

# Mimetic Reproduction of Sexuality in Child Custody Decisions

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*“No matter how she or society views the private morality of the situation, we cannot ignore the influence her conduct may well have upon the future of this child . . . .” – Bennett v. O’Rourke<sup>1</sup>*

*“[T]he child’s development to date has been excellent . . . Mother has not neglected him, and . . . there is no increased likelihood that a male child raised by a lesbian would be homosexual. Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother’s status as a lesbian.” – S.N.E. v. R.L.B.<sup>2</sup>*

**ABSTRACT:** This Article analyzes how courts making child custody determinations consider the sexual orientation of competing parents. It examines the crucial and troubling tension between a strong cultural belief in what I call *mimetic reproduction* and a reform designed to achieve equality—orientation-blind custody decisions. Mimetic reproduction is the deeply embedded belief that children become like their parents through modeling and imitation. Courts rely on mimetic reproduction to make predictions about a parent’s possible influence on the child. Today, orientation-blind custody decisions are often reached using a nexus test that prevents courts from considering orientation unless it proves harmful to a child. Because sexual

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\* Law Teaching Fellow, Williams Institute, University of California at Los Angeles School of Law. This Article was presented at the 2009 Williams Institute’s Work-in-Progress Series, the 2009 Emerging Family Law Scholars Conference, the 2009 Law and Society Conference, and the 2009 National LGBT Bar Association Career Fair and Conference. My research has benefited from the insightful comments of and conversations with Devon Carbado, Carole Goldberg, Angela Riley, Saul Sarabia, Frances Olsen, Jerry Kang, Jyoti Nanda, Patrick Goodman, Clifford Rosky, Nan Hunter, M.V. Lee Badgett, Christine Littleton, Sari Kisilevsky, Addie Rolnick, and Louis-Philippe Hodgson. I extend thanks to Brad Sears, Doug NeJaime, Eugene Volokh, Catherine Smith, Kenneth Karst, Hiroshi Motomura, Noah Zatz, Nancy Polikoff, Russell Robinson, David Cruz, and especially to Cheryl I. Harris for their critiques and suggestions. Thanks also to Christy Mallory and Hentyle Yapp for their excellent research assistance, to Stephanie Plotin and the research staff of UCLA’s Hugh & Hazel Darling Law Library, and to Deborah Megdal and the editorial staff of the *Yale Journal of Law and Feminism* for editorial assistance.

1. 1985 WL 3464, at \*3 (Tenn. Ct. App. Nov. 5, 1985).

2. 699 P.2d 875, 879 (Alaska 1985).

orientation can only be taken into account when it is harmful, lesbian and gay (LG) parents are constrained from using mimetic reproduction arguments to advance their custody cases. LG parents must simultaneously convey that they are good parents and that they will not model homosexuality for their children. They must also demonstrate that they do not pose a risk of harm to the children. If LG parents and their advocates feel compelled by courts to continue arguing that they are not modeling homosexuality, they are arguing against mimetic reproduction, a process that seems natural and universal. When mimetic reproduction and orientation-blindness interact, LG parents are disadvantaged, the neutrality of courts is undermined, and the ability of courts to act in the best interests of children is compromised. Despite ongoing debates about nurture versus nature, mimetic reproduction will continue to have traction in custody decisions because of its historical, cultural, and practical value. Given this reality, LG parents and their advocates should work within, rather than against, theories of mimetic reproduction. Instead of arguing that they do not make their children gay through modeling, LG parents could argue, for example, that they create an environment in which it is safer for children to openly express their own sexual orientations. They could develop counter-narratives that highlight the positive aspects of a child's retaining access to an LG parent because of the traits that that parent can model. Courts should become more receptive to arguments emphasizing the positive aspects of LG parenting to prevent orientation-blindness from acting as a cover for bias.

INTRODUCTION.....	55
I. REFORM.....	59
A. The Nexus Test.....	59
B. Neutrality and Neutral Application.....	61
II. UNFORESEEN CONSEQUENCES.....	66
A. Mimetic Reproduction.....	66
B. Negative Interaction.....	72
1. Nice Genes.....	81
2. Taking Parents as They Are.....	84
III. POSSIBILITIES.....	87
A. The Stakes.....	87
B. Counter-Narratives.....	90
CONCLUSION.....	94

## INTRODUCTION

Imagine an attorney advising a lesbian or gay (LG) parent<sup>3</sup> in a custody dispute to argue that the parent's sexual orientation should be taken into account. The case might look like the following.

Sarah Smith brings an appeal based on the lower court's failure to take sexual orientation into account when determining custody of her five-year-old son, Max. The court followed the precedent set by *In re XYZ* that a parent's homosexuality does not make that parent per se unfit to be awarded custody. *In re XYZ* further held that a parent's sexual orientation should not be considered unless there is evidence that it poses a risk of harm to the child.

At trial, Richard Smith, the child's father, argued that it was in Max's best interests to live primarily in his father's household. Richard had recently remarried and argued that the marriage would provide stability, continuation of the religious training that both parents had agreed to before their separation, and the benefit of having parental figures of both sexes in the home during a confusing and difficult time for Max, who was adjusting to the separation.

Sarah Smith argued that she was also in a committed relationship since the parties had divorced and, like many single parents, she could still provide role models of both genders. The lower court ruled that Sarah was not unfit based on her sexual orientation but that Richard was more fit for the designation of primary custodian.

On appeal, Sarah argues that the court did not properly weigh evidence that Richard and his current family have made offensive remarks about Sarah's sexual orientation and about same-sex orientation in general. They have also voiced concerns about Max's sexual orientation in his presence.

Sarah argues that the lower court should have taken her sexual orientation into account not only to consider it a potential harm to her child but also in order to prevent parental alienation based on Richard's disapproval of homosexuality. Sarah's second argument is that Max may be homosexual and would benefit from having a parent who could help instill a positive self-image about his orientation. Finally, Sarah argues that regardless of the child's own sexual orientation, greater exposure to diversity and to the tolerant attitudes of Sarah, her partner, and LG parenting support groups will benefit Max.

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3. Although I restrict the focus of this Article to lesbian and gay parents, some of the strategies I discuss could apply to bisexual, gender non-conforming, transgender, intersex, asexual, and genderqueer parents. However, most of the social science research and case law for the past fifty years has spoken exclusively to lesbian and gay parenting experiences. Sexual minorities who do not identify as lesbian or gay face different challenges that deserve targeted social science research and scholarship exclusive to their experiences so that accuracy is not sacrificed for the sake of gestures towards inclusivity. Similarly, I focus on child custody cases in which one parent is lesbian or gay and the other parent is heterosexual. While certainly there are custody disputes between same-sex parents, that topic is beyond the scope of this Article.

These types of arguments have not been endorsed by advocates for LG parents, nor have courts been receptive to them. In part, this is due to the interaction of two factors. The first is the belief that children become like their parents, which I call *mimetic reproduction*.<sup>4</sup> The second is the rule that courts should be blind to the sexual orientation of parents in child custody disputes unless there is evidence of risk to the child, which I refer to as *orientation-blindness*. As a result of advocacy by LG parents and their representatives, more courts have moved toward orientation-blindness by instituting a nexus test as part of the effort to make courts more neutral arbiters between heterosexual and homosexual parents. Instead of holding that a parent's homosexuality is per se harmful to children, these courts "blind" themselves to a parent's sexual orientation unless there is a demonstrated nexus between the parent's sexual orientation and potential harm to the child.

This Article argues that courts are still far from neutral. First, the nexus test itself frames homosexuality as potentially harmful. Second, courts do not apply the nexus test neutrally because of their beliefs about mimetic reproduction. When making custody decisions, courts take mimetic reproduction for granted as a natural part of parenting and childhood development by treating parents as the primary influence on the child's development through modeling and imitation. Some parents have used this to their advantage, arguing that they will produce a better outcome by modeling valued traits or that the other parent will model devalued traits. Because homosexuality is generally devalued by courts, LG parents and their advocates are constrained from using beliefs about mimetic reproduction to argue affirmatively that placing the child with them is in the child's best interests *because* they will model homosexuality. Heterosexual parents are not similarly constrained, and the nexus test reinforces this inequity by permitting LG parents only to argue defensively that they will *not* "make" their children gay.

This tension between orientation-blindness and negative valuations of homosexuality undermines courts' gestures towards neutrality and does not serve the best interests of children. Understandably, LG parents may fear that they will lose custody if they cannot simultaneously convey that they are good parents and that they will not model homosexuality for their children. But if LG parents and their advocates feel compelled to continue arguing that LG parents

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4. Mimetic reproduction is drawn from mimesis, rather than meme theory. Mimetic reproduction is different from meme theory's transmission and replication of discrete packets of information. See RICHARD DAWKINS, *THE SELFISH GENE* 192 (2d ed. 1989) ("[Memes are] unit[s] of cultural transmission . . . unit[s] of *imitation* [that] propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation."). Mimesis, rather, is used to signify the identification and imitation that appears in Sigmund Freud's Oedipal Complex. See MATTHEW POTOLSKY, *MIMESIS* 115 (2006) (describing in the chapter entitled "Mimesis and Identity" the "inherent human tendency towards imitation"). Reproduction signifies that more than physical reproduction takes place when people have children; our society believes children are vectors for reproducing culture, heritage, values, and morals.

do not model homosexuality for their children, they should realize that they are arguing against the existence of mimetic reproduction, a process that courts seem to consider natural and universal.

If courts were to adopt a neutral standard that did not conceptualize sexual orientation as a potential harm, this change alone would not correct for the problem of non-neutral application in judicial decision-making. Some observers might consider such a change to a neutral standard sufficient to counter homosexual bias. But in order to counter homosexual bias, courts would also need to *apply* the standard neutrally. Rather than penalizing LG parents for conduct that would be considered indicative of successful heterosexual relationships—such as hugging, kissing, holding hands, and attending family events together—courts should acknowledge the underlying reasons for treating LG parents differently and intentionally correct themselves so that they become truly neutral in their application of these legal standards.

This Article argues that LG parents should have the opportunity to represent themselves honestly to their children and to counter the negative messages about same-sex relationships that their children inevitably will hear, especially because children often identify with their parents and feel a duty to protect their families. If LG parents and their advocates began to implement strategies that provide counter-narratives about the positive value of LG parenting, they could better serve the best interests of children, strive for parity between LG and heterosexual parents in custody disputes, and combat residual bias against LG parenting. To implement counter-narratives, advocates of parenting equality should resist the argument that their modeling does not make their children gay. Instead, they should argue, for example, that LG parents create an environment in which it is safer for children to openly express their own sexual orientations. Other counter-narrative possibilities include arguing for a more expansive view of gender roles and gender equality, equipping children in mixed-orientation families<sup>5</sup> with greater self-esteem, promoting diversity and empathy, and decreasing parental alienation. These counter-narratives shift the focus of custody determination to the many positive traits that LG parents often model.

Part I introduces the nexus test, which was a reform that was designed to counter bias against homosexuality in custody decisions. Here I posit that the nexus test is neither neutral nor neutrally applied to homosexual parents. This Part demonstrates that bias persists and that concerns about mimetic reproduction—the fear that gay parents will make their children gay—leave LG parents little room to argue for child custody.

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5. I prefer the term “mixed-orientation” in referring to families in which one of the parents is homosexual, asexual, or bisexual, as opposed to popular terms like “Brokeback marriages,” “lavender marriages,” or “beards,” which imply the intent to deceive heterosexual spouses. See Katy Butler, *Many Couples Must Negotiate Terms of “Brokeback” Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5 (discussing mixed-orientation marriages in the United States).

Part II proposes that one reason for the non-neutral application of the nexus test is the negative interaction between orientation-blindness and mimetic reproduction. Here I illustrate the deep cultural investment in the popular belief that parental modeling and child imitation are the predominant ways to influence the development of a child's values. With the nexus test, LG parents are unable to argue that they should have custody in order to model homosexuality for their children or that there is anything of value to be passed on because of their sexual orientation. Due to many courts' past and present hostility to homosexuality, advocates have instead argued defensively that homosexual parents do not make their children gay. When LG parents and their advocates argue that LG parents do not engage in mimetic reproduction, they communicate to courts that they do not influence child development the way that other parents do.

Part III argues that courts must apply the nexus test neutrally by refusing to value heterosexual outcomes over homosexual outcomes. To do this, courts should be more open to arguments about the positive value of homosexual modeling and should disavow concerns about recruiting for or proselytizing homosexuality. LG parents are no different from heterosexual parents in that both groups of parents model sexual orientation for their children.

This Part also proposes counter-narrative possibilities that courts should seriously consider. One is that LG parents could offer a more expansive view of gender roles. Also, regardless of the child's orientation, the LG parent could help build the child's self-esteem and teach the child protective strategies for handling hostile remarks and even harassment that might be directed at the family once that parent comes out. Another counter-narrative is the promotion of diversity: LG parents could teach children empathy for marginalized communities and defuse potential parental alienation that could result if the heterosexual parent or others expose the child to anti-gay discourses. Finally, if courts or heterosexual parents insist that LG parents make children gay through modeling, LG parents could shift the burden by asking heterosexual parents to provide evidence of how they transmit heterosexual orientation.

The Conclusion predicts that LG parents and their advocates may be reluctant to believe that counter-narratives would be effective in custody disputes. Some may say that losing custody of a child is too great a risk and that LG parents should continue using the defensive strategies they have in the past. Yet even in orientation-blind courts, the risk of losing custody remains, and there is a strong likelihood that bias will persist. Counter-narrative strategies allow the LG parent to become more active in protecting the child's strong relationships with both parents. In the event that the LG parent loses custody, counter-narrative strategies leave a robust record for appeal, specifically building evidence that the nexus test was applied in a biased or non-neutral manner. Without these counter-narratives, custody decisions will

continue to be informed by simple anti-gay bias and the belief that LG parents make children gay.

## I. REFORM

### A. *The Nexus Test*

Lesbian, gay, bisexual, and transgender (LGBT) advocates have made significant progress in family courts.<sup>6</sup> One mark of progress is that many courts now use the nexus test when considering a parent's sexual orientation during custody decisions, ruling that a parent's sexual orientation may be taken into account only if there is evidence that it is likely to cause harm to the child. The nexus test is a vast improvement over prior standards, which classified homosexual parents as per se unfit. The majority of family courts now employ the nexus test<sup>7</sup> in order to achieve orientation-neutrality and to protect LG parents from judicial bias. An example of this type of test appears in *Damron v. Damron*,<sup>8</sup> where the court stated, "[W]e hold a custodial parent's homosexual household is not grounds for modifying custody . . . in the absence of evidence that environment endangers or potentially endangers the children's physical or emotional health or impairs their emotional development."<sup>9</sup> To demonstrate their neutrality between homosexual and heterosexual individuals, some courts point out that they use the same nexus test<sup>10</sup> when looking at heterosexual

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6. See KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* (2009). Professor Richman gathered and analyzed LGBT cases published between 1952 and 2004, positing that the indeterminate nature of family law has facilitated advances in the recognition of LGBT parenting rights.

7. Jennifer Naeger, *And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effects on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN'S L. REV. 397, 415 (2004) ("[A] majority of states have adopted the 'nexus test.'"); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 859 (2002) ("[T]he majority of states have come to adhere to a nexus test.").

8. 670 N.W.2d 871 (N.D. 2003).

9. *Id.* at 876.

10. *J.B.F. v. J.M.F.*, 730 So. 2d 1186, 1189 (Ala. Civ. App. 1997) ("In custody cases, indiscreet behavior, such as living with someone of the opposite sex without the benefit of marriage, is a factor to be considered; however, there must be a showing that such misconduct has a substantial detrimental effect on the child. . . . Such misconduct is not itself evidence of a substantial detrimental effect on a child.") (citing *Phillips v. Phillips*, 622 So. 2d 410 (Ala. Civ. App. 1993)); *Mongerson v. Mongerson*, 689 S.E.2d 891, 895 (Ga. 2009) ("In the absence of evidence that exposure to any member of the gay and lesbian community acquainted with Husband will have an adverse effect on the best interests of the children, the trial court abused its discretion when it imposed such a restriction on Husband's visitation rights."); *Boswell v. Boswell*, 721 A.2d 662, 678 (Md. 1998) ("[W]e make no distinctions as to the sexual preference of the non-custodial parent whose visitation is being challenged. The only relevance that a parent's sexual conduct or lifestyle has in the context of a visitation proceeding of this type is where that conduct or lifestyle is clearly shown to be detrimental to the children's emotional and/or physical well-being.").

parents, taking into account the timing and frequency of their romantic relationships<sup>11</sup> and paying attention to whether their relationships were “illicit,”<sup>12</sup> post-marital, or extramarital.<sup>13</sup>

While orientation-blindness using the nexus test is an improvement over the overt hostility that used to predominate, it does not combat all forms of bias. Professors Nancy G. Maxwell and Richard Donner argue that because LG sexuality is still framed as harmful, decisions in recent years have been pushing LG parents back into the closet.<sup>14</sup> In other words, the nexus test itself is not neutral because it necessarily seeks evidence of a connection between homosexual orientation and harm. While expressed in formally neutral terms, the construction of the test does not recognize any potential value flowing from the LG parent to the child on account of the parent’s sexual orientation.

Courts deciding custody cases appear to have become more tolerant since 2000, but LG parents who are open in court about their sexual orientation are still more likely to lose custody or have visitation restricted.<sup>15</sup> Indeed, displays of affection and openness about LG identity continue to provide courts with pretextual grounds for restricting visitation or granting custody to the heterosexual parent. Maxwell and Donner criticize courts for reinforcing the belief that LG parents’ sexuality and open lives as sexual minorities are dangerous to a child.<sup>16</sup> Thus, LG parents have little space in which to conduct their lives without fear of losing their children, for they cannot easily predict in advance whether courts will determine that a behavior poses a risk of harm to the children. This forces LG parents to calculate how long or how often to kiss their partners in front of their children, whether taking them to a same-sex

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11. *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at \*3 (Tenn. Ct. App. Mar. 30, 1988) (comparing the mother’s four lesbian relationships in the ten years between the time of divorce and hearing to the father’s “stable nine-year marriage”).

12. *Constant A. v. Paul C.A.*, 496 A.2d 1, 10 (Pa. Super. Ct. 1985) (“[T]here are sufficient distinctions between legal relationships and meretricious relationships to find that it is a relevant consideration in every custody case to scrutinize the illicit relationship, whether heterosexual or homosexual.”).

13. *North v. North*, 648 A.2d 1025, 1030 (Md. Ct. Spec. App. 1994) (considering the lower court’s determination that the father was “discredited” and “deceitful” for having extra-marital sex with a man then having sex with his wife after having contracted HIV from the man).

14. Nancy G. Maxwell & Richard Donner, *The Psychological Consequences of Judicially Imposed Closets in Child Custody and Visitation Disputes Involving Gay or Lesbian Parents*, 13 WM. & MARY J. WOMEN & L. 305 (2006) (arguing that this phenomenon is damaging for, among other reasons, creating an unhealthy parent-child power dynamic by imbuing the child with a false sense of power through the belief that he or she is in the position to out the parent or get the parent in trouble with the court). Maxwell and Donner focus on the family destabilization that occurs because of “secret-keeping,” *id.* at 318, and the “false sense of power” that children have in relation to parents who are judicially required to remain in the closet, *id.* at 325.

15. *Id.* at 316 (explaining that three appellate cases granting custody or visitation still required that LG parents avoid expressing affection and cohabiting with partners when their children were present).

16. *Id.* at 307 (critiquing rulings that prevent LG parents from openly expressing affection and living openly with same-sex partners because they “may result in sexual minority parents living in judicially imposed closets, even in their own homes, to maintain unrestricted contact with their children, reaffirming the earlier cases’ assumption that parents harm their children by being open about their sexual orientation”).



wedding will seem like indoctrination, and if snuggling in bed with them is worth the risk of losing custody.

### *B. Neutrality and Neutral Application*

Orientation-blindness in its current iteration presupposes that nothing of value flows from LG parents to children and that LG parents inherently pose a risk of harm to children. If courts were truly indifferent to orientation, they would view LG parents as they do other parents who transmit values, culture, morals, and traditions—without construing transmissions based on sexual orientation as necessarily harmful. Courts may even use progressive language and gestures towards neutrality in order to conceal biases against homosexuality while applying the standard in a non-neutral manner.

An example of courts using progressive language in this way is the 1995 case *Hertzler v. Hertzler*,<sup>17</sup> in which a lesbian mother and heterosexual father were disputing custody of their son and daughter. When the parties divorced, they agreed that the mother would have primary custody and the father liberal visitation privileges so long as the mother disavowed lesbianism. When the father discovered that the mother had begun a relationship with a woman, he confronted her, and, the court found, she “voluntarily” relinquished custody of the children to the father.<sup>18</sup> The father remarried and began teaching the children that their mother’s lifestyle was morally wrong.<sup>19</sup>

The issues before the court included whether the lower court abused its discretion by relying on an expert who admitted bias against homosexuality, by failing to obtain evidence that the mother was a harm to the children, or by concluding that talking openly about sexual orientation constituted inappropriate sexual behavior in front of the children.<sup>20</sup> During the trial, experts for both sides testified, although the district court rejected the mother’s expert witness<sup>21</sup> and the appellate court later discounted the father’s expert witness as biased and lacking in professional experience.<sup>22</sup> Although the appellate court spoke dismissively about the lower court’s holding that the mother had “eroticized” the children,<sup>23</sup> the appellate court itself had

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17. 908 P.2d 946 (Wyo. 1995).

18. *Id.* at 951. We can question how “voluntary” the custody shift really was. See Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75, 101 (1996) (explaining that according to the court transcript, the father threatened to sue the mother for custody unless she consented to reversing the existing custody arrangement).

19. 908 P.2d at 949.

20. *Id.* at 948.

21. *Id.* at 950 (explaining that the lower court found the testimony “neither particularly useful nor credible”).

22. *Id.*

23. *Id.* at 951.

characterized the mother's behavior as involving "intensive and unrelenting efforts to immerse the children in her alternative lifestyle."<sup>24</sup> By contrast, the dissent argued that the father was the greater offender because he sought to alienate the children from the mother,<sup>25</sup> while the mother's behavior that the court criticized merely consisted of "snuggling' with the children and her companion . . . [and] participation of the children in a gay/lesbian rights parade and her 'commitment' ceremony."<sup>26</sup>

For its time, the *Hertzler* appellate court seems progressive in that it did not conflate the mother's sexual orientation with predation, disapproving of the allegations of "eroticization" (code for sexual abuse) that the lower court had raised.<sup>27</sup> The appellate court recognized the father's role in both parents' bad behavior, specifically their "thoughtless insistence upon making their offspring the focal point of an acrimonious lifestyle debate."<sup>28</sup> The court urged that the adults resolve the dispute by putting their children's interests above their own, asserting that it was in the children's best interests to have access to and good relationships with both parents.<sup>29</sup> The court explicitly said that the lower court erred by discriminating against the mother on the basis of her sexual orientation but that the error was "cured by a decision which serves the best interests of the children."<sup>30</sup>

This ruling seems to move towards placing heterosexual and homosexual parents on a level playing field because the court considered the father's religious teachings against homosexuality along with the mother's involvement in a lesbian relationship. However, the lower court's judgment was affirmed by the appellate court, and the father retained primary custody of the children. The lower court's error—relying on biased experts who testified that the mother sexually abused the children because of her openness about her sexual orientation—may indeed have been cured. However, the appellate court made the overarching error of failing to remedy the lower court's non-neutral consideration of the parents' behavior.

The appellate court treated the mother's behavior as recruitment, even though it did not seem abnormal, predatory, or proselytizing. The mother behaved as a parent often does regardless of sexual orientation; she snuggled with children in bed and invited them to important events. As the dissent points

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24. *Id.* at 949.

25. *Id.* at 954 ("The record quite clearly reveals that the father and Christine [step-mother] worked long and hard at alienating these children from their mother.").

26. *Id.* at 951.

27. *Id.*

28. *Id.*

29. *Id.* at 952 ("If [the parents] cannot fully subordinate promotion of their respective lifestyles to the natural innocence and love of their children for both parents, they will quickly extinguish whatever remaining chances these children have for happy and productive lives.").

30. *Id.*

out, the mother did not retaliate by trying to alienate the children against the father's religious teachings.

The father likely snuggled with the children and took them to family events too, but the court did not judge his activities in the same way that it had judged the mother's. The father "instruct[ed] the children that Pamela [their mother] had abandoned them for the affections of another woman, embracing a lifestyle which was a sin and abomination."<sup>31</sup> Nonetheless, the court treated the mother as though she had actively attempted to indoctrinate the children in homosexuality,<sup>32</sup> while downplaying evidence that the father deliberately attempted to alienate the children from their mother. The court was reluctant to question or undermine the father's right to transmit his religious beliefs and, in affirming the lower court, effectively condoned his attempt to alienate the children from their mother.

In another child custody case that pitted religious teachings against sexual orientation, the court had the statutory authority to limit religious teachings and practices if they posed a risk of harm to the child. Colorado has a statute in place that curtails parental religious liberty interests if the court finds that "the child's physical health would be endangered or the child's emotional development significantly impaired."<sup>33</sup> This test is similar to the nexus test employed by courts with regard to sexual orientation, which takes into account a parent's sexual orientation only if there is evidence of harm to the child. In 2004, a Colorado appeals court vacated an order that prohibited a custodial parent from teaching her child religious principles "that can be considered homophobic."<sup>34</sup>

However, the religious nexus test does not entail as much suspicion as the sexual orientation nexus test does. Religion can be addressed, and positive value is assumed to flow from the religious parent to the child. The test does not seek evidence of harm. Not only are the tests dissimilar in their construction, but their application differs as well. The standard for curtailing religious teaching is more difficult to meet than the standard for proving that an LG parent is unfit or poses a risk of harm to the child. To argue against religious teaching, a parent would have to rely on statutory and common law

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31. *Id.* at 951.

32. *Id.* at 949 ("[T]he record is equally replete with Pamela's intensive and unrelenting efforts to immerse the children in her alternative lifestyle, seemingly to the point of indoctrination.").

33. *In re E.L.M.C.*, 100 P.3d 546, 563 (Colo. App. 2004) (quoting COLO. REV. STAT. § 14-10-130(1) (2003)). The court also looked at states that do not have statutes in place, noting that they had similarly acknowledged that harm to the child had to be shown before religious teachings could be limited. *Id.* at 563-64.

34. *Id.* at 548 (vacating district court order granting sole parental responsibility in the area of religion to one of the mothers, with the proviso that she not teach the child any religious principles that could be "considered homophobic").

principles and present evidence to persuade the court that the child is harmed physically or emotionally by a parent's religious teachings.<sup>35</sup>

Non-neutral application of the standard is evident in the *Hertzler* case. An LG parent, like the mother in that case, risks losing custody or visitation rights for expressing affection to a same-sex partner, taking children to a pride parade, or participating in a commitment ceremony, while a heterosexual parent, like the father in *Hertzler*, may intentionally seek to alienate the child from the LG parent and still retain custody. While background cultural norms may inform a given court's decision for or against the LG parent, the orientation-blind nexus test even constrains courts in more liberal jurisdictions from addressing orientation as anything but a potential harm.

Retaining nexus tests or some way to account for harm to children is a necessary failsafe in custody determinations. Doing away with the nexus test is not the answer unless the test is replaced with an injunction against framing homosexuality only in terms of harm to the child.<sup>36</sup> The problem is not just the neutrality of the test itself, but the unforeseen interaction between mimetic reproduction and orientation-neutrality, which is further discussed below.

While a legislature could make the nexus test more facially neutral, the focus should be on family courts. Because of their elastic and responsive nature, family courts have been valuable for progress on LG parents' rights. Yet until courts look at the underlying causes of non-neutrality and non-neutral applications of nexus tests, even reformed tests can continue to operate as a cover for bias. Signs of overt hostility to homosexuality are less evident than before; nonetheless, bias still exists.

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35. Christian Scientist cases demonstrate courts' reluctance to interfere with parents' transmission of religion to children. The benchmark for harm to the child is much higher for religion cases than for sexual orientation cases, often requiring evidence of physical abuse or neglect. *See, e.g.*, Walker v. Superior Court, 763 P.2d 852 (Cal. 1988) (affirming the ruling that the involuntary manslaughter prosecution of a Christian Scientist mother who did not seek medical care for her minor child who died of meningitis did not violate the state or federal constitution); *People v. Rippberger*, 283 Cal. Rptr. 111 (Cal. Ct. App. 1991) (affirming a felony child endangerment conviction based on the parents' failure to provide medical treatment for their infant during her fifteen-day illness from bacterial meningitis); *Commonwealth v. Twitchell*, 617 N.E.2d. 609 (Mass. 1993) (reversing the conviction of Christian Scientist parents who did not seek medical treatment for their child based on the parents' argument they had not received fair warning that they could be convicted of involuntary manslaughter); *Lundman v. McKown*, 530 N.W.2d 807 (Minn. Ct. App. 1995) (affirming a \$1.5 million compensatory damages award to the birth father of a deceased child against the child's birth mother and stepfather, with whom the child died after three days of Christian Science care); *Eggleston v. Landrum*, 50 So. 2d 364 (Miss. 1951) (reversing the denial of an adoption petition of a Christian Science couple where they had testified under oath that they would provide medical care for the child); *Gluckstern v. Gluckstern*, 148 N.E.2d 305 (N.Y. 1958) (preventing a father from further appealing a custody order awarding the mother custody, conditioned on her taking the child to the doctor for a check-up every month and providing necessary medical and surgical care).

36. *M.A.T. v. G.S.T.*, No. 1517 MDA 2008, 2010 Pa. Super. LEXIS 13, at \*P14 (Pa. Super. Ct. Jan. 21, 2010) (holding that "a homosexual parent bears no special evidentiary presumption in a child custody case" and overruling earlier precedent that required evidence that a parent's sexual orientation was not a harm to the child).

Some have tried to measure implicit bias using the Implicit Association Test<sup>37</sup> and other tests. These studies provide evidence that there is a “tendency to associate negative characteristics with outgroups more easily than ingroups (i.e. outgroup derogation).”<sup>38</sup> These studies address not only automatic attitudes (prejudice), but also automatic beliefs (stereotypes).<sup>38</sup> LG parents are still part of an outgroup,<sup>39</sup> and they struggle to achieve equal treatment in adoption,<sup>40</sup> are vulnerable to termination of parental rights if a civil union dissolves,<sup>41</sup> and risk deportation if they are a mixed immigration status family.<sup>42</sup>

In 1999, researchers measured undergraduate students’ attitudes towards gay fathers and their children.<sup>43</sup> Midwestern heterosexual college students were presented with two hypothetical families with an adopted child in a new middle school. The families were identical except that one was heterosexual and the other was gay and male. The students were asked questions about the child’s well-being in the two families and about gay male stereotypes. The students tended to credit the gay father with stronger parenting skills than the straight father and with traits traditionally associated with mothers, such as being attentive, responsible, and nurturing. The gay father and straight mother received similar parenting scores. Even though the gay father scored higher in parenting skills than the straight father, the child’s distress at home was rated higher than that of the child in the heterosexual couple’s home.<sup>44</sup> The child’s confusion regarding his sexual orientation and, by extension, his male gender identity was rated significantly higher when the parents were gay.<sup>45</sup> The study

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37. Project Implicit, <http://www.projectimplicit.net> (last visited Mar. 19, 2010); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

38. Kang, *supra* note 37, at 1215.

39. See, e.g., William A. Jellison, Allen R. McConnell & Shira Gabriel, *Implicit and Explicit Measures of Sexual Orientation Attitudes: In Group Preferences and Related Behaviors and Beliefs Among Gay and Straight Men*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 629, 631 (2004) (stating that LG parents are an outgroup relative to heterosexual couples and individuals; boys often learn about homophobia before they understand their own orientation; gay men and lesbians often struggle with “internalized negative attitudes toward homosexuality”; and gay men and lesbians “may need to seek support from outside their family or immediate social environment to dispel . . . negative attitudes and explore their newly identified sexuality.”).

40. Pamela Paul, *The Battle Over a Baby*, N.Y. TIMES, July 22, 2009 (Magazine), at 38.

41. April Witt, *About Isabella*, WASH. POST, Feb. 4, 2007 (Magazine), at W14. Lisa Miller and Janet Jenkins had a civil union in Vermont. They had a baby together, the relationship deteriorated, and Miller, the baby’s biological mother, moved to Virginia, which does not recognize the civil union. Jenkins was not permitted to see the baby for years during the dispute.

42. Lisa Leff, *Calif. Lesbian Mother Given Deportation Reprieve*, SEATTLE TIMES, Apr. 23, 2009 (describing how a lesbian couple with mixed immigration status faced deportation of one partner after her application for asylum was denied).

43. Andrew C. McLeod, Isiaah Crawford & Jeanne Zechmeister, *Heterosexual Undergraduates’ Attitudes Toward Gay Fathers and Their Children*, 11 J. PSYCHOL. & HUM. SEXUALITY 43 (1999).

44. *Id.* at 56-58. Courts are beginning to move away from social distress as a factor in custody decisions. See, e.g., *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000) (holding perceived community bias against sexual orientation to be an improper basis for a residential custody determination); *Cook v. Cook*, 965 So. 2d 630, 636 (La. Ct. App. 2007) (“The record, however, contains not one scintilla of evidence that the children have been embarrassed or treated badly by their peers on account of their mother’s relationship.”), *rev’d*, 970 So. 2d 960 (La. 2007).

45. McLeod et al., *supra* note 43, at 57.

suggests that people believe that parent-child modeling and imitation inform a child's development and that people value heterosexual outcomes for children.

## II. UNFORESEEN CONSEQUENCES

### A. *Mimetic Reproduction*

Mimetic reproduction<sup>46</sup> is the strong cultural belief that direct parent-child modeling and imitation are the primary sources of a child's development. It draws the concepts of mimesis and reproduction from literary theory to signify a system of thought about how children identify with and imitate parents during development. The reproduction is not just physical but also the continuation of culture, religion, traditions, values, and morals. Mimetic reproduction references empirical evidence of children's imitation of parents found in developmental psychology and social cognitive theory; more specifically, it refers to deeply held beliefs about parent-child imitation, which exist alongside or in spite of evidence that genetics may play a more significant role in determining a child's development. Mimetic reproduction refers to the culturally-informed, imprecise way that people and courts discuss children's development through modeling and imitation.

Courts sometimes discuss parental modeling as if only parents—and not peers, genetics, and the environment—influence their children's development. Other times, courts blur the line between imitation that leads to identity formation and cultural transmission. Mimetic reproduction includes the ideas that imitation leads to the development of a child's identity and that parents transmit culture to children through modeling. Both ideas exist independently of each other, but they coincide in custody and visitation disputes when family courts make decisions about the best interests of the child.

Courts designate a primary caregiver who they think will produce a better outcome, based in part on the assumption that the child will become more like that parent through close contact, modeling, and imitation and less like the non-primary caregiver. Under a mimetic reproduction regime, parental identity becomes a stand-in for the child's possible orientation outcomes. There is no way of knowing the extent to which the child's genetic make-up might determine how the child develops, but the parents as they present themselves before the court represent the environmental factors the court sees as most likely to affect the child. Parents who regularly attend church, for example, could leverage that to discuss the qualities they model for children, while also

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46. *See supra* note 4.

pointing out the other parent's less valuable or undesirable qualities. Since the child would spend more time with the primary caregiver, the heterosexual parent could intimate to the court that a heterosexual outcome is more likely if he or she is given primary custody.

A parent's ability to manage his or her identity within the framework of mimetic reproduction is a powerful tool in obtaining custody. Mimetic reproduction as a concept is value-neutral; it just means that the court and parents, adhering to the concept, behave as though the child will imitate the parent. It does not matter whether modeling and imitation is an empirically accurate account of child development. It is crucial for parents to recognize that mimetic reproduction is often assumed when courts make custody decisions and that using that fact to the parent's advantage can mean the difference between primary custody and visitation restrictions. In a mimetic reproduction regime, the relative value of what is transmitted from parent to child determines which parent is more likely to prevail.

An example of a parent working within mimetic reproduction to obtain an advantage in court is the case *In re Marriage of D.F.D.*<sup>47</sup> The mother alleged during a custody dispute that the father was a risk to the child because he was a transvestite. Four separate evaluators presented evidence showing that the father posed little risk of harm to the child because his behavior was not compulsive and he had successfully kept his cross-dressing secret from his mother and closest friends.<sup>48</sup> Despite the evidence about the father's strong parenting skills and the low risk of harm from cross-dressing, the lower court found that "if the parties' son was exposed to such role modeling (cross-dressing), he would be irreparably harmed."<sup>49</sup> The court awarded sole custody to the mother, which the appellate court later reversed.<sup>50</sup>

This case illustrates how powerful imitation arguments are in custody disputes and why there are relatively few appellate cases that feature mimetic reproduction. Although the appellate court reversed the lower court in this instance, the mother had already subjected the father to four separate evaluations. Evaluations often are expensive and time consuming; even if the court divides costs evenly between the parties, high litigation costs can deter parents who receive unfavorable rulings at the trial level. Many of the cases in which parental transmission arguments are used to good effect never reach the appellate level because of litigation expenses and the emotional wear and stress that custody disputes cause children.

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47. 862 P.2d 368 (Mont. 1993).

48. *Id.* at 373-75. One of the experts, Dr. Green, provided a report that was generally favorable for the father but, even so, advised him not to cross dress during the child's "next few formative years." *Id.* at 374.

49. *Id.* at 375.

50. *Id.* at 376-77.

In the few instances where parental transmission arguments do appear in appellate settings, there is evidence that the mimetic reproduction framework continues its reign in courtrooms. Examples of appellate cases that engage mimetic reproduction are custody cases where parental speech is considered harmful.<sup>51</sup> The custody cases document the pervasive belief that a parent's speech informs the child's identity so much that the contested speech will be reproduced by the child.<sup>52</sup> That argument assumes that because of exposure to the parent, the parent's chosen activities, and the parent's active performance of his or her identity, this identity will be reproduced in the child through imitation.

Mimetic reproduction has traction in court because of the cultural value that Americans place on the right to pass on culture in families and the mix of science and popular culture that continues to inform and reinforce this value. Parents, court officials, and attorneys are part of society and are not immune to prevailing beliefs that are deeply ingrained in the American psyche. In the language of the Supreme Court in *Moore v. City of East Cleveland*,<sup>53</sup> parental transmission of cultural identity is a "most cherished" value protected by the Constitution. The Court stated, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."<sup>54</sup>

Another example of the investment Americans have in the right to transmit from parent to child is given in *Wisconsin v. Yoder*,<sup>55</sup> in which the Court considered whether Amish children were required to attend compulsory high school. The Court noted:

[Compulsory high school] takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. . . . [T]he Amish child must also grow in his faith and his relationship to the Amish community . . . . Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in

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51. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

52. Volokh frames parental speech in custody cases as particularly important because "today's child listeners will grow up into the next generation's adult speakers," *id.* at 645, reflecting the widespread acceptance of mimetic reproduction. To illustrate his point, Volokh presents a hypothetical case where the parties are a Lutheran and a Muslim, arguing that "[if] a father is barred from teaching a child Muslim views because the mother (who has custody) is teaching Lutheranism, the child may be less likely to grow up to spread Muslim views, and more likely to spread Lutheran views." *Id.* at 706.

53. 431 U.S. 494 (1977).

54. *Id.* at 503-04.

55. 406 U.S. 205 (1972).



the destruction of the Old Order Amish church community as it exists in the United States today.<sup>56</sup>

Parents' right to transmit rests on the assumption that imitation is a valid way to reproduce traits, values, morals, and culture in children. When testifying about Native-American children in non-Native-American homes, Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, stated, "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."<sup>57</sup> The right to transmit is intertwined with the method of delivery, reaffirming how the imitation process itself is normalized.

Imitation is seen in the profound and the mundane. From milk promotions<sup>58</sup> to parenting advice columns,<sup>59</sup> parents are informed that their children imitate them and that they should use their influence to encourage the development of good characteristics in their children. This is based on the widespread belief that parents influence and shape their children's cultural

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56. *Id.* at 211-12.

57. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (quoting *Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians)). In this hearing, Isaac testified about the importance of the Indian Child Welfare Act's role in protecting Indian children from being placed outside of tribal homes.

58. The website of the Southeast United Dairy Industry Association, Inc., features an information sheet called "12 Ways to Dish Out Dairy." The first way to dish out dairy is "Copy Cat: Children imitate their parents. In fact, research concluded that the amount of milk consumed by moms is the strongest predictor of their children's intake. So drink up, Mom." 12 Ways To Dish Out Dairy, [http://www.southeastdairy.org/file/milklovers/health\\_tips.html](http://www.southeastdairy.org/file/milklovers/health_tips.html) (follow the "Dish Out Dairy" link) (last visited Apr. 20, 2010).

59. Alan E. Kazdin & Carlo Rotella, *I Spy Daddy Giving Someone the Finger: Your Kids Will Imitate You. Use It as a Force for Good*, SLATE, Jan. 27, 2009, <http://www.slate.com/id/2209882>; NAT'L INST. CHILD HEALTH & HUMAN DEV., ADVENTURES IN PARENTING: HOW RESPONDING, PREVENTING, MONITORING, MENTORING AND MODELING CAN HELP YOU BE A SUCCESSFUL PARENT (Oct. 2001), available at [http://www.nichd.nih.gov/publications/pubs/adv\\_in\\_parenting/index.cfm](http://www.nichd.nih.gov/publications/pubs/adv_in_parenting/index.cfm). Boys Town Parenting advises, "Everything you do, and don't do, sends a message to children about your values." Boys Town Parenting, Be a Character Role Model, [http://www.parenting.org/archive/discovery/life\\_lessons/2003/Apr\\_May03\\_role\\_model.asp](http://www.parenting.org/archive/discovery/life_lessons/2003/Apr_May03_role_model.asp) (last visited Aug. 25, 2009). The Substance Abuse and Mental Health Services Administration (SAMHSA) of the Department of Health and Human Services offers parenting advice on being a good role model for children. SAMHSA, Be a Good Role Model, <http://family.samhsa.gov/be/> (last visited Apr. 20, 2010). Parenting.com, a website from the makers of *Parenting* and *Babytalk*, magazines available for little to no cost, published Are You a Good Role Model?, <http://www.parenting.com/article/Mom/Work-Family/Are-You-a-Good-Role-Model> (last visited Apr. 20, 2010). The National Association of Social Workers offers evidence that role modeling is directly related to good outcomes for children in Julie Niven, Nat'l Assoc. of Soc. Workers, The Importance of Being a Good Role Model: Parenting in Native Alaskan Villages, [http://www.education.com/reference/article/Ref\\_Importance\\_Good\\_Role/](http://www.education.com/reference/article/Ref_Importance_Good_Role/) (last visited Apr. 20, 2010). The public service advertisement, *Children See, Children Do*, which was produced and aired in Australia, shows how children mimic disfavored parental behavior such as abuse, violence, and racism. Nat'l Assoc. for Prevention of Child Abuse and Neglect, *Children See, Children Do*, [http://www.napcan.org.au/children\\_sec.htm](http://www.napcan.org.au/children_sec.htm) (last visited Apr. 20, 2010) (follow the "Click here to view our range of videos" link). This campaign name seems to intentionally draw on the truism "monkey see monkey do," which also appears in a child psychology textbook by DAVID G. MYERS, *EXPLORING PSYCHOLOGY: SIXTH EDITION IN MODULES* (6th ed. 2005).

identities. Some parents might be skeptical of an imitation-only account of childhood development. Still, in the textbook *Exploring Psychology*,<sup>60</sup> the introduction to an observational learning section reads like a list of truisms drawn from relatively common experiences of parent-child imitation:

Observational learning, in which we observe or imitate others . . . plays a big part. A child who sees his big sister burn her fingers on the stove has thereby learned not to touch it. The process of observing and imitating a specific behavior is often called modeling. We learn all kinds of social behaviors by observing and imitating models.<sup>61</sup>

The author then discusses primates that engage in modeling and even uses the phrase “monkey see, monkey do.”<sup>62</sup> After discussing a few primate studies about smiling, frowning, sticking out tongues, and so forth, the author asserts:

To persuade children to smoke, simply expose them to parents, older youth, and attractive media models who smoke. To encourage children to read, read to them and surround them with books and people who read. To increase the odds of your children practicing your religion, worship and attend other religious activities with them.<sup>63</sup>

There are no scientific studies cited to support this application of “monkey see, monkey do” to children; rather, the author of this science textbook seems to rely primarily on common sense to support his claims.

The persistence of the belief in mimetic reproduction is due in part to experts who blend popular wisdom with science. In 2006, Drew Pinsky and S. Mark Young published the results of a narcissism study in the *Journal of Research in Personality*.<sup>64</sup> Based on the results of the research, Pinsky, or “Dr. Drew” as he is known,<sup>65</sup> co-authored a book entitled *The Mirror Effect: How Celebrity Narcissism is Seducing America*, a parenting handbook for parents of teenagers.<sup>66</sup> In an interview given to *USA Today*, Pinsky was asked why he believed that teens and young adults are so vulnerable to celebrities modeling narcissistic behaviors. He responded:

*They [teens and young adults] are the sponges of our culture. Their values are now being set. Are they really the values we want our young people to be absorbing? Do we want them to have a revolving-door love life, or stable relationships? It harkens back to the question of how much are young people affected by models of social learning. Humans are the only animals who learn by watching. Why don't we*

60. MYERS, *supra* note 59.

61. *Id.* at 273.

62. *Id.*

63. *Id.*

64. Drew Pinsky & S. Mark Young, *Narcissism and Celebrity*, 40 J. RES. IN PERSONALITY 463 (2006).

65. Pinsky is described by the *New York Times* as “navigating a precarious balance of professionalism and salaciousness” because of his medical career and radio and television celebrity. Kara Jesella, *Detox for the Cameras. Doctor's Order!*, N.Y. TIMES, Feb. 3, 2008, at ST2.

66. DREW PINSKY, S. MARK YOUNG & JILL STERN, *THE MIRROR EFFECT: HOW CELEBRITY NARCISSISM IS SEDUCING AMERICA* (2009).

examine human reality here? Why don't we have that conversation and use it as an opportunity to look at the behavior of people and say "What is it really about? What can we learn and [sic] avoid that kind of behavior?" *If parents don't intervene, that's where kids go.*<sup>67</sup>

Pinsky's response resonates with social cognitive learning theory made famous by Albert Bandura decades ago.<sup>68</sup> A section in Pinsky's book offers a layman's explanation of mimetic desires and social learning theory under the umbrella term "the mirror effect,"<sup>69</sup> which serves to reaffirm popular notions of modeling while grounding the discourse in science.<sup>70</sup> One might argue that Pinsky and his work are not popular culture but that he has placed himself

67. Sharon Jaysen, *Celebrity Narcissism: A Bad Reflection for Kids*, USA TODAY, Mar. 16, 2009, at 6D (emphases added).

68. BARRY J. ZIMMERMAN & DALE H. SCHUNK, *Albert Bandura: The Scholar and His Contributions to Educational Psychology*, in EDUCATIONAL PSYCHOLOGY: A CENTURY OF CONTRIBUTIONS 431-57 (2003).

69. PINSKY ET AL., *supra* note 66, at 137-43 (discussing mimicry in primates, including the origination of the phrase "monkey see, monkey do," and referencing mimetic desires and social learning as to why young adults and teenagers are drawn to modeling their behavior after celebrities).

70. A number of texts used in both public and private universities contain sections about Albert Bandura and social cognitive theory. The texts were drawn from online syllabi of classes intended for beginner psychology students. Since a number of students take introductory courses to fulfill a general education science requirement, I focused on the following texts to get a sense of the popular discourse: LAURA E. BERK, *CHILD DEVELOPMENT* (8th ed. 2009) (used by UCLA); MICHAEL COLE, SHEILA R. COLE & CYNTHIA LIGHTFOOT, *THE DEVELOPMENT OF CHILDREN* (5th ed. 2005) (used by Duquesne University); JOHN S. DACEY & JOHN F. TRAVERS, *HUMAN DEVELOPMENT ACROSS THE LIFESPAN* (6th ed. 2006) (used by Vanguard and Murray State Universities); MICHAEL GAZZANIGA & TODD F. HEATHERTON, *PSYCHOLOGICAL SCIENCE* (2d ed. 2006) (used by Penn State); JAMES W. KALAT, *INTRODUCTION TO PSYCHOLOGY* (8th ed. 2008) (used by the University of Northern Iowa); MYERS, *supra* note 59 (used by Doane College); MICHAEL W. PASSER & RONALD E. SMITH, *PSYCHOLOGY: THE SCIENCE OF MIND AND BEHAVIOR* (2d ed. 2004) (used by Duquesne University); JOHN W. SANTROCK, *ADOLESCENCE* (12th ed. 2008) (used by Trinity International); JOHN W. SANTROCK, *LIFE-SPAN DEVELOPMENT* (11th ed. 2008) (used by Lewis and Clark and George Mason Universities); ROBERT SIEGLER, JUDY DELOACHE & NANCY EISENBERG, *HOW CHILDREN DEVELOP* (1st ed. 2003) (used by the University of Georgia, Brandeis University, the University of Wisconsin, the University of Missouri, the University of Texas Arlington, and the University of Maryland); PHILLIP T. SLEE & ROSALYN H. SHUTE, *CHILD DEVELOPMENT: THINKING ABOUT THEORIES* (2003) (used in the United Kingdom); RONALD E. SMITH, *PSYCHOLOGY: THE SCIENCE OF MIND AND BEHAVIOR* (3d ed. 2007) (used by the University of Minnesota).

Some of the texts sampled discuss the "classic" Bobo doll experiment and social cognitive theory as the foundation for outgrowth theories such as cognitive gender schema, but none of the books sampled cite any studies or theories that show that Bandura's work is defunct science. In what some psychologists have described as a classic study, Bandura set up a 1963 laboratory study where nursery school children watched a woman play with toys and a life-size plastic doll (known as a "Bobo doll"). The woman played quietly with the toys for a minute and then approached the doll and began to hit, kick, and sit on it along with accompanying vocalizations such as "pow" and "sock him one in the nose." In the control condition, she played quietly with the toys for the entire period. It was discovered that children who had observed the aggressive model were more likely than the control group of children to act aggressively in imitation of the model's aggressive behavior.

The Bobo doll experiment is a scientific narrative that seems to prove what was already obvious to parents: that children imitate behavior modeled to them. It is not surprising that experiments that demonstrate the power of modeling and imitation would lead people to make an intuitive leap from studies about behavior to identity. Even though the Bobo doll experiment was designed to look at aggression, it could be seen as affirming the popular belief that children's cultural identity is formed by parents' modeling.

within popular culture as a scientific and medical expert.<sup>71</sup> Since Pinsky is targeting parents, teenagers, and young adults who have an underlying belief in modeling, it is reasonable to assume that parents already concerned about their teenage children's fascination with celebrities will read the book and have their imitative beliefs reaffirmed.

The popular wisdom that parents have the right to transmit their cultural identity to their children as a method of family and cultural survival, coupled with the reaffirmation from science and popular culture that children develop through imitation, makes it unsurprising that mimetic reproduction occupies the law. The *Yoder* statement and Chief Isaac's statement about passing on tribal culture equate survival of the respective communities they reference with the right to transmit culture from parent to child.

Some might argue that using the language of survival to describe the disruption of cultural transmission is hyperbolic. Still, in the context of custody and visitation issues, the potential for de facto and sometimes actual termination of parental rights haunts the proceedings. Parents with disfavored identities risk incurring severe limits on access to their children or losing all parental rights. To some, an unfavorable custody decision is the equivalent of a metaphorical death sentence in the sense that the parent becomes a legal stranger to the child and thus loses the opportunity to transmit or control transmission to the child.

### *B. Negative Interaction*

Imagine orientation-blindness as ideally value-neutral on a continuum between negative and positive treatments of same-sex sexual orientation. Configuring sexual orientation as a source of harm means that LG parenting is situated somewhere between negative and neutral. If instead of anxiety about LG parents as recruiters for homosexuality, there were a shift towards the

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71. On the Discovery Health Channel website, under the heading "Dedicated to Helping Young People," Pinsky's medical credentials are listed so as to demonstrate his qualifications as an expert: Dr. Drew received his undergraduate degree from Amherst College and his M.D. from the University of Southern California, School of Medicine. He continued with U.S.C. for his residency and served as chief resident at Huntington Hospital in Pasadena. Dr. Drew is currently medical director of the department of chemical dependency services at Las Encinas Hospital, a world-renowned psychiatric facility in Pasadena known for treating celebrity patients. A staff member at Huntington Memorial Hospital, he also continues to run a private medicine practice and is a clinical assistant professor of psychiatry at USC School of Medicine. His membership and activities in professional societies include the American College of Physicians, the American Medical Association, the American Society of Addiction Medicine, the California Medical Association and the American Society of Internal Medicine.

Discovery Health Channel, Expert Advice, Meet Dr. Drew, [http://health.discovery.com/centers/sex/dr.\\_drew/drew\\_bio.html](http://health.discovery.com/centers/sex/dr._drew/drew_bio.html) (last visited Apr. 3, 2010). Pinsky's Facebook Fan Page also includes the same biography. Dr. Drew Pinsky, Facebook, <http://www.facebook.com/pages/Dr-Drew-Pinsky/250300497676#!/pages/Dr-Drew-Pinsky/250300497676?v=info> (last visited Apr. 3, 2010).

positive end of the continuum so that courts saw LG parents as carriers of LG heritage or as “debiasing agents”<sup>72</sup> in place to counter homophobia, then courts could make decisions that would be value-neutral in terms of sexual orientation. If judges behaved as though a homosexual or heterosexual outcome for the child had equal value, then orientation-blindness would be an equalizer and not an opening to configure the reproduction of homosexuality as a danger. To move closer to actual neutrality, courts would have to be open to accepting and weighing evidence of the positive value of LG parenting in order to counteract the negative weight of the nexus test and cultural bias against homosexuality. To push the slider on the continuum towards actual neutrality requires a change in thinking about the modeling and reproduction of homosexuality.

Because of the non-neutral application of the nexus test, LG parents have to argue that they are a good choice for custody despite their orientation. LG parents are in the unenviable position of conveying to a judge that they are morally upright, good parents with no intention to recruit or model homosexuality and gay culture to their children. LG parents can argue that they do not model homosexuality, engage in mimetic reproduction, or necessarily raise gay children. However, orientation-blind standards foreclose any capacity for LG parents to talk about homosexuality as anything but harmful to the child. When courts apply orientation-blind standards to a dispute that is animated by mimetic reproduction, the assumption that a child will become like his or her primary caregiver then overtakes the discourse about the value of homosexual versus heterosexual outcomes, stealing the focus from more important factors like family cohesion.

When making custody decisions, courts frequently take mimetic reproduction for granted as a natural part of parenting and childhood development. However, LG parents and their advocates cannot use mimetic reproduction to argue affirmatively that placing the child with the LG parents is in the child’s best interests *because* they will model homosexuality. Heterosexual parents are not similarly constrained. Orientation-blind standards reinforce this inequity by only permitting LG parents to argue defensively that they do not make their children gay.

Before courts began using the nexus test, many courts were openly hostile to homosexuality.<sup>73</sup> During this period, court decisions incentivized gay “passing” and circumscribed behavior for LG parents.<sup>74</sup> LG parents routinely

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72. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1066 (2006) (arguing that “debiasing agents” are authority figures who dispel stereotypes and assist in ridding the entire community of its biases).

73. RICHMAN, *supra* note 6, at 39 (discussing “the *per se* standard,” which “assumes that having a homosexual parent is harmful *per se*, as a matter of law, and is always contrary to the child’s best interest”).

74. RICHMAN, *supra* note 6 (discussing a case in which gay father given custody despite being gay “only because the judges have determined that he is not ‘flamboyant,’” *id.* at 8, and data showing that

lost custody of their children or had severe limitations placed on their visitation because of their sexual orientation.<sup>75</sup> Courts were concerned that children would be made homosexual either by modeling and recruitment<sup>76</sup> or child predation.<sup>77</sup> A notable example of how a court treated the possibility of recruitment is *N.K.M. v. L.E.M.*,<sup>78</sup> a 1980 custody dispute between a lesbian mother and a heterosexual father. This case is emblematic of numerous cases that continued through the next several years to mark homosexuality as a dangerous practice from which children had to be protected.<sup>79</sup>

*N.K.M.* stands out not just because the court expressed concern about modeling homosexuality but because it used the mother's resistance to shoring up heterosexuality as further grounds for penalizing her. The father sought a change in custody based on the mother's partner's influence on the parties' nine-year-old daughter. Betty, the mother's partner, was accused of having a "direct and baleful influence" on the child.<sup>80</sup> The principal evidence of the purported negative influence was a letter from the child to Betty in which the child's tone was considered age inappropriate and too "passionate."<sup>81</sup> The court considered dangerous the mother's lack of expectations regarding the child's sexual orientation. The mother said, "If Julie is going to turn out to be a homosexual, that is her life, it's up to her."<sup>82</sup> In this case, the danger was not

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"[b]efore 1990, less than 20 percent of gay and lesbian parents who presented an 'out' identity in court were successful," *id.* at 56); Yoshino, *supra* note 7, at 861-63 (analyzing cases from 1974 to 1999 to show that courts encouraged "covering" homosexual behavior nearly to the point of requiring that the parent "convert" to heterosexuality, *id.* at 862).

75. Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 269 (2009) ("In many cases involving gay and lesbian parents, courts have held that a parent's homosexuality is a 'change in circumstances' that justifies a transfer of custody to the other parent. . . . If a court finds that a parent's behavior may have an 'adverse effect' on the child, then the court may impose broad restrictions on that parent's visitation rights.").

76. *In re* Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (regarding the constitutionality of a bill that would prohibit lesbian and gay individuals from fostering and adopting children: "[W]e believe that the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity. Obviously, this theory most likely holds true in the parent-child or other familial context.").

77. See Rosky, *supra* note 75. Professor Rosky contends that when courts rely on stereotypes about LG parents, the gender of the parents, children, and judges matters. In addressing fears about transmitting homosexuality, Rosky categorizes the stereotypes as active and passive, recruiters and role modelers.

78. 606 S.W.2d 179 (Mo. Ct. App. 1980).

79. There were a number of cases with similar outcomes during this period. See, e.g., *Bennett v. O'Rourke*, 1985 WL 3464, at \*3 (Tenn. Ct. App. 1985) (affirming the lower court's holding that a lesbian mother should lose joint custody of the parties' daughter because of the "increased chance of role modeling"); *L. v. D.*, 630 S.W.2d 240, 245 (Mo. Ct. App. 1982) ("[I]f the child's situation is such that damage is likely to occur as her sexual awareness develops with the approach of young womanhood, the court may in a proper case remove her from the unwholesome environment.") (citing *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980)); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173, at \*3 (Tenn. Ct. App. 1988) (citing *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983)) (including testimony from the psychologist that the child's gender identity was set but that he believed that homosexuality is a learned behavior and that the child would continue learning from the mother).

80. 606 S.W.2d at 185.

81. *Id.*

82. *Id.*

just from the mother's partner, Betty, who was cast in the Svengali role of "a powerful, a dominant personality," but from the mother's failure to state a preference for maintaining or bolstering the child's presumed heterosexuality.<sup>83</sup> The court referred to the mother's sexual orientation as "voluntarily chosen" but speculated that even if homosexuality were genetically formed, "who would place a child in a milieu where she may be inclined toward [homosexuality and] may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness."<sup>84</sup>

In the context of custody cases, Kenji Yoshino theorizes that courts have incentivized heterosexual assimilation or the performance of asexual homosexual identity for LG parents because courts believe "that the failure of such [to cover their homosexuality] will result in the conversion of their children to homosexuality."<sup>85</sup> He proposes "indifference" to sexual orientation as a progressive reform to combat bias against homosexuality.<sup>86</sup> However, mimetic reproduction, operating as an almost unconscious, diffuse belief that children become like their parents, interacts with the inability to address sexual orientation except as a danger. The unforeseen consequence is that this interaction severely limits the arguments LG parents can make about their value as parents.

Facially neutral standards would be an improvement compared to the current standards that frame homosexuality as potentially harmful to children. Still, the social investment in mimetic reproduction is too strong to imagine that a facially neutral standard could counter the belief that gay parents are modeling sexual orientation for their children. The inability of courts and LG advocates to imagine and talk about homosexual outcomes in the same way as heterosexual outcomes demonstrates the full strength of the mimetic reproduction framework and of anti-homosexual bias.

The question of a heterosexual or homosexual outcome for a child is not irrelevant to a custody determination. If studies demonstrated that children raised by lesbian mothers are more likely to have homosexual experiences than children raised by heterosexual single mothers, would a judge be more or less likely to award custody to a lesbian parent during trial?

In 2001, Judith Stacey and Timothy J. Biblarz published a review and analysis of LG parenting studies.<sup>87</sup> The article argues that the studies performed up to that point had been conducted in a "defensive conceptual framework and . . . heterosexism has hampered intellectual progress in the

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83. *Id.* at 186.

84. *Id.*

85. Yoshino, *supra* note 7, at 863.

86. *Id.*

87. Recent studies suggest children raised by LG parents are likely to be open to homoerotic experiences and tend to be more tolerant of sexual minorities. Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter*, 66 AM. SOC. REV. 159 (2001).

field.”<sup>88</sup> Their critique provides valuable insights for shaping advocacy of parenting equality:

We recognize the political dangers of pointing out that recent studies indicate that a higher proportion of children with lesbigay parents are themselves apt to engage in homosexual activity. In a homophobic world, anti-gay forces deploy such results to deny parents custody of their own children and to fuel backlash movements opposed to gay rights. Nonetheless, we believe that denying this probability capitulates to heterosexist ideology and is apt to prove counterproductive in the long run. It is neither intellectually honest nor politically wise to base a claim for justice on grounds that may prove falsifiable empirically.<sup>89</sup>

Stacey and Biblarz recognize the political ramifications of their review but hint that reframing the issue of LG parenting outside of heterosexism could be a productive path. Stacey and Biblarz’s review, noting that a higher proportion of children raised by LG parents engage in homosexual activity than children raised by heterosexual parents, has not been ignored by opponents of LG parenting. On June 10, 2009, Bob Unruh published an online article titled, “‘Gay’ Family Kids 7 Times More Likely To Be Homosexual: But Report Shows Researchers Concealing Information.”<sup>90</sup> The report cited by Unruh was prepared by Trayce Hansen,<sup>91</sup> a clinical and forensic psychologist. Hansen’s review of studies by researchers she characterizes as pro-homosexual “suggest[s] that children raised by homosexual or bisexual parents are approximately 7 times more likely than the general population to develop a non-heterosexual sexual preference.”<sup>92</sup>

Assume that to some degree, courts and both opponents and advocates of LG parenting agree that LG parents are more likely than heterosexual parents to have children who engage in homoerotic behavior. The question before a judge in a custody dispute would then shift from whether a parent transmits homosexuality to his or her child through modeling to whether the possible reproduction of homosexuality is value-neutral or poses some risk of harm to the child. Today, under the cover of orientation-blindness, a judge’s opinion about the relative good or harm of possibly transmitting homosexuality is part of the best interests calculation. The issue is usually framed as whether it is in the best interests of a child for custody to be awarded to an LG parent with the

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88. *Id.* at 159.

89. *Id.* at 178.

90. Bob Unruh, “Gay” Family Kids 7 Times More Likely To Be Homosexual: But Report Shows Researchers Concealing Information, *WORLDNETDAILY*, June 8, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=100593>.

91. Trayce Hansen’s website states that she is “a licensed psychologist with a clinical and forensic practice. She received her Ph.D. from the California School of Professional Psychology, San Diego, in 1997.” About Dr. Hansen, <http://www.drtraycehansen.com/Pages/about.html> (last visited Apr. 2, 2010).

92. Trayce Hansen, *A Review and Analysis of Research Studies Which Assessed Sexual Preference of Children Raised by Homosexuals*, June 30, 2008, [http://www.drtraycehansen.com/Pages/writings\\_sexpref.html](http://www.drtraycehansen.com/Pages/writings_sexpref.html).



possible risk that the child will become homosexual or open-minded about sexual minorities. It is rarely framed as whether, if the heterosexual parent is awarded custody, it is in the best interests of a child to become heterosexual. But, if orientation-blindness were neutral, the objective would be the best interests of the child, and that standard would not be framed in terms of how one parent might affect the child's sexual orientation.

In order to nuance the discussion of status and conduct with regard to homosexuality, it is useful to consider religion and sexual orientation together. As seen in the Colorado case *In re E.L.M.C.*,<sup>93</sup> family courts often have statutory and common law authority to abridge constitutional rights to prevent harm to children. Although the courts do not treat religion and sexual orientation in exactly the same way, the comparison provides hints as to why sexual orientation and homoerotic behavior are conflated with regard to children. The *Hertzler* case,<sup>94</sup> described above, in which the judge accused one parent of proselytizing religion and one parent of proselytizing homosexuality to the children, provides a good example of the conflation of status with conduct and a court's fear of a homosexual outcome for children.

The court afforded equal weight to religious training and homosexual modeling, as though going to church and learning that homosexuality is a sin could lead the children to become members of a faith community in the same way that going to a gay pride parade and snuggling with their mother and her partner in bed could lead them to become members of the LG community. A religious person may not separate her status from her conduct; she might rather conflate her religious practices with her religious beliefs. Thus, she identifies as part of a particular religion because of her conduct, attending church every week, and not because of her status, how she was raised or her genetic makeup. It is because people have this tendency to conflate status and conduct in discussing identity that they may interpret Stacey and Biblarz's results as indicating that gay parents make gay children. Interestingly, opponents of LG rights distinguish "chosen behavior" from innate identity in the area of civil rights, but they do not conflate status and conduct when invoking comparisons with other protected groups.<sup>95</sup>

If courts cannot agree that having homoerotic experiences and identifying as gay are not the same, then when they have an LG parent arguing before them that gay parents cannot make a child gay, courts may not reconcile studies that show children of gay parents being more open to homoerotic experiences with the argument that gay parents do not make gay children. In a situation where a court responds to sexual orientation by acknowledging it only as a potential

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93. 100 P.3d 546 (Colo. App. 2004).

94. 908 P.2d 946 (Wyo. 1995).

95. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 291 (1994).

harm to the child and where there is an underlying belief that children become like their parents because of modeling, it does not make a difference if children identify as homosexual or display homoerotic behavior. The distinction is immaterial because the more important question about the relative value of a homosexual outcome for a child is never addressed.<sup>96</sup> If the court is not permitted to look at a parent's orientation unless it poses a risk of harm to the child, there is no way to articulate an argument about the positive value of a homosexual outcome for the child.

Advocacy groups play an important role in creating dialogue about children raised in LG households. The American Civil Liberties Union (ACLU) published a handbook, *Too High a Price: The Case Against Restricting Gay Parenting*.<sup>97</sup> The ACLU is a national organization and a leader in LGBT advocacy. Other national LGBT advocacy groups direct readers to the ACLU's handbook to answer questions about LG parenting.<sup>98</sup> From a litigator's standpoint, the handbook is very useful because it offers one of the most comprehensive and authoritative collections of studies about LG parenting. The handbook also contains a section on debunking popular beliefs about LG parenting and an extensive gathering of longitudinal studies of children raised by LG parents.<sup>99</sup>

Section Six of the ACLU handbook is titled, "Debunking the Myths: Arguments Against Gay Parenting and Why They're Wrong."<sup>100</sup> One argument presented is that "Being Raised by Gay Parents Will Cause Kids To Be Gay."<sup>101</sup> The ACLU updated the handbook in 2006, indicating that this issue is a persistent concern. The authors are careful to distinguish between parents causing children to be gay and children feeling freer to accept and act on same-sex attraction.<sup>102</sup> The section is designed to calm fears and argue for LG

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96. See Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 291-92 (1996) (arguing that courts' efforts to protect children from contact with homosexual adults stem from an inability to acknowledge the existence of homosexual children and fear that homosexual parents will affect children's heterosexual development); see also Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1737-41 (1993) (discussing the Foucauldian movement from act to identity).

97. LESLIE COOPER & PAUL CATES, ACLU, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* (2nd ed. 2006), available at [http://www.aclu.org/files/images/asset\\_upload\\_file480\\_27496.pdf](http://www.aclu.org/files/images/asset_upload_file480_27496.pdf).

98. The Human Rights Campaign refers readers to the ACLU handbook on their website. Human Rights Campaign, Resources & Publications, <http://www.hrc.org/issues/parenting/8395.htm> (last visited Apr. 3, 2010). The Gay and Lesbian Advocates and Defenders website has a publication entitled *Adoption Questions & Answers*, which recommends to LG parents and their advocates the ACLU's handbook as a resource for refuting "specious claims" that gay people do not make good parents. GAY & LESBIAN ADVOCATES & DEFENDERS, *ADOPTION QUESTIONS & ANSWERS* 4-5 (June 2009), available at <http://www.glad.org/uploads/docs/publications/adoption.pdf>.

99. COOPER & CATES, *supra* note 97, at 25-73, 85-91.

100. *Id.* at 85.

101. *Id.* at 88.

102. *Id.* at 88-89.

parenting in a climate that is filled with accusations of promoting a gay agenda,<sup>103</sup> perhaps making the authors of the ACLU handbook less inclined to ask questions like: So what if gay parents have gay children? Why do we think about sexual orientation so differently from other traits, characteristics, and states of being? Doesn't every parent have the right to transmit values to his or her child?

The ACLU and other major organizations like the Human Rights Campaign, Gay and Lesbian Advocates and Defenders, and the National Center for Lesbian Rights are empowered—in ways that individual LG parents are not—to develop counter-narratives about the positive values LG parents transmit to their children. Courts, attorneys, and parents often rely on advocacy groups for guidance in framing issues and depend on them to collect credible, reliable data. Rather than continuing to take a defensive position<sup>104</sup> or ignoring

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103. See generally Alliance Defense Fund, <http://www.alliancedefensefund.org> (last visited Apr. 21, 2010); Family Research Council, <http://www.frc.org> (last visited Apr. 21, 2010); *WorldNetDaily*, <http://www.wnd.com> (last visited Apr. 21, 2010).

*WorldNetDaily* is an online news source that publishes news and commentaries and maintains links to other news outlets. Articles and editorials on the site refer to same-sex intimacy as sodomy, refer to hate crime legislation for LGBTs as the "Pedophile Protection Act," and raise concerns about recruitment to homosexuality. See, e.g., *American Music Awards Become "Modern Sodom": Openly "Gay" Adam Lambert Simulates Sex Acts with Men on ABC Broadcast*, *WORLDNETDAILY*, Nov. 23, 2009, <http://www.wnd.com/?pagelid=116899>; Star Parker, *Sodom in America*, *WORLDNETDAILY*, Nov. 21, 2009, <http://www.wnd.com/index.php?pagelid=116668>; Chelsea Schilling, *Perversion 101: Kids Taught "Gay" Sex, Rape, Bestiality: High School Teacher Keeps Job After Handing Out Pornographic "Banned Book,"* *WORLDNETDAILY*, Oct. 5, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pagelid=112014>; Chelsea Schilling, *Schools Put on Notice: Mass Boycott of Harvey Milk Day: "Keep Your Kids from Being Sexually Brainwashed,"* *WORLDNETDAILY*, Oct. 17, 2009, <http://www.wnd.com/index.php?pagelid=113024>; Olivia St. John, *A Child Molester's Dream Come True*, *WORLDNETDAILY*, June 22, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pagelid=101773>; Bob Unruh, *Congress Passes "Pedophile Protection Act": Opponents Worry Over Special "Hate Crimes" Treatment for Homosexuals*, *WORLDNETDAILY*, Oct. 22, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pagelid=113788>; Bob Unruh, *Obama's "Safe Schools" Chief Praised Child-Sex Promoter: Jennings: I Was "Inspired" by NAMBLA's Harry Hay*, *WORLDNETDAILY*, Oct. 2, 2009, <http://www.wnd.com/index.php?pagelid=111792>.

The site also promotes ex-gay narratives. See, e.g., Michael Glatze, *The "Straight" Scoop—2 years later*, *WORLDNETDAILY*, July 3, 2007, <http://www.wnd.com/index.php?fa=PAGE.view&pagelid=112247> (citing an ex-gay activist who refers to homosexual desire as an "obsess[ion] with the lustful desires of a fallen body, the body that—ultimately—hates itself and hates the truth"). *WorldNetDaily* publishes content that echoes concerns voiced by the Alliance Defense Fund, mainly that as LGBT advocacy groups succeed in gaining rights, Christians lose or have their rights threatened. See Dan L. White, *Today's Culture War: A Zero Sum Game*, *WORLDNETDAILY*, Oct. 17, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pagelid=113161>.

104. The Human Rights Campaign maintains a 1999 statement on its site from the American Academy of Child and Adolescent Psychiatry: "It has long been established that a homosexual orientation is not related to psychopathology, and there is no basis on which to assume that a parental homosexual orientation will increase the likelihood of or induce a homosexual orientation in the child." Human Rights Campaign, American Academy of Child and Adolescent Psychiatry, <http://www.hrc.org/issues/parenting/1583.htm> (last visited Apr. 3, 2010). The National Center for Lesbian Rights compiles and makes available a publication entitled *Policy Statements Supporting Adoption By Gay, Lesbian, and Bisexual People*. Statement Ninety-Two, "The Child & Adolescent Psychiatry," asserts, "Contrary to popular belief, children of lesbian, gay, or transgender parents [a]re not more likely to be gay than children with heterosexual parents." National Center for Lesbian Rights, *Policy Statements Supporting Adoption By Gay, Lesbian, and Bisexual People*, available at [http://www.nclrights.org/site/DocServer/Adoption\\_Policy\\_Statements\\_200609.pdf?docID=1881](http://www.nclrights.org/site/DocServer/Adoption_Policy_Statements_200609.pdf?docID=1881).

the issue altogether,<sup>105</sup> LGBT advocacy groups are in a position to continue making progressive reforms that move towards equality.

When we consider the authority that advocacy groups like the ACLU have in framing issues, steadfastly maintaining that gay parents do not necessarily raise gay children could be harmful in the long run. LG parents might feel a sense of shame and a desire to disavow their gay children's sexual orientation for fear that it could hurt LGBT advocacy goals.<sup>106</sup> Focusing on actual orientation-neutrality would help LG parents combat the combination of orientation-blindness and mimetic reproduction. By transitioning away from defensive strategies, especially the argument that LG parents do not make their children gay, advocacy groups can challenge courts' bias against potential homosexual outcomes in children.

Other media outlets also help frame the question of whether gay parents reproduce gay children. A 2009 human interest piece by ABC News reported that children raised by lesbian and gay parents are thriving.<sup>107</sup> The children featured in the article were born to or adopted by same-sex parents, not parents who came out after previous heterosexual relationships.<sup>108</sup> Despite the positive tone of the interview and without any indication in the article that the question was posed or relevant, the interviewer quoted Dr. Nanette Gartrell, an associate professor of psychiatry and the principal investigator of a twenty-three year study of lesbian families, on findings about homosexual outcomes for children. Dr. Gartrell made it clear that gay parents do not make gay children by stating, "[m]ost offspring of same-sex parents are heterosexual as adults."<sup>109</sup>

The story in this piece was about children either born to or adopted into lesbian and gay households. The need to declare that children raised by LG parents would still have heterosexual outcomes speaks volumes about LG parents' and their advocates' lack of control over how the issue is framed. It seems absurd for heterosexual couples to declare that they will not model heterosexuality for their children or that studies show that their children are no more likely to be heterosexual than children raised by any other group. The interviewer's inclusion of Dr. Gartrell's assurances provides insight into how sexual-orientation-based identity groups are not treated like other identity

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105. The National Gay and Lesbian Task Force website fails to cite the concern that gay parents might raise gay children on their page entitled "Parenting & Family: Responses to the Most Frequent Objections." The Task Force, Parenting & Family: Responses to the Most Frequent Objections, [http://www.thetaskforce.org/issues/parenting\\_and\\_family/questions](http://www.thetaskforce.org/issues/parenting_and_family/questions) (last visited Apr. 3, 2010).

106. ABIGAIL GARNER, FAMILIES LIKE MINE: CHILDREN OF GAY PARENTS TELL IT LIKE IT IS 168-92 (2004) (interviewing second-generation LGBT children about their experiences and finding that they expressed feelings of alienation because they were not heterosexual).

107. Susan Donaldson James, "Gayby Boom" Fueled by Same-Sex Parents: Post-1980s Children of Gay Parents Thrive in School, More Open Society, ABCNEWS.COM, Aug. 3, 2009, <http://abcnews.go.com/print?id=8232392>.

108. *Id.*

109. *Id.*

groups whose open desire to reproduce their culture, traditions, values, and morals seems natural and worthy of encouragement.

Given the history of homophobia and concerns about recruitment, there is likely to be great investment in moving away from the emphasis on mimetic reproduction of sexual orientation. But LG parents, their advocates, and courts should not wholly embrace the “nature” side of the “nature” versus “nurture” debate by asserting that the “nurture” of LG parents has no effect on children. Rather, LG parents should have the space to argue that custody will enable them to pass on experiences, traditions, morals, values, and a worldview that is shaped by their identity as lesbian or gay persons. This is not possible if courts fail to apply the nexus test neutrally and continue to prefer heterosexual outcomes to homosexual outcomes in children.

### *1. Nice Genes*

In the last fifteen years, the belief that direct parent-child modeling and imitation constitute the primary source for children’s development has been questioned but not overturned. Judith Harris published an article in 1994 in the *Psychological Review*, proposing that it is a child’s peers and community outside the home rather than his or her parents that influence the child’s cultural identity.<sup>110</sup> Harris’s work was groundbreaking in demonstrating that parents are not endowed with the power or responsibility of being the sole source of transmission. Harris’s work ran counter to prevailing beliefs about parenting, which are described by Malcolm Gladwell:

“Have you [parents] ever thought of yourself as a mirror?” Dorothy Corkille Briggs asks in her pop-psychology handbook “Your Child’s Self-Esteem.” “You are one—a psychological mirror your child uses to build his identity. And his whole life is affected by the conclusions he draws.” And . . . Barbara Chernofsky and Diane Gage, in “Change Your Child’s Behavior by Changing Yours,” on how children relate to their parents: “Like living video cameras, children record what they observe.”<sup>111</sup>

In 2000, shortly after Harris’s article was published, the National Institute of Child Health and Human Development and the Robert Wood Johnson Foundation cosponsored a conference at which experts in fields such as psychology, behavioral genetics, and developmental psychology gathered to review years of research to “figure out when, where and how parenting matters.”<sup>112</sup> Dr. Sharon Ramey, a coeditor of the book produced by the

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110. Judith Rich Harris, *Where Is the Child’s Environment? A Group Socialization Theory of Development*, 102 *PSYCHOL. REV.* 458 (1995).

111. Malcolm Gladwell, *Do Parents Matter?*, *THE NEW YORKER*, Aug. 17, 1998, at 63.

112. Beth Azar, *How Do Parents Matter? Let Us Count the Ways*, *MONITOR ON PSYCHOL.*, July-Aug. 2000, at 62, available at <http://www.apa.org/monitor/julaug00/parents.html>.

conference,<sup>113</sup> dismissed the idea that parents could mold children into something they wanted their children to be. The experts agreed that parents still mattered, but not in a direct “parent-to-child influence” model so much as in an “interactive process[] whereby parents and children react to each other and influence each other.”<sup>114</sup>

In 2002, Harvard Professor Steven Pinker wrote *The Blank Slate*,<sup>115</sup> a book that proposed that humans have an innate pattern of thinking, being born pre-loaded with a personality. This theory challenged the perception that parents’ behavior plays a singular role in forming their children’s natures. Pinker challenged the belief that children are blank slates onto which identity is ascribed by considering heritability in theorizing how children’s identities are formed.

Pinker commented in 2006 on the pervasiveness of the popular belief in imitation.<sup>116</sup> He cited Judith Harris’s work and claimed that “most studies of the effects of parenting on which the experts base their advice are useless. . . . [They] don’t control for heritability. They measure some correlation between what parents do and how their kids turn out, they assume that correlation implies causation, attributing the outcome to the parents.”<sup>117</sup> He posited that if one were to “redo the studies [of parental influence on children] with the proper genetic controls, by studying twins or adoptees,”<sup>118</sup> the results would show:

[T]wo adoptive siblings growing up in the same home are no more similar than two people plucked from the population at random. What all this suggests is that children are shaped not by their parents, but in part—but only in part—by their genes; in part by their culture . . . .<sup>119</sup>

Yet this account of imitation that includes both genes and environment does not have the same traction in courtrooms and popular culture as direct parent-child transmission does.

Advocates of purely genetic accounts of children’s development would find that the language in *Conkel v. Conkel*<sup>120</sup> represents progress for parenting equality. The appellate court, affirming overnight visitation for the gay father, took “judicial notice that . . . there is substantial consensus among experts that being raised by a homosexual parent does not increase the likelihood that a

113. PARENTING AND THE CHILD’S WORLD: INFLUENCES ON ACADEMIC, INTELLECTUAL, AND SOCIAL-EMOTIONAL DEVELOPMENT (John G. Borkowski, Sharon Landesman Ramey & Marie Bristol-Power eds., 2009) (a book resulting from the 2000 conference).

114. Azar, *supra* note 112 (quoting Professor Eleanor Maccoby, Stanford University).

115. STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (2002).

116. Steven Pinker, *The Blank Slate*, GEN. PSYCHOLOGIST, Spring 2006, at 1, *available at* [http://pinker.wjh.harvard.edu/articles/papers/The\\_Blank\\_Slate\\_General\\_Psychologist.pdf](http://pinker.wjh.harvard.edu/articles/papers/The_Blank_Slate_General_Psychologist.pdf).

117. *Id.* at 6.

118. *Id.* at 7.

119. *Id.*

120. 509 N.E.2d 983 (Ohio Ct. App. 1987).

child will become homosexual.”<sup>121</sup> This seems like the type of result that should lead to greater equality in custody and visitation decisions.

Still, relying on a genetics-only account of the etiology of homosexuality by arguing that parents have little or nothing to do with how children develop<sup>122</sup> runs counter to deeply ingrained beliefs, especially the popularly accepted and culturally valued assumption of mimetic reproduction. If courts and LG parents accepted that genetics significantly influence children’s outcomes, then sexual orientation, identity, and culture would stand out as being so entirely unlike other things transmitted from parent to child (such as religious practice, heritage, political ideology, and cultural identity) that arguments for parenting equality would risk being seen as part of a political agenda rather than as defenses of LG parents’ right to pass down traditions, values, and culture to their children.

Because no one can accurately know how and what in a child’s genetic makeup and environment affect that child’s development, mimetic reproduction is a valuable, useful tool for controlling for environment. Courts should not choose genetics over mimetic reproduction as a way to correct for past decisions that were based on the fear that children would become homosexual via parental modeling. Carving out an exception for the etiology of homosexuality in contrast to all other types of parent-child transmissions closes off the possibility that positive messaging flows from LG parents to children. Courts can acknowledge that genetics play a part in children’s development while still leaving open the possibility that parents have the ability and the right to transmit culture, values, and morals to their children.

Earlier, I discussed advances in developmental psychology. Steven Pinker, one of the main proponents of doing away with direct parent-child modeling narratives, does not argue that genetics obviate the need for good parenting skills or that parents do not have a moral obligation to be kind, nourishing parents.<sup>123</sup> He advocates decoupling the causal relationship between parental behaviors and children’s development.<sup>124</sup> Courts are in the difficult position of figuring out what custodial conditions ensure the child’s physical safety and overall well-being when the only evidence available to make that decision is how parties appear in court, stereotypes, and past records. Families cannot always afford psychological and other third-party evaluations that may be expensive, time consuming, and hard on children. The inability to know with any certainty how genetic and environmental factors will play out in a child’s life is the reason courts should not abandon mimetic reproduction. This view takes into account the reality that not all heterosexual parents deserve custody,

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121. *Id.* at 986.

122. PINKER, *supra* note 115, at 384-85.

123. *Id.* at 399.

124. *Id.* at 381-92.

not all homosexual parents are paragons, and vice versa. Homosexuality should not be a factor that is weighted more heavily than other considerations, just as religion and culture should not receive preference if they alienate children from a parent.

Courts should not assume that environment alone can make or prevent a child from becoming homosexual—but neither should courts assume that parents transmit nothing; parents transmit values, heritage, and cultural identity. It would be a mistake to believe that children’s sexual orientation is latent until an environmental trigger, such as an LG parent or LG friend, sets it off. This belief treads too close to the idea that homosexuality is a product of child predation and trauma. This is bad for children because it relies on a stereotype of LG parents as predatory,<sup>125</sup> is potentially alienating, and creates mistrust between the parent and the child. A better way for family courts to process sexual orientation as a factor in child custody disputes is to treat homosexual parents like heterosexual parents and impartially value mimetic reproduction. Courts must do more than pay lip service to orientation-blind nexus tests. Imagine if heterosexual parents were expected to protect their children from becoming heterosexual—or risk losing custody—by constantly self-monitoring the expression of their identities, censoring their public displays of affection, and cutting off their political affiliations. Ignoring or purporting to ignore a parent’s sexual orientation unless there is evidence of harm to the child means that any dialogue about a potential homosexual outcome manifests itself as concern about the LG parent’s behavior. This concern animates court opinions so that an LG parent’s friendships, displays of affection to a partner or spouse, political affiliations, and support networks become fraught with peril.

## 2. *Taking Parents as They Are*

Rather than relying solely on greater investments of time and resources in conducting studies to convince courts that LG parents do or do not make their children gay, family courts should adopt a middle-ground approach that is more concerned with parents as they are and how they live. Parents and courts should not expect to resolve the ongoing debate about the etiology of homosexuality during a visitation or custody dispute. Rather, they should be concerned with the best interests of the child. If courts implemented a middle-ground approach when considering homosexuality, then orientation-blindness would be less likely to mask bias based on the fear that LG parents make their children gay.

Professor Janet Halley made a case in the early 1990s to pro-gay advocates, proposing that they fight for equal protection from the “middle

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125. See Rosky, *supra* note 75, at 286.



ground.” She urged them to demand that lesbian and gay people be taken as they are instead of investing in arguments about the etiology of homosexuality.<sup>126</sup> Family courts should take parents as they find them, rather than configuring their sexual orientations as predictors of their children’s sexuality.

There has been a great deal of money and time invested in studies about the effects of LG parenting, including whether LG parenting affects children’s gender identity<sup>127</sup> or sexual orientation.<sup>128</sup> There are a number of studies about the etiology of homosexuality<sup>129</sup> and the effects of lesbian and gay parenting,<sup>130</sup> but there is still no consensus regarding either issue in family law.<sup>131</sup>

Family court judges are free to determine how much weight, if any, they give to expert opinions and studies. This broad discretion has been instrumental in adding nuance to the story of how homosexuality comes into being. Had there not been a major investment in studies about LG parenting, progress for LG parents would likely have slowed rather than moving towards orientation-blindness. The idea of orientation-blindness is appealing because it is a formal step towards parenting equality and appears to solve the problem of homosexual bias.

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126. Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994) (proposing that LG advocacy “should not focus on positive claims of biological causation, or on pure constructivist claims that homosexuality is a historically contingent artifact, but should repair to a common middle ground. . . . [N]o matter what causes it, [sexual orientation] acquires social and political meaning through the material and symbolic activities of living people.”).

127. See, e.g., Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children?: Findings from a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOL. 3 (1996); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in HOMOSEXUALITY AND THE FAMILY 123 (Frederick W. Bozett ed., 1989); Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203 (1995); Jennifer L. Wainwright, Stephen T. Russell & Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886 (2004).

128. See, e.g., Anne Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349 (1997); Susan Golombok, Ann Spencer & Michael Rutter, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. 551 (1983); Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20 (2003); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 167 (1986); Beverly Hoefter, *Children’s Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981); Mary E. Hotvedt & Jane Barclay Mandel, *Children of Lesbian Mothers*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 275-85 (William Paul et al. eds., 1982); Martha Kirkpatrick, Catherine Smith & Ron Roy, *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545 (1981); Fiona MacCullum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 407 (2004).

129. RICHMAN, *supra* note 6, at 47-48.

130. See COOPER & CATES, *supra* note 97, at 38-39.

131. RICHMAN, *supra* note 6, at 48.

But the hypothetical case at the beginning of this Article shows that there is another fault line in orientation-blindness. The hypothetical illustrates that orientation-blindness, as applied by the courts, is not the same as equality. By preventing the lesbian mother from presenting evidence about her sexual orientation, the court revealed its inability to imagine that an LG parent's sexual orientation could possibly benefit the child.

That courts might implement Halley's vision of the middle-ground is an aspiration; however, transmission between an LG parent and child is not likely to be thought of in the same way as transmission of cultural identity, religion, or heritage in the near future. For that to happen, there would have to be some consensus as to the etiology of homosexuality or a more general acceptance of homosexuality without regard to etiology.

Kenji Yoshino posits that social forces incentivize outsiders to downplay or hide characteristics or behaviors associated with outsider identity, in this case, sexual orientation. He refers to this behavior as "covering."<sup>132</sup> Covering is insidious because it entails acknowledging outsider identity, often tolerating or accepting outsiders but simultaneously requiring them to assimilate to prevailing norms. Yoshino proposes that if courts and the state in the context of child custody and parental rights were to regard a questioning child's sexual orientation with complete indifference, gay adults and gay children would achieve equality with heterosexual adults and children.<sup>133</sup> Insofar as courts could truly become indifferent to sexual orientation of both parent and child, I agree with Yoshino's solution. However, I am doubtful that courts could become truly indifferent to sexual orientation or its etiology without first explicitly acknowledging that bias can be hidden by orientation-blindness.

If LG parents are to have a level playing field, they and their advocates need to recognize that the prevailing system in court is mimetic reproduction and need to begin harnessing the equalizing power of working within it. Arguing that only genetics are responsible for homosexuality leaves LG parents working against the current of mimetic reproduction; because of the general acceptance of modeling and imitation, parents who resist these concepts are thought to deviate from parenting norms. Working within mimetic reproduction entails a radical reimagining of litigation strategies so that courts are not making decisions that are biased against possible homosexual outcomes. By transforming defensive strategies into a positive transmission story, LG parents and their advocates ultimately can align themselves with the best interests of the child without any hope, expectation, or imputation of either heterosexuality or homosexuality.

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132. Yoshino, *supra* note 7.

133. *Id.* at 863.

### III. POSSIBILITIES

#### A. *The Stakes*

To combat the anti-gay bias that remains even in orientation-blind decisions, advocates for parenting equality should develop and implement counter-narratives. Counter-narratives matter because they make the best interests standard more useful by achieving parity for the disputing parties before deciding with whom the child should live.

The danger is that courts continue to rely on stereotypes of LG parents as reckless or dangerously promiscuous while still claiming that their custody ruling is orientation-neutral. An example of a better rule is found in *Boswell v. Boswell*,<sup>134</sup> in which a gay father sought to have the court remove the visitation restrictions placed on him by the trial court. The straight mother did not request restrictions and stated that she wanted the father to have visits with his son and daughter. The appellate court in *Boswell* indicated that its consideration of the father's behavior would have been the same had he been heterosexual.<sup>135</sup> The court went further in laying out specific guidelines for how trial courts should treat evidence of a parent's risk of harm, stating that "a factual finding of harm to the child requires that the court focus on evidence-based factors and not on stereotypical presumptions of future harm."<sup>136</sup> The trial court found no conflict between the best interests standard and the requirement that there be evidence to justify restrictions on visitation, which emphasizes that lower courts must review evidence rather than presuming harm because of the nature of the parent's relationship. The appellate court called for the nexus test to be orientation-neutral and then gave this meaning and force by instructing lower courts to rely on evidence rather than stereotypes.

Part of the value of counter-narratives is their ability to fill in the space between evidence and stereotypes about LG parenting. While a judge may believe that he or she is neutrally considering evidence without reference to stereotypes, the interpretation of such evidence may be informed by negative stereotypes about LG parenting that persist because there has not been a robust counter-narrative. Counter-narratives can also help state courts that do not yet have a policy of orientation-blindness to build better, more nuanced rules.

Custody cases before and during the 1980s often ended with trial courts making negative statements about homosexuality and limiting visitation or changing custody as a matter of course to favor the heterosexual parent.<sup>137</sup>

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134. 721 A.2d 662, 665 (Md. 1998).

135. *Id.* at 677 n.5.

136. *Id.* at 678.

137. *See, e.g.,* Constant A. v. Paul C.A., 496 A.2d 1, 3 (Pa. Super. Ct. 1985) (referencing the lower court's characterization of the mother's homosexuality as a "moral deficiency"); Bennett v. O'Rourke,

Currently, LG parenting cases in some jurisdictions reflect the view that homosexuality is fixed, inborn, and non-transmittable by modeling.<sup>138</sup> Nonetheless, those precedents do not bind judges from other jurisdictions. Some adhere closely to the precedent in their own jurisdictions, while others, where there is no clear precedent, are persuaded by secondary authorities with social science evidence. The same flexible quality of the best interests standard that makes it possible to have LG-affirmative rulings also makes it possible to have LG-negative rulings that fall well within the bounds of judicial discretion.<sup>139</sup>

This flexibility in court rulings means that there is no way to predict outcomes, and there is no bright line rule to assist in determining which actions are likely to result in outcomes favorable to LG parents. The language in court decisions about LG parents has become noticeably less negative, but there has been little in the way of positive language, even in more recent cases, to counteract the history of negative characterizations of homosexuality.

An LG parent might fare worse if the court adhered to orientation-blind precedent but still relied on negative stereotypes about homosexuality from *Bowers*-era case law. Instead of beginning at the same place in the race, LG parents would begin several yards behind the starting line, still trying to prove that their sexual orientation will not harm their children. In this way, the best interests standard can be manipulated by a discourse about the politics of sexual orientation.

There is always the risk that in child custody disputes, an LG parent may be reduced to his or her sexual orientation without the court considering parental fitness wholly independent of sexuality. There is also the chance that LG parents who begin reframing the debate with counter-narratives may lose custody of their children. Asking an LG parent to risk an adverse custody determination for the sake of the larger gay rights movement may seem unreasonable. Nonetheless, LG parents are already at risk of losing custody, especially in courts where conduct and status are not viewed as entirely separate. An LG parent's behavior towards a partner is not usually seen as neutral conduct but is tied to the LG parent's identity—a kiss between partners is not just a kiss, but a gay kiss or a kiss between two women. For example,

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1985 WL 3464, at \*11 (Tenn. Ct. App. Nov. 5, 1985) (likening homosexuality to illegal drug use in that both should be kept from the child).

138. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (finding evidence that the child will not become homosexual because the mother is a lesbian persuasive); *Jacoby v. Jacoby*, 763 So.2d 410, 413 (Fla. Dist. Ct. App. 2000) (disregarding an expert who testified that the children would be socially ostracized because their mother was homosexual and would make the children develop homosexual tendencies); *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (taking judicial notice of a "substantial consensus among experts that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual").

139. See RICHMAN, *supra* note 6, at 3 (explaining that "[f]amily law . . . is notorious as one of the most indeterminate and discretionary areas of American law" and that "the best interest of the child" is a problematic standard because "no two people have the same definition" of it).

courts that adopt a *Hertzler* stance, comparing the transmission of religion with the transmission of sexual orientation,<sup>140</sup> might penalize an LG parent for acting “too gay” in front of his or her child.

Whether LG parents can realistically expect to prevail by using counter-narratives is still unknown; granted, it is a risky litigation strategy. There is no responsible way to make a prescriptive argument for the immediate implementation of counter-narratives, for there is much variation across jurisdictions and each family’s situation is unique. Therefore, rather than make overly general recommendations for practitioners or LG families to be implemented today, this Article seeks first to interrogate whether it is in the best interests of children and family cohesion for LG parents to continue to perform asexual homosexual identities. Another objective is to ask courts to be cognizant of the negative interaction between orientation-blindness and mimetic reproduction in order to hopefully create a safer space in which counter-narrative strategies might meet with future success.

The subtlety of bias against LG parents and the lack of counter-narratives to combat attitudes and perceptions of LG parenting means that LG parents must tread carefully. What one court calls the “indoctrination” of homosexuality<sup>141</sup> might be accepted in another court as the harmless or benevolent passing on of identity and culture. An example of the latter shows that American attitudes about homosexuality change<sup>142</sup> and that courts have begun to decouple parents’ sexuality from their parenting skills. Recently, the Georgia Supreme Court overturned a child custody order prohibiting the children from having contact with the gay father’s partner and friends.<sup>143</sup> The

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140. *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995). For discussion of *Herzler*, see *supra* text accompanying notes 17-32.

141. *Id.* at 949 (“[T]he record is equally replete with Pamela’s [lesbian mother] intensive and unrelenting efforts to immerse the children in her alternative lifestyle, seemingly to the point of indoctrination.”).

142. More people polled in America now believe that orientation cannot be changed. See *Poll Majority: Gays’ Orientation Can’t Change*, CNN, June 27, 2007, <http://edition.cnn.com/2007/US/06/27/poll.gay> (showing for the first time on CNN that a majority of Americans believed that lesbians and gays “could not change their sexual orientation even if they wanted to”). In addition, more conservatives support gay marriage currently than in 2004. See Gary Langer, *Changing Views on Gay Marriage, Gun Control, Immigration and Legalizing Marijuana*, ABC NEWS, Apr. 30, 2009, <http://abcnews.go.com/PollingUnit/Obama100days/story?id=7459488&page=1> (reporting that “in 2004, just 32 percent of Americans favored gay marriage, with 62 percent opposed. Now 49 percent support it versus 46 percent opposed—the first time in ABC/Post polls that supporters have outnumbered opponents” and that “[w]hile conservatives are least apt to favor gay marriage, they’ve gone from 10 percent support in 2004 to 19 percent in 2006 and 30 percent now”). Even though Americans still oppose gay marriage (fifty-five percent to thirty-eight percent), more Americans support civil unions (fifty-seven percent to thirty-eight percent) and the repeal of homosexual bans in the military (fifty-six percent to thirty-seven percent). See David Cray, *National Poll: Mixed Views on Gay-Rights Issues*, ABC NEWS, Apr. 30, 2009, <http://abcnews.go.com/US/wireStory?id=7467452> (reporting on the Quinnipiac University poll of 2041 registered voters regarding their views about gay rights).

143. *Mongerson v. Mongerson*, 678 S.E.2d 891 (Ga. 2009); see also Greg Bluestein, *Kids to Meet Gay Dad’s Partner on Father’s Day*, ABC NEWS, June 20, 2009, <http://abcnews.go.com/us/wirestory?id=7888912> (discussing the *Mongerson* case).

*Mongerson* court reasoned that the exclusion of the father's partner and gay friends was contrary to the public policy goal of "encourag[ing] divorced parents to participate in the raising of their children."<sup>144</sup> The decision echoes the *Hertzler* court's concerns about parental alienation. Although it may take time and require help from national advocacy groups to reframe the impact of homosexuality on children, courts are beginning to have a more nuanced understanding of mixed-orientation families.

### *B. Counter-Narratives*

The possibilities I suggest in this Section are just that—possibilities for courts in jurisdictions that aspire to orientation-neutrality. Courts in these jurisdictions can and should begin to accept evidence introduced as counter-narratives. Especially in jurisdictions that have changed to a formally neutral standard and no longer configure homosexuality as harmful to children, there is no reason that courts cannot become open to hearing counter-narratives that highlight the positive modeling that LG parents can provide for their children. There are a lot of quantitative and qualitative data about LG parenting already available and accessible to courts and practitioners to use in building counter-narratives for LG families. This Section provides just a few of many possibilities.

LG parents could highlight the way that they model the expansion of gender roles so that their daughters might become more motivated to pursue male-dominated professions and their sons might become more responsive and nurturing parents. Additionally, LG parents could empower their children by teaching protection and navigation skills to help them thrive as part of a mixed-orientation family in a primarily heterosexual society. Regardless of the child's orientation, having an LG parent available to counterbalance homophobic sentiments and behavior is a benefit. Often the adult children of gay parents express gratitude that they had the benefit of learning compassion and tolerance for marginalized, vulnerable groups. Finally, if courts or straight parents push the idea that gay parents harm children by making them gay, LG parents could devise strategies to shift the burden to heterosexual parents to demonstrate how they intend to transmit their heterosexuality. This could remind the court that sexual orientation is not transmitted directly from parent to child in this way (or else straight parents would never have gay children) and that, in any event, the court should not favor transmission of one sexual orientation over the other.

Assuming that gender equality is valued by the parties and the court, perhaps one of the strongest arguments LG parents could make is that they will

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144. 678 S.E.2d at 895.

empower their children to resist traditional gender stereotypes. There is evidence that children of LG parents are less likely to engage in gender-conforming behavior than children of heterosexual parents. Studies show that lesbian mothers tend to raise children who behave in gender-atypical ways. Although the test sample for the study was small, Richard Green's 1986 study showed that daughters of lesbian mothers were more likely to aspire to "careers such as doctor, lawyer, engineer, and astronaut."<sup>145</sup> More recently, research by Heather Antecol and Michael D. Steinberger shows that lesbian mothers tend to both remain in the workforce after having children.<sup>146</sup> The 1989 study of gay fathers performed by Jerry J. Bigner and R. Brooke Jacobsen provided no evidence that there were differences as a whole between gay fathers and heterosexual fathers in terms of intimacy and involvement with their children, though it did find that gay fathers were more egalitarian with children, more responsive to their needs, and less physically affectionate with their partners in front of their children.<sup>147</sup>

Few parents today would argue that they want their daughters to have fewer educational or career opportunities than their male counterparts or want their sons to express their masculinity by bullying other children. However, if gender equality for the children of LG parents is framed as overly threatening to traditional gender roles (for example, as encouraging girls' openness to homoerotic sexual experiences),<sup>148</sup> this would likely be perceived by courts as a harm. Therefore, instead of focusing on the extremes of gender non-conformity, LG parents could merely explain that they will create the conditions for their children to have greater flexibility within gender norms while enjoying equality in educational and career pursuits.

Another effective counter-narrative argument is that children, regardless of whether they themselves are heterosexual or homosexual, will benefit from having an LG parent who can help navigate homosexual bias and discrimination that they may face as part of a mixed-orientation family. Provided that the LG parent in question is not suffering from internalized

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145. Stacey & Biblarz, *supra* note 87, at 168 (citing Green et al., *supra* note 128).

146. Heather Antecol & Michael D. Steinberger, Labor Supply Differences Between Married Heterosexual Women and Partnered Lesbians: A Semi-Parametric Decomposition Approach (Sept. 2009) (work in progress, on file with author).

147. Jerry J. Bigner & R. Brooke Jacobsen, *Parenting Behaviors of Homosexual and Heterosexual Fathers*, 18 J. HOMOSEXUALITY 173 (1989).

148. See, e.g., Golombok & Tasker, *supra* note 127, at 8 ("[T]hose who had grown up in a lesbian family were more likely to consider the possibility of having lesbian or gay relationships, and to actually do so." The authors conclude that lesbian parents' "accepting atmosphere" of homosexuality "may facilitate the development of a lesbian or gay sexual orientation for some individuals. But, interestingly, the opportunity to explore same-sex relationships may, for others, confirm their heterosexual identity." *Id.* at 9.); Stacey & Biblarz, *supra* note 87, at 171 (showing that daughters of lesbians are more likely to "depart from traditional gender-based norms" and to "be sexually adventurous and less chaste," including being more likely to explore lesbianism, and that for both boys and girls, "parents with greater ambiguity or fluidity of sexual orientation might transmit some of this to their children, leading to greater odds of sexual flexibility").

homophobia, confusion, or discontent about sexual orientation,<sup>149</sup> he or she can be an essential resource for children who may be confused about bias and discrimination. The pain and grief a child feels when her parents divorce should not be compounded by an inability to deflect the expressions of bias or malice that she may encounter about her parent's sexual orientation. A child may see herself as part of her parents, so any slight against one of her parents may be perceived as an attack on her. This is not to say that a heterosexual parent is unable to act as a resource to help the child navigate bias, but rather that an LG parent may be able to draw from his or her own experiences as part of a marginalized community to teach the child and protect her self-esteem.

The relative value of the protection counter-narrative depends on whether the court is able to differentiate between the expressions of anger, betrayal, and sadness that are often felt by the heterosexual parent when the spouse reveals same-sex orientation and those expressions of homophobia that are unrelated to the dissolution of the parties' relationship. If the court refuses or is unable to distinguish between the two, categorizing all expressions of shock and anger about the other parent's sexual orientation as efforts to alienate the child from the LG parent, then efforts to preserve the child's relationships with both parents will be severely compromised. Courts may recognize the vulnerable state that children are in during a divorce or custody dispute but may not always pay enough attention to the nature of comments that the parties exchange. Expressions of homosexual bias may be momentous and threatening to a child afraid of losing the stable family he has known. He could blame the homosexual parent for the dissolution of the entire family or feel isolated from the straight parent for saying unkind or untrue things about the gay parent's sexual orientation.<sup>150</sup> Homophobic statements and behavior by one parent could lead the child to conclude that being gay or lesbian is inherently bad.

Homophobia also comes from sources outside the family, and the child may be wholly unprepared for the public reaction to the new mixed-orientation family. An LG parent could provide a valuable counterbalance or serve as a debiasing agent so that the child does not simply accept homophobia from her peers and media sources, which could further alienate the child from the LG parent. Additionally, an LG parent with a strong sense of self-esteem and compassion for the pain experienced by the family during its transition could lessen any future homophobia, shame, or confusion within the family if the child turns out to be lesbian or gay. Children who are gay, questioning, or

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149. An LG parent leaving a heterosexual relationship may not be in the same mental and emotional state as an LG individual who has been out for years and is part of a supportive community. If anything, an LG parent leaving a heterosexual relationship may be especially vulnerable and uncertain about being out, making it even more imperative that the family as a whole is supported and that the parent's sexual orientation does not provide the occasion for dividing children from him or her.

150. See, e.g., GARNER, *supra* note 106, at 71 (recounting how children of gay parents experience alienation and divided loyalties when a straight parent expresses homophobia).



perceived to be homosexual may be harassed, bullied, killed, or driven to kill themselves because of the intolerance and homophobia they experience.<sup>151</sup> Having an LG parent as a positive role model for a child could be a way to bolster that child's self-esteem and prevent self-hatred. A child's potential sexual orientation should not be a factor considered by courts at the expense of a child losing a loving relationship with a parent. An LG parent who is capable of countering homophobia without denigrating heterosexuality is also a benefit to a child who is heterosexual, because in a mixed-orientation family, children who are heterosexual could feel embarrassed or worried about the way others perceive their family. An LG parent could preserve the ties of parent-child love by reassuring that child that her parent is available as a resource while she works through the transition to a mixed-orientation family.<sup>152</sup>

To demonstrate this, LG parents could provide courts with accounts of adult children of gay or lesbian parents who are grateful for the appreciation of diversity and compassion for marginalized groups that they learned from their parents. Dr. Nanette Gantrell, the principal investigator of the twenty-three year National Longitudinal Lesbian Family Study, stated, "By the time our study kids were 10 years old, they demonstrated a sophisticated understanding of diversity and tolerance, and an appreciation of the destructive effects of discrimination."<sup>153</sup> Even if courts are convinced that children's default sexual orientation is heterosexual and that homosexuality is an abnormality, there is an argument to be made that maintaining strong ties with an LG parent is a worthy objective because it could prevent the child from participating in bullying gay or lesbian children at school. Benefits also accrue to other children who come into contact with the child of an LG parent. Those children could learn to appreciate difference and to treat LG people with dignity and respect.

Given two sets of parents, one with five gay kids and the other with five straight kids, people will look at the five gay kids and think "something happened." On the other hand, people look at the five straight kids and think . . . nothing.<sup>154</sup> What sounds like an anecdote or joke contains the seeds for a robust strategy for countering residual bias about the transmission and reproduction of homosexuality. When the focus shifts away from the "something that happened" to produce the gay children, the court should be

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151. *11-Year-Old Hangs Himself After Enduring Daily Anti-Gay Bullying*, Gay, Lesbian and Straight Education Network, Apr. 9, 2009, <http://www.glsen.org/cgi-bin/iowa/all/news/record/2400.html>; Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK, July 18, 2008, at 41; The Trevor Project, *Suicidal Signs*, <http://www.thetrevorproject.org/info.aspx> (citing a 2007 study that LGBTQ teens from families who reject them are up to nine times more likely to attempt suicide than their heterosexual peers) (last visited Apr. 9, 2010); see also GARNER, *supra* note 106, at 99-102 (discussing what parents can do to prepare children for handling homophobia).

152. See, e.g., GARNER, *supra* note 106, at 54-63 (discussing coming out to children and how parents can be a better resource for their children during this process).

153. James, *supra* note 107.

154. Thanks to Cheryl I. Harris for suggesting this example of privileged transmission and burden-shifting.

asked to look at the “nothing” that happened to produce the straight children. LG parents and their advocates should ask what is being transmitted and how it is believed to be transmitted in order to reveal that invisible heterosexual transmission is the baseline from which LG parents must argue their case.

Rather than reacting defensively and working against the strictures of a heterosexist system, LG parents could shift the burden if counter-narratives fail. Instead of proving that they are a good bet for primary custodianship despite their identity, they could ask heterosexual parents to prove how they will transmit their cultural identity or ensure that the children are gender-conforming and heterosexual. If a court refuses to take seriously arguments about the positive value of transmission between an LG parent and child and still expresses concern that a child will be harmed by the modeling of an LG parent, burden-shifting may be the best way to expose a court’s failure to act neutrally while leaving a record for appeal.

#### CONCLUSION

Orientation-blindness is appealing because it is a step towards parenting equality—but it is a step and not a destination. The strides made in preserving parent-child relationships for LG parents have been many and should not be discounted. Still, LG parents, advocates, and courts should be aware that orientation-blind rulings mask continuing bias. As courts move towards real neutrality, they have the opportunity to embrace LG parents and their advocates who are working within mimetic reproduction to frame the dialogue about what LG parents have to offer their children.

LG parents may feel as deeply about passing on their stories, experiences, and insights as heterosexual parents do about passing on religion or cultural heritage. An LG parent who wants to be a part of his or her child’s life should be able to say, without fear of losing custody, “As a gay parent, I want my child to understand who I am and what my life experience has been like. I want my child to have a positive experience growing up as part of a mixed-orientation family.” If courts understood and appreciated this, they would be better equipped to determine what is in the best interests of the child and to protect the child’s relationship with both parents.

With orientation-blind rulings still positioned between negative and neutral on the spectrum, the risk of losing custody remains, and there is a strong possibility that bias will continue. Rather than continue to work in the current system, LG parents and advocacy groups should work to shape discussions outside the courtroom as well as embark upon new litigation strategies based on counter-narratives.

LG parents and advocates may be reluctant to believe that counter-narratives will work in custody disputes. Some might even argue that losing custody of a child is too great a risk and that LG parents should continue using defensive strategies as they have in the past. But the current strategy is also risky. The relationship with the child could be damaged, perhaps irreparably, because of the negative messages about homosexuality that defensive strategies inevitably send. Counter-narrative strategies also leave evidence of bias on the record for appeal while still protecting the child's interest in having undivided loyalties and in maintaining strong relationships with both parents.

As long as mimetic reproduction persists as a cultural assumption and orientation-blindness forecloses the possibility of courts accepting that LG parents have anything positive to pass on to their children because of their identity, custody decisions will continue to be tainted by the dual belief that LG parents make their children gay and that being gay is inherently negative.

