

III. “Inimical to the Natural Family”: Social Stereotypes and Institutional Barriers that Affect LGBT Parents and Their Children

lgbt parents and lgbt-parented families are already a fact, not merely a possibility, in many countries and cultures around the world. Despite the fact that millions of such relationships exist, they are rendered invisible in many countries and in many communities by prejudice and by social as well as legal norms which do not recognize, acknowledge, or support them. Family law’s failure to recognize LGBT people as real or potential parents is only one such willful blindness that they face. A still more active resistance, a still more comprehensive recalcitrance, often comes from the social environments around them—and from the powerful social institutions with which they must interact.

Like other parents, and especially those with minority or stigmatized identities, LGBT parents seek—against these sometimes difficult odds—to nurture their children and protect them from the difficult world in which we live, with its range of human prejudices and conflicts.³⁸ The aspiration to have children, and the interests of those children, should not be at the mercy of social prejudice. It is the responsibility of states to identify such prejudice, and to divorce it from the motives and rationales for law and policy.

³⁸ The effects of social stigma on children of LGBT parents is discussed on pp. 88–90.

46 · conceiving parenthood

a. invisibility and fear

The silence on the part of laws and institutions about LGBT parents—and their frequent absence from collective spaces, media representations, or official understandings of “the family”—can be isolating and disempowering. In many places they are left unable to participate in the life of their communities, or discover commonality publicly with other families like their own. Their lives provide no place of collective strength from which to challenge discriminatory practices or negative stereotypes.

The invisibility of LGBT parents and their children, coupled with government and media silence or contempt, thus leaves them open to further discrimination. With their selfhoods shunted into the shadows, many of these families are trapped in a cycle in which invisibility produces fear, and fear produces silence, which reinforces invisibility. Serbian activist Lepa Mladjenovic has noted, “I don’t know one woman [in **Serbia**] who lives with a woman and children and wants to talk about it.”³⁹

When asked about cultural factors that shape the environment for lesbian mothers, Beata Sandor, a lesbian activist in **Hungary**, explained: “The first is complete silence. And then when the parliament voted about the registered partnership law . . . even those who supported it kept warning that lesbians and gay men should not be allowed to raise and adopt children. What I would also stress is that while lesbians are completely silenced in all other aspects of their lives, they will not even go to get registered [in a registered partnership] for other reasons—and won’t apply for adopting a child (as lesbians). (Although many lesbians and couples do raise their own, from previous marriages/relationships.)”⁴⁰

Fear of losing one’s children or not being able to adopt or have children due to prejudice and discrimination is a common

39. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 189.

40. E-mails to the author, April 9, 1999 and September 20, 1999.

social stereotypes and institutional barriers . 47

thread in the lives of LGBT parents worldwide. This fear may force parents (or parents-to-be) to remain extremely closeted and to avoid seeking support from existing LGBT groups and movements, cutting off potentially valuable sources of emotional support, access to legal information from sympathetic individuals or organizations, and information about other families like theirs. Fear and threats can be particularly overwhelming when combined with difficulty in obtaining unbiased legal advice and/or lack of legal precedents. In some cases, this fear also keeps parents from seeking forms of government support or other benefits for which they and their children might be eligible. It thus can have a negative effect on the well-being of the child.

As this report indicates, the fears of these parents are often well-founded, due to the widespread discrimination faced by LGBT people throughout the world, the particular stereotypes about their unfitness to be parents or to work with children, and the fact that in many countries these stereotypes can be found in discriminatory legislation, medical and adoption regulations, and legal precedents. Indeed, direct, and sometimes violent, threats to gay and lesbian parents may come from their own families. Malu Marin of the group Can't Live in the Closet (CLIC) in the **Philippines** reports:

We once referred a lesbian mother to a lawyer. Her mother (the child's grandmother) managed to bring her child to the province and was only willing to turn over her grandchild if her daughter broke up with her lesbian partner. When she and her partner attempted to get her child back, her brothers ganged up on her partner. Not only was her partner physically beaten up, she was also verbally abused and shamed before the entire neighborhood.⁴¹

A report published by the Senate of Berlin in **Germany** describes a similar threat of extended family violence against a lesbian foster-mother:

41. E-mail communication to the author, October 5, 1999.

48 · conceiving parenthood

The biological mother of a foster child agreed to have her child taken into permanent foster care by a lesbian woman. However, when the relatives of the extended family found out about the lesbian lifestyle of the foster mother, they reacted with massive threats: “*There were anonymous phone calls, women’s voices. They said, we will kill you with a pickaxe. There were also some lesbophobic slogans.*”⁴²

Although, in the latter case, the foster mother was reportedly able (with difficulty) to resolve these conflicts, such accounts indicate the tangible and terrible effect of prejudice, even within existing family structures. Silence is the overall consequence. Four years after a complex but ultimately successful custody battle, a lesbian mother in **Italy** was willing to be interviewed for a book on lesbian mothers, “but was adamant that her name should not appear in a book about lesbians for fear of possible repercussions.”⁴³

b. hostile rhetoric from governments, the media, and other social actors

Opposition to recognizing families with LGBT parents can be rooted in a number of ideas about tradition, social cohesion, reproduction, sexuality, marriage, and family life. Two broad forms of stereotypes about families with LGBT parents can be noted (although they are often intermingled):

- Those which see LGBT (and often other non-traditional) families as threats to the dominance or continued existence of the traditional family and of a moral or social order which depends on the traditional family;
- Those which see LGBT people themselves as a threat to the psychological or physical well-being of children, either be-

42. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 50; translated by Ute Rupp.

43. Kate Griffin, “Getting Kids and Keeping Them: Lesbian Mothers in Europe,” in *Living Difference*, p. 28.

social stereotypes and institutional barriers . 49

cause they are alleged to disrupt “normal” psychological development of gender and sexual identities by example, or because they are alleged to be sexual predators.

This section of the report provides examples of the rhetoric often used by state and non-state actors in denying, or advocating against, recognition of the parental rights and responsibilities of LGBT people.

Invoking nature: from families to “the family”

An idea of the heterosexual family—created by heterosexual marriage and perpetuated by the birth of legitimate children through the sexual intercourse of the couple—tends, in many societies, to be a core institution of the social imagination. Even this ideal is very far from monolithic: it is devised or dreamed in many varieties, nuclear or extended, monogamous or polygamous. From society to society it serves, however, as a device through which many individual, familial, and extra-familial relationships are experienced and articulated. People see themselves in, and through, families. To see others in different sorts of families can seem a threat to the situation and security of the self.

In the framework this family ideal provides, it is often difficult to disentangle the relationship of marriage, sexuality, and reproduction. Their various connections—socially generated, symbolically manufactured, and differing from culture to culture—come to loom as a “natural” and inextricable complex. Those who do not experience these tangled links in the same way seem either dangerous or incomprehensible. The fact that same-sex couples are not able to procreate through same-sex sexual intercourse, for example, may have given rise to the understanding in some cultures that homosexuals and bisexuals are opposed to the family altogether: inherently hostile (socially and politically) to traditional family forms, narcissistically focused only on themselves, and indifferent to children. These myths may range from a mild and well-meaning misunderstanding of

50 · conceiving parenthood

LGBT people's desires about parenting and family life to extreme defensiveness and hostility toward LGBT relationships.

A gay man in **South Africa**, who decided in the late 1980s to have a child with a lesbian friend, explains in an essay published in 1994:

When I told my mother that we were going to have a child, one of her first responses was to say that she had given away all the clothes I had worn as an infant because she thought that, as I was gay, I wouldn't ever have a child. Most gay men and lesbians who come out to their parents are confronted, at one point or another, with the accusation, 'Now we won't have grandchildren.' The myth that gay men and lesbians don't want children is so pervasive that I have even encountered it in 'progressive' straight circles. More than once, people with whom I work and for whom my homosexuality is not an issue have asked, after noticing a picture of James on my office noticeboard, 'Do *you* have a child?' And I must explain that, yes, I, a homosexual, have a child, and yes, as a homosexual I decided to have a child.⁴⁴

The understanding of homosexuality as "anti-family" may be particularly pronounced in cultures where there are religious or other reasons for valuing and maintaining emphasis on genealogical purity and continuing the family line—though it can be seen in a wide variety of other contexts as well.

When, in 1999, bills designed to prevent recognition of marriages involving homosexuals or transgender people were introduced in the Senate in the **Philippines**, explanatory arguments surrounding them illustrated some of these tendencies. One noted that "The basic objective of marriage is to establish conjugal family life. The contracting parties, *in harmony with biological law*, must necessarily be a male and a female" (emphasis added).

44. Neville John, "'Pretended Families': On Being a Gay Parent" in Mark Gevisser and Edwin Cameron, eds., *Defiant Desire: Gay and Lesbian Lives in South Africa* (1994), p. 343.

social stereotypes and institutional barriers . 51

Spokesman Jimmy Quitain of the pro-life group Familia also recently told the Philippine *Daily Inquirer* that gay relationships “lack the power of procreation, making no real contribution to family or the human race.”⁴⁵

Similarly, in **Mexico** in 1998, the right-wing newspaper *Excelsior* reported, “The National Pro-Life Committee expressed its opposition to legalizing marriages between homosexuals and child adoptions in Mexico City, claiming that ‘it would be a perversion of society’ . . . [A spokesman] pointed out that homosexuality is unnatural and it is a heinous type of relationship because it inverts entirely the meaning of sexuality, which as we know is meant to create life. *Sex between homosexuals is essentially barren and has no other end than that of sheer and immediate pleasure.*”⁴⁶ Such comments are common around the world. Linking sex inextricably to reproduction, they not only denigrate the independent value of sexual intimacy and pleasure, but identify those qualities as an active threat. Moreover—implicitly, and irrationally—they suppose that one who uses sex for any other purpose *cannot*, somehow, separately or simultaneously, engage responsibly in reproduction. Pleasure debilitates; intimacy, it appears, actually unfits one for togetherness.

Religious bodies also frequently approve particular forms of the family and condemn others. In June 1999, the **Vatican**, in its official newspaper, criticized the decision of a court in **Spain** to award custody of a child to the transgender partner of the child’s father, calling this decision “repugnant” and “an insult to the institution of the family.”⁴⁷ (This case will be discussed in greater detail below.)

This rhetoric of “natural” linkage is readily taken up by the state. Seeing the family as natural, rather than socially created—

45. Quoted in Rex Wockner, *International News* #279—Aug 30, 1999.

46. “‘Sería una Perversión de la Sociedad’: Rechaza Pro-Vida se Legalicen Matrimonios Entre Homosexuales y se les Permita Adopta a Menores,” *Excelsior*, May 15, 1998, p. 25A, emphasis added.

47. Daniel Schweimler, “Vatican: Transsexual Adoption an Insult,” BBC, June 26, 1999.

52 . conceiving parenthood

despite the different forms of the family which exist in different cultures—governments may deliberately disparage non-traditional forms of the family as synthetic or otherwise threatening. In a 1986 court case in the **United States** addressing the eligibility of a single bisexual man to adopt a child, the presiding judge declared, “It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other to create a parent after that proscribed model, in effect approving that standard, *inimical to the natural family*, as head of a state-created family” (emphasis added).⁴⁸ The opposition could not be clearer. A standard of “nature” is artificially invented, then invoked to impugn what lies outside it as “artificial.”

Threats to Children

In many cultures, LGBT people are erroneously seen to pose specific threats to children. This threat is alleged to repose in the symbolic infection of example (influencing children to become LGBT themselves) or in a mythical tendency of LGBT people to sexually abuse children. Government officials can use such rhetoric to portray themselves as defenders of the family and children. In December 1996 at the opening of the Women’s Council Congress of the ruling party SWAPO, President Sam Nujoma of **Namibia** declared that “all necessary steps must be taken to combat influences that are influencing us and our children in a negative way. Homosexuals must be condemned and rejected in our society.”⁴⁹

The media can also circulate such messages widely. Antonia

48. In the Matter of the APPEAL IN PIMA COUNTY JUVENILE ACTION B-10489, No. 2 CA-CIV 5548, Court of Appeals of Arizona, p. 5 of 11. Judge Fernandez concurred with the decision by Judge Hathaway, although Judge Howard dissented in a sharp condemnation of the decision, noting, “It is clear from the record that both the trial judge and the majority of this department have no intention of ever letting a bisexual adopt a child. I refuse to participate in such a decision.”

49. IGLHRC, ERN, Vol. 6, No. 2 (1997).

social stereotypes and institutional barriers . 53

Creteanu and Adrian Coman, of the group ACCEPT, have noted in their research on press coverage of homosexuality in **Romania** that “Paedophilia and the corruption of minors are frequently present especially in the newspapers and often associated with homosexuality to the degree that it is impossible to distinguish between the two.”⁵⁰ They add:

The current mentality of the majority adheres to the point of view that homosexuals prefer “our” teenagers and minors. In some articles recently published the term paedophilia is not properly explained or understood, as referring exclusively to an adult’s preference for sexual relations with a child, regardless of gender or of the sexual orientation of the partners, although paedophilia [is not] typical for same-sex relations, [nor do they point out] the fact that the percentage of homosexual paedophiles is not any higher than that of heterosexuals.⁵¹

One article, “Homosexuals and the prisoners—the only concerns of Romania,” published in *Jurnalul National*, on April 23, 1998 offers a clear-cut example. Gay and lesbian activists are identified as “pederasts” aiming not at human rights but sexual predation: “But when certain pederasts become aggressive, when their victims are mainly children, the law must have a strong say in it.”⁵²

Elsewhere in the same study, Creteanu and Coman note extensive press interest in pedophilia, citing the following headlines and articles:

“Adolescent girl was ‘raped’ by a female neighbour” (*Libertatea*, February 1998), “Article 200 in action/the paedophile will stay in prison for 7 years” (*Curierul*

50. “Homosexuality in the Written Media in Romania,” translated from the Romanian by Ioana Popovici and Adrian Newel Paun, February 1999.

51. “Homosexuality in the Written Media in Romania,” translated from the Romanian by Ioana Popovici and Adrian Newel Paun, February 1999.

52. “Homosexuality in the Written Media in Romania,” translated from the Romanian by Ioana Popovici and Adrian Newel Paun, February 1999.

54 . conceiving parenthood

National, January 29, 1998), "Six homosexuals raped an 18 year old teenager" (*Libertatea*, January 19, 1998), "Twenty-three children are terrorised by 23 year old Gabriel Lungu, former swine farmer/Children from the Special Needs school in Babeni are undergoing outrageous perversions at the hand of a psycho caretaker" (*Ziua*, July 28, 1997), "They raped them, they filmed them and then they murdered them/At least five children are victims of a child abusers' network who are marketing morbid scenes," "The homosexual brothel: Live persons, drugs and trafficking in dollars" (*Tinerama*, August 20, 1996).

These stereotypes have been effectively disproven by relevant psychological and sociological research. Peer-reviewed research published by reputable presses and journals has uniformly found no difference between children of LGBT parents and children of heterosexuals in terms of their sexual orientation or gender identity, strongly indicating that fears that homosexuals will have a negative effect on the "normal" sexual and gender development of children are unfounded.⁵³ Moreover, studies indicate that the vast majority of sexual abuse of children is abuse of female children at the hands of *heterosexual men*, not sexual abuse by gay men or lesbians.⁵⁴ Other concerns about the "risk" allegedly posed to children by LGBT people will be discussed in detail in the section on child custody.

53. See pp. 71–96 for more discussion of these questions. For a general overview of psychological research, Charlotte Patterson's "Summary of Research Findings," American Psychological Association, 1995, is a common point of reference for researchers and activists in many countries.

54. See for example D. Finkelhor and D. Russell, "Women as Perpetrators: Review of the Evidence," in D. Finkelhor, ed. *Child Sexual Abuse: New Theory and Research*, 1984; B. M. Jones and K. MacFarlane, eds., *Sexual Abuse of Children: Selected Readings*, Washington, DC: National Center on Child Abuse and Neglect, 1980; E. P. Sarafino, "An estimate of Nation-Wide Incidence of Sexual Offenses against Children," *Child Welfare* 58, 1979; C. Jenny, T. A. Roesler, and K. L. Poyer, "Are Children at Risk for Sexual Abuse by Homosexuals?" *Pediatrics* 94, 1994.

social stereotypes and institutional barriers . 55

c. exclusion and prejudice in institutions that serve families

Discourses such as the above, identifying LGBT people as a direct threat to children, may also result in the exclusion of (openly) LGBT people from work in education and the caring professions. Their consequences may also include bans on discussing or providing information about sexual orientation and gender identity issues in various institutions that serve families, children, and youth. Thus, the very institutions on which an increasing number of LGBT-headed families must rely are often intentionally structured to be less aware, less sympathetic, and less able to serve these families.

In situations where LGBT families are already excluded from or discriminated against in normal laws, regulations, and procedures, LGBT families seeking support, assistance, or simple access within such institutions thus have to rely on the discretion of people whose profession is virtually obligated to stigmatize them. In such an environment, stereotypes and prejudicial misinformation may be widespread. Moreover, fear of being identified as lesbian or gay within such an exclusionary regime might—for example—discourage both heterosexuals and closeted homosexuals from taking steps to recognize the needs of LGBT families. Parents may find themselves without supportive advocates as they negotiate institutions not designed to address their specific situations.

Such laws and regulations not only constitute workplace discrimination against LGBT people, but produce an environment in which LGBT parents, LGBT youth, and children of LGBT parents may be subject to discrimination and other abuses in attempting to access education, health care, and other vital services. The following are a few examples of such legal barriers:

In **Australia**, several state laws continue to permit discrimination against homosexuals in jobs that involve working with children. The Northern Territory *Anti-Discrimination Act* (1992)

56 . conceiving parenthood

includes the following exception (Section 37): “A person may discriminate against another person on the grounds of sexuality in the area of work where—(a) the work involves the care, instruction or supervision of children; and (b) the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of children, having regard to all the relevant circumstances of the case including the person’s actions.” Almost identical provisions exist in the Anti-Discrimination Act (1991) of Queensland and the Equal Opportunity Act (1995) of Victoria.⁵⁵

In **Costa Rica**, in 1998, the organization Triangulo Rosa reports that a teacher was fired from St. Paul High School for being homosexual. The group further noted that although “this kind of discrimination is not infrequent in Costa Rica, this is the first teacher to publicly denounce it.”⁵⁶

In the **United Kingdom**, Section 28 of the *Local Government Act* (1988) prohibits local authorities from promoting “the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship” and includes broader sanctions against using government funds to “intentionally promote homosexuality.” The organization Stonewall UK notes,

No local authority has ever been prosecuted under Section 28 but many, through fear of how it might be applied, have used Section 28 to discriminate against and penalise the lesbian, gay and bisexual communities. It was used by Edinburgh District Council to refuse a grant of £200 to fund a creche for a lesbian film and video screening event; it was used by Keynsham Broadlands School to ban a performance which featured a gay character and it

55. International Lesbian and Gay Association, World Legal Survey, www.ilga.org (December 12, 1999)

56. IGLHRC *Emergency Response Network* “Action Alert,” Vol. VII, No. 2, 1998.

social stereotypes and institutional barriers . 57

was used by Manchester University Press to block the publication of a book on gay politics.⁵⁷

In the course of the past year, Prime Minister Tony Blair's government has suggested that it will seek repeal of the legislation, but has delayed moving directly to do so.⁵⁸

In December 1996, the Rajabat Institute Council, the collective governing body of all of **Thailand's** teachers' colleges, indicated it planned to bar homosexuals from enrolling in any of its colleges nationwide—citing their potential threat to children. While strong protest from domestic and international human rights monitors resulted in the removal of specific references to homosexuality, language allowing authorities to bar people with “improper personalities” was retained. Local activists expressed concern in 1997 that this language could still be used to discriminate against homosexuals.⁵⁹

Discrimination against people living with HIV and AIDS—in many cultures linked to discrimination against homosexuals in crucial ways—can also affect the perception and situation of gay men (HIV-positive or not) in education and the caring professions, through unfounded fears of HIV transmission as a result of casual contact. People living with HIV and AIDS in many countries often find they have few protections for their employment rights. In 1997 in **Costa Rica**, for example, HIV-positive teacher Minor Navarro was forcibly transferred from the elementary school “Escuela Central de Tres Ríos,” where he had worked for three years, to an administrative position elsewhere (then later a teaching position in still another institution) after communicating his HIV status to his school director in December 1996, in the

57. Stonewall UK web site, www.stonewall.org.uk/aoc/sec28.html. (January 6, 2000).

58. See for example, Tim Reid, “Schools' Gay Ban to be Repealed,” *London Times*, October 30, 1999; Colin Brown, “Ministers to Drop Repeal of Rule 28,” *The Independent*, October 25, 1999; “Is Gay Equality Any Closer,” *BBC News*, November 2, 1999.

59. IGLHRC *Emergency Response Network* “Action Alert,” March 1997.

58 . conceiving parenthood

context of medical absences from work. The director met with parents of the class he was scheduled to teach and encouraged them to petition the school for the teacher's removal. Thirty-three parents signed such a petition, stating that if Navarro were allowed to return to his post "we will take the matter to the press in order to keep him from teaching our children."⁶⁰

Initially, lawyers in the national Ministry of Education told Navarro that he had no choice but to accept the transfer, which he did. He later appealed to the office of the government ombuds-person, which recommended an investigation by the Ministry.⁶¹

Persons facing discrimination based on their sexual orientation, gender identity, or HIV status often are deprived of even the minimal recourses which Navarro found. The worldwide paucity of protections against such discrimination is particularly striking given the clarity with which international human rights instruments condemn discrimination. As the conclusion of this report will explain, protections against unequal treatment based on sexual orientation are an accepted part of international human rights law, affirmed as such by the United Nations. It is the responsibility of states to protect individuals, parents, and families from the effects of prejudice and the reach of discrimination—not to amplify the first and to enforce and extend the second.

60. IGLHRC *Emergency Response Network* "Action Alert," Vol. VI, No. 6, 1997.

61. IGLHRC *Emergency Response Network* "Action Alert," Vol. VI, No. 6, 1997.

IV. Custody and Access for LGBT Parents on the Breakdown of Heterosexual Relationships

a. basic concepts

around the world, LGBT parents who are ending a heterosexual relationship often fear that knowledge of their sexual orientation will unduly influence whether they will be able to retain full parental rights, have their children live with them much or even part of the time—or even be able to see their children at all.

Legal decisions about child custody, designed to determine disputed issues between separating parents, can be founded on unpredictable and capricious factors. The arbitrariness of state intervention—the ability to mask multiple, inconsistent, and discriminatory motives in the elasticity of vague provisions and latitudinarian language—is evident here in full. Where courts arbitrarily deny custody or access to LGBT parents, they wrongfully deprive children in these families of a parent's capacity to care. And they set a model for prejudicial action which can be powerful, and extremely painful, to the child.

While custody in some legal systems refers specifically to where the child will reside and who will have primary responsibility for its day-to-day care (referred to variously in English as physical custody, residence, or care of the child), some forms of custody also specify the power to make decisions or have a say in a child's schooling, religious upbringing, and medical care (referred to as legal custody or parental responsibility, sometimes

60 . conceiving parenthood

allotted to both parents as joint custody or shared parental responsibility). In some systems, these are not separated in legal terminology. In most cases, the parent without physical custody has the possibility of requesting reasonable access (also called visitation or contact), including having the children for overnight visits if accommodations are suitable.

Custody is determined in different countries on the basis of a variety of criteria. In most countries, “the best interest of the child” is taken to be a central standard, although in practice this may be interpreted in highly arbitrary ways. Different cultural understandings of the parent-child relationship may lead to a tendency to award custody to the mother or father on the basis of the child’s age or sex, or on the basis of patrilineal or matrilineal traditions of descent or authority.

Separating a child from a parent without legitimate cause runs strictly counter to the rights of the child. While divorce or the dissolution of a joint-parenting relationship ordinarily involves allotting or parcelling elements of custody between the former partners, this cannot be done in a manner either casual or discriminatory. States are obliged to ensure due process in all its senses for such a separation to be valid—a careful evaluation of all aspects of and perspectives on the situation, a clear motivation for any decision, a fair and consistent foundation for the decision in law, and the assurance of judicial review. Article 9 of the Convention on the Rights of the Child declares:

1. States Parties shall ensure that a child not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

b. settling out of court and hiding one's homosexuality: fear of being "outed"

In many countries, LGBT people have so little faith in the capacity of the family law system to function impartially that they are effectively excluded from the legal processes and protections designed to protect them and their children. Some lesbian and gay parents opt to settle out of court because they do not believe that they can receive a fair hearing if their sexual orientation becomes known. Fear of being "outed" before or during a custody dispute can leave a homosexual parent open to blackmail by her or his former spouse.

Activists in **Argentina**, **Brazil**, **Finland**, the **Philippines**, and **Russia** have reported cases in which lesbian mothers agreed out of court to—often highly unfavorable—settlements, sometimes even giving up custody to avoid being outed.

In her 1995 report on **Argentina** in *Unspoken Rules: Sexual Orientation and Women's Human Rights*, Alejandra Sardá notes,

With regard to lesbian mothers who are seeking divorce, it is common for their husbands to force them into an out-of-court settlement with regard to the custody of children. To date, there have been no publicized court cases regarding custody for lesbian mothers. Most lawyers advise them to come to some sort of agreement with their former husbands, since they have little chance of gaining anything by

62 . conceiving parenthood

going to court. These agreements usually involve severe economic disadvantages for the mothers as well as leaving the possibility of seeing their children entirely to the discretion of their ex-husbands. Ana, who obtained a divorce in 1980, is one example of what can happen to lesbian mothers in these circumstances. She was forced to leave her home and all the community property accumulated during 12 years of marriage without any right of compensation. For more than five years her husband would not allow her to see her two children. Only when her children became adults and had decided on their own to reestablish contact with her did she see them again.⁶²

A more recent report notes only one case heard before a court in Buenos Aires, in which a gay father's right to visitation was recognized.⁶³

Reporting on **Brazil**, Miriam Martinho has observed, "Many lesbian mothers live with the constant fear of losing custody and are thus vulnerable to blackmail or extortion from their husbands."⁶⁴

In 1996, in **Finland**, researchers Kati Mustola and Paula Kuosmanen wrote,

We have no information about custody cases where the mother's lesbianism has been an open issue, but probably there are such cases. Disclosure of the mother's lesbianism has been used successfully by the husband to exert pressure in many custody cases. . . . In some of the cases known to us, custody of the children has been given to

62. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women's Human Rights*, IGLHRC, 1995, p. 5.

63. A. Wagmaister and J. Bekerman, "Niños criados por parejas homosexuales: caracterización socio-jurídica de ese contexto. Hacia una construcción de la relación coparento-filial para que el derecho adopte a esos niños," X Congreso Internacional de Derecho de Familia, "El Derecho de Familia y los Nuevos Paradigmas," Mendoza, November 1998; no case citation.

64. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women's Human Rights*, IGLHRC, 1995, p. 18.

the father after he threatened to disclose the mother's lesbianism and the mother had to agree.⁶⁵

Some women fear loss of any contact with their children. Malu Marin of CLIC in the **Philippines** reports, "I know of some lesbian mothers who have agreed to give full custody of their child/children to their husbands just so they wouldn't be subjected to a court case. They aver that it is better to be able to see their children on weekends or special occasions than not see them at all."⁶⁶

Masha Gessen notes how vagueness in the law in **Russia** contributes to fear on the part of Russian lesbian mothers:

The Family Code, signed into law on 29 December 1995, does not specify what a court should consider in custody decisions. . . . Parental rights can be limited by court decision at the request of the police, law enforcement agencies, guardianship agencies, the other parent or close relatives of the child. To limit parental rights a court must hold that being with the parent is dangerous for the child. The law does not define "dangerous."

Though there have not been any widely publicized cases of mothers losing custody because of their lesbianism, many lesbian mothers believe this is exactly what would happen if their sexual identity became known. They tend to remain closeted and to broker custody agreements with the fathers of their children without going to court.⁶⁷

The fear of discrimination in the courts is a powerful motive for lesbian mothers to remain closeted in many countries. In **Germany**, there is a common recommendation, even among sympathetic lawyers, that gay and lesbian parents should remain

65. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 107.

66. E-mails to the author, September 30, 1999 and October 5, 1999.

67. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 185-186.

64 · conceiving parenthood

closeted if their homosexuality is not yet known by others.⁶⁸ In **Ireland**, Patricia Prendiville reported,

Custody of the children of lesbian mothers is at the discretion of the courts. Under the various laws, the judge assesses custody on the basis of the best interests of the child/children only, and does not take into account sexual orientation. However, hearsay evidence is admissible, and women are rightly fearful of declaring their involvement with another woman in court, as they might lose custody.⁶⁹

Daniela Danna reported in 1995 that in **Italy**, “Lawyers continue to advise lesbian mothers to keep silent, even if hiding means that they become subject to blackmailing by their husbands.”⁷⁰ Ann Marie, the female co-chair of J-FLAG, a gay and lesbian organization in **Jamaica**, indicates, “The trend is for same-sex-loving women who face custody battles to terminate their same-sex relationships and stay as far away from the gay life as they can. . . . At least, until they have secured custody, or the child’s father has cooled down the heat.”⁷¹

In **Serbia**,

Although lesbianism is not mentioned explicitly in family law, mothers are afraid to have their homosexuality brought up in court, as it can be used to take custody away from them. Given that lesbians are seen to belong to the same category as those who are “irresponsibly promiscuous, equal to a drug addict

68. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 37.

69. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 136–137.

70. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 144.

71. E-mail to the author, August 7, 1999.

or mentally disturbed and dangerous” . . . judges are not likely to make a decision in their favor.⁷²

c. allegations of homosexuality in court

Accusations of lesbianism—whether true or not—can be used by husbands to gain an advantage in custody disputes. María Bolt González explained the situation in **Nicaragua**:

Allegations of lesbianism can be used as a threat against women involved in custody cases, as was illustrated by a recent dispute over the custody of a six-year-old boy. When the father accused the mother of being a lesbian, she denied the accusation and insisted that it was simply a ploy on the part of her ex-husband to gain custody of their son. Nowhere in the newspaper coverage was the possibility raised that lesbians could in fact be good mothers.⁷³

Adelaide Penha de Costa writes that in **Portugal**,

[The] combination of invisibility, a high profile when there is the very occasional need to punish, and the vagaries of judges’ minds in interpreting “decency” means that lesbians live interstitial existences, fearful of discovery, and the subsequent loss of family ties and jobs.

Custody is not a foregone conclusion for lesbian mothers, although it seems to be a fact that most fathers do not want custody of the children and very often give up their accorded visiting hours, days, weekends, and holidays. However, it is also clear that when the father is interested in claiming his share of the children’s time, the

72. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 189.

73. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women’s Human Rights*, IGLHRC, 1995, p. 136; Bolt González cites the article “Acusan a madre soltera de lesbiana” (Single mother accused of being lesbian”), *Barricada*, May 12, 1995.

66 . conceiving parenthood

lesbian mother who has a lesbian partner faces great difficulties in negotiating suitable arrangements.

During divorce proceedings, lesbian mothers feel the overwhelming need to disguise and hide their lesbianism. If the husband should introduce evidence of his wife's lesbianism, the issue then becomes, not custody, but the sexual orientation of the woman. This often gives rise to the most retrograde and homophobic discussions. On the other hand, courts do not always take seriously a husband's accusation of lesbianism against his wife, as the word "lesbian" is frequently used as an insult.⁷⁴

d. openly lesbian, gay, and bisexual parents in the courts

In many countries, it is possible to lose custody of or access to one's children purely on the basis of one's sexual orientation. Occasionally, this discrimination is explicitly fixed in legislation. For example, in the **Philippines**, the Family Code includes among the conditions for which a marriage can be annulled [Article 45], "the consent of either party obtained by fraud," which can include [Article 46] "[c]oncoalment of drug addiction, habitual alcoholism, homosexuality or lesbianism existing at the time of marriage." In the case of annulment, the party guilty of such fraud (of concealing homosexuality at the time of marriage) may lose rights to joint property and to custody of the children.⁷⁵ Malu Marin of CLIC reports that as yet, activists know of no actual case in which this provision has been used.⁷⁶

74. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, pp. 180–181.

75. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women's Human Rights*, IGLHRC, 1995, p. 148. In an e-mail sent December 24, 1999, Can't Live in the Closet (CLIC) further explained that the Philippines is one of a handful of countries that does not allow divorce as such, but instead has a form of civil annulment modeled on the annulment process of the Catholic Church.

76. E-mail to the author, September 30, 1999.

More often, however, there is no specific legislation mentioning homosexuality, and the chief barrier to lesbian, gay, and bisexual parents obtaining custody is bias on the part of judges, social workers, or other authorities. This bias may be explicit on their part—the expression of a vocal assumption, supported by the full weight of professional power even if not inscribed in the law, that no lesbian, gay, or bisexual parent should be given custody; or it may be more silent and subtle. The frequency with which custody and care decisions are subject to such prejudice is a forceful indicator of the persisting arbitrariness of state interventions in parenthood.

Kurt Krickler, an activist in **Austria**, reports that in custody disputes there, “divorcing partners would use the fact that the ex-wife or ex-husband is homosexual as a weapon in the fight for exclusive custody/parenting rights over the couple’s children. In some cases, this has also been used to restrict the right of the divorced partner to visit and see the children on a regular basis or even to completely deny him/her this right.”⁷⁷ In **Greece**, according to a 1998 ILGA-Europe report, “‘Unorthodox’ sexual orientation counts as a factor in deciding who is awarded custody of children after a divorce. Evidence of such unorthodox orientation is often keenly sought out by the other party if there are any suspicions.”⁷⁸

The bias may also be more indirectly expressed. In **France**, attorney Caroline Mécary and academic Geraud de la Pradelle explain,

Examination of the jurisprudence shows that it is not rare that the judge considers that a [male or female] homosexual would be a bad father or a bad mother. If the criterion advanced for refusing physical custody to the homosexual parent is the interest of the child, it is not also less the case

77. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 32.

78. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 57.75. E-mail to the author, September 30, 1999.

68 · conceiving parenthood

that implicitly this refusal is sometimes in reality a means to punish homosexuality.⁷⁹

The idea of the “best interests of the child” offers courts considerable latitude to find the parent’s LGBT identity—or even widespread bias against it—a potential source of harm. As we have noted above, the Convention on the Rights of the Child offers a contrary understanding of that test: one suggesting that surrendering to prejudice itself damages the child’s interest. Advocates in **Australia**, **Canada**, and the **United States** also note the importance of framing the “best interest” test in court in a way that discourages the discretion of the court from slipping into bias. In **Australia**, Jenni Millbanks notes that

Disputes over children involving lesbian mothers and (usually) heterosexual fathers who are former partners are resolved under the Family Law Act 1975 (Cth). The Family Court has always held that lesbianism in itself is not a bar to custody. There have been around a dozen reported cases concerning lesbian mothers and two concerning gay fathers before the court in the past 20 years and they have been moderately successful (especially when compared with other countries such as the United States, United Kingdom, and Canada). However the court has always viewed the lesbian or gay parent’s sexuality, and especially any current relationship, with heightened suspicion and often subjected the parent to unnecessary scrutiny, and in the past, to invasive restrictions upon their behaviour.⁸⁰

“The major issue in this regard,” according to Millbanks, “is not the law itself, which is value neutral, but its administration through judges (and lawyers whose attitudes may well be deter-

79. Caroline Mécary and Géraud de la Pradelle, *Les droits des homosexuel/les*, Presses Universitaires de France, 1998, p. 44. Translated by L. Minot.

80. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 123.

minative in negotiations). The breadth of the 'best interests of the child' principle requires the exercise of considerable discretion."⁸¹

Concerning **Canada**, McCarthy and Radbord state,

Now that the conduct of a parent has been deemed irrelevant unless it affects the best interest of the child, being gay or lesbian *in and of itself* is no longer a bar to custody. This significant evolution in the law has enabled many lesbians to obtain custody of their children. Still gays and lesbians have yet to achieve substantive equality in custody and access determinations: they continue to be denied custody and be granted limited access to their children as a result of heterosexism and homophobia. The "best interests" test, while appearing to be neutral, is not generally applied in a manner that recognizes the requirements of equality.⁸²

Julie Shapiro, in the **United States**, also declares, "The promise of individualized consideration focused on the best interests of the child has not been fulfilled. Ignorance and prejudice too frequently combine to distort the analysis of custody cases."⁸³ She further notes,

When courts allow prejudice and anxieties about sexual mores to overwhelm other evidence in a custody case, they stray from the goal of determining the best interests of the child. The needs of the particular child are marginalized, distorted, or entirely obscured. Whether courts are motivated by a desire to enforce perceived societal norms, by stereotypical and uninformed views of lesbians and gay men, or by a sincere, if misguided, desire to protect a child, the result is the same: Children are unnecessarily

81. Jenni Millbanks, in "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" *Australian Journal of Family Law* 12 (1998), pp. 123-4.

82. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, p. 53.

83. Julie Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," *Indiana Law Journal*, 71: 623, p. 625.

70 . conceiving parenthood

removed from loving and secure homes where they have been thriving, or their contact with a caring and concern parent is needlessly and unreasonably constrained.⁸⁴

Shapiro also advocates the use of a well-constructed “nexus” test—a common strategy in the **United States** for insisting that for a parent’s sexual orientation or sexual conduct to be considered relevant to the determination of custody, a specific link must be shown between the parent’s orientation or conduct and a particular harm to the child.⁸⁵

In order for such a test to function properly, Shapiro suggests that an effective nexus test that serves the best interests of the child include:

- Recognition of appropriate areas of inquiry (the conduct of the parent as it affects the child)
- A clear definition of harm, with “a specific showing of particular harm, not general conclusions or speculation”;
- Evidence of harm, and evidence that this harm is linked to the conduct of the parent;
- Procedural safeguards about what kind of evidence is relevant to determining harm.⁸⁶

Attorneys and legal scholars in many countries, including the three cited immediately above, note the importance of using a growing body of research on children of lesbian and gay parents to refute common stereotypes in courts.⁸⁷ Overall, this body of

84. Julie Shapiro, “Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,” *Indiana Law Journal*, 71: 623, p. 626.

85. She notes that courts in 27 US states have expressed approval of the basic principles of a nexus test. Julie Shapiro, “Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,” *Indiana Law Journal*, 71: 623, p. 635, note 67.

86. Julie Shapiro, “Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,” *Indiana Law Journal*, 71: 623, p. 666–670.

87. The overwhelming majority of this research has been done in the United States, the United Kingdom, and Europe, and it is this body of research that IGLHRC has seen referenced by researchers and advocates in other regions and countries.

research provides information useful in determining the “best interests of the child.” Charlotte Patterson notes, “It is clear . . . that existing research provides no basis for believing that children’s best interests are served by family conflict or secrecy about a parent’s gay or lesbian identity, or by requirements that a lesbian or gay parent maintain a household separate from that of a same-sex partners [as has been stipulated in some custody decisions].”⁸⁸

The cases below illustrate a variety of issues that arise for the lesbian, gay, or bisexual parent in custody disputes, and indicate social sciences research and/or legal approaches that have been helpful in securing custody in some cases in some countries.

e. homosexuals as unfit parents

Despite the fact that the World Health Organization (WHO) and many national mental health organizations have long since removed homosexuality from their lists of mental illnesses, homosexuals are often discriminated against in the mistaken belief that same-sex desire constitutes a disorder. In 1996, the Supreme Court of Justice in **Turkey** ruled that a lesbian mother constituted a threat to the moral development of her child, because her lesbianism constituted “a (sexual) habit in the degree of sickness.”⁸⁹ There is also one known case of a lesbian mother in the **Czech Republic** winning custody of her children—but only after an extraordinary, and humiliating, battery of psychological and other tests.⁹⁰

88. Charlotte J. Patterson, “Summary of Research Findings,” American Psychological Association, 1995, p. 8.

89. Brother Sister No. 113, August 22, 1996 page 6, cited on GayLawNet, www.gaylawnet.com.

90. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 36. In the same volume the author notes, “In the Czech judicial tradition custody of children falls to the mother in 93 per cent of cases. There are, however, cases of lesbian mothers being denied custody for reasons of sexuality, but it is rare for sexual orientation to be given as a reason for divorce.”

72 . conceiving parenthood

It is also sometimes alleged that homosexual parents pose an array of vague dangers or threats to their children. In **France**, during an interview published in 1998, Nicole and her partner Cathérine gave the following information on the former's custody battle:

Nicole: The legal proceedings were very long. During the period of "non-conciliation" [when the couple cannot come to agreement and a court decision has not yet been made] I was given physical custody of the children. My homosexuality was brought up immediately by Bernard [the ex-husband]: he said that it was a risk for the children. I had said during the hearing that I didn't plan to live with Cathérine. The judge didn't order an investigation, nothing at all, and I had custody of the children on the condition that I made the effort not to mix my family life and my "personal" life. It was clearly stipulated. Bernard appealed this decision and it was then that all the trouble began. There were investigations that lasted a long time . . . even though we were still living together, he and I. It was truly unlivable! We spied on each other: he looked for arguments to use against me, I also tried to find arguments against him. When you remain under the same roof during a divorce, it's catastrophic! Normally, with the non-conciliation decree, he would have had to leave the house, but he created an incident at the appeals court and was allowed to stay on the premises until the appeals decision saying that the children were in danger if he didn't stay.

Cathérine: That lasted almost a year.

. . .

Nicole: . . . Regrettably, even today, citations from the jurisprudence set in relief the intolerance of certain experts. When the other parent reads the texts in question, he says to himself that he's absolutely right, that he has to continue, that he'll make it a fight, and that makes the

subject even more venomous. The reports from investigations that I read made it seem that there were real risks to the children, while discrediting the parent. For example, it was said on many occasions that I shouldn't live with another person of the same sex.

Catherine: When in fact, having a stable situation, living together and having a plan for your lives—that reassures the children. I think that the judge should never say “on the condition that the parent and her/his partner do not live together”; that's really a terrible mistake, because it destabilizes everything and does not reassure anyone.

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Nicole: During this time, everyone suffered a lot, including the children. Océane had frequent nightmares. Nolwenn had anxieties and palpitations. In fact, there was nothing seriously wrong with her, it was in terms of morale that things weren't working. And Erwan was very hard. That lasted a long time after.

Catherine: The situation improved when the judge decided that the children would, in part, choose where they wanted to go. They had, in fact, gotten older during the time the case had gone on!

Nicole: Until the divorce judgement, I had custody of the three children, and the judgement confirmed custody. Since Bernard had come to live near where we were, I had decided to move to cut links a little further with him. I didn't want to feel spied upon. He then launched a new case, asking for custody because I was back together with my girlfriend and there was a new risk to the children. This time, the children were heard by the judge: Erwan preferred to stay with his father. It was he who chose at that moment. He was thirteen and a half. Nolwenn said that she wanted to stay with me and the judge decided, following the report of the most recent expert, which was favorable, that Océane should stay with me.

74 · conceiving parenthood

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Nicole: After the judgement, we finally began to live a sort of ordinary family life. Cathérine rejoined us, my daughters and me.⁹¹

The unusual step of allowing the father to remain in the home during a period of non-conciliation (thereby exposing the children to continued conflict) was linked to fears that the children were in greater danger—a danger never defined—if they lived with their lesbian mother alone.

The prejudices which enable such extraordinary judicial dispositions are without foundation in fact. *Common stereotypes of lesbians and gays as being, as a class, unfit parents are entirely unsupported by empirical studies.* Studies consistently produce data refuting any such conclusion.⁹² Specifically, studies indicate that lesbian and heterosexual women do not differ significantly in overall mental health or in approaches to child rearing.⁹³ Studies suggest that gay fathers demonstrate greater nurturance, have more investment in their role as parents, and view their paternal role more

91. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, pp. 98–103, selected; translation L. Minot

92. Studies addressing this include: D. Cramer, "Gay parents and their children: A Review of Research and Practical Implications," *Journal of Counseling and Development*, 64 (1986): 504–507; P. J. Falk, "Lesbian Mothers: Psychosocial Assumptions in Family Law," *American Psychologist*, 44 (1989): 941–947; E. D. Gibbs, "Psychosocial Development of Children Raised by Lesbian Mothers: A Review of Research," *Women and Therapy* 8 (1988): 65–75; Melanie A. Gold et al., "Children of Gay or Lesbian Parents," *Pediatrics in Review*, Vol. 15, No. 9 (September 1994): 354–358; Charlotte J. Patterson, "Summary of Research Findings," American Psychological Association, 1995.

93. See for example S. L. Kweskin and A. S. Cook, "Heterosexual and Homosexual Mothers Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children," *Sex Roles* 8 (1982): 967–975; T. A. Lyons, "Lesbian Mothers' Custody Fears," *Women and Therapy* 2 (1983): 231–240; J. A. Miller et al., "The Child's Home Environment for Lesbian Versus Heterosexual Mothers: A Neglected Area of Research," *Journal of Homosexuality*, 7 (1981): 49–56; B. M. Mucklow and G. K. Phelan, "Lesbian and Traditional Mothers' Responses to Adult Response to Child Behavior and Self-Concept," *Psychological Reports* 44 (1979): 880–882; M. D. Pagelow, "Heterosexual and Lesbian Single Mothers: A

positively than heterosexual fathers.⁹⁴ Recent work on household division of labor has also shown that lesbian households tend to divide domestic and paid work more evenly than heterosexual households, resulting in a more child-centered schedule.⁹⁵

In general, empirical evidence suggests that the *form* of a family affects the child less, and has less to do with his or her ultimate well-being, than the *processes*—the degree of harmony or disharmony—it contains. Based on a range of research comparing children of gay and lesbian parents to children of heterosexuals during the past five years, Fiona Tasker and Susan Golombok have recently suggested, along similar lines, that “family processes (such as family conflict), rather than family structure (parental sexual orientation and number of parents) . . . have the greater influence on children’s psychological adjustment.”⁹⁶ Such a finding is particularly relevant to a situation such as Nicole’s above,

Comparison of Problems, Coping and Solutions,” *Journal of Homosexuality* 5 (1980): 198–204; C. Rand et al, “Psychological Health and Factors the Court Seeks to Control in Lesbian Mother Custody Trials,” *Journal of Homosexuality* 8 (1982): 27–39; N. Thompson et al., “Personal Adjustment of Male and Female Homosexuals and Heterosexuals,” *Journal of Abnormal Psychology* 78 (1971): 237–240.

94. See for example M. A. Gold, E. C. Perrin, D. Futterman, and S. B. Friedman, “Children of Gay or Lesbian Parents,” *Pediatrics in Review*, 15:9 (September 1994); F. W. Bozett, “Gay Fathers: A Review of the Literature,” *Journal of Homosexuality* 18:1–2 (1989); R. L. Barret and B. E. Robinson, *Gay Fathers*, Lexington, MA: Lexington Books, 1990; J. J. Bigner and F. W. Bozett, “Parenting by Gay Fathers,” in F. W. Bozett and M. B. Sussman, eds, *Homosexuality and Family Relations*, New York: Harrington Park Press, 1990; F. W. Bozett, “Gay Fathers: How and Why They Disclose Their Homosexuality to Their Children,” *Family Relations*, 29 (1980) 173–179.

95. Gillian A. Dunne, “Balancing Acts: Lesbian Experiences of Work and Family Life,” *Report to the Economic and Social Research Council*, June 1998; S. I. Hand, *The Lesbian Parenting Couple*, Unpublished Doctoral Dissertation, The Professional School of Psychology, San Francisco; C. J. Patterson, “Families of the Lesbian Baby Boom: Parents’ Division of Labor and Children’s Adjustment,” *Developmental Psychology*, 31 (1995) 115–123.

96. Fiona Tasker and Susan Golombok, “The Role of Co-Mothers in Planned Lesbian-Led Families” in Gillian Dunne, ed., *Living Difference: Lesbian Perspectives on Work and Family Life*, New York and London: The Haworth Press, 1998, pp. 50–51.

76 . conceiving parenthood

in which a court determined that prolonged family conflict was preferable to exposing children to the contagion represented by their mother's identity.

f. concerns about the children's gender and sexuality

In a 1988 case in **Germany**, a court

... removed a 10-year-old boy from the custody of his mother and her female partner ... [T]he psychological report ordered by the court recommended that the father receive sole custody so that the boy would be in a better position to develop his sexuality and his male identity.⁹⁷

Such solicitude to safeguard the masculinity or femininity of children is a common theme when courts confront lesbian or gay parents. In **Australia**, Jenni Millbanks refers to the 1995 case *In the Marriage of A and J* as showing how such concern leads courts into irreconcilable logical contradictions. The case illustrates how a court can both declare a mother's lesbian relationship not to be a negative factor, and then make its decision on on the assumption that such a relationship *is* a negative factor.

In that case the three year-old child had lived equal amounts of time with the father and with the mother and her female partner for over a year before trial. The court expressly stated that a lesbian relationship was not a negative factor and also that the mother's new partner had a good relationship with the child. It found that the parents were equally balanced in terms of their abilities to care for the child; however the father was moving interstate.

97. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women's Human Rights*, IGLHRC, 1995, pp. 61-2; the case is also found in Kees Waaldijk's *Tip of an Iceberg: Anti-Lesbian and Anti-Gay Discrimination in Europe, 1980-1990*, Utrecht: Interfacultaire Werkgroep Homostudies, Rijksuniversiteit te Utrecht, 1991.

(Often this is referred to as disturbing the status quo and it is a negative factor.) However, a counsellor gave evidence that it was of overriding importance that the child have a “balancing” male influence to counter the effects of the mother’s lesbian relationship. The trial judge accepted the evidence and granted custody to the husband on those grounds. The Full Court upheld this decision.⁹⁸

Despite widespread claims that lesbian and gay parents may influence their children to become homosexual, empirical studies have shown no statistical difference in the number of children of gay and lesbian parents, versus those of heterosexual parents, who grow up to consider themselves lesbian or gay.⁹⁹ (Common

98. Jenni Millbanks, “If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?” *Australian Journal of Family Law* 12 (1998), p. 124, citing *In the Marriage of A and J* 19 Fam LR 260; FLC 92–916.

99. For example see J. M. Bailey, D. Bobrow, M. Wolfe, and S. Mikach, “Sexual Orientation of Adult Sons of Gay Fathers,” *Developmental Psychology*, 31 (1995) 124–129; F.W. Bozett, “Gay Fathers: How and Why They Disclose Their Homosexuality to Their Children,” *Family Relations*, 29 (1980) 173–179; F.W. Bozett, “Heterogeneous Couples in Heterosexual Marriages: Gay Men and Straight Women,” *Journal of Marital and Family Therapy* 8 (1982) 81–89; F.W. Bozett, “Children of Gay Fathers,” in F.W. Bozett, ed., *Gay and Lesbian Parents*, New York: Praeger, 1987; F.W. Bozett, “Gay Fathers: A Review of the Literature,” in F.W. Bozett, ed., *Homosexuality and the Family*, New York: Harrington Park Press, 1987; J. S. Gottman, “Children of Gay and Lesbian Parents,” in F.W. Bozett and M. B. Sussman, eds, *Homosexuality and Family Relations*, New York: Harrington Park Press, 1990; S. Golombok, A. Spencer, and M. Rutter, “Children in Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal,” *Journal of Child Psychology and Psychiatry*, 24 (1983) 551–572; R. Green, “Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents,” *American Journal of Psychiatry*, 135 (1978) 692–697; S. L. Huggins, “A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers,” in Bozett, ed. *Homosexuality and the Family*, New York: Harrington Park Press; B. Miller, “Gay Fathers and Their Children,” *The Family Coordinator*, 28 (1979) 544–52; J. P. Paul, *Growing Up with a Gay, Lesbian, or Bisexual Parent: An Exploratory Study of Experiences and Perceptions*, unpublished doctoral dissertation, University of California at Berkeley, Berkeley, CA, 1986; R. I. Rees, “A Comparison of Children of Lesbian and Single Heterosexual Mothers on Three Measures of Socialization,” unpublished doctoral dissertation, California School of Professional Psychology, Berkeley, CA, 1979.

78 · conceiving parenthood

sense suggests that parental sexual orientation has little influence, since many gay and lesbian people have heterosexual parents.) The very framing of this issue in court, however, indicates the depth and pervasiveness of prejudice. The argument hinges on the assumption that, if proximity to a homosexual parent did in fact “make” children homosexual, a chance at a heterosexual life would be preferable—at the cost of that parent’s custody and care, or even at the cost of contact altogether. The position implies that homosexuals lack the dignity and worth with which heterosexuals are endowed, that it is almost infinitely better to be heterosexual than homosexual, that achieving heterosexuality is worth almost any sacrifice—even of parent and home. Such a contention is profoundly dangerous. It instigates rigorous social policing; it attaches ineradicable stigma to a group within society. It is no less dangerous—and deeply deleterious to the interests of children—in the burden of shame it imposes on homosexual children, whether of homosexual or, indeed, of heterosexual parents.

Separate from the question of sexuality *per se*, biased decisions are often justified by an appeal to concerns about the children’s need for parents of different genders/sexes in order to develop “normally” and avoid alleged “confusion” about gender and gender roles. Research has shown no appreciable difference in gender identity and gender role development on the part of children raised by homosexual parents, indicating that gender is largely shaped by broader social factors and by the extended society with which the family has contact. Several studies have shown that children of lesbian mothers did not experience gender identity difficulties.¹⁰⁰ Studies of the gender role behavior of

100. For example see R. Green, “Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents,” *American Journal of Psychiatry*, 135 (1978) 692–697; R. Green, J. B. Mandel, M. E. Hotvedt, J. Gray & L. Smith, “Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children,” *Archives of Sexual Behavior*, 15 (1986) 167–184; M. Kirkpatrick, C. Smith & R. Roy, “Lesbian Mothers and Their Children:

children of lesbian mothers have looked at such issues as toy preferences, games, activities, interests, occupational choices, favorite television programs, and favorite television characters. No significant differences were found between children of lesbian mothers and children of heterosexual mothers. Lesbian mothers were indeed more likely to report that their daughters sometimes played with “masculine” toys, but sons of lesbians were no more likely to play with “feminine” toys.¹⁰¹

However, it must again be noted that such studies implicitly or explicitly value gender norms in ways that further stigmatize transgender or gender nonconforming children and young people, treating transgender identities as a sign of parental failure. Feminists, as well as transgender activists and theorists, have challenged the “naturalness” of gender roles within society in a variety of ways in different cultural contexts. Certainly, the extensive policing of gender identity by legal systems, educational institutions, and mental health practitioners and bodies in countries throughout the world suggests that an enormous apparatus is often necessary to bring lived gender roles and gender identities

A Comparative Survey,” *American Journal of Orthopsychiatry*, 51 (1981) 545–551; S. Golombok, A. Spencer, & M. Rutter, “Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal,” *Journal of Child Psychology and Psychiatry*, 24 (1983) 551–572.

101. For example see S. Golombok, A. Spencer, & M. Rutter, “Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal,” *Journal of Child Psychology and Psychiatry*, 24 (1983) 551–572.; J. S. Gottman, “Children of Gay and Lesbian Parents” (1990), in F. W. Bozett and M. B. Sussman, eds, *Homosexuality and Family Relations*, New York: Harrington Park Press; R. Green, “Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents,” *American Journal of Psychiatry*, 135 (1978) 692–697; B. Hoeffler, “Children’s Acquisition of Sex-Role Behavior in Lesbian-Mother Families,” *American Journal of Orthopsychiatry*, 51 (1981) 536–544; M. Kirkpatrick, C. Smith, and R. Roy, “Lesbian Mothers and Their Children: A Comparative Survey,” *American Journal of Orthopsychiatry*, 51 (1981) 545–551; C. J. Patterson, “Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex-Role Identity,” in B. Greene and G. M. Merck, eds, *Contemporary Perspectives on Lesbian and Gay Psychology: Theory, Research and Applications*, Beverly Hills, CA: Sage Publications, 1994.

80 · conceiving parenthood

into conformity with a norm that is often as much an ideal as a tangible practice or set of cultural practices. Society and the courts clearly have an obligation to respect the complexity of these issues, and, overridingly, not to stigmatize children, regardless of gender identity. Pathologizing differences in the way children experience gender identity does not serve the best interests of the child.

As seen in the cases above, courts often argue that a child “needs a father.” Anne Brewaeys, I. Ponjaert, E. V. Van Hall, and S. Golombok have noted “a fundamental conviction in western culture that a father is essential to the healthy psychological development of the child.” This conviction—reflected in numerous theoretical constructs, as well as in the self-imagination of patriarchal society—remains largely unsupported by empirical studies of the effects of father absence. Rather, empirical research suggests no overall differences between children brought up with and without a father.¹⁰² Only a handful of studies have found an effect on older boys in such households, and researchers suggest that family discord rather than the absence of a father may account for the children’s difficulties.¹⁰³ Certainly, millions of children throughout the world have been raised successfully in single-parent households—whether due to parental death, separation, divorce, or the choice to raise a child singly.

In a study comparing children of heterosexual parents who

102. Brewaeys et al., “Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families with 4 to 8 Year Old Children,” forthcoming; document available to IGLHRC courtesy of the Belgian organization Tels Quels; citing M. Stevenson and K. Black, “Parental Absences and Sex Role Development, a Meta-Analysis,” *Child Development*, 59 (1988) 793–814.

103. Brewaeys et al., “Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families with 4 to 8 Year Old Children,” forthcoming; document available to IGLHRC courtesy of the Belgian organization Tels Quels; citing M. Stevenson and K. Black, “Parental Absences and Sex Role Development, a Meta-Analysis,” *Child Development*, 59 (1988) 793–814; E. Hetherington, “Coping with Family Transitions: Winners, Losers, and Survivors,” *Child Development*, 60 (1989) 1–4.

conceived using donor insemination, children of heterosexual parents who conceived without insemination, and children of partnered lesbian mothers who conceived using donor insemination, researchers further refuted these myths. They found that children raised in the lesbian households did not differ in gender-role behavior or emotional/behavioral adjustment from those in either heterosexual group (suggesting that lack of a father did not produce gender-role, emotional, or behavioral problems); that lack of a father figure did not lead to a lack of discipline within the families; and that the children in the lesbian households regarded their social (that is, non-biological) mother as a parent to the same degree that children in both heterosexual families did their father.¹⁰⁴

The key question in the context of LGBT parenting may not be whether a child “needs a father” or “needs a mother” or needs to develop rigid gender distinctions on the basis of parental models. Rather, one may ask, from a human rights perspective, what end is served by a state’s insistence that the “difference” between male and female be maintained in families in a way that excludes or rejects the validity of other forms of “difference” already lived by so many families and individuals.

g. concerns about exposing children to an “immoral lifestyle”

Alexandra Duda and Maren Wuch reported in 1995 that lesbian mothers in **Germany** are “often denied custody rights by the courts on the grounds that their lifestyle is ‘immoral.’”¹⁰⁵ They noted one court decision in 1988 stating that it would be “irre-

104. Brewaeys et al., “Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families with 4 to 8 Year Old Children,” forthcoming; document available to IGLHRC courtesy of the Belgian organization Tels Quels.

105. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women’s Human Rights*, IGLHRC, 1995, p. 61.

82 · conceiving parenthood

sponsible to let a child of school age be brought up by a homosexual couple.”¹⁰⁶

In the **United States**, with its fifty component state jurisdictions, the situation for lesbian and gay parents seeking custody varies from state to state. A recent case decided at the state level is described below. It should be noted that this case is all the more startling because it is not representative of the general trend in the US. It does, however, illustrate how other legislation—such as laws criminalizing consensual sexual behavior between adults—can be used to argue that gay and lesbian parents engage in criminal activity and are thus immoral and unfit to raise children. In this case, the argument is particularly ironic, in that there is no sodomy law in the state where the gay father resides—but there is one in Mississippi, the state where the case was decided.

In a February 1999 ruling, the Supreme Court of Mississippi denied a change of custody to a gay father. The father of the child, a gay man residing in California, sought a change in the custody order that would allow his adolescent son to live with him and his partner. The mother and child were living in Mississippi with the mother’s new husband, who had previously been convicted of felony assault and theft in Kansas, and who—according to testimony—drank and beat the mother. He had at one point threatened to kill the child for screaming during one of these assaults, and his violence had led to the family’s eviction from their previous home. One witness, the resident manager in the building from which the mother’s household was evicted, testified that the child was afraid and stayed in the apartment most of the time:

106. Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women’s Human Rights*, IGLHRC, 1995, pp. 61–2; the case is also found in Kees Waaldijk’s *Tip of an Iceberg: Anti-Lesbian and Anti-Gay Discrimination in Europe, 1980–1990* Utrecht: Interfacultaire Werkgroep Homostudies, Rijksuniversiteit te Utrecht, 1991.

We hate for anyone to move, but I really feared for [the mother's] life. This man had beat her so many times, you know, that it was unreal. And I told her, I said, ". . . due to the circumstances," I said, "if he kills you I don't want this on my conscious [sic] and I think it would be best if you moved."

At the time of the decision, the gay father was in stable employment, lived with his domestic partner of eight years, exercised his visitation rights, including having the child stay with him regularly, and took an interest in the child's education.

In its deliberations, nonetheless, (as a dissenting opinion later recollected) the court closely questioned the father about his sexual activity—neglecting to recognize that the Mississippi law against "sodomy" applies to both heterosexual and homosexual couples, and that the mother and step-father should have been similarly examined. The majority decision ultimately noted, "The factor of the moral fitness of the parents did cause the greatest concern," identifying as part of this evaluation the father's status as "an admitted homosexual who lives with and engages in sexual activities with another man on a day-to-day basis." This, however, the decision notes, "was not the sole basis" for the custody decision.¹⁰⁷

Rather, the court stated that the other important factor was "religious training." The majority decision noted, "the mother has seen that [the child] is taken to church and undergone religious training, along with the entire family." The court approvingly "determined that [the child's] best interest would be served by providing religious training."

In a scathing dissenting opinion (one of two), Justice McRae noted: "The chancellor and majority believe a minor is best served by living in an explosive environment in which the unemployed stepfather is a convicted felon, drinker, drug-taker,

107. *Weigand v. Weigand*, Supreme Court of Mississippi, February 4, 1999; 730 So.2d 581.

84 · conceiving parenthood

adulterer, wife-beater, and child-threatener, and in which the mother has been transitory, works two jobs, and has limited time with the child. The chancellor makes such a decision despite the fact that [the child's] father has a good job, a stable home, and does all within his power to care for his son. The chancellor and the majority are blinded by the fact that [the child's] father is gay."

This dissenting opinion also followed closely the process by which the discussion of the father's homosexuality was pursued. The Court's shock at the "audacity" and "brashness" of an individual who would "openly and freely admit to felonious conduct [sodomy] on a regular basis" neglected to recognize both that the father did not live in Mississippi, where sodomy is a felony, but in California, where adult consensual sodomy in private is not a crime. It also ignored the fact that the father's alternative in this situation would be to commit perjury. McRae suggests that the handling of the issue of the father's homosexuality is "contrived by the majority for the purpose of punishing [the father] for his lifestyle, contrary to the well-established legal principle that child custody decisions are to be made in the best interests of the child and should not be used to punish one parent or the other."

Julie Shapiro notes,

How is a judge to determine whether [for example] a lesbian mother's sexual conduct is immoral? A principled judge should not simply enforce his or her own personal morality. There is no social consensus about the morality of homosexual conduct or even nonmarital heterosexual conduct; instead, the morality of much sexual conduct is both contested and unsettled. Under these conditions, the invocation of universally accepted standards of morality is unpersuasive.¹⁰⁸

108. Julie Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," *Indiana Law Journal*, 71: 623, pp. 655-656.

She adds, "The assertion that criminal law provides a guide for determining immoral conduct simply proves too much and is therefore untenable," noting that "the law criminalizes a wide range of activities in which most citizens engage."¹⁰⁹

h. social conformity

A **Belgian** lesbian mother lost custody of her four children in 1994, in a court ruling in which her relationship with another woman was described by the judge as "a serious fault." In determining the best interest of the children, the judge weighed the seriousness of this fault in relation to the facts that:

- The heterosexual ex-husband was on probation for violent attacks against the mother and her lover;
- The report of state social-welfare services favored the mother;
- The three younger children expressed a desire to live with their mother.

In spite of these factors, the judge awarded custody to the father because he believed the mother's "disposition" (her homosexuality) "calls into question her ability to bring up growing children in a society with obviously different values regarding the family." The mother's homosexuality was thus the primary ground for denying her custody. Following a lengthy series of appeals, the case was sent back to trial by Belgium's highest court earlier this year on the basis of a procedural error. The mother's more significant claims of discrimination and privacy rights violations under the European Convention for the Protection of Human Rights and Fundamental Freedoms have not yet been addressed by the courts.¹¹⁰

109. Julie Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," *Indiana Law Journal*, 71: 623, p. 657.

110. Planet Out/Newsplanet, "New Trial for Belgian Lesbian Custody Case," February 17, 1999, www.planetout.com/pno/; "Equality for Lesbians and Gay Men in Europe," ILGA Europe, 1998; *Euroletter* #69, ILGA-Europe, "Recent Events in Belgium" by Anke Hintjens and Remko van Kol.

86 · conceiving parenthood

An important positive precedent in confronting such claims is established by a recent case from **Portugal**, which was decided by the European Court of Human Rights. A gay father was originally awarded custody of his daughter in 1994, after being prevented by his ex-wife from exercising visitation rights, breaking the terms of the divorce settlement. His daughter lived with him until 1995, when he alleges that her mother abducted her. On appeal, the mother regained custody in 1996, and the father was granted access, which he claims he has again been prevented from exercising.¹¹¹ The 1996 decision noted that the child “should be within a traditional Portuguese family, and her father has evidently not chosen such a family, preferring to live maritally with another man.”¹¹²

The father appealed to the European Court of Human Rights (*Salgueiro da Silva Mouta v. Portugal*), which decided in his favor on December 21, 1999. The father alleged that custody was awarded to the mother on the basis of his homosexuality. He also claimed that “the appeal court’s decision constitutes an unjustified interference with his right to respect for family life and also with his right to respect for his private life in that it was specified that he must hide his homosexuality in his meetings with his daughter.”¹¹³ He appealed on the basis of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, guaranteeing respect for private and family life, and Article 14, prohibiting discrimination.¹¹⁴

111. Press release, Registry of the European Court of Human Rights, December 21, 1999.

112. Brother Sister No. 100 22 Feb 96 page 6; *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 76.

113. Information Note No. 1 on the case-law of the Court, European Court of Human Rights, November–December 1998, *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96).

114. Information Note No. 1 on the case-law of the Court, European Court of Human Rights, November–December 1998, *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96).

A December 1999 decision of the court unanimously agreed that a discriminatory enjoyment of privacy—and hence a violation of Article 8 in conjunction with Article 14—had taken place. In its ruling, the court noted that the Portuguese judge’s statements, in reversing an earlier decision which gave custody to the father, had been explicitly discriminatory. It cited particularly the statement that “this is not the place to seek to know whether homosexuality is an illness or not or if it is a sexual orientation toward people of the same sex. In either case, we are in the presence of an abnormality and a child should not grow up in the shadow of abnormal situations.”¹¹⁵ Such expressions were not, as the Portuguese government alleged, simply a matter of unfortunate phrasing, but “had a determining weight” in the Portuguese court’s final decision to award custody to the mother.¹¹⁶ Rejecting such an invidious invitation to discriminate also determined the European Court of Human Rights’ decision to reverse that ruling.

This decision significantly and strongly condemns discrimination on the basis of sexual orientation in the right to enjoyment of family life. Moreover, it specifically condemns denial of custody on the basis of sexual orientation. The decision discovers such discrimination in the earlier decision’s preference for what it called “traditional” or “normal” family life. It thus appears to foreclose one of the forms in which prejudice against homosexuality masquerades in both judicial and policy determinations. The argument that not bias *against* homosexuality, but legitimate bias *in favor of* the advantages of traditional family forms, can justify a decision against a homosexual parent, is disallowed as discriminatory by the Court’s findings.

115. *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96), at 34, December 21, 1999.

116. *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96), at 35, December 21, 1999.

88 · conceiving parenthood

i. stigma

Concerns about social conformity may simply reflect an ideological commitment to a particular form of the family, but may also be related to fears about the child's experience of the social stigma that often surrounds homosexuality. Several points should be borne in mind about social stigma. Social science research, while limited in this area, suggests that children with a homosexual parent have normal peer relationships.¹¹⁷ Moreover, as Shapiro notes, the simple fact of teasing, or other manifestations of stigmatization, should be irrelevant unless it can be shown that the stigmatization results in real and permanent harm to the child.¹¹⁸ She further explains,

even when there is evidence of some harm from teasing or harassment, courts should assess it in the overall context of the child's life, rather than in isolation. Virtually all children are, from time to time, embarrassed by their parents and teased by their peers. Few, if any, suffer lasting or significant harm. Courts must conduct their analysis with the understanding that unless parental rights are terminated, the child will continue to have a lesbian, gay, or cohabiting¹¹⁹ parent and may well suffer the same stigma. Thus, even if custody is awarded to the more conforming parent, the child may experience the same stigmatization.¹²⁰

Recent court decisions at the national and local level have reiterated this argument, and additionally have affirmed principles similar to those on which *Salgueiro da Silva Mouta v. Portugal*, cited above, turned: that discriminatory intent cannot conceal itself in

117. C. J. Patterson, "Children of Lesbian and Gay Parents," *Child Development*, 63 (1992) 1025-1042.

118. Julie Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," *Indiana Law Journal*, 71: 623, p. 652.

119. Shapiro's study also explores custody issues for heterosexuals engaged in non-marital relationships.

120. Julie Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," *Indiana Law Journal*, 71: 623, p. 654.

the convenient clothing of concern for the best interests of the child. In the **United Kingdom**, the case of *C v. C*, in which a lesbian mother won custody, hinged partly on the question of whether the mother's home or the father's—where both the father and the stepmother strongly disapproved of the mother's homosexuality—would provide a better environment for the child to cope. For a variety of reasons, including the strong bond between mother and daughter, the appeals court determined:

The problems the child faced could not be faced happily and honestly without potential damage to her in her father's home. They could only be faced by her in the mother's home with the real possibility that she would be little harmed by the mother's way of life.¹²¹

Similarly in the **United States**, the Superior Court of New Jersey, Appellate Division, addressed the question of stigmatization in the 1979 case of *M. P. v. S. P.* by declaring,

If [the lesbian mother] retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Taking the children from [the mother] can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead.¹²²

121. *C v. C* (custody of a child) (no. 2) (1992) 1 FCR 206.

122. *M. P. v. S. P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979), quoted in Julie Shapiro, "Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children," *Indiana Law Journal*, 71: 623, p. 654.

90 . conceiving parenthood

The 1984 **United States** case of *Palmore v. Sidoti*, addressing the possibility that a child would suffer stigma by remaining in the custody of a parent involved in an interracial relationship, has also provided a useful precedent for addressing the question of stigma in cases involving parents in same-sex relationships. The change of custody was overturned, with the court noting—in resonant and memorable words—that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹²³

j. “discreet” homosexuals versus
“open” homosexuals

Courts may also predicate judgements on another aspect of social conformity—the parent’s degree of openness about her or his sexual orientation, and even on the parent’s participation in LGBT communities or membership in LGBT organizations. Openness about one’s sexual orientation, involvement in collective or political activity relating to LGBT issues or LGBT families has sometimes been held against gay and lesbian parents in court. For example, in *B v. B* (1990), a significant case in the **United Kingdom**, a lesbian mother won custody of her child—but only because the judge noted that she and her lover were “private persons” who “do not believe in advertising their lesbianism and acting in the public field to promote their lesbianism.” The judge added that

this is another matter of principle: what is so important in cases is to distinguish between militant lesbians who try to convert others to their way of life, where there may well be risks that counterbalance other aspects of welfare and are detrimental to the long-term interests of the children

123. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

either in relation to their sexual identity or corruption, and lesbians in private.¹²⁴

McCarthy and Radbord explain that in **Canada**,

As many academics have noted, judges are apt to distinguish between “good” and “bad” gay and lesbian parents on the basis of whether or not the parent is “discreet.” “Bad” lesbian mothers are those who are open about their sexual orientation and who participate in the gay and lesbian community. Arnup and Boyd conclude that these women “are almost certain to lose custody of their children to their ex-husbands.” In essence, these demands of “discretion” require gay and lesbian parents to suppress and deny their full personhood. Courts threaten to punish people for participating in their cultural community, for being an “activist” for lesbian and gay rights, for failing to demonstrate appropriate shame, and for falling in love. The approach is discriminatory and unacceptable.¹²⁵

Mécary and de la Pradelle note that in March 1993, an appeals court in Bordeaux (**France**) refused joint parental authority (joint legal custody which does not determine where the child will reside but gives both parents a voice in the child’s upbringing) because the husband had abandoned the conjugal home and taken up a “notorious” homosexual relationship.¹²⁶

It can reasonably be asked how “notoriety” or “militancy,” as opposed to “discretion,” is to be determined. What degree of openness makes one notorious? May a lesbian tell her friends she is a lesbian? May she come out to her neighbors or co-workers?

124. Quoted in Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers’ Legal Handbook*, London: The Women’s Press, 1997, p. 49; *B v B* (minors) (custody, care and control) (1991) 1 FLR 402.

125. Martha A. McCarthy and Joanna L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course,” *Canadian Journal of Family Law*, Vol. 15, pp. 54–55.

126. Caroline Mécary and Géraud de la Pradelle, *Les droits des homosexuel/les*, Presses Universitaires de France, 1998, p. 45, citing CA Bordeaux, 31 mars 1993, jurisdata 040635.

92 . conceiving parenthood

If she goes to gay bars or to gay pride parades, is she then a militant lesbian? Are motherhood and membership in a human rights organization incompatible? Maintaining a distinction between “discreet” and unacceptably overt forms of homosexuality—and their alleged effects on children—may work similarly to provisions in the penal codes of a number of countries which criminalize homosexual acts if they cause “public scandal” or “public disorder.”¹²⁷ Such provisions are meant to discourage and punish any open manifestation of gay or lesbian identity, permitting homosexuality only a tenuous breathing room in a private sphere turned prisonlike, but rigorously excluding it from the public or political world. Those provisions—like these restrictions on parents—violate fundamental liberties of association, assembly, and expression. The United Nations Committee on the Rights of the Child has emphasized that its mandate is fulfilled only when the freedoms of all member in the family structure are protected: children’s rights “will be especially meaningful in the context of the rights of parents and other members of the family to be recognized, to be respected, to be promoted.”¹²⁸ Children’s interests cannot be furthered by denying parents their basic rights.

k. limitations on custody and access

Prejudice against homosexuals has also in many cases resulted in special conditions—generally related to the fear of the children’s exposure to homosexuality—being imposed on custody or access. These have included:

- Not living with a same-sex lover or partner while the children are living or visiting in the same home;

127. See IGLHRC and Human Rights Watch, *Public Scandals: Sexual Orientation and Criminal Law in Romania*, 1998, for a detailed example of the ways in which allegations of “public scandal” can be applied to a wide range of behavior.

128. U.N. Committee on the Rights of the Child, Report on the Seventh Session, September–October 1994, CRC/C/34, at 183 et. seq.

custody and access . 93

- Not having another LGBT person, or another person of the same sex, or another adult present at all during residence or visitation (the latter can include delivery personnel, medical personnel, relatives, or parents of the child's friends);
- No overnight visits by the child;
- No access without supervision;
- Not taking the child to events or places where there will be other LGBT people.

Such conditions are reasonably imposed on either heterosexual or homosexual parents if there is a history (or strong and justifiable suspicion) of abuse or attempted abduction. They are discriminatory if, as is often the case, they reflect nothing more than a generalized fear of the parent's homosexuality. For the most part, they are founded on familiar prejudices which existing research has dispelled.

In **France** in 1992, a Paris court of appeals decision awarded both legal and physical custody to a lesbian mother on the condition that she not live with anyone else.¹²⁹ The case of Nicole and Cathérine, described above, included the condition, imposed during the period of "non-conciliation," that Nicole not live with another person, although this was not carried into the final custody decision in their case.

The National Center for Lesbian Rights in the **United States** notes, "It is not unusual for a lesbian mother, in a custody case, to be faced with the choice of living either with her partner or with her children. Visitation awards are also commonly accompanied by restrictions concerning the presence of a partner when the children are visiting. Occasionally, judges will prohibit any overnight visitation whatsoever by the children."¹³⁰

129. Caroline Mécary and Géraud de la Pradelle, *Les droits des homosexuel/les*, Presses Universitaires de France, 1998, p. 47, citing CA, Paris, 25 septembre 1992, jurisdata 022887.

130. National Center for Lesbian Rights (USA), *Lesbian Mother Litigation Manual*, 2nd edition, 1990.

94 . conceiving parenthood

ILGA-Europe also reports that a gay father in **Belgium** lost access to his children when he moved in with his boyfriend.¹³¹

In the **United Kingdom**, according to Lynne Harne,

It still occasionally happens that a judge may try and put conditions on a mother's residence or contact order stating that she and her lover should behave 'appropriately' in the presence of the children. Such conditions should be strongly challenged by a woman's legal advisor, as this could be interpreted by the father as meaning that the children cannot witness a kiss or the couple showing any form of affection to each other. It can be clearly argued that all parties should behave 'appropriately' in front of children, and the fact that such conditions are never imposed on heterosexual couples merely reflects ignorance and prejudice about lesbians.¹³²

1. inappropriate sexual behavior and sexual abuse

The authors of *Valued Families: The Lesbian Mothers Legal Handbook* (1997) advise lesbian mothers involved in custody disputes in the **United Kingdom** that "a few fathers have alleged that lesbian mothers have sex in front of the children" and that lesbian mothers should generally be prepared to respond to such allegations in court.¹³³ They also noted one case in which "a father asserted that because they were lesbians, either the mother or her lover would sexually abuse the children."¹³⁴

Homosexual parents are no more likely than heterosexual parents to engage in inappropriate sexual behavior in front of

131. *Equality for Lesbians and Gay Men in Europe*, ILGA-Europe, 1998, p. 35.

132. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997, p. 86.

133. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997, p. 86.

134. Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997, p. 86.

children, and the same standards for determining what is appropriate should be applied to both heterosexual and homosexual couples in this context. (That is, holding hands, which would be an acceptable sign of love and affection between heterosexual partners, should be regarded as no less “appropriate” when same-sex couples engage in it.)¹³⁵ Further, pedophilia must be separated from such behavior: and as noted above, research indicates that the overwhelming majority of pedophilia involves heterosexual men abusing female children.¹³⁶

It is possible that in their vigilance to determine harm, the courts may impose excessive scrutiny upon the children. A Ger-

135. See Julie Shapiro, “Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,” *Indiana Law Journal*, 71: 623, p. 666.

136. See for example D. Finkelhor and D. Russell, “Women as Perpetrators: Review of the Evidence,” in D. Finkelhor, ed. *Child Sexual Abuse: New Theory and Research*, 1984; B. M. Jones and K. MacFarlane, eds., *Sexual Abuse of Children: Selected Readings*, Washington, DC: National Center on Child Abuse and Neglect, 1980; E. P. Sarafino, “An Estimate of Nation-Wide Incidence of Sexual Offenses against Children,” *Child Welfare* 58, 1979; C. Jenny, T. A. Roesler, and K. L. Poyer, “Are Children at Risk for Sexual Abuse by Homosexuals?” *Pediatrics* 94, 1994.

Such allegations confront courts with particularly difficult decisions. An example can be derived from earlier rulings leading up to the European Court’s decision in a case previously mentioned, *Salgueiro da Silva Mouta v. Portugal*. During proceedings at the local and national level, testimony had been introduced indicating that the daughter alleged to a psychologist that she had been abused by her father’s partner. Documents from the Portuguese appeals court (*Tribunal da Relação*, Lisbon, January 9, 1996) reflect disbelief: “The psychologist affirms that the way in which the child recounted this episode made her doubt the truth of the story, which she may have been made to recite several times. She adds that during his daughter’s story, the petitioner had an empathic attitude toward his daughter and asked for clarifications, which confirmed the positive relationship which exists between father and daughter.” The Family Affairs Court of Lisbon had previously (July 14, 1994) expressed similar doubt, noting in giving parental authority to the father that, based on the reports of psychologists, the allegations were more likely the result of outside influence exercised on the child. (The court observed as well the mother’s own failure to provide a stable home environment and to respect previous judicial decisions.) “Manipulating”—in the appeals court’s words—a child into recounting a sexualized story could itself be seen to constitute a form of abuse. (Quotations from *Salgueiro da Silva Mouta v. Portugal* [No. 33290/96], at 14, citing earlier court documents, December 21, 1999; translated by Anna Livia).

96 · conceiving parenthood

man lesbian mother who fought for five years for the right to bring up her children, notes that her children were subject to repeated psychological evaluations:

I openly reported my lesbian lifestyle to the family court because honesty before my children is for me of the foremost importance. I could not have looked them in the eyes anymore if I had denied and lied about such an important part of my life and told them to be silent about it. I was lucky in that my children were such model kids who developed quite superbly. They were psychologically evaluated four times and no damage or failed developments could be found.¹³⁷

m. third-party challenges to custody

While custody cases are usually between the legal parents of the child, various other relatives are sometimes in a position to challenge a homosexual parent's custody of a child.

In the 1995 case of *Bottoms v. Bottoms*, in the state of Virginia in the **United States**, a lesbian mother lost custody of her child to her mother (the child's maternal grandmother). An important consideration in determining the mother's "unfitness" was the fact that "Conduct inherent in lesbianism is punishable as a Class 6 felony" by Virginia's sodomy law.

South Africa offers a different, and positive, example. The 1996 Constitution specifically prohibits discrimination based on sexual orientation—the first constitutional document in the world to do so. Judicial interpretation of the "Equality Clause" led, in 1998, to the elimination of "sodomy laws" penalizing consensual homosexual behavior. At the same time, constitutional protections have begun to be applied in other realms of life.

137. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997, p. 37; translated by Ute Rupp.

Previous jurisprudence in South Africa had embodied many or most of the stereotypes discussed above. The first reported case involving the rights of gay and lesbian parents was *Van Rooyen v. Van Rooyen* (1994)—a case prior to the present Constitution; in it, a court placed stringent conditions on a lesbian mother's access to her two children. The decision invoked a hypothetical "right-thinking person" who "would frown upon the idea of calling the relationship created on the basis of two females a 'family'" and "would say that it is important that the children stay away from confusing signals as to how the sexuality of the male and of the female should develop." The decision ordered the mother to "take all reasonable steps and do all things necessary in order to prevent the children being exposed to lesbianism or to have access to all videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approval of lesbianism."¹³⁸

Jurisprudence since the Constitution came into force, however, shows how effective protections for equality can also protect parents' rights, and protect family life from disruption. In the 1998 matter of *Greyling v. Minister of Welfare and Population Development and Others*, a magistrate, acting at the request of a social worker, took a child from her mother and gave her to her grandparents. The removal involved provisions in the Child Care Act against child abuse: the social worker alleged possible psychological damage to the child solely as a result of the mother's lesbian relationship. The mother sued to regain custody, claiming that the social worker was a friend of, and unduly influenced by, the grandparents. Within several months, as the result of a High Court decision, the child was restored to the custody of her mother; the welfare organisation responsible for the removal was subjected to punitive costs.¹³⁹ Such jurisprudence on equality in

138. *Van Rooyen v. Van Rooyen*, 1994 (2) SA at 325–331 *passim*.

139. *Greyling v. Minister of Welfare and Population Development and Others*, unreported decision of the High Court of South Africa, Witwatersrand Local Division, case no: 98/8197 (discussed in National Coalition for Gay and Lesbian

98 · conceiving parenthood

custody rights continues to set precedents in South Africa. Also in 1998, in *Mohapi v. Mohapi*, full custody of a minor child was granted to a woman involved in a stable lesbian relationship.¹⁴⁰

Just as lesbian and gay parents sometimes face challenges to custody by more distant relatives, cases involving the rights of such relatives often have implications for lesbian and gay parenting. A case currently pending before the **United States** Supreme Court illustrates the potential complexity of parenting status of individuals who are not biological or adoptive parents. The case concerns the rights of grandparents to sue for visitation, and does not directly address gay or lesbian parenting, but activists are concerned that too broad an interpretation of the rights of grandparents might create a usable precedent for children from LGBT parents, as in *Bottoms v. Bottoms* above. Too narrow an interpretation might also serve as a precedent for denying parental rights, custody, or access to non-biological parents, including same-sex partners of legally recognized parents.¹⁴¹ This last concern, in particular, illustrates the difficulties that arise when same-sex co-parents are dependent on the courts rather than on legislation to obtain recognition of their parental rights. (For a different approach through legislation, see the discussion on pp. 173–74 of the model of parental responsibility proposed by the National Coalition for Gay and Lesbian Equality in **South Africa**.)

Equality [NCGLE] submission “South African Law Commission Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship,” April 20, 1999); “South African Mom Regains Custody,” *Planet Out*, April 30, 1998.

140. Unreported decision of the High Court of South Africa, Witwatersrand Local Division, case no. 98/8197. In *V v V*, a court invoked the Equality Clause of the Constitution in awarding joint custody of a child to a lesbian mother and her ex-husband, after answering in a qualified negative the question of whether the Constitution allowed “currently existing bigotry and its consequences” to “be a valid reason to limit the constitutionally guaranteed rights of the lesbian mother.” *V v V* 1998 (4) SA.

141. Linda Greenhouse, “Case on Visitation Rights Hinges on Defining Family,” *New York Times*, January 4, 2000; “High Court Considers Visitation Rights for Grandparents,” *CNN* January 12, 2000 (web posted at 10:47 a.m. EST).

n. transgender parents, custody, and access

According to the National Center for Lesbian Rights (NCLR) in the **United States**, “Transgendered and transsexual parents face tremendous discrimination in the child custody area, as evidenced by most of the published decisions in this area.”¹⁴² Only some ten published cases addressing custody and access issues for transgender parents have been decided in the United States. NCLR cites the following cases in which parental rights have been terminated, custody or access denied, or stringent conditions about the expression of transgender identity imposed:

- A 1986 case in the state of Nevada in which a male-to-female transsexual parent’s gender transition was characterized as “selfish” and her parental rights were terminated;
- A 1987 Minnesota case which granted custody to a cross-dressing father on condition that the father never cross-dress in front of the daughter or have literature relating to transvestism in the home;
- A 1988 Minnesota case in which a “gender dysphoric” father was awarded custody only after agreeing to undergo therapy and to “maintain his male identity”;
- A 1993 Montana case in which custody was awarded to a cross-dressing father after expert testimony that the father *no longer* cross-dressed and *would not do so in the future*;
- A 1997 Missouri appeals court decision which reversed joint legal custody previously awarded to a mother and a male-to-female transsexual father, and imposed an indefinite moratorium on the father’s visitation because it would be confusing for the children to see their father as a woman.

According to NCLR, one case from Colorado in 1973 took a different tack. The court found a parent’s transgender identity ir-

142. National Center for Lesbian Rights (USA), “Representing Transsexual Clients: An Overview of Selected Legal Issues.”

100 . conceivingparenthood

relevant unless specific harm could be shown; it maintained custody with the mother, a female-to-male transsexual who had married a woman.

In the **United Kingdom**, the transgender rights organization Press for Change noted in a June 1999 report:

The break up of any relationship involving children is always difficult and the law is heavily weighted against the transsexual person in this area. Court disputes over children are costly, in terms of both finance and emotions, especially if a transsexual person, as is likely, feels that their lifestyle is on trial.

Despite all the problems, some transsexual people have obtained access to their children. In a few cases, a transsexual person has been given custody of the family children.

For example, in the recent case *Re: H*, a transsexual woman who had been divorced was eventually able to obtain custody of her children, when the children's mother was no longer able to care for them due to a mental breakdown and had put them in government care. Despite the mother's objection, county court granted custody to the transsexual father, with supervision by the local authority.

Such supervision, however, can take highly restrictive form. Press for Change also reports:

The courts may however insist that [transsexual people] must dress according to their original gender in order to see their children, which clearly is a very high price to pay in the case of the post-operative transsexual person.¹⁴³

Press for Change also cites two other cases:

In *G v. G* (1981)[33] the Cambridge county court made an order for access by the transsexual woman father, a Miss

143. "Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom: A report for the Interdepartmental Working Group on Transsexual Issues," Press for Change, June 1999; available at www.pfc.org.uk.

Lawson. It was held that the transsexual father could have access to her daughter once a month, provided that she wore male oriented attire without jewellery or cosmetics. A friend, described as a Mr. S., was not allowed to accompany her on such visits.

In *Re: F (Minors) (Denial of Contact) (1993)*[34] a transsexual father was refused contact with two sons, despite a court welfare officer's report that access should be given. The trial judge saw the two boys in his rooms, and concluded that their wishes were the most consistent and compelling aspect of the case, and as they did not wish to see their father as a woman, access was denied. The transsexual woman appealed, which was dismissed on the grounds that the trial judge had been right to see the boys and to give weight to their views in this case.

This case clearly shows that, although the test under section 1 of the Children Act 1989 is the paramountcy of the child's welfare, rather than its wishes or feelings, it may be appropriate to recognise the extra significance of the child's own views where, as here, all the other factors are evenly balanced. If the children's wishes had been different, then clearly the outcome of this case would also have been different.

In an exemplary and encouraging ruling in June 1999 in Seville, **Spain**, a court awarded custody of an 11-year-old girl to her father's transgender partner, Eva, overturning a previous ruling which had placed the girl in her grandparents' custody following the father's death. The girl's mother had died when the girl was only a year old; the girl had lived with her father and Eva for years as a family, calling Eva "mommy." Although the child knew of Eva's original biological sex, the relationship between Eva and the child's father had not caused any problems for the child. The father had, in his will, clearly expressed the wish that Eva become the child's sole guardian.

No doubt aware that such a decision would cause controversy, the court explained its decision carefully. The court noted

102 · conceiving parenthood

that if the sole reason for denying custody to Eva was her “sexual condition,” this would directly contravene Article 12 of the Constitution and would “constitute blatant discrimination.” The court further determined that continued contact with Eva was important to the child’s development, and would be impeded by the grandparents’ antipathy toward Eva, should they gain custody.

The court insisted that particular family structures not be judged as an absolute good, but as instrumental to the emotional and developmental needs of the child—affirming that not family form, but family dynamic, should be the deciding factor. While this family situation might be described as “peculiar,” so is the condition of being an orphan, the court explained, and yet one cannot force a widowed parent to remarry simply to ensure that the child grows up in a “normal” family. An “ideal” family unit, the court observed, need not always conform to what most people consider to be “normal.” It went further, in asserting that “[d]epending on the case, the traditional family unit structure might be a good or bad point of reference.” The ruling states that “no allusion has been made as to the specific circumstances that make the ideal family unit appropriate; instead this concept has been invoked only because it constitutes an ideal. No considerations were made as to whether this ideal is the most beneficial to the girl, and it is quite doubtful that it might be.”¹⁴⁴

o. transgender parents and children facing a parent’s gender transition

Notions about the fundamentally gendered nature of parenting, and fears of the children developing “gender confusion,” significantly affect the way in which transgender parents are viewed by the courts and other institutions. In 1986, a court in the **United**

144. Information on this case is reported in: *El País* (Spain), June 24, 1999, “Transgender Man is Granted Custody of Dead Partner’s Daughter” (translated by Susana Ackerman) and Daniel Schwimler, BBC News Service, June 26, 1999, “Vatican: Transsexual Adoption an Insult.”

States terminated the parental rights of a transgender parent, noting that it was the father's "choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."¹⁴⁵

Few published studies address developmental issues for children with transgender parents. Richard Green's 1978 study, "Sexual identity of 37 children raised by homosexual or transsexual parents," examined nine children raised by female-to-male transsexuals and seven children raised by male-to-female transsexuals. Green found that the sexual identity of the children (which for this study included three components: the "emerging self-concept of being male or female"; gender-role behavior; and sexual orientation) was typical—that is, did not differ from the sexual identity of children not raised by transsexuals.¹⁴⁶

Psychologists Randi Ettner, Ph.D., and Tonya Jo White, M.D., recently completed a study assessing the impact of a parent's gender transition on children of transgender parents. This study called on the assistance of gender transition specialists who had an average of 14.2 years of experience in such work; it looked at situations in the families of 4,768 clients, approximately 2,500 of whom made a gender transition.¹⁴⁷

Ettner notes, "Mental health workers who are not specialists in this area tell people that this will be devastating to the chil-

145. *Daly v. Daly*, Supreme Court of Nevada [102 Nev. 66; 715 P.2d 56; 59 A.L.R.4th 1155] March 6, 1986.

146. The emphasis on "normalcy" in Green's study, and the stigmatization as abnormal of what are described as "tomboy" and "sissy" behaviors, are indicative of the "policing" by which gender regimes are imposed upon children in LGBT families, even by individuals whose work provides, in other ways, positive support for LGBT parents during custody cases. R. Green, "Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents," *American Journal of Psychiatry*, 135 (1978) 692–697.

147. Still-unpublished study completed in mid-1999 and presented at the 16th Harry Benjamin International Gender Dysphoria Association Symposium, London, August 1999; information obtained in telephone conversation with Randi Ettner on October 6, 1999 and verified by subsequent e-mail communication, November 11, 1999.

104 · conceiving parenthood

dren, you shouldn't do it, you should wait till they're grown, the younger the children the worse it will be." However, the study found that while a gender transition is not a neutral event, in and of itself it is not a trauma.

The study ranked risk factors which increased or decreased the likelihood of trauma for the children. Risk factors for children, ranked in descending order, included:

- Abrupt separation from either parent;
- A spouse extremely opposed to the transition;
- Personality disorder in either parent;
- Parental conflict regarding the transition.

Protective factors for children, ranked in order, included:

- The child's close emotional ties to parents;
- Cooperation between parents regarding child-rearing;
- An extended family supportive of transitioning parent;
- Ongoing contact with both parents.

The study also indicated that children under eight and young adults age 20 and over had the easiest time accepting the transition, while adolescents had more difficulty.

By focusing on risk factors that would make a parent's gender transition traumatic for a child, rather than assuming that a parent's gender transition will be inherently and insupportably traumatic, Ettner and White provide a model, along the lines suggested above by Tasker and Golombok, for focusing on family processes that help a child in dealing with change and difference—rather than fetishizing gender roles within a family.