

The Potential Impact of Homosexual Parenting On Children

by Lynn D. Wardle

The legalization of gay marriage has been a contentious issue since the Hawaii Supreme Court struck down a Hawaii law prohibiting such marriages. Many commentators have addressed the related, and similarly divisive, issue of same-sex parenting. In this article, Professor Lynn D. Wardle argues that the legal academic and social science communities have come to the defense of gay marriage and parenting too hastily, without considering the effects of both on children. In particular, Professor Wardle asserts that law review articles supporting homosexual parenting have relied on methodologically flawed and inadequate social science studies comparing the effects of same-sex and opposite-sex childrearing. The author suggests that these studies have ignored significant potential effects of gay childrearing on children, including increased development of homosexual orientation in children, emotional and cognitive disadvantages caused by the absence of opposite-sex parents, and economic security.

The author also examines judicial responses to homosexual parenting in adoption, custody, and visitation cases. He contends that judicial reaction has run the gamut from outright disapproval to open acceptance of gay parenting. But he notes that more recent case law reflects an approach which treats same-sex and opposite-sex childrearing as equivalent. To underscore the connection between gay marriage and parenting, Professor Wardle discusses and critiques the landmark Hawaii decision overturning a law restricting marriage to heterosexual couples. In particular, he argues that the Hawaii attorney general failed to argue forcefully that the state has a compelling interest in protecting children from the effects of gay marriage, and that the trial judge trivialized the state's expert testimony on that issue. The author concludes that same-sex marriage and parenting issues do not belong in the courts; he approvingly points to Scandinavian laws which are permissive in extending marriage benefits to gay couples, but which are restrictive in denying such couples adoption and custody privileges.

Professor Wardle's answer to the judicial morass is a rebuttable presumption in custody cases relating to proof of extramarital sexual activity. He proposes that such a presumption apply to both heterosexual and homosexual extramarital behavior, take account of the degree of actual harm caused by the extramarital affair, and run in favor of the party who was faithful to the marriage. According to the author, such a presumption, if reasonably applied, would ensure that the interests of children are accorded proper consideration in societal decisions about same-sex marriage and parenting.

**Outline of Lynn D. Wardle,
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[Willy to Biff:] I was lonely, I was terribly lonely.

*Arthur Miller,
Death of a Salesman 120-21 (1949).*

I. Dedication:

Harry D. Krause: Scholar in the Interest of Children

It is an honor to participate in this symposium issue of the University of Illinois Law Review honoring Professor Harry D. Krause. Professor Krause's scholarship has made remarkable contributions to family law in many ways and in many areas. For example, an entire symposium could focus exclusively upon his superb contributions to international and comparative family law, an important area of family law scholarship in which scholars in this country have shown relatively little interest until the last half of this century. Harry has been one of the leading contributors to that field, for which he has received international recognition. Another conference could focus exclusively upon his tremendous contributions to family law teaching through his marvelously clear and teachable casebook, Nutshell series, and Blackletter series, not to mention his service as a teacher for more than thirty years. A generation of students has learned family law vicariously through his casebook and informative basic materials, which even students whose teachers have not selected his casebook have found invaluable. Another issue could focus on Harry's law reform activities and consider the relationship between scholarship and law reform, between the disinterested ivory tower academic roles and interested social activist activities.

However, Harry Krause probably is best known among legal scholars, practicing lawyers, and other professionals for the contributions he has made to family law literature and to the American legal system (and through its reforms to law reforms around the world) relating to the welfare of children. There is no other scholar of his stature in this country in this century whose writings have focused so insistently, informatively, and effectively upon the status of children in and the treatment of children by our legal system, and who have achieved such important legal reforms in the interests of children as Harry D. Krause. His scholarly contributions to the study of laws concerning the status and legal treatment of children constitute a large part of the greatest contemporary literature in that field, and some will remain standard reference works for years to come. His monograph on illegitimacy is not only the recognized definitive analysis of the subject, and the academic powder keg that helped fuel a legal revolution, but it is only one of four major books he has written particularly about the law of parent and child. At least twenty-four of his major law review articles (or book chapters) address legal issues regarding children or children and parents, and this does not count more than a dozen reprints or republications of these articles, or a dozen other significant reports, reviews, briefs, or comments written by him dealing with children and the law.

A disciplined and dedicated family law scholar for nearly four decades, Professor Krause has been one of the most prolific producers of top-quality family law scholarship, while he also has been a determined, passionate, and remarkably successful advocate of some extremely important family law reforms. Yet with his advocacy he has maintained fairness, honesty, and professional objectivity in his writing. He has been consistently willing to present all sides of controversial family policy issues, put their best evidence and arguments forward, and analyze them on their strongest terms. When you read one of Professor Krause's scholarly works, you know that all of the relevant facts will be presented, including those most awkward for the position he personally prefers, and you need not worry that the best legal arguments for the politically unpopular or personally disfavored position might be omitted. His work is factually reliable, organizationally thorough, analytically perceptive, and, above all, completely honest. His scholarship has integrity. And because of that integrity, he is able to render the highest and most effective professional service in the interests of children.

In honor of his unparalleled contributions to the status and treatment of children in the law, and in respect of the quality and integrity of his scholarship, I dedicate this article to Harry D. Krause.

II. Introduction:

Scholarship in the Interest of Adults or Children

A. The Lacuna in Contemporary Law Review Literature Regarding Homosexual Parenting

The proposed restructuring of the family to legitimate homosexual family relations may be among the most heavily advocated family law reforms to be discussed in recent years. For example, a year ago I reviewed as much of the law review literature as I could find on the subject of same-sex marriage that had been published between January 1990 and December 1995. I found seventy-two articles, notes, comments, and essays about same-sex marriage published in law reviews available in North America, a nine-fold increase over the eight law review pieces on the same subject published in a similar period two decades earlier, when the topic was first seriously raised in litigation in the United States. There has been a similar explosion in the law review literature advocating the legalization of what I will herein call homosexual parenting--that is, the exercise of unrestricted, unconditional parental relationship rights, fully equivalent to those enjoyed by heterosexual parents, by lesbian and gay couples, homosexual biological or adoptive parents, homosexual partners and ex-partners of biological parents, and homosexual prospective legal parents (homosexual individuals seeking to adopt children or become parents by means of assisted procreation). At least ninety different law review articles, comments, notes, or essay pieces primarily addressing custody, visitation, assisted procreation, and adoption issues involving gay or lesbian parents have been published since 1990, compared to only three pieces published in the same period twenty years earlier.

In contrast to the law review publications addressing same-sex marriage two decades earlier, the most recent law review literature about same-sex marriage and homosexual parenting has been drastically imbalanced. Only one of the seventy-two pieces published in the nineties unequivocally supports the rule of exclusive heterosexual marriage, while sixty-seven pieces advocate or support same-sex marriage. Thus, the ratio of recent law review literature that favors same-sex marriage to that opposing it is roughly 67:1 - hardly a record of a fair exchange or serious examination. Likewise, virtually all of the law review literature addressing homosexual parenting advocates the politically popular progressive position favoring legalization or expansion of legal status, benefits, and privileges for homosexual parenting. The imbalance is even greater in the articles addressing homosexual parenting. None of the articles contain substantial criticism of proposals to legalize or expand the legal status of homosexual parenting.

Such unanimity in the law review literature is quite remarkable. Because lawyers generally are known for their penchant to discuss all issues from "the other hand," to espouse alternative perspectives, and generally to disagree and to produce more opinions on a given subject than the number of lawyers involved in the discussion, the absence in the law review literature of virtually any substantial disagreement with the orthodoxy favoring homosexual parenting is quite notable. Moreover, the monolithic solidarity of the law review literature endorsing homosexual parenting stands in stark contrast to the sharply divided public controversy regarding homosexual parenting. The substance of the position promoted in the law review literature hardly reflects general public opinion, either. In fact, public opinion polls indicate that the American people strongly disfavor adoption by same-sex couples.

The extremely one-sided overall alignment of the scholarship addressing same-sex marriage and homosexual parenting reflects the one-sided advocatory style of many of the articles, comments, notes, and essays published in the law reviews. With some notable exceptions, the contemporary law review literature on these topics tends toward a propagandistic style and away from the balanced and scholarly. The willingness to honestly state opposing positions, to meet those arguments directly, and commitment to the fair-and-vigorous-exchange-of-informed-opinions

ideal of legal scholarship is generally absent from most of the current law review literature addressing same-sex marriage and homosexual parenting.

The legalization of homosexual parenting, essentially rendering sexual conduct of a parent a presumably irrelevant factor for purposes of child custody, visitation, and other child welfare cases, would constitute a significant shift in the legal and social assumptions and legal model of parenting. Accordingly, the proposals to legalize same-sex marriage and homosexual parenting certainly should be thoroughly and carefully considered. Likewise, the legalization of same-sex marriage would represent profound alteration of the structure of marriage and the family. That, of course, is where the law review literature plays an important role. Historically, lawyers have distinguished themselves by their ability to take all sides in the debate of proposed legal reforms, and law reviews have excelled in providing a forum for the "free trade in ideas," the "robust debate of public issues" that is essential to our system of free government. The current generation of law review literature, however, fails to provide that important function with respect to the same-sex marriage and homosexual parenting issues. The current literature fails to provide almost any serious criticism, scrutiny, or even a modest exchange of opposing opinions. In the law reviews, the "broad dissemination of principles, ideas, and factual information... [and] robust public debate" that is needed to test and refine the proposal has not even begun.

Some bias in the contemporary law review literature regarding homosexual parenting is not surprising. The faction that is most interested in the issue, that stands to gain the most by proposed legal reforms, can be expected to be most active in generating law review articles, notes, comments, and essays. Because advocates of the proposed legalization of homosexual parenting are not explicitly seeking to deny legal rights or interests to any other identified group, there is no group with a strong vested interest in presenting the other point of view. Additionally, academics prone to publish in law reviews live, work, and form their opinions in an environment that prefers novel and antiestablishmentarian positions and which is generally hostile to the expression of conservative positions on this particular issue. A high cost is paid by scholars for opposing or criticizing the preferred intellectual position on such issues. Thus, some imbalance in the law review literature (favoring legalization of homosexual parenting) can be expected. However, the degree of imbalance--the total absence of substantial criticism of the legalization of homosexual parenting--is truly extraordinary. The problem thus goes beyond rational uniformity of belief and involves a rather strong intellectual taboo against criticizing or opposing the pro-legalization point of view.

Most of the articles advocating homosexual parenting are filled with adult-rights talk. Although this certainly is a legitimate perspective, in this area of law (dealing with doctrines and policies protecting and promoting parent-child relations), it probably is not the most important focus. The focus on the welfare of children and the social interests in the parent-child relation ought to be central, and the adult-rights focus secondary. Yet much of the law review literature is clearly adult-advocacy literature attempting to vindicate a particular rule or principle for the benefit of a certain class of adults. The manipulation of child-oriented rules of law for the political purposes and benefits of adults is troubling.

B. Overview of This Article

One of the areas in which there are serious questions that should be carefully considered before proceeding with the proposed legalization of same-sex marriage and homosexual parenting concerns the potential impact of same-sex marriage and homosexual parenting on children. The law review literature regarding same-sex marriage focuses overwhelming only adult policy concerns and horizontal (copartner) issues. That literature largely neglects potential effects of the proposed law reform upon the interests of children. Some of the law review literature addressing homosexual parenting in the context of assisted procreation, adoption, and custody disputes addresses the children's interests. If that literature were balanced, and fully presented the best

arguments pro and con, it would be very helpful. Regrettably, the literature regarding consideration of adult homosexual behavior as a factor in custody, visitation, adoption, and assisted procreation cases seems to be about as zealously one-sided as the same-sex marriage literature.

The number of cases raising issues about homosexual parenting are increasing yearly. Since 1990, more than fifty cases dealing with those issues were decided by courts in opinions available in the LEXIS database. In 1995 more cases were reported dealing with these issues of homosexual parenting than were decided in the three years of 1990-92 combined. Many of those cases directly address the issue that is the focus of this article--the potential impact of homosexual parenting on children. However, some of those cases manifest a disconcertingly determined penchant for platitudes, sweeping generalizations, and suspiciously politically correct conclusions.

In part II, this article argues that some courts and most law review commentators have not paid sufficient attention to the potential impact of legalizing same-sex marriage and homosexual parenting on children. Part III urges great care and caution in relying upon social science studies about the effects of homosexual parenting on children because serious methodological and analytical flaws compromise the reliability and predictability of most of the studies. Part IV notes that there is substantial evidence to support the value to children of being raised by two parents, one male and one female, and that even in the studies promoting homosexual parenting there is some evidence of potential harm to children. Part V reviews and critiques the case law, noting the many ways cases may vary because of the significantly diverse legal and factual contexts in which the issues arise. It describes the connection and disjunction between same-sex marriage and the homosexual parenting issues. Part VI concludes the article by suggesting the use of a rebuttable presumption to protect the well-being of children in homosexual parenting disputes.

III. Caution About the "Scientific Studies" That Are Used to Support Homosexual Parenting Claims

A. Homosexual Parenting Claims and the Equivalence Issue

Advocates of legalization of homosexual parenting assert essentially three kinds of arguments: constitutional arguments, nonconstitutional policy arguments, and social science arguments. The constitutional arguments assert that considering homosexual behavior as a negative factor in custody cases improperly entails classification based on gender, improperly burdens a suspect class, infringes upon a fundamental right of privacy or intimate association, and violates the Establishment Clause. These are not very convincing claims. All of these arguments have been raised numerous times in other family-status cases and law review articles claiming that it is unconstitutional for states to refuse to recognize same-sex marriage, and to date none of them has succeeded. Although it is possible to hypothesize some cases, dealing with extraordinary fact situations or especially ill-considered statutes, in which the constitutional arguments might be valid, the general proposition that a state violates the U.S. Constitution by giving legal preference and comparative advantages to heterosexual adults over homosexual adults in parental relationship cases is without basis.

The public policy arguments assert, *inter alia*, that (1) the state should not enforce prejudicial social stigma against parents who engage in homosexual behavior, (2) same-sex parents can and do provide parenting that is just as good--as valuable for children--as that provided by heterosexual married couples and individuals, (3) public policy should encourage formation of families, even nontraditional same-sex parenting families, because two parents (even of the same gender) are better than one, and (4) because parenting by an adult who is engaged in a homosexual relationship may be the best option for a particular child. The first of these arguments is an adult-agenda-promoting argument that essentially ignores the core concern in parental relationship cases, which must be the welfare of children. Thus, even if it were true, it would not compel or justify a change of parental relationship policies.

The last two policy arguments are variations of a common theme--that in the world we live in, persons who engage in extramarital sexual relations, including homosexual relations, may, in some cases, provide the best available parenting alternative for particular children. This argument recognizes that all parents are imperfect and acknowledges the tremendous failures of the alternatives to parenting (e.g., the abuse of institutional care, the limbo of foster care, and the tragedies of other governmental substitutes for in-home parenting, the disadvantages of single-parenting). It is hard to disagree that, despite the possible harms children may suffer from the extramarital sexual behavior, including homosexual behavior, of their parents, if the best interests of children is followed in all cases, there undeniably will be, and have been, some cases in which a parent engaged in extramarital sexual behavior will offer, and has provided, the least detrimental practical parenting alternative.

Thus, this article does not quarrel with the third principle above or that there are and will be in this imperfect world exceptional cases in which less-than-ideal parents and less-than-perfect custody and adoption arrangements are the best options for a particular child or children. However, the critical policy debate over legalizing homosexual parenting, however, is not about recognizing individual exceptions or legitimating homosexual parenting only in extraordinary cases. The advocates of legalization of homosexual parenting seek to establish a general policy and rule of law that homosexual relations are fully equal--just as good as and legally equivalent in all ways--to heterosexual parenting. That is the core, disputed factual predicate of the claims for homosexual parenting. Thus, the third policy claim raises the fundamental issue in the current policy dispute: is homosexual parenting really as good for children as heterosexual parenting?

This is a factual question. But it is a question of legislative fact, not adjudicative fact. That is, it calls for a determination of more than arguable "scientific" facts about causes and effects. It asks a broad question about overall benefits for children and families in society in general, not a narrow question about benefits for a particular child in a particular case. It takes a long-term perspective (what will the results be for society and children over time), rather than a short-term perspective (what seems to be best here and now). It calls for a finding of normative fact as well as scientific fact. Thus, it is the kind of question that legislatures, not courts, are best-suited to investigate and decide. Legislatures can better address these kinds of issues because of their superior fact-finding capacity and public accountability.

Inevitably, the question requires a factual comparison of the general childrearing abilities of heterosexual and homosexual couples and individuals as classes, a subject about which there was little information until quite recently. Within the past decade, however, it has become a very popular topic in professional, especially social science, literature. Most of this new literature is supportive, much of it self-affirming, of homosexual parenting. Advocates of legalized homosexual parenting have cited this social science literature to show that homosexual parenting is just as good as heterosexual parenting or that there is no more detriment to children from homosexual parenting than from heterosexual parenting. However, on close examination, the evidence does not prove that homosexual parenting is equivalent to heterosexual parenting or that it is not harmful in significant ways to children. Most of the studies of homosexual parenting are based on very unreliable quantitative research, flawed methodologically and analytically (some of little more than anecdotal quality), and provide a very tenuous empirical basis for setting public policy. And even from this body of research there are indications of some significant potential detriments to children from homosexual parenting.

B. Some Methodological Concerns About the Studies Purporting to Show Equivalence of Homosexual Parenting

The publication of studies of homosexual parenting in social science literature has dramatically increased in recent years. Like scientific reports purporting to find biological origins for homosexual behavior (gay genes, brain structures, etc.), most of the recently published social science studies about homosexual parenting are highly affirming of persons in homosexual relationships. They purport to show that childrearing by homosexual parents is equivalent to (as beneficial for children as), if not superior to, childrearing by heterosexual parents. Studies are cited in the law review literature as proof that the homosexual behavior or relationship of parents has no detrimental effect on parenting skills or on children raised by such parents. Likewise, the case law relies heavily, and often excessively, upon studies purporting to show that homosexual parenting is functionally equivalent to heterosexual parenting and not harmful to children. Because of substantial methodological and analytical flaws, however, the studies do not provide a reliable basis for such conclusions.

For instance, the 1993 study by Philip A. Belcastro, an independent examination of the methodological validity and reliability of fourteen post-1975 published "data-based studies addressing the affects of homosexual parenting on children's sexual and social functioning," found:

"The most impressive finding is that all of the studies lacked external validity. Furthermore, not a single study remotely represented any sub-population of homosexual parents. This limitation, in terms of scientific inference, is imposing.

With only three exceptions... the studies' designs presented moderate to fatal threats to their internal validity. Seven studies did not utilize a control group and only three studies satisfactorily attempted to match comparison groups...

The majority of studies also suffered from internal validity flaws such as inadequate instrumentation and disparate testing conditions that... were well with the researchers' control.

Finally,... most were biased towards proving homosexual parents were fit parents. Some of the published works had to disregard their own results in order to conclude that homosexuals were fit parents."

This study concluded that "the statement that there are no significant differences in children reared by homosexual parents versus heterosexual parents is not supported by the published research base."

The first methodological problem with many of the studies of the effect of parental homosexual behavior on children or childrearing is small sample size. In order to provide any conclusions that provide statistically reliable predictive data that would be valid for policy making, the samples must be of significant numerical size. For example, a recent study of the effect of certain "at risk" factors on the welfare of children involved a survey of 34,129 children from an initial sample of 250,000 surveys taken in 460 communities in thirty-two states. None of the studies of parenting by adults engaged in homosexual relationships is of comparable size or reliability. Most of the studies of childrearing by parents in homosexual relationships involve samples of a few dozen, frequently as few as ten to forty subjects--the studies of Charlotte Patterson, the most prominent producer and advocate of this literature, for example--and some studies use sample populations as small as five. The studies of such small sample populations do not provide reliable quantitative research conclusions about parenting or child development.

Another sampling flaw in many of the studies cited to show the lack of harm to children of gay or lesbian parenting is the reliance on the "sample of convenience." Many of the studies involve subjects who are self-selected, or at least not randomly selected, such as subjects "recruited through advertisements in homophile publications." Volunteers for such studies often have an interest in the outcome of the study that distorts the research. Thus, the sample population in these studies is not likely to fairly represent the whole group of homosexual parents that is to be examined. The assertiveness and zeal of self-selected sample populations may not fairly represent the population sought to be sampled. Educated, economically stable white lesbians are typically overrepresented in the trendy samples; poor, minority, uneducated, or troubled homosexuals are seldom included. Gay male couples typically are not included. The "particular nature of the lesbian households studied" creates "further reservations to the generalizations of the findings reported so far" because of uniquely favorable circumstances involving relations with the children's fathers. Moreover, there are many varieties of homosexual relationships and parent-child relationships involving adults in homosexual relationships. For instance, the circumstances and experience of a child who was born to a married couple and whose custodial mother, after divorce, entered into a lesbian relationship is quite different than the experience of a child conceived by artificial insemination by a woman in a lesbian relationship, and both are different from the experience of a child who was abused or abandoned by his or her natural parents, moved around in foster care for several years, then adopted by a single adult who is engaged in some kind of homosexual relationship. Yet many studies just lump all adults in homosexual relationships together or lump their children together.

Another sampling flaw concerns the control groups with which the homosexual parents and their children are compared. Seldom are married heterosexual families used as comparisons. Often the control groups consists of single heterosexual parents and their children. This results in comparison of a favorably composed group of homosexual parents and children with a control group drawn from the segment of the heterosexual parent-child population that is most disadvantaged. In many studies comparing lesbian and heterosexual mothers, "a considerable proportion of the lesbians were cohabiting with sexual partners and this same factor, cohabitation,

was not true for the comparison heterosexual group." A truly representative control group would compare children raised by homosexual parents with children in intact families with heterosexual parents (to make the comparison with the standard desired model of heterosexual parenting), or at least would include a statistically representative proportion of such families, comparable to their percentage in the overall heterosexual parent family population (to make comparison with heterosexual parenting overall--successful and unsuccessful).

Adequate control for other variables that may influence the success of parenting or the well-being of children is often lacking. Control for income, education, employment, health, extended family and other support systems, age, religion, support programs, siblings, and other factors should be included in the study design. Another "limitation to these studies is that most of the children who participated spent the early part of their lives in a heterosexual family." However, these factors are often given only superficial attention or are neglected entirely.

The "social desirability" bias taints the studies of homosexual parenting. Both researchers and respondents perceive that within society, or at least the subgroup of society with which they identify, it is deemed desirable, progressive, and enlightened to support one particular outcome--in this case, that homosexual parenting is just as good as heterosexual parenting. This insight influences the research design and analysis, as well as the data gathered--the responses. Certainly this limitation is not unique to the studies of homosexual parents by gay, lesbian, or sympathetic researchers; all who perceive that there is a socially preferred response or outcome regarding the topic are subject to the same influence as studies. However, the overwhelmingly one-sided position taken in the professional literature, in both law review and in social science literature in support of homosexual parenting, is one strong indication that this factor asserts its distorting influence on these studies.

Methodological flaws in response retrieval abound in the studies. For example, some studies of childhood behavior of adults engaged in homosexual relations rely on retrospective recall, with the potential for memory distortion or selective recall. A study of homosexual orientation in children raised by gay men relied on fathers to identify sons as gay, bisexual, or straight. It reported that only ten percent of the sons were homosexual. However, the method of identification invited underreporting. If the fathers were reluctant to identify sons as gay or bisexual "the extent of homosexuality in [the] sample would have been underestimated." Some studies dismissed data conflicting with pro-homosexual parenting interpretations by referring to factors which their studies did not examine or control for (and which, therefore, could not properly be used to explain the results), or simply ignored results that contradict the pro-homosexual parenting preference. Other basic methodological flaws found in the homosexual-parenting-endorsing literature includes using different data-collecting methods for different groups (e.g., personal interview for the homosexual parents, mail in sheet for heterosexual parents), use of self-description or self-selection techniques, failure to consistently control whether bisexuals would be classified as homosexual or heterosexual, and failure to control for whether and how long the children had lived with their homosexual (and nonhomosexual) parent.

The absence of longitudinal studies is another serious weakness in social science research that purports to show the absence of detrimental effects of homosexual parenting. Problems that are not apparent in the lives of preschool or grade school children, for example, may well emerge during adolescence or young adulthood, especially in the process of forming adult intimate relationships.

The criteria for comparison are another concern. Many studies attempt to compare personality measures of well-being, such as self-esteem, which are notoriously unreliable. Test measures for some of these characteristics have not been independently validated, and some research suggests that self-esteem measures are unrelated to any "at risk" behavior of children.

Data compilation is another area of methodology in which problems have been found in homosexual parenting studies. An influential study of homosexual orientation in children raised by gay men reports that only ten percent of the sons were gay, but "[t]his may be an underestimation, because [the researchers] omitted 7 sons whose fathers were only moderately certain of their sexuality, but 2 of these were believed by their fathers to be nonheterosexual."

Analysis of the data is also problematic in these studies. Broad overgeneralizations abound. One oft-cited psychologist frequently makes such unscientific conclusions in her reports as "[n]ot one study provides any evidence for concern," and "not one of which provides any reason to believe that children of lesbian or gay parents are at risk." This same researcher overstates other salient facts as well. For example, this researcher referred to the brief filed by the American Psychological Association and the National Association of Social Workers as "[r]epresenting the views of more than 250,000 mental health professionals." Although that is not impossible, it is rather improbable--such remarkable, monolithic, ideological unanimity among all the members of independent-thinking professions has not been publicly reported since the fall of communism in Eastern Europe.

Another analytical lapse which occurs in some of the reports addressing the impact of being raised by lesbian or gay parents is analysis of the subsequent sexual orientation of the children. Charlotte Patterson touts the results of one study of eighteen children of lesbian mothers and eighteen children of heterosexual parents and suggests that the number of children raised by lesbians "did not exceed expectations based on presumed population base rates." Diana Baumrind has commented about that study and another one that reached a similar conclusion: "I question their conclusion on theoretical and empirical grounds. Theoretically, one might expect children to identify with life-style features of their gay and lesbian parents. One might also expect gay and lesbian parents to be supportive rather than condemnatory of their child's nonnormative sexual orientation." Moreover, the "expectations" figure used by the authors of the studies (ten percent of the population presumed to be homosexual) was misleading. The ten-percent figure for homosexual population used by Ms. Patterson has been thoroughly discredited; rates of homosexual activity of approximately 2%--closer to 1.5% for women, and less than 3% for men, at the most, have been consistently reported. Using the correct figure, the studies indicate that children raised by parents engaged in homosexual relationships are at substantially greater risk (at least 3.5 to 7 times heightened risk) of being drawn in to homosexual behavior themselves.

Misunderstanding and misinterpretation of statistical analysis is common. For example, one study that reported that nine of twenty-five children of lesbian mothers reported same-sex attraction, but only four of twenty children of heterosexual mothers reported same-sex attraction, ignored the significant statistical fact that it is highly improbable that two random samples would produce such ratios. Some of the studies of homosexual parenting seem to proceed to predetermined conclusions while "gloss[ing] over the inadequacies" of the research and methodology.

After examining the body of social science studies of parenting by lesbian and gay parents, one reviewer sympathetic to gay and lesbian parents concluded that "it is premature to predict adolescent and adult outcomes associated with being reared in any one of the variety of lesbian or gay family arrangements." She further noted:

"Research findings to date are not definitive, however, because most of the studies are based on small samples of convenience, retrospective data, or self-report instruments subject to social desirability biases. Also few, if any, of the studies have explored theoretically relevant hypotheses concerning adolescent outcomes or used intensive observational and interview methods most likely to reveal possible problems such as identity diffusion or parent-child enmeshment..."

Differences in sexual orientation, values, lifestyle, sense of identity, and balance of agency with communion are all expectable by late adolescence. Differences, however, do not imply deficits."

Likewise, another professor of psychology with expertise in social science research methodology in general, and psychometric research in particular, concluded: "Because the body of research [of the effects on children of homosexual parenting] shows little careful analysis or sustained attention given to the reliability and validity of the measures used in studies of gay and lesbian parenting, the existent body of research is, and will continue to be, of little scientific value." Thus, collectively, the social science studies purporting to show that children raised by parents who engage in homosexual behavior are not subject to any significantly enhanced risks are flawed methodologically and analytically, and fall short of the standards of reliability needed to sustain such conclusions.

IV. The Need for Dual-Gender Parenting

A. Indicia of Potential Harm for Children from Homosexual Parenting

Given the sympathetic orientation and methodological bias of the social science studies of the effects of homosexual parenting on children, it is remarkable that the data reported in some of these studies provides a basis for serious concerns about potential detrimental effects upon children raised by gay or lesbian parents. Because of the methodological flaws mentioned above (such as small sample size), the concerns cannot be called conclusive, but the data certainly raise questions that need to be examined. Until these concerns are conclusively dispelled, it would not be rational to adopt a public policy endorsing or legitimating homosexual parenting. The most obvious risk to children from their parents' homosexual behavior suggested by the current studies relates to the sexual development of the child. Both theory and empirical studies indicate the potential that disproportionate percentages of children raised by homosexual parents will develop homosexual interests and behaviors. The Belcastro study noted that even based on the studies biased to produce data supporting homosexual parenting "there appears to be some significant differences between children raised by lesbian mothers versus heterosexual mothers in their family relationships, gender identity and gender behavior... [The only study that] utilized a post-adolescent sample... reported 23.5 percent of the subjects homosexual. However, [this] sample was seriously flawed."

One published case report suggests a link between a daughter's sexual behavior and fantasy and her mother's homosexual behavior: the daughter in the reported case study had experimented with homosexual practices and also indulged in heterosexual promiscuity, anxiously driven by her awareness of her mother's homosexual relations. Another study of New York children reared by lesbian mothers (mostly in couples) and those reared by divorced homosexual single mothers suggested that "[t]here is a possibility that rearing [by a homosexual parent] might influence [the child's] sexual partner choice, temporarily or permanently." Javaid also observed that "a girl in a lesbian home could be more vulnerable [to developing homosexual attraction] because of an increased awareness of herself in relation to other women and a sensitivity to environmental prejudices such as 'the daughter of a gay woman could be gay herself'" and acknowledged that "the effect of an additional exposure to [the lesbian] subculture" might "promote internalized permission for homosexual behaviour." Javaid's study found that four of the twenty-six children raised by lesbian mothers were "asexual" compared to none of the twenty-eight children raised by heterosexual single mothers. Four of the children raised by lesbian mothers stated that they did not want to have children, compared to none of the children raised by heterosexual single mothers. Three of the thirteen lesbian mothers preferred for their daughters to become homosexual, compared to none of the fifteen heterosexual single mothers, and all of the heterosexual mothers (100%) hoped their children would marry and have children, but only nine of thirteen lesbian mothers (69%) wanted their children to have children. Although far from definitive and too small to provide reliable conclusions, this study clearly suggests that homosexual parenting may have some effect upon children in relation to the whole constellation of developmental issues surrounding their own sexuality. One critical report reviewed three reports that found homosexual orientation in approximately nine percent to twelve percent of children raised by homosexual parents and noted: "These three summaries of the literature--by three different teams of investigators--agree in stating that homosexual parents appear to produce a disproportionate percentage of bisexual and homosexual children." Indeed, one sympathetic review of the literature candidly acknowledged that "Clinical studies do suggest a number of possible areas in which the mother's sexual identity might be an issue for the children."

These data are consistent with the data from other studies of sexuality which, though glossed over by researchers and advocates of homosexual parenting, show that a significantly disproportionate percentage of children raised by homosexual parents develop homosexual interests themselves.

Although these studies seem to "ignore findings of potential risk factors," disproportionate incidence of homosexual behavior among children raised by homosexual parents is clearly indicated by the data. Homosexual behavior among youth is associated with suicidal behavior, prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behavior with multiple sex partners, and premature sexual activity. Thus, increased risk of high-risk sexual behavior to children raised by homosexual parents clearly has not been disproven, but appears to be at least a possibility in these studies. Again, although the literature is too incomplete to be definitive, it raises a serious concern that should be examined further.

Increased likelihood of homosexual interest is not the only potential risk for children raised by homosexual parents. Javaid's study also discovered "noticeable" concerns for both lesbian mothers and their sons regarding discipline, expectations, and general parent-child relations. Other studies have also reported that boys raised by homosexual mothers may have a lower self-image regarding masculinity. Children born to or adopted by lesbian mothers who were examined by Charlotte Patterson, for example, showed more symptoms of stress and were "more likely to report feeling angry, scared or upset." A study of children of lesbians by Karen Gail Lewis revealed a "defensiveness" on the part of the children of lesbian couples she studied, a pattern of denial--especially deep in the youngest child in the lesbian couples she studied, hostility from older boys, especially directed at the mother's lesbian lover, children's expressed concern for the welfare of siblings, children's concerns about their own sexuality, children's concerns about the integrity of their family, concerns about their mother's homosexual activities, evidence that one of the lesbian mothers expressly encouraged her daughters to make lesbian sexual choices, children forced to conceal one parent's secret sexual behaviors from the other parent, and "gross maladaptive behavior [by older teenagers that] occurred around the time of the mother's disclosure [of her lesbian relationship]." Likewise, the Belcastro study noted that studies biased in favor of homosexual parenting disclosed that children (especially daughters) of lesbians have increased levels of fantasized anxiety, increased tendencies toward inhibition, increased tendencies toward sadness (at least sons of lesbians), and disclosed increased cross-dressing among daughters, and less cooperative behavior. Sons of lesbians were reportedly more influenced by peers than children raised by heterosexual parents.

Finally, it is reasonable to be concerned that ongoing parental homosexual sexual behavior is harmful to children because that seems to be the lesson of the most relevant and analogous human experience--the experience of extramarital sexual relations generally. The standard and expectation that responsible sexual relations must occur within the heterosexual marriage relationship is deeply rooted in our society and legal system. Extramarital sexual behavior is associated with such harm to children as the breakup of their parents' marriage and the destabilizing, child-harming consequences of divorce. Parental extramarital relationships wound children, shaking, sometimes even destroying, their faith in marriage and in personal commitments of fidelity and intimacy. It hurts a child to learn that one parent has been unfaithful to the other. That pain is very real and very wrenching. Parental extramarital relationships also provide a dangerous model for children, serving to pass intergenerational self-destructive behavior on to children. The message of intergender and intergenerational carelessness, and family-sacrificing selfishness not only hurts, but also may have a programming effect on children. The lesson of sexual self-gratification at the expense of familial fidelity conveys a tragic message about both family commitments and responsible sexual behavior in our society. In these days of so many harmful, even deadly, sexually transmitted diseases, the risks may be physical as well as emotional.

The potential harm to children from homosexual behavior of their parents, however, should not be exaggerated. First, many of the studies are not of large sample populations and have other methodological deficiencies. Moreover, the reasons that men and women turn to homosexual relationships are many and complex, and do not necessarily or always cancel or override their love for and commitment to their children. Some parents with homosexual orientation

undoubtedly are very committed to the welfare of their children, and the kinds of potential risks that may be associated with homosexual parenting may not differ significantly from those associated with heterosexual parenting by adults who engage in heterosexual extramarital activity. Nevertheless, although the social science research is not conclusive, it does suggest that there are some particular and unique potential risks to children raised by active homosexual parents.

B. Indicia of the Needs for and Advantages of Dual-Gender Parenting

Children raised by homosexual couples do not have both a father and a mother. If Heather is being raised by two mommies only, she is being deprived of the experience of being raised by a daddy. Both the common experience of humanity and recent research suggest that a daddy and a mommy together provide by far the best environment in which a child may be reared.

Among the most important reasons why heterosexual parenting is best for children is because there are gender-linked differences in child-rearing skills; men and women contribute different (gender-connected) strengths and attributes to their children's development. Although the critical contributions of mothers to the full and healthy development of children has long been recognized, recent research validates the common understanding that fathers, as well as mothers, are extremely important for child development.

Experts in many disciplines that have recently been studying fathering have reached "surprising unanimity" in their recognition that "[m]en nurture, interact with, and rear competently but differently from women: not worse, not better... differently." When fathers nurture and care for their children, they do so not quite as "substitute mothers" but differently, as fathers. For example, some studies show that fathers play with their infant children more than mothers, play more physical and tactile games than mothers, and use fewer toys when playing with their children. Mothers tend to talk and play more gently with infant children. Compared to mothers, fathers reportedly appear to "have more positive perceptions of the more irritable sons and less irritable daughters," and perceive their baby daughters to be more cuddly than mothers do. Mothers smile and verbalize more to the infant than fathers do, and generally rate their infant sons as cuddlier than fathers do. Moreover, "[m]en encouraged their children's curiosity in the solution of intellectual and physical challenges, supported the child's persistence in solving problems, and did not become overly solicitous with regard to their child's failures." One study found that six-month-old infants whose fathers were actively involved with them "had higher scores on the Bailey Test of Mental and Motor Development." Infants whose fathers spend more time with them are more socially responsive and better able to withstand stressful situations than infants relatively deprived of substantial interaction with their fathers.

Erik Erikson noted that father love and mother love are different kinds of love; fathers "love more dangerously" because their love is more "expectant, more instrumental" than that of mothers. Fathers more than mothers tend to appreciate the value of and foster child interaction with extrafamilial socializing influences, to provide instrumental leadership, to establish and enforce standards regarding unacceptable emotions and behaviors, and "absorb[] hostility" from children, whereas mothers provide more expressive, integrative, and nurturing childrearing, and their love is more unconditional. Fathers see themselves more often than mothers as involved in developing values and discipline in children. Fathers have a powerful influence upon academic achievement of children, and "[m]any researchers today believe that a father's expectations regarding future roles for his child will have an influence upon the child's cognitive competence." Likewise, paternal affection is associated with adolescents having more friends, being happier in relationships, and feeling more secure, calm, and self-confident. Also, "there is a lower incidence of sexual involvement in teens from father-present homes."

Separation of children from their fathers is "the leading cause of declining child well-being in our society. It is also the engine driving our most urgent social problems, from crimes to adolescent pregnancy to child abuse to domestic violence against women." Fatherhood is fragmenting in role. The two main consequences of fatherlessness in American society are rising youth violence and declining child well-being. It has been observed that boys with fathers rarely commit crimes; fatherless boys commonly commit crimes. As one commentator notes,

"Surveys of child well-being repeatedly show that children living apart from their fathers are far more likely than other children to be expelled or suspended from school, to display emotional and behavioral problems, to have difficulty getting along with their peers, and to get in trouble with the police.

According to a 1990 study commissioned by the Progressive Policy Institute, the "relationship between crime and one-parent families" is "so strong that controlling for family configuration erases the relationships between race and crime and between low income and crime."

Accordingly, "the preconditions for effective fatherhood are... coresidency with children and a parental alliance with the mother." Bronislaw Malinowski maintains that "[t]he most important moral and legal rule concerning the physiological site of kinship is that no child should be brought into the world without a man--and one man at that--assuming the role of sociological father, that is of guardian and protector, the male link between the child and the rest of the community. [T]his generalization amounts to a universal sociological law...." The consequences for children of effective fatherhood are compellingly beneficial:

"Parental investment enriches children in four ways. First, it provides them with a father's physical protection. Second, it provides them with a father's money and other material resources. Third, and probably most important, it provides them with what might be termed paternal cultural transmission: a father's distinctive capacity to contribute to the identity, character, and competence of children. Fourth, and most obviously, paternal investment provides children with the day-to-day nurturing--feeding them, playing with them, telling them a story--that they want and need from both of their parents. In virtually all human societies, children's well-being depends decisively upon a relatively high level of paternal investment."

American society "is becoming an increasingly fatherless society." In 1995, an estimated forty percent of all children in the United States resided in homes in which their fathers did not reside; before they turn eighteen, it is predicted that more than one-half of all children in America will spend a "significant" part of their childhood living apart from their fathers. Under these circumstances, and with the knowledge we have of the importance of both father and mother to healthy child development, to legitimate a one-gender style of parenting is simply irrational.

Of course, gender-associated child-interaction skills and patterns appear to be influenced by many variables, and there is wide variation in parenting behaviors within each gender. Undoubtedly, many gender-associated parenting traits are, or are influenced by, social constructs. Nevertheless, children generally develop best, and develop most completely, when raised by both a mother and a father and experience regular family interaction with both genders' parenting skills during their years of childhood. It is now undeniable that, just as a mother's influence is crucial to the secure, healthy, and full development of a child, "[a] paternal presence in the life of a child is essential to the child emotionally and physically." Although exceptional cases do occur, and some voluntarily single mothers undoubtedly have been exceptional parents and have raised wonderful children, rational laws must reflect the realities of life, including the general reality that children develop best and most completely when raised by both a mother and a father.

Parents are important as role models for their children of the same gender because "[c]hildren learn to be adults by watching adults." Children are generally more compliant with the parent of the same sex. The importance of the opposite-gendered parent for the complete emotional and social development of the child is now recognized as well: "Boys and girls build their notions of their sex roles from experience with both sexes." The loss of cross-gender parenting may have severe emotional consequences for the child. For example, the absence of a father in the home may result in a daughter having trouble relating to men throughout her adult life.

Indirectly, it is also best for children to be raised by both a father and a mother because men mature and become most responsible and relate better to children when they have raised children. This is true in part because "[t]he transition from adult male to father is a much more complex task" than some imagine. Yet fathering is a vital part of "the journey toward the complete man." Fatherhood "is the single most creative, complicated, fulfilling, frustrating, engrossing, enriching, depleting endeavor of a man's adult life." If fathers are involved in the daily physical care of a child in infancy, the probability that the man will be involved in physical abuse of any child is dramatically lower. The finding of one psychiatrist that "[t]he intimacy of infant care creates a strong barrier against later exploitation of that intimacy, whether physical or emotional," probably holds true for both mothers as well as fathers. The helplessness of an infant evokes a nurturing response in both men and women. Gender stereotyping is less likely to occur if the father has had an intimate relationship with his child.

The detrimental consequences generally experienced by children raised by only one parent are now irrefutable. For example, children in a single-parent family generally receive less parental time and direction and less competent childrearing than those in two-parent homes. They perform less successfully in educational activities, have more social adjustment problems, and exhibit higher teen-childbirth rates.

Among the most profound advantage of marriage is basic economic security for children. Marital status is more closely associated with avoiding child poverty than any other factor. One study reported that more than half of the increase in child poverty in the United States between 1980 and 1988 "can be accounted for by changes in family structure during the 1980s." In addition, "[c]hanging family structure also accounted for 48 percent of the increase during the 1980s in deep poverty, and 59 percent of the rise in relative poverty among U.S. children." Many studies have shown that children in single-parent families are many times more likely to be living in poverty than children living with both a mother and father. William Galston, who served as a Domestic Policy Advisor to President Clinton, agreed that "[i]t is no exaggeration to say that a stable, two-parent family is an American child's best protection against poverty." Thus, "[a]s a matter of public policy, if not of morality, it pays for society to approve of marriage as the best setting for children."

Advocates of homosexual parenting may argue that two homosexuals could provide for a child economically better than a single parent. However, any overall economic benefit could be more than offset by the overall economic costs and chronic instability of homosexual liaisons, especially gay liaisons. Concerns about the welfare of children have caused the Scandinavian countries with legalized homosexual domestic partnerships to deny to same-sex couples all rights of adoption, including domestic adoptions and even stepparent adoptions, as well as rights of joint custody (in Denmark and Sweden) and assisted procreation. Homosexual parenting poses particular risks for the emotional and gender development of children. Children make the transition through developmental stages better, have stronger gender identity, are more confident of themselves, do better in school, have fewer emotional crises, and become functioning adults best when they are reared in two-parent, dual-gender families. As family sociologist David Popenoe puts it:

“Social science research is almost never conclusive... Yet in three decades of work as a social scientist, I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: on the whole, for children, two-parent families are preferable to single-parent and stepfamilies.”

A child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development. Of course, the disadvantage of single-sex parenting upon a child clearly may be overcome and should not be overstated. Many wonderful children have overcome the loss of one or even both parents in childhood and grown into wonderful adults, despite having little or no experience with dual-gender parenting. But the significance of the disadvantage of growing up without both father and mother in the home should not be trivialized, either, especially in this difficult time of our social history. Individually, the child must cope with the loss of example, counsel, and experience that living with the missing-gender parent would have provided, and must overcome the sense of loss, abandonment, and deprivation (often feelings of devaluation, inadequacy, and anger) caused by loss of the second-gender parent. Socially, the community may be burdened, not just to provide some quasi-parental experience with missing-gender adults for the growing child to compensate for what the missing-gender parent would have provided, but also to bear the adverse behavioral consequences often associated with single-gender parenting. Although single-gender parenting (due mostly to divorce and birth of children out of wedlock) is a fact of modern life, and many single parents undoubtedly do a wonderful job in raising their children, the advantages of dual-gender parenting for children and for society justify society's legal preferences for this type of parenting.

C. Is Nurturing "More Important" than Parental Sexual Behavior?

Parents who are involved in homosexual relationships may, nonetheless, provide much love and nurture for their children. In terms of children's happiness, sense of security, and successful development into responsible adulthood, constant love, caring, and priority of commitment to the welfare of the children are important parenting attributes, and these are not necessarily dependent upon the parents' sexual preference. However, many of the homosexual-parenting-affirming studies overstate this point by suggesting inter alia that a "parent's sexual preference does not matter as much as the love, caring, and maturity of the adults and their effort to help their children become self-reliant and self-assured." This statement poses a comparison between incomparable considerations--between a potentially positive parenting quality on one hand and a potentially negative parenting quality on the other--and speculates in the abstract that having the positive is more important than avoiding the negative. This subtle "does not matter as much" claim also begs the critical question, which is--"better for what purpose?"

If the goal is the optimal healthy sexual identity and heterosexual development of children, the homosexual parenting studies could be interpreted to suggest that parental sexual preference may be as important as or perhaps more important--and homosexual behavior of parents more threatening to child well-being--than ideal parental caring and nurturing. Sexual orientation of children is a major issue that is often assumed or simply ignored in the studies and discussion of homosexual parenting. Is heterosexual development a social goal for child development, or is homosexual orientation just as good? The answer may turn on such issues as whether homosexual parenting is essentially harmless or poses significant risks to children.

Moreover, even if the concern is some generic concept of "overall" child well-being, the statement also ignores the variety of areas that constitutes total parenting. For example, is a parent who is a "nine" in caring/nurturing (on a scale of zero to ten) but who is openly promiscuous in front of his or her young children (a "one" on a zero to ten scale of sexual responsibility modeling) really a better parent overall than a parent who is only a "seven" or an "eight" in caring/nurturing but is happily, monogamously married to the other parent of the

children with whom exclusively he or she shares sexual intimacy in modest privacy (a "nine" in sexual responsibility modeling)? The nurturing-is-more-important-than-sexual-preference statement also ignores the many facets of child needs and child welfare. Is "experiencing love and security" really the highest, ultimate value for child welfare? Always? For all children? Of all ages? What about the special personality and needs of the child? The age and gender of the child? The moral/religious upbringing of the child? The extended family situation? Many variables effect child development, and to categorically state that nurturing/caring is always more important than parental sexuality is to state more than the evidence supports.

Four additional points undermine the credibility of the "nurturing-is-more-important-than-parental-sexuality" claim. First, if parental homosexuality will cause more children to engage in homosexual activities, and a certain percentage of them will contract AIDS or other serious sexually transmitted diseases through their homosexual activities, can we honestly say that for those children, the nurturing of their parents was really a more important influence than the parents' sexual behavior? Is a well-nurtured-as-a-child twenty-four year old dying from AIDS really better off than the less-nurtured-as-a-child twenty-four year old who is healthy?

Second, the death of a parent (especially a custodial parent) is a severe trauma for children. There is some indication that the life expectancy of adults who engage in homosexual behavior may be significantly shorter than that of heterosexual adults and the likelihood of parental death during the childhood years of significantly higher for adults who engage in homosexual behavior. Certainly, this factor (which may cut in several directions) is just as relevant to child welfare and parenting issues as "nurturing."

Third, the term "sexuality of the parent" can include a wide variety of things. For example, no one would disagree that child molesting or incest are not serious factors bearing on parenting issues. These risks are not unique to parents who engage in homosexual behavior. Child molesting and incest are independently serious concerns wholly apart from parental sexual behavior. By the same token, adults who engage in homosexual relations certainly are not immune to these and other child-damaging behaviors. Thus, "sexuality of the parent" includes some serious risk factors that are just as important to child welfare as positive factors such as nurturing. Thus, the statement that nurturing by parents is a more important influence than parents' sexual behavior needs to be significantly qualified. The minimum qualification that must be expressed is "responsible sexual behavior." Of course, this qualification invites the awkward question about what homosexual behavior is and is not responsible. Most people will acknowledge that some sexual practices of homosexuals are irresponsible--if for no other reason than that it is undoubtedly true that some heterosexual sexual practices are irresponsible and dangerous or detrimental to children. We know too much about child prostitution, pedophilia, child pornography, rape, and exhibitionism, to mention just a few practices, to deny this reality. The same, at least, is true about homosexual practices as well. It could easily be shown that historically all homosexual practices were deemed socially and morally irresponsible, and in an open intellectual atmosphere--which does not exist with respect to the subject of homosexuality on most campuses in this country at this time--that claim might be worth considering anew. But the main point is that at least some homosexual and heterosexual practices are irresponsible, and those may have a greater impact upon child development than nurturing.

Fourth, the term "nurturing" needs to be defined and qualified, for not all "nurturing" activities of parents are of equal importance at all times to child well-being. There may be too much nurturing of some kinds and not enough of other kinds of parental interaction. For instance, some excessive "nurturing" may amount to parental possessiveness or overprotectiveness that impedes the development and emerging independence of the growing child. Some "nurturing" may involve a failure to discipline or cover up an unwillingness or inability to teach responsibility. There are some things that a child may need even more than well-intentioned, but ill-directed, styles of nurturing.

Clearly, then, parental sexuality is not the only, or necessarily the most important, facet of responsible parenting, but it is an important aspect of parenting for healthy child development. Parents who provide a less-than-ideal model of responsible sexuality still may provide good parenting in other ways, and if their children learn responsible sexuality outside of the home, they may be no worse for their parent's deficiencies in this aspect of parenting. All parents at some times fall short of being perfect parents. However, some types of adult sexual behavior are clearly detrimental to the healthy development of children. Homosexual behavior of parents poses some unique potential risks to their children which should be candidly recognized and carefully considered when the best interests of children are appraised.

IV. A Review and Critique of the Current Law and Cases

A. Homosexual Behavior as a Factor in Parental Relationship Cases

The volume of litigation over child placement or parenting in which issues of homosexual parenting are raised has increased tremendously, especially in the last three years. Increasingly, courts in the United States must consider how to treat homosexual behavior as a factor in cases in which adults are seeking or disputing a parental relationship with a child or children. The recent case decisions are in a state of flux and inconsistency, ranging from clear disapproval of homosexual behavior as a negative factor in parenting decisions, to open approval of homosexual relations as a positive factor in parenting decisions. Overall, the body of cases decided in this decade reflects a somewhat conservative approach to homosexuality as a parental relationship factor and a cautious approach to judicial extension of procedural and substantive rights relating to parenting by homosexual couples. However, many of the most recent cases (especially those decided since 1994) reveal a trend toward treating homosexual parenting procedurally and substantively as equivalent to heterosexual parenting for purposes of adoption, custody, and visitation.

Great care must be taken in deducing legal rules from particular custody, visitation, and adoption cases because parental relationship cases are fact- and context-sensitive. For instance, the precise nature of the claim asserted or remedy sought makes a tremendous difference to the court's analysis. A claim for adoption (granting permanent, full, exclusive parental rights, duties, and powers to a single adult or a couple) involves different legal considerations than a claim for custody (granting powers of residential day-to-day parental supervision and legal responsibility), and both of these are different than a claim for visitation (granting right of access and temporary or limited parental contact), guardianship (a quasi-parental relation comparable to custody but which entails a different manner and degree of judicial oversight), or foster parenting (an intensively state-supervised quasi-parental relationship in which the state retains legal custody but day-to-day residential authority is given the foster parents who act as agents of the state). Even within these categories of parental relations, the standard of adjudication may vary according to the specific kind of remedy sought. For instance, a claim for joint custody may invoke a different level of judicial scrutiny or involve a different presumption than a claim for sole custody, and a claim for extensive residential visitation may involve different considerations than a claim for restricted or supervised visitation. If the relief sought is termination of parental rights, substantial protections and significant presumptions protecting the parent-child relationship apply that do not apply in cases involving mere removal or transfer of custody. In custody, visitation, and guardianship cases, there is a substantial difference in the standard of judicial scrutiny between an original proceeding and a proceeding to modify a previous order. Usually the original order is based solely on a "best interests of the child" standard, whereas modification requires showing of a significant change of circumstances before the best interests consideration is even reached.

The parties to the case also significantly affect the legal standards and doctrines applied. If the case involves biological father-versus-mother, as in divorce case or custody disputes, it is essentially treated as a private civil dispute, and substantial deference is accorded the private ordering decisions of the parents; if the parents cannot agree, broad discretion is accorded the trial judge to make a fair decision in the child's best interests based on consideration of all potentially relevant factors. On the other extreme, if the case involves state-versus-biological parent(s), as in termination of parental rights, extraordinary procedural protections apply, including a higher standard of proof, the right to a free transcript on appeal, the right of indigents in at least some cases to state-provided assistance of counsel, as well as special substantive protections including presumptions in favor of the parents, reflecting the fundamental constitutional right of parents to raise their own children. If the case involves a biological parent-versus-other relative, such as

grandparents or siblings of the child, the parental presumption will be applied. *Id.* at 837.@ If the case involves a dispute between a biological parent-versus-unrelated adult, the presumptions and protections favoring the biological parent may be even stronger, and the legal stranger may have to establish standing before his or her claim will be entertained.

The parenting alternatives available in particular cases vary significantly and are extremely important. For instance, if the natural parents are dead, unable, or unwilling to care for the child appropriately, the case may involve a choice between a permanent placement with a loving adult homosexual who in some way has cared for the child in the past and a less stable or secure alternative such as foster care. Other cases may involve more desirable alternatives, including family, stability, sexuality, and racial factors, that favor the placement of the child with someone other than a homosexual claimant. Thus, the factual and legal circumstances in disputes over parental relationships with children are critical and vary enormously from case to case. Additionally, the case law is in a state of flux. Ideological considerations seem to color some of the decisions.

One of the most significant controversies in recent homosexual parenting cases relates to the question of harm to children from the homosexual behavior of parents. The most recent cases reach inconsistent conclusions. Courts have held or suggested in recent cases that:

- it was error to take judicial notice that a homosexual environment can adversely affect a child;
- a court may not presume that extramarital cohabitation is harmful to children;
- criticism of homosexual behavior by experts or judges is narrow-minded, intolerant, homophobic, and such expressions by one parent of such behavior by another parent may be harmful to children;

Id. at 952; see also *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) ("In making his findings, the judge improperly relied on his personal belief that homosexuality creates serious endangerment... We are disturbed by the judge's numerous homophobic comments. His personal beliefs improperly clouded his judgment."); *In re J. N.*, 601 N.Y.S.2d 215 (Fam. Ct. 1993) ("Contrary to forceful arguments against having this child with a white lesbian, the law of this State and Nation does not legitimize private prejudices. Such prejudices shall not prevent careful consideration of the child's interests and needs."); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994) ("As judicial officers, ruling on a legal controversy, we must be guided by principles of law. Personal conceptions of morality held by the members of this Court have no place in the resolution of this controversy.").

- a parent's biblical teachings or personal views against homosexuality are not inappropriate;
- failure to disclose homosexuality during a custody dispute creates a suspicion that the party is trying to conceal inculpatory evidence;
- homosexual or HIV-condition concealment is not an indication of lack of trustworthiness;
- moral character is appropriate to consider in custody disputes;
- social disapproval of homosexuality is a valid consideration;

- social disapproval of homosexuality is not a valid consideration;
- HIV-positive condition is a relevant factor to consider;
- discussing homosexuality with children is inappropriate;
- showering with a young daughter and lesbian lover at the same time was not harmful to the child, but snuggling in bed with lesbian lover and children is inappropriate;
- involving children in same-sex commitment ceremonies and gay rights activism is inappropriate;
- failure to spend sufficient time with children on account of spending inordinate time with the homosexual partner is not good; *Id.* at 574.@
- the need for children to receive counseling on account of a parent's homosexual behavior is not good;
- having multiple sexual partners is not consistent with the best interests of children;
- disruption to parental-child relations caused by the homosexual relationship is harmful;
- and premature sexualization of children as a result of parental homosexual relations is not in children's best interest.

The courts also are split about whether open displays of physical homosexual affection in the presence of children are harmful and a negative factor to consider, or are harmless and an irrelevant factor. However, a careful reading of the cases indicates that the nature of the open physical contact is very important; if the physical contact involves more than modest affection--when it moves from warm hugs toward more passionate behavior--the courts are almost always concerned about the effect on the children.

Out of the confusion, conflict, and occasional craziness of the cases, several principles emerge with some consistency. First, the fact of homosexual orientation is not a *per se* ground for denying an otherwise qualified person's claim for parental relations with a child. The parent's conduct must be shown to have had some harmful effect on the children. See *Nadler v. Superior Court*, 63 Cal. Rptr. 352, 354 (Ct. App. 1967) (holding it was error to hold as a matter of law that mother was unfit solely because she is a homosexual); *In re Marriage of R.S. & S.S.*, 677 N.E.2d at 1301-02 (a lesbian mother is not presumed to be an unfit parent); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981) (holding that homosexuality, standing alone, is not grounds for denial of custody); *Lundin*, 563 So. 2d at 1277 ("The mere fact of homosexuality may not require a determination of moral unfitness so as to deprive the homosexual parent of joint custody."); *Hall v. Hall*, 291 N.W.2d 143, 144 (Mich. Ct. App. 1980) (holding that homosexuality is only one of many factors court should consider); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super Ct. App. Div. 1979) (finding it was error to modify custody solely on basis of mother's lesbian behavior); *Van Driel*, 525 N.W.2d at 39 (holding that "immoral conduct by one parent does not automatically render that parent unfit to have custody of the children and require an award of custody to the other parent"); *Shoop*, 460 N.W.2d at 724-25; *Spaulding v. Spaulding*, 278 N.W.2d 639, 641 (S.D. 1979); *Tucker*, 910 P.2d at 1217 (holding trial court was correct not to consider sexual preference as a factor in custody); *Bottoms*, 457 S.E.2d at 108 (holding that "a lesbian mother is not *per se* an unfit parent"); *id.* at 109 (Keenan, J., dissenting) (arguing that the "adverse effects of a parent's

homosexuality on a child cannot be assumed without specific proof").@ Some courts suggest that sexual orientation is not even a relevant consideration in parental relationship cases, but depending on what "orientation" includes, this position may be inconsistent with the "best interests" standard, and therefore those statements are best understood as stating a general principle about not penalizing adult autonomy and choice in sexual feeling, desire, and being, as opposed to activity. Second, the homosexual behavior of a parent or adult seeking parental relations with a child or children is relevant to the parental relations determination. Third, the dispositive factual issue is whether the sexual behavior of the adult claiming a parental relationship has had, is likely to have, or is presumed to have a detrimental effect upon the child. Fourth, at least some homosexual behavior is clearly harmful to children. Fifth, expert testimony about how the homosexual behavior of a parent affects or may affect children is very influential, but is not always absolutely essential.

Sixth, many courts in recent years have equated homosexual behavior with extramarital heterosexual behavior as a factor in parental relationship cases. This is consistent with the traditional approach. For many years, most courts in custody cases have treated homosexual relationships as a factor in determining the parental relationships in about the same way that they have treated other extramarital sexual relationships. As Jeff Atkinson described it more than a dozen years ago:

“Although there is divergence in the manner in which courts deal with nonmarital relationships, there are some situations on which most courts agree. A parent who has a discreet sexual relationship which the child is not aware of will not lose custody because of the affair, unless the parent is spending so much time away from home that the child is not being properly cared for. A parent who has a relationship of which the child might be aware, but refrains from engaging in sex when the child is home, will also usually not lose custody. And a parent who terminates an affair and is not likely to resume it will not lose custody because of the affair.

At the other end of the spectrum, a parent who has multiple lovers in a short period of time and whose children are aware of the relationship will lose custody--especially if the parent shows other signs of instability. In addition, a married parent who has her lover over when the children are at home and places the children in a particularly embarrassing situation is not likely to gain custody.

In between the extremes is a lot of gray area in which the cases turn on the degree to which a judge will presume, without specific proof, that a nonmarital sexual relationship is harmful to children... [T]he decisions within one state are not always consistent.”

Thus, the treatment of "homosexual parents who seek parental relationship rights is similar to the way in which courts treat parents who have heterosexual extramarital relationships." Courts traditionally "will deny custody to a homosexual parent who is promiscuous or flaunts his or her sexual relationships," and while some courts are "more willing to assume harm from a homosexual relationship than a[n extramarital] heterosexual one," the prevailing (and best) approach is to treat all forms of extramarital sexual relationships, including heterosexual adultery and homosexual relations, as variations of the same theme, and deserving of the same general kinds of judicial response, depending on the specific circumstances of the particular case.

In several cases, courts have had to choose between giving custody or other parental relationship rights to one parent who had been or was engaged in extramarital homosexual relations or to the other parent who had been or was engaged in extramarital heterosexual relations. A few courts historically tried to excuse or justify some male heterosexual adultery, revealing a tragic and

hypocritical double-standard mentality, and perhaps revealing a bit of self-justification as well, at the same time as they affect an exaggerated reaction to the horrible immorality of homosexual behavior. But recently, the trend is for courts to reject the suggestion that they penalize homosexual adultery but not heterosexual adultery. Some courts even-handedly deny the harm from both varieties of extramarital sexual behavior, and attempt to justify--treat as a neutral or irrelevant factor--both forms of adult infidelity. Because some segments of society have long justified heterosexual adultery, and refused to believe that children, families, and society are the worse for it, the logic of equality could require that they accept homosexual behavior as insignificant as well and that they deny that it will harm children, families, or society, either. Although the equality of that approach is laudable, denial of the tremendous consequences of adult extramarital sexual behavior upon children is unjustifiable and disservices the need of children for fidelity in their parents' relationships of trust and intimacy.

Traditionally, restricted visitation for a practicing homosexual parent was quite common. Recent decisions are split over imposition of restrictions on visitation by a parent who is gay or lesbian. If the parent is in an active relationship with a homosexual companion, some courts impose restrictions (supervision, no lesbian partner present, no overnight), while other courts overturn or refuse to impose such restrictions.

Courts are split over whether the lesbian former partner of a woman who was artificially inseminated has standing to seek parental relations with the child. Although claims for parental relationship rights by former lesbian partners of biological mothers have generally been denied, some recent cases show increased judicial accommodation of such claims. The issue seems to be a legislative question in the first instance. Although formalism should not deny relationships, some forms of relationship have been given unique standing and status because they are uniquely beneficial to children and to society.

Similarly, a same-sex partner of a biological or adoptive parent traditionally could not adopt the child of the parent-partner because of both standing and substantive bars, but many recent decisions treat same-sex couples as functionally--and for purposes of adoption laws, legally--equivalent to stepparent couples, allowing adoption by one adult without requiring termination of parental rights of the biological or adoptive parent-partner. The result is at least plausible in New York where, by statute, homosexuality may not bar an adoption, though the brushing aside of precise language in the New York adoption statutes limiting adoption without terminating parental rights specifically to stepparent adoptions is transparently manipulative. Most cases authorizing same-sex couples to use stepparent adoption procedures deliberately circumvent narrowly crafted procedural and substantive provisions that allow stepparent adoptions to occur without terminating the parental rights of the biological parent-spouse on the basis of conclusory justifications about the best interest of the child. In most cases, the courts that have denied homosexual couple adoptions have been more consistent with the policy of the legislation and the policies underlying the subject area of law.

One gets the sense that the same-sex partner adoptions are often sought for the sake--status and security--of the adult adopting partner. The objective seems to be to provide a clear basis for claiming relational rights if the same-sex relationship breaks up, rather than to provide for the best interests of the child. In most cases, "the family will remain intact even if the adoptions are not granted." Without adoption, the nonparent partner of the parent is not barred from contributing to the support, health care, or education of the child, or from caring for the child, or giving gifts to the child, or making a will in favor of the child or the child's parent. With millions of anxious, married couples waiting to adopt available children, ignoring the deliberately balanced procedures and priorities that legislatures and adoption agencies have developed seems to put adult politics above the needs and welfare of children. Undoubtedly, some children would benefit from allowing adoptions by same-sex couples. The same is true about almost any other

class or category of prospective adoptive adults that is ineligible to adopt at present. "Best interests" is not a magical shibboleth that empowers judges to circumvent adoption requirements.

Finding some benefits for some children from some same-sex couple adoptions, however, does not conclude the inquiry. One must also assess the potential detriments that would result from allowing same-sex couple adoption, and must compare the overall societal effect, balancing the benefits for some children against the unintended negative consequences for others. Moreover, the issue is not necessarily an all-or-nothing, bipolar issue, as most courts have perceived it. It might be wise social policy to make some same-sex couples or homosexual adults eligible to adopt only some children, but not others, at least until the evidence of the lack of harmful effects of homosexual parenting on children becomes more substantial.

Adoption by adult, single homosexuals of children with special needs has been approved in several cases in which the devotion and benefit of the adult to the child has been undeniable, and the alternatives for the child have been found to be less promising. It may be preferable in current social conditions for a particular hard-to-place, special-needs child to be raised in a private home by a responsible adult gay professional with whom the child already has a positive bond than for the child to be left in the limbo and instability of state foster care or institutional care. However, this is the kind of policy issue on which the judiciary should defer to legislative determination.

The same-sex couple adoption cases raise most clearly the issue of the connection between marriage (heterosexual marriages) and parenting. The cases that permit same-sex couples to adopt in the same fashion as--usually by procedures specifically designed for--stepparents (i.e., by the child's parent's new spouse) assert that, in all relevant respects, same-sex couples provide the same kind of beneficial environment for raising children as a married heterosexual couple provide. The evidence for that proposition, however, may not support that conclusion. The statement of so many courts that adoption by the same-sex partner of a homosexual parent, or by a same-sex couple, is in the "best interests" of a child often is no more than courteous exaggeration. Believing that adoption by the same-sex partner of a biological parent who is residing with the parent and child, whereby the child will have two adults with the legal responsibilities of parents, or the adoption of a foster child by a gay or lesbian foster parent, may provide a better alternative than leaving the child in foster care or with only one responsible parent, the courts apply the label "best interests" to the arrangement. The security of two financial sources for support, two adults with obligation to love, teach, and raise the child, and two people with the right to visit and protect the child are undeniably advantageous for a child. Likewise, a stable home usually is better than transitory foster care. But the enemy of the best is the better. It is possible that, in the adoption context, the purpose of the state really is to promote the parental relationship that lawmakers believe is really "best" for children, not just a relation that is in some ways "better" for a particular child than the immediate alternative.

Thus, parental relationship cases should focus on the interests of a particular child in a particular set of factual and legal circumstances. Most courts are primarily concerned with the facts of the case before them, with the interests of the particular child or children whose lives and welfare the court has the duty to protect, and with faithfully applying the policy choices made by the legislatures.

B. Baehr v. Miike: Linking Same-Sex Marriage and Homosexual Parenting

The nexus between same-sex marriage and homosexual parenting is illustrated by the recent Hawaii circuit court decision in *Baehr v. Miike*. That case began in May 1991 when two lesbian couples and one gay couple, led by Ninia Baehr and her partner Genora Dancel, who had been denied marriage licenses, filed suit in Hawaii Circuit Court against the director of the state agency that issues marriage licenses (Lewin). The suit alleged that the denial of marriage licenses

to same-sex couples violated several provisions of the Hawaii Constitution, and sought declaratory and injunctive relief. The state admitted that the marriage license applications were denied solely because the couples were of the same sex, and moved for judgment on the pleadings, arguing that it did not violate the state constitution to deny marriage licenses to same-sex couples. The circuit court agreed, dismissing the plaintiffs' complaint, and the plaintiffs appealed.

In *Baehr v. Lewin*, the Hawaii Supreme Court vacated the circuit court judgment, in part, and remanded the case for trial, finding unresolved factual questions. The main opinion, a plurality opinion, was written by Justice Levinson, and joined by Acting Chief Justice Moon. The court unanimously rejected the plaintiffs' claim that the "right to marry" protected by the Hawaii Constitution extends to same-sex couples. The plurality (and all of the other justices) concluded that there is no "fundamental constitutional right to same-sex marriage" because such a relationship is not "rooted in tradition" or "at the base of all our civil and political institutions." However, the court split over whether denial of marriage licenses to same-sex couples violated the equal protection guarantee or equal rights amendment of the Hawaii Constitution. The plurality again emphasized Hawaii's independence from federal constitutional analysis by emphasizing that the equality provisions in the Hawaii Constitution are "more elaborate" than those in the U.S. Constitution. Not only is the text of the equal guarantee clause more specific, but Hawaii's adoption of the equal rights amendment was cited as mandating stricter scrutiny of discrimination on the basis of sex. Relying on the U.S. Supreme Court decision in *Loving v. Virginia*, invalidating a Virginia antimiscegenation law, the plurality concluded that Hawaii's marriage license law facially discriminated based on sex against the applicant couples, presenting an apparent violation of the state constitution provisions protecting gender equality.

Chief Judge Burns, concurring in the result, wrote a separate opinion noting that discrimination on the basis of sexual relationship is not necessarily the same as discrimination on the basis of gender. Whether homosexuality is "biologically fated," was, in his opinion, a critical factual question needing trial court examination. Judge Heen, dissenting, urged the court to defer to the legislature in the making of marriage policy and argued that the heterosexual marriage requirement promotes "the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage."

On the state's motion for reconsideration or clarification, the two plurality justices, apparently joined by a new justice who had become a member of the court since the original supreme court decision, clarified that "[o]n remand, in accordance with the 'strict scrutiny' standard, the burden will rest on [the state] to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."

After the Hawaii Supreme Court decision in *Baehr*, the Hawaii legislature responded by amending the marriage law to clarify in unmistakable language that it is the intent of the legislature that marriage be permitted only between a man and a woman. The legislature was reluctant to adopt a constitutional amendment, believing that the state's attorney defending the heterosexuality requirement would easily show that there were compelling state interests for that requirement and the marriage laws would be upheld.

However, on remand, defense of the heterosexual requirement of the marriage law was problematic. In the next election, the gubernatorial candidate supported by the gay and lesbian community was the plurality winner of the governor's office, and his new attorney general was reluctant to present evidence or arguments in defense of the marriage law that would offend members of the gay and lesbian community. Preparation of the defense was delayed repeatedly, apparently through a mixture of the hesitation of some in the attorney general's office to oppose same-sex marriage and the hopes that a political resolution to the issue might be reached. The

attorney for the state who was responsible for defending the marriage law drew heavy criticism from supporters of the marriage law, both within and without the legislature, for his lack of preparation and apparent lack of enthusiasm to defend the law. Shortly before the case was scheduled to be tried, he resigned and left the state, causing yet another postponement of the trial. Although the new state attorney assigned to defend the law was more energetic, the narrow parameters within which the state would defend the law were already established. The nine-day trial finally began before state circuit judge Kevin Chang on September 10, 1996. The state took a very mild litigation strategy, and each side presented only four witnesses.

Because the state had the burden of proof under the supreme court's mandate, it put on its witnesses first. In its pretrial statement, the state had identified five compelling interests it would establish at trial for the law allowing only male-female couples to marry: (1) protecting the health and welfare of children and others, (2) fostering procreation in marriage, (3) assuring recognition of Hawaiian marriages in other jurisdictions, (4) protecting the state's fiscal interests, and (5) protecting civil liberties from the effects of same-sex marriage on Hawaiian citizens. The state particularly emphasized "promot[ing] the optimal development of children" and its belief that "it is best for a child that it be raised... at least by a married male and female."

On December 3, 1996, the trial court issued its finding of fact, conclusions of law, and judgment. Judge Chang's "specific findings" first, and repeatedly, emphasized that the state had "presented insufficient evidence and failed to establish" the state interests of fiscal harm, nonrecognition of Hawaiian judgments, or any need to protect traditional marriage as a fundamental structure in society. He again noted that the state "failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children" and "failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage." Admitting that the welfare of children is a compelling state interest, he found that having both a mother and a father is "important, though not essential" to child development, that intact father-mother families provide benefits to children, but nurturing is most important, diversity in family structure exists, that the sexual orientation of parents is not an indicator of parental fitness or child adjustment, and that gays and lesbians have the potential to raise, and do raise, happy, well-adjusted children. He found that same-sex couples can and do have successful, loving, committed relationships, and that children raised by same-sex couples would benefit from having same-sex marriage legalized. As conclusions of law, Judge Chang repeated the presumption of unconstitutionality of the Hawaii marriage law and the heavy burden of proof laid upon the state, and noted that marriage confers significant benefits upon couples. He also reiterated that the state had "introduced little or no other evidence" about possible nonrecognition in other states of Hawaiian marriages, "little or no" evidence about potential adverse fiscal impact of same-sex marriage, and only "meager evidence with regard to the importance of the institution of traditional marriage" or the adverse effects of legalizing same-sex marriage upon it. There are other compelling reasons to prevent incest and polygamy, he declared, so the state's analogy between same-sex marriage and incest or polygamy is inapplicable. Quoting Judge Ferren's concurring and dissenting opinion in *Dean v. District of Columbia*, Judge Chang reemphasized that "the evidence presented by the state does not establish or prove" harm to any governmental interest because the state "failed to present sufficient credible evidence" and "failed to establish that HRS §572-1 is narrowly tailored." Based upon these findings and conclusions, Judge Chang declared Hawaii's marriage statute allowing only heterosexual marriage to be unconstitutional and enjoined the denial of marriage licenses solely because the parties are of the same sex. The state filed its notice of appeal, and the order was stayed pending appeal.

The *Miike* decision shows how same-sex marriage is linked to homosexual parenting. First, the state's interest in providing the optimal environment in which to raise children was the main state interest raised by the state in defense of the heterosexual marriage requirement and, according to Judge Chang, the only interest in support of which the state presented any significant evidence.

Second, throughout his opinion, Judge Chang treated the interest of the state in childrearing as the key and dispositive issue. Clearly he believed that the case reduced itself to a toggle-switch question about the benefits of homosexual parenting. His opinion indicates that support for same-sex marriage may be won or lost depending on whether the perception of same-sex parenting is positive or negative. Third, throughout his opinion, Judge Chang emphasized, over and over again, that the evidence showed that homosexual adults "can and do" provide good parenting for children. Based on that finding of fact, and his finding that some children, presumably living with a single homosexual parent, would be better off if their parent could marry a same-sex partner, he concluded that the state had no compelling interest in prohibiting same-sex marriage.

The trial court's opinion in *Miike* leaves much to be desired in terms of fair summarization of the evidence and thorough legal analysis. Most relevant to this article about homosexual parenting, Judge Chang's finding that same-sex couples "can and do" provide nurturing parenting simply misses the constitutional point. Incestuous adults and immature adolescents also "can and do" provide nurturing parenting. For that matter, child sexual molesters, other child abusers, wife beaters, pedophiles, child pornographers, and child labor exploiters "can and do" sometimes provide adequate parenting for some children. The issue is not whether any members of this class of parents are capable of providing and ever do provide adequate parenting. The social interest is in securing the best interests of children, the optimal environment in which to procreate and rear children. *Gays Win Hawaii Marriage Ruling; Decision May Set Off Legal Battles on Mainland*, CHI. TRIB., Dec. 4, 1996, at D1.@ Although he had noted early in his opinion that this was the primary compelling interest the state was asserting, in his analysis Judge Chang stumbled and measured the evidence against a different standard. The plaintiffs' claims in *Miike* clearly required a comparison between two groups of couples: heterosexual parents and same-sex parents. The question was whether the two groups are essentially fungible with regard to the state interest in promoting the optimal environment for raising children--whether same-sex parents, as a group, provide an environment for raising children that is substantially "as good as" that provided by heterosexual couples, as a group. Moreover, the comparison must be made between the general characteristics of the two groups as a whole, not the qualities and experience of exceptional and atypical members of the groups. The question is whether a legal benefit (the status of marriage) extended to one class because of the social benefits the members of that group, as a group, generally provide for childrearing must be extended to members of another class because the same or substantially similar social benefits are provided by the members of that group to society. Judge Chang's conclusion that some children, presumably those with a single homosexual parent, will be better off if same-sex marriage is legalized because some homosexual adults "can and do" provide adequate parenting simply begs the relevant legal issue.

The conclusion that some children will be better off if same-sex marriage is legalized is both incomplete and misleading in light of the record recited in the *Miike* opinion. Because the state interest is in promoting the optimal environment for raising children, the finding that the lives of some children being raised by a single gay or lesbian parent will be improved in some respects, because of greater economic resources, more adult caretaking by someone the children identify as a member of their family, or other reasons, if the parent enters into a legitimate, committed, long-term relationship with another adult, is clearly relevant. But it is not dispositive. That is only part of the equation. Assuming that Judge Chang's finding to that effect is true, we must also know the downside, whether the condition of some or most children would be harmed or impaired because of the addition of a second homosexual adult to the household. For example, will there be a greater likelihood of homosexual domestic violence? Will there be greater risks to the physical health of the children from the second homosexual adult in the home? If the relationship breaks up--a significant prospect given the statistical instability of homosexual relations--will the children be left in a worse position because of the emotional loss for them, or the emotional tailspin of their parent, or because of the economic loss due to property division or an alimony or "palimony" obligation their parent may have, or otherwise? Will there be greater risk to the physical health of the children from the second homosexual adult in the home? Will

there be greater danger of sexual confusion and sexual identity problems for the children? Will there be increased stress and anxiety for the child? Will there be increased neglect of the child by the parent? It appears that none of these or similar potentially negative factors were considered by Judge Chang. If these considerations had been examined and assessed, it would have been necessary to weigh and compare the benefits, advantages, and positive prospects against the burdens, disadvantages, and risks to the children to arrive at a net result--whether homosexual coupling overall is beneficial or detrimental to children, and to what extent. Again, nowhere in Judge Chang's opinion is there any analysis of the comparative and relative overall potential benefits and burdens. Having looked solely at one preliminary factor--whether homosexual adults can provide adequate parenting--the court simply leaped past the other analytical steps to a final factual finding and a legal conclusion that might or might not be correct, but for which there is simply inadequate support in the opinion.

Finally, even if the analysis showed some significant overall advantage to children of homosexual parents from promoting same-sex coupling, the court should have considered the range of alternative remedies to determine whether legalizing same-sex marriage (as opposed to permitting informal, private contracting or some other form of public recognition) is necessary to achieve that advantage. Judge Chang alluded to some speculative reasons suggested by witnesses why legalizing same-sex marriage might achieve the results of greater stability, but those speculations were mere conjectures and quite thin. Nor was there any consideration given to whether alternative ways to achieve the desired result would be as good, or better, than legalizing same-sex marriage. Judge Chang simply ordered the state to allow same-sex couples to marry. Why was that the appropriate remedy? Why not order the state to create some other relationship, or order the state to stop regulating marriage altogether, or give the state the choice to legalize same-sex marriage, or to get out the business of issuing marriage licenses?

Notwithstanding its flaws, the circuit court opinion in *Miike* very clearly and correctly demonstrates that there is a direct nexus between homosexual parenting and same-sex marriage. To some extent the same-sex marriage policy issue may depend on whether the general public and lawmakers believe that homosexual parenting protects and promotes the best interests of children as well as heterosexual parenting.

C. Scandinavian Domestic Partnership: Separating Same-Sex Relations from Homosexual Parenting

The linkage between same-sex marriage and homosexual parenting illustrated in the *Miike* decision is neither a necessary or sufficient linkage. Conventional heterosexual marriages make substantial contributions to many other fundamental social interests, toward which same-sex unions do not make comparable contributions. It is possible to defend the heterosexual couple requirement for marriage without considering childrearing advantages of heterosexual coupling over same-sex coupling. For example, in the state supreme court ruling in *Baehr v. Lewin*, the marriage issue was linked with biology--whether homosexuality is biologically fated and the importance of biological reproduction--more than with childrearing. Likewise, when the legislature responded to the *Baehr v. Lewin* decision by specifically declaring that same-sex marriage is prohibited, it emphasized the state's interest in procreation more than childrearing. Thus, childrearing is not a necessary justification for rejecting same-sex marriage, though it may be the most important and most widely recognized reason for doing so.

On the other hand, it is possible to justify legalization of some marriage-like status for same-sex couples without extending marriage-like benefits relating to childrearing. In the past eight years, four independent Scandinavian nations, Denmark, Norway, Sweden, and Iceland, have legalized same-sex domestic partnerships, extending to those registered relationships virtually all of the economic incidents of heterosexual marriage. However, those permissive laws are quite restrictive with regard to childrearing rights. The Icelandic law specifically excludes same-sex

couples from adoption and artificial insemination. In Denmark, the same-sex couple may not adopt a child or exercise joint custody. The Swedish law excludes adoption, joint custody, and fertilization in vitro for registered same-sex domestic partnerships. In Norway, same-sex registered partnerships may not adopt.

All of these countries manifest a permissive policy concerning relations between two consenting adults, but all take a paternalistic posture when it comes to protecting children. The common theme is that adults can do what they want with regard to other consenting adults, but they are not free to do whatever they want with regard to children. These nations take great care to prevent adults from subjecting children to the potentially detrimental effects and consequences of adult sexual preferences. Although homosexual behavior may not bar a responsible biological parent from asserting parental rights--consistent, again, with the permissive nonjudgmental attitude about adult behavior--the Scandinavian states put the needs and interests of the children ahead of the autonomy rights of adults. Several years ago, Mary Ann Glendon demonstrated that in many ways in family law, European nations manifest a much greater care and protection for children than the laws of the United States. The Scandinavian laws extending legal benefits to same-sex domestic partnerships but restricting adoption, joint custody, and assisted procreation by those couples seem to manifest that distinctive concern for children.

VI. A Proposal for a Rebuttable Presumption

A. The Need for a Clear Presumption

The recent cases reveal a great deal of confusion about how to deal with evidence that an adult asserting a claim to a parental relationship is involved in homosexual behavior. There are inconsistencies not only among the states, but sometimes within states. The adoption of a legal presumption concerning the effect of proof of homosexual behavior by a party claiming a parental relationship could clarify issues, simplify litigation, allow courts and litigants to focus on the critical issues, and structure a more coherent presentation and analysis of evidence. By providing a default position, a rebuttable presumption also could provide predictability without the inflexibility of some other kind of rule or doctrine of law.

In the absence of an explicit legal presumption concerning the effect of evidence of homosexual behavior by a party claiming a parental relationship, several problems will persist. First, courts will continue to deal inconsistently with the issue of the effect of homosexual behavior, and litigants will face uncertainty and confusion. Second, other factors will determine the legal effect of such evidence, such as who the plaintiff is, what relief is sought, or more subjective, nonlegal factors. Given the same facts regarding homosexual behavior in two cases involving the same parties, the evidence could produce quite inconsistent results because other factors would determine how the evidence is treated. Third, an ad hoc rule will emerge because the question about the effect of homosexual behavior will still have to be answered. As noted earlier, the number of cases raising questions about homosexual parenting is growing. Thus, the need for a presumption is growing; the potential for significant confusion and injustice in the absence of a reliable presumption is increasing. A mere, rebuttable presumption will not interfere with fact-sensitive judicial analysis but will clarify for attorneys and their clients before trial who must present evidence and pertaining to what issue.

Finally, there is a need for caution in this area of law. When dealing with children, an extra measure of moderation is appropriate. A modest, rebuttable presumption may protect children from being used as guinea pigs in the latest social experiment. As noted above, it is reasonable to be concerned that such a radical reformulation of family relations as same-sex parenting, for example, may have significant unintended consequences for children. Moreover, in their exuberance for the fashion of the times, some courts already seem to have gotten swept away in trying to implement new policy positions popular in the legal literature. But the legal literature, as noted earlier, is severely one-sided and sorely incomplete. Much of the kind of information we would want wise policy makers to have before adopting a radical redefinition of family relations is lacking. Thus, a modest, rebuttable presumption could protect children as well as the law from hasty decisions and radical innovations.

B. A Proposal for a Reasonable Presumption

States should adopt a rebuttable presumption that ongoing homosexual relations by an adult seeking or exercising parental rights is not in the best interests of a child. The presumption should be rebuttable by a mere preponderance of the evidence. Unless rebutted, this presumption should be considered as one of the many nonexclusive "best interests of the child" factors that are weighed by courts deciding parenting issues. This presumption should apply in any case involving significant parental relationship with the child, including custody, adoption, and visitation.

The critical question is whether courts should presume that ongoing homosexual relations by an adult seeking or asserting parental rights are harmful or not harmful to children. Courts must do one or the other. If they do not presume that homosexual parenting is harmful, they will adopt by

default the "not harmful" presumption. If no evidence is presented, or if the evidence is evenly divided, courts must still decide; they must presume either that homosexual behavior is or is not harmful. And that policy decision ought not to turn simply on who filed the lawsuit--which will vary from case to case.

Placement of the presumption has enormous practical consequences: to overcome the presumption-- whichever way it points--will require a party to assume the burden of producing evidence. Expert evidence, usually from child psychologists, is typically necessary in contested cases to overcome presumptions about the effects of parental sexual behavior on the welfare of children. Expert evidence is very costly to obtain. For less-affluent parents, including most who are in the economic "middle class," in custody, visitation, and related litigation, the presumption may effectively determine how the case will be decided because few parents in these classes can afford to hire professional experts to provide the kind of evidence necessary to overcome a significant presumption.

A presumption that parental homosexual relations are not harmful to children means that the faithful parent will bear the expensive burden of getting professionals to examine the parties and the circumstances in order to produce the most convincing evidence of the kinds of harm that may result from the other parent's extramarital sexual conduct. On the other hand, if the presumption is that extramarital sexual relations are harmful to children, that means that the parent who is engaged in an extramarital relationship must bear the burden of producing evidence, usually by getting expert professionals to examine and testify, that no harm has or will come to the children. Because it is unavoidable that one or the other of the contesting adults will have to bear the burden of overcoming the presumption, it seems most fair to give the benefit of the presumption to the parent who has been most responsible, who has been faithful to marriage, or to the sex-within-marriage standard of sexual responsibility that involves the greatest consideration of the needs and security of, and minimal risks to, children and families. The burden of overcoming the presumption concerning child welfare in parental relationship cases should be borne by the parent who chose to act in a way that is less consistent with the welfare of children, the integrity of the institution of marriage, and the standard of sexual responsibility, and who was unfaithful to the marital relationship, especially if that relationship produced children. Of course, there will be cases in which the reasons for the presumption do not apply--but because the presumption is rebuttable, parties in those cases will be able to protect their interests.

Of course, it is not only the existence of the presumption, but the strength of the presumption that effects costs and outcomes. The strength of the presumption is directly proportional to the expense required to overcome it and inversely proportional to the likelihood of overcoming it. That is, if the presumption is mild, it may not be too difficult or expensive (i.e., may not require much or any paid expert evidence) to overcome. On the other hand, if the presumption is almost irrebuttable, it means that it is very difficult and expensive to overcome.

Because the degree of harm to children from the homosexual conduct of a parent is uncertain, and because numerous factors are potentially relevant, and the range of potential harm is enormous--from possibly temporary disruption to permanent physical or emotional harm--the presumption should be moderate enough that in the cases in which the actual harm is minimal, it could be overcome by parties who cannot afford expert witnesses. Such factors as age and emotional development of children, their relationships to the competing parents, the relations between the parents, the nature and circumstances of the homosexual relationship, efforts to help the children cope with the potentially harmful consequences of the homosexual relationship, the relationship of the children to the homosexual partner, the extended family system, support groups, ability to forgive, social circumstances, all may influence the degree and duration of harm to children. The presumption should be mild enough to accommodate fairly the least detrimental cases, as well as substantial enough to influence the outcome in the most outrageous cases. A modest

presumption, leaving the parties with the ability to overcome or supplement the presumption by mere preponderance of the evidence in the circumstances of the case, is certainly reasonable.

The effect of all kinds of parental extramarital sexual behavior on the confidence of children in bonds of intimate trust is tragic and painful. The modeling of irresponsible sexual conduct for both heterosexual and homosexual extramarital behavior is comparable. The social interests in sexual responsibility and the integrity of relations of trust are similar and support a policy that equally proscribes both heterosexual and homosexual extramarital sexual conduct. Much case law equates heterosexual and homosexual extramarital behavior and treats them as equivalent factors in parental relationship cases. Thus, there are good reasons to be concerned about the effects upon children of all forms of extramarital sexual behavior. Those reasons could lead lawmakers to craft similar child interests rebuttable presumptions regarding ongoing homosexual behavior, adultery, and nonmarital cohabitation. Indeed, upon closer study and consideration, it might be found wise to extend the presumption proposed here to all extramarital relations (including all homosexual relations regardless of what the Hawaii courts do in Baehr, as well as all other extramarital sexual relations). However, inasmuch as this article focuses specifically on homosexual parenting, the recommendation here is limited to a presumption for ongoing homosexual relations.

It would be best if the legislature were to adopt such a presumption. The issue involves a fundamental policy question concerning the foundational relations of society. In a democratic form of government, these kinds of questions are matters for the legislative branch to decide, if it will. If the legislature fails to address the question and legislative intent is unclear, then the courts must adopt interstitial rules. The adoption of interstitial rules which, over time, by legislative acceptance (inaction), become settled, is how many legal presumptions are created. A legislative enactment carefully and deliberately crafting a presumption will reflect a broader consensus regarding a profound social policy issue than an ad hoc judicial rule, will have the advantages of broad investigation not associated with judicial case determinations, and may be determined with some deliberate schedule, rather than through case law evolution.

VII. Conclusion: Integrity in the Interest of Children

The law review literature regarding homosexual parenting is extremely one-sided. It is mostly advocacy literature promoting the legalization of homosexual parenting. There apparently is a taboo within our profession against writing or publishing articles opposing or criticizing same-sex marriage or same-sex parenting. The ideal of expressing both sides of an important policy issue for the sake of fairness and balance and the ideal of promoting full, vigorous debate for the sake of having all plausible perspectives seem to have been abandoned by the writers of legal and social science journals.

The social science literature that is cited in support of the claim that homosexual parenting is not significantly harmful to children is unreliable. Methodological defects and analytical flaws abound in the studies. The research is colored significantly by bias in favor of homosexual parenting. Despite the favorable gloss put on the data, some of the research suggests that there are some serious potential harms to children raised by homosexual parents.

The recent case law shows that the issue of the effect of homosexual parenting on children is erupting with increasing frequency in the courts. The courts generally have been cautious about extending full and unrestricted parental relationship rights to persons actively engaged in homosexual behavior, especially if they are not biological parents. But some courts have circumvented substantive and procedural limits on adoption, standing, and other issues to facilitate the legalization and equalization of homosexual parenting. The facts and circumstances of each case appear to be most important--as they should be--but inconsistencies abound. The Hawaii same-sex marriage case, *Baehr*, shows the analytical flaws in the arguments for homosexual parenting. The Scandinavian domestic partnership laws demonstrate that adult homosexual relations can be separated fairly from homosexual parenting.

It would be premature and unwise to legalize homosexual parenting by extending full, unrestricted, parental relationship rights to homosexual parents equivalent to those of heterosexual parents. Legalization of same-sex marriage would be unwise for many of the same reasons. The impact upon children of such radical changes in the form and structure of the family and in the institution of marriage that is the basis of the family, and of society, have not been carefully considered.

Children are the innocent victims who suffer the most from choices their parents make to experiment for personal self-gratification with extramarital sexual relationships. We must be concerned that a parent who makes a calculated decision to deprive a child of a parent of the opposite gender may be making a decision that shows insufficient regard for the needs of children. As Dame Mary Warnock wrote in her committee's celebrated report on artificial conception technology: "[w]e believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother, although we recognize that it is impossible to predict with any certainty how lasting such a relationship will be." In an important sense, the question whether homosexual parenting should be legitimated ultimately depends on what kind of society we want our children and grandchildren to grow up in. Parental fidelity to the relationship that generated a child, to the partnership that produced the child, is a powerfully positive influence in the life of the child. If we want to put children's needs first, we must preserve for them the basic social institution which has over the millennia been the most beneficial of all imperfect human institutions for children's welfare. Thus, we should think very carefully before accepting the invitation to legitimate the brave new world of homosexual parenting as a desirable environment in which to rear future generations.