender oriented behaviors are often associated with sexual orientation, such characteristics are often found in heterosexuals and often absent in homosexuals.

70. Karst, *supra* note 20, at 729. For example, homosexuals have been labelled as immoral by many, placing them on a level of low esteem. Many courts have justified denying lesbian and gay parents custody of their children by pointing to the level of low esteem on which homosexuals have been placed, further isolating them from mainstream society.

71. *Id.*

72. Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 632 (1989) [hereinafter Note, *Custody Denials*].

73. Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 164 (1988) (quoting City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985)).

74. *Id.* at 147.

75. Heather Rhoads, *Cruel Crusade; The Holy War Against Lesbians and Gays*, THE PROGRESSIVE, Mar. 1993, at 18.

stratification. But as society recognizes this inequity, the illegitimacy of this blind prejudice will be exposed.

Although sexual orientation, unlike race, is a trait which presumably can be disguised or denied, homosexuals have traditionally been debased in American society in ways similar to Blacks. Because there is currently no scientific method to differentiate between homosexuals and heterosexuals, the argument that homosexuality evidences moral degeneracy can be rebutted only on philosophical grounds. In *Bowers v. Hardwick*,[76] the Supreme Court, in a five to four decision, declared that statutes outlawing sodomy were constitutionally permissible.[77] Still, some members of the Supreme Court have advanced the idea that homosexuality is a trait which, like race, should receive a suspect classification.[78] In a dissenting opinion, Justice Blackmun analogized sodomy statutes, which disproportionately affect the sexual behavior of gay men, to the anti-miscegenation laws outlined in *Loving v. Virginia*. Blackmun stated that the similarities between sodomy laws and anti-miscegenation laws were "almost uncanny."[79] In a separate dissenting opinion, Justice Stevens made the same connection when he commented, "Interestingly, miscegenation was once treated as a crime similar to sodomy."[80] It took eighty-five years from the time the Supreme Court first analyzed the constitutionality of miscegenation statutes until its decision in *Loving*.[81] Only eight years have passed since the *Bowers* decision. Perhaps another eighty-five year gap will not be required to pass before the judicial system releases its arbitrary enforcement of institutionalized morality and its concomitant effect of institutionalized discrimination.

B. Society's View of Homosexuality is in a State of Flux

Notions of morality are nothing more than concepts of right and wrong.[82] In a democratic society, the courts charged with enforcing right and wrong theoretically do so by reference to an objective standard to determine what behavior should be regulated. To the extent behavior can be shown to harm members of society, society has an interest in seeing that it is regulated. To the extent that behavior can be shown only to offend certain individuals' concepts of right and wrong, society has an interest in allowing differences of opinion to exist and in providing mutual legal respect for these

76. 478 U.S. 186 (1986).
77. *Id.* at 192.
78. Koppelman, *supra* note 73, at 146.
79. *Bowers*, 478 U.S. at 210 n.5. (Blackmun, J., dissenting).
80. *Bowers*, 478 U.S. at 216 n.9. (Stevens, J., dissenting).
81. See *supra* notes 25-28 and accompanying text.
82. WEBSTER'S NEW WORLD DICTIONARY, *supra* note 16, at 882.

differences. There are a myriad of behaviors which give rise to hotly contested "moral" issues among many sects of society which are not proper for legal sanction because there is no basis, apart from an abstract belief, on which to make a legal determination of right and wrong.[83] In such situations, the law usually defers to the moral judgment of individuals to determine and regulate their own behavior. As society changes, shifts in moral judgments also occur. Just as interracial relationships fell into the chasm of uncertain moral distinction in the 1960s, homosexual behavior is currently descending the societal rungs from sexual deviance to permissible behavior. As one court aptly stated:

> Many people erroneously believe that the sexual experience of lesbians and gay men represents the gratification of purely prurient interests, not the expression of mutual affection and love. They fail to recognize that gay people seek and engage in stable, monogamous relationships. Instead, to many, the very existence of lesbians and gay men is inimical to the family. For years, many people have branded gay people as abominations to nature and considered lesbians and gay men mentally ill and psychologically unstable. The stereotypes have no basis in reality and represent outmoded notions about homosexuality, analogous to the 'outmoded notions' of the relative capabilities of the sexes.[84]

While a growing portion of society refuses to morally stigmatize homosexual behavior, many hold steadfastly to a belief that it is wrong. There are currently twenty-five states which statutorily prohibit consensual sodomy.[85] Seven of these statutes apply only to homosexual sodomy.[86] One commentator posited that the public perception that gays and lesbians embrace "sex as a lifestyle" has been a key element in gathering support for sexual prohibitions aimed at homosexuals.[87]

Mainstream religion has also buttressed fears that unbridled perversion would be loosed on society if gays and lesbians were treated with equality.[88]

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83. See *supra* note 39.

84. High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1368, 1369 (N.D. Cal. 1987).

85. Koppelman, *supra* note 73, at 151.

86. *Id.*

87. Trosino, *supra* note 13, at 117.

88. Karst, *supra* note 20, at 684. ("The head of the National Christian Action Coalition listed these evils to illustrate the nation's drift into moral bankruptcy: 'planned parenthood, the pill, no-fault divorce, open marriages, gay rights, palimony, test-tube babies, women's liberation, children's liberation, unisex, day-care centers, child advocates, and abortion on demand. A man is no longer responsible for his family; a woman need not honor and obey her husband. God has been kicked out, and

In a recent case involving a lesbian mother's right to visitation, a South Dakota Supreme Court judge stated, "[t]o give [the lesbian mother] rights of reasonable visitation so that she can teach [her children] to be homosexuals would be the zenith of poor judgment for the judiciary of this state."[89] Citing Leviticus 18:22[90] for support, he further reasoned that because the mother is involved in "a life of abomination . . . she should be totally estopped from contaminating these children."[91] While views such as these still exist among portions of the population, there is a growing trend toward tolerating and respecting differences. This South Dakota judge recognized the trend but dismissed it by declaring, "[t]here appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it."[92]

As portions of society fight to keep gays and lesbians in the lower strata of social acceptance, others work to remove the stigma and prejudice. Several states have affirmatively attempted to afford gays and lesbians equal social rights by including homosexuality as a protected class under discrimination laws.[93] The District of Columbia has created a "Commission on Domestic Partnership Benefits" which guarantees domestic partnership rights to homosexual and heterosexual cohabitants who are employed by the District of Columbia.[94] Essentially, this allows a homosexual partner of a government employee to be treated in the same manner as a spouse with respect to benefits.[95] Several private companies and organizations have chosen to

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humanism enthroned.'" *Id.*)

89. Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring in part, dissenting in part).

90. "Do not lie with a man as with a woman; that is detestable," Leviticus 18:22 (New International Version).

91. *Chicoine*, 479 N.W.2d at 896.

92. *Id.* at 897.

93. See CONN. GEN. STAT. ANN. § 53a-181b(a) (West Supp. 1994); MINN. STAT. ANN. § 609-595(b) (West 1991); WIS. STAT. ANN. §§ 16.765 (West 1986) (employment), 21.35 (West 1986) (national guard), 36.12 (West 1992) (students at University of Wisconsin), 38.23 (West Supp. 1992) (vocational, technical and adult education), and 66.395 (West 1990) (housing).

94. D.C. CODE ANN. § 2-3601 (Supp. 1993).

95. *Id.* In addition, the municipalities of Alameda County, California; Berkeley, California; Laguna Beach, California; Los Angeles, California; San Francisco, California; San Mateo County, California; Santa Cruz, California; West Hollywood, California; Tacoma Park, Maryland; Cambridge, Massachusetts; Ann Arbor, Michigan; Minneapolis, Minnesota; Ithaca, New York; New York, New York; Travis County, Texas; Burlington, Vermont; Seattle, Washington; and Madison, Wisconsin provide domestic partnership benefits for city employees. HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 1-9 (7th ed. 1993).

institute similar programs whereby homosexual partners are afforded the same benefits as other employees' spouses.[96]

The trend to accept homosexuality as a morally neutral trait is also evidenced by the American Psychiatric Association's decision to remove homosexuality from its list of disorders.[97] In a 1976 meeting of the American Psychological Association, a resolution was passed which stated, "the sex, gender identity, or sexual orientation of natural or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases."[98] Even factions of organized Christianity have responded to the change in societal views. Several mainstream denominations have debated whether to accept homosexuals in their congregations and whether they should be eligible for ordination.[99] Some churches have even adopted a stated policy supporting gay and lesbian civil rights.[100] A Pennsylvania court, in a recent child custody case stated:

> In resolving disputes about the custody of children, the court system should recognize the reality of children's lives, however unusual or complex . . . . By failing to do so, they perpetuate the fiction of family homogeneity at the

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96. Private companies and organizations granting partner benefits include the National Quaker Organization, the American Psychological Association, Ben & Jerry's Homemade, the Episcopal Diocese of Newark, New Jersey, Levi Strauss & Co., Lotus Development Corporation, and (owner of Universal Pictures). Curry, *supra* note 95, at 1-10. Such benefits are also provided by Blue Cross and Blue Shield of Massachusetts. William A. Henry III, *Pride and Prejudice*, TIME, June 27, 1994, at 59. Other companies have instituted policies prohibiting discrimination on the basis of sexual orientation. Among them are IBM, Eastman Kodak, Harley-Davidson, Dow Chemical, Du Pont, 3M, and Time-Warner. *Id.*

97. THE AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III at 281-82, 380 (3d ed. 1980) states: "Homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational abilities."

98. John J. Couger, *Proceedings of the American Psychological Association, Inc., for the Year 1976: Minutes of the Annual Meeting of the Counsel of Representatives*, 32 AM. PSYCHOLOGIST 408, 432 (1977).

99. Tamar Lewin, THE NEW YORK TIMES, Oct. 21, 1993, at A1.

100. As of 1990, the following religious organizations had a stated policy supporting gay and lesbian civil rights: General Assembly of the Presbyterian Church; Union of American Hebrew Congregations; National Association of Religious Brothers; General Convention of the Episcopal Church; United Methodist Church; Central Conference of American Rabbis; United Church of Christ; Christian Church, Disciples of Christ; Lutheran Church of America; Unitarian Universalist Association of Congregations; National Federation of Priests Council; and Metropolitan Community Church. ROBIN KANE, WHO SUPPORTS THE GAY AND LESBIAN RIGHTS MOVEMENT 7-8 (National Gay & Lesbian Task Force, 1990).

> expense of the children whose reality does not fit this form. . . . [The child's] best interest is served by exposing [the child] to reality and not fostering in [the child] shame or abhorrence for [a parent's] nontraditional commitment.[101]

One's view of the morality of a gay or lesbian parent should not be the focus of a child custody decision. If a parent's sexual orientation cannot be shown to affect a child, it should be ignored. To the extent the gay or lesbian parent's behavior can be shown to harm the child, it should be balanced against harmful behaviors engaged in by the other parent. Only then is the best interest of the child the true focus.

C. Judicial Response to Gay and Lesbian Parents in Child Custody Cases

In a child custody case where one of the contestants is gay or lesbian, the court must balance the possibility of harm to a child by virtue of being raised by a homosexual with the harm of denying a child a relationship with the lesbian or gay parent. When a court chooses to morally judge a homosexual parent by judicially severing the parent-child relationship on the basis of homosexuality alone, both the parent and the child are harmed by the decision.[102]

In determining "the best interest of the child" in child custody disputes, state courts have been forced to make moral judgments about gay and lesbian parents. Courts which have addressed the fitness of homosexual parents to be awarded custody of their children have applied one of three standards: the "per se rule," a "rebuttable presumption" of unfitness, or a "nexus" test.

Three states have adopted the "per se rule," which establishes an irrebuttable presumption that a parent who engages in homosexual behavior of any sort is unfit.[103] It is therefore in the best interest of the child to be

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101. Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (quoting Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian—Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 469 (1990)).

102. While imprisoned for violating a sodomy law, Oscar Wilde, a nineteenth century gay poet and playwright, wrote, "I can bear [all else except that] . . . my two children are taken from me by legal procedure. That is, and always will remain to me a source of infinite distress, or infinite pain . . . . The disgrace of prison is as nothing compared with it." David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1665 (1991) (quoting Oscar Wilde, DE PROFUNDIS 34 (R. Ross ed. 1909)).

103. Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987); S.E.G. v. R.A.G., 735 S.W.2d 164, 166-67 (Mo. Ct. App. 1987); Roe v. Roe, 324 S.E.2d 691,

in the custody of the heterosexual parent or a third party.[104] One state has adopted a "rebuttable presumption" that a homosexual parent is unfit, placing the burden of proof on the homosexual parent to show that their behavior poses no harm to the child.[105] Nineteen states have adopted a "nexus" test whereby homosexual conduct may be a factor for a court to consider, but it may not be the sole basis for denying custody unless the parent contesting custody can show that such conduct harmed the child.[106] Two states have rejected the nexus test, but have not affirmatively adopted either the per se rule or the rebuttable presumption test.[107] An additional three states have considered the issue and rejected the per se rule without articulating a specific standard.[108]

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693 (Va. 1985). *But see* Bottoms v. Bottoms, No. 1930-93-2, 1994 WL 275049, at *5 (Va. Ct. App. June 21, 1994).

104. *Id.*

105. Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30,1988); Bennett v. O'Rourke, 1985 WL 3464 (Tenn. Ct. App. Nov. 5, 1985); Dailey v. Dailey, 635 S.W.2d 391 (Tenn. Ct. App. 1981).

106. S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985); *In re* Marriage of Birdsall, 197 Cal. App. 3d 1024, 1030 (Cal. Ct. App. 1988); Gerald D. v. Peggy R., Nos. C-9104, 79-12-143-CV, 1980 WL 20452, at *8 (Del. Fam. Ct. Nov. 17, 1980); *In re* L.S. and V.L., Nos. A-269-90, A-270-90, 1991 WL 219598, at *2 (D.C. Aug. 30, 1991) (allowed lesbian couple to adopt each other's child while maintaining parental rights to their own child as well); Buck v. Buck, 233 S.E.2d 792, 793 (Ga. 1977) (no affirmative showing that lesbian mother's sexual preference would not harm child to award custody to the mother where shown father would be just as good a parent); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. 1983); Hodson v. Moore, 464 N.W.2d 699, 701-02 (Iowa Ct. App. 1991); Peyton v. Peyton, 457 So.2d 321, 324 (La. Ct. App. 1984); Bezio v. Patenaude, 410 N.E.2d 1207, 1216 (Mass. 1980); People v. Brown, 212 N.W.2d 55, 59 (Mich. 1973); *In re* Adoption of child by J.M.G., 632 A.2d 550, 552 (N.J. Super. Ct. Ch. Div. 1993) (allowed lesbian to adopt biological child of her partner); A.C. v. C.B., 829 A.2d 660, 664-65 (N.M. Ct. App. 1992); Guinan v. Guinan, 102 A.D.2d 963, 964 (N.Y. 1984); Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993); Large v. Large, No. 93AP-735, 1993 WL 498127, at *2 (Ohio Ct. App. Dec. 2, 1993); Blew v. Verta, 617 A.2d 31, 35 (Pa. Super. Ct. 1992); Stroman v. Williams, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987); Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993); In re Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983).

107. M.J.P. v. J.G.P., 640 P.2d 966, 968-69 (Okla. 1982); Chicoine v. Chicoine, 479 N.W.2d 891, 894 (S.D. 1992).

108. Pleasant v. Pleasant, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) ("Sexual orientation is not relevant to a parent's visitation rights. It is only relevant if it directly harms [the child]."); In re Marriage of Diehl, 582 N.E.2d 281, 292 (Ill. App. Ct. 1991); A. v. A. 514 P.2d 358, 360 (Or. Ct. App. 1973); Rowsey v. Rowsey, 329 S.E.2d 57, 60-61 (W.Va. 1985).

1. The Per Se Rule

Courts which deny gay and lesbian parents custody of their children based on the per se rule consistently cite a combination of five factors in support of their decision. The grounds relied on are: (1) the adverse effect the parent will have on the child's moral development, (2) the harassment and ridicule the child might receive from others, (3) state sodomy laws, (4) the fear that the child might be more likely to be a homosexual if raised by a homosexual parent, and (5) the fear that the child is at an increased risk for contracting AIDS.[109]

A finding that a homosexual parent will adversely affect a child's moral development because of his/her sexual orientation is premised on a belief that homosexual conduct evidences pervasive immorality. Because of the diversity of views attached to the moral implications of homosexual behavior, courts should abstain from basing judgments on such reasoning and defer to the parents' views of right and wrong in raising their children.[110]

In order to rely on others' negative reactions to the homosexual stereotype and on sodomy laws, courts following the per se approach have been forced to deny the analogy, noted by several members of the Supreme Court,[111] between miscegenation laws and sodomy laws.[112] To recognize the analogy would require submission to the standard outlined in *Palmore v. Sidoti*.[113] In addition, to rely on sodomy laws where the parent has never been convicted of their violation is to presume guilt where innocence may be the reality.[114]

The fear that children raised by gays and lesbians are more likely to be homosexual is unfounded. It is premised on the belief that homosexuality is a learned behavior. However, "every study on the subject has revealed that the incidence of same-sex orientation among the children of gays and lesbians occurs as randomly and in the same proportion as it does among children in the general population."[115]

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109. David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 396 (1990).

110. *See supra* notes 39-43 and accompanying text; *supra* part III.B.

111. See *supra* notes 84-86 and accompanying text.

112. *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

113. 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them.").

114. Studies indicate that many lesbians infrequently or never participate in activities which would violate the sodomy laws. *See* Note, *Custody Denials*, *supra* note 72, at 635.

115. Steve Susoeff, Comment, *Assessing Children's Best Interests When A Parent*

To base denial of custody on fear of an increased risk of contracting AIDS where there is no indication that the parent is infected does nothing but enforce the stereotype that only homosexuals contract AIDS. In fact, lesbians have a very low incidence of HIV infection in proportion to the rest of society.[116] If merely being a member of a high risk population warrants denial of child custody, then all hemophiliacs would be similarly denied the opportunity to raise their children in the face of a custody battle.

The five articulated reasons for denying custody to gay and lesbian parents presume facts not uniformly present among them impose judgments on private behavior without inquiry into the parent-child relationship. Child custody decisions should be driven solely by which living arrangement is in the best interest of the child. To the extent that the behavior of a gay or lesbian parent can be shown to have an adverse impact on a child, it should be considered. However, when a court allows a parent's sexual orientation to drive the consideration by irrebuttably presuming that it is never in the best interest of a child to be placed with a homosexual parent, the child's best interest may be sacrificed in order to enforce a stereotype.

a. The Missouri Approach

Missouri is one of the few states that still consistently applies the per se rule. Missouri courts have maintained a steadfast commitment to the notion that homosexuality renders parents unfit to raise their own children. Such a commitment to moral imperatives is not new. In an 1883 decision upholding Missouri's miscegenation statute, the court stated:

> It is stated as well as *authenticated fact* that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, *they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites*, laying out of view other sufficient ground for such enactments.[117]

In a 1982 Missouri case, which is widely cited as a comprehensive study of the law at the time, the Missouri Court of Appeals stated that the per se rule was the majority rule, citing only three states which allowed homosexuals

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is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. REV. 852, 882 (1985).

116. Marshall Kirk & Hunter Nadsen, AFTER THE BALL, HOW AMERICA WILL CONQUER ITS FEAR & HATRED OF GAYS IN THE 90'S 25 (1989); Jackie Winnow, *Lesbians Evolving Health Care: Cancer and Aids*, FEMINIST REVIEW, Summer 1992, at 68, 70.

117. State v. Jackson, 80 Mo. 175, 179 (1883) (emphasis added).

to have custody of their children and seven that did not.[118] Although that survey is no longer accurate, it is still relied on by Missouri courts and cited in other states' opinions. Of the seven states cited, only one, Oklahoma, still maintains that homosexuality can be relied on in denying custody.[119] However, the Oklahoma courts have not considered the issue in a reported decision since 1982.[120]

The 1982 Missouri survey of foreign law cited New York and New Jersey as states which denied custody to parents on the basis of homosexuality.[121] In 1984, New York courts adopted the nexus standard in a decision which stated that sexual orientation, "should be a consideration in a custody dispute only if [it] is shown to adversely affect the child's welfare."[122] New York courts have also been among the first to allow gay men and lesbians to adopt children, which clearly shows that their policy encompasses finding that it is sometimes in the best interest of a child to be placed with a parent who happens to be homosexual.[123] New Jersey courts have adopted a similar position. In a decision upholding a lesbian's right to adopt her partner's child, a New Jersey court stated, "if there is ever any harassment or community disapproval, this court should have no role in supporting or tacitly approving such behavior."[124]

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118. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 870-72 (Mo. Ct. App. 1982) (The court restricted the natural father's visitation with his son to no overnight visits and prohibited the father from taking his son to gay activist gatherings or to churches that approve of homosexual marriages.).

119. M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982).

120. In rendering their 1982 decision, the Oklahoma court relied in part on a psychologist's testimony that, "[i]f [the child] has been taught in some way that it is very sinful and he becomes aware of it, that could be as traumatic as growing up with it being somewhat normal and then finding out that society considers it wrong, but he is going to have to deal with it at that point either way." *Id.* at 969.

121. *J.L.P.(H.)*, 643 S.W.2d at 870.

122. Guinan v. Guinan, 477 N.Y.S.2d 830, 831 (N.Y. App. Div. 1984) (upheld award of custody to lesbian mother).

123. *In re* Commitment of J.N. and E.N., 601 N.Y.S.2d 215, 218 (N.Y. Fam. Ct. 1993) (granted adoption of Black child to White lesbian foster mother over child's natural grandmother). In another New York case, the court reported, "research that has been done in recent years on the possible differences between children of gay and lesbian parents and children of heterosexual parents in otherwise comparable circumstances reveals no disadvantages among the former in any significant respect." *In re* Adoption of Evan, 583 N.Y.S.2d 997, 1002 (N.Y. 1992).

124. *In re* adoption of child by J.M.G., 632 A.2d 550, 552 (N.J. Super. Ct. Ch. Div. 1993).

The 1982 Missouri survey also cited North Carolina and Michigan as states denying custody to homosexual parents.[125] Both of the cited cases upheld a restriction that the parent's lover not be present during overnight visitation periods.[126] Although there are no printed North Carolina decisions which address the issue of vesting primary custody in a gay or lesbian parent, a subsequent decision upheld a gay father's right to unrestricted overnight visits with his son.[127] A 1973 Michigan decision, which was apparently overlooked by the Missouri court, held that the fact that a mother is a lesbian is insufficient to establish that she is unfit for custody of her natural child without an additional showing that the mother's behavior somehow harmed the child.[128]

Other courts cited by the Missouri survey as denying custody to homosexuals include North Dakota, Indiana, and Utah.[129] In a 1993 decision, the North Dakota Supreme Court adopted the nexus standard for considering the sexual orientation of a parent for child custody purposes.[130] Additionally, the court stated that if the heterosexual custodial parent "poisoned the children's minds and hearts with his unyielding, uncharitable intolerance of homosexuality, a change of custody would be required to protect the children's best interests."[131]

The Missouri court cited an Indiana case for the proposition that a majority of courts find it in the best interest of the child to award custody to a heterosexual parent based on sexual orientation alone.[132] In fact, the Indiana case cited in the 1982 Missouri survey states, "we believe the proper rule to be that homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child."[133] Requiring a showing that the child is harmed by the parent's behavior in order for it to impact a custody determination is a clear articulation of the nexus test.

Finally, the Missouri court relied on a frequently cited Utah decision, *Kallas v. Kallas*.[134] In *Kallas*, the court allowed evidence of the mother's sexual behavior to be considered in determining whether overnight visitation should

125. *J.L.P.(H.)*, 643 S.W.2d at 870.
126. *Id.*
127. Woodruff v. Woodruff, 260 S.E.2d 775, 776 (N.C. Ct. App. 1979).
128. People v. Brown, 212 N.W.2d 55, 59 (Mich. 1973).
129. *J.L.P.(H.)*, 643 S.W.2d at 871.
130. Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993).
131. *Id.* at 837 (Levine, J., concurring).
132. *J.L.P.(H.)*, 643 S.W.2d at 871.
133. D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981).
134. 614 P.2d 641 (Utah 1980).

be allowed.[135] No test for considering sexual orientation of a parent in custody disputes was adopted by the *Kallas* court. Rather, the court noted other questionable behavior engaged in by the mother such as making sexual advances to a thirteen year old girl and approaching others to buy drugs.[136] In light of the failure to articulate a standard with respect to homosexuality, and given the presence of several detrimental variables which could easily be considered harmful to a child, one simply cannot extrapolate meaning from the *Kallas* decision as to the position of Utah courts on awarding custody to gay and lesbian parents.

Missouri courts have traditionally applied a "judicial policy [ ] to conclusively presume the detrimental impact on a child from the parent's homosexuality."[137] The courts have attempted to hide this policy under equitable verbiage such as: "Fundamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation, per se."[138] While verbally reciting such a standard, the court denied a lesbian mother custody of her child because the child "may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness."[139] The court went on to further expose this hypocrisy when it held that although all the evidence suggested the child was "normal and well-adjusted . . . [t]he court need not wait, though, till the damage is done."[140] Presuming that living with a homosexual parent harms a child, when there is evidence to the contrary, erects an irrebuttable presumption that a gay man or lesbian is unfit to be a custodial parent.

The Missouri Supreme Court has stated that "sexual misconduct does not ipso facto dictate the award of custody one way or the other."[141] Therefore, the Court in *T.C.H. v. K.M.H.* reasoned, "one spouse's testimony as to the other's [homosexual or heterosexual] extramarital affairs should be considered by the court."[142] On remand, the trial court denied the lesbian mother custody of her children. In reviewing that decision, the appellate court

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135. *Id.* at 643.

136. *Id.*

137. G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (Lowenstein, J., dissenting).

138. N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (quoting *In re* J.S. and C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974)).

139. *Id.*

140. *Id.*

141. T.C.H. v. K.M.H., 693 S.W.2d 802, 804 (Mo. 1985) (quoting Robertson v. Robertson, 630 S.W.2d 266, 267 (Mo. Ct. App. 1982)) (holding that communication between a husband and wife is not confidential and privileged when it relates to a matter material in determining an award of child custody).

142. *Id.* at 805.

expounded that considering a spouse's homosexual affair raises an irrebuttable presumption of unfitness: "Missouri case law recognizes, that a parent's homosexuality 'can never be kept private enough to be a neutral factor in the development of a child's values and character.' '[A] court cannot ignore the effect which the sexual conduct of a parent may have on a child's moral development.'"[143]

There are no reported Missouri decisions where known lesbian or gay parents have been awarded custody or unrestricted visitation with their natural children. In contrast, judicial scrutiny of spouses involved in heterosexual extramarital affairs has not been so strict. In *Wilhelmsen v. Peck*,[144] the Missouri Court of Appeals upheld an award of custody to a mother who had two successive live-in paramours in the home she shared with her sons.[145] The court stated that her "illicit" relationships were insufficient to affect custody unless "the moral conduct of the offending spouse is so gross, promiscuous, open or coupled with other types of antisocial behavior as to directly affect the physical, mental, economic or social well-being of a child."[146]

Without regard to the fitness of the homosexual parent, the unfitness of the heterosexual parent, or the parent-child relationship, Missouri courts presume that "placing primary custody of a minor child with the nonhomosexual parent is in the best interests of the child."[147] In a case where custody was originally granted to the mother, the order was changed to award custody to the father when new evidence was uncovered that the mother was involved in a lesbian relationship.[148] The court based its change in custody on the prospective criteria that it was in the best interest of the children "to protect [them] from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative lifestyle' their mother has chosen."[149]

In a dissenting opinion in a Missouri Court of Appeals case, Judge Lowenstein demonstrated the detrimental result of applying a per se rule by stating the facts of a case where a mother was denied custody because of her homosexual behavior:

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143. T.C.H. v. K.M.H., 784 S.W.2d 281, 285 (Mo. Ct. App. 1989) (quoting *G.A.*, 745 S.W.2d at 728) (citations omitted).

144. 743 S.W.2d 88 (Mo. Ct. App. 1987).

145. *Id.* at 94.

146. *Id.* at 93 (citing *In re* Marriage of F., 602 S.W.2d 227, 231 (Mo. Ct. App. 1980)).

147. S.L.H. v. D.B.H., 745 S.W.2d 848, 849 (Mo. Ct. App. 1988).

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

149. *Id.* at 166.

> The mother provides the child with his own room in a well-kept house, enrolls him in a pre-school, has a steady nursing job, cares about the child, and, despite sleeping with and occasionally hugging a woman, has stated under oath she would discourage her son from emulating her sexual preference. The father has limited education, an income of $6,500 and lives in basically a one room cabin containing a toilet surrounded by a curtain; the child sleeps in a foldup cot by a woodstove and plays in an area littered with Busch beer cans, collected by the father's 'slow' sister, who was ordered by the trial court not to care for the boy while alone .... To say it is in the best interests of this little boy to put him in the sole custody of the father, who was pictured leering at a girly magazine, solely on the basis of the mother's sexual preference, would be and is a mistake.[150]

b. The Bottoms Case

In a recent, highly publicized decision,[151] a Virginia trial court removed custody of a child from Sharon Bottoms, the natural mother, and awarded it to the maternal grandmother, Kay Bottoms, because the mother was involved in a lesbian relationship.[152] A Virginia Court of Appeals overturned the decision, holding that the presumption in favor of granting custody to a natural parent over a third party was not rebutted by evidence of the mother's lesbianism alone.[153] Most likely Kay Bottoms will seek review of the decision in the Virginia Supreme Court.[154] It is unclear whether the Virginia Supreme Court would change its previous rule and follow the trend of courts by applying the nexus test or whether it would maintain that an irrebuttable presumption of unfitness attaches to lesbian and gay parents. Therefore, an analysis of the trial judge's decision is instructive on how the per se rule is applied and its practical consequences.

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150. *G.A.*, 745 S.W.2d at 729 (Lowenstein, J., dissenting).

151. After the decision was announced, the parties received requests for interviews from radio and television stations in Australia and Canada as well as the United States. Oprah Winfrey, Phil Donahue, Larry King, Sally Jessie Raphael, Geraldo Rivera, Maury Povich, Montel Williams, Jane Whitney, Jerry Springer, "Eye to Eye with Connie Chung," "20-20" and "Prime Time Live" all requested interviews. Deborah Kelly, *Bottoms Case Proves to be Magnet for Talk Shows*, RICHMOND TIMES-DISPATCH, Sept. 9, 1993, at A1. Interview requests also came from USA Today, People and Time. Ray McAllister, *Virginia is For Talk Shows*, RICHMOND TIMES-DISPATCH, Sept. 15, 1993, at B1.

152. Deborah Kelly, *Lesbian Ruled Unfit to Raise 2-Year-Old Custody Decision Upheld in Henrico*, RICHMOND TIMES-DISPATCH, Sept. 8, 1993, at A1.

153. Bottoms v. Bottoms, 1994 WL 275049, at 3 (Va. Ct. App. June 21, 1994).

154. *Appeals Court Awards Custody of Boy, Z, to his Lesbian Mother*, KANSAS CITY STAR, June 22, 1994, at A3.

The ruling of the trial judge limited Sharon Bottoms, the natural mother, to a weekly, thirty-two hour, overnight, restricted visit with her son.[155] During the weekly visit, Tyler, Sharon's son, was prohibited from being in the presence of Sharon's lover or visiting the apartment the couple shares.[156] The trial judge stated his reasons for the decision:

> It is the opinion of this court that the conduct is immoral, and the conduct of Sharon Bottoms renders her an unfit parent. However, I also must recognize a presumption in law in favor of the custody being with the actual parent .... Then I ask myself—Sharon Bottoms' circumstances of unfitness—are they of such an extraordinary nature to rebut this presumption? My answer to this is yes.[157]

The irony of this decision was that custody was awarded to Kay Bottoms, a woman who lived with a man for seventeen years without being married while raising her two children.[158] On advice from her lawyer, Kay asked her paramour to move out of her home only shortly after she decided to seek custody of Tyler.[159] Sharon testified that she was sexually abused by her mother's live-in boyfriend twice a week for five years[160] before moving out of the house at age eighteen to escape the systematic abuse.[161] Yet, in the eyes of the trial court, Sharon Bottoms' commitment to a relationship with a member of her own sex overshadowed any harm to the child which might result from being raised by a woman who has a history of exposing children to child molesters.

Even though his parental rights have not been terminated, Tyler's natural father was not allowed to testify in court as to his preference for a custodian.[162] Outside of court, the natural father expressed sorrow over the decision to place Tyler in the custody of the maternal grandmother, Kay Bottoms.[163] Although the father did not fight for custody, he did state that he felt his ex-wife would be a better custodian for Tyler than Kay Bottoms.[164]

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155. *Id.*

156. *Id.*

157. *Id.* (quoting Henrico Circuit Judge Buford M. Parsons, Jr.).

158. *Id.*

159. *Id.*

160. *Id.*

161. Ellen Goodman, *Imagining a Gentler Outcome in the Richmond Case*, RICHMOND TIMES-DISPATCH, Sept. 14, 1993, at A9.

162. Kelly, *supra* note 152.

163. Deborah Kelly, *Dad Hopes Lesbian Regains Tot Boy's Father Speaks Out About Custody Case*, RICHMOND TIMES-DISPATCH, Sept. 13, 1993, at A1.

164. *Id.*

The attorney for the grandmother commented that Virginia residents believe "that this country is in about the same place as the Roman Empire, when the Roman Empire fell because of lesbianism, homosexuals and things of this nature."[165] As evidenced by the numerous supporters of Sharon Bottoms throughout this ordeal, not all Virginia residents subscribe to this belief. National leaders of The Commission on Social Action of Reform Judaism publicly spoke out against the decision.[166] The ruling also spurred the largest turnout in history to Richmond's Gay Pride Parade and Gay Pride Festival, which was held just days after the decision was announced.[167] The Bottoms case illustrates that the best interest of the child is sometimes sacrificed when the court invokes its own standard of morality rather than deferring to the morality of the parent on issues which cannot be affirmatively shown to harm the child.[168] When a court attempts to legally force societal homogeneity, it abandons the duty to determine which living arrangement will be in a child's best interest in favor of ensuring that the child will be raised by a heterosexual.

The Virginia Appellate Court recognized the inequity of divesting Sharon Bottoms of custody in favor of Kay Bottoms. The trial court stated that in order to remove custody from a natural parent, "more is required than simply showing that a parent . . . is not meeting society's traditional or conventional

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165. Deborah Kelly, *Lesbian Mother Tells Story, Bottoms Partner Interviewed for Connie Chung TV Program*, RICHMOND TIMES-DISPATCH, Sept. 10, 1993, at B3.

166. Ed Briggs, *Custody Decision Criticized Reform Jews Defend Lesbian Mom's Rights*, RICHMOND TIMES-DISPATCH, Sept. 22, 1993, at B3. The commission's chairman, Evely Laser Shlensky, and director, Rabbi Eric Yoffie, who is also a vice president of the Union of American Hebrew Congregations, stated: "A homosexual who is shown to be a neglectful, abusive or incompetent parent has no more right than a heterosexual to retain custody of a child. But for a judge to single out homosexuality or lesbianism as the single issue on which to base a custody ruling violates not only the concept of a parent's traditional right but (also) his or her constitutional right to equal protection of the laws." *Id.*

167. Peter Bacque, *Marching With Pride But Many Gay Parents Fear Losing Children*, RICHMOND TIMES-DISPATCH, Sept. 13, 1993, at B1.

168. Sharon Bottoms' partner wrote a poem dedicated to Tyler titled "A Child in the Middle" which illustrates some of the hardship rendered by the court's decision: "A little boy with bright blue eyes, wanting to know the how's and why's / Torn apart by cruelty and hate, and everyone ponders the child's fate / To see the sadness to feel the pain of a lonely mother who some try to blame / The child we see will suffer forever because of the bonds they force him to sever / Today we pray that God is with us and corrects this wrong and painful injustice." *Lesbian Mother in Custody Fight Henrico Case Could Become Landmark*, RICHMOND TIMES-DISPATCH, Sept. 7, 1993, at B1.

standards of morality."[169] Rather, the court stated that it would "not remove a child from the custody of a parent, based on proof that the parent is engaged in private, illegal sexual conduct or conduct considered by some to be deviant, in the absence of proof that such behavior or activity poses a substantial threat of harm to a child's emotional, psychological, or physical well-being."[170]

2. The Rebuttable Presumption of Unfitness

A rebuttable presumption places the burden of proof on gay or lesbian parents to show that their behavior does not pose a harm to the child. Application of this standard may preclude a homosexual parent from being awarded custody when all other factors are equal.[171] However, it does overcome the problem presented by the per se rule where a child may be placed in a detrimental situation because of the irrebuttable presumption that a homosexual parent is unfit.[172]

Use of a presumption in a child custody case infers that the substance of the presumption is in the best interest of the child. In balancing competing characteristics of parents seeking custody, no one characteristic should be determinative of the outcome. The child's interests are best served by examining the overall fitness of each parent.

Whether one believes that a parent being gay or lesbian is harmful in and of itself is largely dependent on one's moral judgment of homosexuality. To the extent that an honest debate exists among respected members of society whether homosexual behavior is morally neutral or morally corrupt, the court should not presume that those who view it as morally corrupt are correct. Without evidence that the sexual orientation of a parent affects the child's welfare, the widely contested notion that it is not in the best interest of a child to be placed with a homosexual parent should not be elevated to the status of a presumption. To the extent that a parent's sexual orientation negatively affects a child, it should be weighed, along with other factors that negatively affect a child, in determining the child's best interest. To the extent that no harm can be shown, a parent's sexual orientation should be treated as a neutral factor. Allowing neutral factors of one parent to be weighed against negative factors of the other parent in balancing a child's best interest serves only to

169. *Bottoms*, 1994 WL 275049 at *5.

170. *Id.*

171. *See* Collins v. Collins, 1988 WL 30173, at 3 (Tenn. Ct. App. March 30, 1988).

172. A Missouri judge argued for adoption of the rebuttable presumption standard in a dissenting opinion to a case denying custody to a lesbian mom. *See* G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (Lowenstein, J., dissenting).

disrupt the proper balance. When this occurs, it is the child who is put at risk, and it is the child whose best interest may not be served.

3. The Nexus Test

The nexus test allows consideration of a parent's homosexuality as a factor, but it cannot be the basis for denying custody absent evidence of harm to the child. Under the nexus test, harm cannot be presumed, but must be proven on a case by case basis.[173] Courts which have adopted the nexus test hold that the state cannot sever the relationship between a parent and child "merely because that parent's lifestyle is not within the societal mainstream."[174] A Pennsylvania court explained:

> Of primary importance to the child's well-being is the child's full and realistic knowledge of his parents, except where it can be shown that exposure to the parent is harmful to the child: Courts ought not to impose restrictions which unnecessarily shield children from the true nature of their parents unless it can be shown that some detrimental impact will flow from the specific behavior of the parent.[175]

The majority of courts which have addressed the issue find that there is no "detrimental impact" on children raised by homosexual parents by virtue of their sexual orientation alone.[176] These courts have also found that it is not the position of the court to favor one parent's moral judgment over the other parent's when no indication of harm can be shown by exposure to either.[177]

Several courts adopting the nexus standard have relied on scientific studies to support their finding that harm to the child cannot be presumed because the custodian is homosexual. In a recent decision, the Massachusetts Supreme Court relied on testimony by an assistant clinical professor of psychiatry at Harvard Medical School that children raised by lesbians and gay

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173. S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) ("Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian.")

174. In re Marriage of Cabalquinto, 669 P.2d 886, 890 (Wash. 1983) (Stafford, J., concurring in part, dissenting in part).

175. Blew v. Verta, 617 A.2d 31, 35 (Pa. 1992).

176. *See supra* note 106.

177. *In re* Marriage of Birdsall, 197 Cal. App. 3d 1024, 1031 (Cal. Ct. App. 1988) ("The unconventional lifestyle of one parent, or the opposing moral positions of the parties, or the outright condemnation of one parent's beliefs by the other parent's religion, which may result in confusion for the child, do not provide an adequate basis for restricting visitation rights.").

men develop normally.[178] In another case, a psychology expert testified that "most children raised in homosexual situations become heterosexual as adults . . . . There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, [or] maladjusted than children raised with a loving couple of mixed sex."[179] In response, the court held that "[t]he state may not deprive parents of custody of their children '. . . simply because the parents embrace ideologies or pursue life-styles at odds with the average.'"[180]

The nexus standard allows courts which are confronted with the reality of lesbian and gay parents to find that the child's "best interest is served by exposing [the child] to reality and not fostering in [the child] shame or abhorrence for [the parent's] nontraditional commitment."[181] The Vermont Supreme Court observed in a recent decision:

> When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment . . . . Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that cannot be solved by idealizing the past."[182]

The result of idealizing the past is to deprive children of lesbians and gays a relationship with their natural parent.[183]

IV. CONCLUSION

Regardless of the intensity with which some members of the judiciary and of society harbor moral judgments on issues such as interracial and homosexual relationships, the fact remains that such relationships do exist. Many people involved in such relationships are also parents who desire to raise their children in accordance with their own beliefs. Unless it can be shown that living with a particular parent is harmful to the child, the best interest of all children is to be raised by their natural parents. In deciding between parents, the best interest of the child is served by balancing the

178. *In re* Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993).

179. Bezio v. Patenaude, 410 N.E.2d 1207, 1215-16 (Mass. 1980).

180. *Id.* at 1216 (quoting Custody of a Minor, 393 N.E.2d 379, 383 (1979)).

181. *Blew*, 617 A.2d at 36.

182. Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

183. *See* Pleasant v. Pleasant, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) ("We are disturbed by the [trial] judge's numerous homophobic comments. His personal beliefs improperly clouded his judgment. Consequently, for the last four years, a little boy has been deprived of unrestricted visits with his mother.").

competing characteristics of each parent rather than making absolute judgments by presuming that individual characteristics render one parent unfit. When the only harm posited to exist is "moral harm," the question should be posed whether severing family ties on such a basis is in the best interest of the child or if it is really in the best interest of those attempting to invoke moral standards in the form of legal sanctions.

Protection of the child does not occur by ensuring that all children are raised in a similar setting. Rather, protection results from ensuring that the individual child and his or her individual heritage will be respected by the government. As family diversity increases, the courts must consider child custody issues from the perspective of the relationship between the parent and the child. In determining the plight of the children of gays and lesbians during a time when society's moral judgment of homosexuality is in flux, the judiciary should reflect on the history of the struggle of interracial couples to establish a legally recognized family in the face of "moral" opposition. A decision dictating who will obtain custody of a child will impact that child's life forever. Therefore, courts must be cautious to consider all relevant factors free from personal prejudices. Courts must use their power to protect children, not to enforce stereotypes and maintain societal uniformity. Custody decisions must always be in the best interest of the child.

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