

# COMMENTS

## Homosexual Parenting: Child Custody and Adoption

### INTRODUCTION

Homosexuals<sup>1</sup> wishing to raise children often encounter misconceptions and prejudice regarding homosexuality, each of which often results in legal barriers that hinder their parenting goals.<sup>2</sup> Because of these barriers, homosexuals have difficulty adopting<sup>3</sup> or receiving custody<sup>4</sup> of children.<sup>5</sup> In deciding custody and adoption cases, courts use

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<sup>1</sup> This Comment uses "homosexual" to refer to both gays and lesbians.

<sup>2</sup> See H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIANS & GAY COUPLES 142-72 (3d ed. 1985). Possible methods of becoming a gay or lesbian parent include having children from previous heterosexual marriages, adopting, foster-parenting, arranging for a surrogate mother, and using artificial insemination. *Id.*

One of these methods, artificial insemination, involves injecting the sperm into the uterus to fertilize an egg. *Id.* at 170. Thus, the woman need not have intercourse to give birth. *Id.* This method has been used since the 18th century. *Id.*

The courts have wrestled with some controversy regarding the identity of the father of an artificially inseminated child. *Id.* at 171. The current rule considers as the father the inseminated woman's husband who consents to insemination by the donor. See *In re Adoption of Anonymous*, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973); see also Van Gelder, *Gay Gothic*, Ms., July-Aug. 1987, at 146 (reporting raising of artificially inseminated baby girl by her four "parents": mother and her lesbian lover, father and his gay lover).

<sup>3</sup> For a definition of adoption, see *infra* note 107 and accompanying text.

<sup>4</sup> This Comment uses "custody" to refer to petitions for joint custody, sole custody, and visitation. Joint custody is defined by the California Civil Code as "joint physical custody and joint legal custody." CAL. CIV. CODE § 4600.5(d) (West Supp. 1989). Sole custody entails sole physical and legal custody. *Id.* Physical custody gives the parent the right to reside with and supervise the child. *Id.* Legal custody gives the parent the "right and the responsibility to make the decisions relating to the health, education, and welfare of a child." *Id.*

<sup>5</sup> For a discussion of barriers to child custody by homosexuals, see *infra* notes 40-77

the "best interests of the child" test.<sup>6</sup> This test requires the court to choose the result that best furthers the interests of the child.<sup>7</sup> In applying this test, however, courts differ in their interpretations of children's best interests.<sup>8</sup> In the past, courts often concluded that the child's best interests required excluding the homosexual parent, whether natural or prospective, from the child's life.<sup>9</sup> Recently, however, many courts have simply considered a parent's homosexuality as one factor affecting the best interests of the child.<sup>10</sup>

Although courts apply the child's best interests test in both adoption and custody cases, they treat homosexuality differently in custody than in adoption.<sup>11</sup> Child-custody courts have increasingly recognized that precluding homosexual parents from obtaining custody does not necessarily serve the child's best interests.<sup>12</sup> Instead, these courts weigh other relevant factors in deciding custody cases and no longer automatically deny custody to the homosexual parent.<sup>13</sup> In contrast, adoption law lags behind custody law in recognizing the parenting abilities of homosexuals.<sup>14</sup> Adoption agencies and courts still give undue weight to sexual orientation,<sup>15</sup> and some absolutely bar homosexuals from adopting children.<sup>16</sup>

This Comment examines current law regarding child-custody battles and adoption cases. Part I of the Comment explores the recent reforms

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and accompanying text. For a discussion of barriers to adoption by homosexuals, see *infra* notes 142-56 and accompanying text.

<sup>6</sup> See *infra* note 22 and accompanying text.

<sup>7</sup> See *infra* note 22 and accompanying text.

<sup>8</sup> For example, some courts believe that excluding the homosexual parent from the child's life is in the child's best interests. See *infra* notes 83-85 and accompanying text.

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* notes 86-106 and accompanying text.

<sup>11</sup> Child-custody courts have begun to use the nexus test. See *infra* notes 86-106 and accompanying text. This test does not exist in adoption law, and courts and agencies frequently exclude homosexuals from adopting. See *infra* notes 142-54 and accompanying text.

<sup>12</sup> However, adoption law is primarily statutory. See *infra* notes 110-18 and accompanying text.

<sup>13</sup> See *infra* notes 86-106 and accompanying text; see generally Comment, *Second-Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986) (discussing second-parent adoption, primarily as a possibility for lesbian-parented families).

<sup>14</sup> See *infra* notes 115-28 and accompanying text.

<sup>15</sup> See Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, in GAY AND LESBIAN PARENTS 103 (F. Bozett ed. 1987). For instance, Massachusetts requires adoption and foster-care applicants to identify their sexual orientation. *Id.*

<sup>16</sup> See *infra* notes 115-18 and accompanying text.

that allow homosexuals custody of their children. This first section also outlines the major obstacles impeding such custody and argues that courts should avoid unjustified presumptions in homosexual child-custody cases. Part II analyzes the current adoption law affecting homosexuals and discusses recent trends and setbacks for the adoptive homosexual parent. It also discusses the lack of progress for homosexuals in adoption cases, especially as compared to custody cases. Finally, Part III proposes that courts apply the emerging custody law standard, the *nexus test*,<sup>17</sup> to adoption cases. It also proposes that state legislatures codify this custody standard to apply to both custody and adoption.<sup>18</sup>

### I. CUSTODY PETITIONS BY GAY AND LESBIAN PARENTS

Homosexuals often have children through heterosexual marriages.<sup>19</sup> If these marriages end in divorce, the presence of children often evokes especially complex custody battles.<sup>20</sup> This Part examines the consequences of such divorces and the resulting custody issues between the homosexual parent and the heterosexual parent.<sup>21</sup>

Courts decide custody disputes by applying the *best interests of the child test*.<sup>22</sup> This test applies in all custody cases, not only custody cases

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<sup>17</sup> This test requires a nexus between a parent's homosexuality and any adverse effects upon the child. Only then does the test allow exclusion of the homosexual parent. See *infra* notes 86-106.

<sup>18</sup> Because more states have recently begun statutorily excluding homosexuals from adopting, adoption law compels codifying the nexus test more than does custody law. For that reason, this Comment limits its codification discussion to adoption law. See *infra* Part III.

<sup>19</sup> One study estimated that one quarter of all gay men father children. See Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 857 n.23 (1985).

<sup>20</sup> Divorce does not necessarily result from the homosexual partner's disclosure of his or her sexuality. Bozett, *Gay Fathers*, in GAY AND LESBIAN PARENTS, *supra* note 15, at 9. Homosexual-heterosexual marriages, like completely heterosexual marriages, terminate for a variety of reasons. *Id.*

<sup>21</sup> Parents in custody disputes may be fighting for joint custody, sole custody, a change of custody, or visitation rights. I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW: CASES, TEXT, PROBLEMS 464 (1986). Joint custody entails shared legal custody. *Id.* The court can award physical custody to either or both parents. *Id.*

<sup>22</sup> See Comment, *supra* note 19, at 853. The Uniform Marriage and Divorce Act § 402 defines the child's best interests to include the following:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

involving homosexual parents.<sup>23</sup> Because the test's guidelines are very general, courts possess broad discretion in examining relevant factors affecting the child's best interests.<sup>24</sup> These relevant factors may include the parents' wishes, the child's wishes, and the child's relationship with her parents and siblings.<sup>25</sup> Factors may also include the child's adjustment to her home, school, and community.<sup>26</sup> Finally, courts may consider the mental and physical health of everyone involved.<sup>27</sup>

Unfortunately, these factors sometimes encompass the court's personal morality standard.<sup>28</sup> Especially in cases involving homosexuals, courts often apply their "morality standards" in addition to the best interests test when determining the outcome of the case.<sup>29</sup> Allowing courts this broad discretion in applying the best interests test thus allows judicial prejudices and misconceptions to determine the child's best interests.<sup>30</sup>

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(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIFORM MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

Until 1817, courts automatically granted custody to the father. *See* Bruch, *Forms of Exclusion in Child Custody Law*, 7 *ETHOLOGY & SOCIOBIOLOGY* 339, 340-41 (1986). This eventually gave way to the *tender years doctrine*, which granted maternal custody to children seven years of age and younger. *Id.* Finally, the *best interests of the child test* replaced the tender years doctrine in this country and became the current American standard for child custody law. *Id.* at 343.

<sup>23</sup> *See supra* note 22.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g., Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (ordering change of custody from mother to father solely on grounds that mother openly cohabited with a man), *cert. denied*, 449 U.S. 927 (1980).

Personal morality standards sometimes include racism or sexism. *See* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that white custodial mother's decision to live with, and later marry, a black man was insufficient reason for change of custody to father despite possible harassment and ridicule the child might suffer); *see also* *Bezou v. Bezou*, Case No. 83CC1466, Civ. Dist., Parish of Orleans, New Orleans, La. (La. Civ. Dist. Ct. 1983), *quoted in* 69 ABA J. 1808 (1983) (removing four-year-old from mother when she joined National Labor Relations Board, reasoning that mother, an attorney, wanted "to be a lawyer more than she want[ed] to be a mother").

<sup>29</sup> For examples of judges applying their own standards of morality to their cases, *see supra* note 28.

<sup>30</sup> *See* *Koop v. Koop*, No. 221097 (Wash. Super. Ct., Pierce County., Sept. 17, 1973), *cited in* Comment, *supra* note 19, at 894. In *Koop*, the lesbian mother's three

## A. Common Preconceptions

Judicial preconceptions of homosexuality fall into five major categories.<sup>31</sup> First, many courts still equate homosexuality with mental illness or mental instability.<sup>32</sup> Second, some courts assume that either homosexuals will convert their children to homosexuality, or that the child will become homosexual.<sup>33</sup> Third, courts commonly believe that homosexuals sexually molest their children.<sup>34</sup> The threat of AIDS<sup>35</sup> creates a fourth kind of judicial preconception.<sup>36</sup> Finally, some courts assume that possible societal harassment and ridicule of the child justify separating the child from her homosexual parent.<sup>37</sup>

The first four preconceptions are completely unjustified because they are misconceptions and false stereotypes.<sup>38</sup> Courts should ignore these misconceptions when determining the child's best interests. The fifth preconception, that of social stigma, has some factual basis,<sup>39</sup> but should still be considered only as one of many factors in determining custody.

Courts often equate homosexuality with mental instability or mental illness.<sup>40</sup> However, in 1973, the American Psychiatric Association recognized that homosexuality was neither a mental illness nor a mental disorder.<sup>41</sup> The American Psychological Association soon followed

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children wished to live with their mother. *Id.* After the court granted custody to the father, the children ran away several times. *Id.* Instead of granting the mother's petition for a custody change, the court placed the children in a juvenile detention center. *Id.* Despite no evidence of harm to the children from the mother's lesbianism, the court then placed the children with a half sister. *Id.* Only five years after the initial custody order did the mother finally receive permanent custody of the children. *Id.*

<sup>31</sup> For a discussion of these five major preconceptions, see *infra* notes 40-77 and accompanying text.

<sup>32</sup> See *infra* notes 40-45 and accompanying text.

<sup>33</sup> See *infra* notes 49-55 and accompanying text.

<sup>34</sup> See *infra* notes 56-60 and accompanying text.

<sup>35</sup> Acquired Immune Deficiency Syndrome is a "condition of acquired immunological deficiency, associated especially with male homosexuality and intravenous drug abuse." WEBSTER'S NEW COLLEGIATE DICTIONARY 66 (9th ed. 1986).

<sup>36</sup> See *infra* notes 63-70 and accompanying text.

<sup>37</sup> See *infra* notes 71-76 and accompanying text.

<sup>38</sup> For a discussion of why these preconceptions are unjustified, see *infra* notes 40-72 and accompanying text.

<sup>39</sup> See *infra* note 71.

<sup>40</sup> Comment, *supra* note 19, at 870-76.

<sup>41</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M. III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d ed. 1980); see also Comment, *supra* note 19, at 872 (reporting 1975 conclusion of American Psychological Association that homosexuality is not an illness or disorder).

Modern clinical thought supports the position of the American Psychiatric Association. Recent studies show more psychological similarities between homosexuals and heterosexuals than previously supposed. See Comment, *supra* note 13, at 750 (citing Kirkpatrick & Morgan, *Psychodynamic Psychotherapy of Female Homosexuality*, in *HOMOSEXUAL BEHAVIOR* 357 (J. Marmor ed. 1980)) (concluding that homosexuals show no more evidence of "psychological distress" than heterosexuals in comparable situations).

Further studies refute the notion of homosexuals as mentally unstable and indicate that homosexuals are as happy and well-adjusted as heterosexuals. See H. CURRY & D. CLIFFORD, *supra* note 2, at 131. Studies also show that homosexuals can have lasting, stable relationships. *Id.*; see also Comment, *supra* note 13, at 750, n.122 (citing D. MCWHIRTER & A. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 285 (1984)) (stating that a study of 156 gay male couples estimated that one third had been together for 10 years or more, while some had been together for 40 or 50 years); Comment, *supra* note 19, at 870-76.

Unfortunately, antisodomy statutes in nearly half the states contribute to the myth that homosexuals are mentally unstable. These statutes outlaw homosexual lovemaking and render the homosexual lifestyle itself criminal. Twenty-six states have decriminalized their sodomy statutes. Rivera, *Legal Issues in Gay and Lesbian Parenting* in *GAY AND LESBIAN PARENTS*, *supra* note 15, at 200. Twenty-four states and the District of Columbia retain theirs. *Id.*

In 1957 the Wolfenden Report in England recommended decriminalization of male homosexual behavior, and the British Parliament complied with the recommendation. See WOLFENDEN REPORT, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 9-10 (1957).

In 1962 the American Law Institute's proposed official draft of the Model Penal Code decriminalized all adult, consensual, private, sexual behavior. See MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962). The American Law Institute recommended decriminalization of homosexual practices because no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. *Id.*

Although the constitutionality of these antisodomy statutes seemed doubtful, the United States Supreme Court upheld a Georgia antisodomy statute providing for imprisonment of up to twenty years. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court considered the statute in the homosexual context, and implied that it may have decided differently in a corresponding heterosexual situation:

[T]he Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens . . . . The sex or status of the persons who engage in the act [of sodomy] is irrelevant as a matter of state law.

478 U.S. at 200 (Blackmun, J., dissenting).

Since the *Bowers* decision, courts can, in effect, argue that homosexuals are criminals because the antisodomy laws say so. Courts can then circularly conclude that homosexuals are unstable because criminals cannot be stable and psychologically healthy. See, e.g., *Roe v. Roe*, 228 Va. 722, 727, 324 S.E.2d 691, 694 (1985) (holding that the

suit.<sup>42</sup> But the notion that homosexuals are mentally ill still permeates Western thought as it has for centuries.<sup>43</sup> Until courts dispense with this preconception, gay and lesbian parents fighting for custody must continue to overcome it.<sup>44</sup> Homosexual parents must educate courts by submitting evidence showing that homosexuals can lead lives as normal and as well-adjusted as those of their heterosexual counterparts.<sup>45</sup>

Judges often erroneously believe that homosexual parents will somehow adversely affect their children.<sup>46</sup> They usually perceive this adverse

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father's continually exposing his nine-year-old daughter to his "immoral and illicit [homosexual] relationship rendered him an unfit and improper custodian as a matter of law"); *see also* N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (comparing lesbian mother with a "habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher," by holding that since the court would deny custody to one of the latter, it could also reasonably deny custody to lesbian mother); *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537, 541 (1973) (refusing to even discuss situation that court considered unacceptable in even the most "permissive society"), *cert. denied sub nom. Spence v. Spence*, 415 U.S. 918 (1974).

However, the American Psychiatric Association, the American Psychological Association, the National Association for Mental Health, and the United States Surgeon General have all repudiated this view. *See* Comment, *supra* note 19, at 872.

In addition, both the American Law Institute and the Wolfenden Report in England recommended decriminalization of homosexual lovemaking. *See* WOLFENDEN REPORT, *supra* note 41; *see also* MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962). The current trend is towards decriminalizing homosexual lovemaking. *See* H. CURRY & D. CLIFFORD, *supra* note 2, at 9.

<sup>42</sup> Comment, *supra* note 19, at 872.

<sup>43</sup> *Id.* at 870.

<sup>44</sup> *See* *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980) (holding both that mother's lesbianism did not render her unfit custodian as matter of law, and that trial court's finding that lesbianism would lead to instability in the home was insufficient).

<sup>45</sup> *See supra* note 41. One study estimates the number of children of gay and lesbian parents to be 6 million. J. SCHULENBURG, GAY PARENTING (1985). Another study estimates that 14 million children have gay or lesbian parents. *See supra* note 19 and accompanying text.

<sup>46</sup> *See, e.g., In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Super. Ct. 1976) (removing custody from mother because of her lesbian relationship and holding that her children "may be affected physically and emotionally by close contact with homosexual conduct of adults"); *see also In re Appeal in Pima County, Juvenile Action B-10489*, 151 Ariz. 335, 727 P.2d 830, 838 (Ariz. 1986) (court asking openly bisexual man applying to adopt child whether he would molest child placed in his custody or whether he would try to convert child to homosexuality); *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1981) (stating that child might "have trouble fulfilling her heterosexual identity" and therefore denying custody to lesbian mother); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (granting custody to lesbian mother only on condition that she end her relationship with her lover, reasoning that environment might harm child, who might "incline toward homosexuality").

effect as confused sexual identity or increased inclination toward homosexuality on the child's part.<sup>47</sup> This notion persists, despite studies indicating that children of homosexuals and transsexuals do not significantly differ in their psychosocial development from children in heterosexual families.<sup>48</sup>

Some courts also believe that the homosexual parent will convert the child to homosexuality.<sup>49</sup> This belief incorrectly assumes that homosexuals want their children to be homosexual.<sup>50</sup> It also incorrectly assumes

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<sup>47</sup> *Id.* See Steckel, *Psychosocial Development of Children of Lesbian Parents* in GAY AND LESBIAN PARENTS, *supra* note 15, at 76.

<sup>48</sup> One researcher found no greater proportion of atypical sex-role orientation in the children of lesbian and transsexual parents than in heterosexual parents' children. *Id.* at 76-77.

Another study compared heterosexual parents with their gay or lesbian counterparts. Harris & Turner, *Gay and Lesbian Parents*, 12 J. HOMOSEXUALITY 101, 101-13 (1985-1986). This study found no significant differences in the relationships between these parents and their children. *Id.* The researchers found that the parent's sexual orientation did not constitute a primary issue in the parent-child relationship. *Id.* The researchers found a notable difference only in that homosexual parents made a greater effort to provide an opposite-sex role model for their children. *Id.*

See Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 89-111. This book cites the following studies:

1. Kirkpatrick, Smith & Roy, *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545 (1981). This study compared 20 children of single lesbian mothers with 20 children of single heterosexual mothers. *Id.* The study found that the mother's sexual orientation made no difference in the type or frequency of emotional problems between the two groups of children. *Id.* The study also found no evidence of developmental difficulties, gender disorders, or increased likelihood of homosexuality in the children of lesbian mothers. *Id.*

2. D. PURYEAR, A COMPARISON BETWEEN THE CHILDREN OF LESBIAN MOTHERS AND THE CHILDREN OF HETEROSEXUAL MOTHERS (1983) (unpublished doctoral dissertation, California School of Professional Psychology, Berkeley, Cal.). The study found no significant differences in self-concept or family view in the two groups. The study also revealed that the father's availability affected both groups more than the mother's sexual orientation. *Id.*

<sup>49</sup> See, e.g., *supra* note 46 and accompanying text.

In addition, as one commentator points out: "This fear [that the parent can convert the child's sexual orientation] is founded on the incorrect assumption that children develop their own sexual orientation by mimicking their parents." Comment, *supra* note 19, at 881-82.

<sup>50</sup> Rivera, *Legal Issues in Gay and Lesbian Parenting* in GAY AND LESBIAN PARENTS, *supra* note 15, at 212. Many gay and lesbian parents do not want their children to be homosexual. *Id.* One litigator writes that most of her clients manifest this attitude: "Who would encourage their kid to be gay? For what purpose? To be harassed, discriminated against, to be hated . . . what are we, nuts?" *Id.*; see N.Y. Times, June 21, 1979, § 2, at 1, col. 1 (gay adoptive father remarking of his son, "I'm sure he's



that homosexual parents have the *ability* to convert their children.<sup>51</sup>

Even if courts do not believe that the homosexual parent will convert the child, courts often believe that the child will *become* gay if placed with the homosexual parent.<sup>52</sup> This belief assumes that the parents' sexual orientation affects the child's sexual orientation. Taken one step further, this belief also incorrectly assumes that children acquire their sexual orientation by imitating their parents.<sup>53</sup> However, this reasoning fails to explain why, if children acquire their sexual orientation by imitation, heterosexual parents ever have homosexual children.<sup>54</sup> Furthermore, studies indicate that a parent's sexual orientation has no bearing on the child's sexual orientation.<sup>55</sup>

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straight, and that's fine with me. . . . I'm glad he's the way he is for two reasons: one, because it will make it easier for him, and two, because I want grandchildren."').

<sup>51</sup> See, e.g., N.Y. Times, Jan. 21, 1987, § 3, at 1, col. 1. The chairman of the American Psychological Association's Committee on Lesbian and Gay Concerns, stated, "People who worry that a child's sexual orientation inevitably will follow that of their parents should remember that most people who are homosexual were raised by heterosexual parents and surrounded by heterosexual role models as they were growing up." *Id.*

One gay father essentially summed up this quotation when he commented, "My straight parents failed to make me straight, so there's no reason to believe I'd succeed in doing the reverse with [my son], even if I wanted to." Comment, *supra* note 19, at 883 n.200.

<sup>52</sup> See *supra* note 46.

<sup>53</sup> Comment, *supra* note 19, at 881-82.

<sup>54</sup> One commentator writes, "In terms of rationality this claim [that the child will become gay] probably is the most ludicrous. Who are the parents of gay human beings? . . . Obviously, the way to prevent homosexuality is to prevent heterosexual childbearing or childrearing." See Rivera, *Legal Issues in Gay and Lesbian Parenting* in GAY AND LESBIAN PARENTS, *supra* note 15, at 211; see also *supra* note 51 and accompanying text.

<sup>55</sup> See Comment, *supra* note 19, at 883 (stating that no study or "respected theory of causation" has linked a child's sexual orientation to the parent's); see also Steckel, *Psychosocial Development of Children of Lesbian Mothers* in GAY AND LESBIAN PARENTS, *supra* note 15, at 76-79 (citing Green, *Sexual Identity of 37 Children Raised by Homosexual and Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696-97 (1978)) (stating that "[c]hildren being raised by transsexual or homosexual parents do not differ appreciably from children raised in more conventional family settings on macroscopic measures of sexual identity."); Hoeffter, *Children's Acquisition of Sex-Role Behaviour in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY, 536, 542 (1981) (finding no significant differences in sex-role behavior between children of lesbian mothers and children of heterosexual mothers); Mandel & Hotvedt, 4 HUSIARTS & PRAKTIK 31 (1980) (finding no significant differences between a group of 50 children of lesbian mothers and a group of 35 children of heterosexual mothers regarding peer group relationships, sexual identity, and relations with fathers or other males); D. PURYEAR, *supra* note 48.

A third belief held by many courts presumes that homosexuals tend to molest their children.<sup>56</sup> However, research shows that heterosexual, not homosexual, men commit the vast majority of child molestations.<sup>57</sup> Yet, this data has not removed gay fathers, and even lesbian mothers from the courts' suspicions of molestation.<sup>58</sup> Many courts still regard homosexual parents as more capable than heterosexual parents of mo-

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One article discussed studies conducted by Robert J. Howell, Professor of Clinical Psychology, Brigham Young University: [R]esearch projects comparing children raised by lesbians with those raised by single heterosexual mothers have found few differences between the two groups: the lesbians' children show nothing unusual in the development of gender identity, no increased preference for gay life, no serious social [or] emotional maladjustments." N.Y. Times, Jan. 21, 1987, § 3, at 1, col. 1.

In a survey of 17 research projects, Dr. Howell found that "while custody decisions have tended to reflect stereotyped beliefs of fears concerning the detrimental effects of homosexual parenting practices on child development, a review of the research consistently fails to document any evidence substantiating those fears." *Id.*

Furthermore, some studies point to biological causes as the root of sexual orientation. At the Annual Convention of the American Psychological Association in 1985, both experts and parents of homosexual children embraced the view that homosexuality stems from biological causes. N.Y. Times, Aug. 25, 1985, § 1, at 2, col. 1. Judd Marmor, a psychiatrist at Stanford University, stated that no one completely understood the roots of gender identity. *Id.* However, he added, ". . . [T]here may be some prenatal source. Familial patterns, if they exist, could be a reaction to, not a cause of, gender distortion patterns." *Id.* One parent of a gay son said:

No one chooses to be gay. We believe our gay children were born that way. . . . There appears to be no [psychological] pattern [in the parents of homosexuals]. We come from every kind of background — racial, ethnic, religious, economic, political — and every kind of family model: divorced, absent parent, devoted parents, weak or strong mother.

*Id.*

<sup>56</sup> See, e.g., *In re Appeal in Pima County, Juvenile Action B-10489*, 151 Ariz. 335, 727 P.2d 830 (1986) (court asking an openly bisexual man applying to adopt a child whether he would molest the child placed in his custody or whether he would try to convert the child to homosexuality).

<sup>57</sup> See H. CURRY & D. CLIFFORD, *supra* note 2, at 131 (stating that 97% of child molesters are heterosexual males and 87% of the victims are female); see also Rivera, *Legal Issues in Gay and Lesbian Parenting* in GAY AND LESBIAN PARENTS, *supra* note 15, at 211 (finding that although heterosexual men commit 85% of child molestation, homosexual men commit only 14% of child molestation); Comment, *supra* note 19, at 881.

<sup>58</sup> Lesbian mothers are suspect because of their sexual orientation, despite the fact that women commit only 3% of child molestations. H. CURRY & D. CLIFFORD, *supra* note 2, at 131. Further, experts now believe that sexual molestation of children has nothing to do with sexual orientation, but stems from "fixation on the childishness as a sexual object." GAY AND LESBIAN PARENTS, *supra* note 15, at 211 (citing D. WEST, *HOMOSEXUALITY REEXAMINED* 212-17 (1977), and D. WEST, *HOMOSEXUALITY* 118-19 (1967)).

lesting their children.<sup>59</sup> Ironically enough, the evidence indicates that the reverse holds true, and courts should consider homosexuals as less likely to molest their children.<sup>60</sup>

In recent years homosexual parents, especially fathers, have confronted a fourth preconception regarding their parenting ability.<sup>61</sup> Because of the recent spread of AIDS,<sup>62</sup> courts often automatically exclude homosexual parents on the grounds that they might expose the child to AIDS.<sup>63</sup> However, the AIDS virus can be transmitted in only a few ways.<sup>64</sup> Nevertheless, courts do not realize that children are generally not at risk of infection by a parent who has the virus.<sup>65</sup> Courts still deny parents custody, however, even if the parents are not infected.<sup>66</sup> Judges often deny custody to the homosexual parent simply because they fear the homosexual parent is more likely to contract the disease than the heterosexual parent.<sup>67</sup>

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<sup>59</sup> See, e.g., *In re Appeal in Pima County, Juvenile Action B-10489*, 151 Ariz. 335, 727 P.2d 830 (1986) (court asking an openly bisexual man applying to adopt a child whether he would molest the child placed in his custody or whether he would try to convert the child to homosexuality).

<sup>60</sup> See *supra* notes 57-58 and accompanying text.

<sup>61</sup> See *infra* notes 63-70 and accompanying text.

<sup>62</sup> For a definition of AIDS, see *supra* note 35.

<sup>63</sup> See *Tougher Time for Gays' Custody*, 74 A.B.A. J. 24 (Jan. 1988) (stating that AIDS issue complicates cases because of courts' ignorance of the disease and recommending expert testimony).

In Chicago, a court prohibited a gay father's daughters from visiting him overnight in San Francisco for fear they might contract AIDS. Uehling & Abramson, *A Chicago Family Feud Over AIDS*, NEWSWEEK, June 30, 1986, at 26. The father's doctor testified to the father's health. *Id.* The doctor also testified that AIDS tests gave no useful information about risks the father presented to his children during normal visitations. *Id.* But when the father refused to take an AIDS test, the court banned overnight visits. *Id.*

<sup>64</sup> For information on transmission of AIDS, see L. FRUMKIN & J. LEONARD, QUESTIONS AND ANSWERS ON AIDS 32-52 (1987). AIDS cannot be spread by casual contact. See generally *id.* The virus spreads through body fluids, usually by sexual contact, intravenous injection of drugs with unsterilized needles, and blood transfusions. See generally *id.*

<sup>65</sup> *Id.* Lesbian mothers do not fall within the high-risk category for AIDS. GAY AND LESBIAN PARENTS, *supra* note 15, at 215. Nonetheless, one court ordered a lesbian mother not to kiss her children or even have them in her home because of potential danger from AIDS. *Id.*; see Uehling & Abramson, *supra* note 62, at 26. Because of the widespread ignorance regarding AIDS, the American Bar Association advises homosexuals to enter custody battles armed with expert testimony. See *Tougher Time for Gays' Custody*, *supra* note 63, at 24.

<sup>66</sup> See *supra* note 63.

<sup>67</sup> *Id.*

The difficulty of overcoming the AIDS hysteria lies in the general lack of knowledge among judges about the disease.<sup>68</sup> Many courts neither realize that limits exist on the extent to which the disease can be transmitted, nor realize the extent to which the disease threatens the child.<sup>69</sup> Until they do, homosexual parents must prepare to educate the courts with expert testimony.<sup>70</sup>

Finally, the fear that the child will be harassed and ridiculed if placed with the homosexual parent presents perhaps the only justified concern in this area.<sup>71</sup> Even so, courts should keep this factor in perspective and treat it as only one factor in deciding a custody case. Some courts already keep the concern of social stigma in perspective when deciding a custody case.<sup>72</sup>

For example, in *Palmore v. Sidoti*,<sup>73</sup> the United States Supreme Court reversed a state court decision denying child custody to a mother because of her interracial remarriage.<sup>74</sup> The Supreme Court held that potential societal stigma resulting from the interracial marriage did not merit denying custody to the mother.<sup>75</sup> Similarly, in 1986, a New York court relied on *Palmore* in awarding a gay father custody of his thirteen-year-old son.<sup>76</sup> These cases show that while societal stigma is a

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<sup>68</sup> Although AIDS cannot spread by casual contact, courts still order blood tests or forbid parents from kissing their children, an act constituting casual contact. Uehling & Abramson, *supra* note 63, at 26.

<sup>69</sup> See *supra* notes 63-65.

<sup>70</sup> See *Tougher Time for Gays' Custody*, *supra* note 63, at 24 (stating that the AIDS issue complicates cases because of the courts' ignorance of the disease, and homosexuals involved in custody fights must be prepared with expert testimony).

<sup>71</sup> Comment, *supra* note 19, at 877 n.157 (quoting the first openly gay judge in the United States, Steven Lachs, who considers harassment "a truly rational concern, considering the intensity of our society's prejudice and the cruelty which children can exhibit toward one another").

<sup>72</sup> See *infra* notes 73-76.

<sup>73</sup> 466 U.S. 429 (1984).

<sup>74</sup> *Id.* at 434. In *Palmore*, a father sought a change of custody from the custodial mother. *Id.* The mother, a white woman, cohabited with, and later married, a black man. *Id.* The father alleged that the interracial marriage would subject the child to peer harassment and prejudice. *Id.* at 430.

<sup>75</sup> The Court stated, "the law cannot, directly or indirectly, give [other peoples' biases and prejudices] effect . . . ." The Court also stated, "[t]he Constitution cannot control such prejudices, but neither can it tolerate them." *Id.* at 433.

<sup>76</sup> *M.A.B. v. R.B.*, 134 Misc. 2d 317, 324-25, 510 N.Y.S.2d 960, 963-64 (1986). The mother argued that living with the gay father and his lover would adversely affect the boy. *Id.* at 322-23, 510 N.Y.S.2d at 963. The court conceded that the boy would require strength to contend with genuine social pressures. *Id.* at 323, 510 N.Y.S.2d at 963. However, the court held that this did not show that the father's homosexual con-

valid concern, it should not conclusively bar custody.

By overcoming unjustified preconceptions regarding homosexual parents, these custody courts set the stage for a new standard in custody law.<sup>77</sup> These courts opened the way for a more specific, more rational standard that does not give undue weight to sexual orientation. Instead, this new standard weighs sexual orientation against other factors when deciding child custody.

### B. Current State of the Law

Conflicting precedent characterizes current law regarding child custody battles involving homosexual parents.<sup>78</sup> The court in *Nadler v. Superior Court*<sup>79</sup> declared for the first time that homosexuality alone did not render a parent unfit as a matter of law.<sup>80</sup> Recently, the court in *In re Marriage of Cabalquinto*<sup>81</sup> affirmed *Nadler* by holding that homosexuality alone did not bar custody or reasonable visitation rights.<sup>82</sup> However, not all courts followed this first step towards a ra-

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duct would adversely affect the boy. *Id.*, 510 N.Y.S.2d at 963-64.

<sup>77</sup> See, e.g., *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256 (1979) (holding that the threat of social stigma did not warrant removing custody from the lesbian mother). The court first held that a custody change would have no effect on social stigma directed toward the child. *Id.* at 436, 404 A.2d at 1262. The court reasoned that social stigma resulted from the parent's homosexuality and not from whether the child lived with that parent. *Id.* A custody change would not change the parent's sexual orientation and therefore would not decrease potential stigma. *Id.*, 404 A.2d at 1262-63.

The court then held that even if the lesbian mother's custody contributed to stigmatizing the children, this stigma did not warrant a custody change. *Id.* at 438, 404 A.2d at 1263. The court held that as a result of their mother's homosexuality, the girls would emerge stronger and less inclined to succumb to bigotry. *Id.* The court stated:

[T]here is no reason to think that the girls will be unable to manage whatever anxieties may flow from the community's disapproval of their mother. . . . It is just as reasonable to expect that they will emerge . . . better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice. . . . Instead of courage and the precept that people of integrity do not shrink from bigots, [removing custody from the mother] counsels the easy option of shirking difficult problems and following the course of expedience.

*Id.*

The court further stated that the mother's "loving and supportive relationship" with the girls constituted the crucial factor in the dispute. *Id.*

<sup>78</sup> See *infra* notes 79-101 and accompanying text.

<sup>79</sup> 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

<sup>80</sup> *Id.* at 525, 63 Cal. Rptr. at 354.

<sup>81</sup> 100 Wash. 2d 325, 669 P.2d 886 (1983).

<sup>82</sup> *Id.* at 329, 669 P.2d at 888.

tional custody standard.<sup>83</sup> Many courts retained the view that homosexuality amounted to unfitness as a matter of law.<sup>84</sup> Other courts compromised by granting homosexuals "conditional" custody or visitation.<sup>85</sup>

The nearly unlimited discretion of custody courts resulted in desultory, conflicting precedent in custody law. However, one particular standard, the *nexus test*, began to emerge from the chaos.<sup>86</sup> Courts began requiring a nexus between the parent's homosexuality and any adverse effect on the child rather than automatically denying custody to the homosexual parent.<sup>87</sup> Absent some showing that the parent's homosexuality adversely affected the child, courts did not conclusively deny custody to the homosexual parent.<sup>88</sup>

One of the first courts to apply the nexus test was a Michigan appellate court in *People v. Brown*,<sup>89</sup> which involved a custody dispute between a father and a lesbian mother. In deciding the dispute, the court

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<sup>83</sup> See, e.g., *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E.2d 849 (1979) (removing children from the mother when the father established her homosexuality, and holding that the mother's live-in lover rendered the mother, although loving and caring, unsuitable for raising a minor child); see also *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (denying custody to the lesbian mother partly because the harassment threat constituted a compelling reason for doing so); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (holding the gay father an unfit custodian as a matter of law for continually exposing his nine-year-old daughter to his "immoral and illicit homosexual relationship").

<sup>84</sup> See *supra* note 82.

<sup>85</sup> See, e.g., *Scarlett v. Scarlett*, 257 Pa. Super. 468, 390 A.2d 1331 (1978) (affirming lower court order that limited lesbian mother's visitation by ordering her not to expose her children to any "improper influences," particularly her lesbian lover); see also *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. 1980) (granting mother custody only upon termination of her lesbian relationship, and comparing lesbian mother to a habitual criminal, drug pusher, or child abuser for custody purposes).

Courts restrict or forbid overnight visits presumably to allay the danger of sexual molestation. Rivera, *Legal Issues in Gay and Lesbian Parenting* in GAY AND LESBIAN PARENTS, *supra* note 15, at 210-11. However, heterosexual males comprise the vast majority of child molesters. See *supra* notes 57-58. One commentator writes, "One can only presume that the judge believes that child molestation occurs only in the dark of night." GAY AND LESBIAN PARENTS, *supra* note 15, at 211.

<sup>86</sup> One of the first courts to apply this test was the court in *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (Ct. App. 1973). See *infra* notes 87-102 and accompanying text (discussing nexus test).

<sup>87</sup> See, e.g., *Guinan v. Guinan*, 477 N.Y.S.2d 830, 102 A.D.2d 963 (1984). The court adopted the nexus test by holding that the mother's sexual relationships with other women did not determine the outcome of the dispute unless they adversely affected the child's welfare. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 212 N.W.2d 55 (Mich. Ct. App. 1973).

required a causal connection between the mother's lesbianism and any adverse effect upon the children.<sup>90</sup> Finding no such nexus, the court refused to consider the mother's lesbianism as a detriment to her in the dispute.<sup>91</sup>

In 1980 the Massachusetts Supreme Judicial Court applied and refined the nexus test<sup>92</sup> in *Bezio v. Patenaude*.<sup>93</sup> The court in this case held that the mother's lesbian relationship alone did not justify denying her custody in favor of the current guardian.<sup>94</sup> The court also held insufficient a finding that lesbian relationships created instability that would adversely affect the child's welfare.<sup>95</sup> Instead, the court required some correlation between the mother's homosexuality and her fitness as a parent.<sup>96</sup> Because the court found no correlation, and therefore no showing of any adverse effect upon the child, the court considered the mother's sexual orientation irrelevant to her parenting skills.<sup>97</sup>

The New York case of *Gottlieb v. Gottlieb*<sup>98</sup> slightly expanded the nexus test. The lower court in *Gottlieb* had awarded custody to the gay father, but had imposed conditions on the award that prohibited the father from certain activities.<sup>99</sup> Because the activities specified in the conditions did not adversely affect the child, the appellate court removed the conditions imposed on custody.<sup>100</sup> Thus, the court extended application of the adverse impact requirement to any conditions imposed on custody, as well as to the primary custody award.<sup>101</sup>

Several other courts have also adopted the nexus test in evaluating

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<sup>90</sup> *Id.* at 59.

<sup>91</sup> *Id.*

<sup>92</sup> See *Guinan v. Guinan*, 477 N.Y.S.2d 830, 102 A.D.2d 963 (1984).

<sup>93</sup> 381 Mass. 563, 410 N.E.2d 1207 (1980).

<sup>94</sup> *Id.* at 579, 410 N.E.2d at 1215-16.

<sup>95</sup> *Id.*, 410 N.E.2d at 1215.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 108 A.D.2d 120, 488 N.Y.S.2d 180 (App. Div. 1985).

<sup>99</sup> The lower court conditioned the gay father's visitation privileges on two conditions. *Id.* The first required total exclusion of the father's lover and other homosexuals during visitation periods. *Id.* The second prohibited homosexual contact with the father and child even when outside the home. *Id.*

The appellate court held that excluding the lover served no real purpose except as a punitive measure. *Id.* at 122, 488 N.Y.S.2d at 182 (Kupferman, J.P., concurring). The court also found no adverse impact on the child from either of the two prohibited activities. *Id.* For these reasons, the court struck the two conditions from the custody order. *Id.* at 121, 488 N.Y.S.2d at 181.

<sup>100</sup> The appellate court concluded that the trial court had only imposed the conditions for punitive purposes. *Id.* at 122, 488 N.Y.S.2d at 182.

<sup>101</sup> *Id.* at 121, 488 N.Y.S.2d at 181.

custody disputes involving gay or lesbian parents.<sup>102</sup> These courts have held that homosexuality alone does not render a parent unfit as a matter of law.<sup>103</sup> The courts applying the nexus test instead require a specific showing that the parent's homosexuality adversely affects the child.<sup>104</sup> In these cases, the courts examine the facts of each case instead of presumptively denying custody to the homosexual parent.<sup>105</sup> Thus, by treating homosexual parents fairly and by dismissing irrational preconceptions regarding them, these courts properly focus on the child's best interests.<sup>106</sup>

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<sup>102</sup> See, e.g., *M.A.B. v. R.B.*, 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. 1986); *Doe v. Doe*, 222 Va. 736, 284 S.E.2d 799 (1981); *Schuster v. Schuster*, 90 Wash. 2d 626, 585 P.2d 130 (1978). But see *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985) (distinguishing *Doe* because *Doe* had petitioned termination of parental rights, and holding that the gay father's exposing his daughter to his "immoral and illicit" homosexual relationship rendered him an unfit custodian as a matter of law).

<sup>103</sup> See *supra* notes 86-102. One commentator describes the nexus test as a logical extension of the preference for frequent and continued contact. Comment, *supra* note 19, at 900. California has recognized that children benefit from continued and frequent contact with both parents. CAL. CIV. CODE § 4600(a) (West Supp. 1989). California has also codified its preference for joint custody. *Id.* § 4600.5(a). Because the nexus test furthers the joint custody objective, this commentator considers the nexus test as an extension of California's preference for joint custody. Comment, *supra* note 19, at 901-902. Therefore, he suggests, the legislature should amend the Civil Code to include that test. *Id.* He urges the legislature to specify that a parent's custodial capacity should neither be preferred, nor rejected, on the basis of sexual orientation. *Id.*

<sup>104</sup> See Comment, *supra* note 19, at 901-902.

<sup>105</sup> See, e.g., *M.A.B. v. R.B.*, 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. 1986) (modifying divorce judgment to award child custody to homosexual father in absence of adverse effects on child from father's homosexuality); *Doe v. Doe*, 222 Va. 736, 284 S.E.2d 799 (1981) (denying termination of a mother's parental rights when she admitted her lesbian relationship, holding that such an admission did not produce conclusive presumption that she was unfit mother); *Schuster v. Schuster*, 90 Wash. 2d 626, 585 P.2d 130 (1978) (awarding each of two lesbian mothers, living together as lovers, custody of her children).

<sup>106</sup> For example, one court ordered reasonable visitation rights to a lesbian mother's ex-lover. *Loften v. Flournoy* (Alameda County Super. Ct. Cal. 1983), cited in H. CURRY & D. CLIFFORD, *supra* note 2, at 169. In *Loften*, two lesbian women had raised a child together. *Id.* One of the lesbian women was the child's natural mother. *Id.* When they separated, the natural mother would not allow the ex-lover to visit the child. *Id.* The court awarded reasonable visitation rights to the ex-lover. *Id.*

Another court awarded custody of the child to the deceased lesbian mother's lover, stating that the important thing in raising a child was "love and nurturing," not sexual identity. See *In re Hatzoupoulos*, 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. 1977), cited in H. CURRY & D. CLIFFORD, *supra* note 2, at 129.

In a similar case, *Batey v. Batey*, a San Diego superior court awarded custody of a minor boy to his dead father's gay lover over the boy's mother's protestations. See San



## II. ADOPTION

In addition to parenting their natural children, homosexuals can raise children through adoption.<sup>107</sup> Unfortunately, the same kinds of barriers that impede homosexual custody also block homosexual adoption. In fact, adoption law actually lags behind custody law in overcoming unjustified preconceptions regarding homosexual parenting.<sup>108</sup> The standards that shape adoption today closely resemble those that shaped custody law twenty years ago. For instance, adoption law still adheres to the same erroneous misconceptions that courts in custody law dispensed with in *Nadler*.<sup>109</sup> This part first discusses the current state of adoption law. Next, it examines some of the obstacles preventing homosexuals from adopting. Finally, this section discusses recent trends in adoption law.

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Francisco Chron., Nov. 6, 1987, § 1, at 7, col. 1. The court held the mother's custody to be detrimental to the boy. *Id.* The court also heavily weighed the boy's wish to return to his father's lover's home. *Id.* For further treatment of the same case, see N.Y. Times, Nov. 6, 1987, § 1, at 14, col. 1; L.A. Times, July 27, 1987, § 5, at 1, col. 3; L.A. Times, July 9, 1987, § 1, at 34, col. 1.

<sup>107</sup> *Black's Law Dictionary* defines adoption in the following way: "Legal process pursuant to state statute in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted. To take into one's family the child of another and give him or her the rights, privileges, and duties of a child and heir." BLACK'S LAW DICTIONARY 45 (5th ed. 1979). The biological parents of a child must consent to an adoption. 2 AM. JUR. 2D *Adoption* §§ 24, 29 (1962 & Supp. 1988). They must give up all parental rights with respect to the child. *Id.* These rights can then be vested in the adoptive parents. *Id.*

This rule does not apply to the unwed father who has left the scene and has never taken an interest in the child. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Wilcott*, 434 U.S. 246 (1978). The adoptive parents do not need such a father's consent to adopt his child. 434 U.S. at 256. Courts also do not require consent when the biological parents' rights have already been terminated. See Bruch, *supra* note 22, at 347-48. Step-parent adoption constitutes an exception to the rule that both parents consenting to their child's adoption must give up all parental rights. See Comment, *supra* note 13, at 738. Like conventional adoption, step-parent adoption severs all parental ties with the noncustodial parent. *Id.* But step-parent adoption allows the custodial parent, the spouse of the adoptive step-parent, to maintain the natural parent-child relationship. *Id.*

<sup>108</sup> For a discussion of unjustified preconceptions impeding adoption by homosexual parents, see *infra* notes 142-56 and accompanying text.

<sup>109</sup> See *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967). For examples of misconceptions impeding homosexuals from adopting, see *infra* notes 117 & 125.

### A. Current State of the Law

#### 1. Policies and Regulations

Adoption is regulated primarily by state statutes.<sup>110</sup> Most states allow both agency<sup>111</sup> and private adoptions.<sup>112</sup> Both agency approval and judicial approval of the adoption rest on the best interests of the child test.<sup>113</sup> The agency or judge weighs all relevant factors to determine whether the placement furthers the child's best interests. Again, the vagueness of the best interests test gives agencies and courts the same broad discretion as in custody law.<sup>114</sup>

To date two states, Florida and New Hampshire, statutorily and explicitly regulate adoption by homosexuals.<sup>115</sup> Florida's adoption statute prohibits gays and lesbians from adopting children.<sup>116</sup> New Hampshire's adoption statute prohibits gays and lesbians from fostering or adopting children.<sup>117</sup> Other states lack schemes regulating adoption

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<sup>110</sup> See *infra* notes 115-18 and accompanying text.

<sup>111</sup> In the former case, a private or public agency places a child for adoption after investigating the parents. Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 96. A judicial proceeding then approves or disapproves the adoption. See H. CURRY & D. CLIFFORD, *supra* note 2, at 163. Usually, the judge follows the recommendation of the adoption agency. *Id.*

<sup>112</sup> Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 96.

<sup>113</sup> See Comment, *supra* note 13, at 737.

<sup>114</sup> For a discussion of the best interests test, see *supra* note 22. For an example of the broad discretion the best interests test grants, see *infra* note 125.

<sup>115</sup> For a discussion of Florida and New Hampshire laws, see *infra* notes 116-17 and accompanying text.

<sup>116</sup> See FLA. STAT. ANN. § 63.042(3) (West 1985).

<sup>117</sup> See N.Y. Times, Oct. 4, 1988, § 1, at 50, col. 1; see also N.H. REV. STAT. ANN. § 170-B:4 (West Supp. 1987). The New Hampshire legislature enacted the law to protect children from "unnatural role model[s] and possible sexual abuse." N.Y. Times, *supra*. The New Hampshire legislature enacted the law despite evidence showing no significant differences between the children of homosexual parents and the children of heterosexual parents. For a discussion of lack of differences between children of homosexuals and children of heterosexuals, see *supra* notes 47-54. In addition, evidence that heterosexual men comprise the overwhelming majority of child molesters also failed to convince the legislature. N.Y. Times, *supra*.

Opposition to the law by the American Civil Liberties Union and other civil rights organizations also did not deter the legislature. *Id.* The ACLU stated that the measure would not decrease child abuse: "The vast amount of sexual abuse is perpetrated by heterosexual men on female children. That gay parents are an improper role model is rubbish. . . . This law doesn't serve children. It serves the base prejudice of those who opposed it." *Id.*

by homosexuals and instead regulate adoption through court decisions.<sup>118</sup>

Most state statutes do not explicitly favor or disfavor adoption by homosexuals.<sup>119</sup> Instead, the state agency or private adoption agency decides whether or not to recommend the homosexual applicant for adoptive parenthood.<sup>120</sup> Even if the agency recommends the homosexual applicant, the judge decides whether actually to grant the adoption.<sup>121</sup> The judge may consider sexual orientation either as the determinative factor barring adoption, or as one factor to be weighed in approving or disapproving the adoption.<sup>122</sup>

In addition to regulating adoption through state or private adoption agencies, states may also incorporate policies regarding adoption by homosexuals. For example, Massachusetts retains a policy similar to the New Hampshire law.<sup>123</sup> The Massachusetts policy precludes homosexuals from becoming foster parents.<sup>124</sup> Presumably, this policy also applies in adoptions.<sup>125</sup>

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The New Hampshire Supreme Court upheld the New Hampshire statute and dismissed the constitutional challenges raised against it. *See* 13 FAM. L. REP. (BNA) 1385 (June 9, 1987). The court held that the law did not violate the equal protection clause because no fundamental right to adopt or foster children exists. *Id.* Further, because homosexuals do not constitute a suspect class, the court used the rational-basis standard of review to evaluate the law. *Id.* The court concluded that providing suitable role models for children constituted a rational basis for the statute and therefore rendered the law constitutional. *Id.* The court upheld the law despite the lack of any correlation between the child's sexual orientation and the parent's. *See id.*; *see also supra* notes 48-55.

<sup>118</sup> H. CURRY & D. CLIFFORD, *supra* note 2, at 161.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 163-64.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 161.

<sup>123</sup> In 1986 the Massachusetts Department of Social Services (DSS) instigated a policy of placing foster children only in what it considered "traditional settings." Schulz, *Fostering Prejudice*, PROGRESSIVE, Jan. 1987, at 15. Under this policy, the order of priority in placing children is: (1) married couples with experience in childraising, (2) married couples without experience in childraising, (3) single parents or unmarried couples, and (4) gay and lesbian couples or singles. In addition, a foster-care applicant must reveal his or her sexual orientation. Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 103.

<sup>124</sup> Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 103.

<sup>125</sup> The Massachusetts Department of Social Services instigated this policy after its battle with a male gay couple who had applied to be foster parents. Schulz, *supra* note 123, at 15. The DSS had placed two foster children with the couple, who had informed

The policies against homosexuals in these states derive support in some degree from a presidential advisory committee formed in 1987 to promote adoption.<sup>126</sup> This committee issued a report supporting policies similar to the policy in Massachusetts.<sup>127</sup> Although the committee supported transracial adoption, it ratified the position against adoption by homosexuals.<sup>128</sup>

Not all states have adopted this bias against adoption by homosexuals. In 1982 the New York Department of Social Services adopted new guidelines for adoption by homosexuals.<sup>129</sup> These guidelines explicitly rejected precluding homosexual-adoption applicants because of their sexual orientation alone.<sup>130</sup> The Department of Social Services

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the DSS of their homosexuality at the time they applied. *Id.* The Boston Globe released the story, violently opposing the placement and accusing the DSS of lacking a policy covering homosexuals. *Id.* The DSS, flustered, removed the children from the home. *Id.* Governor Dukakis backed the DSS, despite considerable opposition. *Id.* The state acknowledged, even while removing the children, that the boys' "emotional and physical condition [had] improved dramatically" since they had been placed with the gay couple. *Id.* In addition, the Gay and Lesbian Defense Committee stated, "Dukakis has not produced a shred of clinical data to support his contention that traditional heterosexual married couples are the ideal setting for foster children." *Id.*

Babets and Jean went to court. Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 103-104. The state moved to dismiss. *Id.* The Massachusetts Superior Court denied the state's motion. *Id.* The court declared that precluding homosexuals from foster-parenting was blatantly irrational. *Id.* The court held that because the children's interests constituted the important factor, foster parents should be chosen with respect to their parenting ability. *Id.* The court held that the gay couple had a right to prove that discrimination based on sexual preference stemmed from the state's "bare desire to harm a politically unpopular group." *Id.* The court held that this desire was not a legitimate state interest, and therefore would not withstand even a rational basis standard. *Id.*

<sup>126</sup> See L.A. Times, Dec. 5, 1987, § 1, at 20, col. 1; see also N.Y. Times, Dec. 6, 1987, § 1, at 33, col. 1 (providing a different commentary on the same committee report). The President's advisory committee encouraged adoption as a solution to unwanted pregnancies. But, while encouraging transracial adoption, the committee urged states to prevent initiatives favoring adoption by homosexuals. L.A. Times, Dec. 5, 1987, § 1, at 20, col. 1.

The committee espoused that neither marital status, age, nor handicap should preclude individuals from adopting children. *Id.* The committee actually encouraged transracial adoption because such adoption can establish a "loving and permanent home." *Id.* The advisory committee recognized that transracial adoption can provide "loving and permanent homes" for children. *Id.* However, it refused to recognize that adoption by homosexuals can provide that same kind of home. *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See N.Y. Times, Aug. 28, 1982, at 27, col. 1.

<sup>130</sup> A spokesperson for the Department approved a common-sense attitude that fo-

approved these guidelines to break down irrational and unjustified preconceptions regarding homosexuals.<sup>131</sup>

Similarly, California treats homosexuality as only one factor in determining the child's best interests. Two California cases taken together imply this policy: *Nadler v. Superior Court*<sup>132</sup> and *Gay Law Students Assoc. v. Pacific Telephone & Telegraph Co.*<sup>133</sup> *Nadler* established this policy by rejecting automatic exclusion of the homosexual parent in the custody area.<sup>134</sup> In *Gay Law Students* the California Supreme Court prohibited government discrimination against homosexuals.<sup>135</sup> The court held that such discrimination violated the equal protection clause of the California Constitution.<sup>136</sup> Taken together with *Nadler*, *Gay Law Students* prohibits the state Department of Social Services from denying adoption privileges to homosexuals solely because of sexual orientation.<sup>137</sup> Consequently, this California policy also discourages erroneous preconceptions concerning homosexuality.

## 2. Additional Obstacles Hindering Homosexual Adoption

Just as misconceptions and baseless preconceptions about homosexuals obstruct homosexual parents seeking custody of their children, similar misconceptions impede homosexuals from adopting children.<sup>138</sup> These misconceptions often lurk in statutory schemes as well as in

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cused on the best interests of the child, the goal every jurisdiction claims to apply: "What we're doing is making sure that anybody who is not only eligible to adopt, but who would make a good parent for a child, is considered. . . . We don't want the people involved in casework to start out with preconceived notions about who is a good parent." *Id.*

Many private organizations as well as legislatures support adoption by homosexuals. For example, in 1983 the National Association of Social Workers in San Francisco stated its policy as "increasingly [supportive] of full adoption rights for homosexuals." See *San Francisco Chron.*, Jan. 19, 1983, at 35, col. 1. The organization considered this support a logical extension of the American Psychological Association's support of homosexual foster parents. *Id.* The organization considers the "qualities of parenting and the home environment" to be the determining criteria for adoption. *Id.*

<sup>131</sup> *N.Y. Times*, Aug. 28, 1982, at 27, col. 1. For a discussion of such preconceptions in adoption law, see *infra* notes 138-54 and accompanying text; for preconceptions in custody law, see *supra* notes 40-72 and accompanying text.

<sup>132</sup> 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); see *supra* note 79 and accompanying text.

<sup>133</sup> 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

<sup>134</sup> See *supra* notes 79-82.

<sup>135</sup> 24 Cal. 3d 458, 474-75, 595 P.2d 592, 602, 156 Cal. Rptr. 14, 24 (1979).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 479, 595 P.2d at 605, 156 Cal. Rptr. at 27.

<sup>138</sup> See, e.g., *infra* notes 142-54 and accompanying text.

courtrooms. This part examines three major obstacles hindering homosexual adoption. The marriage requirement poses the first obstacle: homosexuals cannot legally marry, yet without marriage they often cannot adopt.<sup>139</sup> Second, antisodomy laws help depict homosexuals as criminals, thereby rendering it more difficult for homosexuals to convince courts and agencies of their fitness as parents.<sup>140</sup> Third, stereotypes of primary care givers assume that men cannot be effective and loving fathers.<sup>141</sup>

Marriage presents the first of these obstacles. The marriage requirement imposes a Catch-22<sup>142</sup> situation on gays and lesbians wishing to adopt or foster-parent. For example, Massachusetts prefers married couples as foster parents before even considering single heterosexuals or *any* homosexuals.<sup>143</sup> The single heterosexual wishing to solve this problem can always marry. But homosexuals cannot legally marry.<sup>144</sup> In effect, though the Massachusetts law prefers married applicants, it paradoxically prohibits marriage between homosexuals, leaving them no way to improve their chances of adopting.<sup>145</sup> No matter how stable their relationships, homosexuals necessarily fall into the unmarried category, thus rendered unlikely candidates as foster or adoptive parents.<sup>146</sup>

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<sup>139</sup> See *infra* note 142-46 and accompanying text.

<sup>140</sup> See *infra* notes 147-52 and accompanying text.

<sup>141</sup> See *infra* notes 153-55 and accompanying text.

<sup>142</sup> "Catch-22" refers to the paradoxical rule established in the novel, *Catch-22*, by Joseph Heller. J. HELLER, *CATCH-22* (1961). The rule refers to a situation in which the solution to a problem is inherent in the problem itself. It also describes a situation in which the "only solution is denied by a circumstance inherent in the problem." See WEBSTER'S DICTIONARY 215 (9th ed. 1986). For example, in Heller's book, one of the characters was able to solve his situation only by claiming insanity. However, the mere fact that he claimed insanity was enough to indicate that he was sane. See J. HELLER, *CATCH-22* (1961).

<sup>143</sup> See *supra* note 123.

<sup>144</sup> See Comment, *supra* note 13, at 732-33.

<sup>145</sup> *Id.*

<sup>146</sup> However, this situation might be improving slightly. Marriage provides a criterion for judging the stability of the applicant's home life. The best interests of the child test recommends a stable home life. See *supra* note 21 and accompanying text. Homosexuals cannot point to marriage as an indicator of their stable home lives. But recently, the clergy of various religions have supported "weddings," or blessings, for homosexual couples. See N.Y. Times, Dec. 28, 1987, § 2, at 1, col. 2; L.A. Times, Dec. 7, 1987, § 1, at 3, col. 1; N.Y. Times, Jan. 30, 1987, § 2, at 3, col. 1; N.Y. Times, Feb. 9, 1985, § 1, at 6, col. 6. In Los Angeles as of 1987, one rabbi and officials of several Protestant churches perform "ceremonial blessings" for gay and lesbian couples. L.A. Times, Dec. 7, 1987, § 1, at 3, col. 1.

With the increase of homosexual weddings, homosexual couples may more easily

Antisodomy laws pose a second Catch-22 situation for homosexual parents.<sup>147</sup> These laws exist in nearly half the states<sup>148</sup> and usually criminalize homosexual conduct.<sup>149</sup> Because courts do not award adoption privileges to criminals, homosexuals cannot engage in homosexual conduct and still adopt. In fact, courts often assume that even those homosexuals not currently involved in sexual relationships are likely to do so in the future.<sup>150</sup> Consequently, homosexual persons are criminalized simply by virtue of being homosexual.<sup>151</sup> Fortunately, the current trend is towards decriminalizing homosexual conduct.<sup>152</sup> However, until

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convince adoption officials of their stable home lives. The blessings may function as the criterion for stability in homosexual parents, as marriage does for heterosexual parents. Adoption officials might be more comfortable granting adoptions if they have this kind of objective criterion. Perhaps this will finally provide assurance of a stable home life for the adoptive or foster child.

<sup>147</sup> See *supra* note 41 and accompanying text.

<sup>148</sup> See Rivera, *Legal Issues in Gay and Lesbian Parenting* in GAY AND LESBIAN PARENTS, *supra* note 15, at 199.

<sup>149</sup> Georgia has a typical antisodomy law. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding Georgia antisodomy law constitutionally permissible). That law provides that "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1984). The Georgia law provides for imprisonment of up to twenty years for the offense of sodomy. *Id.*

<sup>150</sup> See Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 95.

<sup>151</sup> Criminalizing the homosexual adoptive parent allows courts to hide their prejudices behind statutes. One court reasoned that the state would not have outlawed homosexual conduct if the state had intended to create parental rights in people who engaged in such conduct. See *Appeal in Pima County, Juvenile Action B-10489*, 151 Ariz. 335, 727 P.2d 830 (1986) (stating that although a bisexual man approved for adoptive parenthood could not be denied adoption solely because of sexual orientation, Arizona's antisodomy law made criminal behavior inconsistent with parenthood); see also *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. App. 1980) (lesbian mother likened to a habitual criminal); *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985) (father's homosexual relationship rendered him an unfit custodian as a matter of law).

<sup>152</sup> However, the United States Supreme Court's recent decision validating the constitutionality of antisodomy laws might impede this trend. The United States Supreme Court undermined the American Law Institute's view by holding antisodomy laws to be constitutionally permissible. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that antisodomy laws did not violate the constitutional right of privacy).

In 1962 the American Law Institute (ALI) recommended decriminalizing private, consensual, adult, sexual conduct. MODEL PENAL CODE § 213.3 (Proposed Official Draft 1962). The ALI reasoned that because such homosexual conduct did not harm the community, it should not be a criminal offense. *Id.* at § 277.

In 1957 the Wolfenden Report in England had already recommended decriminalizing all homosexual lovemaking; the British Parliament accepted this recommendation.

more states incorporate the American Law Institute's decriminalization recommendation, antisodomy laws will remain a problem for homosexuals.

The last obstacle disadvantages all males by assuming that only women can be primary care givers.<sup>153</sup> This stereotype assumes that men do not have the ability to function as primary parents or as effective fathers.<sup>154</sup> This stereotype adversely affects gay men and single heterosexual men in particular because they cannot pass the function of primary care giver to their wives. The preference for joint custody has eliminated this stereotype in custody cases.<sup>155</sup> However, adoption agencies can still refuse applicants when the father functions as the primary care giver.<sup>156</sup>

### B. Trends in Adoption Law

Despite the obstacles to adoption discussed above, many of the conventional attitudes regarding adoption show signs of changing.<sup>157</sup> This section examines the trends in adoption law. It first discusses changing attitudes toward conventional adoption. Next, it discusses two recently recognized forms of adoption: joint adoption and second-parent adoption.

#### 1. Conventional Adoption

Only recently have openly homosexual persons been able to adopt children.<sup>158</sup> Many courts no longer focus exclusively on sexual orienta-

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See REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957).

For further discussion of antisodomy laws, see *supra* note 40 and accompanying text; Rivera, *Legal Issues in Gay and Lesbian Parenting* in GAY AND LESBIAN PARENTS, *supra* note 15, at 199-200.

<sup>153</sup> Allison, *Adoptive Parents Sue Agency*, 13 Ms. 24 (Jan. 1985).

<sup>154</sup> One adoption agency refused a heterosexual couple's application because the father planned to stay at home while the mother worked. *Id.* This incident presents a recent example of the kinds of stereotypes with which all adoptive parents must contend. *Id.*

<sup>155</sup> CAL. CIV. CODE § 4600.5(a) (West 1984).

<sup>156</sup> See, e.g., Allison, *supra* note 153 and accompanying text.

<sup>157</sup> See, e.g., *infra* notes 158, 161-62 and accompanying text.

<sup>158</sup> Hundreds of gay and lesbian men and women have adopted children over the years, but not openly as homosexuals. Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 92. According to Dr. Bruce Voeller, former executive director of the National Gay Task Force, homosexual men and women have recently adopted children in several states.



tion,<sup>159</sup> but focus also on parenting abilities and stability of the home environment.<sup>160</sup> This change in criteria correctly shifts the center of attention from the parent's homosexuality to the child's interests.

Recent cases reflect this shift in emphasis.<sup>161</sup> Rather than simply searching for a traditional parent, many courts now apply standards that focus on benefit to the child, thus increasing the number of single-parent adoptions.<sup>162</sup> The next logical step would give homosexuals equal status with heterosexual single persons for purposes of single-parent adoption. Equal status would benefit both the child and the adoptive parent by providing a home for the child in institutionalized limbo and a parenting opportunity for a homosexual adoption applicant.

## 2. Joint Adoption and Second-Parent Adoption

Because homosexuals are not allowed to marry, they must apply to adopt as individuals instead of couples, even if they have life partners.

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N.Y. Times, June 21, 1979, § 2, at 1, col. 1. Dr. Voeller knew of cases "that were quietly negotiated with full knowledge of local adoption officials." *Id.*

<sup>159</sup> See, e.g., *infra* notes 161-62 and accompanying text.

<sup>160</sup> *Id.*

<sup>161</sup> In 1978 a gay New York minister adopted a 13-year-old boy. N.Y. Times, June 21, 1979, § 2, at 1, col. 1. The court granted the adoption even after the minister publicly announced his involvement in a homosexual relationship. *Id.* The court found that the minister provided a good home and the boy loved and wanted to be with him. *Id.* Therefore, the court held that the adoptive father's homosexuality did not bar the adoption. *Id.*

In a similar case, an openly gay man adopted his 17-year-old foster son. See Blodgett, *Family Feuds: Gays Fight for Custody*, 70 A.B.A. J. 38 (Dec. 1984); *Homosexual Adopts Son*, 69 A.B.A. J. 152 (Feb. 1983); San Francisco Chron., Jan. 19, 1983, at 35, col. 1. The court in that case considered the father's homosexuality as one of any number of factors in a parent-child relationship. *Id.* This adoption occurred after a two-year fight with the adoption agency. *Id.* During this time, agency subjected the gay adoptive father and his family to "an inordinate number of psychological and fitness evaluations," "footdragging," and "harassment." *Id.*

<sup>162</sup> See, e.g., *supra* note 161. In these cases, the courts granted the adoptions even though the adoptive parents were both nontraditional (because of their homosexuality) and single. *Id.* One adoption official advocates placing children in single-parented, permanent adoptive homes rather than keeping them waiting in limbo at the adoption agency. San Francisco Chron., Dec. 9, 1984, § WOR, at 7, col. 1.

This reasoning regarding heterosexual single parents easily applies to adoption by homosexuals. The child might prefer a permanent home with a single homosexual parent than limbo in an adoption agency. *Id.* This would especially apply to older children, because agencies find them harder to place. *Id.* Children with physical or emotional problems, who are also difficult to place, often need permanent homes more than children without these problems. *Id.*

In most cases, courts do not recognize homosexual life partners at all in custody and adoption proceedings.<sup>163</sup> Recently, however, a few courts have legally recognized the gay or lesbian coparent<sup>164</sup> by granting a joint adoption.<sup>165</sup> Although most states do not expressly prohibit joint adoption by an unmarried couple, courts rarely grant such adoptions.<sup>166</sup>

Second-parent adoptions<sup>167</sup> occur almost as rarely.<sup>168</sup> This kind of adoption occurs when a child's nonbiological parent, or coparent, adopts the child without the biological parent giving up parental rights.<sup>169</sup> For example, a lesbian mother might wish to share her parental rights with her lesbian lover. Rather than creating a new relationship between child and adoptive parent with conventional adoption, second-parent adoption usually legalizes a pre-existing relationship between child and adoptive parent, as in this case.<sup>170</sup> Second-parent adoption resembles step-parent adoption except that the parent and "step-parent" in this case are unmarried.<sup>171</sup> Second-parent adoption cases<sup>172</sup>

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<sup>163</sup> Because the life partner has no legal status with respect to the biological parent or the child, courts do not recognize the life partner. See Comment, *supra* note 13, at 743-44.

<sup>164</sup> This Comment does not necessarily use the term coparent to imply legal status with respect to the child. However, the term indicates that the child will probably share a home with the natural parent's life partner. Therefore, the life partner will probably contribute significantly to the upbringing of the child.

<sup>165</sup> For a discussion of joint adoption, see *infra* note 163; Ricketts and Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 97-99; L.A. Times, Aug. 10, 1986, § 1, at 3, col. 1.

<sup>166</sup> By 1986 only two openly lesbian couples had jointly adopted children. See L.A. Times, Aug. 10, 1986, § 1, at 3, col. 1.

<sup>167</sup> See generally Comment, *supra* note 13 (advocating second-parent adoption for lesbian-parented families).

<sup>168</sup> See Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, 97-99.

<sup>169</sup> *Id.* at 98.

<sup>170</sup> See Comment, *supra* note 13, at 737.

<sup>171</sup> *Id.* at 731-32.

<sup>172</sup> An Oregon Circuit Court first granted a second-parent adoption to a lesbian-parented family. *Id.* at 731 (citing *In re Adoption of M. by S. & A.*, No. D8503-61930 (Or. Circ. Ct. Sept. 4, 1985)). Courts have granted several such adoptions since then, but infrequently. See, e.g., *In re Hatzopoulos*, 4 FAM. L. REP. (BNA) 2075 (Colo. Juv. Ct. 1977), cited in H. CURRY & D. CLIFFORD, *supra* note 2, at 129 (awarding custody to the lesbian lover of the deceased mother); Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent* in GAY AND LESBIAN PARENTS, *supra* note 15, at 98 (citing *In Re Adoption of A*, No. 1JU-85-25 P/A (Alaska Super. Ct. 1986)) (granting petition of two biological parents who wanted the child to be adopted by a third "psychological parent"). See generally Comment, *supra* note 13 (advocating second-parent adoption for lesbian-parented families).

suggest that judges may now look beyond the traditional family to other situations which best serve the child's interests.

In adoption as well as in custody cases courts apply the universal best interests of the child standard.<sup>173</sup> However, the broad discretion granted under this standard often allows courts to incorporate their own prejudices into the decision.<sup>174</sup> Courts too often weigh sexual orientation to the disadvantage of the homosexual adoptive parent.<sup>175</sup> Worse, courts often *per se* bar adoption solely on the basis of sexual orientation.<sup>176</sup>

When courts focus on sexual orientation instead of parenting ability, they shift their focus from the child to the parent. This detracts from serving the child's interests and fosters irrational preconceptions regarding homosexuality. Child custody courts have transcended a great deal of baseless prejudice, although much still remains.<sup>177</sup> To a large extent, these courts have realized that research, experts, and reputable medical organizations all indicate that homosexuals *can* provide loving and permanent homes for children.<sup>178</sup> Courts should now extend this progress to the adoption arena.

### III. ARGUMENT FOR A MORE RATIONAL ADOPTION STANDARD

When courts disregard sexual orientation in determining parenting ability, they properly shift the focus from the parent back to the child.<sup>179</sup> This shift accords with the goals expostulated by the best interests of the child test.<sup>180</sup> It also counters the irrational preconceptions that have historically hindered homosexual parents.<sup>181</sup> However, despite progress for homosexuals who wish to adopt, policies and regulations

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<sup>173</sup> For a discussion of the best interests of the child test, see *supra* note 22 and accompanying text.

<sup>174</sup> For a discussion of unjustified presumptions applied by courts to custody cases involving homosexuals, see *supra* notes 40-77 and accompanying text. For a discussion of unjustified presumptions applied by courts in adoption cases involving homosexuals, see *supra* notes 142-54 and accompanying text.

<sup>175</sup> See *supra* notes 40-77 and accompanying text.

<sup>176</sup> *Id.*

<sup>177</sup> For a discussion of child custody law with respect to homosexual parents, see *supra* notes 79-106 and accompanying text.

<sup>178</sup> *Id.*

<sup>179</sup> See *supra* notes 115-37 and accompanying text (discussing current adoption law).

<sup>180</sup> For a discussion of the best interests of the child test, see *supra* note 22 and accompanying text.

<sup>181</sup> See *supra* notes 40-77 and accompanying text (discussing the unjustified presumptions impeding homosexual parenting).

remain stumbling blocks.<sup>182</sup>

With respect to homosexual parents, adoption law should parallel the progressive trends in custody law. *Nadler*<sup>183</sup> and the emergence of a true child's best-interests standard demonstrate that today many courts properly credit homosexual parents with parenting skills.<sup>184</sup> In child custody cases, courts recognize empirical evidence indicating that homosexuals and heterosexuals possess equal parenting abilities.<sup>185</sup> Custody courts now require a nexus between the parent's homosexuality and any adverse effect on the child before excluding the homosexual parent from the child's life.<sup>186</sup>

Courts should apply this progressive custody standard, the nexus test, to adoption law. As in custody cases, adoption courts should require a nexus between the adoptive parent's homosexuality and any potential adverse effect on the child. The result would produce changes vitally needed in adoption law. For instance, application of the nexus test to adoption law requires adoption agencies to evaluate homosexuals applying for adoption on the basis of their objective parenting skills and qualifications. The nexus test mandates that agencies require a showing of direct harm to the child resulting from the parent's homosexuality before denying a petition for adoption by a homosexual person. Finally, the nexus test applied to adoption correctly extirpates erroneous preconceptions against homosexuality in adoption cases as well as in child custody cases.<sup>187</sup>

A standard requiring adverse effect on the child overcomes unfounded prejudice. As already evident in custody cases, the nexus test truly focuses on the adoptive child's best interests.<sup>188</sup> It prevents those representing the law from venting their prejudices on the parents at the expense of the children.

Courts should not automatically deny adoption privileges to qualified homosexuals. Instead, they should consider sexual orientation as only one of many factors in assessing the child's best interests. The nexus

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<sup>182</sup> For a discussion of policies and regulations impeding homosexual adoption, see *supra* notes 115-28 and accompanying text; *supra* notes 142-54 and accompanying text.

<sup>183</sup> *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967). For a discussion of *Nadler*, see *supra* note 79 and accompanying text.

<sup>184</sup> See *supra* notes 85-106 and accompanying text.

<sup>185</sup> See *supra* notes 48-55 and accompanying text.

<sup>186</sup> See *supra* notes 85-106 and accompanying text.

<sup>187</sup> *Id.*

<sup>188</sup> For a discussion of the nexus test as applied to custody cases, see *supra* notes 85-106 and accompanying text.

test applied to adoption law would eliminate decisions that invoke the child's interest as an excuse to discriminate against homosexuals.

Legislatures should codify the nexus test in adoption law for the same reasons that courts should apply it to adoption cases.<sup>189</sup> Codifying the nexus test in the context of both custody and adoption would produce the same kinds of needed changes that judicial use of the test would produce. For instance, codifying the nexus test would eliminate statutes that explicitly bar homosexuals from adopting. It would also require changing statutes that do not explicitly regulate adoption by homosexuals. The new statutes should specifically require that agencies show a nexus between the parent's homosexuality and harm to the child before denying adoption. Codifying the nexus test can be accomplished in one of two ways.

First, legislatures should clearly evince their intent that the best interests test *include* the nexus test. The nexus test eliminates preconceptions against homosexuals and shifts the focus from the parent to the child.<sup>190</sup> Thus, the nexus test operates in the child's best interests by focusing on the child. Therefore, the best interests test implicitly incorporates the nexus test into its very definition.<sup>191</sup> Applying the best interests test in homosexual-adoption cases would implicitly require courts to apply the nexus test.

If a mere reading of the statute would be insufficiently unequivocal, legislatures have a second alternative. Legislatures may enact a legislative amendment prohibiting sexual orientation from becoming the sole consideration in adoption proceedings. The statute should explicitly set forth the nexus test as a guide to homosexual adoption. For example, section 221 of the California Civil Code adoption statute<sup>192</sup> could be amended to include the nexus test in the following way:

§ 221. Minors and Adults Subject to Adoption

Any unmarried minor child may be adopted by any adult person . . .  
and any adult person or married minor child may be adopted by any other

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<sup>189</sup> One way to mandate the nexus test is by interpreting it as part of the best interests test. In addition, however, the Constitution may mandate the nexus test as a necessary manifestation of the equal protection clause. However, this Comment does not discuss this constitutional issue because it is beyond the scope of this Comment.

<sup>190</sup> See *supra* notes 85-106 and accompanying text (discussing the nexus test).

<sup>191</sup> Some jurisdictions have already read the nexus test into their statutes. See, e.g., *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967), and *Gay Law Students Assoc. v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979); see also *supra* notes 79-82 and accompanying text; *supra* notes 132-37 and accompanying text.

<sup>192</sup> CAL. CIV. CODE § 221 (Deering 1984).

adult person . . . . *In deciding whether to grant the adoption, the court shall neither prefer nor reject an adoptive parent because of that adoptive parent's race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or sexual orientation, unless it can be shown with empirical evidence that one or more of the above characteristics would adversely affect the child.*

Under either statutory scheme, before agencies and courts could deny homosexuals adoption privileges, they would need to show that the parent's sexual orientation would harm the child. Codifying the nexus test would thus further the child's best interests test, because both tests mandate prioritizing the result most beneficial to the child.

### CONCLUSION

Adoption law lags behind custody law in its approach to homosexual parents.<sup>193</sup> Many courts in custody cases utilize the nexus test, requiring a showing that the parent's homosexuality directly harms the child.<sup>194</sup> Courts in adoption cases should follow this trend and adopt the nexus test, a rational, progressive standard. Courts should require empirical evidence showing an adverse effect on the child from the parent's homosexuality. Absent evidence showing that a parent's homosexuality adversely affects the child, courts should treat homosexuals applying for adoption the same way courts treat their heterosexual counterparts.

In addition to shifting judicial focus to the child, the nexus test avoids unjustified preconceptions against homosexual parenting. Legislatures should include the nexus test in their adoption statutes as a guide for homosexual adoption. Codifying the nexus test would ensure adoption decisions based on evaluation of parenting ability and the home environment. Fairness to the homosexual adoptive parent demands such a standard. But more importantly, the best interests of the adoptive child demand such a standard.

*Shaista-Parveen Ali*

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<sup>193</sup> For a discussion of custody law with respect to homosexual parents, see *supra* notes 79-106 and accompanying text.

<sup>194</sup> See *supra* notes 85-106 and accompanying text.