IT'S REALLY ABOUT SEX: SAME-SEX MARRIAGE, LESBIGAY PARENTING, AND THE PSYCHOLOGY OF DISGUST

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INTRODUCTION

Lesbian and gay (hereinafter "lesbigay") parenting is becoming ever more prevalent in America. As many as nine million children living in the United States have a gay or lesbian parent,[1] and twenty-five percent of all lesbigay couples are raising children.[2] Indeed, marriage and parenting are aspirations of most Americans, yet these rights have often been denied to gays and lesbians.[3] For many years, states maintained legal presumptions against awarding custody to a lesbigay parent,[4] assuming that doing so would not serve the child's best interests. However, much has changed over the last quarter-century and most courts now consider a parent's homosexuality to be irrelevant in child-custody decisions.[5] All but eight states (i.e. Alabama, Colorado, Florida, Mississippi, Nebraska, Oklahoma, Utah, Wisconsin) permit adoption by gay and lesbian couples.[6] All but two states – Nebraska and Utah – allow them to serve as foster parents.[7] Yet, only four states allow same-sex couples to legally marry or enter into civil unions.[8]

The national debate surrounding same-sex marriage has galvanized renewed interest in the issue of lesbigay parenting,[9] and in the last several years ballot measures have been proposed in sixteen states to prohibit gays and

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1. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164–65 (2001). According to the U.S. Census, there were 594,691 same-sex households in 2000, but research suggests that the census likely undercounted the number of lesbigay households by 16–19%. *See* James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 350–51 (2006).

2. Pawelski et al., *supra* note 1, at 351.

3. *See* Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Parents with Children: Implications of Social Science Research for Policy*, 52:3 J. SOC. ISSUES 29, 30–32 (1996).

4. *Id.* at 33–34.

5. Since courts must take into account any factor that might have a bearing on the best interests of the child, they will consider a parent's sexual orientation if it can be shown to have a present adverse impact on a particular child. *See* PATTERSON & REDDING, *supra* note 3, at 33.

6. *See* Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 513–15 (2006) [hereinafter "*Inner Lives*"] (reviewing state laws on lesbigay adoption).

7. *See* UTAH CODE ANN. §§62A-4a-607(1)(b), 78-30-1.6(3)(2003); Memorandum from Mary Dean Harvey, Dir. of the Neb. Dep't. of Soc. Serv. (Jan. 23, 1995) (on file with the Neb. Dep't. of Soc. Serv.) (stating that "effective immediately, it is the policy of the Department of Social Services that children will not be placed in the homes of persons who identify themselves as homosexual").

8. Only Massachusetts extends marriage rights to same-sex couples. *See* Goodridge v. Dep't. of Pub. Health, 789 N.E.2d 941 (Mass. 2003). California, Connecticut, New Jersey, and Vermont have civil union or domestic partnership laws, and Hawaii has a reciprocal beneficiaries law. *See* CAL. FAM. CODE § 297 (West 2007); CONN. GEN. STAT. Ann. §§46b-38aa-38pp (West 2006); HAW. REV. STAT § 572C (2005); 2007 N.J. LAWS CH. 103; VT. STAT. ANN tit. 15, §§ 1201-1207 (2002).

As of 2006, only five (Belgium, Canada, The Netherlands, South Africa, and Spain) of the 191 countries in the world allow same-sex marriage, and the constitutions of at least thirty-two countries explicitly define marriage as the union of a man and woman. *See* Lynn D. Wardle, *What is Marriage?* 6 WHITTIER J. OF CHILD & FAMILY ADVOCACY 53, 67 (2006).

9. The issue has also been central in international debates over gay marriage. *See e.g.*, Larry Rohter, *Lesbian Judge Fights Chilean Court for Taking Her Children*, N.Y. TIMES, July 20, 2006, at A3 (reporting case of lesbian mother in Chile who was denied custody of her children due to her homosexuality, and noting that the issue of lesbigay parenting has been central in the emerging Chilean debates over gay marriage).

lesbians from adopting children.[10] Asserting that the central purposes of marriage are procreation and childrearing, opponents of lesbigay marriage argue that children are harmed or disadvantaged when reared in homosexual households:[11]

> Man–woman marriage is the irreplaceable foundation of the child-rearing mode . . . that correlates . . . with the optimal outcomes deemed crucial for a child's – and hence society's – well being. These outcomes include physical, mental, and emotional health and development; academic performance and levels of attainment; and avoidance of crime and other forms of self- and other-destructive behavior such as drug abuse and high-risk sexual conduct.[12]

They further argue that since marriage is a social institution that helps determine sexual and procreative norms by "guid[ing] individuals' identities, perceptions, aspirations, and conduct," same-sex marriage will serve to change social norms by legitimizing lesbigay parenting,[13] resulting in greater numbers of children being raised by non-biological parents:

> [A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it. And it means abolishing the norm that children . . . have a prima facie right to know and be reared within their own biological family by their mother and father.[14]

The effects of lesbigay parenting on children was a key issue in recent litigation in Hawaii,[15] Vermont,[16] Massachusetts,[17] Washington[18], and New York[19]

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10. *See* PAWELSKI ET AL., *supra* note 1, at 356 (stating that efforts to introduce constitutional amendments were underway in Alabama, Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and West Virginia); Andrea Stone, *Drives to Ban Gay Adoption Heat Up in 16 States*, USA TODAY, Feb. 21, 2006, at 1A.

11. *See, e.g.*, Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 17–23 (2006).

12. *Id.* at 18–19.

13. *See id.* at 9–10. *See also* Maggie Gallagher, (*How*) *Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 52, 59 (2004) ("[T]he law of marriage serves the 'sanctification narrative,' sustaining the boundaries of marriage and the basic norms required of married people . . . [and that] reserving marriage to opposite-sex couples . . . send[s] messages that affect the way people think, act and behave, and indeed experience their own relationships."); *see also Marriage and the Law: A Statement of Principles*, 2006 INST. FOR AM. VALUES 26 ("[C]hanges in law may trigger 'informational' or 'reputational' cascades, in which Americans adopt certain beliefs because they perceive others to acknowledge them as true, or because they perceive their social standing will be negatively affected because of what others believe to be true and good . . . . Same-sex marriage supporters are acknowledging this same privileged power of the law to affect social meaning when, for example, they argue (as the *Goodridge* court did) that the creation of a separate legal status for same-sex couples would not be the same as marriage, even if the legal benefit structure was identical.").

14. Stewart, *supra* note 11 at 22.

15. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the prohibition against same-sex marriage violates Equal Protection).

16. *See* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that the State is required to extend the benefits and protections of marriage to same-sex couples).

17. *See* Goodridge v. Dep't. of Pub. Health, 789 N.E.2d 941 (Mass. 2003) (holding that the denial of marriage rights to lesbian and gay couples violates the Massachusetts constitution).

on same-sex marriage. In the 1993 case of *Baehr v. Lewin*, the Hawaii Supreme Court held that the denial of marriage licenses to same-sex couples was potentially discriminatory and an Equal Protection violation of Hawaii's constitution.[20] On remand to trial court,[21] the parties centered their arguments "almost entirely around the issue of the possible effects on children of allowing same-sex marriages. All of the witnesses called for both sides of the case either were social scientists or commented on the social scientific research, in order to persuade the court which family structure would ultimately be in the best interest of the child."[22]

Lesbigay parenting also was the touchstone issue in the 2003 case *Goodridge v. Dept. of Public Health*, in which the Massachusetts Supreme Court held 4-3 that denying of marriage rights to lesbigay couples violated the Massachusetts constitution.[23] Two of the three rationales proffered by the Commonwealth of Massachusetts involved parenting.[24] Massachusetts argued that the primary purpose of marriage was to provide a "favorable setting for procreation" and to "ensure[] the optimal setting for child rearing," which it defined it "a two-parent family with one parent of each sex."[25] But the Court held that denying marriage benefits to same-sex couples "cannot plausibly further" the State's policy of protecting the welfare of children.[26] Utilizing "rational basis" review, it struck down the Massachusetts marriage law as a violation of the state constitution's equal protection guarantee.[27] According to the Court, the State had not proffered persuasive evidence that lesbigay parenting was harmful to children. The Court noted that lesbigay parenting was a reality, and that denying marriage licenses to same-sex couples deprived them of the financial and other benefits that positively impacted the parenting of children in married

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18. *See* Andersen v. King County, 138 P.3d 963 (Wash. 2006) (holding that the legislature is not constitutionally prohibited from defining marriage as between one man and one woman only).

19. *See* Hernandez v. Robles, 855 N.E. 2d 1 (N.Y. 2006) (holding that the New York constitution does not require recognition of same-sex marriage).

20. *See Baehr*, 852 P.2d at 44. (holding that "[o]n remand, in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that [the statute disallowing same-sex marriage] is unconstitutional.") In 1998, Hawaii voters approved a ballot referendum amending the Hawaii Constitution to grant the legislature the authority to restrict marriage to male-female couples. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

21. *See* Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996).

22. Richard N. Williams, *A Critique of the Research on Same-Sex Parenting*, *in* STRENGTHENING OUR FAMILIES: AN IN-DEPTH LOOK AT THE PROCLAMATION ON THE FAMILY 352, 352 (2000).

23. *See Goodridge*, 789 N.E.2d at 941.

24. The other rationale proffered was that "limiting marriage to opposite-sex couples furthers the Legislative interest in conserving scarce State and private financial resources." *Id.* at 964.

25. *Id.* at 961.

26. *Id.* at 962.

27. *Id.* at 960–61. As the Court explained, "[t]he Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be 'arbitrary and capricious' . . . . [R]egulatory authority must, at the very least, serve 'a legitimate purpose in a rational way' . . . . Any law failing to satisfy the basic standards of rationality is void." *Id.* at 959–60. Moreover, "[n]ot every asserted rational relationship is a 'conceivable' one, and rationality review is not 'toothless'." *Id.* at 960 n.20 (internal citations omitted).

households.[28] However, Justice Sosman's vigorous dissent emphasized that a statute need only satisfy "a minimal threshold of rationality"[29] to survive rational basis review. "[T]he Legislature [could] have some rational basis for concluding that, at present, [same-sex] family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries."[30] Justice

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28. *Id.* at 963–64. *See also Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting) (stating that "[T]he State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples isn antithetical to their welfare, as defendants do not dispute . . . . [I]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risk that the State argues the marriage laws are designed to secure against. . . . [T]o rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them") (internal citations omitted); *See also* Lewis v. Harris, 908 A.2d 196, 216–17 (N.J. 2006) (noting that "the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too. With fewer financial benefits and protections available, those children are disadvantaged in a way that children in married households are not. Children have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family, yet under the current system they are treated differently").

"In 2004, the United States Government Accountability Office identified a total of 1138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving rights, benefits, and protections." Pawelski et al., *supra* note 1, at 352; s*ee also id.* at 357–58 (listing the many legal and financial benefits of marriage).

Research shows that financial and educational advantage correlates with better parenting, even when controlling for other relevant factors. *See* ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS : WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING 34, 43–48 (2001); S. MCLANAHAN & G. SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 80–94, (1994) (describing studies suggesting that the educational and financial disadvantages of single families is what is responsible for much of the variation in children's outcomes when comparing dual and single-parent families); Jane E. Miller & Diane Davis, *Poverty History, Marital History, and the Quality of Children's Home Environments*, 59 J. MARRIAGE & THE FAM. 996, 1005 (1997) (reporting findings of a large national study that "the quality of the home environment increases with increasing income"); Walter R. Schumm, *Empirical and Theoretical Perspectives From Social Science on Gay Marriage and Child Custody Issues*, 18 ST. THOMAS L. REV. 425, 445-46, 449-50 (2006).

29. *See Goodridge*, 789 N.E.2d at 978 (Sosman, J., dissenting). *See also id.* at 994 (Cordy, J., dissenting) (stating that "[t]he statute 'only need[s to] be supported by a conceivable rational basis") (internal citation omitted); *id.* at 998 (Cordy, J., dissenting) (stating that "[i]n considering whether such a rational basis exists, we defer to the decision-making process of the Legislature, and must make deferential assumptions about the information that it might consider"). *See generally* Romer v. Evans, 517 U.S. 620, 633 (1996) (applying rational basis test to legislation that discriminates against gays and lesbians); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174–76 (1980) (describing application of rational basis test).

30. *See Goodridge*, 789 N.E.2d at 979. *See also* Andersen v. King County, 138 P.3d 963, 980, 983–84 (Wash. 2006) ("Under the rational basis standard, the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification. In fact, the rational basis standard may be satisfied where the 'legislative choice . . . [is] based on rational speculation unsupported by evidence or empirical data' . . . . [G]iven the rational relationship standard and that the legislature was provided with testimony that children thrive in opposite-sex marriage environments, the legislature acted within its power to limit the status of marriage. That is, the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to

Sosman concluded that the Massachusetts legislature had at least a minimally rational basis for denying marriage rights to same-sex couples:

> The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief.[31]

In an equally vigorous dissent, Justice Cordy opined that the denial of marriage rights to same-sex couples satisfied the deferential rational basis test:

> We must assume that the Legislature . . . would be familiar with many recent studies that variously support the proposition that children raised in intact families headed by same-sex couples fare as well on many measures as children raised in similar families headed by opposite-sex couples; support the proposition that children of same-sex couples fare worse on some measures; or reveal notable differences between the two groups of children that warrant further study.
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> . . . [Thus], the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.[32]

Thus, courts are looking to the extant social science research on lesbigay parenting. This research addresses the five sets of concerns that courts, policymakers, and commentators frequently express about the possible negative effects of lesbigay parenting on children.[33] First, there is a concern that lesbigay

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thrive. We reiterate that the rational basis standard is a highly deferential standard. . . . . We emphasize that it is not the province of this court to pass on the merits of the arguments and studies presented to the legislature . . . . And at risk of sounding monotonous, we repeat that the rational basis standard is extremely deferential. There are many examples of laws upheld on rational basis grounds where strong policy arguments opposing such laws have been advanced. But legislative bodies, not courts, hold the power to make public policy determinations, and where no suspect classification or fundamental right is at stake, that power is nearly limitless.") (internal citations omitted).

31. *Goodridge*, 789 N.E.2d at 979–80 (Sosman, J., dissenting).

32. *Id.* at 998–1000, 1004.

33. *See* Patterson & Redding, *supra* note 3, at 36–39 (discussing judicial concerns about lesbigay parenting). *See also* Paul Cameron, *Homosexual Parents: Testing "Common Sense" – A Literature Review Emphasizing the Golombok & Tasker Longitudinal Study of Lesbians' Children*, 85 PSYCHOL. REP. 282, 289–93 (1998) (stating that "[f]olk psychology considers homosexuality unusually dangerous . . . [that] is harmful to the individual and society (which is why children need to be protected from it)", and proposing, based on folk psychology, that lesbigay parenting has five types of negative effects on children).

parenting may produce psychological or adjustment problems in children such as anxiety, depression, lowered self esteem, or behavior problems, and that homosexual parents themselves are more likely to have serious mental health problems that may adversely impact their children.[34] Second, there is the concern that children of lesbigay parents will be teased or rejected by peers, and thus experience difficulties in their social relationships.[35] Third, there is the concern that children of lesbigay parents will have gender identity problems and are more likely to become homosexual.[36] Fourth, some argue that children do best when raised by a mother and a father because men and women each contribute something unique and important to childrearing. Finally, some argue that gays and lesbians are inherently unfit to be parents because they are more likely to sexually abuse children, to engage in promiscuous sexual conduct that puts their children at risk for premature and inappropriate sexual behavior, and to have unstable families due to relationship infidelity.[37]

To assess the validity of the claim that the denial of marriage or parenting rights to same-sex couples serves the goal of promoting the welfare of children, I will review and critique social science research relevant to these five concerns. In particular, I will focus on research relevant to whether growing up in a lesbigay household is as positive an experience for children as growing up in a heterosexual household, since most of the commentary to date has addressed the issue of whether lesbigay parenting is psychological harmful to children. Indeed, the extant research permits the conclusion that lesbigay parenting is *not* psychologically harmful to children. Yet, the research on lesbigay parenting has methodological limitations, and some research suggests that dual-gender parenting may be modestly advantageous for children. Given this state of affairs, laws prohibiting same-sex marriage on the theory that lesbigay parenting disadvantages children can (and probably should) pass constitutional muster under the highly deferential rational basis test for judicial review of legislative action.

But as a matter of public policy, the research fails to support the theory that denying marriage or parenting rights to same-sex couples serves the welfare of children. First, research suggests that children raised by lesbigay parents may be more likely to develop a homosexual orientation, but this should not and cannot be viewed as a negative outcome. Second, children raised by lesbigay parents frequently report concerns about peer rejection if friends find out that their parents are gay or lesbian, and many times they go to considerable lengths to keep this a secret. Yet, this stressor is likely not so different in magnitude from the many other peer-related stressors commonly experienced by adolescents, and research shows that the children of lesbigay parents have normal peer relationships. Third, gays and lesbians have higher rates of depression, anxiety, and substance abuse than the general population, perhaps in part due to the effects of stigma and prejudice. But most gays and lesbians do *not* have mental health or substance abuse problems. Gays and lesbians also

34. *See* Patterson & Redding, *supra* note 3, at 36–38.
35. *Id.*
36. *See id.* at 37–38.
37. *See id.* at 36, 38; Wardle, *supra* note 6, at 518, 520–28.

have higher rates of promiscuity and infidelity. Yet, the legalization of same-sex marriage, and particularly childrearing in the context of these committed relationships, would promote fidelity in lesbigay relationships. Fourth, the extant research suggests that mothers and fathers each make a unique contribution to children's social, emotional, and intellectual development, though the relative advantages of dual-gender parenting appear to be modest. Thus, a two-parent mother and father family may be the *best* family structure for childrearing, but the law has never required that parents conform to a perfect model of family life. If this were the case, the state would deny marriage licenses to a substantial minority of heterosexual couples, a substantial number of whom have unplanned or unwanted children.

After proposing new directions for future research on lesbigay parenting, I will conclude by suggesting that public opposition to gay marriage, particularly in the context of lesbigay parenting, is animated in large part by a deeper concern – the proverbial "elephant in the room" on gay rights issues. That elephant is the visceral disgust reaction that many Americans feel toward homosexual sex, particularly gay anal sex, and the accompanying moral intuition that homosexuality and homosexual relationships are immoral. Thus, regardless of what the research may otherwise show about the effects of lesbigay parenting on children, many people will conclude that it is better for children to be raised in heterosexual households because they do not want children exposed to the lesbigay "lifestyle," nor do they want to increase the "risk" that children will develop a homosexual orientation if they are raised by lesbigay parents. The article concludes with a discussion of emerging psychological research on moral decision making, which suggests that the emotion of disgust (an emotion that evolved to protect the body from contamination and disease) that many feel towards homosexual behavior is at the root of anti-gay attitudes on policy questions surrounding gay parenting and marriage. Recent research demonstrates the powerful role that disgust plays in the moral judgments people make about sexual behavior and the fact that such judgments are often based more on emotion than rational analysis. I argue that the disgust reaction is likely a byproduct of human evolution that fails to inform rational judgments about the moral rightness or wrongness of homosexuality, much less the public policy questions surrounding lesbigay parenting and marriage rights.

I. THE STATE OF SOCIAL SCIENCE RESEARCH ON LESBIGAY PARENTING

> Because the existing psychological literature uniformly agrees that children raised by lesbians are as psychologically healthy as children raised by heterosexual parents, courts influenced solely by this literature would have to agree that raising a child in a lesbian-mother family is not against a child's best interests.[38]

38. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian–-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 566 (1990).

A. Early Research Returns: "No Differences" Between Children Raised by Lesbigay Versus Heterosexual Parents

Social scientists and mental health professionals have conducted over fifty studies, of varying quality, to examine the effects of lesbigay parenting on children. In many cases, the investigators undertook the research to inform, if not directly influence, legal policy. They have concluded that the findings "are exceptionally clear,"[39] and demonstrate that there are no relevant differences in outcomes between children raised by heterosexual versus homosexual parents and that lesbigay parenting has no negative effects on children.[40] Children raised by lesbigay parents do not have disturbances in gender identity, they have normal peer relationships, their mental health and psychosocial

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39. Charlotte J. Patterson & Raymond W. Chan, *Families Headed by Lesbian and Gay Parents*, *in* PARENTING AND CHILD DEVELOPMENT IN "NONTRADITIONAL" FAMILIES 191, 212 (Michael E. Lamb ed. 1999).

40. *E.g.*, AM. PSYCHOL. ASS'N., LESBIAN AND GAY PARENTING 15 (2008) (stating that "[n]ot a single study had found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth"); Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32 J. HOMOSEXUALITY 19, 19 (1996) (stating that "the results demonstrate no differences on any measures between the heterosexual and homosexual parents regarding parenting styles, emotional adjustment, and sexual orientation of the child"); Jerry J. Bigner, *Gay and Lesbian Families*, *in* HANDBOOK OF FAMILY DEVELOPMENT AND INTERVENTION 279, 292 (William C. Nichols et al., eds. 2000) (stating that "[r]esearch consistently indicates that gay fathers and lesbian mothers are effective in providing care for their children and that children are not harmed by being raised in such households"); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 613 (2006) (stating that "[e]mpirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or [psycho]social adjustment"); Patterson & Chan, *supra* note 39, at 212 (stating that "the results of the research are exceptionally clear. Results of the empirical research provide no reason under the prevailing best interests of the child standard to deny or curtail parental rights of lesbian or gay parents on the basis of their sexual orientation, nor do systematic studies provide any reason to believe that lesbians or gay men are less suitable than heterosexuals to serve as adoptive or foster parents"); Patterson & Redding, *supra* note 3, at 44–45 (stating that "the review of the scientific literature reveals no evidence that psychosocial development among children of gay men or lesbians is compromised in any significant respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any important way relative to children of heterosexual parents . . . . [R]esults of existing research comparing children of gay or lesbian parents with those of heterosexual parents are quite clear"); PAWELSKI ET AL., *supra* note 1, at 361 (stating that "[m]ore than 25 years of research have documented that there is no relationship between parents' sexual orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment. These data have demonstrated no risk to children as a result of growing up in a family with one or more gay parents"); Stacey & Biblarz, *supra* note 1, at 177, 179 (stating that "[m]ost of the differences in the findings . . . cannot be considered deficits from any legitimate public policy perspective. They either favor the children with lesbigay parents, are secondary effects of social prejudice, or represent 'just a difference' of the sort democratic societies should respect and protect . . . . [W]e unequivocally endorse [the] conclusion that social science research provides no grounds for taking sexual orientation into account"); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 224, 238 (2005) (stating that "there is no evidence that children experience difficulties because of being brought up by lesbian or gay parents").

adjustment is as positive as that of children raised in heterosexual households, and homosexual parents are no more likely to sexually abuse children than are heterosexual parents.[41]

Indeed, leading professional organizations including the *American Psychological Association*, the *American Academy of Child* and *Adolescent Psychiatry*, the *American Academy of Family Physicians*, the *American Academy of Pediatrics*, the *American Psychoanalytic Association*, and the *National Association of Social Workers*,[42] and most recently, the *American Medical Association*,[43] regard the findings as sufficiently compelling to warrant statements against policies that disadvantage lesbians and gays in child custody, adoption, and foster care proceedings. Advocates have used these research conclusions to bolster support for lesbigay parenting and marriage rights, and the research is now frequently cited in public policy debates and judicial opinions.[44]

B. Critics Take a Fresh Look at the Research: Fatally Flawed or Flawed But Informative?

> We must . . . assume that the Legislature would be aware of the many critiques of the methodologies used in virtually all of the comparative studies of children raised in these different environments, cautioning that the sampling populations are not representative, that the observation periods are too limited in time, that the empirical data are unreliable, and that the hypotheses are too infused with political or agenda driven bias.[45]

> [A]lmost everyone agrees that the research has substantial limitations, whether the critics are pro-gay or anti-gay. Nevertheless, the research continues to be trusted to provide serious answers. It is quite remarkable how many authors note the limitations quite fairly and then ignore those weaknesses in order to draw relatively firm conclusions . . . the researchers tend to see what they want to see and once they have found it, they quit, rather than trying to test their results from an oppositional perspective.[46]

As Professors Stacey and Biblarz observe, "contemporary scholarship on the effects of parental sexual orientation on children's development is rarely critical of lesbigay parenthood. Few respectable scholars today oppose such parenting."[47] Challenging the social science conclusion that there are no

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41. *See* AM. PSYCHOL. *supra* note 40, at 12.

42. *See* Pawelski et al., *supra* note 1, at 362.

43. In 2005, the American Medical Association House of Delegates passed a resolution that "support[s] legislation and other efforts to allow adoption of a child by the same-sex partner or opposite sex non-married partner who functions as a second parent or co-parent to that child." *See id.* at 362.

44. *See* LERNER & NAGAI, *supra* note 28, at 124–26 (discussing cases that cite research on lesbigay parenting).

45. *Goodridge*, 789 N.E.2d at 999 (Cordy, J., dissenting).

46. Schumm, *supra* note 28, at 436–38.

47. Stacey & Biblarz, *supra* note 1, at 161. Increasingly, it seems that the courts, while once presuming that gays and lesbians were unfit parents, now concur with the social scientists. In recent cases, judges have characterized arguments against lesbigay adoption as "the purest form of irrationality," "ridiculous," reflective of "virulent homophobia," "nothing less than appalling,"

differences between children raised in lesbigay versus heterosexual households "has been a bit of a David and Goliath situation, and the Davids have not fared so well in the published scholarly analysis."[48] Perhaps this is partly because the psychologists, psychiatrists and social workers conducting the research are members of professional disciplines where the majority is politically liberal.[49] Most of the researchers favor lesbigay parenting and marriage rights. Many are also gay or lesbian[50] and likely have a personal stake in the outcome of the research.[51] This raises the concern in some quarters that unconscious biases may have affected their research, or at least, how they interpreted the results of their research studies.[52]

Recently, a few (mostly) conservative social scientists and legal scholars have questioned the validity and reliability of this research and the "no difference" conclusion.[53] As Professor Wardle concludes, "the social science evidence is very important, [but] thus far that evidence has been immature, biased, and unreliable. The day will come when thorough, serious, longitudinal

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"wholly absurd and untenable," and "unreasonable and irrational." *See* WARDLE *supra* note 6, at 535 (collecting judicial opinions reflecting judicial "animus" concerning the opposition to lesbigay parenting).

48. Schumm, *supra* note 28, at 433. As Professor Wardle wrote in the preamble to his seminal law review article arguing against lesbigay parenting, "I was lonely, I was terribly lonely." Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 834 (1997) (quoting ARTHUR MILLER, DEATH OF A SALESMAN 120–21 (1949)).

49. *See* Richard E. Redding, *Sociopolitical Diversity in Psychology: The Case for Pluralism*, 56 AM. PSYCHOLOGIST 205, 205 (2001) (documenting a liberal bias in the science and profession of psychology).

50. *See* Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCHOL. 130, 135 (1995) (stating that "it would be useful for future work to include studies conducted jointly by gay, lesbian, and heterosexual investigators, and for hypotheses positing deficits to be formulated by conservative, as well as liberal, scientists in such a way that they could be tested empirically").

51. I do *not* mean to suggest that gays and lesbians should not be conducting this kind of research or that researchers intentionally skewed their research in order to produce results favorable to lesbigay parenting, only that unconscious biases can affect the research enterprise, as social psychological studies have well demonstrated. *See generally* Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259 (1998) (reviewing research on biases in social science research); Richard E. Redding, *Reconstructing Science Through Law*, 23 SO. ILL. U.L.J. 585, 592–96 (1999) (discussing biases in social science research).

52. *See e.g.*, *Goodridge*, 789 N.E.2d at 980 (Sosman, J., dissenting) (stating that the "[i]nterpretation of the data gathered by [lesbigay parenting] studies then becomes clouded by the personal and political beliefs of the investigators. . . (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions)").

53. Some of these critics are members of what might be considered to be anti-gay organizations. For example, Dean Byrd and Professor Rekers are members of the National Association for Research and Therapy of Homosexuality ("NARTH") and are featured on the organization's website. *See* NARTH Home Page, www.narth.com. Kirk Cameron is a well-known anti-gay activist and Paul Cameron was expelled from the American Psychological Association for apparently misrepresenting the findings of his previous research, a fact frequently cited by his opponents. *See* Mark E. Pietrzyk, *Queer Science: Paul Cameron, Professional Sham*, THE NEW REPUBLIC 10 (Oct. 3, 1994). For Cameron's response to these allegations, *see Revisiting New Republic's Attack on Cameron*, http://www.familyresearchinst.org/FRI_APA-rebuttal.html.). Nonetheless, the claims made by the critics should be addressed on the merits of their arguments rather than on an *ad hominem* basis.

research will be available, but that day has not yet arrived."[54] Eight published critiques of the empirical research on lesbigay parenting concluded that the methodological limitations of the studies render them unreliable, particularly when inferring that there are "no-differences."[55] A 1993 review of fourteen

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54. Wardle, *supra* note 6, at 517.

55. *See* LERNER & NAGAI, *supra* note 28, at 31; Philip A. Belacastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105, 105–06 (1993) (concluding that "all of the [fourteen] studies lacked external validity, and not a single study represented any sub-population of homosexual parents. Three studies met minimal or higher standards of internal validity, while the remaining eleven presented moderate to fatal threats of internal validity. The conclusion that there are no significant differences in children reared by lesbian mothers versus heterosexual mothers is not supported by the published research data base"); A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J.L. & FAM. STUDIES 213, 217, 228 (2004) (stating that "advocacy groups have argued that an upbringing in a homosexual environment not only presents no challenges for children, but actually may be better than a dual-gender parenting environment. Such advocacy seems illogical and at odds with an abundance of peer-reviewed research. The emerging data . . . suggest[s] that there are differences between children reared by homosexual and heterosexual couples"); CAMERON, *supra* note 33, at 282 (stating that "the strongly worded official claims of there being 'no differences' are overstatements. They amount to the organizations and some prominent researchers asserting that they have proven the null hypothesis, which is fundamentally impossible. It is likely that the nonsignificant statistical findings stressed thus fare include Type Two errors created by use of volunteer samples, inadequate identification and measurement of likely difference, and refusal to interpret results in ways contrary to the sympathies of subjects, investigators, and the organizations"); George A. Rekers, *An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325, 403–04 (2005) (stating that "[m]ultiple reviews by psychologists and other social scientists have documented fatal flaws in the research methods of virtually all of the quantitative studies that claim there is no difference in child outcomes between parenting by homosexuals and heterosexuals . . . . In fact, social science research commonly finding no important difference between homosexual and heterosexual parenting does not, in fact, support that proposition"); George A. Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT L. REV. 343, 382 (2001–02) (stating that "the available research to date essentially constitutes a number of poorly designed, exploratory pilot studies . . . [but] the authors of the studies and many reviewers . . . have concluded substantially more from these methodologically flawed studies than was warranted scientifically"); SCHUMM, *supra* note 28, at 541 (stating that "[t]aken together on the basis of several factors (inadequate sample size, selection effects, nonrandom samples with different recruitment methods for homosexuals and heterosexuals, numerous advantages for the homosexual groups selected, and suppresser effects), the conditions suggest strongly that research has been biased against rejection of the null hypothesis for parental sexual orientation and other outcomes and therefore should be granted very little weight in judicial proceedings"); Wardle, *supra* note 48, at 852 (stating that studies "purporting to show that children raised by parents who engage in homosexual behavior are not subject to any significantly enhanced risks are flawed methodologically and analytically, and fall short of the standards of reliability needed to sustain such conclusions"); Richard N. Williams, *A Critique of Research on Same-Sex Parenting*, *in* STRENGTHENING OUR FAMILIES 352, 353, 355 (D.C. Dollahite ed. 2000) ("[T]he research itself has little scientific merit because of errors in design, subject selection, and measurement . . . . [I]t is my professional opinion that there is no empirical support for the conclusion that parents' sexual orientation has no effect on children . . . . The much publicized conclusion that there is no research evidence of an effect on children of parents' sexual orientation is conceptually problematic, violates the logic of scientific rigor, and is empirically untrue"). *See also* Paul Cameron & Kirk Cameron, *Children of Homosexual Parents Report Childhood Difficulties*, 90 PSYCHOLOGICAL RPTS. 71, 82 (2002) (concluding, based on their content analysis of the narratives of fifty-seven children raised by homosexual parents, that "it is difficult to construe the interviews of the 155 children in these studies as suggesting other than that the homosexual households provided a more difficult environment for

studies was published in a peer-reviewed social science journal,[56] but is now outdated in light of the additional thirty-eight studies that have been conducted since their review. With one exception, the five more recent critiques have appeared in low-prestige psychology journals, in the law reviews of conservative, religiously-affiliated law schools, or in a book sponsored and published by a conservative organization. Therefore, they may not receive the attention they deserve from policymakers much less social scientists. Indeed, the critiques have received scant attention in the scholarly literature,[57] though they have been cited in several recent court opinions.[58] As discussed in *Section II (infra)*, this research suggests possible differences in outcomes between children raised in homosexual as compared to heterosexual households.

The most detailed and persuasive methodological critique was provided by the quantitative sociologists Robert Lerner and Althea Nagai in their 2001 book, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*,[59] which reviews the methodology and statistical analysis used in the forty-nine empirical studies of lesbigay parenting. They concluded that the studies are deeply flawed, and *"offer no basis for that conclusion."*[60] Although researchers have made the case that "it is not the results obtained from any one specific sample but the accumulation of findings from many different samples that will be most meaningful," Lerner and Nagai retort that even when taken as a whole, the research is too unreliable to meaningfully inform public policy.[61] None of the forty-eight studies fully satisfied the key methodological criteria required for strong validity and reliability: a heterosexual control group, adequate control for extraneous variables, reliable measures, use of a random or probability sample, appropriate statistical analyses, and adequate sample size and statistical power.[62]

The most significant and widely acknowledged limitation is the small size of the samples used in the studies. Most studies typically include only fifteen to fifty participants per comparison group, which results in insufficient statistical "power" to detect small or moderate differences in outcomes between children raised by heterosexual versus lesbigay parents.[63] Lerner and Nagai estimate that the probability of finding a false negative (i.e., failing to find true existing

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children than would likely have been provided by heterosexual households"). *See also Studies on Children of Gay and Lesbian Couples Spark Controversy* (National Public Radio broadcast May 24, 2000) (interviewing University of Virginia Professor of Sociology Steven Nock, who finds the studies to be flawed methodologically).

56. *See* Belacastro et al., *supra* note 55, at 105.

57. *But see* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998) (providing a rebuttal to Professor Wardle's critique).

58. *See* Goodridge, *supra* note 23, at 999 (Cordy, J., dissenting) (citing LERNER & NAGAI, *supra* note 28).

59. LERNER & NAGAI, *supra* note 28.

60. *Id.* at 9 (emphasis added).

61. *Id.* at 77 (quoting Patterson & Redding, *supra* note 3, at 44).

62. *Id.* at 118–22.

63. *See* LERNER & NAGAI, *supra* note 28, at 95–110; Rekers & Kilgus, *supra* note 55, at 353–57, 360; Schumm, *supra* note 28, at 452; Tasker, *supra* note 40, at 235; Williams, *supra* note 55, at 354.

differences)[64] was eighty to ninety percent in most of the studies.[65] However, this is true only with respect to detecting relatively small differences ("effect sizes") that would account for five-to twenty-five percent of the variance. Several of the more recent studies had sample sizes large enough to detect large differences, and some were powerful enough to detect even moderate differences.[66] But many of the important discoveries found in psychological research involve relatively modest effects.[67]

The second major limitation concerns the use of non-representative, self-selected samples of convenience rather than random samples, making it difficult to generalize the findings to the larger lesbigay or heterosexual populations. According to Cameron, "[i]t is always difficult to judge the relevance of findings from studies utilizing volunteer samples. . . . They look 'real' in that they have methods, statistical treatments, and report results, but unlike studies based on random samples, their findings can not be used to generalize to any population . . . ."[68] Most of the lesbigay participants in these studies were white, middle- and upper-middle class, professional parents living in politically liberal urban areas (e.g., the San Francisco Bay area),[69] while most of the single-parent heterosexual participants were "draw[n] heavily from [populations] that seem extremely unrepresentative of single parents."[70] The lesbigay participants in many of the studies had family incomes and educational levels higher than the

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64. Statisticians call this a "type II error" – i.e., failing to reject the null hypothesis when true differences exist. For more information on type II errors, *see* ARTHUR ARON, ELAINE N. ARON, & ELLIOT COUPS, STATISTICS FOR PSYCHOLOGY (4th ed. 2008).

65. *See* LERNER & NAGAI, *supra* note 28, at 103. On the other hand, enough studies have been conducted that, from a statistical standpoint, at least several should have detected even small differences, if such differences truly exist. With an alpha value set at the conventional .05 level for statistical significance, one would expect five percent of the studies to have found statistically significant differences just by chance.

66. The "effect size" refers to the degree of effect or difference detected, and the ability to detect effects increases with the sample size, which increases the statistical "power" of the study. "Consider the relation of power to a nonsignificant result. Suppose you did not get a significant result and the power of the study was low. In this situation, the study is entirely inconclusive. Not getting a significant result may have been because the research hypothesis was false. Or, it may have been because the study had too little power (for example, having too few participants)." ARTHUR ARON, ELAINE N. ARON, & ELLIOT COUPS, *supra* note 64 at 241.

In social science research, effects sizes of less than .50 (accounting for less than 25% of the variance) are considered small, effect sizes between about .50 and .80 are considered to be moderate, and effects sizes of .80 (accounting for 64% of the variance) or greater are considered to be large. *See generally id.* at 230.

67. *See* LERNER & NAGAI, *supra* note 28, at 100.

68. Cameron, *supra* note 33, at 318. *See also* Rekers, *supra* note 55, at 401–02 (stating that the "research studied convenience samples of volunteer homosexual parents without reported psychological disorders and substance abuse who were 'cherry-picked' by the investigators, and are thus not representative of the general population of homosexuals . . . . Parenting practices by the minority of homosexuals who are psychologically normal cannot be considered representative of the parenting practices of the entire group of homosexuals who have much higher rates of psychological disorder and substance abuse than the studied homosexual parents").

69. *See* Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1058 (2000) (discussing demographics of the research samples). *Accord* LERNER & NAGAI, *supra* note 28, at 75.

70. LERNER & NAGAI, *supra* note 28, at 76.

general lesbigay population or heterosexual comparison group. These factors have been shown to be advantageous in childrearing.[71] In addition, most participants were volunteers recruited through lesbigay organizations, advertisements in lesbigay publications, and/or through other study participants ("snowball sampling"),[72] rather than through a random sampling of the lesbigay community. Participants "are usually relatively open about their homosexuality and, therefore, may bias the research towards a particular group of gay and lesbian parents."[73] Moreover, participants usually knew what the studies were designed to investigate, leading to the possibility of conscious or unconscious biases that produce results favoring lesbigay parenting.[74]

Professors Rekers and Kilgus similarly argue that the confluent problems of small sample size and non-representative samples make the "no-difference" finding of most studies wholly unreliable:

> [W]hen a small sample is drawn in a non-representative fashion and no statistically significant difference is found between two groups . . . the persistent problem is that the findings from an unrepresentative sample have no demonstrated generalization to the larger population of homosexual parents and their children. Additionally, there is the added possibility that even if the sample had been representative of the population, the study's small sample size rendered it methodologically limited in being able to detect any actual differences that may exist in the large population studied. Therefore, a finding of no difference between small, unrepresentative samples provides insufficient evidence to determine whether a group difference is present or not in the larger population of homosexual parents and their children compared to others.[75]

Furthermore, the studies variously suffer from a number of other methodological problems including: failure to control for important variables (parents' educational level or socioeconomic status, parents' living arrangements, amount of childrens' contact with biological parents, single- versus dual-parent homosexual families, ex cetera); a lack of heterosexual control or matched groups; over-reliance on self-report; lack of longitudinal data; improper formulation and statistical testing of the "no difference" hypotheses;[76] and measures that fail to distinguish adequately between sexual identity, behavior, and desire.[77] Importantly, "visible lesbigay parenthood is such a recent phenomenon that most studies are necessarily of the children of a transitional generation of self-identified lesbians and gay men who became parents in the context of heterosexual relationships that dissolved before or after they assumed a gay identity. These unique historical conditions make it impossible to fully distinguish the impact of a parent's sexual orientation on a

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71. *Id.*

72. Stacey & Biblarz, *supra* note 1, at 166.

73. Bridget Fitzgerald, *Children of Lesbian and Gay Parents: A Review of the Literature*, 29 MARRIAGE & FAM. REV. 57, 68 (1999).

74. *See* LERNER & NAGAI, *supra* note 28, at 74; Rekers & Kilgus, *supra* note 55, at 357–60, 363–65; Tasker, *supra* note 40, at 234–35; Williams, *supra* note 55, at 354.

75. Rekers and Kilgus, *supra* note 55, at 360.

76. *See generally* LERNER & NAGAI, *supra* note 28; Rekers & Kilgus, *supra* note 55, at 346–74; Schumm, *supra* note 28, at 434–36; Tasker, *supra* note 40, at 234–35; Williams, *supra* note 55, at 353–55.

77. *See* Ball & Pea, *supra* note 57, at 284.

child from the impact of such factors as divorce, re-mating, the secrecy of the closet, the process of coming out, or the social consequences of stigma."[78] Many early studies compared development among children of divorced lesbian mothers living with a lesbian partner against children of divorced, heterosexual single mothers. Consequently, it is difficult to disentangle the possible effects of parents' sexual orientation from those relating to living in single-parent versus two-parent households. "Because two parents have more resources (time, money, energy, etc.) than a single parent, finding no difference in child outcomes in such studies does not provide legitimate or valid data on the comparability of parenting by homosexuals to heterosexuals."[79]

In addition, current research has not yet examined several important groups of lesbigay parents and their children. Most studies include lesbian parents but few have included gay parents, and there are no studies specifically of adoptive parents. Given the small sample sizes, the studies do not permit a statistically reliable examination of whether lesbigay parenting may affect boys and girls differently. Most importantly, very few studies have included the adult children of lesbigay parents. Most studies are of pre-adolescent or young adolescent children, although some outcomes of interest (such as sexual orientation) may not occur until late adolescence or adulthood. Finally, no study has examined the custody preferences of the children of divorced lesbigay parents.

C. The Importance of "Getting It Right"

Many of the methodological limitations in the existing studies are not due to the negligence of the researchers, but rather, to the difficulty in recruiting participants for these kinds of studies. "[I]t is still not safe for lesbians and gay men to be publicly 'out' about their sexuality, so a representative sample of lesbian and gay parents and their children probably constitutes an unattainable goal at present."[80] One common criticism is that the studies set out to prove a scientific impossibility – the "null hypothesis."[81] As Professor Williams explains, "[i]t is impossible for science to prove a negative . . . . It is, in principle, inadvisable to base important decisions on a body of nonaffects. Absent findings do not aggregate."[82] It is a fundamental principle of statistical inference that unless one samples the entire population of interest (e.g., *all* children of lesbigay parents versus *all* children of heterosexual parents), a study cannot affirm the null hypothesis. Scientific studies are designed to detect *differences*. Yet, adherence to this principle would mean that research could *never* be used to support policies favoring lesbigay parenting because any "no difference" findings would be disregarded. Although one can never prove the null hypothesis, an adequate number of methodologically sound studies finding no

78. Stacey & Biblarz, *supra* note 1, at 165.

79. Rekers, *supra* note 55, at 403.

80. Tasker, *supra* note 40, at 234.

81. For a discussion of this statistical principle in the context of lesbigay parenting research, *see* LERNER & NAGAI, *supra* note 28, at 15–21; Rekers & Kilgus, *supra* note 55, at 368–70.

82. Williams, *supra* note 55, at 353.

differences should be sufficient to permit an inference – if only tentatively – that the null hypothesis is likely correct.

But when considering fundamental changes in family law policies that may affect the welfare of children for generations to come, the importance of "getting it right" argues for setting a fairly demanding standard when relying on lesbigay parenting research in guiding public policy. Studies should be designed so as to maximize the chances of detecting possible differences in outcomes between children raised by lesbigay versus heterosexual parents.[83] "How sure we need to be before we accept a hypothesis will depend on how serious a mistake it would be" if we are wrong.[84] In this regard, researchers as well as those making policy decisions must consider the ethical consequences of making a "type II error" (i.e., accepting the null hypothesis when it is false).

At a minimum, researchers must be fully candid about the differences they do find. Commentators note that some studies appear to report findings inaccurately or incompletely,[85] leading some to question the biases or political motivations of the researchers.[86] Seemingly some researchers, "disregard[ed] their own results"[87] when they claimed that parents' sexual orientation does not influence children's sexual orientation. For example, Professors Rekers and Kilgus notes that Green and colleagues "stated in the abstract of their article, [that] no significant differences were found between the two types of households for boys' . . . but this contradicts the [many differences] reported in the body of the article."[88] Similarly, Tasker and Golombok concluded that lesbigay parents are no more likely to have gay sons or lesbian daughters than

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83. *See* David J. Pittenger, *Hypothesis Testing as a Moral Choice*, 11 ETHICS & BEHAV. 151, 152–56 (2001) (stressing the importance of ethical value judgments).

84. *Id.* at 154 (quoting R. Rudner, *The Scientist Qua Scientist Makes Value Judgments*, 20 PHIL. SCI. 1, 2 (1953)).

85. *See* Rekers & Kilgus, *supra* note 55, at 366–67, 371–73; Schumm, *supra* note 28, at 436-39; Williams, *supra* note 55, at 355 (stating that "[Golombok et al.'s study] in 1996 showed children of homosexual parents were significantly more likely to have (a) considered engaging in a homosexual relationship and (b) actually engaged in a homosexual relationship. In the report of the research, little is made of this finding, and it does not dissuade the authors from concluding that there is no evidence of an effect of parents' sexual orientation. This oversight is difficult to explain, but is found in other studies as well. Huggins, for example, found a difference in the variability of self-esteem (i.e., how spread out the children were along the self-esteem scale) between children of homosexual versus children of heterosexual parents. However, she did not bother to test it for significance – although my analysis found the difference to be significant. She chose not to comment on it further. Patterson found, but left unreported, a similar difference; and Lewis, in a qualitative study, found evidence of emotional and social difficulties in the lives of children of homosexual parents, but the findings did not affect her conclusion that there were no effects").

86. *See* Rekers & Kilgus, *supra* note 55, at 346, 361 (stating that the goal of their article is "to identify politically-motivated assertions regarding so-called 'research findings,'" and noting that "the researchers find results that parallel their own sexual orientation and/or values regarding homosexual lifestyles"); Schumm, *supra* note 28, at 512, 514 (stating that "[i]n addition to bias appearing to limit the ways in which one draws conclusions or in the scope of one's search for relevant evidence, bias appears to keep researchers from asking really tough questions about the validity of research with which they agree").

87. Belacastro et al., *supra* note 55, at 117.

88. Rekers & Kilgus, *supra* note 55, at 366.

are heterosexual parents,[89] yet their study found that "the daughters of lesbians were more likely to (a) be open to a gay lifestyle, (b) have engaged in same-sex sexual activity if they had experienced same-sex attraction, and (c) that 20% of the lesbian's children had considered same-sex sexual relationships even though they had never experienced same-sex sexual attraction."[90] Professors Rekers and Kilgus also note that:

> Tasker and Golombok . . . [concluded]: 'The commonly held assumption that lesbian mothers will have lesbian daughters and gay sons was not supported by the findings.' But this is an illegitimate conclusion from their study . . . . The finding of 12% active homosexual adult children among daughters of homosexuals in this methodologically flawed exploratory study is at least three times the base rate of homosexuality in the adult female population . . .[91]

In another example, Tasker and Golombok concluded from their comparative study of twenty-five children of lesbian mothers and twenty-one children of heterosexual mothers that the children of lesbian mothers "were no more likely than their counterparts from heterosexual single-parent families to experience peer stigma [and teasing] during adolescence."[92] Although a technically accurate description of the study findings, the data show that thirty-six percent of the children of lesbian mothers experienced teasing as compared to only fourteen percent of the children of single heterosexual mothers.[93] It is likely the difference is not statistically significant merely because of the small sample size. Had the same findings been obtained with a larger sample, they likely would have been statistically significant, requiring the conclusion that children of lesbian mothers are indeed more likely to be teased. Moreover, even with the small sample size, the study did find a statistical trend indicating that the children of lesbian mothers were more likely to have been teased about their own sexuality.[94]

At the same time, allegations that researchers are biased in interpreting the literature to favor lesbigay parenting are overstated. For example, Professor Schumm points out that "most reviewers . . . frequently overlooked an interesting article by Sotirios Sarantakos which, in contrast to most other research, used a relatively large sample of families. However, that article, though a methodological improvement over much of the other research, happened to find several adverse outcomes associated with gay parenting. *It seems too convenient for such an important article to have been completely overlooked by virtually all of those who have reviewed the literature so thoroughly.*"[95] The Sarantakos

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89. *See* Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203, 203 (1995).

90. Schumm, *supra* note 28, at 518 (citing Walter R. Schumm, *What Was Really Learned from Tasker and Golombok's (1995) Study of Lesbian and Single Parent Mothers?*, 94 PSYCHOL. RPTS. 422, 467 (2004)).

91. Rekers & Kilgus, *supra* note 55, at 373–74.

92. Tasker & Golombok, *supra* note 89, at 212.

93. *See id.* at 210.

94. *Id.*

95. Schumm, *supra* note 28, at 438 (citing Sotirios Sarantakos, *Children in Three Contexts: Family, Education, and Social Development*, 21 CHILD. AUSTL. 23 (1996) (emphasis added)).

study, however, was published in an obscure Australian journal that is not indexed in most of the American on-line databases. Although the largely qualitative study is a methodological improvement in having a larger sample size (116 homosexual couples and 58 heterosexual couples), it is methodologically weaker insofar as the findings are based primarily on interviews with teachers who were not blind as to whether children came from heterosexual or homosexual households.

D. Three Recent Studies

Three recent studies rest on a much sounder methodological foundation than previous research and therefore merit a detailed discussion. The sample sizes in these studies, while somewhat larger than those of previous studies, are also relatively small. However, they drew their samples from large community studies in which participants were recruited randomly and not on the basis of sexual orientation, or from sperm-bank clients, which eliminated any confounding effects of a parent's sexual orientation status with those of divorce. These three studies also found that lesbigay parenting has no negative psychological effects on children

A 2004 study by Wainright and colleagues compared the psychosocial adjustment and school outcomes among twelve- to eighteen-year-old children of forty-four same-sex couples and an equal number of heterosexual couples.[96] Their data were obtained from the National Longitudinal Study of Adolescent Health (a large random sample of adolescents). The study included adolescents (rather than young children) who were drawn from a randomly selected national sample, and the lesbigay and heterosexual parents were matched on relevant characteristics (e.g., child's age and gender; parent's age, income, ethnicity, and educational level).[97] The study found no differences in children's levels of depression, anxiety, or self-esteem as a function of family type. There also were no differences in parental warmth, care from adults and peers, children's autonomy, or children's integration into their neighborhoods, nor were there any differences in the children's GPA or difficulties experienced at school. Adolescents in lesbigay households, however, were more connected to their school than those living in heterosexual households.[98]

A 2003 study by Professor Golombok and colleagues, which used mostly random sampling techniques to draw from a large community study of 14,000 mothers and children in the United Kingdom, compared thirty-nine single-parent lesbian families, sixty single-parent heterosexual mother-families, and seventy-four two-parent hetero-sexual families.[99] The average age of the children was seven. The study used a number of standard and reliable measures of parenting quality (warmth, conflict, supervision, and play with

96. Jennifer L. Wainright, Stephen T. Russell, & Charlotte J. Patterson, *Psychosocial Adjustment, Social Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 CHILD DEV. 1886 (2004).

97. *Id.* at 1888–90.

98. *Id.* at 1895–96.

99. Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20 (2003).

child); mothers' psychological health (depression, anxiety); children's gender role behavior, and children's socioemotional development (measures of self-esteem, peer relations, hyperactivity, emotional symptoms, conduct problems, and prosocial behavior). These measures were variously assessed via interviews with children, parents, and teachers.[100] Although a number of differences were found between single-parent and two-parent families that generally favored the two-parent families, only several were found as a function of maternal sexual orientation and these differences favored the lesbian families.[101]

Finally in a 1998 study, Chan and colleagues generally found no differences in the family relations and psychosocial adjustment of the children of fifty-five families headed by lesbians as compared to twenty-five families headed by heterosexual parents.[102] The average age of the children was seven and all had been conceived through the same California sperm bank. No demographic differences between those who agreed to participate in the study and the larger population of families who used the sperm bank were found.[103] The study utilized parent and teacher ratings of children's behavioral adjustment and sampled systematically from a known larger population (sperm bank clients).[104] There were, however, "differences between lesbian and heterosexual families in the study that favored the lesbian families,"[105] since the lesbians tended to be older and to have higher income levels.[106]

II. DOES SOCIAL SCIENCE RESEARCH ON LESBIGAY PARENTING PROVIDE A BASIS FOR PROHIBITING LESBIGAY MARRIAGE OR ADOPTION?

The extant research currently permits the conclusion that lesbigay parenting does *not* psychologically harm children. A number of studies, including the three recent studies discussed above, have examined whether children raised by lesbigay parents are more likely to have mental health or psychosocial adjustment problems. Despite the methodological limitations inherent in many of these studies (*see supra)*, their findings are remarkably consistent given the vaying samples and research designs, thereby providing a degree of convergent validity.

Of course, the finding that lesbigay parenting is not harmful psychologically to children does not resolve the policy debate over lesbigay parenting. Most extant research on lesbigay parenting has focused on whether it harms children, not on whether growing up in a lesbigay household is as positive an experience for children as growing up in a heterosexual household. Some argue that children do best when raised by a mother and a father, and arguments that children raised by lesbigay parents are more likely to be

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100. LERNER & NAGAI, *supra* note 28 at 22–25.

101. *Id.* at 29–30.

102. *See* Raymond W. Chan, B. Raboy, & Charlotte J. Patterson, *Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443, 449–53 (1998).

103. *Id.* at 444–45.

104. *Id.* at 454.

105. LERNER & NAGAI, *supra* note 28, at 90.

106. *Id.* at 91.

homosexual, have difficulty with peers, and experience harm from the sexual behavior of their parents are common. Such concerns reflect the view that lesbigay parenting is disadvantageous to children when compared to heterosexual parenting. The next sections evaluate this claim against the relevant extant research and offer implications for public policy.

A. Are Children Raised by Lesbigay Parents More Likely to Be Homosexual?

Despite the claim that studies show no differences between children raised in lesbigay versus heterosexual households, as discussed *supra*, the studies have methodological limitations. More importantly, they suggest differences in the sexual identity and sexual orientation of children raised in lesbigay versus heterosexual households. The eminent parenting researcher Diana Baumrind noted that "[i]t would be surprising indeed if . . . children's own sexual identities were unaffected by the sexual identities of their parents."[107] Professors Stacey and Biblarz similarly explain, "[o]nly a crude theory of cultural indoctrination that posited the absolute impotence of parents might predict [no differences] . . . . The burden of proof in the domain of gender and sexuality should rest with those who embrace the null hypothesis."[108]

Especially informative is an analysis by Professors Stacey and Biblarz recently published in the prestigious journal, *American Sociological Review*.[109] They reviewed twenty-one studies, selecting those studies that satisfied basic standards of sound methodology and included findings directly relevant to developmental outcomes in children. They found that the limited extant research simply "does not support the 'no differences' claim" when it comes to sexual orientation and gender–role behavior:[110]

> [T]he authors of all 21 studies almost uniformly claim to find no differences in measures of parenting or child outcomes. In contrast, our careful scrutiny of the findings they report suggests that on some dimensions – particularly those related to gender and sexuality – the sexual orientation of parents matters somewhat more for their children than the researchers claimed . . . Children with lesbigay parents appear less traditionally gender-typed and more likely to be open to homoerotic relationships . . . . [C]onsider, for example, the study by R. Green et al. (1986) that, by our count, finds at least 15 intriguing, statistically significant differences in gender behavior and preferences among children (4 among boys and 11 among girls) in lesbian and heterosexual single-mother homes. [111]

Stacey and Biblarz's analysis is consistent with the critique of Professors Rekers and Kilgus, who agree that the studies suggest differences between children

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107. Baumrind, *supra* note 50, at 134.

108. Stacey & Biblarz, *supra* note 1, at 177.

109. *Id.* at 159.

110. *Id.* at 176.

111. *Id.* at 167, 170, 176—77 (quoting R. Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCH. SEX. BEHAV. 167, 167 (1986).)

raised in lesbigay compared to heterosexual households.[112] Collectively, the studies suggest that children raised by lesbigay parents are significantly more likely to experience homoerotic attraction, to consider homosexual relationships, and to engage in homosexual behavior.[113] Children raised in lesbigay households, particularly girls, are also more likely to behave in ways less conforming to traditional gender roles by showing greater interest in both masculine and feminine activities.[114]

Golombok and Tasker's 1996 study is the only longitudinal study comparing the children of heterosexual mothers with those of lesbian mothers when the children were ten years of age and again in adulthood (at twenty-four years of age).[115] It found that thirty-six percent of children raised by lesbian mothers reported a same-sex attraction, compared to only twenty percent of those raised by heterosexual mothers. Moreover, of those children reporting a same-sex attraction, *none* of the children of heterosexual mothers had experienced a homosexual relationship whereas *sixty-seven percent* of the children of lesbian mothers had experienced such a relationship – a sizeable, statistically significant difference.[116] Sixty-four percent of the children of lesbian mothers had also considered the possibility of having a homosexual relationship compared to only seventeen percent of the children of heterosexual mothers. Eight percent of the children (33% of the daughters and 0% of the sons) of lesbian mothers identified themselves as homosexual.[117] Yet, Golombok and Tasker concluded that:

> [T]he commonly held assumption that children brought up by lesbian mothers will themselves grow up to be lesbian or gay is not supported by the findings of the study; the majority of children who grew up in lesbian families identified as heterosexual in adulthood, and there was no statistically significant difference between young adults from lesbian and heterosexual family backgrounds with respect to sexual orientation.[118]

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112. *See* Rekers & Kilgus, *supra* note 55, at 371–74, 379–80. *See also* Baumrind, *supra* note 50, at 133–34 (noting that Bailey et al.'s study may have underestimated the number of homosexual children in the study due to the way in which sexual orientation was measured); Williams, *supra* note 55, at 355 (noting that although the Tasker and Golombok study found that children of lesbigay parents were more likely to have had a homosexual relationship, the authors concluded that there was no effect of parents' sexual orientation on their children).

113. *See* Stacey & Biblarz, *supra* note 1, at 170–71 (summarizing study results).

114. *Id.* at 168–70 (summarizing study results). *But see* Herek, *supra* note 40, at 613 n.6 (stating that "[o]n the basis of their review of the literature, Stacey and Biblarz (2001) asserted that six empirical studies have indicated that children of lesbian mothers display less gender role conformity than children of heterosexual mothers. However, only two of the cited sources reported statistically significant differences in this regard . . . and both of those reports appear to have been derived from the same ongoing study. Moreover, many of the differences reported in that study . . . can be considered healthy in a world in which gender-based discrimination persists").

115. *See* Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 31 DEVELOPMENTAL PSYCHOL. 3 (1996).

116. *Id.* at 7–8.

117. *Id.*

118. *Id.* at 8.

This conclusion does not flow from the study findings. First, the sample sizes were too small to yield statistically significant differences given the low base rates for homosexuality in the general population. Second, although most of the children of lesbian mothers may not have self-identified as homosexual, many of them had experienced homoerotic attraction or homosexual relationships.

Bailey et al's. 1995 study is also unique because it examined the sexual orientation of the adult sons of gay fathers.[119] The results indicated that nine percent of the sons were gay or bisexual, somewhat higher than the two- to five-percent rate of male homosexuality thought to exist in the general population.[120] In addition, a 1996 study by Professor Sarantakos, which compared the school behavior (as reported by teachers) of 116 primary school children of homosexual couples (47 lesbian and 11 gay) with 58 children of married couples, found that "children of homosexual couples were described by teachers as more expressive, more effeminate (irrespective of their gender) and 'more confused about their gender' than children of heterosexual couples."[121] These results must be viewed with caution, however, as they are based on a qualitative study involving the reports of teachers who were not blind as to whether children came from heterosexual or homosexual households.[122]

Thus, the few available studies provide evidence that children (particularly girls) raised by lesbigay parents are more likely to experience homoerotic attraction, to engage in homosexual relationships, and to show gender non-conforming behaviors. "Lesbian mothers tend to have a feminizing effect on their sons and a masculinizing effect on their daughters,"[123] and such gender non-conforming behavior in childhood strongly predicts homosexuality in adulthood.[124] Whether the parents' attitudes and parenting behavior is responsible for the greater gender nonconformity among the children of lesbigay parents is unclear, but several studies indicate that lesbian mothers are less likely to care whether their children engage in gender-typical activities.[125] Moreover, parents who do not conform to gender stereotypes would be likely to model such behavior to their children.

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119. *See* J.M. Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVELOPMENTAL PSYCHOL. 124 (1995).

120. *Id.* at 126–27. *See* also Wainright et al., *supra* note 96, at 1893 (attempting to evaluate the romantic relationships of the adult children of heterosexual versus homosexual couples, but unable to do so due to the very small number of participants in their sample of eighty-eight eighteen-year-old children that reported having had same-sex attractions or relationships).

121. Sarantakos, *supra* note 95, at 26 (stating that "[t]eachers felt that a number of students of homosexual parents were confused about their identity and what was considered right and expected of them in certain situations. Girls of gay fathers were reported to demonstrate more 'boyish' attitudes and behavior than girls of heterosexual parents. Most young boys of lesbian mothers were reported to be more effeminate in their behavior and mannerisms than boys of heterosexual parents. Compared to boys of heterosexual parents, they were reported to be more interested in toys, sport activities and games usually chosen by girls; they cried more often when under the same type of stressful situations; and they more often sought the advice of female teachers").

122. *See id.*

123. Byrd, *supra* note 55, at 219.

124. *Id.*

125. *See* Stacey & Biblarz, *supra* note 1, at 172.

However, it is unknown whether the intergenerational transmission of homosexuality is due primarily to genetic or socialization factors, or a combination of the two.[126] Because children living in homosexual households are exposed to same-sex relationships and a gay-affirming environment, one might expect these children to be more open to homosexuality and more willing to experiment with homosexual relationships.[127] However, Bailey's study found no relationship between the sons' sexual orientations and the number of years they resided with their gay fathers, perhaps suggesting that their father's sexual orientation had little influence on the development of their own sexual orientation,[128] though the number of gay or bisexual sons (nine) in the sample was so small that this finding lacks reliability. But recall the findings of the Tasker and Golombok study that of those children reporting a same-sex attraction, none of the children of heterosexual mothers had experienced a homosexual relationship whereas sixty-seven percent of the children of lesbian mothers had experienced such a relationship.[129] The study also found reasonably strong correlations between children's sexual orientation and their lesbian mothers' openness in showing physical affection to their partner when their children were school age, the mother's number of lesbian partners, and the mother's openness to her children having homosexual relationships.[130] (A recent study of lesbian mothers found that only twenty-one percent hoped that their child would be heterosexual while sixty-five percent did not care whether their child was heterosexual or homosexual.)[131] Together, these findings suggest that children's sexual orientation may be affected by a home environment that models and is accepting of homosexuality. Interestingly, an interview study of children whose mother had "come out" as a lesbian during their early adolescence, revealed that the children worried that they might become homosexual.[132]

Yet, as Sigmund Freud said years ago, "[h]omosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation. It cannot be classified as an illness."[133] Indeed, mental health professionals do not consider homosexuality to be a mental disorder or psychosocial problem of any kind. Although the limited available research suggests that children raised in lesbigay households may be somewhat more likely to experience homoerotic attraction and homosexual relationships, this outcome should not be viewed as

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126. *See generally* David Reiss, *The Interplay Between Genotypes and Family Relationships: Reframing Concepts of Development and Prevention*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 139 (2005).

127. *See* Baumrind, *supra* note 50, at 134.

128. *See* Bailey et al., *supra* note 119, at 126–28.

129. *See* Tasker & Golombok, *supra* note 89, at 210–211.

130. *See* Golombok & Tasker, *supra* note 115, at 7.

131. *See* Nanette Gartrell et al., *The National Lesbian Family Study: 3. Interviews with Mothers of Five-Year Olds*, 70 AM. J. ORTHOPSYCHIATRY 542, 546 (2000). *But cf.* Carrie Yang Costello, *Conceiving Identity: Bisexual, Lesbian & Gay Parents' Consider Their Children's Sexual Orientations*, 24. J. SOCIOL. & SOC. WELFARE 63, 82 (1997) (reporting results of interviews with eighteen bisexual and lesbigay parents finding that many "stated that they would take active steps to ensure that their children did not feel any pressure to conform to their parents' sexual identities").

132. *See* Ann O'Connell, *Voices From the Heart: The Developmental Impact of a Mother's Lesbianism on her Adolescent Children*, 63 SMITH COLL. STUDIES IN SOC. WORK 290–91 (1993).

133. Sigmund Freud, *Letter to an American Mother*, 107 AM. J. PSYCHIATRY 786, 786 (1951).

negative in terms of public policy if, as a society, we respect pluralism and diversity. There is a strong scientific consensus that homosexuality is not a mental illness nor is it per se harmful.[134] To be sure, many Americans morally disapprove of homosexuality.[135] Yet, gay and lesbian Americans should not be deprived of parenting rights *based merely on majoritarian moral views, absent any showing of demonstrable harm*, particularly when those moral views may largely be an evolutionary byproduct of a psychology of disgust (an emotion that evolved to protect the body from contamination and disease) that fails to rationally inform modern-day policy judgments *(see Section IV, infra*). Indeed, in *Lawrence v. Texas*,[136] which struck down criminal sodomy statutes, the U.S. Supreme Court made clear that moral values alone, absent any showing of harm, cannot properly be the basis for legal prohibitions against homosexual conduct:

> [T]he Court in *Bowers* was making the broader point that *for centuries there have been powerful voices to condemn homosexual conduct as immoral.* The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. *These considerations do not answer the question before us, however.* The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. *Our obligation is to define the liberty of all, not to mandate our own moral code.*[137]

B. Are Children Raised by Lesbigay Parents Likely to Have Difficulty with Peers?

Studies have found that children (particularly boys) raised in homosexual households are more likely to be teased by peers – either about their parent's sexual orientation or their own sexuality – than children raised in heterosexual households.[138] This is not surprising, given the strength and pervasiveness of

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134. The American Psychiatric Association removed homosexuality from its official list of mental disorders in 1973, and since that time, neither the American Psychiatric Association nor the American Psychological Association has considered it to be a mental disorder or psychological problem of any kind. *See* John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974*, AM. PSYCHOLOGIST 620, 633 (1975) (stating that "[t]he American Psychological Association supports the action taken on December 15, 1973, by the American Psychiatric Association, removing homosexuality from that Association's official list of mental disorders. The American Psychological Association therefore adopts the following resolution: Homosexuality, per se, implies no impairment in judgment, stability, reliability, or general social or vocational capabilities: Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations").

135. *See infra* notes 351–58 and accompanying text (summarizing national polling data).

136. 539 U.S. 558 (2003).

137. *Id.* at 571 (emphasis added).

138. *See, e.g.*, *supra* notes 92–94 and accompanying text; Norman Anderssen, Christine Amlie, & Erling Andre Ytteroy, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 SCANDANAVIAN J. PSYCHOL. 335, 344–45 (2002); REKERS, *supra* note 55, at 366–76

anti-gay prejudice. For example, recent survey findings indicate that ninety percent of students had heard anti-gay epithets at school.[139] The stigma of membership in a marginalized group often extends to family members, including one's children: "[h]aving a relationship with a stigmatized individual may lead society to treat both individuals as members of the stigmatized group."[140] Even college students, presumably more open-minded and more mature than adolescents, reported that they would be less willing to be friends with the sons or daughters of lesbian.[141] Surveying undergraduates at a midwestern university, Professor King found that they rated the children of lesbians as being stigmatized in society to the same degree as the children of an ex- convict parent, though most expressed a willingness to be friends with the children of lesbian mothers.[142] A 1996 Australian study that asked teachers about the peer relations of fifty-eight primary school children of lesbigay parents reported:

> [T]hese children usually find it difficult to be fully accepted by their peers as boys or girls. In many cases these children had been harassed or ridiculed by their peers for having a homosexual parent, for 'being queer' and even labeled as homosexuals themselves. In certain cases, heterosexual parents advised their children not to associate with children of homosexuals, or gave instructions to teachers to keep their children as much as possible away from children of homosexual couples . . . . Teachers have reported that children who went through such experiences have suffered significantly in social and emotional terms.[143]

Yet despite the teasing commonly experienced by the children of lesbigay parents, these children also have normal peer relations and friendships. Moreover, the degree of typical teasing does not appear to be extreme, and studies consistently find that children have not felt harassed or unduly stigmatized.[144] Without question, however, the degree of prejudice and teasing children experience depends on the age of the child and the community environment in which he lives. Thus, the finding that children have normal peer relationships may reflect the fact that many of the lesbigay parenting studies were conducted in socially liberal urban and suburban communities (e.g., the San Francisco Bay area). The findings might be very different if such

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(reviewing qualitative studies and narratives of the children of lesbigay parents that report the teasing, embarrassment, and discrimination experienced by the children of lesbigay parents).

139. *See* Katherine van Wormer & Robin McKinney, *What Schools Can Do to Help Gay/Lesbian/Bisexual Youth: A Harm Reduction Approach*, 38 ADOLESCENCE 409, 410 (2003) (citing findings of 1999 survey).

140. Beverly R. King, *Ranking of Stigmatization Toward Lesbians and Their Children and the Influence of Perceptions of Controllability of Homosexuality*, 41 J. HOMOSEXUALITY 77, 78 (2001).

141. *Id.* at 81 (citing study findings).

142. *Id.* at 87–91.

143. Sarantakos, *supra* note 95, at 26.

144. *See* Anderssen, *supra* note 138, at 344–45 (reviewing studies on peer relationships among children of lesbigay parents). *Accord* Charlotte J. Patterson, Megan Fulcher, & Jennifer Wainright, *Children of Lesbian and Gay Parents: Research, Law, and Policy*, *in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 176, 187 (Bette L. Bottoms et al. eds., 2002); Tasker, *supra* note 40, at 232–33.

studies were conducted in rural areas of the American South[145] or in African-American communities.[146]

In any case, *virtually every study examining the issue has found that most children report having significant concerns about peer rejection and take steps to keep their parent's sexual orientation secret*.[147] As the daughter of a lesbian mother explained:

> As a 13-year-old girl with a lesbian mother, I find life is pretty hard. We don't tell anybody, but people know. And people tease, and people taunt. No other teen I know has gay parents, and it causes a lot of hurt not being able to share some of my feelings.[148]

As one teenage boy explained:

> Growing up with lesbian moms wasn't easy. Some kids teased me and tried to beat me up. They thought that I was gay just because my parents are . . . . Still, sometimes, I don't tell people about my family. It's hard to bring girlfriends home because I don't know how they will react.[149]

And as a lesbian mother said in an unsent letter to her daughter:

> I talked to you that night. I explained that all gay meant was that I loved Suzie the way I used to love your dad. It was a lie. To you – and to me. I really thought that was all it meant. As it turned out, it also meant that the neighbors would throw trash in our yard, people would stare at us when we took walks in the evenings during the summer, the neighbor's children would call us homos,

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145. The South has the highest percentage of lesbigay couples raising children. *See* Pawelski et al., *supra* note 1, at 351.

146. National public opinion polls have consistently shown that opposition to gay rights and same-sex marriage is strongest among African-Americans and in the American South. *See* Patrick Egan, Nathaniel Persily, & Kevin Wallsten, Gay Rights, Public Opinion and the Courts (unpublished manuscript, on file with author).

For example, as the daughter of a lesbian mother recently wrote: "I can say with certainty that growing up in Mississippi influenced my ability to process the disclosure of my mother's lesbianism. For instance, there was not a large gay and lesbian community and there were only one or two lesbian households with children in my age group. Thus, shared experience or discussion with others was scarce. As a result, it took some before I felt comfortable within myself." Kirsten Lea Doolittle, *Don't Ask, You May Not Want to Know: Custody Preferences of Children of Gay and Lesbian Parents*, 73 S. CAL. L. REV. 677, 695, n.105 (2000).

147. *See* L. RAFKIN, DIFFERENT MOTHERS: SONS AND DAUGHTERS OF LESBIANS TALK ABOUT THEIR LIVES 13–15 (1990) (stating that "[a]lmost every contributor talks about keeping mom's lesbianism a secret, from school friends, from neighbors, and sometimes from other family members . . . . [They] keep their mother's sexual preference from someone, for all of part of their lives, even if they live in places like San Francisco"); G.A. Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 23 CHILD PSYCHIATRY & HUM. DEV. 235, 243 (1993) (finding that "a general attitude of secrecy" prevailed among the children of lesbians); O'CONNELL, *supra* note 132, at 281; TASKER, *supra* note 40, at 232–33.

148. Kelsey White, Letter to the Editor, NEWSWEEK, Apr. 10, 2000, at 18.

149. Rekers, *supra* note 55, at 369 (citing Peggy Gillespie, *Preface*, *in* LOVE MAKES A FAMILY: PORTRAITS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARENTS AND THEIR FAMILIES xi (1999)).

> your father would hire a lawyer to try to take you away from me, your brother would go live with him, and worst of all your friends would tease you.[150]

The San Francisco Bay area is probably the most accepting area in the country of homosexuality and lesbigay relationships. Even so, a 1999 study of seventy-six adolescent children of gay mothers living in the San Francisco Bay area found that many perceived that they were stigmatized, and the study found a significant relationship between feeling stigmatized and lower self-esteem.[151] A 1993 national study of children and adolescents of forty-eight gay couples, most of whom were openly gay, found that the children were much more closeted about their gay parents than the parents themselves. Many kept their parents' sexual orientation a secret (even from relatives), many felt that they lacked support from families and relatives in dealing with the issue, and one third said that they often felt isolated.[152]

A 1993 case study of eleven young men and women who learned that their mother was a lesbian when she came out after their parent's divorce, reported that all felt a strong need to keep their mother's lesbianism a secret from peers:

> The theme of losing friends and of being judged was expressed by each subject with a moderate to high degree of intensity . . . . One daughter said, 'In high school, constantly, as soon as the subject changed to moms, you were on your toes about everything . . . . Secrecy, remaining silent, and overt lying were perceived to be an important aspect of relationship maintenance and were presented as problems . . . . Keeping secrets led to loneliness, particularly for the boys, although the intense need to talk to others was reported by everyone in this study. While fear of disclosure was strong, the desire to be known was also profound. Isolation was less problematic for those subjects who had contact with other children of lesbians, suggesting this is an important aspect of breaking the pattern of isolation . . . 'closeting' and 'passing' proved to be complicated both intrapsychically as well as socially. Several subjects spoke about the conflict between feeling intensely loyal to their mothers versus the need for self-protection; a conflict that often resulted in feelings of shame.[153]

Being closeted about one's family situation can be quite stressful, often producing feelings of shame, disloyalty, and anxiety.[154] Continually keeping one's identity closeted or "passing" (i.e., pretending that one's parents are heterosexual) to conform to the dominant group identity can be psychologically harmful or stressful.[155] As Professor Tasker explains, "One aspect that is common to lesbian and gay parents and their children is coping with the constant possibility of experiencing the effects of prejudice . . . . Fear of possible homophobia is [] a stressful experience . . . . The child, like his or her parents,

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150. Doolittle, *supra* note 146, at 677 (quoting Martha Miller, *An Unsent Letter*, *in* LESBIANS RAISING SONS 196, 198 (Jess Wells ed. 1997)).

151. Tamar D. Gershon, Jeanne M. Tschann, & John M. Jemerin, *Stigmatization, Self-Esteem, and Coping Among the Adolescent Children of Lesbian Mothers*, 24 J. ADOLESCENT HEALTH 438, 443 (1999).

152. *See* Margaret Crosbie-Burnett & Lawrence Helmbrecht, *A Descriptive Empirical Study of Gay Male Stepfamilies*, 42 FAM. RELATIONS 256, 260 (1993).

153. O'Connell, *supra* note 132, at 289–90, 294–95.

154. *See id.*

155. *See* Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 900 (2006).

will constantly have to make decisions about when it is safe to 'come out' about his or her family and be aware of the possibility of homophobia in each new social situation encountered."[156]

Thus, children living with lesbigay parents frequently report concerns about peer rejection and often go to considerable lengths to keep their parents' sexuality a secret. Although this stressor is unique to children of lesbigay parents, it is probably not very different in magnitude from the many other peer-related stressors commonly experienced by adolescents, and research shows that the children of lesbigay parents have normal peer relationships. Nonetheless, as the narratives of the children of lesbigay parents make clear,[157] it would be a mistake to underestimate the significance of the psychological toll taken on these children as a result of teasing or bullying[158] as well as the disruption in their lives caused by attempting to hide their parents' sexual orientation. For example, a recent study of the ten-year-old children of lesbian parents found that, despite the fact that many of the children attended schools providing "LGBT-affirmative educational environments,"[159] forty-three percent of the children were teased about their mothers' sexual orientation. This made them feel "angry, upset, or sad," and such experiences were correlated with symptoms of overall psychological distress.[160]

But as the U. S. Supreme Court made clear in *Palmore v. Sidoti*[161] (striking down laws prohibiting interracial marriage), societal prejudice cannot be a relevant consideration when deciding public policy, even when that prejudice extends to the children of parents who are members of stigmatized groups. Accordingly, the reactions of others to a child's lesbigay parent should not and cannot be grounds for the denial of parenting rights to gays and lesbians.[162] "[G]ranting equal rights to nonheterosexual parents should not require . . .

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156. Tasker, *supra* note 40, at 237.

157. *See* Rekers, *supra* note 55, at 366–76 (reviewing narrative accounts).

158. Bullying takes a substantial psychological and physical toll on children, and negatively impacts their academic performance. *See* Dorothy Seals & Jerry Young, *Bullying and Victimization: Prevalence and Relationship to Gender, Grade Level, Ethnicity, Self-Esteem, and Depression*, 38 ADOLESCENCE 735 (2003).

159. Nanette Gartrell et al., *The National Lesbian Family Study: 4 Interviews with the 10-Year-Old Children*, 75 AM. J. ORTHOPSYCHIATRY 518, 523 (2005).

160. *Id.* at 522.

161. 466 U.S. 429, 433 (1983) (stating that "[i]t would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of the natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

162. *See* Blew v. Verta, 617 A.2d 31, 35 (Pa. Super. 1992) (stating that "[t]he trial judge is appropriately sensitive to the fact that Nicholas is embarrassed, confused and angry over other people's reactions to his mother and Sandy E.'s relationship. However, the merits of a custody arrangement ought not to depend upon *other people's* reactions. Would a court restrict a handicapped parent's custody because *other people* made remarks about the handicapped parent which embarrassed, confused and angered the child? We think not").

finding that [their] children do not encounter distinctive challenges or risks, especially when these derive from social prejudice."[163]

Moreover, as popular culture increasingly normalizes homosexuality and lesbigay relationships (e.g., television shows featuring positive portrayals of gay characters, prominent "out" celebrities, and the increasing "political correctness" of gay marriage), future generations will likewise increasingly perceive lesbigay relationships as normal or quasi-normal, thus making it less likely that the children of lesbigay parents will be teased about their parents' sexual orientation.

C. Does the Mental Health Status or Sexual Behavior of Lesbigay Parents Put Children At Risk?

Some courts and commentators express the concern that gay and lesbian parents are more likely to have mental health problems[164] that negatively affect their children's well being.[165] This concern likely reflects residues of the time when homosexuality was considered to be a mental illness.[166] In 1973, the American Psychiatric Association removed homosexuality as a diagnostic category for mental disorder from its *Diagnostic and Statistical Manual of Mental Disorders*, the standard reference for psychiatric diagnosis.[167] Although homosexuality is *not* a mental illness, research indicates that homosexual populations suffer from a higher prevalence rate of certain psychiatric disorders

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163. Stacey & Biblarz, *supra* note 1, at 178.

164. *See, e.g.*, Byrd, *supra* note 55, at 220–22 (discussing higher prevalence rate of mental health problems among lesbigay populations); Rekers, *supra* note 55, at 331–41 (stating that studies "generally find that the majority of homosexually-behaving adults have a psychiatric disorder while a majority of exclusively heterosexually-behaving adults do not have a psychiatric disorder").

165. Parental mental illness can affect children in a variety of ways. For example, research shows that maternal depression hinders cognitive and psychosocial development, and possibly even brain development in infancy and childhood, and that depressed mothers tend to have ineffective parenting skills and children who exhibit behavioral, emotional, and academic problems. There also is a higher prevalence rate of psychopathology among children of depressed mothers. *See also* Geraldine Dawson et al., *Frontal Brain Electrical Activity in Infants of Depressed and Nondepressed Mothers: Relation to Variations in Infant Behavior*, 11 DEV. & PSYCHOPATHOLOGY 589 (1999) (finding that infants of depressed mothers have diminished electrical activity in the left frontal lobe of the brain); Constance Hammen & Patricia A. Brennan, *Depressed Adolescents of Depressed and Nondepressed Mothers: Tests of an Interpersonal Impairment Hypothesis*, 69 J. CONSULTING & CLINICAL PSYCHOL. 284 (2001) (finding that depressed children of depressed mothers had more negative interpersonal behaviors and cognitions than the depressed children of non-depressed mothers). *See generally* MARIAN RADKE-YARROW, CHILDREN OF DEPRESSED MOTHERS: FROM EARLY CHILDHOOD TO MATURITY (1998); Sherryl H. Goodman & Ian H. Gotlib, *Risk for Psychopathology in the Children of Depressed Mothers: A Developmental Model for Understanding Mechanisms of Transmission*, 106 PSYCHOL. REV. 458 (1999).

166. *See* Cameron, *supra* note 33, at 289 (stating that "[o]f the major sexual deviations, e.g., adultery, prostitution, homosexuality, folk psychology considers homosexuality unusually dangerous . . . . In common parlance, homosexual practitioners are considered and called 'weird' or 'sick' – the same concept has appeared in psychiatry in more sophisticated terms, e.g., 'mentally ill,' 'emotionally troubled,' or 'diseased'").

167. *See* Herek, *supra* note 40, at 613.

than the general population, including anxiety and depression, substance abuse and suicidal behavior.[168]

The rates of suicidal ideation and behavior among young gay men are three to four times higher than that among young heterosexual men. This epidemiological finding has been replicated in several recent rigorous studies that used methodologies (e.g., study of twins with divergent sexual orientations; study of eighty percent of a birth cohort in New Zealand) designed to achieve more representative samples and to better control for extraneous variables.[169] In 1985, a nationwide health survey of 1,925 lesbian women (most between the ages of 25-44), found "a distressingly high prevalence of life events and behaviors related to mental health problems . . . . Twenty-one percent of the sample had thoughts about suicide sometimes or often, and 18% actually had tried to kill themselves . . . . More than 68% of lesbians reported having had a range of mental health problems in the past, including long-term depression and sadness, constant anxiety and fear, and other mental health concerns."[170] Like other studies (*see infra*), the nationwide survey also found high rates of substance abuse among lesbians.[171] The largest study to date is a 2001 national epidemiological study conducted in the Netherlands (probably the most accepting country in the world of gays and lesbians), which found that gays and lesbians had more mental and physical health problems than the general population.[172]

Three recent large-scale national studies in the United States are particularly informative. They used large national data sets collected by U.S. federal agencies, and thereby avoided some of the sample selection biases of much previous research while allowing a comparison between demographically equivalent heterosexual and homosexual populations.[173] In sum, these studies

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168. *See* I. H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCOL. BULL. 674 (2003) (reviewing studies). *See, e.g.*, David M. Ferguson, L. John Horwood, & Annette L. Beautrais, *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCH GEN PSYCHIATRY 876 (1999); Richard Herrell et al., *Sexual Orientation and Suicidality: A Co-Twin Control Study in Adult Men*, 56 ARCH GEN PSYCHIATRY 867 (1999) (discussing sexual orientation and suicidality); Theo G. M. Sandfort, Ron de Graaf, Rob V. Bijl, & Paul Schnabel, *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study (NEMESIS)*, 58 ARCH GEN PSYCHIATRY 85 (2001) (discussing homosexual behavior and psychiatric disorders).

169. *See* Ferguson et al., *supra* note 168, at 876 (reporting results of a "longitudinal study of a birth cohort of 1,265 children in Christchurch, New Zealand"); HERELL ET AL., *supra* note 168, at 867 (reporting results of a "co-twin control study").

170. Judith Bradford, Caitlin Ryan, and Ester D. Rothblum, *National Lesbian Health Care Survey: Implications for Mental Health Care*, 62 J. CONSULTING & CLIN. PSYCHOL. 228, 239, 241 (1994).

171. *Id.*

172. *See* Theo G. M. Sandfort et al., *Sexual Orientation and Mental and Physical Health Status: Findings From a Dutch Population Survey*, 96 AM. J. PUB. HEALTH. 1119, 1122–24 (2006).

173. *See* Susan D. Cochran & Vickie M. Mays, *Estimating Prevalence of Mental and Substance-Using Disorders Among Lesbians and Gay Men From Existing National Health Data*, *in* SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY AND DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE 143, 146 (Allen M. Omoto & Howard S. Kurtzman eds. 2006) (stating that "[s]ampling bias and the absence of heterosexual control groups stand as two of the major difficulties today in interpreting the body of empirical evidence that has accumulated suggesting that lesbians and gay

found: gay men have higher rates of panic attacks and suicide attempts than heterosexual men; lesbians have higher rates of substance abuse, posttraumatic stress disorder, and anxiety disorders than heterosexual women; and both gays and lesbians have higher rates of depression than heterosexuals.[174] In addition, gays and lesbians have higher prevalence rates of multiple psychiatric disorders and higher utilization rates of mental health services.[175] Importantly, however, the studies also show that although they have higher rates of certain mental disorders, most gays and lesbians have no such disorders.[176]

The rate of substance abuse among the homosexual population is also higher than in the general population. A 2003–2005 nationwide epidemiological study of 10,000 gay and bisexual men conducted by the Centers for Disease Control found that 42% had recently used drugs (77% had used marijuana, 37% cocaine, 29% ecstasy, 28% poppers (amyl nitrate), and 27% stimulants).[177] A large Australian study conducted in the 1990's found that twenty-five percent of lesbian and bisexual women had a history of injecting drug use,[178] and a study of homosexual and bisexual men in the San Francisco/Berkeley area found that twelve percent had reported injecting drug use in the last six months.[179] These data are roughly consistent with the findings of other recent smaller-scale studies[180] finding "*remarkably high rates*" of lifetime drug use among homosexuals.[181] But many of the studies used sampling methods that did not closely match the homosexual and heterosexual comparison groups on relevant demographic variables, and studies using better matching procedures, while still finding higher substance abuse rates in the homosexual population, find less significant disparities.[182] For example, a 1980's survey of 3,400 gays and

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men experience greater than expected rates of depression, alcohol and drug use and psychiatric help-seeking").

174. *See id.* at 149–56.

175. *Id.* at 155.

176. *Id.* at 153 (emphasis added).

177. *See* Travis Sanchez et al., *Human Immunodeficiency Virus (HIV) Risk, Prevention, and Testing Behaviors – United States, National HIV Behavioral Surveillance System: Men Who Have Sex with Men, November 2003–April 2005*, 55 (No. SS-6) MMWR 1, 1 (July 7, 2006).

178. *See* Katherine Fethers, Caron Marks, Adrian Mindel, and Claudia S. Estcourt, *Sexually Transmitted Infections and Risk Behaviours in Women Who Have Sex with Women*, 76 SEXUALLY TRANSMITTED INFECTIONS 345, 348 (2000).

179. *See* George F. Lemp et al., *Seroprevalence of HIV and Risk Behaviors Among Young Homosexual and Bisexual Men: The San Francisco/Berkeley Young Men's Survey*, 272 J. AM. MED. ASS'N 449, 449 (1994).

180. *See* Michael C. Clatts, Lloyd A. Goldsamt, & Huso Yi, Grant Colfax et al., *Drug and Sexual Risk in Four Men Who Have Sex with Men Populations: Evidence for a Sustained HIV Epidemic in New York City*, 82 J. URBAN HEALTH i9, i12 (2005) (reporting results of study finding that 47% of gay men and lesbians in New York City had used methamphetamines, 28% powder cocaine, 7% crack cocaine, 20% speed, 28% ketamine, and 6% heroin); Grant Colfax et al., *Longitudinal Patterns of Methamphetamine, Popper (Amyl Nitrate), and Cocaine Use and High-Risk Sexual Behavior Among a Cohort of San Francisco Men Who Have Sex with Men*, 82 J URBAN HEALTH i62, i65 (2005) (reporting results of study finding that 23% of gay and bisexual men in San Francisco had used methamphetamine, 19% had used powder cocaine, and 37% had used amyl nitrate).

181. Clatts et al., *supra* note 180, at i12 (emphasis added).

182. *See* Tonda L. Hughes, Sharon C. Wilsnack, & Timothy P. Johnson, *Investigating Lesbians' Mental Health and Alcohol Use: What Is An Appropriate Comparison Group?*, *in* SEXUAL ORIENTATION

lesbians living in the Chicago area, found a higher prevalence of alcohol problems as well as marijuana and cocaine use among homosexuals than in the general population.[183] The higher rates were found only among women and older respondents; the rate of substance abuse among young homosexual men was the same as in the general population.[184] The study authors hypothesize that the high substance abuse rates among lesbians and older homosexuals may occur because: (1) homosexuals do not marry and raise children to the same extent as heterosexuals (both of which serve to reduce substance abuse); (2) lesbians may not adhere to traditional gender-role behaviors; and thus may drink more than heterosexual women; (3) bars are a particularly important social setting for the homosexual community.[185]

It is unknown which factors are responsible for the higher rates of depression, suicide, and substance abuse among gays and lesbians: the stress they experience as a result of the prejudice and discrimination and other social stressors accompanying gender and sexual non-conformity;[186] the shame or psychological conflict some may feel about their homosexuality; the psychological sequelae of high-risk sexual behaviors engaged in by some gay men; a biological vulnerability to certain mental illnesses,[187] or the absence of the stabilizing effects of marriage.[188] Marriage has positive effects on mental health by serving as a buffer against life stressors and by providing greater financial and emotional security, as well as greater social support, than does a cohabiting relationship lacking legal recognition.[189]

A related set of concerns expressed by courts and commentators involves the perception that homosexuals are sexually promiscuous and engage in high-risk sexual behaviors that expose their children to an unhealthy environment that sexualizes them prematurely or inappropriately. Such concerns are consistent with prevailing negative stereotypes of the "hyper-sexual"

AND MENTAL HEALTH: EXAMINING IDENTITY DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE 167, 178–79 (Allen M. Omoto & Howard S. Kurtzman eds. 2006) (reporting study findings and reviewing past research).

183. *See* David McKirnan & Peggy L. Peterson, *Alcohol and Drug Use Among Men and Women: Epidemiology and Population Characteristics*, 14 ADDICTIVE BEHAVIORS 545, 551–52 (1989) (reporting results of study finding that 23% of homosexuals had alcohol problems compared to 8-16% of the general population, 56% of homosexuals had used marijuana as compared to 26% of the general population, and 23% of homosexuals had used cocaine compared to 8.5 percent of general population).

184. *Id.* at 549–50.

185. *Id.* at 550.

186. *See generally* MEYER, *supra* note 168, (reviewing empirical studies suggesting that the higher prevalence of mental disorders among lesbigays is due in part to the effects of "minority stress," which may include experiencing prejudice and discrimination, expectations of rejection and discrimination, internalizing societal prejudices, and the stress of concealing one's sexual identity).

187. *See* J. Michael Bailey, *Commentary: Homosexuality and Mental Illness*, 56 ARCH GEN PSYCHIATRY 883 (1999); Richard C. Friedman, *Commentary: Homosexuality, Psychopathology, and Suicidality*, 56 ARCH GEN PSYCHIATRY 887 (1999); Gary Remafedi, *Commentary: Suicide and Sexual Orientation*, 56 ARCH GEN PSYCHIATRY 885 (1999).

188. *See generally* MAGGIE GALLAGHER & LINDA J. WAITE, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2001).

189. *See* Herek, *supra* note 40, at 614–16 (reviewing research showing the positive effects of marriage on mental and physical health).

homosexual who is casual about sexual relationships. Because such views are likely to be seen as politically incorrect, they are less commonly expressed than those discussed above. However, they have been given new voice in several recent articles,[190] including one by Professor Lynn Wardle,[191] the best-known and most prolific legal scholar opposing lesbigay marriage and parenting rights. Professor Wardle writes:

> [O]ne of the very serious flaws of the existing research is that it ignores and evades the "hard questions" about the effect of homosexual activity by residential parents (and/or their partners) upon children . . . . [T]he critical questions concern how the sexual practices of adults affect the children whom they are raising. Researchers might look to the areas of child behavior that are most likely to be influenced by parental sexual behaviors – beginning with the sexual behaviors, interests, and identification of children – including premature or delayed sexual behavior, types of sexual behaviors, risky sexual behavior, sexual self-identification, fidelity in sexual relations, and promiscuity in sexual relations, to name a few.[192]

Professor Wardle emphasizes a recent Netherlands study showing that even gays with "steady partners" frequently have casual sex with other partners, engage in risky sexual behaviors, have high rates of HIV/AIDS infections, and that the "steady partnerships" do not last long and have very high rates of dissolution. Wardle interprets the extant research as indicating that "[h]omosexual behavior among [gay male] youth is associated with suicidal behavior, prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behavior with multiple sex partners, and premature sexual activity."[193] For Wardle, "[t]his data raises serious concerns about the welfare of children placed for adoption in homes of lesbians and gays."[194] In addition, Professor Wardle collects narrative accounts provided by children of lesbigay parents. He selects narratives and custody cases that illustrate the instability of the parent's homosexual relationships;[195] the premature sexualization of children;[196] the prevalence of child molestation by the parents' lover;[197] the high incidence of domestic violence and drug and alcohol abuse among lesbigay couples;[198] the stress of living in the closet;[199] "the risk of disease and death in the household . . . hastened by sexually-transmitted diseases common to gays and lesbians;"[200] and, "the irresponsible neglect of the

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190. *See* Byrd, *supra* note 55; REKERS, *supra* note 55, at 342–46; 381–86.

191. *See* Wardle, *supra* note 6.

192. *Id.* at 518.

193. Wardle, *supra* note 48, at 854.

194. Wardle, *supra* note 6, at 527 (citing Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029 (2003)).

195. *Id.* at 519–20.

196. *Id.* at 520–22.

197. *Id.* at 521–22.

198. *Id.* at 523.

199. *Id.* at 524.

200. *Id.* at 525. *See* Wardle, *supra* note 48, at 865 (stating that "[t]here is some indication that the life expectancy of adults who engage in homosexual behavior may be significantly shorter than that

needs of the child by the parent and partners obsessed with his or her adult sexual relationship."[201] This paints a picture of many gays and lesbians as being hypersexual,[202] drug and alcohol abusing, unsafe-sex practicing philanderers – perhaps even child molesters.

But does the empirical evidence support Professor Wardle's claims? First, the empirical evidence does not support the claim that homosexuals are more likely to molest children. Studies have found that homosexuals are no more likely to sexually abuse children than are heterosexuals.[203] Second, there is a dearth of reliable comparative data on domestic violence rates in lesbigay and heterosexual relationships. Studies have produced widely discrepant findings, in large part due to varying sample characteristics, time frames, and definitions and measures of perpetration and victimization.[204] For example, studies have reported prevalence rates for physical violence between seventeen and fifty-two percent in lesbian relationships.[205] However, the evidence tends to suggest that the prevalence of violence in lesbian relationships is equivalent, if not lower, than that found in heterosexual relationships.[206] It is unclear whether there is a higher prevalence rate of violence in gay relationships. While one recent study found a higher prevalence rate, which may reflect the fact that "intimate partner

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of heterosexual adults and the likelihood of parental death during the childhood years of significantly higher for adults who engage in homosexual behavior"). *See also* SANDFORT ET AL., *supra* note 172, at 1122–24 (reporting results of large Dutch epidemiological study finding that gays and lesbians were in poorer physical health than the general population).

201. *See* Wardle, supra note 6, at 514–24.

202. *Id.* at 528. It is not uncommon to "perceive lesbians and gay men as exclusively sexual beings, while heterosexual parents are perceived as people who, along many other activities in their lives, occasionally engage in sex." Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 624 (1996).

203. *See* Patterson & Redding, *supra* note 3, at 42–43 (reviewing studies). *See also* Gartrell et al., *supra* note 159, at 522 (reporting results of study finding lower levels of physical and sexual abuse among the children of lesbian mothers as compared to national norms, and suggesting that "the absence of adult heterosexual men in households may be protective against abuse and its devastating psychological sequelae").

204. *See* JANICE L. RISTOCK, NO MORE SECRETS: VIOLENCE IN LESBIAN RELATIONSHIPS 10–13 (2002); Lisa K. Waldner-Haugrud, Linda Vaden Gratch & Brian Magruder, *Victimization and Perpetration Rates of Violence in Gay and Lesbian Relationships: Gender Issues Explored*, 12 VIOLENCE & VICTIMS 173, 173–74 (1997).

205. *See* RISTOCK, *supra* note 204, at 10.

206. *See* PATRICIA TJADEN & NANCY THOENNES, U.S. JUSTICE DEP'T., OFFICE OF JUSTICE PROGRAMS, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 29–31 (2000) (reviewing previous studies finding equivalent or lower rates of domestic violence among lesbian couples as compared to heterosexual couples, and reporting results of study finding similar rates of violence among lesbian couples as has been reported with heterosexual couples); Diane Helene Miller, *Domestic Violence in Lesbian Relationships*, 23:3 WOMEN & THERAPY 107, 110, 119–20 (2001); Gwat-Yong Lie & Sabrina Gentlewarrier, *Intimate Violence in Lesbian Relationships: Discussion of Survey Findings and Practice Implications*, 15 J. SOC. SERV. RES. 41, 47, 52 (1991) (reporting results of study finding rates of violence in lesbian relationships similar to those reported in heterosexual relationships). *Compare* Bradford et al., *supra* note 170, at 232 (reporting results of national lesbian health care survey finding that roughly 8% of lesbians reported having been abused by their lover), *with* TJADEN & THOENNES, *supra* 206, at 30 (finding that 21.5% of women in heterosexual relationships had been raped or physically abused by their partner).

violence is perpetrated primarily by men,"[207] another (smaller) study found a slightly lower rate of intimate violence among gay men with HIV/AIDS.[208] Finally, there are no empirical studies examining whether, as Wardle claims, lesbigay parents tend to neglect their parenting responsibilities to satisfy sexual obsessions. Conversely, the finding that there are no differences in the psychological adjustment of children raised by lesbigay and heterosexual parents[209] tends to undercut this claim, since parental neglect is linked to psychological maladjustment in children.[210]

The research does bear out several of Wardle's concerns. As compared to the heterosexual population, among gays and lesbians there is a much higher rate of substance abuse,[211] unsafe sex practices and sexually-transmitted diseases,[212] and likewise of promiscuity, relationship infidelity, and non-

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207. TJADEN & THOENNES, *supra* note 206, at 31 ("[S]ame-sex cohabiting men were nearly twice as likely to report being victimized by a male partner than were opposite-sex cohabiting men by a female partner . . . . These findings suggest that intimate partner violence is perpetrated primarily by men, whether against male or female partners."). *See also* WALDNER-HAUGRUD, *supra* note 204, at 175 (stating that although research has generally failed to find significant differences in violence rates between gay and lesbian couples, it is assumed that males are more violent in general than females and "[g]iven that gay male dyads have two potential perpetrators instead of one . . . researchers continue to expect greater gay male violence rates").

208. *See* Laura M. Bogart et al., *The Association of Partner Abuse and Risky Sexual Behaviors Among Women and Men with HIV/AIDS*, 9 AIDS & BEHAV. 325, 329 (2005) (reporting results of study finding that 16% of gay/bisexual men had been the perpetrator of abuse within an intimate relationship whereas 23% of heterosexual men had perpetrated such abuse).

209. *See supra* notes 40, 96–106 and accompanying text.

210. See generally NATIONAL ACADEMY OF SCIENCES, UNDERSTANDING CHILD ABUSE AND NEGLECT 212-16 (1993).

211. *See supra* notes 177–185 and accompanying text. The high rate of substance abuse among gay men is, in turn, partly responsible for the high rate of unsafe sex practices in this population. *See* Colfax et al., *supra* note 180, at i63 (stating that "[t]he general relationship between noninjection drug use and HIV risk behavior has been well documented"). A recent study directly comparing the rates of substance abuse among gay/bisexual men and heterosexual men found that 63% of gay/bisexual men had abused substances before or during sex whereas only 32% of heterosexual men had done so. *See* Bogart et al., *supra* note 208, at 329.

212. *See* Kate Buchacz et al., *Syphilis Epidemics and Human Immunodeficiency Virus (HIV) Incidence Among Men Who Have Sex with Men in the United States: Implications for HIV Prevention*, 32:10 SEXUALLY TRANSMITTED DISEASES S73, S73 (2005) (reporting outbreaks of syphilis among gay men in major cities across the United States, and noting that syphilis facilitates HIV transmission); Maria L. Ekstrand et al., *Gay Men Report High Rates of Unprotected Anal Sex with Partners of Unknown or Discordant HIV Status*, 13 AIDS 1525, 1525 (1999) (reporting results of longitudinal study in San Francisco of 510 young gay men finding that 50% had participated in unprotected anal intercourse, often with a partner of unknown HIV status); Fethers et al., *supra* note 178, at 345 (finding high prevalence rates of hepatitis C, bacterial vaginosis, and HIV-risk behaviors among bisexual and lesbian women); Beryl A. Koblin et al., *High-Risk Behaviors Among Men Who Have Sex with Men in 6 US Cities: Baseline Data From the EXPLORE Study*, 93 AM. J. PUB. HEALTH 926, 929 (2003) (reporting results of survey of 4295 gay and bisexual men finding that 78% had engaged in sexual intercourse with a partner of unknown HIV status and 22% had engaged in unprotected sex in the six-month period preceding the study); George F. Lemp et al., *Seroprevalence of HIV and Risk Behaviors Among Young Homosexual & Bisexual Men*, 272 J. AM. MED. ASS'N 449, 449 (1994) (reporting survey of 425 young homosexual and bisexual men in Berkeley and San Francisco finding that 9.4% tested positive for HIV, 19.8% for hepatitis B, and 1% for syphilis); Sanchez et al., *supra* note 177, at 1 (reporting findings from epidemiological survey of 10,000 gay and bisexual men in the United States that 58% had unprotected anal sex with committed partners and 34% with casual sex partners).

monogamy.[213] It is problematic, however, to compare monogamy rates between lesbigay couples and heterosexual couples. Professor Herek notes:

> [I]mportant differences have been observed between those who choose to marry and those who do not, with the former generally manifesting greater commitment [and] higher levels of relationship satisfaction . . . . [The] research on different-sex couples routinely controls for self-selection into marriage by differentiating those who are married from, for example, unmarried cohabiting couples. Because the vast majority of U.S. same-sex couples lack legal marriage as an option, a comparable distinction cannot be made when studying them. As a result, many research samples of same-sex couples have been more heterogeneous than samples of heterosexual couples . . . This greater heterogeneity might be expected to produce findings that overstate the extent of dissimilarities between same-sex and different-sex couples because observed differences might be attributed to sexual orientation when in fact they are due to other factors, such as marital status.[214]

Moreover, about half of adult gays and lesbians report being in a committed relationship, many of which have lasted for at least ten years.[215]

But there seems to be little dispute in the research literature that the rates of nonmonogamy in gay and lesbian partnerships are higher than in heterosexual unmarried partnerships,[216] and that gay men have on average a substantially greater number of sexual partners over their lifetime than do heterosexuals. Commenting on their landmark 1980's longitudinal study of 156 long-term gay couples, which found that "[o]nly seven couples have a totally exclusive sexual relationship," McWhirter and Mattison observed that "sexual exclusivity among these couples is infrequent, yet their expectations of fidelity are high. Fidelity is not defined in terms of sexual behavior but rather by their emotional commitment to each other . . . . Many of the couples have started their relationship with either explicit agreements or implicit assumptions about sexual exclusivity, which they have modified over time, finding emotional

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213. *See* Byrd, *supra* note 55, at 226–27 (reviewing empirical studies); Colfax et al., *supra* note 180, at i65 (reporting results of longitudinal survey of 736 gay and bisexual San Francisco men finding that 49% had more than ten male sex partners during a six-month period and 17% had between six and nine partners); Koblin et al., *supra* note 212, at 929 (reporting results of survey of 4295 gay and bisexual men finding that 42% had more than ten sexual partners in the six-month period preceding the study and 18% had between six and nine partners); Lemp et al., *supra* note 212, at 451 (reporting results of study of 425 young gay and bisexual men in San Francisco/Berkeley finding that 27% reported having had over fifty sexual partners in their lifetime); Paul Van de Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 J. SEX RES. 349, 354 (1997) (reporting results of survey of 2583 Australian gay men finding that 47–50% had casual sex only and 15–25% were sexually monogamous, and that the modal number of lifetime male sex partners for older men was 101–500); Marie Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029, 1031 (2003) (reporting study results of finding that gay men with a steady partner had, on average, eight other sexual partners per year).

214. Herek, *supra* note 40, at 609–10.

215. *Id.* at 610.

216. *See* Virginia Rutter & Pepper Schwartz, *Gender, Marriage, and Diverse Possibilities for Cross-Sex and Same-Sex Pairs*, *in* HANDBOOK OF FAMILY DIVERSITY 82, 73–74 (David H. Demo, Katherine R. Allen, & Mark A Fine eds. 2000) (reviewing research studies).

fidelity more enduring."[217] Indeed, studies have found that gay and lesbian couples report the same levels of relationship satisfaction and commitment as heterosexual couples.[218] According to Rutter and Shwartz, "whether a gay relationship is open or closed to nonmonogamy has little impact on satisfaction, commitment, expectations for the future, or degrees of liking or loving their partner."[219] These findings suggest that lesbigay families are just as stable for childrearing as heterosexual families.

Thus, gays and lesbians have higher rates of depression, anxiety, and substance abuse than the general population, perhaps in part due to the effects of stigma and prejudice. In any case, epidemiological studies identify a number of population groups that have increased prevalence rates of particular mental and physical disorders[220] or relationship infidelity;[221] yet, we do not deny parenting or marriage rights to these groups on this basis. But as one commentator notes, "[t]he basic issue . . . is not whether some or many homosexuals can be found to be neurotically disturbed. In a society like ours where homosexuals are uniformly treated with disparagement or contempt—to say nothing of outright hostility—it would be surprising indeed if substantial numbers of them did *not* suffer from an impaired self-image and some degree of unhappiness with their stigmatized status."[222] Most gays and lesbians, however, do *not* have mental health or substance abuse problems.[223] And while gays have higher rates of promiscuity and relationship infidelity than do heterosexuals, it is unlikely that this would be equally true for homosexual couples who were parenting in the context of marriage or civil unions. Recent data, for instance, indicates that forty-one percent of lesbigay parents raising children have been together for five years or longer as compared to only twenty percent of heterosexual unmarried couples.[224] The normalization of lesbigay relationships through the legalization of same-sex marriage, and particularly childrearing in the context of these committed relationships would likely promote fidelity in

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217. DAVID P. MCWHIRTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252 (1984).

218. *See* Herek, *supra* note 40, at 610 (stating that "same-sex couples have not been found to differ from heterosexual couples in their satisfaction with their relationships or the social psychological processes that predict relationship quality"); Megan Fulcher et al., *Lesbian Mothers and Their Children: Findings From the Contemporary Families Study*, *in* SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE 281, 294 (Allen M. Omoto & Howard S. Kurtzman eds. 2006) (reporting study findings); L.A. Kurdek & K.P. Schmitt, *Interaction of Relationship Beliefs in Married, Heterosexual Cohabiting, Gay, and Lesbian Couples*, 51 J. PERSONALITY & SOC. PSYCHOL. 365, 365 (1986) (reporting study findings).

219. Rutter & Schwartz, *supra* note 216, at 73.

220. *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. text rev. 2000) (providing epidemiological data on prevalence of mental disorders).

221. *See* Herek, *supra* note 40, at 611 (citing research).

222. Judd Marmor, *Epilogue: Homosexuality and the Issue of Mental Illness*, *in* HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 391, 400 (Judd Marmor ed., 1980).

223. *See* Cochran & Mays, *supra* note 173, at 156 (stating studies show that "between half and three quarters of sexual minority respondents did not meet criteria for any [psychiatric] disorder").

224. Pawelski et al., *supra* note 1, at 351.

lesbigay relationships,[225] just as it does in heterosexual relationships.[226] A study of gay men who entered into civil unions in Vermont found that they were more likely to consider their relationship as being monogamous than men who chose not to enter into civil unions.[227] Additionally, allowing gays and lesbians to marry may reduce the rates of mental health and substance abuse problems.[228]

D. Do Children Need a Mother and a Father (and Two Biological Parents)?

One of the most difficult questions to answer is whether dual-gender parenting (parenting by a father and a mother) is more optimal for child development than same-gender parenting. As Hernandez notes,

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the legislature could find that the general rule will usually hold.[229]

Similarly, as Goodridge notes:

> [It is] rational to posit that the child himself might invoke gender as a justification for the view that neither of his parents "understands" him, or that they "don't know what he is going through," particularly if his disagreement or dissatisfaction involves some issue pertaining to sex. Given that same-sex couples raising children are a very recent phenomenon, the ramifications of an adolescent child's having two parents but not one of his or her own gender have yet to be fully realized.[230]

Although the issue is not often addressed by advocates of lesbigay parenting, the opponents of lesbigay parenting frequently express arguments in support of dual-gender parenting. Specifically, opponents claim that dual gender parents provide the ideal family structure for children because mothers and fathers

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225. *But cf.* Timothy J. Dailey, COMPARING THE LIFESTYLES OF HOMOSEXUAL COUPLES TO MARRIED COUPLES 6-8, FAMILY RESEARCH COUNCIL REPORT, accessed at www.frc.org/get.cfm?i=ISO4C02 (retrieved on Aug. 20, 2006) (noting that since the Netherlands and Sweden legalized same-sex marriage in 2001 and 2003, very few gay and lesbian couples have chosen to get married, and that very few gay and lesbian couples in Vermont have chosen to enter civil unions since that state instituted civil union laws for same-sex couples in 2000; and, arguing that these data "indicate[] that even in the most 'gay friendly' localities, the vast majority of homosexual and lesbians display little inclination for the kind of lifelong, committed relationships that they purport to desire to enter.").

226. *See* HEREK, *supra* note 40, at 615 (citing research studies showing that "[b]y creating barriers and constraints on dissolving the relationship, marriage can be a source of relationship stability and commitment").

227. S.E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 574 (2005).

228. *See* GALLAGER & WAITE, *supra* note 188; Herek, *supra* note 40, at 614-16; *see also supra* and accompanying text.

229. Hernandez, *supra* note 19, at 7.

230. *Goodridge*, 789 N.E.2d at 1000 n.29 (Cordy, J., dissenting).

bring unique, complementary skills to childrearing (the "complementarity hypothesis").[231] Under this theory, children need opposite-gender parents (and particularly a same-gender parent) for gender role development and socialization.[232]

Indeed, most of us probably have the intuition that children benefit by having two parents of the opposite gender, an intuition confirmed by the fact that children often have a very different kind of relationship with their mother than they do with their father.[233] But what does the research show? The research on this question is unclear and difficult to interpret, particularly when considering whether there is something unique and important about paternal nurturance. This question also broaches the issue of whether a two-parent lesbian family or two-parent heterosexual family is better for a child.[234]

On the other side of the debate sit the self-described "deconstructionists" of traditional family structure. In their celebrated article, "*Deconstructing the Essential Father*," Professors Silverstein and Auerbach claim that fathers do not contribute anything importantly unique or essential to childrearing.[235] They argue that mothers and fathers socialize children in much the same way.[236] To them, there is nothing essential about the presence of a male role model in the home of a boy.[237] Studies purporting to show that father-absence produces negative outcomes are often confounded with other factors (such as low socioeconomic status) that correlate with father-absence.[238] In sum, the deconstructionists argue that it is *not family structure that matters, but rather, parenting skills and nurturance*.[239]

Clearly, research shows that children do best when raised in two-parent families as opposed to single-parent families.[240] The research on this point is so

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231. Wardle, *supra* note 48, at 857–63; *see, e.g.*, Byrd, *supra* note 55, at 214–17.

232. *Id.*

233. Steven Pinker, *Block that Metaphor!*, THE NEW REPUBLIC, Oct. 9, 2006, at 24 (urging reader to "think of the difference in meaning between 'to mother a child' and 'to father a child'").

234. Lesbian couples constitute the majority of homosexual couples raising children. *See* PAWELSKI ET AL., *supra* note 1, at 351 (summarizing 2000 U.S. Census data finding that 34.3% of lesbian couples are raising children as compared to 22.3% of gay couples).

235. Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 AM. PSYCHOLOGIST 397 (1999).

236. *Id.*

237. *Id.*

238. *Id.*

239. *See id. See also* Adele Eskeles Gottfried & Allen W. Gottfried, *Impact of Redefined Families on Children's Development: Conclusions, Conceptual Perspectives, and Social Implications*, *in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 224, 228 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994) (arguing that there is "no clear, consistent, or convincing evidence that the alterations in family structure per se are detrimental to children's development . . . [V]ery simply, love, nurturing, encouragement, respect, empathy, and the like are the ingredients that are basic to positive developmental outcomes in any family configuration.").

240. *See generally* P.R. AMATO & A. BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997); S. MCLANAHAN & G. SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); DAVID POPENOE, LIFE WITHOUT FATHERS: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 176 (1999) (stating that "in three decades of work as a social scientist, I know of few other

compelling that it cannot be gainsaid. It may be, however, that what matters is having *two* parents, not necessarily a mother and a father. Noting that "[c]laims that children need both a mother and a father . . . rely on studies that conflate the gender of parents with other family structure variables,"[241] Professors Stacey and Biblarz reviewed eighty studies that compared child outcomes in single-mother versus single-father families or two-parent families with same-sex parent families. They found no differences between a child's psychosocial adjustment and social success in two-lesbian parent families and mother-father parent families, and that any differences in parenting skills tended to favor women over men.[242] A recent study that directly compared two-parent lesbian families, two-parent heterosexual families, and heterosexual single-mother families[243] found a number of differences between the two-parent versus single-parent families in relation to children's socio-emotional development, parenting stress levels, and the degree of mothers' warmth with the child. Most of the differences favored the two-parent families.[244] There were, however, virtually no differences between two-parent lesbian and two-parent heterosexual families.[245] Similarly, other research has found that children raised by a mother and father and children raised by a mother and grandmother have equivalent outcomes in terms of their psychosocial adjustment.[246]

Nonetheless, the parenting styles of mothers and fathers may be complementary in ways important for child development:

> A growing body of research indicates that fathers may supplement what the mother offers . . . by teaching, modeling, or mentoring in ways that may not necessarily be part of the mother's repertoire of skills. Thus, it seems that parents can complement one another, modeling different sorts of behaviors.[247]

The differences in how mothers and fathers parent appear to matter;[248] positive father-child interactions contribute uniquely to children's social, emotional, and intellectual development.[249]

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bodies of data in which the weight of the evidence is so decisively on one side of the issue: on the whole, for children, two-parent families are preferable to single-parent and stepfamilies").

241. Judith Stacey & Timothy Biblarz, *(How) Does the Gender of Parents Matter?*, Paper presented at the Conference on Evolving Families, Institute for Social Science, Cornell University (Apr. 7, 2006).

242. *Id.*

243. Golombok et al., *supra* note 99, at 22.

244. *See id.* at 30.

245. *Id.* at 25–30.

246. ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART (1986).

247. Frank F. Furstenberg, Jr., *Social Capital and the Role of Fathers in the Family*, *in* MEN IN FAMILIES: WHEY DO THEY GET INVOLVED? WHAT DIFFERENCE DOES IT MAKE? 295, 296 (Alan Booth & Ann C. Crouter eds., 1998).

248. Professors Lamb and Lewis state that "[w]hatever the difference between maternal and paternal behavioral styles, there is impressive evidence that mothers and fathers may have different effects on child development." Michael E. Lamb & Charlie Lewis, *The Development and Significance of Father-Child Relationships in Two-Parent Families*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 272, 277 (Michael E. Lamb ed., 4th ed. 2004).

249. *See generally* HENRY B. BILLER, FATHERS AND FAMILIES: PATERNAL FACTORS IN CHILD DEVELOPMENT (1993) (concluding that "[t]he father is extremely important for the child's intellectual, emotional and social development").

First, mothers and fathers discipline, play, and talk with their children differently. "[T]he distinctive maternal and paternal styles are quite robust and are still evident when fathers are highly involved in child care."[250] Whereas mothers spend more time on childcare activities, fathers spend more time playing with the child. When playing with the child, "mothers function as distress regulators and fathers as challenging but reassuring play partners."[251] Moreover, father's play with children is more physical, unpredictable, and challenging[252] a kind of apprenticeship for the child ("come on, let me show you how").[253] "Because these types of play elicit more positive responses from infants, young children prefer to play with their fathers when they have a choice."[254] Father involvement is also related to children's early cognitive-motivational and linguistic development.[255] Due to the fact that fathers use more complex sentences, imperatives, and attention-getting utterances than mothers do, they may make a unique contribution to children's early language development.[256]

Second, father-child interaction also promotes children's social competence and later popularity with peers.[257] Conversely, children raised without fathers are more likely to have deficiencies in peer relationships.[258] Research suggests that the father's role in promoting positive peer relationships is multifaceted. Fathers teach children how to manage their emotions, the father-child bond leads to the child's development of appropriate cognitive-representational models of relationships, fathers play a unique role as "advisors, social guides, and rule providers," and, fathers help provide social opportunities for the child.[259] As the National Academy of Sciences concluded, "[y]oung children who play regularly with their fathers seem to get along better with peers and display greater social confidence. Attempts to understand the 'active ingredient' in fathers' play that promotes peer competence have revealed that children learn critical lessons about how to recognize and deal with highly charged emotions in the context of playing with their fathers."[260] Positive father-child relationships also enhance children's self-esteem.[261]

Third, social-learning and social-cognitive theories of child development suggest that the presence of a same-gender, as well as opposite-gender, parent is important to children's conception of appropriate gender-role behavior and

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250. Lamb & Lewis, *supra* note 248.

251. Ross D. Parke et al., *Fathering and Children's Peer Relationships*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 311 (4th ed. 2004) (discussing theoretical and empirical work).

252. *Id.* at 277; NATIONAL ACADEMY OF SCIENCES, AMERICA'S FATHERS AND PUBLIC POLICY: REPORT OF A WORKSHOP 7–8 (Nancy A. Crowell & Ethel M. Leeper eds. 1994).

253. POPENOE, *supra* note 240, at 143.

254. NATIONAL ACADEMY OF SCIENCES, *supra* note 252, at 276.

255. *See* LAMB & LEWIS, *supra* note 248, at 285 (reviewing studies).

256. *Id.* at 286.

257. *Id.*

258. PARKE ET AL., *supra* note 251, at 314–24 (reviewing recent research studies).

259. *Id.* at 311–12 (reviewing recent research studies).

260. NATIONAL ACADEMY OF SCIENCES, *supra* note 252, at 8.

261. D. Wenk et al., *The Influence of Parental Involvement on the Well-Being of Sons and Daughters*, 56 J. MARRIAGE & THE FAMILY 229, 232 (1994).

relationships with the opposite gender.[262] Although research has not yet found that the differential interactions and play styles of mothers and fathers affect children's gender-role development,[263] it is likely that children learn about appropriate gender role behavior by observing and internalizing the behavior of their parents. "Children learn to be adults by watching adults,"[264] with "[b]oys and girls build[ing] their notions of their sex roles from experiences with both sexes."[265] Indeed, research has, for example, found a positive relationship between the sensitivity of a father's play with his child and the child's sense of security in romantic relationships experienced during young adulthood.[266]

Finally, father involvement predicts children's short- and long-term psychosocial adjustment, even in adulthood. Studies have found a correlation between the level of fathers' involvement and children's later emotional well-being, happiness, life satisfaction, educational achievement, and psychosocial adjustment in young- and mid-adulthood.[267] One of the most comprehensive and methodologically sophisticated studies to date is a twelve-year longitudinal study involving interviews of two thousand married heterosexual couples and their children (when the children were between the ages of 7 and 19, and again at ages 19 to 31).[268] The study controlled for paternal and maternal characteristics and involvement in order to assess the independent effects of maternal and paternal involvement on different aspects of children's well-being (educational attainment, kinship ties, friendships, life satisfaction, psychological distress, and self-esteem).[269] Although considerable overlap was found between maternal and paternal effects, small, unique effects were found for mothers and fathers. Mothers contributed somewhat more to children's kinship ties and friendships, whereas fathers contributed somewhat more to children's educational attainment, self-esteem, and psychological health. Both seemed to contribute equally to children's life satisfaction.[270] Overall, "the results suggest that fathers are about as important as mothers in predicting children's long-term

262. *See* Baumrind, *supra* note 50, at 134.

263. *See* Lamb & Lewis, *supra* note 248, at 287 (stating that "[s]ocial learning theorists have long assumed that the different interactional styles of mothers and fathers must somehow help boys and girls acquire gender-appropriate behavioral repertoires," but that "[c]onsistent differences between parents have been hard to identify" vis-a-vis children's gender-role development).

264. WARDLE, *supra* note 48, at 860–61 (quoting David L. Giveans & Michael K. Robinson, *Fathers and the Preschool-Age Child*, *in* DIMENSIONS OF FATHERHOOD 115, 128 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985).).

265. Wardle, *supra* note 48, at 861 (quoting WILLIAM S. APPLETON, FATHERS AND DAUGHTERS 72 (1981).)

266. *See* K.E. Grossman et al., *Attachment Relationships and Appraisal of Partnership: From Early Experience of Sensitive Support to Later Relationship Representation*, *in* PERSONALITY IN THE LIFE COURSE: PATH TO SUCCESSFUL DEVELOPMENT 73 (L. Pulkkinen & A. Caspi eds., 2002).

267. Lamb & Lewis, *supra* note 248, at 291–92 (summarizing results of studies); *accord* P. R. Amato, *More Than Money? Men's Contributions to Their Children's Lives*, *in* MEN IN FAMILIES: WHEN DO THEY GET INVOLVED? WHAT DIFFERENCE DOES IT MAKE? 241, 255–56 (Alan Booth & Ann C. Crouter eds., 1998).

268. Amato, *supra* note 267, at 258–59.

269. *Id.* at 268–69.

270. *Id.*

outcomes."[271] Similarly, a longitudinal study of 584 children living with both biological parents, which assessed the children at ages 7-11, 11-16 and 17-24,[272] found that positive paternal involvement had a small effect in promoting educational attainment and in preventing psychological distress and delinquency.[273]

A review of the empirical literature concludes that "father love sometimes explains a unique, independent portion of the variation in specific child outcomes, over and above the portion explained by mother love . . . . father love is heavily implicated not only in children's and adults' psychological well-being and health, but also in an array of psychological and behavioral problems."[274] As Professor Popenoe explains:

> Even with older children the father's mode of parenting is not interchangeable with the mother's. Men typically emphasize play more than caretaking, and their play is more likely to involve a rough-and-tumble approach. In attitude and behavior, mothers tend to be responsive and fathers firm; mothers stress emotional security and relationships, and fathers stress competition and risk taking; mothers typically express more concern for the child's immediate well-being, while fathers express more concern for the child's long-run autonomy and independence . . . The importance of these different approaches for the growing child should not be underestimated. All children have the need for affiliation with others but also the drive to go off on their own, to be independent . . .They need a parent who says 'strive, do better, challenge yourself," along with one who comforts them when they fall short. . . . [F]or both sexes the resolution and balancing of these forces is one of the key components of maturation and personal achievement.[275]

Notwithstanding the findings that paternal involvement produces beneficial effects, the magnitude of the positive effects is often modest. Moreover, a substantially smaller number of studies have failed to find any independent effects of paternal involvement on children's well-being.[276] In addition, studies of maternal and paternal involvement suffer from a number of methodological limitations[277] (though some of the limitations actually may serve to underestimate the positive effects of fathers on children's development).[278] Many studies examine the effects of single-mother parenting, making it

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271. *Id.* at 269.

272. Kathleen Mullan Harris, Frank F. Furstenberg & Jeremy K. Marmer, *Paternal Involvement with Adolescents in Intact Families: The Influence of Fathers Over the Life Course*, 35 DEMOGRAPHY 201, 203 (1998).

273. *Id.* at 214.

274. *See* Ronald P. Rohner, *Father Love and Child Development: History and Current Evidence*, 7 CURRENT DIRECTIONS IN PSYCHOL. SCI. 157, 158, 160 (1998).

275. POPENOE, *supra* note 240, at 11–12.

276. Amato, *supra* note 267, at 253–55 (reviewing the effects found in studies).

277. *See* Jay Belsky, *Paternal Influences and Children's Well-Being: Limits of, and New Directions for, Understanding*, *in* MEN IN FAMILIES: WHEN DO THEY GET INVOLVED? WHAT DIFFERENCE DOES IT MAKE? 279 (Alan Booth & Ann C. Crouter eds., 1998) (discussing limitations of research studies on paternal involvement).

278. *See* LAMB & LEWIS, *supra* note 248, at 292 (stating that many of the measures used in studies tend to favor mothers and do not measure the kinds of activities and influences more typical of fathers).

impossible to know whether any effects found are due to father-absence or the lack of two parents in the home (and factors correlated with single-mother families – *e.g.*, lower income).[279] Yet, "[d]espite the sometimes ambiguous findings of prior research, most researchers would argue that a high level of paternal involvement and a close father-child bond results in beneficial outcomes for children."[280]

In particular, paternal nurturance appears to be a protective factor against substance abuse, conduct disorder, delinquency, and depression. The clearest and strongest finding on the effects of fathers is that children (particularly boys) raised in father-absent homes are at greater risk for delinquency and other adolescent problem behaviors.[281] Research suggests that this trend is particularly true amongst African-American boys.[282] A recent study of 433 African-American boys between the ages of thirteen and seventeen found that the children raised in father-absent homes were substantially more likely to have been retained a grade in school, to have been suspended or truant from school, to have run away from home, and to have had contacts with the police.[283] Studies have shown that children who exhibit aggressive behavior in school are eleven times more likely to live in father-absent homes,[284] that paternal involvement in childhood and adolescence predicts boys' police contacts and criminal records in young adulthood,[285] and that the quality and quantity of paternal involvement indirectly affects adolescent substance abuse.[286] Professor David Lykken summarizes the research findings well:

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279. Silverstein & Auerbach, *supra* note 235, at 403.

280. Harris et al., *supra* note 272, at 202.

281. *See* POPENOE, *supra* note 240, at 153–55; Leah East, Debra Jackson, & Lousise O'Brien, *Father Absence and Adolescent Development. A Review of the Literature*, 10 J. CHILD HEALTH CARE 238 (2006).

282. *See* H. Elaine Rodney & Robert Mupier, *Behavioral Differences Between African-American Male Adolescents with Biological Fathers and Those Without Biological Fathers in the Home*, 30 J. BLACK STUDIES 45, 46 (1999) (reviewing research showing that father involvement "plays an especially important role in the development of positive self-esteem in African-American boys" and that boys living in father-absent homes are more likely to exhibit hypermasculine behaviors); JAMES GARBARINO, LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM (1999).

283. Rodney & Mupier, *supra* note 282, at 53–55 (reporting that 24% of children with a father in the home had been retained a grade, 23% had been truant, 55% had been suspended from school, 1% had run away from home, and 29% had been in trouble with the police; but of children without a father in the home, 46% had been retained a grade, 37% had been truant, 74% had been suspended, and 42% had been in trouble with the police).

284. J.L. Sheline, B.J. Skipper & E. Broadhead, *Risk Factors for Violent Behavior in Elementary School Boys: Have you Hugged Your Child Today?*, 48 AM. J. PUB. HEALTH 661, 662 (1994).

285. *See* E. Flouri & A. Buchanan, *What Predicts Good Relationships with Parents in Adolescence and Partners in Adult Life: Findings From the 1958 British Birth Cohort*, 17 J. INTERPERSONAL VIOLENCE 689 (2002); C. Lewis, L. J. Newson & E. Newson, *Father Participation Through Childhood*, *in* FATHERS: PSYCHOLOGICAL PERSPECTIVES 174 (N. Beail & J. McGuire eds., 1982).

286. *See* Eva M. Kung & Albert D. Farrell, *The Role of Parents and Peers in Adolescent Substance Use: An Examination of Mediating and Moderating Effects*, 9 J. CHILD & FAM. STUDIES 509, 522 (2000) (reporting study of 443 African-American seventh graders finding that peer pressure was related to drug use and that paternal involvement influenced the effects of peer pressure); Diana H. Fishbein & Deanna M. Perez, *A Regional Study of Risk Factors for Drug Abuse and Delinquency: Sex and Racial Differences*, 9 J. CHILD & FAM. STUDIES 461 (2000) (reporting study of 567 youth aged 10–17 finding that having a positive relationship with the father was negatively related to involvement in antisocial conduct).

> A striking correlation exists, at least in the United States, between fatherless child rearing and subsequent social pathology. More than two thirds of incarcerated delinquents, of high school dropouts, of teenage runaways, of abused or murdered babies, and of juvenile murderers were raised without their biological fathers . . . Nationally, about 70% of teenage girls who have out-of-wedlock babies were raised without fathers . . . [T]he risk for social pathologies ranging from delinquency to death is about seven times higher for youngsters raised without fathers."[287]

A recent large-scale longitudinal study found that whether boys were raised in a single-parent versus two-parent home was the strongest predictor of incarceration in young adulthood, even after controlling for socioeconomic status, race, or place of residence.[288] Forty-three percent of incarcerated adults were raised in single-parent homes, mostly without fathers.[289]

Yet, even with respect to the preventive effect of fathers in relation to delinquency and antisocial behavior, the "empirical evidence for the link between father absence and criminal behavior has been weak."[290] Most studies have been conducted with father-absent families, so it is difficult to know whether increased delinquency among children of single-mother families is due to the lack of an involved father or the lack of two parents (of whatever gender) in the home. Moreover, research consistently shows that discipline, supervision and emotional availability are among the most critical factors in determining whether children will become involved in delinquency.[291] When it comes to providing supervision and discipline, two parents are better than one.[292] A single parent has less time to spend on such activities and lacks the support and mutual reinforcement that comes with having a second parent in the home.[293] At least one study designed to disentangle the effects of having fathers versus two-parents in the household found that competent single mothers who used effective discipline practices "insulate[d] a child against criminogentic influences even in deteriorated neighborhoods."[294] Another study that

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287. David T. Lykken, *Reconstructing Fathers*, 55 AM. PSYCHOLOGIST 681, 681 (2000).

288. *See* David T. Lykken, *Parental Licensure*, 56 AM. PSYCHOLOGIST 885, 887 (2001) (citing C.C. Harper and S.S. McLanahan, *Father Absence and Youth Incarceration*, Paper Presented at the ANNUAL MEETING OF THE AM. SOCIOLOGICAL ASSOC., SAN FRANCISCO, CAL. (Aug. 1998)).

289. D. Fost, *The Lost Art of Fatherhood*, 18 AM. DEMOGRAPHICS 16 (1996).

290. Rodney & Mupier, *supra* note 282, at 46.

291. *Accord* Richard E. Redding & Bruce Arrigo, *Multicultural Perspectives on Delinquency Among African-American Youth*, *in* COMPREHENSIVE HANDBOOK OF MULTICULTURAL SCHOOL PSYCHOLOGY 710, 723–24 (Craig Frisby & Cecil Reynolds eds., 2005); *see* Richard E. Redding, Naomi E. Sevin Goldstein & Kirk Heilbrun, *Juvenile Delinquency: Past and Present*, *in* JUVENILE DELINQUENCY: ASSESSMENT, PREVENTION, AND INTERVENTION 3, 11–12 (Kirk Heilbrun, Naomi E. Sevin Goldstein & Richard E. Redding eds., 2005) (discussing importance of effective parenting).

292. *See* Sanford M. Dornbusch, J. Merrill Carlsmith, Steven J. Bushwall, Philip L. Ritter, Herbert Leiderman, Albert H. Hastort, & Ruth T. Goss, *Single Parents, Extended Households, and the Control of Adolescents*, 56 CHILD DEV. 326, (1985) (reporting results of study finding that "[t]he presence of an additional adult in a mother-only household, especially for males, is associated with increased parental control and a reduction in various forms of adolescent deviance.")

293. POPENOE, *supra* note 240, at 155.

294. *See* J. McCord, *Family Relationship, Juvenile Delinquency, and Adult Criminality*, 29 CRIMINOLOGY 397, 411 (1991).

controlled for the levels of parental involvement and supervision found only small differences between single-mother and two-parent families in the children's rates of idleness and high-school dropout.[295] A third study, which analyzed data from the 1972 National Youth Survey, found no correlations between delinquency rates as a function of mother-child attachment quality versus father-child attachment quality: "[m]other versus father appears not to be a relevant concern here; instead, it may be *the number* of parental attachments that is meaningful."[296]

However, the clinical experience of those who work with delinquent boys, and a limited amount of empirical evidence, suggests that fathers may be somewhat more effective disciplinarians than mothers.[297] Father-absence appears to give rise in some boys to insecurity over their own masculinity, sometimes resulting in their exhibiting antisocial, hypermasculine violent behaviors designed to prove "how tough they are." This is accompanied by their rejection of the mother's authority.[298] It seems that boys strongly desire to have an adult male presence in their lives. In his book, *Lost Boys: Why Our Sons Turn Violent and How We Can Save Them*,[299] Professor Garbarino underscores the importance of family, particularly fathers, in the emotional lives of violent boys, noting that many come from single-mother homes with no strong authority figure for the boy. As Professor Popenoe explains, "[t]hrough identification and imitation, sons learn from their fathers, as they cannot from their mothers, how to be a man. Making the shift from boyhood to constructive manhood is one of life's most difficult transitions . . . [boys] typically do this through identifying and bonding with their fathers."[300]

Munroe and Munroe's study of the impact of father absence in four different cultures found that boys raised in father-absent homes paid much greater attention to males in their immediate social environment than did boys in father-present homes, suggesting that the boys in father-absent homes were seeking attention from other males to compensate for the lack of father attention at home.[301] Drawing on other empirical and theoretical work, they speculate about the impact of father absence on boys' development:

> [B]oys without fathers in the home experience a form of "deprivation" that evokes female-like responses at earlier ages and hypermasculine behavior in the adolescent years . . . . [T]he father-present boy . . . forms a representation of the concept *male* on the basis of exposure to the multifaceted, sometimes contradictory characteristics displayed in the behavior of an actual father. The father-absent boy, as a "novice" without this exposure, forms a representation of

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295. *See* MCLANAHAN & SANDEFUR, *supra* note 28, at 109—11.

296. Joseph H. Rankin & Roger Kern, *Parental Attachments and Delinquency*, 32 CRIMINOLOGY 495, 504 (1994)(emphasis added).

297. *See* THOMAS G. MOELLER, YOUTH AGGRESSION AND VIOLENCE: A PSYCHOLOGICAL APPROACH 123-24 (2001) (citing studies).

298. POPENOE, *supra* note 240, at 156—57.

299. GARBARINO, *supra* note 282, at 40—62.

300. POPENOE, *supra* note 240, at 142.

301. Robert L. Munroe & Ruth H. Munroe, *Fathers in Children's Environments: A Four Culture Study*, *in* FATHER-CHILD RELATIONS: CULTURAL AND BIOSOCIAL CONTEXTS 213, 220–21 (Barry S. Hewlett ed., 1992).

> the concept *male* that is . . . a stereotype [centered on aggression]. Thus, for father-absent boys over a long period, a disproportionate attention to males—as found in the present sample—would promote construction of a prototypical image of the male role.

According to Munroe and Munroe, this research shows that the father is a "critical element" in a boy's appropriate sex-role development.[302]

In addition, fathers model self-control and empathy for their sons, two key factors in preventing antisocial behavior. Father involvement appears to be uniquely important in the development of empathy, at least according to one study which found that the level of father involvement was the single most important parenting factor determining empathy in adulthood, even when controlling for maternal factors (e.g., maternal inhibition of child's aggression).[303] These findings "fit with previous findings indicating that prosocial behaviors such as altruism and generosity in children were related to active involvement in child care by fathers."[304]

Thus, it may be particularly important that lesbian parents provide male influences and role models for their boys. Perhaps judges should consider, as just one of many factors, the possible impact of father absence when deciding whether to award custody of male children to two-parent lesbian versus heterosexual couples. However, these conclusions do not suggest that lesbian couples are less qualified to raise boys. Several studies have found that divorced lesbian mothers appear to take steps, more so than divorced heterosexual mothers, to ensure that their son has regular contact with their father and an adult male presence in their lives.[305]

Father figures also have positive effects on girls' psychosocial development, particularly in reducing internalizing behaviors (e.g., depression, negative affect, and self-destructive behaviors).[306] Girls with involved fathers have lower rates of promiscuity and teen pregnancy and a stronger sense of self-efficacy.[307] As one commentator explains, fathers provide girls with a sense of security which may ultimately lead to healthier heterosexual relationships, more independence and self-determination.[308]

In sum, although being raised by homosexual parents may not lead to negative outcomes in children (*see* Sections I-D & II, *supra*), the complementarily theory argues that children miss something of value by not having a mother and

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302. *Id.*

303. *See* Richard Koestner, Carol Franz & Joel Weinberger, *The Family Origins of Empathic Concern: A 26-Year Longitudinal Study*, 58 J. PERSONALITY & SOC. PSYCHOL. 709, 712–13 (1990).

304. *Id.* at 713.

305. *See* Patterson, Fulcher & Wainright, *supra* note 144, at 187–88 (reviewing studies).

306. *See* PARKE ET AL., *supra* note 251, at 327.

307. *See* POPENOE *supra* note 240, at 158–60 (discussing studies).

308. POPENOE, *supra* note 240, at 159. According to Popenoe, "Fathers are the first and most important men in the lives of girls. They provide male role models, accustoming their daughters to male-female relationships. . . . [and] [t]hey protect them, providing them with a sense of physical and emotional security. Girls with adequate fathering are more able, as they grow older, to develop constructive heterosexual relationships based on trust and intimacy . . . they are more independent and self-possessed, more likely to assume responsibility for the consequences of their actions, and more likely to perceive themselves as masters of their own fate. Id.

a father. Although it is difficult to draw strong conclusions in light of the methodological limitations of the studies,[309] research suggests that mothers and fathers each make a unique contribution to children's (particularly boys') social, emotional, and intellectual development (though the relative advantages of dual-gender parenting appear to be modest). Thus, everything else being equal, a two-parent mother and father family may well be the *best* family structure for childrearing.

But rarely is everything else equal. In any case, the law has never required that parents conform to a perfect model of family life—if this were the case, the state would deny marriage licenses to a substantial number of heterosexual couples.[310] Moreover,

> [a] question at the core of fatherhood research is the criticality of fathers for children's social development in light of the recent research evidence that children of lesbian families are socially well adjusted . . . [and] there may be opportunities to experience both maternal and paternal interactive styles in same-gender households.[311]

In light of these realities, a lesbian household may not be any less adequate of a household than a household with a male presence.

Furthermore, one partner in a same-sex couple may incorporate the opposite-sex behaviors into their parenting repertoire. Thus, existing studies on the effects of mothers and fathers, which have been conducted with single parents or heterosexual couples, may not shed light on what may be a fundamentally different dynamic with respect to same-sex parents. Importantly, research shows that among lesbigay couples, each partner tends to adopt both masculine and feminine roles,[312] in part because gays and lesbians tend to be more androgynous than heterosexuals.[313] Perhaps in same-sex relationships, one or both of the partners incorporates both maternal and paternal styles into their parenting repertoire. Yet, as Professor Baumrind's study of the effects of parental androgyny on parenting behavior and children's development suggests, such androgyny may not be beneficial in childrearing.[314] First, androgynous men were more similar to androgynous women than to men in their childrearing style, which was a less effective style than that of non-androgynous men and women. The androgynous parents were "loving and responsive, but not firm with their children," and somewhat permissive in their exercise of parental authority.[315] Thus, they exhibited what parenting researchers call the "permissive" parenting style rather than the "authoritative"

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309. *See supra* notes 53–79 and accompanying text.

310. *Cf.* Lykken, *supra* note 288, at 890 (arguing for parental licensure, based on research "strongly suggest[ing] that reducing the numbers of unwanted children being reared by single mothers" would substantially reduce crime rates).

311. Parke et al., *supra* note 251, at 330.

312. *See* Herek, *supra* note 40, at 610 (reviewing research).

313. *See, e.g.*, Kurdek & Schmitt, *supra* note 218, at 718 (reporting results of study finding that lesbian partners are more masculine that heterosexual female partners).

314. *See* Diana Baumrind, *Are Androgynous Individuals More Effective Persons and Parents?*, 53 CHILD DEV. 44 (1982).

315. *Id.* at 68.

style that has shown to be the most effective.[316] Second, the children of androgynous parents were somewhat (though not substantially) less socially and cognitively competent than the children of non-androgynous parents, which "appears to be a consequence of . . . lax paternal authority."[317] In contrast, the non-androgynous parents were more likely to adopt the effective authoritative parenting style: "As couples, sex-typed parents are traditional, authoritative, and demanding rather than nondirective, permissive, or punitive."[318] On the other hand, several recent studies have found that gay fathers use more reasoning and limit-setting when disciplining their children as compared to heterosexual fathers.[319] In sum, although gays and lesbians may be more androgynous than heterosexuals and therefore may incorporate opposite-sex behaviors in their patenting repertoire, the studies are conflicting on whether "androgynous" parents are effective disciplinarians.

Finally, related to the argument that children do best when raised by a mother and a father, opponents of lesbigay parenting and marriage claim that children do best when raised by two *biological* parents. Accordingly, lesbigay marriage "diminishes the social importance of children being raised by their own biological parents."[320] One commentator, for example, characterizes lesbigay parenting as "planned parentlessness" that "intentionally depriv[es] [the child] of one biological parent."[321] These opponents further emphasize the evolutionary importance of biology in childrearing.[322] They point to research

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316. *See* Diana Baumrind, *Current Patterns of Parental Authority*, 4:1 (Part 2) DEVELOPMENTAL PSYCHOL. MONOGRAPHS (1971).

317. Baumrind, *supra* note 314, at 68.

318. *Id. But see* Janet T. Spence, *Comments on Baumrind's "Are Androgynous Individuals More Effective Persons and Parents?,"* 53 CHILD DEV. 76, 79 (1982) (questioning the methodology and conclusions of Baumrind's study, and stating that "we suspect that individuals who are high in both instrumental and expressive qualities have an aggregated advantage over others in a number of significant respects. Rearing children with these qualities can thus be regarded as a desirable goal . . . . Our data clearly did not support Baumrind's hypothesis that mothers and fathers who are both sex typed in personality are the 'best' parents in the sense of being most likely to encourage both instrumentality and expressiveness in their children.")

319. *See* Charlotte J. Patterson, *Gay Fathers*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 397, 404-05 (Michael Lamb, ed. 4th ed. 2004).

320. DAN CERE, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 38 (2005). *See also* Stewart, *supra* note 11, at 21-22; POPENOE, *supra* note 240, at 150–51, 155–56.

321. Williams, *supra* note 22, at 396 (stating that "giving a child one or two loving fathers or two loving mothers, is no recompense for intentionally depriving her of one biological parent").

322. POPENOE, *supra* note 240, at 151 (stating that "[p]arenting is fundamentally rooted in human biology, and it is at least partly activated by the 'genetically selfish' activity of favoring one's own relatives"). *See, e.g.*, David J. Herring, *Foster Care Safety and the Kinship Cue of Attitude Similarity*, 7 MINN. J.L. SCI. & TECH. 355 (2006) (stating that "[e]volutionary theorists postulate that individuals develop behavioral mechanisms that lead them to treat biologically related others more favorably than unrelated others. Experimental research conducted to test and explore these postulates has confirmed this core hypothesis concerning favorable treatment of kin").

See also J. David Velleman, The Gift of Life 2-3 (Nov. 29, 2007, unpublished manuscript, on file with Author) (stating that "associating with relatives is more than a biological imperative; its' a personal need . . . Because I believe that biological ties have value, I also believe that they are good reasons for assigning the duties of childrearing to biological parents in the first instance. Indeed, I believe that the act of procreation generates parental obligations that cannot be contracted out to others, except when doing so is in the best interest of the child").

showing that stepparents are more likely to physically and sexually abuse children[323] and that stepparents are less involved in childrearing.[324] But a non-biological lesbigay parent who has raised (and possibly adopted, via a "second-parent adoption") a child from an early age, thus making the child his or her own, is not the same as a stepparent who assumes parenting responsibilities for an older child upon marrying that child's mother or father. Most importantly, these arguments falsely assume that children raised by same sex couples would necessarily otherwise be raised by two biological parents.

E. Are There Advantages to Lesbigay Parenting?

Here, we consider whether lesbigay parenting may provide some uniquely positive experiences for children relative to heterosexual parenting. Can gays and lesbians, in some ways, make better parents on average than heterosexual parents?

One issue rarely discussed in the debate over lesbigay parenting is that far fewer, if any, births to lesbigay couples involve unplanned or unwanted children. In the United States, fourteen percent of births to women fifteen to forty-four years of age in 2002 were unwanted, and twenty-one percent were unplanned.[325] Research has consistently found that unplanned children are at higher risk for delinquency and criminality, at significantly greater risk for child abuse and neglect,[326] so much so that researchers suggest that "programs which help families to improve their family planning skills may well be the very best strategy for preventing child abuse and neglect."[327] Mothers of unwanted children also have poorer relationships with their children.[328]

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323. *See* Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 265–66 (2001).

324. *See* MCLANAHAN & SANDEFUR *supra* note 28, at 101 (reporting results of study finding that stepfathers spent less time with their stepchildren than do biological fathers); *see also* Golombok et al., *supra* note 99, at 26 (reporting study comparing two-parent lesbian families with two-parent heterosexual families, finding that fathers are more emotionally involved with their children than are lesbian mothers). *But see* Stacey & Biblarz, *supra* note 1, at 174 (reviewing studies and concluding that nonbiological lesbian mothers are more involved in, and skilled at, parenting than are stepfathers).

325. U.S. Dept. of Health & Human Serv., Centers for Disease Control & Prevention, *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data From the 2002 National Survey of Family Growth*, 23:25 VITAL & HEALTH STATISTICS 12 (2005).

326. *See, e.g.*, Steven Kairys, Charles F. Johnson & the Committee on Child Abuse and Neglect, *American Academy of Pediatrics: The Psychological Maltreatment of Children – Technical Report*, 109 PEDIATRICS 1, 2 (2002); Susan J. Zuravin, *Fertility Patterns: Their Relationship to Child Physical Abuse and Neglect*, 50 J. OF MARR. & THE FAMILY 983 (1988); Susan J. Zuravin, *Unplanned Pregnancies, Family Planning Problems, and Child Maltreatment*, 36 FAMILY RELATIONS 135, 135 (1987).

327. *See* Carter Hay & Michelle M. Evans, *Has Roe v. Wade Reduced U.S. Crime Rates?: Examining the Link Between Mothers' Pregnancy Intentions and Children's Later Involvement in Law-Violating Behavior*, 43 J. RESEARCH IN CRIME & DELINQUENCY 36, 57 (2006) (reporting results of longitudinal study finding that "being born of an unwanted pregnancy is indeed a risk factor for law-violating behavior").

328. Jennifer S. Barber, William G. Axinn & Arland Thornton, *Unwanted Childbearing, Health, and Mother-Child Relationships*, 40 J. HEALTH & SOCIAL BEHAV. 231, 231 (1999) (reporting results of a thirty-one year longitudinal study of 1113 mother-child pairs finding that mothers of unwanted birth have lower quality relationships with the unwanted children as well as with their other children).

In addition, some studies suggest that two mothers parent better than a father and a mother, because mothers generally are more skilled at child care than fathers.[329] Several studies comparing lesbian and heterosexual couples have found that lesbian mothers score higher on measures of parenting skills (including discipline, limit-setting, time spent on child-care activities, and quality of interactions with the child) than do fathers[330] (though the measures used in the studies may tend to favor mothers and overlook paternal contributions to parenting). Furthermore, children report feeling closer to their nonbiological lesbian mothers than they do to their biological fathers.[331] Thus, while some studies highlight the unique contributions of fathers in parenting, other studies suggest possible benefits in having two parents more skilled in typical caregiving activities.

Finally, children raised by lesbigay parents are likely to better appreciate the value of human diversity. A study involving eleven young adult children of lesbian mothers found the following:

> Sons and daughters repeatedly expressed concern at the lack of understanding about the substantial benefits of growing up with a mother who is lesbian. Having experienced real or threatened stigmatization, these subjects reported an increased sensitivity to prejudice and a heightened ability to think critically about the impact of discrimination. Their mothers were said to be role models of "bravery" and "risk taking," which gave these children permission to think about their own differences in a flexible, positive way. Like many children of oppressed groups, strength was developed out of adversity.[332]

The planned parenting of the child, the nurturing environment into which the child is received and the worldly perspective such difference can offer are only a few ways that children may benefit from lesbigay parenting. The next section will discuss how these possible benefits should be examined in the future.

III. DIRECTIONS FOR FUTURE RESEARCH

Future research on lesbigay parenting should shift the focus from the question of deficits—i.e., whether gay and lesbian parenting produces negative outcomes in children—to the question of positive outcomes. This would be similar to the paradigm shift that has recently occurred in psychology toward a "positive psychology" that examines people's strengths, not just their deficits.[333] In addition to standard measures of psychopathology (e.g., of anxiety, depression), we need to use measures of life satisfaction and positive psychological adjustment, particularly since the standard measures of

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329. *See* Stacey & Biblarz, *supra* note 1, at 174.

330. *See id.* at 174–75.

331. *See id.* at 175.

332. O'Connell, *supra* note 132, at 296.

333. *See* A PSYCHOLOGY OF HUMAN STRENGTHS: FUNDAMENTAL QUESTIONS AND FUTURE DIRECTIONS FOR A POSITIVE PSYCHOLOGY (Lisa G. Aspinwall & Ursula M. Staudinger eds., 2003); FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED (Corey L. M. Keyes & Jonathan Haidt eds., 2003); POSITIVE PSYCHOLOGICAL ASSESSMENT: A HANDBOOK OF MODELS AND MEASURES (Shane J. Lopez & C. R. Snyder eds., 2003).

psychopathology will not detect subtler, non-pathological forms of distress; furthermore, they will not tell us about childrens' happiness and life satisfaction. From this perspective, we can ask whether children are happier or more satisfied living in heterosexual or homosexual households. Moreover, does living with homosexual parents —a stigmatized group in society—produce positive qualities in children such as tolerance and acceptance of diversity?

Future research should also include qualitative longitudinal studies that obtain the childrens' own perspective about their positive and negative experiences over time. To date, only several such studies have been conducted involving a small number of children.[334] We must listen to what the children say about their experiences living with lesbian parents, gay parents, and heterosexual parents. By doing so, we will likely learn much that was not revealed through our standard measures of psychological adjustment. Consider, for example, the findings of a recent study that examined the impact of father absence on the children of divorced parents: "In the eyes of young-adult children, their relationships with their nonresidential fathers are important in ways that seem obvious to them if not others . . . [This] underscores the importance of recognizing the limited coverage of many of the most commonly used measures of psychological adjustment."[335] The article by Kirsten Doolittle, *Don't Ask, You May Not Want to Know: Custody Preferences of Children of Gay and Lesbian Parents,*[336] serves as one such study into the effects of lesbigay parenting on children. The author, the daughter of a lesbian mother, pulls together narrative accounts from a number of sources to paint a rich portrait of the common experiences and feelings of children who learn of a parent's homosexuality following divorce. Observing that "[i]t took some time before I felt comfortable within myself,"[337] Doolittle says that the emotional toll taken on such children is "profound."[338]

> Although many children are outwardly supportive and protective of their gay or lesbian parent, they often simultaneously fear ridicule, feel ashamed, and question their own sexuality . . . . [The child] now will have to introduce the parent's partner to friends, respond to taunts and jeers by peers, and negotiate her own homophobia with her love for her parent . . . Coming to terms with the revelation of a parent's same sex orientation and the loss of privileges associated with having a heterosexual parent may take years . . . . Many children and adolescents react angrily because they fear that their parent's gay or lesbian orientation will affect their own lives. A common concern expressed by children in the interviews was that their parent's same sex orientation would influence their own orientation . . . . they often attempt to limit the gay or lesbian parent's behavior and to minimize the ways in which the parent's gay or lesbian identity

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334. *See, e.g.*, Gartrell et al., *supra* note 131, (reporting results of longitudinal study that assessed children when they were two, five, and ten years old, and that plans to assess them again when they are seventeen years old).

335. Lisa Laumann-Billings & Robert E. Emery, *Distress Among Young Adults From Divorced Families*, 14 J. FAMILY PSYCHOL. 671, 683 (2000).

336. DOOLITTLE, *supra* note 146.

337. *Id.* at 695 n.105.

338. *Id.* at 698. One wonders whether such feelings are exacerbated if the child resides with the homosexual parent, particularly if the parent is living with his or her partner.

> will be disclosed . . . . One child, explaining his reasons for secrecy, said 'Mom, it embarrasses me. I've lost friends. I don't want to bring them home' . . . . Once a parent discloses same sex orientation, the child's reality is altered and the child suffers a significant loss.[339]

Doolittle posits that, in the context of divorce, a child's acceptance of a parent's homosexuality ultimately is achieved through a series of stages similar to the grieving process: "If children are given time and help in resolving the issues associated with [the stages of Denial, Anger, Bargaining for Secrecy, Sadness and Depression, and Acceptance], most will come to accept the parent's gay or lesbian orientation."[340] If these stages exist, then perhaps we would find varying results depending upon when we assess children's functioning following a divorce. This is another reason why we need longitudinal studies.

IV. (IT'S REALLY ABOUT SEX): ATTITUDES TOWARD LESBIGAY PARENTING AND THE PSYCHOLOGY OF DISGUST

> We talk about the weather.
> We talk about work.
> We talk about everything else.
> Except the elephant in the room.[341]

In response to the concerns expressed by the opponents of lesbigay marriage and parenting, this article has provided a comprehensive review and critique of the extant social science research on the effects of lesbigay parenting on children's emotional, intellectual, psychosocial, and sexual development. But these stated concerns may obscure a deeper source of the opposition to lesbigay marriage and parenting: moral and religious views of homosexuality as disgusting, immoral, and sinful.[342] Social Science research, which demonstrates that lesbigay parenting does not negatively affect children, may be "outing" the opponents of same-sex marriage to reveal the underlying reasons for their opposition—reasons that the U.S. Supreme Court's decisions in *Lawrence v. Texas*,[343] *Romer v. Evans*,[344] and *Palmore v. Sidoti*[345] would suggest to be legally irrelevant.

Public opposition to same-sex marriage, particularly in the context of lesbigay parenting, is often animated by a deeper concern—the proverbial

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339. *Id.* at 690—94.

340. *Id.* at 695.

341. EVIATAR ZERUBAVEL, THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL IN EVERYDAY LIFE 84 (2006) (quoting Terry Kettering, *The Elephant in the Room*).

342. *See, e.g.*, John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1055 (1994) (noting that "[a]ll three of the greatest Greek philosophers, Socrates, Plato and Aristotle, regarded homosexual conduct as intrinsically shameful, immoral, and indeed depraved").

343. 539 U.S. 558 (2003) (holding that moral and religious values alone are an improper basis for legal prohibitions against sodomy).

344. 517 U.S. 618, 634 (1996) (finding that amendment to Colorado Constitution prohibiting legislative, executive, or judicial action designed to protect homosexuals from discrimination "was born of animosity" toward homosexuals, and violates equal protection).

345. 466 U.S. 429, 433 (1983) (stating that the law cannot give effect to other people's prejudices when deciding child custody issues).

"elephant in the room" on gay rights issues. That elephant is the visceral disgust reaction that many feel toward the sexual practices of gays and lesbians, particularly gay anal sex, and the resulting intuition that homosexuality is immoral.[346] Thus, much of the concern revolves around sex and sexuality. For example, Paul Cameron, a prominent anti-gay rights researcher and advocate, has argued that:

> Homosexual parents, as they raise their children, should have ample opportunity to socialize them into the parental image. Further, such parents should fill their children's environment with homosexuals and homosexual activities . . . . Because the homosexual parents' life-style is disproportionately sex-oriented, the child's lifespace may be hypersexualized through exposure to sexually oriented entertainment as well as exposure to the sexually tinged interaction of the parent and his associates.[347]

And, according to Professor Wardle, the leading legal scholar opposed to lesbigay parenting:

> One of the very serious flaws of the existing research is that it ignores and evades the 'hard questions' about the effect of homosexual activity by residential parents (and / or their partners) upon children . . . *the critical questions concern how the sexual practices of adults affect the children whom they are raising.* Researchers might look to the areas of child behavior that are most likely to be influenced by parental sexual behaviors – beginning with the sexual behaviors, interests, and identification of children – including premature or delayed sexual behavior, types of sexual behaviors, risky sexual behaviors, sexual self-identification, fidelity in sexual relations, and promiscuity in sexual relations.[348]

Therefore, regardless of what the research may show about the effects of lesbigay parenting on children, many people will feel that it is better for children to be raised in heterosexual households because they do not want children exposed to homosexuality and "the gay lifestyle."[349] Nor do they want to increase the "risk" that children will develop a homosexual orientation if they are raised by lesbigay parents. Clearly, many critics of lesbigay parenting view the development of a homosexual orientation as an undesirable outcome.[350]

Indeed, issues surrounding homosexuality stir strong emotion, so much so that they are frequently used as "wedge" issues in American political campaigns.[351] Although public opinion polls over the last several decades show

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346. *See infra* notes 366—404 and accompanying text.

347. Cameron, *supra* note 33, at 292.

348. Wardle, *supra* note 6, at 508 (emphasis added).

349. *See id.*; Cameron, *supra* note 33, at 290-92; DAILEY, *supra* note 225, at 2—10 (discussing negative characteristics of the "homosexual lifestyle").

350. *See, e.g.*, Wardle, *supra* note 48, at 854 (stating that the "increased likelihood of homosexual interest . . . [is a] risk for children raised by homosexual parents"); *id.* at 866 (stating that "historically *all* homosexual practices were deemed socially and morally irresponsible . . . that claim might be worth considering anew").

351. Herek, *supra* note 40, at 609 (noting that "the fight against gay marriage has proved to be a winning issue for conservatives in most of the electoral and legislative arenas in which is has been contested"). *See also* Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPL. SOCIAL PSYCHOL. 191, 192 (2001). Republicans successfully used concerns about gay marriage to motivate voters in the 2004 presidential and congressional

favorable shifts in public attitudes toward gay rights,[352] it remains the case that a large segment of the public has negative attitudes about homosexuality. Professor Herek, a leading scholar on sexual orientation prejudice, notes that "Respondents to the ongoing American National Election Studies ["ANES"] have typically rated lesbians and gay men among the lowest of all groups on a 101-point feeling thermometer."[353] As Egan further emphasizes, "ANES respondents have consistently ranked gays and lesbians either last or next-to-last among all demographic groups in every administration of the survey since gays were first included in the battery of feeling thermometer questions in 1984."[354] According to the most recent polling data, sixty-three percent of Americans think that homosexual sex is "almost always or always wrong" (even thirty-eight percent of self-described liberals and fifty-two percent of Democrats think so),[355] forty-five percent consider it to be an "unacceptable alternative lifestyle," forty-three percent think that homosexual relations should be illegal, and forty-three percent would not allow a gay person to babysit their child.[356] Between fifty-nine and sixty-six percent of the public does not consider a cohabiting gay or lesbian couple raising children to be "a family." About half

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campaigns. Some analysts believe that opposition to gay marriage was a part of the moral values vote that elected George W. Bush. *See* Debra Rosenberg & Karen Breslau, *Winning the 'Values' Vote*, NEWSWEEK, Nov. 15, 2004, at 23. Sixteen percent of voters polled said that they would not vote for a candidate who did not share their views on gay marriage, and forty-nine percent said they would be less likely to support a presidential candidate who favored gay marriage. *See* AMERICAN ENTERPRISE INSTITUTE, AEI STUDIES IN PUBLIC OPINION: ATTITUDES ABOUT HOMOSEXUALITY AND GAY MARRIAGE 46 (1996), http://www.aei.org (summarizing national poll results) (last visited July 1, 2006). Also in 2004 and 2006, the voters of eighteen states passed, usually with very substantial majorities (ranging from 52% to 81%), ballot measures prohibiting same-sex marriage. *See* Debra Rosenberg, *Politics of the Altar: GOP Leaders are Putting Gay Marriage Back on the Agenda. Will Voters Respond?*, NEWSWEEK, June 12, 2006, at 34. Same-sex marriage is now explicitly banned, either by statute or constitutional provision, in forty-four states. *See* David Tuller, *A Knottier Knot for Gay Couples*, N.Y. TIMES, Nov. 12, 2006, at 2. On the federal level, Congress passed the Defense of Marriage Act ("DOMA") in 2006. The Act prohibits the federal recognition of same-sex marriage and allows states to deny legal recognition to same-sex marriages granted in other states. Moreover, in the last several years, though never passed, resolutions were introduced in the Senate and House of Representatives to amend the U.S. Constitution to prohibit same-sex marriage in the United States by defining marriage as a male-female union. *See* Pawelski et al., *supra* note 1, at 356 (summarizing Congressional action on same-sex marriage).

352. *See* Herek, *supra* note 40, at 609 (discussing opinion poll results over the years).

353. Gregory M. Herek, *The Psychology of Sexual Prejudice*, 9:1 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCI. 19, 20 (2000).

354. Egan et al., *supra* note 146, at 64.

355. It is true, however, that a greater percentage of conservatives view homosexuality as being immoral than do liberals. *See* AMERICAN ENTERPRISE INSTITUTE, *supra* note 351, at 2–7 (summarizing the results of national polling data from, *inter alia*, the Gallup, ABC/Washington Post, CBS/NYT, L.A. Times, and Yankelovich/CNN polls.) This is probably because conservative morality is more closely linked to the moral emotion of disgust than is liberal morality. *See* Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues*, DAEDALUS 55, 65 (Fall, 2004) (stating that conservatives have a "more finely honed and valued sense of disgust"); Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191, 211–15 (2001) (reporting results of study finding that conservatives rely more on their emotional reactions, including disgust, to homosexual conduct than do liberals when making judgments about the moral status of homosexuality).

356. AMERICAN ENTERPRISE INSTITUTE, *supra* note 351, at 2–7.

the population does not think that gays and lesbians should be allowed to adopt children, thirty-seven percent do not think that homosexuals "can be as good parents as heterosexuals,"[357] and about sixty percent are opposed to gay marriage.[358]

To be sure, attitudes toward homosexuality have varied somewhat historically and across cultures.[359] Among some tribes in the Highlands of New Guinea, "boys leave their family home around the age of seven and are expected to spend the next 10 years living with males. During this time, boys regularly perform oral sex on older males . . . homosexual acts are considered a natural progression toward heterosexual behavior." Casual sex between heterosexual men is relatively common in certain countries (namely Brazil, Greece, Mexico, and Morocco).[360] Homosexual sex between men and pubescent boys was common and accepted practice during certain periods in ancient Greece (though sex between adult men was usually frowned upon).[361] But these are noteworthy exceptions—historical and cultural exceptions that prove the rule that homosexual behavior has generally been condemned across time and cultures:[362] "[V]irtually all societies . . . discourage as *predominant adult* sex behavior anything but heterosexual intercourse. Some societies permit homosexuality . . . and other nonmarital, nonreproductive behaviors for certain people at certain times of life, *but nowhere for most adults most of the time*."[363]

Even today, many nations criminalize sodomy, an offense punishable by death in some countries;[364] and gays and lesbians around the world are often subjected to private and state-sponsored harassment, torture, and degrading

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357. *Id.*

358. *Id.* at 21–26.

359. *See generally* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980) (reviewing acceptance of homosexuality in Western Europe, and arguing that early Christianity did not have prohibitions against homosexuality); MELINDA JONES, SOCIAL PSYCHOLOGY OF PREJUDICE 41–45 (2002) (reviewing research on historical and cross-cultural attitudes toward gays and lesbians); J.M. Carrier, *Homosexual Behavior in Cross Cultural Perspective*, *in* HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 100 (Judd Marmor ed., 1980) (reviewing cross-cultural data on homosexual behavior).

360. JONES, *supra* note 359, at 42.

361. *Accord* Arno Karlen, *Homosexuality in History*, *in* HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 75, 78–80 (Judd Marmor ed., 1980). *See generally* SIMON GOLDHILL, LOVE, SEX, AND TRAGEDY: HOW THE ANCIENT WORLD SHAPES OUR LIVES 55–65 (2004); *id.* at 57–58 (stating that in ancient Greece, "a sexual relationship between males is straightforwardly normal . . . [f]or the Greek man in the classical city, the desire which a free adult citizen feels for a free boy is the dominant model of erotic liason. No other form of masculine contact has the same prestige, the same acceptability or even the same erotic bliss . . . "); K. J. DOVER, GREEK HOMOSEXUALITY (1989) (reviewing history and practice of homosexuality in ancient Greece).

362. Homosexuality has been condemned throughout ancient, medieval, and modern times. Karlen, *supra* note 361, at 78–80. Under Roman and Visigoth law, for instance, homosexuals were burned at the stake or castrated. *Id.* at 84.

363. Karlen, *supra* note 361, at 76 (emphasis added).

364. *See* Wardle, *supra* note 8 (providing comparative law analysis). In the United States, just prior to the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court held that sodomy laws were unconstitutional, twenty-seven states had statutes criminalizing sodomy, though such laws were rarely enforced. *See id.* (discussing sodomy laws and the fact that they were seldom enforced).

treatment.[365] Many twentieth-century American court opinions relied on society's feeling of disgust toward homosexuals as an important justification for sodomy laws and for upholding the dismissal of homosexual government employees.[366] As one commentator put it, "[a]fter reading a string of fornication, adultery, and sodomy cases in which the judges talked of morality but could scarcely contain their sense of disgust, I began to suspect that the latter powerfully influenced case outcomes."[367] Consider the campaign literature circulated on behalf of Colorado's "Amendment Two" ballot initiative, the law denying local communities the right to pass laws prohibiting discrimination on the basis of sexual orientation (later declared unconstitutional in *Romer v. Evans*).[368] It included the stark claims that gays eat feces and drink blood.[369] Disgust continues to play a prominent role in debates over gay rights.

Disgust arises from the sense of bodily contamination, particularly when the body comes in contact with human or animal waste products (e.g., feces, urine, vomit, rotting flesh). It evolved to prevent contact with biological vectors of disease transmission and to maintain the boundaries between our human and animal natures.[370] "Disgust appears to function as a guardian of the body in all cultures, responding to elicitors that are biologically or culturally linked to disease transmission (feces, vomit, rotting corpses, and animals whose habits associate them with such vectors) . . . In many cultures, disgust goes beyond

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365. *See* Susan Hawthorne, *Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians*, 4 J. HATE STUDIES 33 (2005–06) (documenting torture of lesbians).

366. *See generally* EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 9–73 (1990) (reviewing caselaw in criminal law and employment law); *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623 (1960–61) (discussing the role of disgust in maintaining criminal laws against homosexual conduct); Robert G. Bagnall, Patrick C. Gallagher & Joni L. Goldstein, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881, 901 n.91 (1987); J.E.B. Myers, *Singer v. United States Civil Service Commission – Dismissal of a Government Employee for Advocacy of Homosexuality*, 1976 UTAH L. REV. 172, 176 (1976) (criticizing judicial opinions concerning dismissals and exclusions of homosexuals from government employment due to their overwhelming tendency to appeal to disgust); Mark A. Stodola, *The Homosexual's Dilemma*, 27 ARK. L. REV. 687 (1973) (describing judicial treatment of homosexuals in criminal and civil law). Cases can be found in the criminal law in which defendants who murdered a gay victim were convicted of manslaughter (rather than murder), on grounds that they acted in the heat of passion because they were disgusted by the victim's non-violent and non-threatening sexual overture. *See generally* Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Defense, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195 (2000); Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279 (2001).

367. Dalton, *supra* note 366, at 901 n.91.

368. 517 U.S. 620 (1996).

369. *See* MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 150, 256, 264–44, 362 n.81 (2004) (describing literature that was circulated in favor of the Amendment).

370. Bunmi O. Olatunji & Craig N. Sawchuk, *Disgust: Characteristic Features, Social Manifestations, and Clinical Implications*, 24 J. SOC. & CLIN. PSYCHOL. 932, 941 (2005). For example, Immanuel Kant, who viewed homosexual behavior as a violation of deontological ethics, said that when committing homosexual acts, "the self is degraded below the level of animals, and humanity is dishonored." IMMANUEL KANT, LECTURES IN ETHICS 170 (L. Infield trans., Harper & Row) (1963).

such contaminant-related issues and supports a set of virtues and vices linked to bodily activities in general."[371]

Over time, disgust evolved into a moral emotion[372] – we perceive conduct that disgusts us as being immoral conduct. Noting "the profound moralization of the body and bodily activities such as . . . sex,"[373] Professor Haidt explains that:

> [C]ulturally widespread concerns with purity and pollution can be traced to a purity module [in the human brain] evolved to deal with the adaptive challenges of life in a world full of dangerous microbes and parasites. The proper domain of the purity module is the set of things that were associated with these dangers in our evolutionary history, things like rotting corpses, excrement, and scavenger animals. Such things, and people who come into contact with them, trigger a fast, automatic feeling of disgust. Over time, this purity module and its affective output have been elaborated by many cultures into sets of rules, sometimes quite elaborate, regulating a great many bodily functions and practices . . . Once norms were in place for such practices, violations of those norms produced negative affective flashes, that is, moral intuitions.[374]

In addition to religious beliefs (which themselves may have evolved from the "moral emotion" of disgust),[375] the "moral emotion" of disgust may explain why public sentiments about homosexuality are so strong, negative, and pervasive. Philosophers, psychologists, and evolutionary biologists theorize that the aversion to homosexuality is rooted in the human emotion of disgust, an emotion so basic that even twelve-month-old infants respond to the facial cues

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371. Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUS. RES. 98, 106 (2007).

372. *See generally* HARMON HOLCOMB, EVOLUTIONARY PSYCHOLOGY, PUBLIC POLICY, AND PERSONAL DECISIONS 73 (Charles Crawford & Catherine Salmon eds.) (2004) (describing the evolutionary biology of moral norms); HAIDT & JOSEPH, *supra* note 355, at 59–61 (discussing evolution of the moral emotions); Joseph Rozin, Jonathan Haidt, & Clark R. McCauley, *Disgust*, in HANDBOOK OF THE EMOTIONS 575, 587-588 (Michael Lewis & Jeanette M. Haviland eds. 1993) (discussing evolution of the emotion of disgust).

373. Haidt & Joseph, *supra* note 355, at 60.

374. *Id.*

375. *See also*, for example, *Romans* 1:24–27 ("Therefore, God handed them over to *degrading* passions . . . Males *did shameful things with males and thus received in their own persons* the due penalty for their *perversity*.") (emphasis added). *See generally* MARK D. JORDAN, THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY (1997) (providing an historical analysis of how the Catholic Church came to label the act of sodomy as sinful, and the considerable extent to which doing so was based on the perception that sodomy, particularly homosexual sodomy, is disgusting).

In addition to disgust, conservatives' respect for authority and established gender roles (especially masculinity) and social hierarchies, *see* Haidt & Graham, *supra* note 371, at 105-08, 111—12 (2007), is likely another important component of conservative opposition to lesbigay marriage. As Professor Haidt explains, "an important part of the opposition to homosexuality is grounded in the fact that most basic roles in society are organized around the dichotomies of male and female, father and mother, provider and nurturer. Many cultural conservatives simply feel uneasy about alterations that go to the core of the existing social structure. It gives rise to a certain kind of social angst, which gives them a sense of impending doom – that it is the beginning of the crumbling of the social order." E-mail from Jonathan Haidt to author (Jan. 29, 2007).

of disgust reactions in others more than they do almost any other emotion.[376] "[F]ew [words] elicit such an innate, visceral response as disgust,"[377] a strong human emotion having psychological as well as physiological components.[378] Disgust has variously been defined to include "revulsion, repugnance, abhorrence, repulsion, antipathy, aversion, loathing, sicken, appall, and nauseate."[379]

Research shows that feelings of disgust are frequently linked to sexual behavior,[380] and that homosexuality is often perceived to be disgusting.[381] Feelings of disgust result in a rejection of that which we find disgusting,[382] as well as feelings of contempt and anger. (Researchers refer to disgust, contempt, and anger as the "hostility triad," since these emotions often co-occur.)[383] Moreover, those who engage in what are perceived to be disgusting behaviors will themselves be seen as objects of disgust, warranting approbation. In this way, contact with "those designated as interpersonally offensive . . . carr[ies] a degree of contamination threat. Contamination in this case is not related to disease acquisition, but rather in acquiring the characteristics, behaviors, or qualities of the undesirable individual."[384] Thus, because they find it disgusting, many people will reject homosexuality and will not want children to be "contaminated" by lesbigay parents.[385] Indeed, recent psychological research has

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376. *See* Leslie J. Carr & Brenda G. Vaccaro, *12-Month-Old Infants Allocate Increased Neural Resources to Stimuli Associated with Negative Adult Emotion*, 43 DEVELOPMENTAL PSYCHOL. 54 (2007).

377. Olatunji & Sawchuck, *supra* note 370, at 933.

378. *Id.* at 934–38 (reviewing research on the emotion of disgust); Haidt & Joseph, *supra* note 355, at 59–64 (arguing that disgust is the emotion association with purity, which is one of five basic, "innately prepared" human moral modules); Rozin et al., *supra* note 372, at 577–89 (1993) (discussing research on disgust); MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO (1966) (providing anthropological analysis of the role of disgust in preventing contagion and pollution and in preserving the boundaries between human and animal).

"[D]isgust appears to be largely mediated by the parasympathetic branch of the autonomic nervous system . . . [and may include] reductions in heart rate, blood pressure, respiration rate, and skin temperature. Increased salivation and gastrointestinal mobility, precursors to nausea and vomiting, have also been observed. . . . The behavioral manifestations of disgust, including facial expressions and action tendencies, all appear consistent with its functional value of protecting the individual from unwanted contact and incorporation of aversive stimuli. The well-defined facial expression of disgust is characterized by a furrowing of the eyebrows, closure of the eyes and pupil constriction, wrinkling of the nose, upper lip retraction and upward movement of the lower lip and chin, and drawing the corners of the mouth down and back." Olatunji & Sawchuk, *supra* note 37770, at 936 (internal citations omitted).

379. Olatunji & Sawchuk, *supra* note 370, at 935.

380. *See id.* at 956 (stating that "[s]ex is highly suggestive of our underlying animal nature, with disgust evolving to patrol the animal-human border").

381. Rozin et al., *supra* note 3782, at 587 (reviewing research). *See, e.g.*, Bowman & Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMPLE L. Q. 273, 304–05 (1956) (reporting survey results showing that Americans had stronger feelings of disgust toward homosexuality than any other subject about which they were surveyed).

382. Olatunji & Sawchuk, *supra* note 370, at 937.

383. Rozin et al., *supra* note 372, at 589.

384. Olatunji & Sawchuk, *supra* note 37770, at 943 (internal citation omitted).

385. *Cf.* Bagnall et al., *supra* note 366, at 515 (stating that "nowhere are the personal reactions of judges toward homosexuality more evident than in child custody proceedings").

found that people who are more sensitive to disgust are also more likely to oppose gay marriage.[386]

Gay anal sex may be an especially strong source of disgust because bodily contact with fecal material, in particular, gives rise to disgust.[387] Moreover, "disgust serves the function of protecting the organism from contact with contaminated and offensive stimuli . . . Homosexual individuals may therefore be negatively evaluated due to heightened concerns over HIV contamination [most associated with gay anal sex] . . . 'Homophobic disgust' may then involve concerns about bodily products, such as blood and semen, and their potential for disease consequence."[388] Indeed, studies show that public attitudes are more negative toward gay men than toward lesbians, the difference being more pronounced among heterosexual men than women.[389] As Professor Nussbaum observes:

> [T]he central locus of disgust in today's United States [is] male loathing of the male homosexual. Female homosexuals may be objects of fear, or moral indignation, or generalized anxiety, but they are less often objects of disgust. Similarly, heterosexual females may feel negative emotions toward the male homosexual—fear, moral indignation, anxiety—but again, they rarely feel emotions of disgust. What inspires disgust is typically the male thought of the male homosexual, imagined as anally penetrable. The idea of semen and feces mixing together inside the body of a male is one of the most disgusting ideas imaginable—to males, for whom the idea of non-penetrability is a sacred boundary against stickiness, ooze, and death. The presence of a homosexual male in the neighborhood inspires the thought that one might oneself lose one's clean safeness, one might become the receptacle for those animal products. Thus disgust is ultimately disgust at one's own imagined penetrability and ooziness, and this is why the male homosexual is both regarded with disgust and viewed with fear as a predator who might make everyone else disgusting. The very look of such a male is itself contaminating—as we see in the extraordinary debates about showers in the military. The gaze of a homosexual male is seen as contaminating because it says. "You can be penetrated." And this means that you can be made of feces and semen and blood, not clean plastic flesh. (And this means: you will soon be dead.)[390]

Whether disgust properly forms the basis for making moral and public policy judgments in the modern world, however, has long been debated by philosophers, ethicists, and jurists.[391] Some argue that there is moral wisdom in disgust.[392] For example, Professor Leon Kass, Chairman of President Bush's

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386. Y. Inbar, David A Pizarro & Peter Bloom, Conservatives are More Easily Disgusted (October 1, 2007) (working draft, on file with Author).

387. Rozin et al., *supra* note 3780, at 579–80.

388. Olatunji & Sawchuk, *supra* note 370, at 946.

389. *See* Herek, *supra* note 353, at 20 (reviewing research studies).

390. NUSSBAUM, *supra* note 369, at 30–31.

391. *See, e.g.*, SIR ARTHUR PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); Dan M. Kahan, *The Progressive Appropriation of Disgust*, *in* THE PASSIONS OF LAW 63 (Susan A. Bandes ed., 1999); LEON KASS, THE WISDOM OF REPUGNANCE (1998); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997); Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW (Susan A. Bandes ed., 1999).

392. *Id.*

Commission on Bioethics, argues for "the wisdom of repugnance" in guiding public policy:[393] "Revulsion is not an argument; and some of yesterday's repugnances are today calmly accepted—though, one must add, not always for the better. In crucial cases, however, repugnance is the emotional expression of deep wisdom, beyond reason's power to fully articulate it."[394]

But as Professor Nussbaum, the leading scholar on disgust and the law, observes:

> Although some disgust-reactions may have an evolutionary basis and thus may be broadly shared across societies, and although the more mediated types of disgust may be broadly shared within a society, that does not mean that disgust provides a disgusted person with a set of reasons that can be used for purposes of public persuasion . . . Disgust concerns thoughts of contamination as opposed to real harm; it is usually grounded on "magical thinking" rather than on real danger; and its root cause is our ambivalence to our mortality and animalistic qualities, namely to what we are (mortal animals).[395]

Recent experimental and theoretical work in social psychology and neuroscience (including brain imaging studies) makes a very compelling case that many moral judgments, including those relating to sexuality, are not the product of a deliberate, rational thought process that involves weighing and evaluating competing arguments. Rather, such judgments are made intuitively, emotionally, rapidly, and largely outside of conscious awareness.[396] These intuitive reactions, which arise from conditioned emotional responses to situations and stimuli, are provided with post-hoc rationalizations.[397] Moral reasoning is "employed only to seek confirmation of preordained conclusions."[398]

In an ingenious series of studies, Professor Haidt, the leading scholar on moral emotions, demonstrated the powerful role disgust plays in the moral judgments people make about sexual behavior as well as the fact that such judgments are often based far more on emotion than they are on rationality. In one study, college undergraduates were presented with brief scenarios describing conduct that violates sexual norms, including homosexuality. After reading each scenario, participants were asked a series of questions about, *inter alia*, how they felt about the conduct described, whether anyone was harmed by

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393. *See* Leon R. Kass, *The Wisdom of Repugnance*, THE NEW REPUBLIC 17 (June 2, 1997).

394. *Id.*

395. *Id.* at 27–28.

396. *See* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. BULL. 814 (2001) (reviewing a large body of empirical research suggesting that moral judgments are made on an intuitive, automatic, unconscious, and emotional basis rather than a "rational"basis); Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCIENCES 517, 522 (2002).

Our moral intuitions develop during childhood and adolescence as the result of external influences interacting with innate mental structures designed for moral perception; these global moral intuitions eventually become "hardwired" in the brain and guide subsequent judgments on particular moral issues. *See* HAIDT & JOSEPH, *supra* note 355, at 59–64 (explaining how moral intuitions develop).

397. Haidt, *supra* note 396, at 822–23.

398. *Id.* at 822.

the conduct, and how they would feel if they saw a photograph of the act described.[399] The study found that participant's moral judgments were better predicted by their emotional reactions to the conduct than by their perceptions of its harmfulness. People frequently offered their emotional reactions ("affective condemnation") as a justification for their condemnation of the conduct, but had "a confused inability to explain [their] position" ("moral dumbfounding"):

> This finding fits well with the qualitative finding that participants often condemned the scenarios instantly, and then seemed to search and stumble through sentences laces with pauses, "ums" and "I don't knows," before producing a statement about harm. This general pattern of quick affective judgment and slow, awkward justification fits well with an intuitionist model of moral judgment, while it does not fit well with models in which moral reasoning drives moral judgment.[400]

For example, one participant gave the following explanation when asked about her condemnation of the gay anal sex scenario: "I don't know, um [long pause], I guess, I don't know, I just don't really believe in premarital sex anyway, but, and obviously they're not married so . . . ."[401] Dumbfounding along with affective condemnation "are clear signs of emotion-driven judgment."[402] Many found the scenarios depicting gay male anal sex and lesbian oral sex to be "disgusting."[403] In fact, *participants (conservatives as well as liberals) expressed on average more negative feelings toward these scenarios depicting homosexual conduct than they did toward those depicting consensual incest or a man masturbating "while his dog willingly licks his owner's genitals."*[404]

In another experiment, participants were hypnotized and given hypnotic suggestions to feel disgust towards an arbitrary word (the word "take" or "often"). After the hypnotic session, they read scenarios depicting various acts, and were asked to judge the moral wrongfulness of the act depicted. Some of the scenarios included the arbitrary disgust word while others did not.[405] Presence of the hypnotic disgust word in a scenario "caused participants to rate transgressions as more morally wrong . . . participants used their feelings of disgust (attached only to a word, not to the act in question) as information about the wrongness of the act."[406] But not only did it cause them to rate moral transgressions more harshly, it also caused them to feel disgust towards neutral conduct, including the following scenario: "Dan is a student council representative at his school. This semester he is in charge of scheduling discussions about academic issues. He [tried to take] [often picks] topics that

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399. Haidt & Hersh, *supra* note 355, at 196–98.

400. *Id.* at 214–15 (internal citations omitted).

401. *Id.* at 210.

402. *Id.* at 209–10.

403. *See id.* at 212.

404. *See id.* at 203.

405. Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCHOL. SCI. 780, 780–81 (2005).

406. *Id.* at 781.

appeal to both professors and students in order to stimulate discussion."[407] Haidt describes the reactions of those participants who read the student council scenario that had embedded in it the hypnotic disgust word:

> The post hoc nature of moral reasoning was most dramatically illustrated by the Student Council story. Rather than overrule their feelings about Dan, some participants launched an even more desperate search for external justification. One participant wrote: "It just seems like he's up to something" . . . Even when such tenuous justifications could not be found, several participants clung to their repugnance, choosing to abandon explanation altogether.[408]

Findings such as these "indicate that gut feelings can indeed influence moral judgments. It also indicates that if there is 'wisdom' in disgust, this wisdom can be manipulated by extraneous factors such as hypnosis."[409]

Indeed, although disgust is an innate human emotion that evolved to protect the body from contamination and disease, it is also a malleable emotion.[410] "What is deemed to be disgusting and to be avoided varies considerably by culture, is perpetuated by societal norms, and is taught and modeled by individuals. Growing evidence suggests that the social influences of disgust are more important in our development of avoidance and rejection tendencies than its evolutionary preparedness."[411] Disgust "[p]lays a special role among the major emotions in that it is . . . a major means of socialization,"[412] and "[m]ost forms of disgust . . . involve learning that has associated the object with danger and contamination."[413] *Such associations can be unlearned.* We tend not to be disgusted with practices and people with which we are familiar.[414] Indeed, research shows that knowing gay and lesbian individuals substantially reduces anti-gay prejudice,[415] which polls show to have been declining in recent years.[416]

In sum, the disgust reaction that many have towards homosexuality and homosexuals is likely a byproduct of human evolution that fails to inform

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407. *Id.* at 782.

408. *Id.* at 783.

409. E-mail from Jonathan Haidt to author (Jan. 29, 2007).

410. DALTON, *supra* note 366, at 901–02, provides the following example:

Recently I acquired a dog, or more accurately, he acquired me. Early in our life together, he found it useful to "mark" the wall outside my bedroom. In an effort to wash away the urine and mask its putrid smell, I scrubbed the area with a heavy-duty household cleanser. As the smell of ammonia wafted into my nostrils, signalling [sic] to me a cleaning job well done, it suddenly occurred to me that the cleanser's odor was every bit as pungent as that of urine, and that in fact the two odors were quite similar. Different associations, however, had produced in me quite different initial reactions. I then remembered how horrified I had been when, during my very first dog-walking outing, Biko stopped several times to sniff remembrances deposited in our path by others of his ilk. Within a week my fecal distress abated, and my sole concern became the possible ingestion of parasites.

411. Olatunji & Sawchuk, *supra* note 377, at 939.

412. Rozin et al., *supra* note 372, at 577.

413. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 286 (n.52) (1996).

414. Dalton, *supra* note 366, at 904

415. *See* G.M. Herek & J.P. Capitanio, "*Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexual's Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1996).

416. *See* Herek, *supra* note 40, at 609 (discussing opinion poll results over the years).

rational judgments about the morality of homosexuality, much less the public policy questions surrounding lesbigay parenting and marriage rights.[417] "The distinctions that disgust has evolved to police, those between the in-group and the out-group . . . are much more subjective than the aspects of life dealt with by the other [moral] emotions."[418] "Disgust didn't evolve to track things that we would normally consider morally important, unlike empathy, which is triggered by the real pain or suffering of others."[419] As Professor Nussbaum argues, "the moral progress of society can be measured by the degree to with it *separates* disgust from danger and indignation, basing laws and social rules on substantive harm, rather than on the symbolic relationship an object bears to anxieties about animality and mortality."[420]

> [D]isgust is in essence an emotion of distancing . . . this aspect of disgust made it a suitable raw material for evolution to work with in building up instinctive distinctions between the in-group and the out-group . . . Our moral disgust/indignation brain network is the source of prejudice, stereotyping, and sometimes outward aggression . . . History seems to bear this out. Women (especially menstruating ones), the mentally and physically disabled, and inter-racial sex have all been viewed with disgust, and are still viewed as such by some. But few people in liberal societies today would defend such attitudes and many have genuinely ceased to feel them. If disgust wasn't a good moral indicator then, why should it be now?"[421]

Today, the emotion of disgust is being used to exclude gays and lesbians from enjoying the rights to marry and raise children – rights central to the imagination of virtually all Americans.

CONCLUSION

We now have a sufficient body of research to permit the conclusion that growing up in a lesbigay household does not cause psychological harm to children. But that is different from concluding that growing up in a homosexual household is as positive an experience for children as is growing up in a heterosexual household. Probably the most controversial issue is whether children benefit from having a mother and a father as opposed to same-sex parents. A plausible reading of the research is that fathers and mothers each make a unique—though not essential—contribution to children's social, emotional and intellectual development. In particular, boys raised in father-

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417. Although disgust is an evolutionary adaptation to protect us from harmful contamination, we no longer need to prohibit conduct that many find disgusting, because we know how otherwise to protect ourselves from disease. For example, gay men can use condoms during anal sex to protect against disease transmission.

418. Dan Jones, *The Depths of Disgust*, 447 NATURE 768, 771 (2007).

419. *Id.* at 771 (quoting Cornell University psychology professor David Pizarro).

420. NUSSBAUM, *supra* note 369, at 32. *See also id.* at 29 (providing historical examples, including the Nazi propaganda against the Jews, and stating that "throughout history, certain disgust properties-sliminess, bad smell, stickiness, decay, foulness-have repeatedly and monotonously been associated with, indeed projected onto, groups by reference to whom privileged groups seek to define their superior human status").

421. Jones, *supra* note 418, at 770–71.

absent homes are more likely to exhibit behavioral problems and involvement in delinquency, than boys raised in homes with fathers.

Given the methodological limitations of the existing research on lesbigay parenting, as well as research suggesting that dual-gender parenting may be modestly advantageous for children, laws prohibiting same-sex marriage or adoption on the theory that lesbigay parenting disadvantages children can (and probably should) pass constitutional muster under the highly deferential rational basis test for judicial review of legislative action:

> [T]he studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households . . . More definitive results could hardly be expected, for until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such childrearing . . . In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home.[422]

As a matter of sound public policy, however, the extant research fails to support the theory that denying marriage or parenting rights to same-sex couples serves the welfare of children. Although children raised by lesbigay couples may be somewhat more likely to develop a homosexual orientation, such an outcome cannot be viewed as negative if, as a society, we respect pluralism and diversity. Children's concerns about peer rejection probably are not so different in magnitude from the many other peer-related stressors commonly experienced by adolescents, and research shows that the children of lesbigay parents have normal peer relationships. In any event, the courts have made clear that prejudice against children whose parents are members of a stigmatized group is not a permissible consideration. Most gays and lesbians do not have mental health or substance abuse problems, and although rates of infidelity are higher among gays and lesbians, the legalization of same-sex marriage and particularly childrearing in the context of these relationships is likely to promote fidelity in lesbigay relationships. But dual-gender parenting may be modestly advantageous for children's development, and one can well imagine why it is plausible to assume that most children would prefer to have a mother and a father. Thus, a two-parent mother and father family may be the best family structure for childrearing, everything else being equal. Yet rarely is everything else equal. In any case, the law has never required that parents conform to a perfect model of family life, and there may be some unique advantages to lesbigay parenting.

Why, then, do legislators persist so strongly in their efforts to limit lesbigay marriage and parenting rights in the face of research data demonstrating that children are not harmed when raised by lesbigay parents? Research findings on outcomes will not override the *moral emotion* of many that homosexual behavior

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422. *Hernandez*, 855 N.E. 2d at 8. *See also Anderson v. King County*, *supra* note 30. If the *Hernandez* majority is requiring scientific certainty or near-certainty, however, it is seriously misguided. To expect such certainty reflects an inappropriate idealization of science and of what science can realistically contribute to public policy. *See generally* DAVID S. CAUDILL & LEWIS H. LARUE, NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW 15–84 (2006) (discussing the ways in which courts idealize science).

is disgusting and therefore immoral. Thus, they do not want children exposed to a lesbigay "lifestyle." Nor do they want to increase the "risk" that they will develop a homosexual orientation if raised by lesbigay parents. Opponents of gay marriage will continue to use these arguments as the bete noire in their brief against marriage and parenting rights for gay and lesbian Americans. But we could have predicted that, because the debate is really about sex(uality).