

## NOTES

### AND THEN THERE WERE NONE: THE REPEAL OF SODOMY LAWS AFTER *LAWRENCE V. TEXAS* AND ITS EFFECT ON THE CUSTODY AND VISITATION RIGHTS OF GAY AND LESBIAN PARENTS

JENNIFER NAEGER †

#### INTRODUCTION

Sodomy laws, which authorize the government to dictate what behavior is appropriate in the bedroom, have historically been extremely controversial. These laws criminalize either same-sex acts<sup>1</sup> or certain gender-neutral, non-procreative sexual conduct.<sup>2</sup> For the past third of a century, however, sodomy laws have rarely been enforced.<sup>3</sup> Instead, they were used mainly as

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† J.D. Candidate, June 2005, St. John's University School of Law; B.A., 2000 Emory University.

<sup>1</sup> See, e.g., MO. ANN. STAT. § 566.090 (West 1979) (defining "sexual misconduct" as "sexual intercourse with another person of the same sex").

<sup>2</sup> See, e.g., GA. CODE ANN. § 16-6-2 (2003) (stating that the commission of sodomy occurs "when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another"); MISS. CODE ANN. § 97-29-59 (1972) ("Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."). The Mississippi statute contains very expansive language with limited defining factors and can easily be interpreted according to a judge's moral views. It exemplifies one of the most "restrictive" sodomy laws in the country. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 51 n.9 (1988).

<sup>3</sup> Many states have admitted to never prosecuting consenting adults for sodomy engaged in privately. See, e.g., *Gryczan v. State*, 942 P.2d 112, 118 (Mont. 1997) (noting that "the statute has never been enforced against consenting adults"); *Campbell v. Sundquist*, 926 S.W.2d 250, 255 (Tenn. 1996) (stating "that there have

legal justification to discriminate against homosexuality.<sup>4</sup> Recently, in *Lawrence v. Texas*,<sup>5</sup> the Supreme Court of the United States, by a 6-3 vote,<sup>6</sup> held that sodomy laws were an unconstitutional violation of privacy and due process guarantees.<sup>7</sup> This landmark decision not only gives homosexuals the right to enter into sexual relationships in the privacy of the home “and still retain their dignity as free persons,”<sup>8</sup> but also provides them with legal entitlement to equal respect and equal treatment in civil litigation in areas where they have been disadvantaged the most<sup>9</sup>—namely employment,<sup>10</sup> housing,<sup>11</sup> and

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been [no] arrests for purely private, consensual, adult, sexual activity” under Tennessee’s sodomy law); *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994) (“[T]here is no record of even a single instance in which the sodomy statute has been prosecuted against [private consensual] conduct [between adults].”). The non-enforcement of sodomy laws, however, was later refuted by *Lawrence v. Texas*, when police arrested two adult men for engaging in consensual intimacy in the confines of their home. *Lawrence v. Texas*, 123 S. Ct. 2472, 2475–76 (2003).

<sup>4</sup> See *Lawrence*, 123 S. Ct. at 2482 (noting that having a law against homosexual conduct invites discrimination against homosexuals); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 136 (2000). Some states even repealed their general sodomy laws and enacted statutes that applied only to same-sex conduct. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 664–65 (1999).

<sup>5</sup> 123 S. Ct. 2472 (2003).

<sup>6</sup> *Id.* at 2475. Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer formed the majority. Justice O’Connor concurred in the judgment, while Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

<sup>7</sup> *Id.* at 2484.

<sup>8</sup> *Id.* at 2478. *But see* Associated Press, *N.C. Sodomy Law Still Enforced Despite Ruling on Texas Measure*, Aug. 26, 2003 (noting that officers in Raleigh, North Carolina will continue to charge both homosexuals and heterosexuals with sodomy if the activity occurs in public), at <http://lgrl.sitestreet.com/news/article.asp?id=379> (last visited Mar. 2, 2004); Laurence Hammack, *Sodomy Ruling Might Not Alter Much in Virginia*, THE ROANOKE TIMES, July 6, 2003 (pointing out that the *Lawrence* decision does not repeal sodomy laws that cover forced sodomy or sodomy in public, regardless of the actor’s sexual orientation), available at <http://www.sodomylaws.org/usa/virginia/vanews110.htm> (last visited Feb. 10, 2004).

<sup>9</sup> See *Lawrence*, 123 S. Ct. at 2482 (noting that protected conduct will lead to “[e]quality of treatment and the due process right to demand respect”).

<sup>10</sup> See, e.g., *DeSantis v. Pacific Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (upholding denial of the job of a telephone operator to a homosexual); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971) (librarian); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (teacher); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (same); *Childers v. Dallas Police Dep’t*, 513 F. Supp. 134 (N.D. Tex. 1981) (police officer), *aff’d*, 669 F.2d 732 (5th Cir. 1982).

<sup>11</sup> See, e.g., *Hubert v. Williams*, 184 Cal. Rptr. 161 (Cal. App. Dep’t Super. Ct. 1982).

parenthood<sup>12</sup>—and puts homosexuals in a better position in court to fight for equal treatment in the military.<sup>13</sup>

This Note will analyze how the *Lawrence* decision and the repeal of sodomy laws will affect one particular area of civil litigation—child custody disputes involving gay and lesbian parents. This Note focuses entirely on natural parents. Cases between a parent and a non-parent, termination of parental rights, adoption, and foster parents are beyond the scope of this piece. Part I addresses the origin of sodomy through the Court's decision in *Bowers v. Hardwick*,<sup>14</sup> which called attention to homosexual discrimination, and the spin-off effects of the decision. Part II discusses the facts and holding of *Lawrence v. Texas* and the grounds on which the Court came to its ruling. Part III provides background information on how family courts resolve child custody disputes and the rationale employed to justify the denial of custody or restriction of visitation rights of gay and lesbian parents. Finally, Part IV analyzes how the *Lawrence* decision and the repeal of sodomy laws will change this custody discrimination.

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<sup>12</sup> See, e.g., *L. v. D.*, 630 S.W.2d 240 (Mo. Ct. App. 1982) (reasoning that, because an intimate same-sex relationship is illegal, a parent involved in such a relationship is unsuitable for child custody); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974) (restricting visitation), *aff'd*, 362 A.2d 54 (1976); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981), *overruled in part by* *Damron v. Damron*, 670 N.W.2d 871 (N.D. 2003).

<sup>13</sup> See, e.g., *Rich v. Sec'y of the Army*, 735 F.2d 1220 (10th Cir. 1984) (holding that a serviceman's discharge did not violate his substantive due process rights, because the government's interests in preventing armed servicemen from engaging in homosexual conduct outweighed any privacy interests); see also Erik Stetson, *Military Matters: Don't Ask, Don't Tell: Will it Fall?*, SOUNDINGS NEWS, July 2, 2003 (noting that the sodomy laws have helped to justify the military's homosexual ban), available at [http://www.soundingsnews.com/soundings\\_arc\\_pages/07.02.03.html#arc07](http://www.soundingsnews.com/soundings_arc_pages/07.02.03.html#arc07) (last visited Mar. 2, 2004). The repeal of sodomy laws will not automatically change the military's policy on homosexuality, because it has "broad discretion to promulgate regulations regarding eligibility for military service." *Rich*, 735 F.2d at 1224 n.1.

<sup>14</sup> 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

I. HISTORICAL EVOLUTION OF SODOMY LAWS LEADING UP TO  
*LAWRENCE*

A. *The Development and Status of Sodomy Laws Before Bowers*

Delineating the ebb and flow of sodomy laws throughout history is an elaborate task beyond the scope of this Note,<sup>15</sup> but it is important to identify a few notable ripples in order to understand the state of the law when the Supreme Court came face to face with *Bowers*. The aversion to sodomy is so deeply rooted that it is necessary to trace its origin back to biblical times. The term “sodomy” comes from the biblical city of Sodom, which God destroyed because of its corrupt and immoral customs.<sup>16</sup> During the Middle Ages, sodomy was considered a religious offense regulated by ecclesiastical courts.<sup>17</sup> The crime consisted of “a range of nonmarital, nonprocreative sexual practices. Nonprocreation was the central offense and the core of the crime.”<sup>18</sup>

The influence of Christianity made sodomy a secular crime.<sup>19</sup> As the Colonial period ended in the eighteenth century, the United States came into existence and adopted, along with the rest of the English common law, the offense of sodomy.<sup>20</sup> These laws criminalized non-procreative, heterosexual intimacy—not homosexual conduct in particular.<sup>21</sup> As the

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<sup>15</sup> See generally RICHARD A. POSNER, *SEX AND REASON* (1992) (giving a detailed discussion on the history of regulation of sexuality).

<sup>16</sup> *Genesis* 13; see Pauline G. Feist, *State v. Baxley: A Disappointing Louisiana Supreme Court Decision*, 21 S.U. L. REV. 129, 132 (1994).

<sup>17</sup> Feist, *supra* note 16, at 133. Sodomy was so severe that those who were found guilty received a merciless punishment, such as “burning at the stake, hanging, drowning, or being buried alive.” *Id.*

<sup>18</sup> Nan Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 533 (1992) (citing JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 30 (1988)). Because reproduction was the only permissible reason to engage in sexual activity, any intimate conduct that would not result in procreation was forbidden, including “masturbation . . . contraceptive intercourse and possibly even sex with one's infertile spouse.” POSNER, *supra* note 15, at 46.

<sup>19</sup> WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY: 1760-1830*, 39 (1975) (stating that colonial law was in effect religious law, and “all crime was . . . synonymous with sin”).

<sup>20</sup> Feist, *supra* note 16, at 133 (noting that the restriction against sodomy appeared in America during the formation of the states).

<sup>21</sup> JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 4 (1988).

nineteenth century unfolded, almost every state had adopted laws prohibiting sodomy.<sup>22</sup> Society's focus, however, gradually shifted away from governmental control and left the regulation of private, sexual conduct "largely to the family."<sup>23</sup>

Although sodomy laws remained on the books in most states, the government stayed at arms length with respect to their regulation.<sup>24</sup> In 1955, the American Law Institute (ALI) transformed the practice of non-enforcement into an official acknowledgement when it decided that the Model Penal Code would not include sodomy laws.<sup>25</sup> The ALI started a trend of decriminalization<sup>26</sup> that began in 1961 with the state of Illinois.<sup>27</sup> When the *Bowers* case was brought before the Supreme Court in 1986, twenty-six state legislatures had abolished their sodomy laws, either by legislative repeal or judicial intervention.<sup>28</sup>

The striking down of sodomy laws was consistent with the open-minded attitudes of popular culture, which favored a more liberated outlook on sexual behavior that diverged from the strict principles of the past.<sup>29</sup> This sexual freedom took the focus

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<sup>22</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986) (listing sodomy statutes in effect in 1868 for thirty-two of the thirty-seven States in the Union), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2427 (2003).

<sup>23</sup> D'EMILIO & FREEDMAN, *supra* note 21, at 66–67 (noting that the government became familiar with the concept of separation of church and state and doctors, as opposed to clergy, monitored sexuality).

<sup>24</sup> See RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 66 (1996) ("Prosecutions for sodomy are today almost entirely limited either to sexual conduct in a public place . . . or sexual conduct involving force or lack of consent, where a sexual assault charge would be difficult to prove."); William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1015 (1997). There were no reported convictions for private, consensual sodomy in the nineteenth century before 1880. *Id.*; see *supra* note 3. The lack of *reported* convictions, however, does not necessarily prove there were no convictions or guilty pleas.

<sup>25</sup> MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962).

<sup>26</sup> See Hunter, *supra* note 18, at 538–39 (illustrating the trend of compliance with the Model Penal Code).

<sup>27</sup> Eskridge, Jr., *supra* note 4, at 662.

<sup>28</sup> *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Before *Bowers*, constitutional challenges to sodomy laws were extremely uncommon. See, e.g., *Doe v. Commonwealth's Attorney of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); *Kelly v. State*, 412 A.2d 1274 (Md. Ct. Spec. App. 1980), *aff'd sub nom.*, *Neville v. State*, 430 A.2d 570 (Md. 1981).

<sup>29</sup> See D'EMILIO & FREEDMAN, *supra* note 21, at 300 (noting that much of the population practiced a substantial portion of the non-reproductive sex acts prohibited by sodomy laws).

off of heterosexual intimacy, but because prejudice against homosexuals continued to exist and the gay rights movement made homosexual culture more visible,<sup>30</sup> the new outlook on sexuality indirectly strengthened the link between sodomy laws and homosexuals. Concerned legislatures reacted by amending the laws to apply only to same-sex intimacy and interpreted gender-neutral statutes as if they applied solely to gays and lesbians.<sup>31</sup> The Supreme Court's decision in *Bowers v. Hardwick* emphasized the negative sentiment toward homosexuality<sup>32</sup> and illustrated just how sodomy laws served as a means of legal discrimination.<sup>33</sup>

### B. *Bowers v. Hardwick: A Brief Synopsis*

Although *Bowers* was not the first constitutional challenge to sodomy laws to reach the Supreme Court,<sup>34</sup> it did create the most fervent backlash from gay rights activists, and with good reason.<sup>35</sup> In August 1982, an Atlanta police officer arrived at

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<sup>30</sup> American Civil Liberties Union, *Why Sodomy Laws Matter* (commenting on why sodomy laws were aimed at gay people in the 1970s), at <http://www.aclu.org/getequal/whymatter.html> (last visited Mar. 3, 2004).

<sup>31</sup> *Id.* Kansas, Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas rewrote their sodomy statutes to criminalize only same-sex intimacy. Similarly, Maryland and Oklahoma courts decided not to apply sodomy laws to private heterosexual conduct, "leaving what amounted to same-sex only laws in effect." *Id.* Other states applied sodomy laws as if they only targeted gay people, though in reality, they were gender-neutral. *Id.*; see also MOHR, *supra* note 2, at 51 n.9 (discussing that if states "liberalize" heterosexual couples from criminalization but not homosexuals, such statutes "should raise serious questions of the laws' validity under rights to equal protection"). Because of this inequality, some states ignored their sodomy statutes altogether. See, e.g., *In re R.E.W.*, 471 S.E.2d 6 (Ga. Ct. App. 1996) (disregarding the state sodomy statute when awarding visitation rights to the gay father, who admitted to engaging in illegal sex acts).

<sup>32</sup> See *Bowers*, 478 U.S. at 196 (noting that the belief that "homosexual sodomy is immoral and unacceptable" would provide a rational basis for Georgia to implement its sodomy statute).

<sup>33</sup> Hunter, *supra* note 18, at 538–39; see *supra* notes 10–13; see also D'EMILIO & FREEDMAN, *supra* note 21, at 345–54 (explaining the sexual politics of social conservatives); American Civil Liberties Union, *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision* (noting that the Supreme Court's ruling in *Bowers* was an example of how a sodomy statute that regulates the sexual intimacy of all couples can be twisted to apply only to homosexual conduct), at <http://www.aclu.org/getequal/gettingrid.html> (last visited Mar. 2, 2004) [hereinafter *Getting Rid*].

<sup>34</sup> See *Doe v. Commonwealth's Attorney of Richmond*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

<sup>35</sup> See *infra* notes 44–49 and accompanying text.

Michael Hardwick's house "to confront him with an unpaid ticket for public drunkenness" and his subsequent failure to appear in court.<sup>36</sup> A half-asleep houseguest responded to the officer's knock and directed him to Hardwick's bedroom.<sup>37</sup> Through a partially open door, the officer either witnessed or heard Hardwick and his companion engaging in consensual sex acts.<sup>38</sup> The officer barged into the bedroom and arrested both men for violating Georgia's sodomy law.<sup>39</sup> Hardwick challenged the constitutionality of the statute, claiming that it violated his due process right to privacy.<sup>40</sup> He based his argument on a line of privacy cases decided by the Supreme Court, which recognized that consenting adults have the fundamental right to form intimate personal relationships within the protective shelter of the home—a right which cannot be hindered by the government without a compelling justification.<sup>41</sup> After much debate among the lower courts,<sup>42</sup> the Supreme Court granted certiorari.<sup>43</sup>

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<sup>36</sup> MOHR, *supra* note 2, at 52; Teresa M. Bruce, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1135 (1996); *see also Getting Rid*, *supra* note 33 (calling the officer's reason for entering Hardwick's house a "flimsy excuse").

<sup>37</sup> Bruce, *supra* note 36, at 1135. The houseguest did not know that Hardwick and his companion were together in the room. *Id.* at 1135 n.3.

<sup>38</sup> *Id.* at 1135.

<sup>39</sup> *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986) (charging Hardwick with "violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of [his] home"), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>40</sup> *Id.* at 188.

<sup>41</sup> *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977) (extending the right of privacy to sexual intimacy of unmarried individuals); *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (same); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (protecting the liberty interest of married individuals to engage in sexual intimacy).

<sup>42</sup> *See Bowers*, 478 U.S. at 188–89. "The District Court granted the defendant's motion to dismiss for failure to state a claim, relying on *Doe v. Commonwealth's Attorney of Richmond*." *Id.* at 188. A divided panel of the Court of Appeals for the Eleventh Circuit reversed, distinguishing *Doe* and holding that the Georgia statute violated Hardwick's fundamental right to engage in homosexual activity in private. The Eleventh Circuit remanded the case, ordering the State to provide a compelling interest in support of the statute as well as evidence that the statute was the "most narrowly drawn means of achieving that end." *Id.* at 189. The Supreme Court pointed out that other courts of appeals came to opposite findings to that of the Eleventh Circuit. *Id.* (citing *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) and *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984)).

<sup>43</sup> *Id.* *Bowers*, the Georgia Attorney General, filed the appeal to the Supreme Court on behalf of the State. *Id.*

Narrowing the issue exclusively to whether the Constitution conferred to homosexuals a fundamental right to engage in consensual sodomy, the Court held by a 5-4 vote that the constitutional right to privacy does not extend to homosexual intimacy.<sup>44</sup> The “protection of public morality”<sup>45</sup> provided a legitimate state interest to prohibit such a crime; therefore, Georgia needed only a rational basis for sustaining its statute.<sup>46</sup> In reaching this conclusion, the Court focused a disproportionate amount of its opinion on the historical analysis of the “illegality of gay sex.”<sup>47</sup> What really stood out, however, was the fact that the Court took a sodomy statute that did not explicitly refer to same-sex intimacy and, nevertheless, selectively applied it to homosexuals.<sup>48</sup> The majority’s “utter contempt” for homosexual conduct was apparent when the Court stated that “it was ‘facetious’ to argue the fundamental right to privacy protected gay people.”<sup>49</sup>

The *Bowers* dissent stressed several key factors in urging the unconstitutionality of Georgia’s sodomy statute, concepts which would later be endorsed by the majority in *Lawrence v. Texas*. First, the focus should be on “‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”<sup>50</sup> This issue is much broader than

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<sup>44</sup> *Id.* at 190. The Court stated that there is a constitutional right to privacy in situations dealing with marriage, procreation, and family, but that right does not include homosexual conduct. *Id.* at 190–92; see MOHR, *supra* note 2, at 49–50. The majority could have followed the dissent’s line of reasoning and applied a broad interpretation of the Constitution in order to reach the conclusion that all individuals have a fundamental right to maintain intimate, personal relationships. See *Bowers*, 478 U.S. at 205–06 (Blackmun, J., dissenting).

<sup>45</sup> Bruce, *supra* note 36, at 1143.

<sup>46</sup> *Id.* at 1142–43; see *Bowers*, 478 U.S. at 196 (noting that substantive due process does not extend to such “immoral and unacceptable” conduct).

<sup>47</sup> See *Bowers*, 478 U.S. at 192–94 (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)). In his concurring opinion, Justice Burger found that the proscription of sodomy was “firmly rooted in Judeo-Christian moral and ethical standards,” *id.* at 196 (Burger, C.J., concurring), and to interpret the Constitution as to provide homosexuals with the fundamental right to engage in sodomy “would be to cast aside millennia of moral teaching,” *id.* at 197 (Burger, C.J., concurring). See generally Bruce, *supra* note 36, at 1142 (commenting that scholars have widely criticized the *Bowers* opinion for its historical inaccuracy and its reliance on a single law review article).

<sup>48</sup> See *Bowers*, 478 U.S. at 200–01 (Blackmun, J., dissenting).

<sup>49</sup> *Getting Rid*, *supra* note 33 (quoting *Bowers*, 478 U.S. at 194).

<sup>50</sup> *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting *Olmstead v.*

whether homosexuals have a fundamental right to engage in sodomy. Second, morality should not be the decisive factor in upholding the constitutionality of a statute, especially “if the grounds upon which [the law] was laid down have vanished long since.”<sup>51</sup> The dissent noted that the majority’s “obsessive focus on homosexual activity” was not warranted because Georgia’s sodomy statute was gender-neutral, thereby also criminalizing heterosexual sodomy.<sup>52</sup> Finally, the dissent argued that the Court had already “recognized a privacy interest with reference to certain decisions that are properly for the individual to make,”<sup>53</sup> and that this protection extends to the confines of the home.<sup>54</sup> The petitioners, therefore, should have the right to decide how to conduct personal relationships without governmental intrusion.

### C. *The Aftermath of Bowers*

Discrimination against homosexuals existed before *Bowers*,<sup>55</sup> but by upholding the constitutionality of sodomy laws, the Court created spin-off effects far beyond the consequences of prosecution.<sup>56</sup> First, the *Bowers* decision indirectly encouraged state governments to “create a criminal class” out of homosexuals,<sup>57</sup> regardless of whether they actually partook in

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United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

<sup>51</sup> *Id.* (Blackmun, J., dissenting) (quoting Oliver Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>52</sup> *Id.* at 200 (Blackmun, J., dissenting).

<sup>53</sup> *Id.* at 204 (Blackmun, J., dissenting) (emphasis omitted) (citing *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) and *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925)).

<sup>54</sup> *Id.* (Blackmun, J., dissenting) (citing *United States v. Karo*, 468 U.S. 705, 716–17 (1984), *Payton v. New York*, 445 U.S. 573, 589–90 (1980) and *Rios v. United States*, 364 U.S. 253, 260–62 (1960)).

<sup>55</sup> *See supra* notes 10–13.

<sup>56</sup> *See* Feist, *supra* note 16, at 138 (citing a speech at an ALI meeting concerning the decriminalization of sex offenses in which Judge Learned Hand stated, “[C]riminal law which is not enforced practically is much worse than if it was not on the books at all. I think homosexuality is a matter of morals, a matter very largely of taste, and is not a matter that people should be put in prison about.”). It is important to note that state governments kept sodomy laws on the books to send a message that homosexuality was unacceptable. “Statutes have significance completely independent of their actual enforcement. Law reflects society and informs it.” Leslie, *supra* note 4, at 114.

<sup>57</sup> Leslie, *supra* note 4, at 110 (pointing out that state governments were able to indirectly criminalize homosexuals through the use of sodomy laws). “Labeling gay men and lesbians as ‘criminal[s]’ facilitates discrimination because the law permits

such illegal conduct.<sup>58</sup> The ruling reaffirmed the judiciary's right to uphold anti-gay sentiment in areas of civil litigation and provided opponents of civil rights with ammunition that did not sound blatantly prejudiced.<sup>59</sup> For example, courts continued to justify discrimination against gay and lesbian employees and job applicants,<sup>60</sup> to separate children from their gay and lesbian parents by denying custody or restricting visitation,<sup>61</sup> to uphold the removal of competent homosexuals from military service,<sup>62</sup> and to suppress gay people from publicly exercising their First Amendment rights.<sup>63</sup> In addition, the continued existence of

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differential treatment of criminals." *Id.* at 115.

<sup>58</sup> See Bruce, *supra* note 36, at 1149–51; see Feist, *supra* note 16, at 138 (noting that even if homosexuals wanted to engage in sodomy, the prohibition of such conduct may “inhibit persons from fulfilling their sexual desires”).

<sup>59</sup> See MOHR, *supra* note 2, at 55–56 (pointing out that judges tend to base their decisions on public policy, so the continued existence of sodomy laws may influence the way judges apply the law).

<sup>60</sup> See, e.g., Shahar v. Bowers, 114 F.3d 1097, 1110–11 (11th Cir. 1997) (holding that an offer of employment could be revoked based on the future employee's same-sex wedding ceremony); Todd v. Navarro, 698 F. Supp. 871, 876–77 (S.D. Fla. 1988) (holding that the Broward Sheriff's Office could dismiss the plaintiff's case because she was an admitted lesbian); Truesdale v. Univ. of N.C., 371 S.E.2d 503, 509 (N.C. Ct. App. 1988) (giving police departments permission to terminate or to refuse to hire gay and lesbian employees), *overruled by* Corum v. Univ. of N.C., 413 S.E.2d 276 (N.C. 1992).

<sup>61</sup> See, e.g., Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (denying custody to a mother because sodomy is seen as “immoral, unacceptable, and criminal conduct”); Weigand v. Houghton, 730 So. 2d 581, 586–88 (Miss. 1999) (denying a gay father's request to modify denial of custody even though the child lives with the mother's new husband, who is a convicted felon and wife abuser); S.E.G. v. R.A.G., 735 S.W.2d 164, 166–67 (Mo. Ct. App. 1987) (favoring the custody rights of alcoholic father over those of the lesbian mother).

<sup>62</sup> See, e.g., Philips v. Perry, 106 F.3d 1420, 1429 (9th Cir. 1997) (stating that the discharge of a service member for engaging in homosexual conduct did not violate constitutional rights); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (justifying the discharge of an FBI agent for homosexual conduct on the grounds that special deference is given to military decisions regarding security clearances and national security, and the fact that the right to engage in consensual sodomy is not “implicit in the concept of ordered liberty” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986))).

<sup>63</sup> See People for the American Way Foundation, *Anti-Gay Politics and the Religious Right: Gays and the GOP* (commenting on the fact that politically active homosexuals are deterred from conveying their beliefs in conventional political environments because of the existence of sodomy statutes), *available at* <http://www.pfaw.org/pfaw/general/default.aspx?oid=2038> (last visited Mar. 9, 2004). “For example, the Texas Republican party refused to let Log Cabin Republicans, a gay Republican organization, set up an exhibit booth at the state Republican convention, because sodomy [was] a crime in Texas.” *Leslie, supra* note 4, at 157 n.365.

sodomy laws was an unremitting “assault” on the dignity of homosexuals,<sup>64</sup> and prohibiting sexual intimacy, which is often important to one’s mental health and happiness, may very well have caused psychological harm to gays and lesbians.<sup>65</sup>

Although *Bowers* created a huge hurdle for gay rights activists, not all of its repercussions were bad. After pushing state legislatures and clogging state courts with arguments against sodomy laws, activists revived the earlier trend—repeal and invalidation.<sup>66</sup> When *Lawrence* reached the Supreme Court, half of the states that had sodomy statutes when *Bowers* was decided no longer had such laws,<sup>67</sup> including Georgia itself.<sup>68</sup>

Additionally, the Court decided two principal cases after *Bowers* that indirectly questioned its validity. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>69</sup> the Court stressed the *expansiveness* of the liberty protected by the Due Process Clause, which includes “personal decisions relating to marriage, procreation, contraception, family relationships,

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<sup>64</sup> MOHR, *supra* note 2, at 58–59. Being continually judged without regard to individual merits or accomplishments can have a profound effect on one’s self-esteem. *Id.* at 59; *cf.* Claudia Card, *Evils and Inequalities*, 9 J. CONTEMP. LEGAL ISSUES 87, 92–93 (1998) (explaining that discrimination against African-Americans and the ensuing assaults on their dignity have led to “unspeakable violence, terror, poverty and degradation”).

<sup>65</sup> Evan Wolfson & Robert S. Mower, *When the Police are in Our Bedrooms, Shouldn’t the Courts Go in After Them?: An Update on the Fight Against “Sodomy” Laws*, 21 FORDHAM URB. L.J. 997, 1130–31 (1994) (noting that the repression of the homosexual expression of intimacy can lead to harmful results). The “enforced repression of desire for such [sexual] expression is associated with dysfunction and pathology.” *Id.* at 1030. *But see* MOHR, *supra* note 2, at 54 (noting that sodomy laws are not the initiating cause of psychological damage in homosexuals; therefore, little weight should be given to such a claim).

<sup>66</sup> *Getting Rid*, *supra* note 33. Seven years after *Bowers*, Nevada was the first state to repeal its sodomy law and many others followed. *Id.* In regard to the invalidation of sodomy laws, many state high courts have held that state constitutions provide more protection for individual rights than does the federal constitution. *Id.*; *see, e.g.*, *Gryczan v. State*, 942 P.2d 112, 121–22 (Mont. 1997) (observing that Montana’s Constitution explicitly grants all Montana citizens the right to individual privacy, which includes the right to engage in consensual, private homosexual intimacy).

<sup>67</sup> *Sodomy Laws in the United States*, at <http://www.sodomylaws.org> (last modified Dec. 14, 2003). By the time *Lawrence* was decided in 2003, ten states had gender-neutral sodomy laws and only four states, including Texas, had sodomy laws that only applied to homosexuals. *Id.*

<sup>68</sup> *See Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (striking down Georgia’s law criminalizing non-commercial, private consensual adult sodomy—the law involved in *Bowers*).

<sup>69</sup> 505 U.S. 833 (1992) (plurality opinion).

[parenthood], and education.”<sup>70</sup> The second landmark decision was *Romer v. Evans*,<sup>71</sup> which invalidated a Colorado constitutional amendment that barred equal rights laws for homosexuals.<sup>72</sup> The Court acknowledged that gays and lesbians were entitled to equal protection,<sup>73</sup> and stated that “if a law neither burdens a fundamental right nor targets a suspect class,” it would be upheld “so long as it bears a rational relation to some legitimate end.”<sup>74</sup> After concluding that the sole purpose of the Colorado amendment was to harm homosexuals, the Court declared it unconstitutional.<sup>75</sup> The *Romer* decision, however, can be seen as consistent with *Bowers*. That is, the Court upheld Georgia’s sodomy statute as constitutional because homosexuals did not have a fundamental right to engage in sodomy, and protection against the immorality of homosexual conduct provided a legitimate reason for the statute.<sup>76</sup>

The variability of case law and the gradual approval of homosexuality in American society enabled *Lawrence v. Texas*, another challenge to the constitutionality of sodomy laws, to find itself before a receptive Supreme Court. The Court, in turn, provided gays and lesbians with its single most influential decision to date.

## II. LAWRENCE V. TEXAS

Responding to a reported weapons disturbance, officers of the Harris County Police Department in Houston, Texas entered the apartment of John Lawrence, where they observed him and another male, Tyron Garner, engaging in sexual acts.<sup>77</sup> Both men were arrested, jailed overnight, charged, and convicted before a Justice of the Peace<sup>78</sup> for violating Texas Penal Code

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<sup>70</sup> *Id.* at 851. *Casey* indirectly raised the question of whether the right to autonomy in these circumstances applies to homosexuals as well as to heterosexuals. Under *Bowers*, homosexuals would have been denied this right. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

<sup>71</sup> 517 U.S. 620 (1996).

<sup>72</sup> *Id.* at 632.

<sup>73</sup> *Id.* at 635–36.

<sup>74</sup> *Id.* at 631.

<sup>75</sup> *Id.* at 633.

<sup>76</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>77</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2475–76. No one questioned the right of the police to enter Lawrence’s apartment. *Id.* at 2475.

<sup>78</sup> *Id.* at 2476.

section 21.06, which criminalized “deviate sexual intercourse” for same-sex couples but not for opposite-sex couples.<sup>79</sup>

Both petitioners felt that section 21.06 violated their federal constitutional guarantees of privacy and equal protection under the Fourteenth Amendment<sup>80</sup> and like provisions of the Texas Constitution;<sup>81</sup> therefore, they exercised their right to a trial de novo in Harris County Criminal Court.<sup>82</sup> Petitioners’ constitutional arguments were rejected, so they took the case to the Texas Court of Appeals, which affirmed the convictions.<sup>83</sup> The court of appeals rationalized its decision on principles of morality, holding that Texas could treat same-sex couples differently from opposite-sex couples in order to express its disapproval of homosexuality.<sup>84</sup> The United States Supreme Court granted certiorari to address the constitutionality of the Texas sodomy statute, and in doing so, reconsidered its holding in *Bowers*.<sup>85</sup>

First, the Court discussed the zone of liberty protected under the Due Process Clause of the Constitution and whether private, sexual intimacy between consenting adults could be carved out of that zone.<sup>86</sup> Because there has never been a specific formula defining the substantive reach of the Due Process Clause,<sup>87</sup> the Court used its past decisions and their underlying rationales as

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<sup>79</sup> TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). It reads, “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The statute defines “[d]eviate sexual intercourse” as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” TEX. PENAL CODE ANN. § 21.01(1).

<sup>80</sup> U.S. CONST. amend. XIV, § 1.

<sup>81</sup> TEX. CONST. art. I, § 3a.

<sup>82</sup> *Lawrence*, 123 S. Ct. at 2476.

<sup>83</sup> *Lawrence v. State*, 41 S.W.3d 349 (Tex. Crim. App. 2001), *rev’d*, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). The court heard the case en banc and in a divided opinion, rejected petitioners’ federal due process arguments based on the controlling *Bowers* decision. *Id.* at 365–66 (Fowler, J., concurring).

<sup>84</sup> *Id.* at 354.

<sup>85</sup> *Lawrence*, 123 S. Ct. at 2476. The Supreme Court was not compelled to reconsider its holding in *Bowers*, because the Texas sodomy statute was limited to homosexuals, unlike the gender-neutral Georgia sodomy statute. *See infra* text accompanying notes 104–05.

<sup>86</sup> *Lawrence*, 123 S. Ct. at 2476–77.

<sup>87</sup> *See Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (stating that the liberty protected under the Due Process Clause has never been “determined by reference to any code”).

signposts.<sup>88</sup> These cases recognized a fundamental right to develop personal relationships, as well as the right to engage in private, sexual intimacy, regardless of marriage or procreation.<sup>89</sup> The Texas statute's only purpose was to prohibit a sexual act that fell "within the liberty of persons to choose without being punished as criminals."<sup>90</sup> The majority noted that the issue in *Bowers*, whether homosexuals had the right to partake of certain sexual activity, was simply too narrow.<sup>91</sup> Having "misapprehended the claim of liberty . . . presented to it," the *Bowers* Court trivialized the "far-reaching consequences" of criminal sodomy laws.<sup>92</sup>

Next, the Court addressed the history of laws banning sodomy in America, and after a thorough review, concluded that such statutes were not distinctly directed at homosexual conduct until quite recently.<sup>93</sup> Moreover, they were rarely enforced against consenting adults acting in private.<sup>94</sup> The *Bowers* Court

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<sup>88</sup> See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (extending the right of privacy to engage in sexual intimacy to unmarried individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the fundamental right of women to define the destiny of their pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing unmarried individuals' right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing married couples' right to privacy); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (protecting parents' right to control the rearing of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same).

<sup>89</sup> See *Lawrence*, 123 S. Ct. at 2478. Although not mentioned in *Lawrence*, the Court had recognized in earlier cases that the right to privacy from needless governmental intrusion protects the home and the activities conducted there. See *Oliver v. United States*, 466 U.S. 170, 179 (1984) (reasoning that the home provides a place for individuals to conduct "those intimate activities that the [Fourth] Amendment is intended to shelter from government interference"); *United States v. Orito*, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (protecting the right to read obscene material in the privacy of one's home, even if that material is illegal to possess); *Poe*, 367 U.S. at 551 (Harlan, J., dissenting) ("[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.").

<sup>90</sup> *Lawrence*, 123 S. Ct. at 2478.

<sup>91</sup> *Id.*; *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003). The Due Process Clause protects those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)); *cf. County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.").

<sup>92</sup> *Lawrence*, 123 S. Ct. at 2478.

<sup>93</sup> *Id.* at 2479; *see supra* notes 18, 21 and accompanying text.

<sup>94</sup> *Lawrence*, 123 S. Ct. at 2479; *see supra* notes 24–28 and accompanying text.

based its ruling on the notion that “[p]roscriptions against [homosexual] conduct have ancient roots,”<sup>95</sup> thus relying almost entirely on a flawed reconstruction of American history.<sup>96</sup>

Although ethical and moral beliefs provide a solid foundation on which to lead one’s life, the *Lawrence* Court stated that such principles are an insufficient reason to uphold a criminal law.<sup>97</sup> The Court’s “obligation is to define the liberty of all, not to mandate [its] own moral code.”<sup>98</sup> Criminal offenses have a negative effect on the dignity of the individual charged, and convictions carry “collateral consequences” that invite discrimination against homosexuals.<sup>99</sup>

In reconsidering *Bowers*, the Court also examined the recent trend in case law.<sup>100</sup> Specifically, it considered *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Romer v. Evans*, which expanded the fundamental rights to privacy.<sup>101</sup> Finally, the Court noted that international forums, including the European Court of Human Rights, afford homosexual adults the right to engage in intimate, sexual conduct.<sup>102</sup>

After careful analysis, the Court concluded that petitioners’ “right to liberty under the Due Process Clause gives them the full right to engage in [private, sexual] conduct without intervention of the government . . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into

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<sup>95</sup> *Bowers*, 478 U.S. at 192.

<sup>96</sup> See *Lawrence*, 123 S. Ct. at 2480.

<sup>97</sup> *Id.* Many criminal statutes have been based on a state’s moral views, but if those laws compromise an individual’s fundamental liberty, they are unconstitutional. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion) (“Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy . . . .”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating a law prohibiting the distribution of contraceptives to unmarried persons); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (protecting interracial marriage); cf. *Bowers*, 478 U.S. at 196 (stating that because homosexual sodomy is unacceptable and immoral, it provides a rational basis for upholding the Georgia sodomy law).

<sup>98</sup> *Lawrence*, 123 S. Ct. at 2480 (quoting *Casey*, 505 U.S. at 850).

<sup>99</sup> *Id.* at 2482; see *supra* notes 57–65 and accompanying text. The Court provides several examples of these “collateral consequences,” including notations of conviction on records and job applications and registration as a sex offender under state law. *Lawrence*, 123 S. Ct. at 2482.

<sup>100</sup> *Lawrence*, 123 S. Ct. at 2481–82.

<sup>101</sup> See *supra* notes 69–76 and accompanying text.

<sup>102</sup> *Lawrence*, 123 S. Ct. at 2483.

the personal and private life of the individual.”<sup>103</sup> The majority could have chosen simply to distinguish *Bowers* by declaring the Texas sodomy statute, which only criminalized homosexual sodomy, unconstitutional on equal protection grounds.<sup>104</sup> Instead, the Court completely overruled it by holding unconstitutional on substantive due process grounds all statutes that interfere with an adult's right to engage in private, consensual sexual conduct.<sup>105</sup> The *Lawrence* decision undermines every ruling that has relied on *Bowers*. After *Lawrence*, every sodomy statute that pertains to private, sexual conduct between consenting adults is now unconstitutional.

### III. CHILD CUSTODY AND VISITATION RIGHTS OF GAY AND LESBIAN PARENTS BEFORE *LAWRENCE*

#### A. *Background in Family Law*

The Supreme Court has deemed the right to have and raise children a fundamental liberty,<sup>106</sup> deserving protection against all but compelling state interests.<sup>107</sup> This level of protection, however, is jeopardized when a family is torn apart by divorce or legal separation and parents find it impossible to agree on child custody arrangements.<sup>108</sup> As a result, courts make the initial

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<sup>103</sup> *Id.* at 2484.

<sup>104</sup> *See id.* (O'Connor, J., concurring) (arguing that the decision should be based on equal protection).

<sup>105</sup> *See id.*

<sup>106</sup> *See Stanley v. Illinois*, 405 U.S. 645, 651 (1971) (“The private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 518 (1924) (stating that parents should have the freedom to guide their child both intellectually and religiously); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (reasoning that the right to conceive and raise one's child is “essential to the orderly pursuit of happiness by free men”).

<sup>107</sup> *See, e.g., Troxel v. Granville*, 530 U.S. 57, 96 (2000) (Kennedy, J., dissenting) (noting that protecting a child from harm provides a “compelling state interest” that overrides a parent's fundamental right to raise his or her own child); *Christensen v. State*, 468 S.E.2d 188, 190 (Ga. 1996) (holding that the “furtherance of the moral welfare of the public” provides a compelling state interest to prohibit sodomy). *See generally* Sheila Reynolds & Roy B. Lacoursiere, *Interminable Child Neglect/Custody Cases: Are There Better Alternatives?*, 21 J. FAM. L. 239, 264–65, 269–73 (1982–83) (noting that what qualifies as a compelling interest may vary depending on the state).

<sup>108</sup> Vicki Parrott, *The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship—North Carolina Adopts the “Nexus Test” in Pulliam v. Smith*, 19 CAMPBELL L. REV. 131, 138 (1996). Although a parent has a

allocation with respect to marriage dissolution and the non-custodial parent's visitation rights.<sup>109</sup> Statutes<sup>110</sup> and case law<sup>111</sup> require courts to determine child care disputes based on the best interests of the child, which is determined by weighing the positive and negative characteristics of one party against those of all opposing parties and placing the child with the one that is best able to serve the child's needs.<sup>112</sup> At a later point, one parent may petition for a modification of existing custody by showing that the child's current living conditions endanger his or her welfare and that a change in custody would benefit the child.<sup>113</sup>

Unfortunately, the "best interests of the child" standard is vaguely defined.<sup>114</sup> Judges have broad discretionary power to protect the children brought before them and can deem virtually

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fundamental right to raise his or her own child, the child's well-being takes precedence over the parent's liberty interest in the course of a custody or visitation dispute. *See, e.g.,* Wasserman v. Wasserman, 671 F.2d 832, 833 (4th Cir. 1982).

<sup>109</sup> Parrott, *supra* note 108, at 138. With respect to visitation privileges, courts generally allocate them on a reasonable basis in order to foster the relationship between the child and non-custodial parent. *See, e.g.,* Boswell v. Boswell, 701 A.2d 1153, 1163 (Md. Ct. Spec. App. 1997) (noting that a parent can see his or her child at reasonable times if the child is not in his or her custody), *aff'd*, 721 A.2d 662 (Md. 1998).

<sup>110</sup> *See, e.g.,* ARK. CODE ANN. § 9-13-101 (Supp. 2002); CONN. GEN. STAT. ANN. § 46b-56 (West 1987); GA. CODE ANN. § 19-9-3 (1988); MINN. STAT. ANN. § 257.025 (West 1988); *see also* UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1987).

<sup>111</sup> *See, e.g.,* Bull v. Bull, 24 Cal. Rptr. 149, 150 (Cal. Dist. Ct. App. 1962) (stating that between a choice of two households, a child's best interests will be met where he or she will be "better cared for, better trained, more secure and happier"); Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925) ("The chancellor . . . acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate and careful parent' . . . and make provision for the child accordingly."); Wolff v. Wolff, 349 N.W.2d 656, 658 (S.D. 1984).

<sup>112</sup> *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989) (citing A. HARALAMBIE, HANDLING CHILD CUSTODY CASES §§ 3.06, 7.07 (1983)) [hereinafter *Developments*].

<sup>113</sup> Parrott, *supra* note 108, at 138-39; *e.g.,* S.N.E. v. R.L.B., 699 P.2d 875, 877 (Alaska 1985) ("[W]hen one party seeks a change in custody, a court must consider whether there are changed circumstances which justify modifying a prior custody order."); *see also* UNIFORM MARRIAGE AND DIVORCE ACT § 409(a)-(b) (stating that to change a custody order, there must be reason to believe the child's current environment may seriously jeopardize his "physical, mental, moral, or emotional health").

<sup>114</sup> For example, many state statutes and case rulings do not provide the judge with a list of factors to consider when determining what is best for the child's welfare. *See supra* note 111.

any factor relevant to the child's welfare.<sup>115</sup> This flexibility may help to avoid an arbitrary judgment that clashes with a child's essential needs, but it invites discrimination that may ultimately result in the child's best interests being sacrificed and allows judges to be swayed by their own biases.<sup>116</sup>

### B. *Current Law Applied to Gay and Lesbian Parents*

Because many gay men and lesbians have children from heterosexual relationships or marriage, they also face potential custody litigation.<sup>117</sup> In a dispute where one of the contestants is homosexual, the court, depending on the state of jurisdiction, may interpret the applicable statute to "permit consideration of the parent's sexual orientation."<sup>118</sup> Generally, this is done only if the homosexual parent is involved in a same-sex relationship.<sup>119</sup>

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<sup>115</sup> Parrott, *supra* note 108, at 138.

<sup>116</sup> Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 647 (1996) ("In addition to . . . genuine concerns, some judges appear to be motivated by general hostility towards lesbian and gay parents and a desire to punish these individuals for living in a manner which the court finds unacceptable."); *see, e.g.*, Ward v. Ward, 742 So. 2d 250, 252–55 (Fla. Dist. Ct. App. 1996) (removing child from custody of lesbian mother and granting custody to the father, who had served an eight-year prison term for the second-degree murder of his first wife); Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (removing child from custody of loving and nurturing mother because she engaged in criminal, immoral sexual behavior with her live-in partner). In addition, appellate courts will only reverse a trial court's denial of custody if there is a clear abuse of discretion; therefore, the trial court's decision is generally final. *See Developments, supra* note 112, at 1630.

<sup>117</sup> Although the concept may conflict with how society traditionally views gay men and lesbians, millions of children in the United States are raised by homosexual parents. *See* Leslie, *supra* note 4, at 147.

<sup>118</sup> *Developments, supra* note 112, at 1631; *see, e.g.*, ALA. CODE § 30-3-1 (1983) (listing "moral character" of the parent as a factor); FLA. STAT. ANN. § 61.13 (West Supp. 2004); IND. CODE ANN. § 31-17-2-15 (West 1983) (listing the "emotional environment" provided by the parent as a factor). There are no cases that specifically consider sexual orientation when evaluating a child's "emotional environment," but statutes leave room for interpretation. For example, a court has held that a harmful emotional environment exists if the child is "exceptionally deprived of appropriate modeling," which prejudiced judges may construe to include children living with homosexual parents. *In re* Y.D.R., 567 N.E.2d 872, 873–74 (Ind. Ct. App. 1991) (concluding that the children were in extreme emotional pain and suffered from low self-esteem and depression due to neglect of the parents).

<sup>119</sup> *See, e.g.*, Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) ("Sandra's homosexuality may, indeed, be . . . beyond her control. However, living with another person of the same sex in a sexual relationship is not . . ."), *overruled in part by* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003); M.J.P. v. J.G.P., 640 P.2d 966, 967 (Okla. 1982) (holding that an "acknowledged homosexual relationship" sufficiently justified a change in custody); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (implying

Courts apply one of three standards when determining whether homosexuality harms or will likely harm the child: the “nexus test,” the “permissive determinative inference” approach, or the “per se” rule.<sup>120</sup>

A majority of states have adopted the “nexus test.”<sup>121</sup> Courts may consider a parent’s sexual orientation as a factor, but it cannot be the sole basis for denying custody without evidence from the contesting parent<sup>122</sup> that the gay or lesbian parent’s conduct has harmed the child, or in other words, that there is a nexus between homosexuality and parental unfitness.<sup>123</sup> Under the nexus test, harm cannot be presumed, but must be determined on a case-by-case basis.<sup>124</sup> Courts, therefore, hold that the state cannot separate a parent and a child “merely because that parent’s lifestyle is not within the societal mainstream.”<sup>125</sup>

For example, in *S.N.E. v. R.L.B.*,<sup>126</sup> the Alaska Supreme Court applied the nexus test in an action brought by the father, who sought a change of custody due to the mother’s involvement

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that it was not the father’s homosexuality but his continuous exposure of the child to his “immoral and illicit relationship” that rendered him unfit as a custodial parent).

<sup>120</sup> See Shapiro, *supra* note 116, at 635–41.

<sup>121</sup> *Id.* at 635 n.67 (noting that courts use the test in an effort to assess an “individual’s fitness as a parent”).

<sup>122</sup> See *id.* at 636–37 (noting that the heterosexual father in the *Van Driel* case was not granted custody because he gave no evidence showing that the lesbian mother adversely affected the children’s well-being); see also *infra* note 124.

<sup>123</sup> Shapiro, *supra* note 116, at 635–36; see also *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) (“[H]omosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.”).

<sup>124</sup> Shapiro, *supra* note 116, at 636. Compare *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994) (reasoning that the mother’s sexual orientation “must be shown to have had some harmful effect on the children”), with *Chicoine v. Chicoine*, 479 N.W.2d 891, 893–94 (S.D. 1992) (holding that the South Dakota trial court abused its discretion when it authorized overnight, unsupervised visitation with the lesbian mother, even though there was no evidence of harm to the child).

<sup>125</sup> *In re Marriage of Cabalquinto*, 669 P.2d 886, 890 (Wash. 1983) (Stafford, J., concurring in part, dissenting in part); see also *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987). The court emphasized the importance of an evidentiary showing of impact on the child by holding that “[a] parent’s morality, while a proper factor for consideration, ‘is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child.’” *Id.* at 705 (quoting *Davenport v. Davenport*, 220 S.E.2d 228, 230 (S.C. 1975) (affirming a decision granting custody to the mother despite her adulterous affair)).

<sup>126</sup> 699 P.2d 875 (Alaska 1985).

in a homosexual relationship.<sup>127</sup> The father claimed that the mother was emotionally unstable and that he was the child's primary parent.<sup>128</sup> The trial court granted custody to the father,<sup>129</sup> but the supreme court reversed, holding that "[c]onsideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests."<sup>130</sup> In addition, the court refused to consider the social stigma attached to a parent's status as a homosexual, finding it relevant only upon evidence of detrimental impact.<sup>131</sup>

The "permissive determinative inference" approach is a rebuttable presumption of unfitness, which explicitly places the burden on the homosexual parent to prove that his or her sexual orientation will not harm the child.<sup>132</sup> If no evidence is offered, "the permissible inference is one that, standing alone, can justify the court's decision to deny custody" to the homosexual parent and grant it to the avowedly heterosexual parent.<sup>133</sup>

In *Ex parte J.M.F.*,<sup>134</sup> the Alabama Supreme Court rejected the notion that there must be evidence of a detrimental impact on the child in order to support a change of custody.<sup>135</sup> The father, who had recently remarried, sought to gain custody of his child from the openly lesbian mother.<sup>136</sup> The supreme court held

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<sup>127</sup> *Id.* at 878.

<sup>128</sup> *Id.* at 877.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 879.

<sup>131</sup> *Id.* ("Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian.")

<sup>132</sup> *Developments*, *supra* note 112, at 1631.

<sup>133</sup> Shapiro, *supra* note 116, at 634; *e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark Ct. App. 1987) ("[I]t has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children. Arkansas courts have presumed that it is."); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (holding that "the burden of proving no adverse effect of the homosexual relationship falls on the person advocating"); *see also* Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998). The North Carolina Supreme Court approved the trial court's decision to modify custody from the gay father to the mother, presuming that the conduct between the father and his gay partner was "improper" and therefore "detrimental to the best interest and welfare of the two minor children." *Id.* at 904, *construed in* Parrot, *supra* note 108.

<sup>134</sup> 730 So. 2d 1190 (Ala. 1998).

<sup>135</sup> *See id.* at 1196 (refusing to support an illegal and immoral relationship despite evidence that the mother had been a good parent).

<sup>136</sup> *Id.* (stating that the father only had to show that the change in custody would materially promote the child's best interests and the positive effects brought

that the establishment of marriage was the societal and moral norm—thus it was in the child’s best interests for the heterosexual father to gain custody.<sup>137</sup> Although the court did not explicitly declare the mother’s homosexual conduct to be presumptively detrimental to the child,<sup>138</sup> it asserted that “[w]hile the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is ‘neither legal in this state, nor moral in the eyes of most of its citizens.’ ”<sup>139</sup>

The last standard employed by state courts is the “per se” rule, which applies an irrebuttable presumption against grants of custody to parents involved in a homosexual relationship.<sup>140</sup> Where an adequate heterosexual parent or relative is available, courts assume that awarding custody to gay and lesbian parents is never in the best interests of the child.<sup>141</sup>

*Bottoms v. Bottoms*<sup>142</sup> is the most highly publicized case utilizing this standard. After the mother admitted being involved in a homosexual relationship, the Virginia trial court awarded custody to the grandmother, ruling that the lesbian mother’s “illegal” and “immoral” conduct rendered her an unfit

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about by this change would “more than offset the inherent [disruptive effect of] uprooting the child”).

<sup>137</sup> *Id.*

<sup>138</sup> See Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 410–11 (2001) (noting that some courts presume parents who are in heterosexual relationships to be the “more prudent custodial choice”). The essay cited the *J.M.F.* decision as one where a state court, without evidence, presumed the heterosexual relationship was “successful,” and the “developmental benefit” of such a marriage to children was “undisputed.” *Id.* at 411.

<sup>139</sup> *J.M.F.*, 730 So. 2d at 1196 (quoting *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998)); see also Diana Laretta, *Protecting the Child’s Best Interests: Defending Second-Parent Adoptions Granted Prior to the 2002 Enactment of California Assembly Bill 25*, 33 GOLDEN GATE U. L. REV. 173, 193 (2003) (noting that “[t]he court focused on the sexual orientation of the parents, rather than the relationship between the mother and child”).

<sup>140</sup> Shapiro, *supra* note 116, at 637 (noting that lesbian and gay parents are in a “particular category” that simply will not get custody of their children).

<sup>141</sup> *Id.*

<sup>142</sup> 457 S.E.2d 102 (Va. 1995). The *Bottoms* case followed the ruling in *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985), where the Virginia Supreme Court held that if a parent was involved in a same-sex relationship, the court was required to deny custody and grant extremely limited visitation. Shapiro, *supra* note 116, at 631.

parent as a matter of law.<sup>143</sup> The court of appeals reversed, concluding that “the evidence fails to prove [that the mother] abused or neglected her son, that her lesbian relationship . . . has or will have a deleterious effect on her son, or that she is an unfit parent.”<sup>144</sup> The grandmother appealed to the Virginia Supreme Court, which overturned the appeals court ruling and reinstated the trial court’s order granting custody to the grandmother.<sup>145</sup> In reaching its decision, the supreme court expressed concern about the long-term consequences of being raised by lesbians, namely the social condemnation that may be imposed on the child.<sup>146</sup> This case illustrates a major flaw of the per se rule: that a loving homosexual parent can lose custody of his or her child, regardless of the lack of negative influence. Thus, this rule destroys precisely what it seeks to protect—the best interests of the child.

Courts that have religiously applied the per se rule in the past seem to be treating homosexuality with slightly more tolerance. Recently, in *J.A.D. v. F.J.D.*,<sup>147</sup> the Supreme Court of Missouri reconsidered the notion that a parent who engages in same-sex intimacy of any sort is automatically unfit.<sup>148</sup> The court held that a parent’s homosexuality was still presumed to have a detrimental impact on the child’s welfare but could no longer be considered “ipso facto” parental unfitness.<sup>149</sup>

In addition to custody determinations, the “best interests of the child” standard is also applied to establish visitation rights of gay and lesbian parents.<sup>150</sup> Although no court has completely denied visitation rights based on a parent’s sexual orientation, some courts have restricted such privileges to protect children from what they presume to be harmful conduct.<sup>151</sup> These

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<sup>143</sup> *Bottoms v. Bottoms*, 444 S.E.2d 276, 279–80 (Va. Ct. App. 1994).

<sup>144</sup> *Id.* at 278. The court continued, “To the contrary, the evidence showed that [the mother] is and has been a fit and nurturing parent who has adequately provided and cared for her son.” *Id.*

<sup>145</sup> *Bottoms*, 457 S.E.2d at 108–09.

<sup>146</sup> *Id.* at 108.

<sup>147</sup> 978 S.W.2d 336 (Mo. 1998).

<sup>148</sup> Heidi C. Doerhoff, *Assessing the Best Interests of the Child: Missouri Declares that a Homosexual Parent is Not Ipso Facto Unfit for Custody*, 64 MO. L. REV. 949, 950–51 (1999).

<sup>149</sup> *Id.* at 951.

<sup>150</sup> *Developments*, *supra* note 112, at 1629.

<sup>151</sup> See Robin Cheryl Miller, Annotation, *Restrictions on Parent’s Child Visitation Rights Based on Parent’s Sexual Conduct*, 99 A.L.R. 5th 475, 475 (2002);

restrictions have included prohibiting the child from overnight visits, taking the child to the home that the homosexual parent shares with his or her same-sex partner, taking the child to homosexual gatherings, and being in the presence of the same-sex companion.<sup>152</sup> Other courts, however, have declined to limit visitation rights without evidence of harm justifying those restrictions.<sup>153</sup>

*C. Sodomy Laws and Other Rationales Behind Custody and Visitation Discrimination*

Courts that restrict visitation rights or deny custody to gay and lesbian parents under the permissive determinative inference approach or per se rule consistently cite a combination of five factors in support of their decisions.<sup>154</sup> First, in recognizing the intensity of prejudice against homosexuals, courts express concern about children being harassed or teased by their peers.<sup>155</sup> Second, courts fear that a child, through extended exposure to the homosexual lifestyle, will develop a same-sex orientation.<sup>156</sup> Third, based on the notion that same-

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*see, e.g., Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998); *T.K.T. v. F.P.T.*, 716 So. 2d 1235, 1238 (Ala. Civ. App. 1998) (justifying visitation restrictions between homosexual parents and their children by stating that overexposure to such illicit sexual relationships was bound to have a detrimental impact).

<sup>152</sup> *Miller, supra* note 151, at 475.

<sup>153</sup> *Id.*; *see, e.g., In re Marriage of Birdsall*, 243 Cal. Rptr. 287, 290 (Cal. Ct. App. 1988) (holding that visitation can be restricted only upon a showing of actual or potential harm to the child resulting from the parent's homosexual conduct); *Boswell v. Boswell*, 721 A.2d 662, 665, 672 (Md. 1998).

<sup>154</sup> *Developments, supra* note 112, at 1637–38.

<sup>155</sup> *Id.* at 1637; *Parrott, supra* note 108, at 147 (noting that children of homosexual parents could face “social condemnation and humiliation”). *Compare Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981), *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (holding that the child would be socially stigmatized if he lived with the homosexual parent), *and Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981), *with Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that simply because a child may suffer ridicule from her peers because her white mother remarried an African-American man does not justify removing the child from her home, because the law is not concerned with people's particular prejudices).

<sup>156</sup> *Parrott, supra* note 108, at 149–50; *Developments, supra* note 112, at 1637–38. *Compare S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1981) (removing daughter from custody of mother on the belief that the daughter “may have difficulties in achieving a fulfilling heterosexual identity of her own in the future”), *and N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (“[Although homosexuality may be a] permissible life style, . . . who would place a child in a milieu where she may be inclined toward it?”), *with Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (concluding that “there is no consensus on what causes homosexuality, but

sex intimacy demonstrates immorality, courts believe that living with a homosexual parent may have an adverse affect on the child's moral development.<sup>157</sup> Fourth, courts fear that a child may be sexually molested by the parent or the parent's friends.<sup>158</sup> Finally, courts frequently cite state sodomy laws as a factor.<sup>159</sup>

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there is substantial consensus among experts that being raised by a homosexual parent does *not* increase the likelihood that a child will become homosexual") (emphasis added). *But see* J.P. v. P.W., 772 S.W.2d 786, 793 (Mo. Ct. App. 1989) ("[E]xpert testimony is not a necessary basis for a determination that exposure to a homosexual influence will adversely affect a child . . . 'the father's acknowledgment that he was living with an avowed homosexual certainly augurs for potential harm to the child that the trial court was perfectly competent to assess.'" (emphasis omitted).

<sup>157</sup> *Developments, supra* note 112, at 1638; *see, e.g.*, Immerman v. Immerman, 1 Cal. Rptr. 298, 301 (Cal. Ct. App. 1959) (reasoning that the custody order in favor of the mother was "clearly erroneous" because evidence of her homosexuality should have been admitted as relevant to her "moral character, acts, conduct and disposition"); Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985) (finding that the trial court abused its discretion by failing to condition the homosexual father's visitation rights because homosexuality is "errant sexual behavior which threatens the social fabric"). *But see* M.A.B. v. R.B., 134 Misc.2d 317, 323-24, 510 N.Y.S.2d 960, 964 (Sup. Ct. Suffolk County 1986). The court stated:

If defendant [who is involved in a same-sex relationship], retains custody, . . . this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

*Id.* at 324, 510 N.Y.S.2d at 964 (quoting M.P. v. S.P., 404 A.2d 1256, 1262-63 (N.J. Super. Ct. App. Div. 1979)), *construed in* Parrott, *supra* note 108, at 150-51.

<sup>158</sup> *Developments, supra* note 112, at 1638; *see, e.g.*, J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 867, 869 (Mo. Ct. App. 1982) (restricting father's visitation because of the court's refusal to believe that ninety-five percent of molestation is heterosexual and stating, "Every trial judge . . . knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated").

<sup>159</sup> *Developments, supra* note 112, at 1638; *see, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Craft, J., concurring) (noting that constituents of the state, through legislative action, claimed that "sodomy is immoral, unacceptable, and criminal conduct"); J.P., 772 S.W.2d at 792, 794 (citing a sodomy statute to restrict gay father's visitation rights and as proof of the state's interest in condemning homosexuality); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (noting that, although Pennsylvania did not have a sodomy statute, a lesbian mother may be subject to arrest if she traveled to states with such statutes); Bottoms v. Bottoms, 457 S.E.2d 102, 108-09 (Va. 1995) (transferring custody of a son from the mother to the maternal grandmother in part because the mother actively practiced lesbianism in the home); Roe v. Roe, 324 S.E.2d 691, 694

The most powerful and seemingly least prejudicial reason for denying custody and restricting visitation rights of gay and lesbian parents is state sodomy laws, because other factors simply lack evidence showing a link between them and a child's best interests.<sup>160</sup> Courts are apprehensive about placing a child in the home of a homosexual parent who is presumed to be engaging in behavior deemed illegal by the state,<sup>161</sup> and claim that sodomy statutes "embody a state interest against homosexuality."<sup>162</sup> Despite the lack of evidence that "the parent in question actually participated in any statutorily prohibited conduct," the courts, nonetheless, infer that sodomy laws have been violated.<sup>163</sup> The result is that homosexual parents are punished for breaking criminal laws "without having been afforded any of the procedural protections normally guaranteed to criminal defendants."<sup>164</sup> In addition, the presumption of illegality allows courts to selectively invoke sodomy laws against homosexual parents when they cannot otherwise show parental

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(Va. 1985) (granting sole custody to the mother because the "father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law").

<sup>160</sup> *Developments, supra* note 112, at 1638–40.

<sup>161</sup> Leslie, *supra* note 4, at 148. "Empirically, it appears more likely that courts will not take children away from gay or lesbian parents in states without sodomy laws." *Id.* at 148 n.304.

<sup>162</sup> *Developments, supra* note 112, at 1638; see also Stephen Beale, *In Defense of Sodomy Laws*, BROWN DAILY HERALD, July 12, 2003 (noting that sexuality shapes important social structures; therefore, the state has good reason to criminalize conduct that could "erode the legitimacy of the family"). He states:

Sexuality . . . serves as the basis for the family—the most important social institution. Dysfunctional families correlate with poverty, illegitimacy and crime. Society obviously has at least a legitimate interest—if not a compelling interest—invested in sexual morality. Sodomy laws serve this legitimate state interest in sexuality by passively reinforcing the institution of traditional marriage. This ancillary role insures the cultural hegemony of the family.

*Id.*

<sup>163</sup> *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 635 (1989) [hereinafter *Custody Denials*]; see, e.g., *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) ("[T]he conduct inherent in lesbianism is illegal in Alabama."); Constant A., 496 A.2d at 5 ("[P]ermitting the appellant the freedom to travel could clearly place the children in a situation . . . where the adults could be subject to arrest and prosecution for deviant sexual behavior."); *Bottoms*, 457 S.E.2d at 108 (noting that the "[c]onduct inherent in lesbianism" was a felony that could properly be taken into account when determining the custodial placement).

<sup>164</sup> Leslie, *supra* note 4, at 150.

unfitness,<sup>165</sup> even if the particular state in which the family lives does not make such conduct criminal.<sup>166</sup> Finally, a decision based solely on sexual conduct has no link to the best interests of the child and plays no role in the child's well being, assuming, of course, that the child is neither present during the sexual activity nor aware of its occurrence,<sup>167</sup> which would be equally true of heterosexual intimacy.

#### IV. WILL GAY AND LESBIAN PARENTS STILL BE DISCRIMINATED AGAINST IN CHILD CUSTODY DISPUTES?

The *Lawrence* Court not only recognized that *Bowers* was out of sync with its recent privacy decisions, and thus wrongly decided,<sup>168</sup> but also that *Bowers* had been used to justify every kind of discrimination against gay people because of the criminal stigma attached to their sexual intimacy.<sup>169</sup> By grounding its ruling in the privacy and liberty interests protected by the Due Process Clause,<sup>170</sup> the majority gave *Lawrence* the necessary sweep to undo certain forms of discrimination.

Although prejudice against homosexuality has not instantaneously vanished, the *Lawrence* decision will have a direct and immediate influence on child custody disputes. First and foremost, sodomy laws can no longer provide a legal justification for custody discrimination. The repeal of these statutes will cause a dramatic departure from the presumption that homosexuality is detrimental to a child's welfare, with the greatest impact being felt in recalcitrant states such as Missouri, Virginia, and Alabama.<sup>171</sup> Prejudiced judges cannot deny

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<sup>165</sup> *Id.* at 151–52.

<sup>166</sup> *See Constant A.*, 496 A.2d at 5 (observing that although the Pennsylvania sodomy law had been repealed, the mother could be arrested if she took a trip to a state that still had such laws).

<sup>167</sup> *Custody Denials*, *supra* note 163, at 635.

<sup>168</sup> *See supra* notes 91–92, 95–96 and accompanying text.

<sup>169</sup> American Civil Liberties Union, *Why the Supreme Court Decision Striking Down Sodomy Laws Is So Important* (noting that the *Lawrence* Court was “well aware of the damage that *Bowers* had done, and it set about to undo as much of it as it could” by first admitting it was wrongly decided and then by overruling it), at [http://www.aclu.org/lesbiangayrights/l\\_lesbiangayrightsmain.cfm](http://www.aclu.org/lesbiangayrights/l_lesbiangayrightsmain.cfm) (last visited Mar. 3, 2004).

<sup>170</sup> *See supra* text accompanying note 103.

<sup>171</sup> While most states have gradually adopted the “nexus test” to settle custody disputes involving a gay or lesbian parent, Missouri, Alabama, and Virginia have presumed homosexuality to have a detrimental impact, often citing sodomy statutes as evidence of the homosexual parent's criminality. *See supra* notes 134–39, 142–49

custody or restrict visitation rights solely because of a parent's sexual orientation and the reputed belief that gay and lesbian parents are engaging in illegal behavior. All other factors aside, homosexual parents are now on a more even playing field with their heterosexual opponents.<sup>172</sup> Gay and lesbian parents will be more confident when revealing their homosexuality, no longer fearing that they will jeopardize their rights as parents.

Next, the repeal of sodomy laws will take the spotlight off the parent and put it on the particular child involved in the dispute, a shift that validates the interest of promoting the welfare of the child. Courts—no longer focusing on the gay or lesbian parent's illegal activity—will be more willing to concentrate on what is truly important: the child's feelings, wishes and developmental needs.<sup>173</sup> Narrow-minded judges will not ignore factors that may actually harm a child's well being, such as alcoholism, conviction of a violent crime, or physical abuse.<sup>174</sup>

Finally, the *Lawrence* decision demonstrates a shift in public policy, specifically, at least in the Court's view, that private same-sex intimacy is no longer considered detrimental to the welfare of society.<sup>175</sup> Sodomy laws made certain forms of sexual

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and accompanying text.

<sup>172</sup> See Leslie, *supra* note 4, at 150 (noting that heterosexual parents use sodomy laws in court to attack their homosexual former spouses).

<sup>173</sup> See MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT 3, 7–9 (1999) (addressing the fact that children are being ignored by the legal system in custody disputes, and explaining how courts could be more child-centered in making their determinations).

<sup>174</sup> See Joseph Landau, *Ripple Effect*, THE NEW REPUBLIC, June 23, 2003, at 14. The article illustratively describes several cases where judges placed children in environments with abusive, alcoholic adults just to avoid exposing the children to the homosexual parent's lifestyle. For example, an Alabama Supreme Court decision approved a custody order placing two children in the home of a violent alcoholic father, who had beaten his wife and threatened to kill his kids, stating that the children would be traumatized if they continuously saw their lesbian mother engage in illegal conduct. *Id.*; see, e.g., *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998). In another case, also in Alabama, the supreme court again used sodomy laws as an excuse to deny custody to the lesbian mother, even though the father had previously hit the children and whipped them with a belt. Landau, *supra*; see, e.g., *Ex parte H.H.*, 830 So. 2d 21, 23 (Ala. 2002); see also *Ward v. Ward*, 742 So. 2d 250, 255 (Fla. Dist. Ct. App. 1996) (granting custody to the heterosexual father even though he was previously jailed for murdering his ex-wife).

<sup>175</sup> Following a line of cases recently decided by the Supreme Court, including *Lawrence v. Texas*, the latest Gallup Poll showed that six in ten Americans approve of the job done by the Court. See *Sodomy Laws: Social Issues & Policy*, July 19, 2003

intimacy illegal on the grounds of preserving public morality.<sup>176</sup> But, by holding that homosexuals have the fundamental right to engage in such acts, the *Lawrence* Court indirectly stated that notions of morality no longer provide a legitimate basis for upholding the sodomy laws.<sup>177</sup>

When determining the best interests of the child, family courts may consider a parent's morality, which is often assessed by reference to behavior deemed to be associated with probity.<sup>178</sup> Before *Lawrence v. Texas*, judges were inclined to target homosexual conduct to indicate pervasive parental immorality.<sup>179</sup> Now, however, the rationale that homosexual conduct will impair a child's moral development cannot be used to deny custody to gay parents.<sup>180</sup> Thus, absent other proof of unfitness, homosexual parents have the constitutional right to live with and care for their child.

#### CONCLUSION

*Lawrence v. Texas* has changed the traditional ideas regarding homosexuals and their fundamental constitutional rights. This decision will have a profound impact in family courts. Judges can no longer be unconditionally unsympathetic to gay and lesbian parents or accept without question historical prejudices and unjustifiable theories about what happens to children who grow up in homosexual households. The ruling should also guarantee an impartial balancing of factors in the "best interests of the child" standard. Unfortunately, however, courts still have the ability to invent new reasoning within their power of discretion to rule, just as they did under the old laws. Beneficial to the children, however, is the fact that it will be more difficult for judges to use moral justification to stigmatize and punish parents for their nontraditional choices.

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at <http://www.sodomylaws.org/lawrence/lwnews066.htm>.

<sup>176</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (stating that Georgia's rational basis for criminalizing sodomy was to uphold public morality), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>177</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2479–80 (2003); see *supra* note 97 and accompanying text.

<sup>178</sup> See *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (noting that a parent's morality was a proper factor for family courts to consider when making custody determinations).

<sup>179</sup> See *supra* note 157.

<sup>180</sup> See *supra* text accompanying notes 97–98.

Additionally, although the repeal of sodomy laws is unlikely to have an instantaneous effect on certain realms of government-sanctioned discrimination like the military's anti-gay policy and bans on same-sex marriage, it will put gay people in a stronger position in court. Hopefully, as with the rationale behind custody discrimination, the *Lawrence* decision will gradually erode the reasoning behind other prejudicial policies, and they too will be declared unconstitutional,<sup>181</sup> thus establishing equal treatment for homosexuals in two more important institutions of American society.

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<sup>181</sup> The Ontario Court of Appeals recently ruled in *Halpern v. Canada*, C39172, [2003] ON.C. LEXIS 1042, that denying homosexuals the right to marry is discriminatory and unconstitutional. The Canadian federal government will not appeal the decision, but instead will begin drafting legislation recognizing same-sex marriage. Michelle Mann, *Will Canada Lead the Way in Same-Sex Marriage? Winds of Change in the United States May Come From Up North*, 2 ABA JOURNAL EREPORT 27, July 11, 2003.