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The Judicial Evaluation of Gay Male and Lesbian Parental Fitness in Custody Matters

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Abstract

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As we reach the end of this decade the current fight for orientation equality appears to be at a crossroads. Formal grants of legal orientation equality have been numerous over the last few decades, but inequality on the ground, *de facto* inequality, appears to linger. This dissertation fills holes in the existing scholarship by exploring real-world discrimination in the adjudication of custody disputes against parents labelled by the courts as gay, lesbian or homosexual.

I examine real-world, *de facto* bias against gay parents in custody adjudications through the use of three separate methodologies: semi-structured interviews of gay parents (and their attorneys), a textual analysis of judicial decisions available through Lexis and Westlaw, and a randomized, controlled experiment. I find that gay parents and their attorneys report significant anti-homosexual bias in the custody adjudication process and on the fringes of that process, a significant difference in bias across both parental gender and gender of the child at issue, and a belief that these biases are moderated by judicial religiosity and disgust sensitivity. Through a textual analysis of judicial decisions available on Westlaw and Lexis I find that gay parents have suffered a significant disadvantage in terms of custody outcomes when compared to their heterosexual peers, and continue to face a significant outcome disadvantage in terms of visitation restrictions. I further find that the evaluation of their parental fitness is routinely marred by judicially held homophobic stereotypes, the majority of which appear to violate legal side constraints, and that the intersectional impact of gender bias creates unique burdens across both parental gender and gender of the child at issue. Through experimental analysis, I find that individual disgust sensitivity predicts custody denial for gay male fathers, but not for lesbian mothers or heterosexual parent of either gender. Moreover, this finding remains even after controlling for normative beliefs that might also explain an orientation or gender bias: traditional gender role beliefs, moral traditionalism and sexual prejudice. I further find that political ideology moderates custody outcomes, but only for gay male fathers. Conservative political ideology interacted with sexual orientation to predict the imposition of visitation restrictions when the parental fitness of fathers was at issue, but this interaction did not produce significant results when the parental fitness of mothers was at issue.

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Chapter 1

Introduction

It's an old story that the legal advancement of civil rights does not always translate into immediate benefits on the ground. Consider the Civil Rights Movement; over the course of approximately twenty years the Civil Rights Movement achieved multiple grants of formal legal equality for racial minorities. *Shelley v. Kraemer* (1948) barred the state enforcement of race-based housing covenants. *Jones v. Mayer* (1968) barred their private enforcement.[1] *Brown v. Board* (1954) promised an end to racially segregated education and The Civil Rights Acts of 1957 and 1960 guaranteed race neutral access to the ballot.[2]

But inequality on the ground remained. The housing market remained racially segregated well after *Shelley* and *Jones* (Bond, 1996). Education remained racially segregated after *Brown*, and access to the ballot remained unequal after the Civil Rights Acts of 1957 and 1960 (*U.S. Congress, House, Committee on the Judiciary, Subcommittee No. 5, Voting Rights, Hearings on H.R. 6400*, 1965; Vaas, 1965).

Legal scholars often draw a distinction between *de jure* and *de facto*. *De jure* refers to the state of affairs mandated by law (Garner, 2019). The Civil Rights Acts of 1957 and 1960 mandated that states were not allowed to parse access to the ballot by race.[3] Thus after 1960, racial minorities enjoyed *de jure* equality in terms of access to the ballot. *De facto* refers to the state of affairs as they actually exist. As stated earlier, *de facto* inequality, inequality on the ground, tends to linger well past the announcement of formal, *de jure* equality.

Ultimately, to address real-world, *de facto* inequality it frequently becomes necessary to push for more full-throated policy interventions. The Fair Housing Act of 1968 created a private right of action to combat lingering discrimination in the housing market.[4] Title IV of The 1964

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[1] *Shelley v. Kraemer*, 334 US 1 (1948); *Jones v. Alfred H. Mayer* Co., 392 U.S. 409 (1968).

[2] *Brown v. Board* of Education of Topeka, 347 U.S. 483 (1954) (technically, and infamously, *Brown* only promised to address racial inequality "with all deliberate speed."); *United States. Civil Rights Acts of 1957, 1960, 1964, 1968, and Voting Rights Act of 1965. Washington: U.S. Govt. Print. Off., 1969. Print.*

[3] *United States. Civil Rights Acts of 1957, 1960, 1964, 1968, and Voting Rights Act of 1965. Washington: U.S. Govt. Print. Off., 1969. Print.*

[4] 42 U.S.C. § 1983 ("Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.")

Civil Rights Act granted the authority to combat lingering discrimination in education,[5] and Title I of that same act created the authority to police unequal voter registration requirements.[6]

But to enact these interventions Congress and the public first had to be convinced (or shamed) into accepting that real-world inequality remained even after the formal provision of *de jure* equality, and to do that concrete data were essential. Without the Kerner Commission Report, which methodically documented ongoing segregation in the housing market after the precedents of *Shelly* and *Jones*, it's doubtful that the Fair Housing Act of 1968 would have passed (Bond, 1996; *Report of the Nat'l Advisory Comm'n on Civil Disorders*, 1968). Without the data driven reports of the Commission on Civil Rights, documenting ongoing racial discrimination at the ballot well after the Civil Rights Acts of 1957 and 1960, it's highly unlikely that Title IV or Title I of the 1964 Civil Rights Act would have passed (*U.S. Congress, House, Committee on the Judiciary, Subcommittee No. 5, Voting Rights, Hearings on H.R. 6400*, 1965; Vaas, 1965).

Absent real world data, *de jure* solutions can appear sufficient. To address lingering, on-the-ground, *de facto* inequality, people need to be convinced (or shamed) into acknowledging that more assertive interventions are required. Data have always been central to that task.

As we reach the end of this decade the current fight for orientation equality appears to be at a similar crossroads.[7] Formal grants of orientation equality have been numerous over the last few decades. *Romer v. Evans* barred efforts born out of animus that legally discriminate against LGBTQ+ individuals.[8] *Lawrence v. Texas* barred the criminalization of consensual same-sex sex.[9] The Matthew Sheppard Act extended federal hate crime protection to LGBTQ+ individuals (Coston, 2020), and the U.S. military formally accepted openly gay and lesbian enlistees in 2013 (transgender enlistees would endure legal uncertainty until 2021).[10] State and local prohibitions against LGBTQ+ discrimination in the workplace, commerce and the housing market have become commonplace in many parts of the country (Surfus, 2018). Conversion therapy has been banned in approximately 24 states (Flores et al., 2020), and, of course, *Obergefell v. Hodges* granted same-

[5] Title IV of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964).

[6] Title I of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964) (It is important to note that Title I did not eliminate literacy tests. Nor did it confront ongoing barriers to the ballot in the form of police repression, economic retaliation or even public violence. It merely allowed the Attorney General to combat, via lawsuit, voting requirements that were applied unequally. The Civil Rights Act of 1965 attempted to address many of these remaining concerns).

[7] This is not to imply that the analogy is perfect. The fight for race based progress in the Civil Rights Era obviously faced unique obstacles and social pressures (Novkov, 2008). But in the main the point remains: both movements have witnessed continued, on the ground discrimination well after grants of *de jure* equality.

[8] Romer v. Evans, 517 U.S. 620 (1996).

[9] Lawrence v. Texas, 539 U.S. 558 (2003).

[10] The ban on open homosexuality in the U.S. Military formally ceased on December 26, 2013, when President Barack Obama signed the National Defense Authorization Act for Fiscal Year 2014 (Gilder, 2019). Transgendered individuals were barred from service until 2015, when Secretary of Defense Ashton Carter declared the former prohibition outdated and formerly lifted it. This revocation was challenged, however, by the incoming Trump administration which purported to reinstate the ban via executive order in 2017 (Gilder, 2019). The Biden Administration formally revoked Trump's executive order in 2021, thus restoring the 2015 *status quo* (Gilder, 2019).

sex marriage, and to a lesser extent same-sex adoption, constitutional protection in 2015 (Hull, 2017).

This string of legal advancement might lead one to believe that the fight for orientation equality is, at least in large part, complete. But, as with the Civil Rights Movement, inequality on the ground, *de facto* inequality, appears to linger. *Obergefell* guaranteed the right to marry, but state agencies continue to resist and commercial vendors have sought the right to refuse service.[11] Same-sex couples by and large have the formal right to adopt, but evidence abounds that state agents continue to hold their sexual orientation against them.[12]

This dissertation fills holes in the existing scholarship by exploring real-world discrimination in the adjudication of custody disputes against parents labelled by the courts as gay, lesbian or homosexual (as will be explained later, courts often lump all forms on non-heterosexuality into the category: "homosexual"). In terms of formal legal doctrine, these parents have largely approached custody adjudications on equal footing since the introduction of orientation neutral rules in the late 1970s. But scholars and activists agree that they continued to face significant bias on the ground well after the adoption of those rules (Eskridge, 2009; Gates & Williams Institute, UCLA, 2011; Rosky, 2013b).[13]

There is surprisingly little hard data on the subject, however, and thus it's difficult to advocate for additional policy interventions. We do, of course, have *some* data. A wealth of doctrinal and qualitative analysis have examined the biases and stereotypes that burden gay parents when they adjudicate the custody of their children (Rivera, 1978; Rosky, 2008; Shapiro, 1995a). But we lack firm, population-level estimates as to how these biases impact custody outcomes. We also lack a comprehensive catalogue of these biases, and firm data on their relative prevalence – both overall and as their prevalence shifts over time.

There are other gaps. We have long known that courts rely on essentialized views of the mother and father when allocating custody. But while legal scholars have discussed the impact of sexual-orientation bias on custody, the intersectional impact of gender bias on these adjudications has been relatively ignored. There are no studies, for example, that empirically examine the intersectional impact of parental gender and orientation bias on custody *outcomes*. There are likewise no studies that examine, in a comprehensive, empirical fashion, how the judiciary

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[11] *See* (*Federal Judge Rules Florida Must Add Same-Sex Spouses to Partners' Death Certificates*, n.d.; *Judge to Indiana Same-Sex Couples*, n.d.; *Same-Sex-Marriage Flashpoint*, n.d.; *Tennessee Legislator Says Same Sex Marriage "Wicked,"* n.d.; Tesfaye, n.d.).

[12] Instances of such behavior are almost too numerous to list, but for a sample see: (*Bill Would Allow Texas to Refuse Same-Sex Couples, Non-Christians as Foster Parents*, 2017; *Oklahoma Becomes New Battleground for Same-Sex Adoption*, 2018; *Religious Protection Bill Could Deter Same-Sex Adoption*, n.d.; *Republicans Are Trying to Pass a Bill That Would Stop Same-Sex Couples Adopting in Georgia · PinkNews*, n.d.; Ford, 2017; Lang, n.d.; Wingerter, n.d.). Courts nationwide have also waivered when it comes to the acceptance of gay male and lesbian parenthood (Gash & Raiskin, 2018).

[13] But this opinion is not universal. Other voices, particularly conservative scholars and public officials who share their sympathies, have argued that this bias has either dramatically diminished or disappeared over the most recent decades (George, 2009; Sprigg, 2012; L. D. Wardle, 1997). A real dispute exists on the current reality of anti-homosexual bias in custody adjudications.

perceives lesbian mothers and gay male fathers differently, or how judicial arguments against gay parental fitness differ by the gender of the parent.[14]

Another gap in our knowledge involves the gender of the child. There is good reason to think that the gender of the child matters in these adjudications. For example, the well-known "sexual abuser" stereotype (the belief that a gay parent will sexually abuse a child), will likely ring with more force when the child at issue is of the same sex as the gay parent. There are also well-known "gender modeling" concerns (the fear that a gay male father will be unable to model masculinity or that a lesbian mother will be unable to model femininity), which also may moderate on the gender of the child in relation to the gender of the gay parent. But to date there has been very little scholarship on this interaction, and no scholarship (to this authors knowledge) that examines gender of the child in relation to custody outcomes.[15]

There are other notable gaps in our understanding. Psychologists have long known that affective disgust bias frequently burdens the evaluation of gay individuals (and gay men in particular). Does a judge's disgust sensitivity impact their evaluation of gay parents? If so, might training help? What are the moderators of orientation bias from the bench? Are male judges more biased than female judges? Are conservative judges more biased than liberal judges? And do the answers to these questions call for more judicial training, more diversity on the bench or both? How does orientation bias impact the adjudication process outside of the hearings themselves? Does orientation bias impact the selection of lawyers and litigation strategy? Does orientation bias impact a gay parent's interaction with court personnel, *guardian ad litems* or court reporters?

In this dissertation I examine real-world, *de facto* bias against gay parents in custody adjudications. I employ three separate methodologies. First, I conduct semi-structured interviews of gay parents (and their attorneys) who have experience with custody adjudications. In these interviews I gain a first-hand perspective on the biases they face, how those biases differ by gender (of the parent and the child), if they believe that affective disgust bias impacted their treatment, what judicial background characteristics (gender, religiosity, etc.) they perceive to moderate judicial orientation bias and how orientation bias impacted their adjudications outside of the traditional court room setting.

Second, I conduct a thorough analysis of judicial decisions available through Lexis and Westlaw. I compile the complete set of custody decisions featuring a gay parent opposing a heterosexual parent through 2017 (n=212) and a comparable sample of "traditional" heterosexual vs. heterosexual cases. I then code those decisions for custody outcomes, arguments against gay parental fitness and judicial perceptions of the parent. By so doing I am able to track disparate

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[14] Professor Rosky's 2008 study, *Like Father Like Son*, examined the judicial decisions available through Lexis and Westlaw (through 2007) to determine the differential application of homophobic stereotypes to gay male and lesbian parents in custody contests. It did not, however, examine the *judicial* application of these stereotypes. Rather it conflated stereotypes applied by litigants, the courts, the litigants' experts and the litigants' witnesses. Thus, while clearly important, this study cannot be said to examine *judicial* bias in this area (Rosky, 2008). Professor Rosky's study also did not consider the impact of those stereotypes on custody outcomes.

[15] There is one notable exception. Professor Rosky's 2008 study, *Like Father Like Son*, examined the judicial decisions available through Lexis and Westlaw (through 2007) to determine the differential application of homophobic stereotypes to gay male and lesbian parents in custody contests. But, again, this study did not isolate *judicial* bias or *Judicial* arguments against gay parental fitness. *See* Supra Note 14.

outcomes over time by both sexual orientation and gender. I am also able to correlate those outcomes to judicial arguments against parental fitness and judicial perceptions of non-heterosexual parents overall.

And finally, I conduct a randomized, controlled experiment to test for the existence of anti-homosexual bias in custody adjudications and the impact of its theorized moderators (including the possible moderating impact of affective disgust bias on those proceedings).

This dissertation thus offers several firsts. It is the first to track the impact of anti-homosexual bias in custody over time while taking into account the possible intersectional differences of parental gender and gender of the child at issue. It is also the first to measure the impact of theorized moderators on this alleged bias: disgust sensitivity, moral traditionalism, gender role beliefs, sexual prejudice, age, gender, education, religiosity and political ideology.

And finally, this dissertation is the first to examine anti-homosexual bias through the use of three separate methodologies (semi-structures interviews, textual analysis of custody decisions available through Lexis and Westlaw, and a randomized, controlled experiment). By so doing, I aim to both generate a richer understanding of the biases these parents face and to contribute to the literature on orientation bias in psychology, law, judicial decision making, gender theory and intersectionality more generally.

Chapter 2

Sexual Orientation and Judicial Evaluation of Parental Fitness

When parents adjudicate their custody rights the primary focus is typically their parental fitness, and gay parents are no different in this regard. But gay parents often face a series of questions during this inquiry that heterosexual parents do not. Does their orientation render them less moral than a comparable heterosexual parent? Does their orientation suggest that they are more likely to abuse their children? Are the children of gay parents more likely to suffer negative life outcomes like depression, poor educational performance or substance abuse issues?

These judicial concerns are of primary importance to this dissertation, but, as the realists have long realized, they do not exist in a vacuum. They can both respond to and reflect the concerns of the general culture (Ho & Quinn, 2010; Marshall, 1987, 1989; Mishler & Sheehan, 1996; Page & Shapiro, 1983). This section will thus examine not only the judicial examination of gay parental fitness but it will also put those evaluations into context by examining broader cultural concerns with gay parenting.

The evaluation of gay parental fitness in academia and politics

Homosexuality has long been a heavily debated topic. The moral status of homosexuality and homosexual acts has been debated since at least biblical times.[16] While modern debates concerning its biological function, origin, and taxonomy can be traced to the middle of the nineteenth century.[17]

But arguments concerning gay male and lesbian *parents* are of a more recent vintage. In the United States, gay male and lesbian parents did not contest custody at the appellate level until the 1970s, at least in noticeable numbers.[18] The scholastic examination of non-heterosexual parenting emerged in their wake and thus few academic discussions of the topic pre-date the 1970s.[19] Political discussion of the topic arose even later, appearing alongside the same-sex marriage debates of the early 1990s.

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[16] Judaic prohibitions found in Leviticus 18:22 and 20:13 are widely interpreted to declare all same-sex sex as an abomination against god (and hence immoral). While denouncements of homosexuality from St. Paul, Chrysostom and Tertullian are widely interpreted to support the same conclusion for the Christian tradition (*CHURCH FATHERS: Homily 4 on Romans (Chrysostom)*, n.d.; *The Ante-Nicene Fathers*, 2007).

[17] The modern use of the term "homosexual" has been traced to a German psychiatric publication in 1869 (Pickett, 2011). This is not to say, of course, that the phenomenon of same-sex attraction or same-sex sex was unknown before this taxonomy.

[18] There are only 21 custody cases in the judicial decisions available through Lexis and Westlaw that predate 1970 with a (known) gay male or lesbian parent. Two from the 1950s, three from the 1960s and sixteen from the 1970s.

[19] Professor Lynn Wardle compiled a helpful catalogue of academic articles on this by decade (see Appendix E) (L. D. Wardle, 1997). It clearly demonstrates the exponential growth of scholastic interest in this topic.

a) Academic Debates Concerning Gay Male and Lesbian Parental Fitness

The academic discussion of non-heterosexual parenting did not begin in earnest until the early 1970s, after the emergence of gay male and lesbian parents in the nation's custody courts brought the matter to scholastic attention.[20] Initial legal analyses did not focus on the relative parental fitness of these parents.[21] Rather these legal scholars focused on the legal evaluation of these parents, the trends scholars perceived and the unique legal issues these parents faced (Armanno, 1973; Hunter & Polikoff, 1975; Riley, 1975; Rivera, 1978).[22] Initial studies on the impact of non-heterosexual parenting on childhood development and family structure in Psychology and Sociology were likewise limited, focusing mostly on the qualitative analysis of small convenience samples (Basile, 1974; Green, 1978; Mager, 1975; Mayadas & Duehn, 1976; B. Miller, 1979; Mucklow, 1979; Osman, 1972; Perreault, 1975; Weeks et al., 1975) and recommendations for related clinical care (Hall, 1978; Riddle, 1978).

But serious examination of the larger societal implications soon followed and grew in an exponential fashion. By 1985 no fewer than thirty articles had analyzed the impact of non-heterosexual parenting on children.[23] The initial studies were often small, theory generating and lacking in longitudinal data, but more thorough studies followed. By 1995 at least ninety-three additional studies were published on the topic (L. D. Wardle, 1997),[24] and these studies featured larger sample sizes and longitudinal data. These studies also accumulated a wealth of qualitative interviews.

While these studies differed widely in discipline, methodology and focus, to the extent that they addressed the impact of gay male or lesbian parenting they formed a near universal consensus: children raised by gay male or lesbian parents fared just as well, if not better, than children raised by "traditional" heterosexual parents.[25]

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[20] It should be noted that the appearance of these cases also coincided with the national expansion of no-fault divorce. While changing norms in the 1970s certainly contributed to the appearance of these cases as well, the mere accessibility of divorce during this period likely also played a key role.

[21] While this statement is true these articles did feature a strong normative undercurrent doubting that these parents should be considered inferior parents *per se*.

[22] There is at least one judicial take on this new development. In 1978 the Honorable Ross Campbell wrote an article for the *Judge's Journal* to provide guidance for his colleagues on the "unusual type of child custody case that we are now beginning to see." Judge Campbell recommended that his colleagues keep the following factors in mind if they should have to decide such a case themselves: who is the primary parent? Are the children likely to develop a homosexual preference? What will be the effect on their moral development? The pain of being criticized by others, and the availability of other alternatives (Campbell, 1978).

[23] See, for example (Basile, 1974; Bozett, 1980, 1981; Golombok et al., 1983; Green, 1978, 1982; Hoeffer, 1981; Kirkpatrick et al., 1981; Kweskin & Cook, 1982; Lewis, 1980, 1980; Lyons, 1983, 1983; Mager, 1975; Mayadas & Duehn, 1976; B. Miller, 1979; J. Miller et al., 1981; Mucklow, 1979; Osman, 1972; Pagelow, 1980; Perreault, 1975; Rand et al., 1982; Riddle, 1978; Weeks et al., 1975).

[24] For a thorough list of these later articles, see Appendix E (L. D. Wardle, 1997).

[25] At least two meta analyses reached this conclusion in 1995. See, for example (Patterson, 1995) the studies have "failed to produce conclusive evidence that children of lesbian mothers or gay fathers have significant difficulties in development" but show instead that "children of lesbian

But this consensus faced a challenge in 1997 with the publication of "The Potential Impact of Homosexual Parenting on Children" by Lynn Wardle (L. Wardle, 1997). Wardle attacked the consensus view by challenging the methodological rigor of its foundational research, arguing that it suffered from small sample sizes, biased samples,[26] improper controls,[27] a failure to control for relevant variables,[28] an absence of longitudinal data and a social desirability bias.[29]

Wardle's critique was at least partially correct on nearly all of these points, but he went further. He argued that the academy not only failed to support its current consensus but that it had actively ignored opposing evidence. Wardle's accusation was two-fold: (1) the academy ignored evidence that children raised by non-heterosexual parents were more likely to develop "homosexual interests or behaviors,"[30] and (2) the academy ignored data indicating that these children suffered comparatively negative life outcomes in the more general sense.[31] "Until these concerns are conclusively dispelled," he concluded, "it would not be rational to adopt a public policy endorsing or legitimating homosexual parenting" (L. Wardle, 1997).

Wardle's article touched off a minor firestorm in academic circles and started what has come to be known as the "no difference" debate: are the children of gay male and lesbian parents

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mothers **...**develop normally") and (Strickland, 1995) (""when differences do emerge, they are most likely to favor lesbian families"). Credit for these citations is owed to Lynn Wardle (L. D. Wardle, 1997).

[26] Wardle correctly notes that many surveys featured "samples of convenience," often drawn from progressive (pro-LG parenting) publications (L. Wardle, 1997)

[27] Specifically Wardle takes issue with articles that compare the parenting of same-sex couples to the parenting of single heterosexual parents, though he also implies that that heterosexual couples should be the comparator for even single non-heterosexual parents. The former point has undoubted merit. It's hard to find merit in the second point (L. Wardle, 1997).

[28] Wardle correctly notes that many "life outcome" studies failed to account for such obvious confounds as education, health, socio-economic status and, race and employment.

[29] While Wardle does not elaborate on this charge it is true the very few of the articles prior to 1995 were blinded in any way. This critique also sounds against his overall claim that academia had been one-sided on the evaluation of lesbian and gay parenting, with the implication being that their views are biased (L. Wardle, 1997).

[30] Wardle points to a variety of studies to support this claim. Javaid 1983, for example, suggests a link between a daughter's homosexual fantasy and her mother's homosexual orientation (Javaid, 1983). Belcastro 1994 noted that the children of lesbian and gay male parents exhibited "significant differences" in their gender identity and gender behavior (Belcastro et al., 1994). Wardle also cites the work of controversial academic / political advocate Dr. Paul Cameron as evidence that the academy routinely ignores on this front. Dr. Cameron's work is highly controversial and regularly dismissed (Cameron et al., 1996). Dr. Cameron's work will be discussed later in this section.

[31] Wardle's argument on this point is somewhat muddled because many of the "negative life outcomes" he cites are what he believes to be the negative results of living with a homosexual orientation. So this claim largely blends into the first (that these children may be more likely to "adopt" a homosexual orientation). That said, he lists the following as negative life outcomes that deserve more academic attentions: "[h]omosexual behavior among youth is associated with suicidal behavior, prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behavior with multiple sex partners, and premature sexual activity" (L. Wardle, 1997).

"different" in meaningful ways from the children of heterosexual parents? And, as Wardle initially framed it, this debate proceeded on two main fronts. The first questioned whether the children of gay male or lesbian parents are more likely to fare worse on a variety of health and welfare metrics. The second questioned whether the children of gay male or lesbian parents are more likely to adopt nontraditional gender norms or nontraditional sexual orientations.[32]

Both arguments are still active. The University of Texas Sociologist Mark Regnerus recently published a large scale study claiming numerous negative life outcomes for the children of gay male and lesbian parents. Specifically, Regnerus claims that these children:

- Are more likely to rely on welfare assistance;
- Have lower educational attainment;
- Are more likely to suffer from depression;
- Have been arrested more often;
- Are more likely to smoke;
- Are less likely to be employed full time;
- Are more likely to be unemployed;
- Are more likely to express an attachment disorder;
- Use marijuana more frequently;
- Have a lower household income;
- Are more likely to watch TV for long periods; and
- Are less likely to vote in presidential elections.[33]

(Regnerus, 2012).[34]

But critics have noted methodological flaws in Regnerus' research, specifically that it compares children raised by heterosexual parents *in intact marital relationships* to children raised by any parent who has at one point participated in a same-sex relationship. This later population, of course, includes single parents and parents who have divorced, prompting critics to argue that Regnerus has measured the impact of divorce and single parent parenting rather than the impact of non-heterosexual parenting (Ball & Pea, 1998; Osborne, 2012; Stacey & Biblarz, 2001). Given these flaws, it remains the vast consensus that gay male or lesbian parents impart no greater threat to a child's welfare or health than heterosexual parents, save a minimal (negative) effect attributed to the increased societal scorn that these children may face (increased depression and problems with self-esteem) (Stacey & Biblarz, 2001).[35]

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[32] While the "no difference" debate, can accurately be said to encompass the lion share of academic discourse on the issue of non-heterosexual parenting, there is a second vein or literature that tangentially touches on the relative fitness of lesbian and gay male parents. Robert George, along with his former students, Ryan Anderson and Sherif Girgis, have argued against the legal recognition of same-sex marriage by stressing the (alleged) unique nature of opposite sex union. This argument occasionally implies that men and women have different inherent qualities and successful parenting requires both. In other words, occasionally it mimics the common political argument that a child "needs a mother and a father" (M. J. Anderson, 2002; George, 2009; Girgis et al., 2011; Macedo, 1995).

[33] It's debatable, of course, if this is a "negative" outcome, but Wardle lists it as such.

[34] This is but a small sample of Regnerus' findings (Regnerus, 2012).

[35] Notably, there is some evidence that they are more likely to experience depression and report low self-esteem in their younger years (Stacey & Biblarz, 2001).

The second prong of the "no difference" debate concerns gender and orientation development: are the children of gay male and lesbian parents more likely to express non-traditional gender roles or non-traditional sexual orientation? Wardle answers yes on both counts. He points to evidence gathered in early studies and claims that "homosexual parents appear to produce a disproportionate percentage of bisexual and homosexual children." He further claims that these children tend to express gender in non-traditional ways, citing evidence of increased "cross-dressing" (children dressing in gender atypical clothes), a (disproportionately high) stated preference to remain childless when older and less masculine expression from the boys (Ball & Pea, 1998; L. Wardle, 1997). Regnerus has seconded this conclusion and provided fresh data in support (Regnerus, 2012).[36]

Critics have attacked these claims in several ways. First and foremost they attacked their methodology. Ball and Pea argue that Wardle is playing fast and loose with his statistical claims, especially when it comes to the second prong of the debate (Ball & Pea, 1998).[37] Likewise, the Regnerus study continues to be roundly criticized for comparing the children of intact heterosexual families to the children of gay male or lesbian *single* parents, or to *recently divorced* gay male or lesbian parents (Osborne, 2012).

Others have attacked the orientation and modeling arguments on normative and constitutional grounds. Of course there is the common-sense, normative retort: there's nothing wrong with developing a non-heterosexual orientation or a non-traditional gender expression and thus the entire argument is misguided (Eskridge, 2000; Rosky, 2012a). But many scholars have advanced more sophisticated version of this argument; Eskridge takes issue with the underlying assumption that the state has a legitimate interest in the promotion of heteronormativity. On a normative level, he objects to this argument because it simply repackages older, now impolitic homophobic slurs (homosexual individuals are disliked and thus society should discourage their presence) in a modern, seemingly more acceptable veneer. On a constitutional level, he contends that the argument runs afoul of numerous constitutional concerns: *Craig v. Bowen*[38] mandates heightened review for the state promotion of gender roles, *Romer v. Evans*[39] arguably prohibits government action that reflects animus towards sexual minorities and *Lawrence v. Texas*[40] may mandate strict scrutiny for laws discouraging private, consensual homosexual behavior (Eskridge, 2000).

In a related point, several scholars argue against the implied argument that the state has an interest in promoting heterosexuality. "Orientation modeling," for example, is only a harm if the

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[36] This is not the sum total of his findings. Regnerus lists many additional claims and, like Wardle, includes measures of consensual (adult) sexual behavior as a "negative" outcome (more sexual partners than average, more likely to cohabitate prior to marriage etc.) (Regnerus, 2012).

[37] Specifically, Ball and Pea note that Wardle muddies his comparisons, often comparing the statistical prevalence of exclusive homosexual orientation to the desire to perform a solitary homosexual act (assuming, in other words, if children express a momentary fantasy or desire, they will grow into an exclusive homosexual orientation), or to the report of a single homosexual act. Ball and Pea note that if the data is categorized properly there is no evidence that the children of gay parents are more likely to express a homosexual orientation or a non-traditional gender role (Ball & Pea, 1998).

[38] Craig v. Bowen, 835 F.2d 56 (3rd Cir. 1987).

[39] Romer v. Evans, 517 U.S. 620 (1996).

[40] Lawrence v. Texas, 539 U.S. 558 (2003).

state has a legitimate interest in children remaining heterosexual. This assumption is legally problematic in at least three ways. First, when a policy targets a child's homosexual speech, it is a form of viewpoint discrimination that arguably violates the free speech protections of the First and Fourteenth Amendments. Second, when a policy targets a child's homosexual status, it arguably runs afoul of *Romer v. Evans*[41] by reflecting animus against lesbian, gay, and bisexual people; and third, when a policy targets a child's homosexual relationships, it is a form of moral disapproval that arguably violates the due process protections of the Fifth and Fourteenth Amendment (Rosky, 2012b).

b) Political Debates Concerning Gay Male and Lesbian Parental Fitness

Political speech is often imprecise, and thus politically minded arguments opposing non-heterosexual parenting often blur together with objections to homosexuality in general or, in more recent times, objections to same-sex marriage. That said, when viewed from a wider lens four main arguments emerge. Political activists share the two main concerns of academia: do the children of these parents suffer comparatively worse life outcomes than the children of heterosexual parents and are the children of these parents more likely to express non-traditional gender norms and/or non-traditional sexual orientations than the children of heterosexual parents? But the political sphere consistently adds two arguments that like-minded academics have tended to avoid: gay parents are more likely to sexually abuse their children and gay parents are more likely to expose their children to disease (typically, H.I.V.).

Political discourse on the first two arguments has been noticeably coarser than the related academic discussions. While academics like Wardle and Regnerus tend to paint their orientation and gender concerns as concerns over *modeling* gender and orientation, political activists tend to charge gay male and lesbian parents with actively "recruiting" children on both fronts. This charge was a favorite of Anita Bryant in the later 1970s ("As a mother, I know that homosexuals cannot biologically reproduce children; therefore, they must recruit our children") (Bryant, 1977), and it remained a widely circulated charge among like-minded activists well into the 2000s.[42]

Concerns regarding the alleged negative health and welfare outcomes that these children might experience were likewise expressed in coarser terms. While political activist have mimicked the more sober allegations of Wardle and Regnerus on this point (noting the alleged greater dependence on welfare, the increased incidence of depression etc.) political activists frequently merge anti-homosexual slurs into these arguments.[43] For example, Paul Cameron, founder of the influential Family Research Institute,[44] argued that "Homosexuals make poor parents" in part because they (allegedly) are more likely to physically abuse their partners. Cameron has likewise

[41] Romer v. Evans, 517 U.S. 620 (1996).

[42] For example, in 2004 the U.S. Traditional Values Coalition stated: "There's growing concern among parents over the use of tax dollars to fund homosexual recruitment programs in the public schools. During the Teach Out, state HIV instructors taught teenagers how to engage in deviant sex acts and they also taught teachers how to indoctrinate children into accepting homosexuality as normal (*Let's End Taxpayer Supported Homosexual Recruitment Programs In Public Schools*, n.d.).

[43] See, for example, (*Bryan Fischer*, 2012; *Tony Perkins*, 2012; Sprigg, 2012).

[44] The Southern Poverty Law Center describes the Family Research Institute as the "anti-gay movement's main source for what Cameron claims is cutting-edge research" (*Colorado Springs-Based Family Research Institute Tagged as Hate Group - The Colorado Independent*, n.d.).

argued that the children of these parents are more likely to engage in such habits as habitual urine consumption (for erotic purposes) (Cameron & Cameron, 1996; *Paul Cameron: Introduction*, n.d.).

Political activists also tend to package these claims in more grandiose, and offensive, terms. For example, Peter Sprigg and Tony Perkins, both prominent spokesmen for the Family Research Council, regularly refer to homosexuality as "the greatest public health hazard in America" (Sprigg, 2012; *Tony Perkins*, 2012). Likewise Bryan Fischer, a prominent radio host on American Family Radio, extrapolates from more sober mental health data that homosexuality is the root cause of a recent increase in student suicide ("if we want to see fewer students commit suicide, we want to see fewer homosexual students") (Mantlya, 2020).

But anti-LGBT political activists have routinely focused on two arguments that like-minded political activists have consistently shied away from: the threat of sexual abuse and the threat of disease transfer.[45]

The charge that homosexual parents are more likely to sexually abuse their children is empirically false; straight males are statistically more likely to sexually abuse minors than any other demographic, while lesbians and straight women are the least likely. Gay males fall somewhere in between (Eskridge, 2000; Eskridge & Hunter, 1997; Herek, 1991; Stacey & Biblarz, 2001). But this allegation remains common in anti-LGBT political literature. Recent publications from the Family Research Institute, the Family Research Council and Focus on the Family have all repeated the claim (Cameron, 2014; Sprigg, 2012; Tashman, 2015; *Tony Perkins*, 2012).[46] Known anti-LGBT activists also continue to repeat the claim frequently during speaking engagements, though they have largely avoided doing so on mainstream media outlets in recent years (*Brian Brown*, 2012; *Bryan Fischer*, 2012; Signorile, 2014; Tashman, 2015).[47]

Political activists are also far more concerned with the alleged threat of disease transfer than academics. This argument claims that gay males and lesbians are more likely to contract sexually transmitted diseases, specifically H.I.V. and hepatitis, and that they are therefore more likely to transmit these diseases to the children in their care. While the specific mechanism of this threatened transfer is often left unsaid many of the more offensive activists directly link this charge to the alleged threat of sexual abuse, implying a direct, sexual transmission to their children (*Bryan Fischer*, 2012; *Paul Cameron: Introduction*, n.d.; Cameron & Cameron, 1996).

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[45] While it is true that academics have consistently shied away from these assertions, they are not all together absent from their work. Wardle, in particular, linked non-heterosexual parenting to the threat of disease in his 1996 publication "The Potential Impact of Homosexual Parenting on Children:" "if parental homosexuality will cause more children to engage in homosexual activities, and a certain percentage of them will contract AIDS or other serious sexually transmitted diseases through their homosexual activities, can we honestly say that for those children, the nurturing of their parents was really a more important influence than the parents' sexual behavior?"

[46] For a recent example, see Paul Cameron's 2014 article "Are Gay Parents More Apt to Commit Incest?", in which he claims: "It is well-documented that those who engage in homosexuality are — as a group — much more likely to molest children than are heterosexuals" (Cameron, 2014).

[47] For example, Bryan Fischer of the American Family Association stated in 2012: ""In the wake of what we've seen at Penn State, that alone out to be enough to say that, look: we are not going to put children in same-sex households—we are not going to adopt them into same-sex households" (*Bryan Fischer*, 2012);

Once again this argument is empirically false. There is no empirical support for the claim that the children of gay parents are more likely to contract disease (Ball & Pea, 1998; Herek, 1991; Stacey & Biblarz, 2001). Nonetheless, political activists continue to make this allegation, in print and in public pronouncements (*Bryan Fischer*, 2012; Cameron, 2014; Cameron et al., 1996; Cameron & Cameron, 1996).

The judicial evaluation of gay parental fitness in custody matters.

Dissecting the judicial treatment of gay parental fitness is complicated by the courts' ambiguous understanding of homosexuality itself. Put simply, it is not altogether clear what courts mean when they label a parent "gay," "lesbian," or "homosexual." To fall into such classifications, must these parents engage in same-sex sex? Must they *only* engage in same-sex sex? Must they engage in same-sex sex more than once? Is same-sex sexual attraction sufficient? Is non-traditional gender expression sufficient? Does a parent's self-identification matter?

While modern scholars tend to treat biological sex, sexual orientation, and gender identity as distinct concepts, American courts have by and large ignored this separation. Instead, they tend to collapse all those who are non-cis or "non-heterosexual" into the category: "homosexual."[48] Consider the following persons who have been labelled or treated as "homosexuals" by American courts:[49]

- A father in a heterosexual marriage who experimented with same-sex sex in his late teens;[50]
- A man who claimed to be "homosexual" but never admitted to any same-sex sexual activity;[51]
- A woman who dressed in "mannish attire;"[52]

[48] The courts are not alone in this regard. Blurring orientation, gender and identity is an old habit across many disciplines. *See* (Valdes, 1995).

[49] Rhonda Rivera uncovered the first five cases listed here. Her 1979 article, *Our Straight Laced Judges*, also provides an excellent, though early, discussion of the ambiguities discussed above. *See* (Rivera, 1978).

[50] Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963). In this case an air traffic controller employed by the air force was dismissed (partially) for homosexual acts that occurred in his teens. Mr. Dew was thus treated as a homosexual employee, but there is some dispute as to whether the court labelled him as such. The dissent notes that the Air Force's own psychological exam determined that Mr. Dew did *not* manifest a "homosexual personality disorder" at the time of his discharge, indicating that the dissent, at least, did not view Mr. Dew as a homosexual at the time of trial. It is unclear if the majority shared the dissent's assessment. *Id.* at 583.

[51] Gaylord v. Tacoma School Dist., 535 P.2d 804, 805 (1975).

[52] Nickola v. Munro, 328 P.2d 271 (Cal. Dis. Ct. App. 1958). There is some ambiguity here; it is possible that the Court meant to label the woman wearing "mannish attire" as a "sexual deviant" rather than a "homosexual." *Id.* at 273. This ambiguity is typical for the early post-war period as the popular understanding of "homosexual" had only recently been separated from (alleged) "sexual deviants" and (alleged) "perverts" of all varieties. *See* Martin Bauml Duberman, *Reclaiming the Gay Past*, 16 REVIEWS IN AMERICAN HISTORY 515–525 (1988); Margot Canaday, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (Princeton University Press) (2011).

- Men and women who displayed "homosexual propensities;"[53]
- A man with one conviction for engaging in same-sex sex;[54]
- A man who denied same-sex attraction but once sent a valentine to his male friend;[55]
- A mother who denied she was a lesbian but admitted to a single sexual encounter with her female friend;[56] and
- A woman who denied same-sex attraction and same-sex sexual activity but shared a bedroom with another woman.[57]

American courts have also demonstrated difficulty understanding any of these categories (biological sex, sexual orientation, and gender identity) as a continuum, despite growing acceptance that all three express as a spectrum.[58] Instead, they collapse these identities into a single binary: homosexual or heterosexual.[59]

In short, American courts appear to have adopted a simplistic "one drop" logic in custody matters of this kind. Exclusive heterosexuality serves as the default norm, but any instance of same-sex intimacy, attraction, or non-heterosexual identification places one into the category "homosexual." Vagaries, distinctions, and spectrums are ignored.[60]

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[53] Kerma Restaurant Corp. v. State Liquor Auth., 278 N.Y.S.2d 951, 951 (N.Y. App. Div. 1967). *See also* Nickola v. Munro, 328 P.2d 271, 273 (Cal. Dis. Ct. App. 1958).

[54] United States v. Flores-Rodriquez, 237 F.2d 405, 407 - 08 (2nd Cir. 1956).

[55] Pennington v. Pennington, 596 N.E.2d 305 (Ind. Ct. App. 1992); the man alleged that he sent the valentine in jest. *Id*. at 308. ip

[56] T.C.H. v. K.M.H., 784 S.W.2d 281, 283 (Mo.App. E.D. 1989).

[57] Boucher v. Boucher, 1990 WL 751138, 2 - 3 (Vir. Cir. Ct. Apr. 30, 1990).

[58] *See* Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 3 DUKEMINIER AWARDS - BEST SEXUAL ORIENTATION LAW REVIEW 1 (2005); Rosky, *supra* note 7; Rivera, *Supra* note 14. The continuous nature of sexual orientation has been professionally accepted since at least the Kinsey Report (1948), which measured sexual orientation on a six-point scale ranging from "exclusively heterosexual" (0) to "exclusively homosexual" (6). (Kinsey, 1998)

[59] This "forced binary" is perhaps best demonstrated by the well-studied case *Rowland v. Mad River*, wherein the plaintiff (Ms. Rowland) repeatedly defined herself as a bi-sexual only to be repeatedly defined as a "homosexual" by both the trial and appellate courts. 730 F.2d 444 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985). But *Rowland* is by no means the only example. The data for this study contains no fewer than nine examples of similar "bi-sexual erasure;" *See* Bachman v. Bradley, 171 Pa.Super. 587 (1952); In re Marriage of Teepe v. Teepe, 271 N.W.2d 740 (Iowa 1978); Maradie v. Maradie, 680 So.2d 538 (Fla. Dist. Ct. App. 1996); Conkel v. Conkel, 509 N.E.2d 983 (Ohio App. 1987); S.B. v. L.W., 793 So.2d 656 (Miss. App. 2001); Cabalquinto v. Cabalquinto, 100 Wash.2d 325 (Wash. 1983); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865 (Mo.App. W.D. 1982); Large v. Large, 1993 WL 498127 (Ohio Ct. App. Dec. 2, 1993); Dorworth v. Dorworth, 33 P.3d 1260 (Colo.App. 2001).

[60] In many ways this can also be seen as a rough analogue to the "heterosexual metanarrative" noted by Fineman, wherein the judiciary appears to understand the family in only cis-gendered, heterosexual terms. *See* (Fineman, 1995).

For the purpose of this review (and for the case analyses in chapters 5 and 6), I will examine the judicial treatment of all custody cases featuring one parent labelled by a court as "homosexual," "gay," or "lesbian." I will also considers cases that avoid these labels altogether but consider same-sex attraction or same-sex sex while evaluating one of the parents. As noted above, these labels may misrepresent reality, but the terms have traction for this analysis. Courts proceed as if they are accurate and this is an analysis of judicial tendencies.

…….

Unlike many other traditional bias regimes (racism, sexism, etc.), anti-homosexual bias has not been an identifiable variable in the published custody record until relatively recently - for the very simply reason that custody cases did not explicitly discuss parental sexual orientation until the latter half of the 20th century. The first published custody matter discussing a gay male or lesbian parent dates back to just 1951, a relatively recent 69 years ago.[61] And published custody cases featuring a gay male or lesbian parent were relatively rare until the start of the 1980's.[62] The reasons for this silence are likely two-fold: divorce itself was relatively rare prior to the no-fault divorce revolution of the 1970s (L. D. Wardle, 1991), and homosexuality faced such scorn during these early decades that it's doubtful gay parents saw much utility in adjudicating their parental rights (Rivera, 1978).

During this early period, anti-homosexual bias was actually baked into the rules themselves. Prior to the 1970's most jurisdictions allowed an inference of parental unfitness based solely on a parent's non-heterosexual orientation (Shapiro, 1995a). This rule, known as the "*per se"* rule, allowed courts to simply assume, without evidence or inquiry, that a gay male or lesbian parent was, *ceteris paribus*, less parentally fit than an opposing heterosexual parent.[63]

The *per se* rule was replaced by the Nexus Test in the 1970s, a test designed to weigh, rather than assume, the impact of all alleged immorality (not just homosexuality) on the evaluation of parental fitness.[64] The "Nexus Test" afforded gay male and lesbian parents some protection in

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[61] While gay male and lesbian parents certainly existed prior to the case, the first published custody case known to this author that openly discussed a gay male or lesbian parent occurred in 1951. Luley v. Luley, 234 Minn. 324 (MN 1951).

[62] Only twenty-one such decisions are known to the author.

[63] There is some dispute on the precise parameters of this rule or inference. Known as the "*per se*" rule, some have implied that the rule mandates, as a matter of law, a finding that gay male and lesbian parents are less parentally fit than heterosexual parents (Shapiro, 1995b). While others have implied that the *per se* rule merely creates a presumption that gay male and lesbian parents are less fit, *ceteris paribus*, than heterosexual parents (Eskridge, 2011). The reality is slightly more complicated. In truth, nearly all courts during this period were *allowed* to presume the parental unfitness of gay male and lesbian parents, but very few of them were actually *required* to do so. In short, the presumption that a gay male or lesbian parent was less fit to obtain custody wasn't so much a rule as it was a permissible inference (Shapiro, 1995a).

[64] The genesis of the Nexus Test is widely attributed to *Whaley v. Whaley*, a 1978 Ohio decision that refused to assume that a mother's adulterous affair impacted her parental fitness. Whaley v. Whaley, 399 N.E.2d 1270, 1273 (Ohio Ct. App. 1978). But other courts arguably applied it earlier. The *Whaley* Court itself noted that an earlier case, *Beamer v. Beamer*, 244 N.E.2d 775 (1969), presaged its holding. *Id.* at 1273. The Nexus Test was first used to consider the relevance of a parent's homosexual behavior in the 1978 case *Schuster v. Schuster*. 90 Wash.2d 626 (WA 1978).

theory, because it required a demonstrated nexus between a parent's homosexuality and harm to the child before the parent's homosexuality could be deemed relevant to the evaluation of their parental fitness (Shapiro, 1995b). But while this was no doubt formal progress courts were still free to find that homosexuality rendered gay male and lesbian parents less suitable. They now simply had to justify their conclusions rather than assert them.

While there is no concrete data on this point, scholars agree that strong anti-homosexual bias continued to place gay male and lesbian parents at a severe disadvantage even after the introduction of the Nexus Test.[65] In other words, there is a general consensus that gay male and lesbian parents continued to receive custody less often and have their visitation restricted more frequently than comparably situated heterosexual parents, *even after* the *per se* rule fell from use (Richman, 2002; Rivera, 1978; Rosky, 2008; Shapiro, 1995b). Early scholars made this claim ("justice for the homosexual parent does not come cheaply or often") (Rivera, 1978), and modern scholars have echoed it ("individual lesbians and gay men routinely lose custody and instead receive restricted visitation simply because they are lesbian or gay") (Shapiro, 1995b). Courts themselves have even drawn this conclusion ("In the majority of cases involving the award of custody where one parent is a homosexual, the courts have awarded custody to the non-homosexual parent").[66]

Despite the lack of concrete data on allocation rates or restriction tendencies, it is not hard to see why scholars and jurists reached this conclusion. In addition to numerous accounts from lawyers, activists and academics attesting to the bias they experienced, the opinions themselves have revealed their bias quite openly; consider this quote from *Chicoine v. Chicoine* (1992):

> There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan "Egyptian Book of the Dead" bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement (*internal citations omitted*).[67]

Or this exposition from *Ex. parte H.H.*(2002):

> Homosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an

[65] For many this conclusion flows from the realist assumption that societal bias will also find its way onto the bench, and the existence of anti-homosexual bias in society is seemingly beyond doubt; a 2005 study revealed that approximately 21% of self-identified gay male, lesbian and bisexual adults have suffered violence or property damage because of their sexual orientation. The same study revealed that 23% have been threatened with violence, 13% have had objects thrown at them and 49% have suffered verbal abuse (Herek, 2007). Gay males and lesbians have also experienced a long history of discrimination in employment and housing (Eskridge, 2009), and attitude surveys consistently reveal that gay males and lesbians are frequently viewed less favorably than heterosexuals, both in terms of implicit and explicit attitudes (Banse et al., 2001; Breen & Karpinski, 2013; Jonathan, 2008; Lemm, 2006; Steffens, 2005).

[66] J.L.P v. D.J.P., 643 S.W.2d 865, 871 (Mo. App. 1982).

[67] Chicoine v. Chicoine, 479 N.W.2d 891, 897 (S.D. 1992).

> act so heinous that it defies one's ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child. To declare that homosexuality is harmful is not to make new law but to reaffirm the old; to say that it is not harmful is to experiment with people's lives, particularly the lives of children (*internal citations omitted*).[68]

The case law is also replete with less verbose indications of anti-homosexual bias: descriptions of same-sex sex as "despicable,"[69] "repugnant"[70] or "detestable;"[71] a recurrent need to place quotation marks around a parent's same-sex "partner;"[72] the obvious slight of describing an individual as an "admitted"[73] or "avowed"[74] gay male or lesbian. The explicit presence of anti-homosexual sentiment in judicial opinions has not been subtle.

Gay male and lesbian parents also routinely face arguments against their parental fitness that have no real analogue in the heterosexual world. Courts have frequently argued, for example, that gay male or lesbian parents might lure their children into homosexuality (orientation recruitment):

> [A] child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality]. God Almighty made the two sexes not only to enjoy, but to perpetuate the human race. And after all, that is the most valuable aspect of sexual behavior, perpetuating the human race (clarification added by the Appellate Court).[75]

Or that they will fail to impart traditional gender norms to their children (gender confusion):

> A two-year-old child is at a stage of development where they are forming a gender identity and learning sex appropriate roles for their own sex, whatever, masculine and female rolls. [sic] It's preferable that they have good roll (sic) models in a stable environment always. I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected.[76]

Courts have worried that gay male or lesbian parents might expose their children to disease:

> [I]t is theoretically possible for a parent to infect a child with the AIDS virus while extracting a child's tooth. Under these circumstances, a parent "might" infect his child with AIDS. Because the statute clearly invests the trial court with a broad

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[68] Ex. Parte H.H., 830 So.2d 21, 37 (Al. 2002).
[69] Lewis v. Lewis, 1976 Ohio App. LEXIS 6024.
[70] Weigand v. Houghton, 730 So.2d 58, 588 (Miss. 1999).
[71] *Id*.
[72] *Id.*
[73] *Black v. Black*, 1998 WL 22823, 2 (Tn. App. 1998).
[74] *Delong v. Delong*, 1998 WL 15536, 6 (Mo. Ct. App. Jan. 20, 1998).
[75] *Cabalquinto v. Cabalquinto*, 100 Wash.2d 325 (Wash. 1983) (quoting the trial court).
[76] *Id.* at 1275.

> discretion in this area, I believe the trial court did not manifestly abuse its discretion by denying appellant his visitation rights under these circumstances.[77]

Or that they may sexually abuse their children:

> The experts' testimony with respect to molestation of minors is likewise suspect. Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated. … It may be that numerically instances of molestation occur with more frequency between heterosexual males and female children, but given the statistical incidence of homosexuality in the population, which the father claims is 5 to 10%, homosexual molestation is *probably*, on an absolute basis, more prevalent (emphasis added). [78]

On occasion, courts have even worried that non-heterosexual parenting threatens societal morality itself:

> The courts of this state have a duty to perpetuate the values and morals associated with the family and conventional marriage, inasmuch as homosexuality is and should be treated as errant and deviant social behavior. I would have this Court declare under this or a similar set of facts that a practicing homosexual parent be disqualified from obtaining legal custody of one's minor child or children.[79]

Gay male and lesbian parents have also appeared to face what this project has termed "closet penalties," an apparent judicial desire to limit or silence the public expression of gay male and lesbian parents, especially pro-LGBT political expression and the open acknowledgment of their non-heterosexual orientations.

Courts frequently criticized, for example, gay male and lesbian parents for failing to conceal post-marital same-sex relationships:

> [T]he mother and G.S. have established a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage[80]

Open advocacy or support for LGBTQ+ causes has also been viewed as a negative:

> Defendant has involved the children in his attempts to further homosexuality. They have accompanied him on protest marches, at rallies and were filmed with him for

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[77] *Stewart v. Stewart*, 521 N.E.2d 956 (Ind.App. 1988).
[78] 643 S.W.2d 865 (1982).
[79] *Collins v. Collins*, 1988 WL 30173 (Tn. Ct. App. 1988) (Tomlin, Presiding Judge, Western Section, concurring).
[80] Ex parte J.M.F., 730 So.2d 1190 (AL 1998).

> a television show which discussed homosexuality……. Both my interview with the children and the testimony at the hearing indicated that homosexuality and gay rights are a common if not the most common topic of conversation when the children are with defendant.[81]
>
> They frequent gay bars and have discussed taking the children to a homosexual church.[82]

On an even deeper level, gay male and lesbian parents have seen their custody rights restricted for simply revealing their orientation.[83] For example, in *Hertzler v. Hertzler* a gay male father was ordered to refrain from "exposing the child to ... his gay lifestyle." He was subsequently held in contempt for simply telling his son that he was gay.[84] Likewise in *G.A. v. D.A.* where a lesbian mother saw a restriction of her custody rights upheld in part because she failed to conceal her orientation from her daughters and the world at large ("Although Dena said she did not advertise the fact that she was a lesbian, from her testimony it is apparent that she did not attempt to keep it a secret").[85]

In short, there are very good reasons to believe that gay male and lesbian parents fared worse in custody contests even after the introduction of orientation neutral rules in the 1970's. There are likewise good reasons to believe that this bias remains today. In the judicial decisions available through Lexis and Westlaw there are numerous, recent custody decisions that still appear to evidence an anti-homosexual bias.[86] Numerous scholars who focus on Anti-homosexual bias

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[81] In the Matter of J.S. & C., 129 N.J.Super. 486 (Sup.Ct.NJ. 1974).

[82] Ex parte D.W.W., 717 So.2d 793 (AL 1998).

[83] *See* Hassenstab v. Hassenstab, 6 Neb.App. 13 (NE.App. 1997) ("with equally ill-conceived ardor, Pamela insisted upon fully informing the children as to her lifestyle.").

[84] Hertzler v. Hertzler, 908 P.2d 946 (WY 1995).

[85] G.A. v. D.A., 745 S.W.2d 726 (Mo.App. W.D. 1988). The reverse has also been true; while gay male and lesbian parents have been punished for exiting the closet they have also been rewarded for staying in. At least one appellate court has explicitly noted this fact ("Prior appellate decisions have indicated *discreet* homosexual parents will not be denied visitation or custody merely because of their sexual orientation" (emphasis added). In re the Marriage of Cupples, 531 N.W.2d 656 (Ia.App. 1995).

[86] *See,* for example, Brimberry v. Gordon affirming the removal of a lesbian mother's custody rights after criticizing the mother's "lifestyle choices." 2013 Ark. App. 473 (Ark.App. 2013). *See also* Cole v. Cole affirming the denial of a lesbian mother's custody, in part, because she "engaged in a homosexual relationship of which the children are not fully aware and do not understand." 2012 Ark. App. 528, 1 (Ark.App. 2012). And *see* Carnes v. Snider, 865 N.W.2d 124 (N.D. 2015) (unpublished decision). The court cited with approval the following language from Jacobson v. Jacobson, 314 N.W.2d 78, 82 (N.D.1981): "because of the mores of today's society, because [the mother] is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the best interests of the children would be better served by placing custody of the children with [the father]." While the Court clarified that Jacobson did not create a presumption, they reasoned that it was still permissible to base a finding of parental unfitness on non-traditional sexual orientation.

have also indicated that they consider the impact of anti-homosexual bias to be an ongoing issue (Eskridge, 2011, 2013; Rosky, 2013b; Shapiro, 1995b)

Chapter 3
The Judicial Evaluation of Gay Parental Fitness in Custody: What Remains Obscured

Considerable scholarship has been devoted to orientation bias in custody matters, but considerable gaps in our knowledge remain. The evolution of the relevant legal doctrine, the impact of the relevant social movements and doctrinal critiques of both judicial and statutory authority have been well examined, but other key subject areas have not. For one, there is a general lack of empirical analysis. To what degree has orientation bias disadvantaged gay parents in terms of custody outcomes (custody allocation and visitation restrictions)? How has that bias evolved over time? What background characteristics of the judiciary (age, gender, political persuasion, etc.) moderate this alleged bias, if any? What is the content of judicial orientation bias (what are the judiciary's concerns with gay parenting, how do they justify disparate treatment etc.)? How does parental gender interact with judicial orientation bias in custody matters? Does the gender of the child matter to the above questions, and if so how? Does judicial sensitivity to disgust bias the judicial evaluation of gay parents? And, finally, how does orientation bias impact the custody adjudication processes that occurs outside of the court room: the selection of lawyers, litigation strategy, managing *guardians ad litem*, managing home inspectors, navigating parental fitness classes and the rest?

In short, while we know a great deal about the formal, *de jure*, status of gay parents in custody matters, we know considerably less about the *de facto*, on-the-ground biases they face every day. What follows is a brief recitation about what is known in the above highlighted areas, and, perhaps more importantly, what remains obscured.

Does orientation bias exist in terms of custody outcomes?

In terms of formal legal doctrine, non-heterosexual parents have largely approached custody contests on equal footing since the introduction of orientation neutral rules in the late 1970s, but scholars and activists argue that they have faced - and still face - significant real-world bias in terms of custody outcomes. (Eskridge, 2009; Gates & Williams Institute, UCLA, 2011; Rosky, 2013b).

This opinion, however, is not universal. While this author is not aware of any scholastic objection to the claim that gay parents suffered disproportionately negative custody outcomes *in the past*, several conservative scholars have argued that this bias has either dramatically diminished or disappeared over the most recent decades (George, 2009; Sprigg, 2012; L. D. Wardle, 1997). In fact, some scholars on the conservative end of the spectrum have claimed that the courts have recently adopted a pro-LGBT bias in custody matters. Perhaps the most well-known of these academics, Professor Lynn Wardle, has been advancing this argument since at least 1997 (L. D. Wardle, 1997),[87] while others have been espousing the more general claim that the courts have adopted a pro-LGBT bias in all matters of familial relations (Cameron & Cameron, 1996; George, 2009; Girgis et al., 2011; Sprigg, 2012).

And this skepticism about anti-gay bias in custody matters echoes a widely held popular belief about the status of LGBTQ+ equality in general. The Atlantic, by most accounts a fairly progressive publication, published an article in 2019 titled "The Struggle for Gay Rights is Over,"

[87] This claim has been advanced by other "conservative" academics as well (Cameron & Cameron, 1996; Sprigg, 2012)

in which the author ponders whether further legislative efforts to aid LGBT+ equality are even necessary in the contemporary United States (Kirchick, 2019). And, of course, right wing media pundits have posited this claim in coarser terms, frequently accusing the courts of adopting a "gay agenda" in all matters of custody, marriage and adoption (*Brian Brown*, 2012; *Bryan Fischer*, 2012; *Tony Perkins*, 2012; Tashman, 2015).

But to date there has been virtually no empirical assessment of either claim in terms of custody outcomes. While numerous scholars have studied anti-homosexual sentiment in custody decisions the vast majority have approached this topic anecdotally, primarily to buttress doctrinal legal analysis. (Connolly, 1996, 1998; Dalton, 2000; Dalton & Bielby, 2000; Eskridge, 2000, 2002; Herek, 1991, 2007; Richman, 2002, 2010; Rivera, 1978; Shapiro, 1995a). These scholars did not proceed to empirical, population-level assessments of custody outcomes across orientation.[88]

This lack of scholarship is particularly odd given the empirical attention that has been paid to gender bias in custody outcomes. Research for this article has uncovered twelve such studies, spanning a timeframe from 1979 to 2004. The majority of these studies employed statistical inference to argue that mothers remained more likely to receive custody even after the introduction of gender-neutral allocation rules (Bahr et al., 1994; Gender Bias Study Committee, 1990; Lemon, 1981; Pearson & Ring, 1982; Polikoff, 1981; Swent, 1996; Weitzman & Dixon, 1979a).[89] Still others utilized statistics to make population level claims about the motivations behind this continued bias (Artis, 2004; Bahr et al., 1994; Lemon, 1981; Nickerson, 2000; Swent, 1996).[90]

To date it remains unclear the degree to which gay parents received disproportionately negative custody outcomes in the past, and how that (assumed) disparate impact has shifted over time.

What are the moderators of this alleged orientation bias?

It has long been known the certain background characteristic are predictive of anti-homosexual bias in general. For example, gender: straight males typically report a negative attitude towards gay males and more positive attitude towards lesbians, whereas straight women tend to hold an equally positive valence toward both gay males and lesbians (Breen & Karpinski, 2012;

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[88] These scholars largely focused on the content of orientation bias and a more detailed discussion of their work can be found under the heading "What is the content of judicial orientation bias in custody matters," below. It should also be noted that there are some population assessments in the cited works, just not population assessments of *custody outcomes across orientation.* Connolly, for example, conducted an empirical analysis of the judicial treatment of same-sex parents (both members of the couples were of the same-sex) and made a population assessment of the court's willingness to grant non-biological parents standing in custody matters (Connolly, 1996).

[89] There is debate on this point. Some scholars agree that mothers remain preferred for custody but disagree as to why; they argue that the low percentage of custody awards to fathers reflects disinterest on their part rather than judicial bias (Chesler, 1991; Maccoby & Mnookin, 1992; Weitzman, 1985). Mothers and fathers tend to receive custody in more equal proportion, they argue, when fathers actually fight for it (Polikoff, 1981; Weitzman & Dixon, 1979b). For a thorough summary of this debate see *Parenting by the Clock,* at 92 – 93 and especially footnotes 34 and 35 (Warshak, 2011).

[90] The consensus view is that continued allocation bias reflects an ingrained assumption that mothers are more nurturing, and family focused than fathers (Artis, 2004; Bahr et al., 1994; Lemon, 1981; Nickerson, 2000; Swent, 1996).

Herek & McLemore, 2013). This moderating effect has also been observed in at least one case law analysis (male judges evaluated the parental fitness of gay males more harshly that female judges, though the differential was not statistically significant) (Rosky, 2008). Numerous studies have likewise suggest that age is positively correlated with negative attitudes towards homosexuality (Herek, 1984, 2009a; M. E. Johnson et al., 1997), and that education is negatively correlated (Herek, 1994, 2009a; Loftus, 2001; Strand, 1998).

The general consensus also holds that as religiosity increases, attitudes toward lesbian and gay individuals become more negative (Jonathan, 2008; Rowatt et al., 2006).[91] And political conservatism has been associated with the negative evaluation of numerous out-groups, including lesbian and gay individuals (Herek, 2009a; Nosek et al., 2007).[92] In addition, several scholars have pointed to conservative political backlash as a possible explanation for the disparate treatment of same-sex parents, arguing that conservatives have adopted a reflexive aversion towards the rise of LGBT identity politics (Haidt & Hersh, 2001; Kam & Estes, 2016).

From a realist perspective, it stands to reason that judges would manifest a relationship with orientation bias that is similar to the population at large. In other words, one would expect judges high in religiosity, age and conservatism to demonstrate more orientation bias than judges low in those attributes. Moreover, one would expect male judges to express orientation bias more strongly than female judges, at least when gay male fathers are before the bench. There is, however, some reason to believe that a legal education, which is thought to stress egalitarian norms, may grant decision makers an elevated ability to cabin biases and associations. Rachlinski, et. al, for example, found that trial judges were able to suppress the impact of their implicit racial biases on theoretical judicial decisions when the race of the theoretical litigants was made explicit, thus offering some support for a correlation between legal education and tolerance on the bench (Rachlinski et al., 2008).[93]

But to this author's knowledge only one scholar has empirically examined the impact of these moderators on orientation bias in a custody adjudication, and even this analysis was only partial. Rosky's 2008 textual analysis of anti-homosexual stereotypes in gay parental custody decisions found that male judges were more likely to express stereotypically homophobic views than females (as the larger literature on orientation bias would predict), though the results were

[91] Sophisticated studies of "Religiosity" and its interaction with homosexual bias have traditionally relied on three separate measures, religious fundamentalism, right-wing authoritarianism and Christian Orthodoxy, with religious fundamentalism being the strongest predictor of the three (Rowatt et al., 2006). Since this study does not focus on religiosity specifically but rather examines its impact as a moderator, religious attendance will serve as a proxy for religiosity. This is a common measure of religiosity and it has been shown to correlate positively with anti-homosexual bias (Fisher et al., 1994).

[92] Nosek in particular has examined the impact of political ideology on homosexual attitudes quite thoroughly, and he found that strong liberals express a slight implicit preference for heterosexuality and no explicit preference, while strong conservatives express a significant implicit preference for heterosexuality and an even stronger explicit preference (Nosek et al., 2007).

[93] But those same judges were unable to suppress the impact of their implicit biases when the race of the litigants was subliminally primed and not explicit (Rachlinski et al., 2008). It should also be noted that Rachlinski did not test a control group of "non-judges," so any conclusions regarding the impact of legal or judicial training based on this study is tentative at best.

not statistically significant (Rosky, 2008). The impact of other, well-known moderators (age, religiosity, political affiliation etc.) remains unexamined.

This lack of information is, in many ways, understandable because many of these alleged moderators are hard to gather from the available record. Family law is typically adjudicated in state court, so it's not easy to identify the political leanings of a particular judge (in federal court, the political party that appointed the judge can often be used as a proxy for political ideology). The religiosity of a justice is also hard to gauge from the record, for obvious reasons, and even judicial gender is often impossible to discern; the first name of a judge can, of course, allow for an educated guess as to the judge's gender (though some names are androgynous) but many opinions report only last names, and for state judges from the pre-internet era detailed background information is often not readily available.[94]

But while understandable, this lack of information is consequential for a variety of reasons. First and foremost, it would aid our understanding of orientation bias, and it's possible roots, if the impact of these moderators could be measured. And, secondly, knowledge of these measurements might further efforts to diversify the bench (if, for example, it was concluded that female judges express less anti-homosexual bias than male judges, one could use that fact to support a call for more gender diversity on the bench).

What is the content of judicial orientation bias in custody matters?

At first glance it might appear that academia has a firm grasp on the content of judicial orientation bias in custody hearings (what orientation biases do the judiciary hold?), and to a certain extent that is true. Academics from a variety of disciplines have analyzed judicial opinions and court transcripts to identify numerous orientation biases in custody adjudications: the belief that homosexuality is a mental illness (Herek, 1991), the belief that children will be stigmatized if they are placed in the custody of gay parents (Herek, 1991; Rivera, 1978; Shapiro, 1995a), the belief that homosexuality is a choice and can be avoided (Herek, 1991), the belief that gay parents are more likely to be child molesters (Herek, 1991; Rosky, 2008), the belief that gay parents will fail to provide an adequate gender role model (Eskridge, 2000; Herek, 1991; Rosky, 2008; Shapiro, 1995a), the belief that gay parenting will challenge societal heteronormativity (Eskridge, 2000; Rosky, 2012a; Sedgwick, 1993), the belief that gay parenting will challenge traditional morality (Rivera, 1978), the belief that gay parenting will result is some undefined, "future harm" (Rivera, 1978; Shapiro, 1995a), the belief that gay parents are morally unfit (Rivera, 1978; Shapiro, 1995a), the fear that gay parents will expose their children to immorality (Rivera, 1978; Shapiro, 1995a), the belief that a judicial sanction of gay parenting would sanction criminal sexual activity (Rivera, 1978), the belief that gay parents will recruit their children to homosexuality (Rosky, 2008; Shapiro, 1995a), and the fear that gay parents will expose their children to disease, especially H.I.V. (Herek, 1991; Rosky, 2008).

But these analyses are lacking in a few important ways. First and foremost, they are not empirical, and thus fail to grant insight into the relative prevalence of these fears. What *most concerns* the judiciary about gay parenting? What concerns the judiciary *the least*? And how have

[94] It's unclear how Clifford Rosky was able to investigate judicial gender from the publicly available custody decisions. It appears that judicial gender was assigned from first names, when available through the text of the opinion, though this method would seemingly result in a considerable amount of missing data (only last names were used, the names were androgynous etc.).

these concerns shifted over time? While the above cited research provides excellent analysis of orientation bias and, often, excellent doctrinal critique, it largely fails to provide the necessary data to answer these questions.

These analyses also frequently fail to distinguish judicial biases from the biases of the litigants or others that are also expressed in judicial opinions (Rosky, 2008). While this is not a cardinal sin by any means (for many research purposes it is completely appropriate), it does leave obscured the question of *judicial bias* in these matters.

And finally, these analyses rarely aim to provide a *comprehensive* list of orientation biases in custody hearings (held by the judiciary or otherwise).[95] Typically they focus on one bias that they have highlighted and then dissect it, or point to a cluster of biases that are thematically related and do the same (Eskridge, 2000; Rosky, 2008, 2012a; Sedgwick, 1993). On occasion they discuss a list of biases that are relevant to litigators or to recent developments in social science (Herek, 1991; Hull, 2017; Shapiro, 1995a). But what is lacking is a modern, comprehensive catalogue of judicially held orientation biases; a review of all available decisions with the aim of mapping the population of orientation biases that appear in those cases.

There is one notable, though partial, exception to the above shortcomings. In a 2008 study Professor Clifford Rosky studied the incidence of a select group of homophobic stereotypes in gay parental custody decisions (gay parents will engage in sexual abuse, disease transfer or orientation recruitment) (Rosky, 2008). Professor Rosky utilized judicial decisions available through Lexis and Westlaw (through 2007) to determine the differential application of these stereotypes to gay male and lesbian parents in custody contests. In this way Professor Rosky measured the incidence of these stereotypes overall and their incidence across parental gender. This study did not, however, examine the *judicial* application of these stereotypes. Rather it conflated stereotypes applied by litigants, the courts, the litigants' experts and the litigants' witnesses. Thus, while clearly important, this study cannot be said to examine *judicial* bias in this area (Rosky, 2008). It likewise focused on only a small handful of homophobic stereotypes (it did not chart the vast majority of the concerns listed above), and it did not consider the impact of orientation bias on custody *outcomes* (Rosky, 2008).

What is the intersectional impact of parental gender?

Increasingly, scholars recognize that an analysis of human relations should avoid the "single axis" approach when possible. An analysis of the experience of Black women is incomplete if it focuses only on racism or sexism (Crenshaw, 1989). Similarly, an analysis of motherhood is less sound if it fails to take into account the unique experiences of Black or Hispanic women (Crenshaw, 1989; Mason, 1996; Mcquillan et al., 2008). While no scholar can probe the infinite layers of identity and bias behind every issue, some issues demand an intersectional approach more than others. At a minimum that set includes human interactions that sit at the intersection of "primary" bias regimes—well-known biases that have been shown, through repeated scholastic investigation, to greatly impact societal outcomes. Biases such as gender, race, ethnicity and, of course, sexual orientation.

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[95] Rivera's 1978 article "Our Straight Laced Judges" is arguably an exception to this critique. While Rivera never stated that she intended to review the universe of gay custody cases and provide a comprehensive accounting of the orientation bias therein, she arguably accomplished that goal. Applicable cases were rare in the late 70s and thus her analysis was able to discuss nearly the whole of the available case law (Rivera, 1978).

When gay male and lesbian parents fight for the custody of their children, they approach the court not only as gay parents, but also as fathers and mothers. They thus sit at the intersection of two primary bias regimes: sexual orientation and gender. But while it is generally agreed that both anti-homosexual bias and gender bias hold traction in custody determinations there has been very little scholarship on the interaction of both. Mothers are viewed differently than fathers and heterosexual parents are viewed differently than non-heterosexual parents. But are gay male fathers viewed differently than lesbian mothers and what impact, if any, does that difference have on custody outcomes?

a) The Impact of Parental Gender on Custody

Gendered views of the mother and father have always impacted custody. In fact, for the majority of our history gendered biases were baked into the rules themselves. During the pre-industrial era courts explicitly preferred fathers for custody, reflecting an early common law tradition that viewed custody as a paternal right (Polikoff, 1981; Warshak, 2011). As the industrial era dawned courts gradually shifted to the "Tender Years Doctrine," a custody allocation rule that preferred the mother when the child was of "tender years."[96] In the mid-twentieth century many courts adopted a custody preference for the "primary caretaker," an allocation rule that did not preference mothers explicitly but did preference the parent who filled the traditional role of the mother (caretaker).[97]

All of these rules reflect gendered assumptions and biases. Paternal Preference reflects a mixture of patriarchal bias and the economic reality of the time; children were a valuable source of labor in the agrarian era that fathers in a patriarchal society were generally allowed to keep (D'Emilio, 1997; Polikoff, 1981). The Tender Years Doctrine reflected the assumption that mothers were inherently more nurturing than fathers and thus better suited for caregiving (Artis, 2004; Polikoff, 1981; S. Williams & Haas, 2013), while the Primary Caretake Doctrine, gender neutral on its face, rested on an assumed division of parental labor that was itself historically gendered: the caretaker (the mother) and the breadwinner (the father) (Neely, 1984; O'Hanlon & Workman, 1989; S. Williams & Haas, 2013).[98]

Even after the introduction of gender neutral rules in the early 1970's (Best Interest of the Child Standard, Joint Custody Presumption, etc.) gendered, essentialized views of the mother and

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[96] The "Tender Years Doctrine" held that mothers should be the preferred custodian of a child that remains within the child's "tender years" (typically seven years old or younger). The presumption was generally rebuttable, meaning that fathers could still receive custody during a child's tender years if the mother was demonstrably less parentally fit than the father (Warshak, 2011)

[97] This is not to say that other allocation rules have not been proposed or briefly adopted. Professor Kendel proposed an allocation rule whereby the child's preference, when they have the requisite maturity, should be given preference (Kandel, 1994), and Mary Becker advocates for maternal deference (Becker, 1992). In addition, a handful of states have adopted the "Approximation" standard, first proposed by Elizabeth Scott, whereby the court is instructed to best approximate the child's current custodial environment (Scott, 1992).

[98] It should be noted that the Primary Caretaker Doctrine has been defended on progressive grounds. Richard Neely, for example, supports the Doctrine because he believes that the parent serving the role of caretaker typically has less financial resources to successfully litigate custody. A deference for the primary caretaker thus helps even the playing field (Neely, 1984). It has also received praise for is nominally gender neutral stance (Polikoff, 1981).

father persisted.[99] Scholars have noted, for example, the persistent assumption that mothers are expected to prioritize their family over all other life endeavors (typically, a career) (Chodrow & Contratto, 1982; Dow, 2016; Gerson, 1986; Meyers, 2001; Ronner, 2000; Swent, 1996; Watkins, 2011).[100] Of course this essentialized view has old roots - cartoons from the early 19th century can be found mocking women who work outside the home (Chodrow & Contratto, 1982), and the belief that women belonged in the home served as a recurring argument against extending women the suffrage (Goodwin, 1913).[101] And while it is true that in recent decades the essentialized notion of motherhood has enlarged to accept career ambitions as well (Dow, 2016), the "hierarchy of motherhood" still considers the traditional, stay at home mother to be the ideal (DiLapi, 1989). Moreover it has been noted that contemporary society still expects a mother's focus on her children to be so intensive that it is extraordinarily difficult, if not impossible, for women to pursue a career and still satisfy the societal expectations for motherhood (Hays, 1998; Thompson, 2002).[102]

Perhaps unsurprisingly, this essentialized view of motherhood also persists in relatively recent case law (Ronner, 2000; Swent, 1996; S. Williams & Haas, 2013).[103] Custody courts in recent decades have, for example, penalized mothers for working outside the home,[104] penalized mothers for failing to fulfill "homemaker duties,"[105] and penalized mothers for attending graduate

[99] Some scholars have gone even further, arguing that judges not only continue to apply these gendered assumptions but that they do so consciously (Artis, 2004; Felner et al., 1985; Lowery, 1981; Maccoby & Mnookin, 1992; Pearson & Ring, 1982; Stamps, 2002).

[100] It must be noted that this expectation differs across race. African American mothers, for example, have always been expected to juggle a career alongside mothering duties (Dow, 2016).

[101] It was thought that involving women in politics would necessitate their entrance into the public sphere, which would contradict the essentialized notion that mothers belonged in the domestic sphere exclusively (Goodwin, 1913).

[102] A recent study of female executives concluded that nearly all of the interviewed respondents believed that they failed to mother "sufficiently" in society's eyes because of their career ambitions. In a related conclusion, older female executives tended to believe that motherhood and a career life were incompatible (Blair-Loy, 2001).

[103] The expectation that mothers must perfectly fulfill the role of the homemaker often places mothers in what Amy Ronner refers to as the "double bind." They must essentially choose between life as a career woman or life as a mother (Ronner, 2000). It can also create a "biased scale" when a heterosexual couples' parenting abilities are weighed against one another in court, with the mother receiving less credit for homemaking labor (it is expected) and the father receiving more credit for homemaking labor (it is not expected and thus considered "extra") (Polikoff, 1981; Ronner, 2000).

[104] *See* Young v. Hector, 740 So.2d 1153 (Fl.Dist. 1998) (appellate court denied mother custody, in part, because she worked as an attorney and did not fill the role of the homemaker)

[105] *See* Pikula v. Pikula, 374 N.W.2d 705 (MN 1985) (trial court describes mother as "ambivalent about her role as a mother," in part because she fails to keep a tidy house), Prost v. Green, 652 a.2d 621 (D.C. 1995) (Judge states that he is "appalled" at the fact that the mother rarely cooks dinner for the family).

school.[106] On the other hand, custody courts in recent decades have praised and rewarded mothers who have fulfilled the role of the stereotypical homemaker (cooking, cleaning etc.).[107]

Mothers are likewise assumed to be more nurturing than fathers, and thus better suited as care givers (Blair-Loy, 2001; Chodrow & Contratto, 1982; Dow, 2016; McNeely, 1997; Watkins, 2011). Numerous studies of relatively recent, state-mandated studies of gender bias in family court have concluded that this essentialized stereotype has persisted in family courts throughout the country as well (New York: "women are seen as natural parents whose desire for custody is not only acceptable but expected;" Georgia: "[many judges believe that] a mother is a better parent than a father;" Florida: "courts still presume that mothers are the better residential parent") (Nickerson, 2000; Purvis, 2013; Swent, 1996), and scholastic examinations of recent case law have concluded likewise (Watkins, 2011).

And finally, there is a persistent assumption that mothers should place a lower emphasis on sexual satisfaction than fathers. (Kim, 2012a; Thompson, 2002). The notion that women are less sexual than men or that women *should be* less sexual than men also has old roots. Victorian era tracts discussing the "virtuous woman" often instructed wives to *not* enjoy sex, even with their husbands, and concluded that the wife would be morally suspect if she did (Cott, 1978; Griswold, 2012). The notion also appears to persist in contemporary custody adjudications. Mothers appear to face stiffer penalties for extra-marital sex in custody adjudications than fathers (Kim, 2012a; Rubin, 1984; Thompson, 2002; Watkins, 2011), and female extra-marital sex appears to be more salient to the court than male extra-marital sex (Kim, 2012a; Watkins, 2011).

Fathers have been burdened by essentialized assumptions as well, primarily the assumption that their proper familial role is that of the provider or the "bread-winner" (Artis, 2004; Ferreiro, 1990; Purvis, 2013; M. Sullivan, 1996; S. Williams & Haas, 2013). The same state-mandated studies of gender bias in family court mentioned above likewise concluded that that courts often penalize fathers who fail to fulfill the breadwinner role and reward fathers who do (Nickerson, 2000; Swent, 1996), and this essentialized expectation of fatherhood is frequently made explicit. The Florida Court in *Young v. Hector*, for example, famously chided a father for adopting a stay-at-home caretaker role while his wife followed a career. After describing his day-to-day child-care routine to the court, the judge curtly responded: "Maybe I'm missing something. Why don't you get a job?"[108] The court subsequently awarded full custody to the mother.[109] On appeal the decision was reversed, and the Chief Justice concluded that there was "no question whatever" that the decision was based on gender bias.[110]

In another telling moment, this time from the Supreme Court, Justice Blackmun famously reacted with stunned disbelief when presented with the idea that a father might voluntarily elect to

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[106] *See* Ireland v. Smith, 542 N.W.2d 344 (Mi.App. 1995) (trial court awarded custody to father, in part, because mother decided to return to enroll in graduate school), Tresnak 297 N.W.2d 109 (Iowa 1980) (trial court awards custody to father, in part, because mother enrolled in law school).

[107] *See* In re Marriage of Tresnak, 297 N.W.2d 109 (Iowa 1980) (appellate court overturns award of custody to father, in part, because the court is impressed with mother's fulfillment of homemaking duties).

[108] Young v. Hector, 740 So.2d 1153 (Fl.Dist. 1998). This case is famous for the expression of essentialized notions of motherhood as well. The Appellate Court later reversed and denied mother custody, in part, because she worked as an attorney and did not fill the role of the homemaker. *Id.*

[109] *Id.* at 1161.

[110] *Id.* at

raise children at home while his wife continued to work. In *Weinberger v. Wiesenfeld*, the Court overturned a federal law that granted additional benefits to widows, but not to widowers, who were raising children.[111] Justice Brennan drafted the opinion and circulated his initial draft with comments in the margins, one of which noted: "Here, [Father] was not given the opportunity to show, as may well have been the case, that … had his wife lived, she would have remained at work while he took over the care of the child." Justice Blackmun reacted with apparent shock to this idea, responding with his own comment in the margin: "Wow!" (C. Franklin, 2010; Purvis, 2013).

These essentialized notions of the mother and the father echo in our legal institutions as well. Deborah Widiss has articulated a "thick version" of marriage, a legal institution that includes not only the particular statutes and precedents that govern marriage itself, but also the essentialized gender norms that marriage is understood to entail and the accompanying legal incentives that encourage them (Widiss, 2011). Past examples of these incentives are almost too numerous to list: women were legally barred from certain professions,[112] labor legislation "protected" women by limiting the amount of hours a woman could work,[113] women were often fired upon marriage (Goldin, 1990; Widiss, 2011), or upon becoming pregnant (Dinner, 2011; Widiss, 2011), and only widows were initially allotted social security benefits upon the death or retirement of a spouse (Kessler-Harris, 1995; Widiss, 2011). But while the majority of these gender disparate incentives have been eliminated, their echo remains in practice. For example, it has been noted that men typically have a more difficult time taking child-care leave than women, despite the nominally gender agnostic guarantees of the Family Medical Leave Act (Bornstein, 2012). They face both additional pressure from their employers ("the claimants commonly allege that supervisors told them that as men, they should not be responsible for their children") and a steeper hurdle challenging termination or adverse employment consequences in court (Bornstein, 2012).[114]

Considerable scholarship has been devoted to the impact of these assumptions on custody. While scholars generally agree that these persistent gender biases continue to have an impact on custody outcomes they strongly disagree on the parameters of that impact (Warshak, 2011).[115] Some argue that mothers continue to be strongly preferred for custody because of the continued assumption that they are more nurturing than fathers and the continued assumption that fathers are best suited as providers. These scholars point to numerous studies and surveys to support this view, all of which conclude that mothers receive custody at higher rates than fathers (Artis, 2004; Bahr et al., 1994; Lemon, 1981; Nickerson, 2000; Swent, 1996). But others argue that these numbers fail to capture the true dynamic at play (Chesler, 1991; Maccoby & Mnookin, 1992; Weitzman, 1985). While they do not necessarily disagree that mothers continue to receive custody more often than fathers, they do argue that courts tend to award custody to fathers at higher rates when fathers

[111] Weinberger v. Wisenfeld, 420 U.S. 636 (1975).

[112] To take just one example, women were barred from working as bartenders in Michigan and the Supreme Court upheld that restriction in Goessart v. Cleary. 335 U.S. 464 (1948) (Widiss, 2011).

[113] Oregon, for example, limited the number of hours a women could work (outside the home) to ten hours a day. No comparable law restricted the amount of hours a man could work. This law was upheld in Mueller v. Oregon. 208 U.S. 412 (1908) (Widiss, 2011).

[114] There is also considerable evidence that men have internalized the expectation that they must serve as the provider, and base their notion of masculinity on fulfilling it (Blankenhorn, 1996; Dowd, 2008).

[115] For a thorough summary of this debate see *Parenting by the Clock,* at 92 – 93 and especially footnotes 34 and 35 (Warshak, 2011).

actually fight for it. The low percentage of custody allocations to fathers, they argue, is merely a reflection of male disinterest in child rearing (Polikoff, 1981; Weitzman & Dixon, 1979b).

b) The Missing Intersectional Analysis

Scholars of orientation bias have long known that gay males and lesbian women face distinct biases (Eckes, 1996; Herek, 1994). In terms of overall attitude, gay males are generally viewed less favorably than lesbian women (Herek & McLemore, 2013; Kite & Whitley, 1996; Louderback & Jr, 1997). They also face distinct stereotypes. Gay males are frequently associated with both mental and physical disease, immorality, effeminate behavior, perversion, general promiscuity, frequent drug use and the tendency to seduce innocents (Canaday, 2011; Herek, 1991; Herek & McLemore, 2013; Madon, 1997a; Rosky, 2008). Lesbian women are also viewed as immoral and promiscuous but they are less frequently associated with physical disease, drug use and sexual predation (Canaday, 2011; Herek, 1994; Herek & McLemore, 2013; Levitt & Hiestand, 2005; Walker et al., 2012).

Many of these biases are regarded as the product of at least two intersectional biases, gender bias and orientation bias (Levit et al., 2011; Levitt & Hiestand, 2005; Madon, 1997a; Purvis, 2013). Gay men, for example are associated with characteristics linked to sexual predation while lesbian women are not. This can be seen as a logical interaction between a male stereotype, men are perceived as more aggressive, promiscuous, physically violent, and risk seeking than women (Connell, 1992; Herek, 1986; Kimmel, 2004; Levit et al., 2011), and at least two homosexual stereotypes: (1) gay individuals are "hypersexual," overly fixated on and overly expressive of their own sexuality (K. J. Anderson, 2009), and (2) gay individuals place sexual satisfaction at a higher priority than their heterosexual peers (K. J. Anderson, 2009; Herek, 1991). When these intersecting biases are considered the fact that gay males are burdened with the sexual predator stereotype while lesbian women are not makes a certain degree of sense. While both may be viewed as "hypersexual" and overly fixated on sexual satisfaction, the more aggressive, promiscuous, physically violent, and risk seeking member of the pair is naturally the individual who is more likely to engage in sexual predation.

Scholars likewise generally agree that both anti-homosexual bias and gender bias hold traction when gay parents adjudicate their parental fitness in court, and yet there has been very little scholarship on the interaction of both gender bias and orientation bias in these cases. How do essentialized notions of the mother and father interact with anti-homosexual bias in these cases? Previous work on the judicial treatment of gay parents in custody matters has tended to ignore the impact of parental gender completely, focusing instead on the burdens that gay male fathers or lesbian mothers face exclusively (Dalton & Bielby, 2000), or as a group (Connolly, 1996, 1998; Dalton, 2000; Richman, 2002, 2010).

There are, however, a handful of studies from which a few conclusions that can be drawn. For one, it is the general consensus that gay male fathers are more likely to be perceived by all participants to the litigation process (opposing litigants, experts, judges etc.) as potential child molesters than lesbian mothers (Rosky, 2008; Watkins, 2011).[116] There is also at least one study

[116] In a 2008 study Clifford Rosky mapped the incidence of anti-homosexual stereotypes in custody opinions across orientation and parental gender. He found that gay male fathers were stereotyped as potential child molesters in 22% of their cases while lesbian mothers were stereotyped as potential child molesters at a mere 9% rate (Rosky, 2008). Krista Watkins reached a similar conclusion in 2011 though her results were less quantitative (Watkins, 2011).

concluding that gay male fathers are more likely than lesbian mothers to be perceived by litigation participants as potential vectors of disease (Rosky, 2008).[117]

And a handful of scholars have examined the impact of orientation bias on very specific evaluations of the mother and father. A 2011 study concluded, for example, that courts frequently overlook a lesbian mother's sexual orientation when the mother adopts a norm-aligning caretaker role (Watkins, 2011). A related study concluded that gay male fathers who engaged in caregiving were perceived as doubly transgressive because they violated both sexual norms and the traditionally gendered division of parental labor (Kessler, 2005).

But a full empirical, intersectional analysis is lacking. There are no studies that empirically examine the intersectional impact of parental gender and orientation bias on custody *outcomes*. There are likewise no studies that examine the entirety of published judicial decisions to determine how the judiciary perceives lesbian and gay male parental fitness differently, or how those disparate perceptions impact outcomes.[118]

This lack of analysis is troubling for at least three reasons. First and foremost, we simply have no firm accounting of how these parents are treated by the bench when they adjudicate custody. It is well known that anti-orientation bias places gay parents at a disadvantage in custody proceedings.[119] And it is likewise known that gender expectations warp the judicial allocation of custody (Bahr et al., 1994; Gender Bias Study Committee, 1990; Lemon, 1981; Pearson & Ring, 1982; Polikoff, 1981; Swent, 1996; Weitzman & Dixon, 1979a), but it is not yet known how the interaction of these two biases impacts the outcomes and judicial biases that gay parents face.

Second, we know from experience that intersectional biases are not simply the additive result of the colliding cardinal biases, rather they include new biases that arise from their interaction (Collins, 2002; Crenshaw, 1989; Hooks, 2000).[120] For example, it has been observed that surrogacy markets do not follow a simple additive model of gender and wealth bias when Indian women of color participate. Rather, wealthy Indian women who choose to be surrogates face a unique, intersectional bias because the status conferred by their wealth results in a stricter

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[117] Professor Rosky's 2008 study found that fear of disease transfer was raised in 12% of the cases involving gay male fathers but in none of the cases involving lesbian mothers (Rosky, 2008).

[118] Professor Rosky's 2008 study, *Like Father Like Son*, examined the published record (through 2007) to determine the differential application of homophobic stereotypes to gay male and lesbian parents in custody contests. It did not, however, examine custody *outcomes* across gender. Nor did it examine the *judicial* use of homophobic stereotypes. Rather it conflated stereotypes applied by litigants, the courts, the litigants' experts and the litigants' witnesses. Thus, while clearly important, this study cannot be said to examine *judicial* bias in this area. (Rosky, 2008)

[119] (Rivera, 1978) ("justice for the homosexual parent does not come cheaply or often"). (Shapiro, 1995a) ("individual lesbians and gay men routinely lose custody and instead receive restricted visitation simply because they are lesbian or gay"). J.L.P v. D.J.P., 643 S.W.2d 865, 871 (Mo. Ct. App. 1982) ("In the majority of cases involving the award of custody where one parent is a homosexual, the courts have awarded custody to the non-homosexual parent.").

[120] Black women suffer a unique set of biases owing to the interaction of racial and gender bias (Crenshaw, 1989), "[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated") (Collins, 2002). Likewise, women of lesser means suffer unique biases owing to the interaction of gender and wealth bias (Hooks, 2000)

condemnation of the gender taboos surrogacy is perceived to violate (Khader, 2013; Smerdon, 2008). The interaction of wealth and gender bias on these women thus produces a bias that might have been unexpected had one merely considered the two biases separately.

In this case we have a similar possibility. It's quite possible that our lack of attention to the intersection of gender and orientation bias in custody has obscured unique, previously unnoticed biases that arises from their intersection. As scholars of intersectional burdens have long noted, the failure to highlight these unique biases can obscure real instances of problematic discrimination (Collins, 2002; Crenshaw, 1989; Hooks, 2000).

And third, we know from experience that less privileged members of a bias interaction risk having their burdens obscured or, in some cases, erased from legal salience. Crenshaw famously highlighted this tendency in her seminal analysis of *DeGraffenreid v. General Motors.*[121] Recall that in *DeGraffenreid,* black women were unable to sue General Motors for an alleged refusal to hire black women because General Motors had a history of hiring *white* women and black *men.*[122] They were unable to sue for sex discrimination because *white* women had been hired, and unable to sue for racial discrimination because black *men* had been hired, thus erasing their intersectional discrimination from legal salience.[123] Crenshaw rightly noted that these women were left obscured and without remedy because racial discrimination had been framed from the privileged, male perspective while sex discrimination had been framed from the privileged, white perspective (Crenshaw, 1989).

In this case we face a similar possibility. While one hesitates to call gay males "privileged," it is true that both the popular and academic discussion of anti-gay bias has focused on the gay male. In psychology, for example, the analysis of affective bias has focused almost exclusively on the gay male.[124] Likewise in recent popular discourse. A sizeable number of the arguments opposing same-sex marriage apply only to the gay male, as do a sizeable number of the arguments opposing non-heterosexual parenting in general.[125] And this contemporary focus reflects a long tradition of obscuring the lesbian woman. While same-sex relations between men are explicitly condemned in the Hebrew Bible same-sex relations between women are ignored (Alpert, 2009). Likewise, early efforts to eradicate "homosexuals" from the U.S. military focused on the gay male, and were confused by the prospect of eradicating lesbian women (Canaday, 2011).

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[121] DeGraffenreid v. General Motors, 413 F. Supp. 142 (E.D. Mo 1976).

[122] *Id.*

[123] *Id.*

[124] The vast majority of these analyses have focused on gay males exclusively (i.e. does affective bias impact the evaluation of gay males) (Caswell & Sackett-Fox, 2018; Cottrell & Neuberg, 2005; Inbar et al., 2009; Kiss et al., 2020; Lai et al., 2014; Ray & Parkhill, 2020; A. R. Smith, 2012; Tapias et al., 2007). To this authors knowledge, there are only two studies of affective bias that parse the impact of such bias on gay individuals across gender (Cunningham et al., 2013; Inbar et al., 2012).

[125] Consider, for example, the well-worn argument that gay individuals lack the ability to maintain long term, monogamous relationships. This argument is frequently supported by statistics that allege these traits in relation to gay male relationships, while ignoring the fact the lesbian women appear to buck this (alleged) trend. (*Paul Cameron: Introduction*, n.d.) Likewise, many of the coarser arguments opposing gay marriage and gay parenting focused on the alleged health repercussions of anal sex, while ignoring that this argument does not cleanly apply to lesbian women. (*Paul Cameron: Introduction,* n.d.)

The concern for an erasure similar to *DeGraffenreid* is therefore real. There are realistic concerns that the intersectional plight of the lesbian mother in custody have been obscured by a framing that highlights anti-gay bias through reference to the gay male. A true examination of their disparate treatment across gender is necessary to address this possibility.

What is the impact of the child's gender?

There are good reasons to suspect that the gender of the child impacts the expression of orientation bias in these cases. For one, many of the known biases against gay parental fitness hinge on the gender of the child at issue. If a judge believes that a gay parent is likely to sexually abuse a child, then that judge may balk at placing a child with a gay parent of the same gender. Likewise if a judge is concerned about the transmission of traditional gender norms, then that judge may be less likely to pair a lesbian mother with a daughter or a gay male father with a son.

There is, however, exceedingly little analysis on the subject. The one empirical study addressing this topic engaged in a very narrow inquiry: how does a child's gender impact the incidence of homophobic stereotypes within custody decisions for gay parents (Rosky, 2008)?[126] This study catalogued the incidence of homophobic stereotypes within published custody records across parental sexual orientation, parental gender, and the gender of the child. It found that the gender of the child impacts the application of two common homophobic stereotypes: the "recruiting" stereotype and the "role modeling" stereotype (Rosky, 2008).

These stereotypes are closely related. The "recruiting" stereotype depicts gay parents as individuals who actively recruit their children away from heterosexuality. The "role modeling" stereotype alleges that gay parents merely influence the sexual orientation of their children by passive example. This study found that both stereotypes are applied more often when sons are at issue and are rare in cases featuring a daughter. It argues that this pattern evidences a greater concern for the production of "masculine" young men than "feminine" young women when courts adjudicate the custody rights of gay parents (Rosky, 2008).

There are good reasons to believe that society does, in fact, value the development of "traditional," masculine men more than the development of "traditional," feminine women. While this assumption can be rooted in the widely held assumption that society contains an overall patriarchal bias, there is also evidence from psychology that support this speculation. In the 1970s, for example, psychologists wrestling with the origins of homosexuality focused almost exclusively on the development of homosexuality in men. The development of homosexuality in women was largely ignored (Sedgwick, 1993). Moreover, the prevailing theory of the time held that men "became" homosexual largely because they were raised by overly harsh and domineering mothers, or by weak and effeminate fathers (Sedgwick, 1993). In other words, the development of male, not female, homosexuality was reason for concern and gender a-typical parents were considered the primary cause of male homosexuality.

These theories were largely discarded when homosexuality lost its designation as a mental illness in the 1980s, but Eve Sedgwick's classic "*How to Bring Your Kids Up Gay: The War on Effeminate Boys*" argues that their underlying logic can still be seen in psychology and contemporary culture today (Sedgwick, 1993, 2008). Sedgwick argues that both psychology and

[126] It should be noted that Rosky's study focused on stereotypes from all parties to the case, the litigants, their experts, the lower courts, and the presiding judge(s) (Rosky, 2008). This study is interested in the judicial view of sons and daughters in these cases, so it only analyzes rationales and arguments set forth by a judge.

the culture as a whole still fear the development of male homosexuality more than the development of female homosexuality, and still worry that hetero-transgressive parenting will lead to its development.[127]

In other words, there are numerous reasons why the child's gender might moderate or even mediate the expression of orientation bias in these cases. Many of the judicial concerns that have been expressed about gay parenting hinge on the gender of the child before the court. And there is reason to believe that courts are both more concerned about the development of male homosexuality than female homosexuality and likely to believe that non-heterotypical parents will encourage its development.

How does orientation bias manifest itself during the custody process as a whole?

Custody adjudications involve more than just hearings before the judge. They involve the selection of an attorney, litigation strategy, depositions and interactions with court personnel. They also may involve interactions with *guardian ad litems*, home inspectors and, on occasion, mandatory parenting classes. For gay parents navigating these waters, orientation bias can intrude into these portions of the adjudication process as well, occasionally with devastating impact.

To date there has been very little scholarship on the impact of orientation bias during these "fringe" aspects of the custody adjudication process. To this author's knowledge, there is no scholarship that has looked at the issue directly. There are articles written to advise litigators who handle these cases, and these articles do brush upon some of the difficulties that might arise: selecting a *guardian ad litem* that will be amenable to the idea of a gay parent, choosing a more amenable forum etc. (Herek, 1991; Hunter & Polikoff, 1975; Shapiro, 1995a), but the impact of orientation bias on these aspects of the case have not been not thoroughly discussed.

Does affective disgust bias impact the adjudication of custody?

It is well known that disgust biases the evaluation of homosexual individuals. Both induced disgust (Cunningham et al., 2013; Dasgupta, 2002; Inbar et al., 2012) and disgust sensitivity (Ernulf & Innala, 1987; Haidt et al., 1994b; Inbar et al., 2009; Tapias et al., 2007; Van de Ven et al., 1996) have been shown to predict the negative assessment of homosexual individuals and their conduct.

The relationship between disgust and the evaluation of LGBT related policy matters has been studied thoroughly in political science. For example, Disgust at the thought of same-sex sex (and especially gay male sex) has been theorized by many to lie at the root of legislative efforts to ban same-sex adoption, same-sex marriage and LGBT+ anti-discrimination ordinances (Kahan, 2000; Kelly, 2011; Nussbaum, 2009, 2010). But the impact of disgust on the *judicial* evaluation

[127] This over focus on male homosexuality can arguably also be seen in the current literature discussing the impact of disgust bias on the evaluation of gay individuals. The current study of affective disgust bias on the evaluation of gay individuals has focused almost exclusively on the evaluation of gay males (Caswell & Sackett-Fox, 2018; Cottrell & Neuberg, 2005; Inbar et al., 2009; Kiss et al., 2020; Lai et al., 2014; Ray & Parkhill, 2020; A. R. Smith, 2012; Tapias et al., 2007) or gay individuals as a cohort (Crawford et al., 2014; Dasgupta et al., 2009; Haidt et al., 1994a; Hodson et al., 2013; Hodson & Costello, 2007a; Inbar et al., 2009; Olatunji, 2008; Terrizzi et al., 2010). The impact of disgust on the evaluation of lesbian women has been largely ignored (Inbar et al., 2009; Kiss et al., 2020; Olatunji, 2008).

of gay individuals, however, remains unclear.[128] To date there has been no empirical examination of disgust as a moderator in the judicial evaluation of gay litigants.

It is quite possible, indeed even likely, that judges manifest the same relationship between disgust and the evaluation of gay individuals and, if so, this fact would raise a host of issues concerning impermissible bias and potential additions to judicial training. This shortcoming, and the highly detailed literature to which it speaks, will be discussed in Chapter 10 ("Toxic Sexuality: The Impact of Disgust").

[128] To this author's knowledge, only one study has examined the impact of disgust on a simulated trial evaluation. But this study differed from the instant project in that it simulated the decision making of a jury (rather than a judge) and did not focus on the evaluation of gay individuals (Jones & Fitness, 2008).

Chapter 4
Semi-Structured Interviews of Gay Parents and their Attorneys

The first part of this project involves semi-structured interviews with two groups: gay male and lesbian parents who have suffered through custody disputes and the attorneys who have represented them. In short, this phase of the project will capture the perception of anti-homosexual bias in these matters from those with intimate, first-hand knowledge of the process.[129] These interviews are thus ideal to capture three areas of inquiry that are hard to reach through other methodologies: (1) how orientation bias impacts the custody adjudication process outside of the traditional court room setting, (2) the perceived moderators of orientation bias in these adjudications (gender of the judge, religiosity, etc.) and (3) the perception of an affective disgust reaction from the bench or other participants to the process.

The first is particularly important as it is rarely studied. Adjudicating custody involves far more than simply appearing before a judge and pleading one's case. It involves the selection of an attorney, litigation strategy, depositions and navigating court personnel. Occasionally it requires interactions with *guardian ad litems*, hostile experts, hostile witnesses, and court mandated parenting classes. Orientation bias can intrude into any one of these interactions and the record will typically remain silent. Interviews are uniquely situated to access this information.

The same can be said for perceived moderators of orientation bias (e.g., the judge was homophobic because he was religious) and the perception that one has engendered disgust in another. The official record will rarely shed light on these perceptions either.

These interviews can also, of course, obtain useful information for the other queries relevant to this research: (1) does orientation bias impact outcome and, if so, how has that impact changed over time, (2) what is the content of the orientation biases you have encountered, and (3) how does gender interact with the biases you experienced (parental gender and gender of the child)? The knowledge gained from these semi-structured interviews are also intended to inform the investigations of the case law and the experiment that are to follow.

Methodology

The sample contained thirty-six respondents (36), including twenty lawyers (20) and sixteen (16) gay male or lesbian parents. All had experience with a gay male or lesbian custody dispute, but they also had a variety of other, related, experiences. Specifically, sixteen (16) had experience with an adoption proceeding involving a gay male or lesbian parent and five (5) had experience with a gay male or lesbian surrogacy.

Respondents were located via a "snowball" technique. Essentially, lawyers with well-known reputations for assisting gay parents and applicable gay parents were contacted, as were known organizations with an interest in these matters. Without compromising confidentiality, it can be reported that the following organizations assisted with the recruitment of respondents:[130]

- The National Center for Lesbian Rights.

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[129] These semi-structured interviews obtained Institutional Review Board approval from the University of California, Berkeley on June 16, 2017 (FWA#00006252).

[130] Numerous other organizations also assisted, including law firms, academics and locally focused "support groups." But given the small membership of these groups this author believes that listing them might compromise confidentiality. What is listed above are relatively large organizations with a wide geographic focus.

- PROMO Missouri
- Growing American Youth
- ACLU
- Family Law Association
- Lambda Legal
- Southern Poverty Law Center
- GLAD
- The Williams Institute (U.C.L.A.)
- Our Family
- Association of Family and Conciliation Courts
- Equality California

Given the nature of this "snowball" recruitment technique the sample is not random. The selection method involved no randomization and the sample selected is clearly non-representative. It is, for example, clearly biased geographically (organizations and individual associations tend to be geographically focused) and likely biased on other variables as well (socio-economic status, etc.). While a random sample would have been ideal, the challenges of recruiting even this, small sample, made a random sample infeasible. That said, this sample does represent a diverse range of participant viewpoints (gay male fathers, lesbian mothers and attorneys who handle these matters), and the semi-structured format allows for a thorough discussion of relevant issues.

I then conducted semi-structured interviews. All respondents were asked the same questions (over the phone), but conversation and follow-up questions were allowed to flow from their initial responses. Accordingly, "post question" conversations differed from respondent to respondent.

All respondents received the following questions:

1) What specific biases, if any, do you think gay male parents face during custody disputes?
2) Without naming any names or specific locales, do you recall any incidents in particular that demonstrate those biases?
3) Do you think lesbian parents face the same biases as gay males during custody disputes?
4) What additional biases, if any, do lesbian parents face during custody disputes?
5) Without naming any names or specific locales, do you recall any incidents in particular that demonstrate those biases?
6) Do you think the gender of the child or children at issue effects the court's view of gay male or lesbian parents during custody proceedings?
7) In the context of custody, what do you think judges worry about when it comes to gay or lesbian parents?
8) What other aspects of the judge's own personal background do you think impact his or her treatment of gay male or lesbian parents during custody determinations?
9) Did you ever get the sense that court personnel were repulsed by you / your clients?[131]

[131] This question was added in an attempt to determine if disgust played a role in any of the bias reported. Numerous psychological studies have indicated that both disgust sensitivity and state level disgust predict harsh evaluations of non-heterosexual individuals (Dasgupta et al., 2009; Inbar et al., 2009). It has also been shown to bias legal proceedings (Jones & Fitness, 2008). The word "repulsed" was used rather than "disgust" because disgust can have a conventional meaning

10) What kinds of strategies on the part of individuals, attorneys, or other actors do you think might be effective in mitigating these biases?
11) What strategies have you used?
12) Have these strategies been effective?

All interviews were transcribed into text by a professional transcription service. Steps were then taken to ensure confidentiality; all names mentioned in the transcripts were changed or redacted and all identifying information was destroyed (audio recording of the interviews, phone numbers, email addresses, email messages, identifying records, etc.).[132]

Transcripts were hand coded by the primary author in three rounds. Round one served as a generative exercise (what are the main themes? what codes best elucidate the data etc.?) Round two coded the data with pre-determined variables and round three served as a check for errors. All qualitative coding was conducted within Atlas-Ti while statistical analysis was conducted in STATA.

Basic Quantitative Results

Given the limited size and non-random nature of this sample it is unwise to place too much confidence into fine-grained quantitative results, but the data collected are useful as a snapshot of the lesbian and gay male experience in custody matters.

Overall, the perception that gay male and lesbian parents face additional burdens during the custody process is strong. One-hundred percent (36 of 36) of the respondents in this sample believed that gay male and lesbian parents frequently face orientation related biases during the custody process (*See* Figure 1).

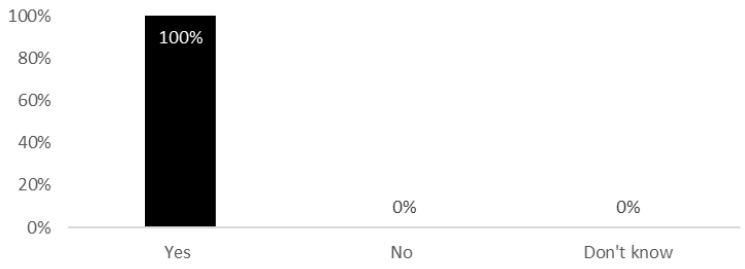
But the perceived impact of gender on the content of those biases was both less certain and less uniform. Thirty-six percent (13 of 36) of interviewed respondents believed that gay male fathers and lesbian mothers faced different biases in terms of content when they contested custody while 19% (7 of 36) thought they were treated the same. A full 44% (16 of 36) had no opinion on the matter (*See* Figure 2).

The impact of child gender on the content of the orientation bias they perceived was likewise split but leaned in the opposite direction. Only 17% (6 of 36) of the interviewed respondents thought that the gender of the child mattered when gay male and lesbian parents contested custody, while a full 58% (21 of 36) believed that the gender of the child had no impact whatsoever. Twenty-five percent (9 of 36) of the respondents had no opinion (*See* Figure 3).

(strong dislike, strong disapproval) that differs from the more clinical definition used in psychology (an actual state of near nauseous revulsion). It is believed that confusion over these two meanings have biased studies in the past (Russell & Giner-Sorolla, 2013).

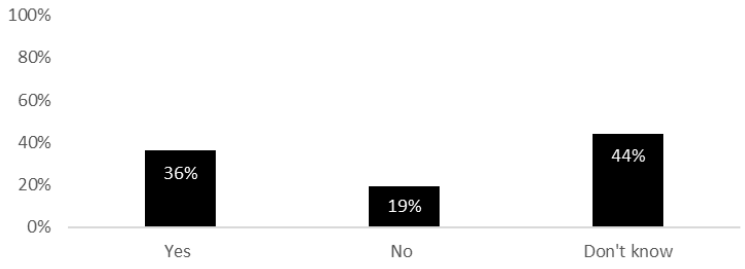
[132] These steps are in accordance with the privacy guarantees mandated by University of California's Institutional Review Board.

Figure 1.
Do Gay Male and Lesbian Parents face Orientation Related Bias in Custody Contests?



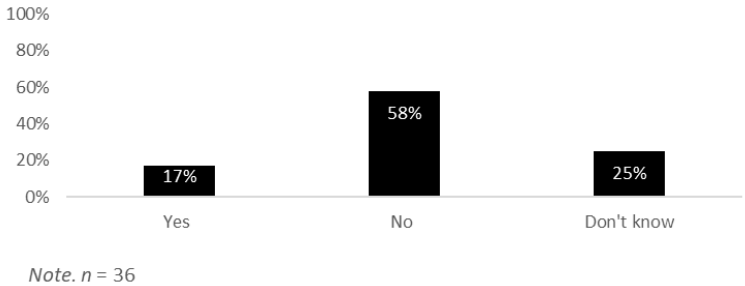
Note. n = 36

Figure 2.
Do Gay Male and Lesbian Parents face Different Orientation Related Biases in Custody Contests?



Note. n = 36

Figure 3.
Does the Gender of the Child(ren) at issue Alter the Orientation Related Biases Faced by Gay Male and Lesbian Parents in Custody Contests?



Note. n = 36

So, from a macro level, these interviews indicate a near unanimous view that gay male and lesbian parents face orientation related biases during custody determinations. But the perceived impact of gender on those determinations varied widely; the belief that gay male and lesbian parents face *different* orientation related bias was relatively strong (36% agreed). Only a small, but not insignificant, few believed that the gender of the child had any impact (17% agreed).[133]

[133] It should be noted that while respondents predominately hailed from two distinct regions, either Missouri (the St. Louis metropolitan area) or California (the San Francisco Bay metropolitan area), these semi-structured interviews lacked the statistical power to parse results by geography. The

The Experience of Orientation Related Bias in Custody Matters

The personal experience of orientation related bias also varied widely. Most harrowing were accounts of "severe bias," clear, explicit statements of orientation related bias that directly impacted respondents' rights as parents. Of the respondents in this set, six (17%) recited claims fell into this "severe" category.

Consider this response from a lawyer describing a parent who received distressing news from the first two lawyers he contacted:[134]

> I remember one of my earliest cases, he came to me and he had been to two other attorneys. I don't know if this is helpful or not. But anyway, he'd been to two other attorneys, and one of them had just said, "Well, you'll never see your daughter again." Then the other one had said, "Let's pray and I'll get my bible." Those were the responses that he had and [he] was practically crying …..
> ……

Or this respondent who heard a judge state that placing a child with a lesbian mother was child abuse *per se:*

> [A]nd [this judge] asked one of the attorneys …. "Don't you think it's child abuse *per se* to put a child with a lesbian?" The attorney said "No."[135]

Or the experience of this lesbian parent who was told by a judge that she had no real right to her children:

> The judge basically said to me that given my personal circumstances I had no right to custody.
> …
>
> The judge literally, it was this old Southern white guy who was like peering down his nose at me and calling me "Young lady," and talking about how my being a homosexual was not a good influence on the children, and that if I contested the ...

---

sample size was simply too small. Moreover, many respondents spoke of cases that occurred outside of the above two regions, making a geographic comparison even more problematic.

[134] The quotations recounted in this paper have been redacted when confidentiality concerns make it necessary. Proper names have been altered or removed and certain locations have been obscured. All redactions are denoted with a bracket ([ ]). It should also be noted that some quotations contain offensive language and derogatory terms. Please note that the inclusion of such language in the quotation is not meant to signal approval of the language.

[135] Legal scholars might note that judges were allowed to assume gay male and lesbian parents less parentally fit *per se* until the mid-seventies (Shapiro, 1995a). This particular respondent was referring a case from the mid-1990s in a jurisdiction that had long since moved on from the *per se* rule.

> Oh yeah, this. He said if I contested the court's decision I would never see my children again, so he also was threatening to me.

Still others experienced "severe bias" from personnel outside of court. For example, two respondents, both parents, encountered severe orientation related bias from a court appointed home inspector:

> [T]here was one [home inspector] that would not meet our eyes. And [she] would look at other people.
> ….
>
> [The home inspector] hinted at that it was an abomination. He didn't say those exact words. I can't really remember the exact wording he used, but the fact that we were white lesbians, there's no way this girl was gonna have a chance at surviving in the big city of Milwaukee, is ultimately what he said. Excuse me. To which we said, "Well, okay, we're going to do our best and we think we are more than capable of meeting her needs."

Other respondents provided more muted accounts. Many claimed that the biases they encountered did not affect them personally or did not dramatically alter the outcome of their case. Still others claimed that they personally experienced no orientation related bias, though they were aware that other gay male and lesbian parents often do.

The claims of "no bias in my case" were almost universally coupled with an assertion of geographic or temporal good fortune:[136] "Strong bias exists elsewhere but I live in a progressive bubble," or "strong bias existed ten years ago but times had changed for the better before my case:"

> I believe there's discrimination, but as far as here in the city of St. Louis? Not that I'm aware of.
> ….
>
> So definitely, we see that kind of bias from time to time, but not as much as I used to. I mean I always say, that's really one of the things that has super-duper evolved, even just in the last few years. I call it like the Will & Grace effect
> …..
>
> You know where I practice, no. Maryland, D.C., and Northern Virginia, no. Not at all. I've heard horror stories from other jurisdiction and certainly from southern Virginia years ago, but not recently and not really around here. I mean I don't want to create sort of a boogey man where they don't exist.
> ….

[136] Respondents for these interviews hailed primarily from the St. Louis and San Francisco metropolitan regions, but the cases they discussed often occurred outside of those regions and, occasionally, across several parts of the country. It is therefore not possible to comment on the geographic dispersion of this opinion in any meaningful way.

> Also, we're in Southern California. Southern California I feel like is very liberal in general.
> ….
>
> Yeah, you know what, that hasn't come up in anything that I've done. When you said biases, I really can't think of that. I'm in California. I'm in Northern California. I'm kind of in a liberal mecca.
> …..

And yet many of those who claimed no bias in their particular experience frequently revealed instances of bias later in the interview, often consequential bias, that they did not previously deem noteworthy. Consider this respondent, a lesbian mother living in St. Louis. She stated outright that she did not believe that orientation related biases colored the custody process within her urban (allegedly progressive) jurisdiction:

> I believe there's discrimination, but as far as here in the city of St. Louis? Not that I'm aware of.

But a few moments later she notes that her attorney felt the need to wait for an "LGBT friendly judge" to rotate to the family docket before filing her motion to modify:

> [My] attorney was waiting for a judge that she thought was more LGBT friendly.

And still later this same respondent noted that they specifically selected a home study agent that was known to be LGBT friendly and "willing to work with us:"

> Yeah. We selected ... You had to select people that were willing to do it ….because so many ... You couldn't just go to anybody. You had to find out who was willing to work with us. Our lawyer was a lesbian and our social worker, we used her for the ... I think it was the same-
> ….
> [The home inspector they choose] had been recommended to us as someone who was gay friendly. That's why we picked her.

Or consider these statements from a lawyer who claimed that orientation related bias "is not generally a huge issue" in her practice:

> [G]enerally speaking, I think we've reached a point where it is generally not huge issue.

But later she admits that orientation status did arise as an explicit factor in one of her recent "abuse and neglect" cases:

> I was fairly surprised that in that abuse and neglect case that we had that it was mentioned by somebody with the state that she was a lesbian as if that was some sort of a factor towards a stable household.

These stories appear to suggest that orientation related bias may be so baked into the norm that for many respondents even explicit discrimination occasionally goes unnoticed. Or perhaps self-protective rationalizations are coloring their recollection of the matter.

And finally, many respondents noted that while they did not encounter any *explicit* bias, they strongly suspected that intentional, though unstated, bias silently steered the process behind the scenes. Numerous respondents recounted stories of "slow walking," manipulation or outright sabotage that they firmly believed stemmed from an unwillingness to award custody to a gay male or lesbian parent:

> [T]here's just so many invidious ways for them to do it without saying they're doing it.... another claiming to do it on other grounds when they really know it's just a bias.

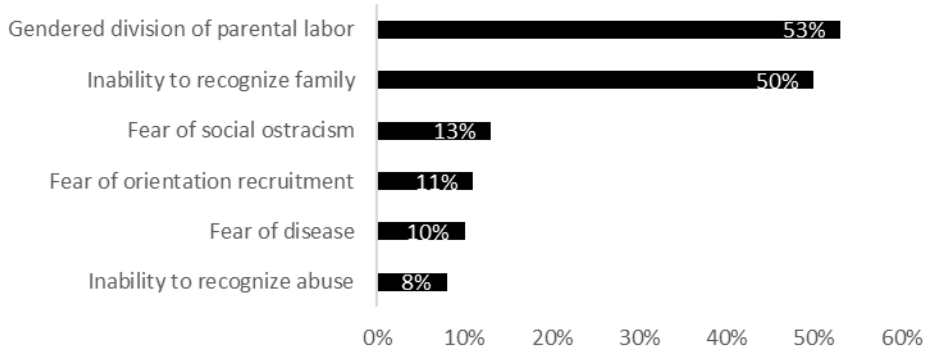
One respondent, a lesbian mother, described this experience thoroughly. She described a long ordeal with a home inspector who allegedly ignored her phone calls and even scheduled impromptu inspections when she knew that she was at work, only to later use her absence as a mark against her with the court.

> And we could tell that [the home inspector] was definitely being more obvious in her attitude and her lack of follow-up with any of our questions or concerns with the girls…….She didn't say anything explicitly homophobic-
>
> So it was like she would set me up to fail, you know what I mean? …..[S]he would literally say, "I'm on my way to your house," knowing that I was running my business.

Biases Faced by Gay Male and Lesbian Parents Alike.

While some of the orientation related headwinds and burdens recounted by these respondents could reasonably be labelled "gender specific" the majority were not. Most burdened gay male and lesbian parents alike, and within this "gender universal" group two biases clearly dominated: problems arising due to the assumed division of parental labor by gender and an inability to see gay male and lesbian parents as part of a family unit. Both of these biases were reported by over half of the respondents in this set while several, less prevalent, biases rounded out the group (*See* Figure 4).

Figure 4.
Biases Faced by Gay Male and Lesbian Parents Alike



Note. $n = 36$

a) Assumed Division of Parental Labor by Gender

The primary bias reported to affect both gay male and lesbian parents alike was the assumed division of parental labor by gender, or the related assumption that parental gender should be divided into "caretaker" and "breadwinner" roles regardless of gender. This assumed division of parental labor is, of course, a well-known issue among practitioners and scholars of family law as it also impacts the evaluation of heterosexual parental fitness (Neely, 1984; O'Hanlon & Workman, 1989; Sack, 1991).[137] But the respondents in this set, especially those who contested custody against a parent of the same gender, encountered a slightly different version of this bias: a struggle to determine which parent served as the "father" (breadwinner) and which served as the "mother" (caretaker) when both parents before the court were of the same gender.

Numerous respondents reported that the court, and in some instances the home inspectors or *guardian ad litems*, attempted to pigeon hole the parents into one gender role or the other ("breadwinner" or "caretaker"), and expressed in inability to understand the family dynamic when they could not:

> Our [home inspectors] were totally, one of them was totally great and wonderful and one was like did not know how to deal with us. She was just like, she didn't like ask who's the guy but she practically did. She was like "so who tucks them at night?" Like we both do. What do you mean?
>
> …..
>
> But it was just in our daily interactions where [the judge] assumed that there should

[137] *See* Garska v. McCoy, 278 S.E.2d 357 (W.Va. 1981) The gendered nature of the preferred "caretaker role" becomes evident in its definition, best elucidated by *Garska v. McCoy* as the parent who typically performs the following duties: preparing and planning for meals, bathing grooming and dressing, purchasing and cleaning clothes, medical care, arranging the child's social life, arranging alternative care (babysitting), putting child to sleep, waking them up, attending to them at night, disciplinary matters and toilet training, educating (religious, manners etc.), and educating (reading, writing, arithmetic). Garska v. McCoy, 278 S.E.2d 357 (W.Va. 1981).

> be one role taken on by a man and one role that's taken on by a woman and that's how a household runs and that's not how our household was and so she was kinda always like well where, where's the discrimination in our life that will negatively affect the kids. And then she's always trying to peg who's doing what dad role and who's doing what mom role.

Some respondents even reported a lack of respect from the bench because their family did not divide labor along traditional gender lines:

> At that time we had a judge who is now retired, but he definitely was more homophobic. He was a former priest, so he came to the table with some preconceived notions about what parenting looks like. I definitely remember that the judge's demeanor towards the two women was a little ... what's the right word. He didn't really treat either one of them with respect. I think it was because neither one of them really had an identified role. There wasn't really a female who was more feminine than the other, so no one was really the woman in the relationship. And I don't think he could really comprehend that part of that, that someone wasn't more feminine. Actually the one who appeared to be more masculine was actually the parent who stayed at home more. But neither one of them was extraordinarily feminine or extraordinarily masculine. They were both kinda middle of the road as far as their appearance was concerned.

And some respondents noted this mismatch from yet another angle, pushback when outward appearances within the couple failed to align with pre-determined assumptions concerning the gendered division of parental labor:

> It's the obvious stuff. So a woman who's butch is probably gonna have a harder time being taken seriously as a nurturer than a woman who's more femme. It's exactly what you would expect.

b) Inability to See Gay Male or Lesbian Parents as Part of a Family Unit

Of the respondents interviewed, a full 50% (18 of 36) claimed that court personnel frequently lacked the ability to look past their sexual orientation and see them simply as fathers or mothers. Or, to put the complaint another way, respondents in this set perceived an inability to envision a family composed of two dads or two moms:

> I think that the court system still is having some difficulty embracing the concept of gay men being parents. Not in the abstract, but in reality and fact.
>
> ….
>
> [S]he really didn't know how queer families would work. She had an idea of what a family looked like and it wasn't how ours looked.
>
> ….
>
> The guardian ad litem really just minimizing my relationship as a mother and minimizing my relationship as a parent.

One respondent even noted that a judge in her case specifically refused to refer to the two fathers before her as "dad," because the judge found the concept of two dad's confusing:

> [W]hen they were giving testimony would sort of refer to the dads and the judge did not want to identify them as dads. He said, "You know what, we're not gonna call them dads in this courtroom because that's confusing me and I need to not be confused here." And I remember that, I remember that the guys looked pretty sad about that.

Occasionally this inability was directly linked to an inability to perceive the gay male or lesbian parent as both a parent and a sexually active (non-heterosexual) adult. Consider this statement, whereby the respondent notes that the court seemingly couldn't hold the image of a sexually active gay man and father simultaneously in mind:

> She just couldn't hold this image that they managed to create of a sexually active gay man and dad in her mind at the same time. That really is what it felt like. I've done workshops with gay fathers where I've raised this issue and it definitely has resonated.

These responses also appear to be describing a saliency bias, a well-known bias whereby the brain finds it difficult to focus on anything other than the most salient elements of an experience (Mullen et al., 1992). Non-heterosexuality has long been theorized to be a salient characteristic and the reactions described above appear to center on an inability to see past non-heterosexuality when evaluating the respondent (Kim, 2012a).

c) Fear of Social Ostracism

A handful of respondents claimed that the fear of social ostracism burdened their case, the notion that children would suffer societal scorn if they were placed into the custody of a gay male or lesbian parent. This fear was highlighted by several respondents in this set:

> And it was explained as a concern of all of the mistreatment that the child might suffer from the community ….
>
> ……
>
> "Oh, you know, this isn't my opinion." …. "This is really about the best interest of the child. We're just concerned about all of the hate that he might suffer because he has two moms."

This fear, of course, echoes the race-related argument rejected by the Supreme Court in *Palmore v. Sidoti*.[138] In *Palmore*, a Florida trial court awarded a father custody in large part because the mother, a white woman, started dating an African-American man. The trial court reasoned that the child would be subjected to societal scorn if it remained in a mixed-race

[138] 466 U.S. 429 (1984).

household. On appeal, the Supreme Court reversed, holding that a mixed-race couple cannot be denied custody merely because the novelty of their interracial relationship might subject the child to ridicule.[139] To do so, the Court stated, would be to indirectly give private (impermissible) biases legal effect.[140]

Respondents cited above are describing a similar logic: non-heterosexual parents should not be allowed custody because the child would suffer scorn if placed in their custody. But the two arguments are not completely analogous, at least not legally; race is a protected class, demanding strict review on constitutional grounds. But the constitutional status of sexual orientation is currently unclear.[141]

d) Fear of Disease Transfer

Respondents also listed the fear of disease transfer as a burden that impacted gay male and lesbian parents alike (though one respondent argued that gay male fathers felt this burden more heavily):

> Absolutely…. So the combination either of that they were a disease that would infect the kids, or that ... this was more in the adoption arena, it's a crossover of sort of homophobia and disability discrimination, is that you can't raise a kid if you yourself are sick and it would be unfair to the kid to place them with a sick parent. So we dealt with that a lot too.

The fear that gay parents (and in particular gay males) might expose their children to disease has been a frequent argument against the parental fitness of gay male and lesbian parents. This fear was undoubtedly exacerbated by early notions that H.I.V. was a "gay disease" and the popular misconception that it could be spread through ordinary contact.[142] Of note here is the fact that *both* gay male fathers and lesbian mothers reported the bias, while numerous studies have indicated that this is a stereotype that typically applies to gay males alone (Canaday, 2011; Herek, 1991; Herek & McLemore, 2013; Madon, 1997a; Rosky, 2008).

e) Fear of Orientation Recruitment

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[139] Palmore v. Sidoti, 466 U.S. 429 (1984).

[140] *Id.* at 417.

[141] The status of sexual orientation is currently unsettled in this regard. In short, sexual orientation appears to now be a suspect class in the 9th Circuit, at least in certain contexts. Smithkline Beecham v. Abbott, 740 F.3d 471 (9th. Cir. 2014). And there is reason to believe that the Supreme Court decisions have held likewise; *Windsor, Hollingsworth* and *Obergefell* certainly contained language hinting at heightened review, as the 9th circuit just famously noted in *Smithkline Beecham v. Abbott* ("*Windsor,* of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary …. [we consider] what the Court actually did"). *Id.*

[142] Surveys from 1999 and 2000 indicate that nearly one half of Americans still believed H.I.V. can be transmitted by coughing, sneezing or sharing the same glass (Lentine et al., 2000).

Eleven percent (4 of 36) of the respondents in this set listed the fear of orientation recruitment as a burden they had to face while fighting for the custody of their children. According to these respondents, this stereotype applied to gay male and lesbian parents alike:

> I think they had two concerns. … The other thing was that my children might turn out to be gay, which in fact one of them did.
> …
>
> I think they were desperately afraid that he was going to be gay.
> ….
>
> [A]lso just a general fear of, you know, that gays recruit and that they would raise queer children.
> …..
>
> [T]here was some overlap of just the general fear of the other, and that if somebody's sexual orientation was gay or lesbian, that they were gonna either abuse the kids or recruit them.

f) Inability to Recognize Abuse

Finally, 8% (3 of 36) of the respondents in this set reported an unexpected manifestation of bias: minimization of or the inability to recognize domestic abuse when it occurred within a same-sex couple. And while this inability obviously brings to mind many concerns, these respondents noted that it also hindered the court's ability to properly weigh abuse when evaluating the parental fitness of two (now divorcing) gay male or lesbian parents.

Consider this revealing statement from a gay male father, who felt that the court failed to properly weigh the (physical) abuse he suffered at the hands of his same-sex partner. The description provided depicts a courtroom that failed to take his physical abuse seriously, to the point where it appeared to be viewed as amusing rather than problematic:

> Being abused by a straight white guy. You know, that I usually get an eye roll. Like, "Of course, of course that's happening." This was more like the eye roll of, "Yep, silly faggots doing silly faggot stuff." You know, it seemed very derogatory, the look that I had in the courtroom that day from some of the people who were there. And I will tell you, even on that day in particular, more people stayed in the courtroom to watch that drama play out than normal …. So I think that was probably the thing that was minimized the most.

The lawyer for that particular father was also interviewed and the lawyer shared the father's assessment. He likewise believed that the abuse suffered by his client was viewed differently than abuse within a "traditional" male/female couple:

> And I do know that my court reporter was kind of looking at the whole situation like, "What? This is not right." And I don't know if it was like, "Oh this is typical, you've got the old guy and the young guy and they're lovers and now they have a lover's quarrel." I don't know, it was definitely some looks from the court reporter

> that day that I would say lended more toward stereotypes because they're not the typical looks I get when I have an abused woman in front of that same court reporter.

A lesbian mother also recounted the minimization recurring physical abuse, though in less detail:

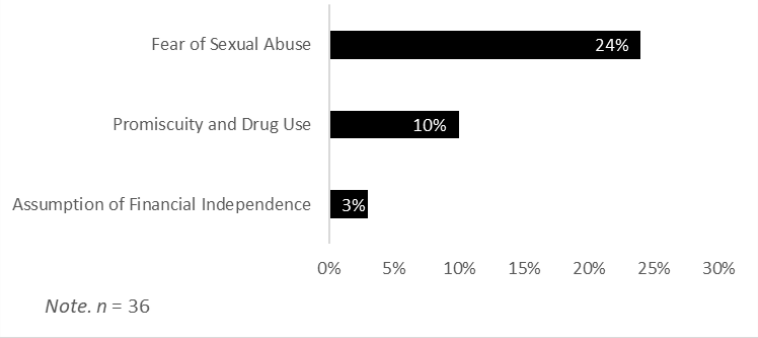
> We had an abusive relationship and that was something that was minimized a lot. I think because we were lesbians or two women, that's just not a thing that happens or something.

All three respondents recounted a minimization of domestic violence and firmly believed that this minimization directly related to their status as same-sex couples. All three, in varying levels of detail, described a judicial system unsure how to conceptualize and appropriately weigh domestic violence outside of the "traditional" male/female context, and all three felt that the evaluation of their abuser's parental fitness was warped because of this inability.

Biases specific to gay male fathers

Some biases recounted by these respondents appeared to be "gender specific," meaning that they only impacted gay male fathers or lesbian mothers respectively.[143] While the small size of this sample makes it difficult to read too much into this pattern, many of these "gender specific" responses do appear to align with gender specific anti-gay stereotypes (*See* Figure 5). Others offer intriguing insight into possible gender specific anti-gay stereotypes that have not been well theorized.

Figure 5.
Biases Faced by Gay Male Fathers Exclusively



a) Fear of Sexual Abuse

The most common bias reported only by gay male fathers (or their attorneys) was the fear that they might sexually abuse their children.[144] This bias was reported by 24% (7 of 29) of the

[143] As one gay male father put it: "it wasn't that I was gay it's that I was a gay *and a man*." Or as this lesbian mother explained: "[t]hey had their hang-ups about queers - sure, but they also had the hang up about lesbians, just lesbians. And women too you know. That mattered."

[144] All 20 of the attorneys in the sample had represented both gay male fathers and lesbian mothers. The sample also included 9 gay male fathers.

respondents in this set, exclusively by gay male fathers or lawyers referring to their representation of gay male fathers:

> [T]he most classic bias that we've seen is the image that had been predominant for years. That we were predatory and an image of child molesters that's been used against gay males

But mentions of this bias were also frequently followed by qualifications. Several of those that recounted this fear noted that they did not think it burdened their particular case(s) ("But we've never experienced that"), or that this bias has recently waned ("again, that has waned in the intervening years"). These qualifications seem to support the notion that this particular bias has diminished as society has grown more accepting of homosexuality and gay male parenting in general.

b) Promiscuity and Drug Use

Another handful of respondents (10%, 3 of 29) recounted confrontations with the familiar trope that gay men are "hypersexual," promiscuous and prone to drug use:

> So I think that there are stereotypes about, particularly about gay men being hypersexual, and drug use in the gay male community, but particularly the sexual piece of it that ... there are traditional concerns about sex around children. I think that there are things about the stereotypes of gay men that make the courts nervous about gay men parenting children. I have more than once seen in custody battles the way that one of the fathers expressed his sexuality used against him in custody.

One respondent, a lawyer who had represented several gay male fathers in custody matters, even claimed that "ordinary" sexual activity could be colored by this bias:

> He would watch pornography and masturbate while the babies were asleep …. You know, shit like that would come out and we're like, "What is this even?" I mean, how many parents do that if they're on the telephone, right? You know, it felt like it was just really ... and it felt so messed up and inappropriate. We were sort of relying on the fact that the judge would see it for what it was. And instead, like I said, it worked. But it was that kind of thing.

c) Assumption of Financial Independence

And finally, one (3%) respondent in this set, a lawyer with deep experience representing both gay male and lesbian parents in custody matters, claimed that gay male couples face an additional burden when they approach a custody contest: the assumption that both members of the couple are financially independent. And while this may simply reflect a common male stereotype, this respondent felt that it especially burdened gay male couples who contested custody. He claimed that judges frequently failed to appreciate that both male parents were, in fact, a financially intertwined unit:

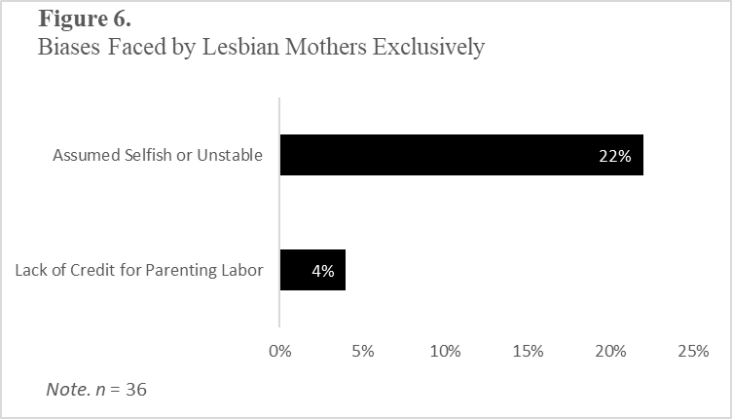
> I mean the thing that as lawyers, LGBT lawyers, we've been worried about is can the judges recognize a gay male couple as being financially interdependent? Which

> I know is not the issue you're asking about, but ... so we have sort of thought, particularly outside San Francisco, will they see us as a family system consistent with the other family systems they see all the time?

Another lawyer noted a similar assumption: the assumption that all gay males have disposable income ("I call it like the Will & Grace effect. I think that people kind of have this sense that maybe gay guys have got lots of disposable income").

The alleged repercussion of these assumptions are, of course, that gay male fathers are not treated fairly when it comes to property distribution ("And if they don't see us as a family system, then they're not going to be able to rule properly in their cases."). But it also suggests a biased view of their parental fitness overall. For couples with one primary earner, the assumption that both are actually financially self-sufficient works to the disadvantage of the non-primary earner. They may be expected to shoulder more of the child rearing costs than they can afford, or be denied needed maintenance.

Orientation related biases specific to lesbian mothers



a) Assumed Selfish or Unstable

A recurring lesbian specific bias from this set is the notion that lesbian mothers are seen selfish or unstable (*See* Figure 6). Several respondents argued that lesbian mothers, especially when the lesbian mother has separated from a heterosexual male partner, are frequently blamed for the separation; these respondents argue that they appear to be viewed as unstable or selfish for breaking up a standard heterosexual union, with the assumption being that a woman should, by her very nature, value marital harmony more than sexual or romantic satisfaction:

> I think that my experience has been that in a lesbian, straight man relationship, and divorces, the straight man, for the most part is most, I would say 80% of the time, got the house. I think that they're seen as the more stable by judges, as the more stable one because the woman has decided to do this crazy thing. I still think that's part of it.
>
> …….
> For some reason, I think that lesbians who are married to straight men are blamed more for the situation. Again, I think some of this is gender biased, but I do think,

> yeah, I would say they go into it with judges assuming that they have caused all these problems.

Inherent in this bias appears to be the notion that women should place less value on sexual or romantic compatibility and more on familial stability. Consider the phrasing of this respondent, an experienced lawyer, who argued that lesbian women who separate from male partners are often met with astonishment; they are assumed to want nothing more than a stable marital home, what one judge termed the "good life:"

> I mean, that sounds horrible, but I really ... that's my impression that ... For a long time here, we had the majority of male judges, so maybe that's also what's going on, that I'm basing it on lots of directions with male judges who really, it was the, "You had a perfectly good life, what have you done?", and that sort of ... Yeah. That's been my experience.

In this sense the lesbian mother is viewed as essentially selfish, fickle or unstable, and thus a poor parent:

> They go, "Oh well she's a lesbian now. She doesn't know what she wants. How could she possibly raise these kids?" And I'm like oh, what is this man?... Yeah. Like this person can't even take care of themselves, doesn't know what they want.

This contrasted starkly with the reported perception of gay male fathers who divorced for similar reasons. No respondents reported that these fathers were viewed as selfish. A handful even claimed that they were viewed as self-actualized for the same behavior ("With the guys, sometimes it was like 'good for you, you finally found yourself'").

This disparate perception was also directly linked to outcome by several respondents. Respondents noted that lesbian mothers, especially those divorcing a heterosexual spouse, did not seem to benefit from the same outcome bias that comparable heterosexual mothers enjoyed. While heterosexual mothers appeared to them to receive custody more often than opposing heterosexual fathers, respondents claimed that lesbian mothers received no such advantage over gay male fathers. As one attorney put it, "normally judges assume that mother should be raising these kids. But with lesbian moms, they lost their motherly shine."

b) Lack of Credit for Parental Labor

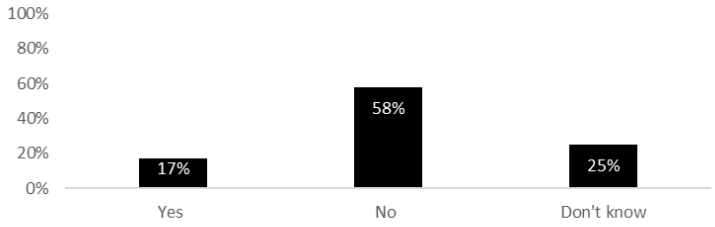
And finally, one respondent, a lawyer who has handled both gay male and lesbian clients in custody matters, repeated a complaint frequently voiced by heterosexual women in "traditional" custody matters: women fail to get sufficient credit for caretaking labor while men tend to get exaggerated credit for the same.

> In some way I think the women fared worse because sometimes with the men there was this, "Oh, my God, what an angel. How amazing he's willing to spend time with a child. Look, he took his child to the park." And with women, it was just like they're supposed to take care of the kids…

Impact of the child's gender

As already reported, very few respondents believed that the gender of the children had any impact on the evaluation of gay male and lesbian parents in custody proceedings. Only 17% (6 of 36) believed that the gender of the child had any noticeable impact, while a majority, 58% (21 of 36) believed that it did not. A remaining 25% (9 of 36) had no opinion (*See* Figure 3).

Figure 3.
Does the Gender of the Child(ren) at issue Alter the Orientation Related Biases Faced by Gay Male and Lesbian Parents in Custody Contests?



Note. $n = 36$

Of those that reported an impact, the majority reported a judicial assumption that sons and daughters would react differently to non-heterosexual parenting. Sons were assumed to be more unaccepting and combative ("you could say they expected more acting out from the boys"), while daughters were assumed to be more susceptible to developmental and emotional damage ("It's hard to say. Sometimes I just think they see the girls as delicate. You know, fragile. Especially the young ones.").

Many also reported concerns related to specific gender pairings. In other words, concerns that specifically related to pairing a son with a gay male father or a daughter with a lesbian mother. For example, two attorneys perceived a concern that gay male parents would be more likely to sexually abuse a son ("I have had attorneys trying to make the distinction. In the gay male context, you don't want the boys over there").

Another attorney noted that she occasionally encountered a role modeling concern: the notion that a son needs a male role model while a daughter needs a female role model; the result being, of course, that gay male fathers faced difficulty fighting for daughters while lesbian mothers faced difficulty fighting for sons ("[The notion that] They can't possibly do proper role modeling.").

And a stray few respondents reported the same impact in a related procedure, same-sex adoption. But here the reported bias was not from the court, or even from the placement agencies, but rather from the biological parents:

> Not judicial bias, but bias from the family placing the child up for adoption. Here a father, who had no issues with a lesbian couple adopting when he believed the child to be a daughter, suddenly changed his opinion when he learned that his child would be a son. He reasoned that a son needed a male role model.
>
> …
> But this is what happened. She placed with a lesbian couple ... or she matched with a lesbian couple. She was open to place with a lesbian couple, very happy to be doing that. And then she found out that the child was going to be a boy, and then

> decided against placing with this couple. And she claims that it was because the baby-daddy, the boyfriend, she said it was him that insisted on having a heterosexual family with the child, that he felt uncomfortable once he found out that his son needs his father.

However, the majority of the sample, 58% (21 of 36), believed the gender of the child had no discernable effect on the evaluation of lesbian and gay male parents in custody procedures, alongside a healthy 25% (9 of 36) that claimed not to know .

The perceived roots of anti-homosexual bias

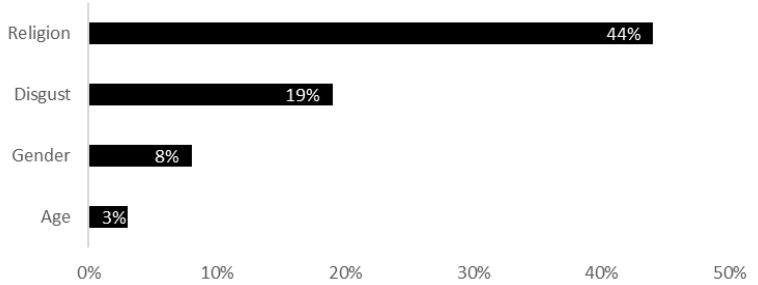
All respondents were asked if they believed that certain characteristics of the judge's background impacted his or her evaluation of gay male or lesbian parents ("What aspects of the judge's own personal background do you think impact their treatment of gay or lesbian parents during custody determinations?").

In response to this query a healthy percentage of respondents mentioned religion. Religious beliefs concerning the moral status of homosexuality were mentioned as a root of anti-homosexual bias by 44% (16 of 36) of the respondents in these interviews. Only a handful of respondents mentioned other background characteristics (gender: 3 respondents; age: 1 respondent).[145]

To be fair it is possible that the question was poorly understood. Several respondents questioned its precise meaning and many of those same respondents indicated that they would not have considered trait characteristics like gender, race or age to be part of an individual's "background." That said, the respondents in these interviews clearly perceived religion as a significant root of anti-homosexual bias in custody matters. One can also say that at least some respondents believed gender and age to be significant factors as well.

Respondents were also asked if they ever sense that court personnel were repulsed by gay male or lesbian parents. As stated earlier, this question was designed to determine if respondents believed that disgust biased their proceeding. A full 19% (7 of 36) of respondents gave some indication that it was (*See* Figure 7).

Figure 7.
Perceived Roots of Anti-Homosexual Bias



Note. n = 36

[145] While it is frequently a major factor in biases of all kinds, race was not mentioned as a bias moderator (or mediator) by any of the respondents interviewed. It should be noted that the race of the respondents is unknown.

a) Religion

Numerous respondents indicated that they had reason to believe that their judge's religious convictions negatively impacted their treatment. Consider this response from a lawyer in a small, conservative town; the judge presiding over this respondent's case specifically stated that his religious convictions prevented him from granting custody to his client:

> In the story that I told you originally where the judge said, "You're done. Your client's getting nothing." He specifically said that that was not ... that he was raised in the church and that that was not going to happen under his watch kind of thing. I think the most ... The stuff that I could probably point to would be a religious background.
>
> …..
> So, yeah. Yeah. It basically tends to be the religious. Even as far as the judges or the attorneys, yes.

Several lawyers also indicated that they assumed an openly religious judge to harbor anti-homosexual attitudes, especially if they had an affiliation with a religiously aligned political group:

> You know, I think that's something we're still working through. As always, some judges are better than other. I will say that we've got some judges who took the endorsement of our local Christian coalition, so that would mean that they're pretty homophobic.
>
> …
> At that time we had a judge who is now retired, but he definitely was more homophobic. He was a former priest, so he came to the table with some preconceived notions about what parenting looks like.

While mentions of religiously motivated bias from the bench were plentiful, it also bears noting that respondents also mentioned religiously inspired bias from a variety of other actors. Most prominently for the focus of this study (custody contests), several respondents reported religiously based bias from their home inspectors or guardians ad litem. The bias reported from these quarters was subtle and frequently unstated. Consider the following respondent, who believed her home inspector was biased for "deeply religious reasons" but could point to only vague religious comments as evidence of this bias:

> [Respondent] Deeply religious. It was religious reasons.
>
> [Interviewer] Why do you think that?
>
> [Respondent] Because of the other comments that she said as it relates to her life. And she was clearly a deeply religious and also very weird person. I think it was religious reasons.

In a similar fashion a lesbian mother noted that she perceived bias from her home inspector "[b]because she made comments about God and Jesus," but could not point to any explicit instance of bias.

Other respondents, however, noted that religious convictions were not a bright line. They argued that judges, even those with religious objections to homosexuality, were often able to put those beliefs aside:

> And I have very conservative judges that also say, "Well, it's not my deal. It's not my religion, but this is a fucking job and I need to do my job….
>
> …
> Yeah, I mean, obviously there's some people who are religious who are good, decent human beings, and some that [inaudible 00:21:08] people who are religious, there are judges who are religious who also realize that their job and their religion don't always mesh.

b) Gender

While the response was small, a handful of respondents (8%, 3 of 36)) did mention gender as an aspect of the judge's background that they believed impacted the evaluation of their case. But even those that mentioned gender simultaneously downplayed its import:

> Well, actually that's where I went to. Let's see. My initial answer was going to be a woman, I can say generally are more comfortable. Just anecdotally, well ... I don't know if I could say it.

Or limited its impact to certain specific scenarios (in this case, matters with two female parents):

> I think that my female judges are a little more judgmental of two women than they are of two men, as far as the tolerance level. Because the two guys, they're not going hysterical.

This stood in contrast to a nearly equal number of respondents that strongly believed that the gender of the judge made no difference.

> [Interviewer] [Are you saying that] you search for female judges over male judges?
>
> [Respondent] No. No, no, no. No, it's ... I couldn't generalize like that, because it would depend on who those clients are.
>
> ……
> It's hard to describe. I've been doing it so long, there's more a sense of ... a lot of it is really a guy sense of who would or wouldn't be a good judge for any client, let alone particular ... I don't think I'd pick gender for gender, if that makes sense.

c) Age

It bears noting that age was virtually absent from this discussion. This is noteworthy when one considers that age is routinely reported as a moderator of orientation related bias in the literature (Herek, 1984, 2009b). But in this set age was virtually absent. Only one respondent in the set mentioned age at all and when they did so they lumped it in with gender in a seemingly offhand description of their "preferred judge:"

> Yeah, I mean, I'd be inclined to say that if I were going up in front of a 70-year-old man, would I be a little more concerned about how this case may go than if I was in front of a 40-year-old woman? Yes, I would be. I don't know if that's fair of me, but I would be.

But when pressed this respondent refused to go any further, and even began to doubt the impact of the moderators she just alleged. All told, even considering the potential confusion the question engendered, these respondents were notably mute on the influence of judge's age.

d) Disgust

Respondents were also asked if they ever sensed that court personnel were repulsed by them (if the respondent was a lawyer, they were asked if court personnel were ever repulsed by their clients). As stated previously, this question was designed to reveal bias motivated by disgust without using the actual term "disgust," because the term itself can be problematic in interviews of this kind.[146] Nineteen percent responded in the affirmative (19%, 7 of 36), and they reported instance that mapped directly to known behavioral expressions of disgust.

For example, a common disgust response is to physically turn away from and distance oneself from the disgust elicitor. Disgust, quite literally, repulses (Ekman, 1992; Kelly, 2011). This precise response was described quite vividly by two gay parents when describing their experience in a parenting class mandated by the court:

> Yeah, so, in classes, they won't look at us. They won't acknowledge anything that we say. They'll physically turn their bodies away from us when we are participating in classes and they will not acknowledge any of the thoughts and ideas that we share.
>
> …
> people that are in those classes will actively put themselves in the opposite side of the room from us, and then not look at us when we talk. Whereas they will look at other people and they will engage with other people. So, yeah.
>
> ….
> anytime we had any input on the conversation, they would turn away. Didn't really want to hear anything we had to say no matter what it was in regards to. During breaks and things like that, again, more so kind of always just having their back to

[146] The word "repulsed" was used rather than "disgust" because disgust has a conventional meaning (strong dislike, strong disapproval) that differs from the more clinical definition used in psychology (an actual state of near nauseous revulsion). It is believed that confusion over these two meanings have biased studies in the past (Russell & Giner-Sorolla, 2013).

> us, not really wanting us to approach them at all.

Another parent described a similar reaction from court personnel at the hearings themselves.

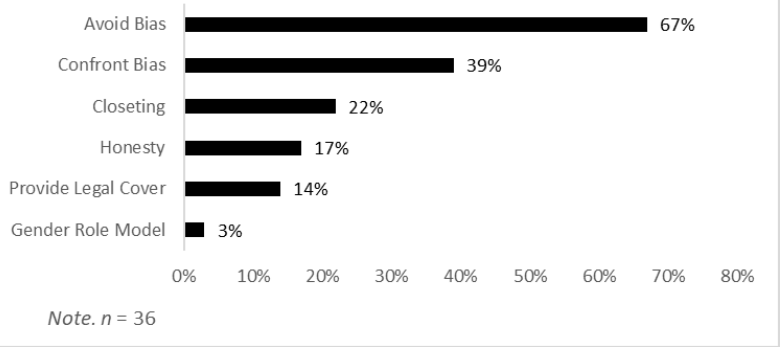
> And when they came in, I said hi to everyone and I'm like super friendly, and they would not meet my eyes to say hello.

Very few respondents reported obvious instances of revulsion from the judges themselves, though some lawyers did report subtle indications. One lawyer, for example, stated that they noticed the judge "curling up his face" when testimony regarding a same-sex affair was presented.[147] Another lawyer reported that the judge appeared to drop a report discussing her gay male client's home life quite quickly, "as if he didn't want to touch it."

Strategies to navigate bias

The final three questions posed to all respondents involved strategies employed to mitigate bias, and the respondents had a lot to say on this subject.[148] Every respondent questioned had some perspective on the issue and the responses varied widely. They also offered strategies that, in many cases, were diametrically opposed (avoid bias vs. confront bias, for example) (*See* Figure 8).

Figure 8.
Strategies to Navigate Anti-Homosexual Bias



a) Avoid Bias

The most common mitigation strategy mentioned, by far, was to simply avoid bias all together. Some form of bias avoidance was mentioned as a primary strategy by a full 67% (24 of 36) of the respondents in these interviews. Among the attorneys in these interviews, this strategy emerged most frequently in the form of "judge avoidance," the practice of striking judges that they knew or

[147] This description appears to be describing the "gape face," a facial expression people commonly perform when confronted with something that disgusts them. It mimics the facial contortions that precede vomiting (Ekman, 1992; Kelly, 2011).

[148] These three questions are: (1) What kinds of strategies on the part of individuals, attorneys, or other actors do you think might be effective in mitigating these biases?; (2) What strategies have you used? (3) Have these strategies been effective?

suspected to have LGBTQ bias. This strategy was discussed almost as a matter of course, often before the respondent was even asked about their mitigation strategies:

> Right, because I think like most courts, each attorney has one, the ability to being strike one judge. So, yeah. I've got my little list of ... it's usually the same judges [that] I'm not gonna bring in LGBT case [to]
>
> ……
>
> And like I said, with the judges, initially we had that issue, and we requested change of judge and that's it, and we're fine. We haven't had that issue since then.

Attorneys also exercised judicial avoidance by simply timing their motions; in many jurisdictions judges at the trial level "rotate," moving (after a certain period of time) from the criminal docket to the civil docket and so forth. Lawyers hoping to file for divorce can thus wait for a "friendly judge" to rotate onto the family docket ("Our lawyer was waiting for who she felt would be a good judge for us"), or file quickly before a friendly judge rotated off ("We picked [that day] because that was the judge's last day on the bench before he was gonna rotate to a different docket").

Attorneys occasionally avoided bias by picking the forum itself. In cases where the proper forum was up for debate (if the parents are from separate jurisdictions, or if one moved with the child to another jurisdiction) attorneys could occasionally argue for the forum that they perceived to have the least bias, or the forum that offered more control over the choice of judge:

> [B]ut I do think that I did some cases in the city where they probably should have been done in the county because there was a little more control over it. In the county there's, I don't know, 15 judges or 20 judges or something that you could get, and in the city, it's basically two. If you didn't like the one, you [inaudible 00:35:11] choose for the other one. There was a lot more control over what you could do. and if you knew that Judge [name redacted] was gonna be there, you knew whether that was gonna be an issue or not.

And finally, attorneys and the parents they represented routinely avoided bias by selecting LGBTQ friendly home inspectors or guardians ad litem. This practice was so widespread among respondents that it was frequently mentioned as a matter of course, as something that any reasonable gay male or lesbian parent would do.

> [t]here's a pretty active LBGT community in St. Louis, and I think most of these folks …. they talk to other lesbians and gay men and so they kind of know, "Well, so-and-so works with this agency and they were really receptive and understanding, and all of those sorts of things."
>
> ….
> Yeah. We selected ... You had to select people that were willing to do it and that's differential treatment right there, because so many ... You couldn't just go to anybody. You had to find out who was willing to work with us.

….

> The court always appoints who we ask them to appoint as the guardian ad litems. My only criteria is are there, you know, have any ... Are they gay-friendly? And so, far, we've had no problems finding ample gay-friendly guardian ad litems in the county.

b) Confront Bias

A sizeable 39% (14 of 36) of this sample advocated for the direct opposite of the avoidance approach: confrontation. Rather than avoid, these respondents described addressing bias head on, though in a wide variety of ways.

The most noticeable example of confrontation comes from the handful of parents who decided to physically protest the handling of their custody matter. It should be noted that in all of these cases the respondents indicated that they did not have the money to pursue legal appeals and thus felt that protest was their only option.

One angry parent threatened the governor with going to the press:

> Honestly. I really don't because I'll tell you, two days ago I threatened the governor's office with going in front of a news camera. I don't freaking care. I don't care.

Another threatened to physically camp outside of her governor's house:

> I'm screwed. I'm screwed. I'm about to go camp out at [redacted]'s office, which is our governor, who is supposed to be about gay rights and see if that gets me anywhere.

In all of these cases the parents expressed a feeling of disempowerment that lead to deep despair. All believed that they had unfairly lost access to their children, and all expressed frustration that they lacked the money to continue their fight within the legal system. The vast majority of these parents felt that protest was their only option.

A different form of protest was recounted by the lawyers. Several lawyers noted that they protested perceived mistreatment, but they did so within the confines of the legal system rather than the public sphere at large. These "protests" often amounted to simply calling the judge out on his or her perceived bias:

> Oh, well I do that all the time. Which is pretty much ... But, it's not so much of a strategy as I'm a really in-your-face person. And if a judge seems to wanna react in a fashion that's anything other than a levelheaded consideration of two parents who both want the child equally, then I'll call him on it.

Occasionally the lawyers in this set described doing more. Some described confronting bias by delving into the realm of politics and advocating for legal change. Consider this attorney who formed a political action group designed to overturn a statewide law used to criminalize same-sex relations:

> Well, now my now spouse, my partner then because of the law, anyway, she and I and a number of other people started a group called the [Redacted] Project that, sort of, got off the ground in 1987 to try and get [Redacted State's] sexual misconduct law, which is the law that was used to criminalize, you know, gay sexual relations, off the books.

While these actions might not be considered "protests" in the classical sense they are a direct assault on a perceived source of orientation related bias.

Finally, a sizeable number of respondents described a more communal means of confrontation: education. Numerous respondents stated that they confronted bias by forming support groups designed to help others navigate the headwinds that they would possibly face.

> Yeah, so I think teaching parents, gay or lesbian, same-sex parents, or whatever, being aware that there are biases out there, that's kind of tough, as you know, like if you're telling somebody about biases and making them aware, are they going to place those biases in a situation that is not actually that situation? But I think education is definitely important. Secondarily, having good support group, whether it be your family, friends, or other gay and lesbian couples that have been there, done that, things like that I think are important.
>
> ……
> Since we intentionally try to organize more to get the information out there, we've seen parenting groups pop up so folks can share information with one another. In fact, I think that there's a relatively robust Facebook page that's on LGBT parenting in St. Louis. I'm still a party to it, but I don't necessarily follow the posts, so it doesn't pop up for me in my feed.

Respondents described these programs as a means to both prepare and guide the gay male or lesbian parent through the custody process. Several respondents stated that they learned of "LGBT friendly" judges or home inspectors by attending these programs. Still more claimed that they found their attorneys through these groups.

c) Closeting

Twenty-two percent (8 of 36) of the respondents in these interviews described a mitigation strategy that can be described as "closeting," the intentional concealment of a gay male or lesbian parent's sexual orientation or sexuality.

In the extreme, this strategy, as described by respondents, entailed complete secrecy: the gay male or lesbian parent remained closeted throughout the entire adjudication process for fear that an admission might negatively impact their custody rights. To take a clear example, one lawyer described a father who sought divorce after coming to terms with his sexual orientation but chose to remain closeted to both the court and his wife in order to obtain an unbiased custody allocation:

> I had a client years ago who came to me, I thought it was a typical heterosexual divorce, and about halfway through he said, "Well, I really don't want this divorce, but I've decided I'm gay."…. But that was a situation where his wife didn't know that, and he ... I mean, we did the whole thing and nothing was ever said or done.

But more respondents recounted closeting strategies that were less complete. For example, several attorneys noted that they would often settle matters quickly in order to avoid discussing their client's sexual orientation in court.

> Yeah, it may be better to settle a case on not the greatest terms, rather than have a judge hear about the sexual allegations, so that would be a way of avoiding it altogether or as much as you could.

While this might not be "closeting" in the traditional sense, it is an effort to avoid placing the client's sexual orientation before the court.

Still other strategies involved efforts to keep their client's *sexuality* under wraps. In these instances the orientation of the parent was known to all parties but their lawyers made every effort to suppress references to their sexuality. Normal sexual activity or instances of sexual intimacy were recast in platonic terms. One lawyer described this strategy as an effort to "de-sex" his client:

> I think a way of handling gay and lesbian custody issues is to try to de-sex them as much as you can, both sexual activity, and also in terms of gender roles. Which is interesting, I'm just talking out loud here, you'd think in some ways, you would want to make it sound more like, "Well, this is just like a heterosexual family." But I think instead of that, I tend to say, "Well, this is more like a friendship, or more like a ... " I think it's that fear of getting into sex with judges, or having them think about it.

While another described an effort to make even regular family outings appear "innocent" by deemphasizing the possibility of intimacy.

> I think there's a tendency to downplay anything physical at all, and to downplay ... I hear myself saying this and I hate it, but I think it's true. Things that would, in a heterosexual relationship seem benign, I hate the word. For example, like ... and we always go on vacation together. Those kinds of things I try to ... I don't know, I try to make them sound ... This is awful. I'm glad you're not using my name. But make them sound more innocent. Not that they're orgies, but that it's just like a big group of people, like gang of people just decide to go camping rather than, it was like the family vacation. I think there's a little bit of a tendency to de-emphasize the family part of it. That sounds horrible, but I think I do it.

And finally, while not directly related to the topic at hand (custody), several clients described an elaborate "legal closeting" strategy they employed when attempting to adopt as same-sex couples. These clients and attorneys (all from the same metro area) stated that during the early 2000s "LGBT friendly" judges and attorneys in the area would process their adoptions only if they agreed to sign actual non-disclosure agreements:

> The situation back then was that it was done relatively quietly. The judge was clearly an ally. She was an out lesbian individual, but they didn't not ... They put this through family court, but it was not necessarily widely broadcasted. In fact, over the period of time that [the "LGBT friendly judge"] then moved into private practice as well, she and a handful of other attorneys did require that their parents who go through the adoption process actually sign a document that states they would not discuss the attorney, the judge, or the adoption publicly.

At the time this elaborate form of secrecy was deemed necessary for political reasons, as it was widely believed that same-sex adoption might be targeted by local political groups seeking to reverse the advancement of LGBT rights in general ("it was widely thought that adoption ban was gonna be the next thing that they tried to put on the ballot"). But while understandable it demonstrates the remarkable lengths to which closeting was employed to protect the rights of LGBTQ parents.

d) Honesty

While closeting was a relatively popular mitigation strategy an almost equal percentage (17%; 6 of 36) reporting employing the precise opposite tack: upfront honesty. While perhaps not a "strategy" *per se*, those that described this approach did employ honesty in a conscious attempt to defuse the impact of perceived orientation related bias. In particular, lawyers appeared to recommend honesty as a way to keep the discussion of their client's orientation brief:

> Because I think there is still this idea that it's like, a salacious fact if you're going to get some sort of, "Oh well didn't you have an affair with ..." and it's a person of the same sex, who cares? At this point, what's your relevance, where are we going with this? If the answer is yes, say yes and then move on. Because I don't want the judge to think that you're the kind of person that's gonna lie about things and hide things about other stuff that matters in your case.
>
> ….
> So I would caution any client to, "Just own it factually. You don't need to get into any details." Because of the underlying prejudice or stereotype if it was in front of a male judge, I certainly would tell male homosexual clients to just keep it short.

e) Provide Legal Cover

Fourteen percent (5 of 36) of the respondents in this sample described a process of providing "cover" as a means to mitigate potential orientation-related bias. In short, these respondents (all attorneys) stated that they made a point to provide their judges with overwhelming legal support for the proposition that orientation alone should not justify limiting custody or visitation rights. While this might sound like the ordinary process of lawyering, these respondents made clear that this was a special case:

> You have to do more educating of the courts about some of what we're talking about. You would do more briefing and sometimes actually bring in expert witnesses, or to just get the court to focus on the issues it's supposed to focus on.

And they also made clear that they felt the need to over justify their position in part because awarding custody or unrestricted visitation to a gay male or lesbian parent made judges nervous, especially prior to the late 2000s. As one respondent put it, these judges needed cover because they believed they were "going out on a limb" if they sided for their client:

> [Respondent]: And the judges used to call me in all the time without the clients, and they would be like, well [redacted] I read your brief but, can I really do this?

> And I'd be, oh yes your honor you can definitely do this. And they'd go, alright then bring the clients in. It was so weird.
>
> [Interviewer]: Oh, so they were concerned about their reputation I suppose?
>
> [Respondent]: Yeah, am I out on a limb doing this?

f) Provide Gender Role Model

Finally, one respondent (3%) mentioned a unique mitigation strategy that bears mentioning: assuring the court that the child at issue would have access to both male and female role models should the gay male or lesbian parent receive custody.

This respondent, an attorney, noted that when representing gay male or lesbian parents he often encountered the "role modeling" concern, the notion that a gay male or lesbian parent will not be able to sufficiently model both genders to the child (with the assumption being that they would eventually partner with someone of the same gender). He therefore made it a point to note that the child will, in fact, have access to a role model of the opposite gender:

> [So I say] "Yes," you know. One of the wives, her brother or her uncle, or friends of theirs….. they're concerned that there is no man in the house, so they have identified someone to fill that role.

He argued that this tactic both mitigated the court's concern and presented his client as a thoughtful parent:

> But I think it is effective. I think it shows that they're thinking about these things and that they want to give their child access to as much as they possibly can growing up. I think it speaks to their determination.

Discussion

Taken as a whole these interviews support many assumed facts but question others. In terms of anti-homosexual bias in custody matters, respondents unanimously agreed that it exists and largely agreed that it has waned in recent years. This matches conventional wisdom. But these interviews also uncovered a tendency for respondents to ignore, downplay or simply accept as fact orientation related bias. This creates the very real possibility that anti-homosexual bias may in fact be worse than is generally assumed, even in "progressive" jurisdictions. Scholars who argue that orientation bias in legal matters is largely a thing of the past may be missing very real, present-day discrimination below the perception of the immediate actors (George, 2009; Sprigg, 2012; L. D. Wardle, 1997).

In terms of gender, respondents largely agreed that gay male fathers and lesbians mothers face different headwinds when they contest custody. This was expected, but many of the specific findings related to gender were not. For one, numerous respondents alleged that lesbian mothers appeared to lose the beneficial assumption that, as women, they are inherently superior caregivers. Respondents also claimed that lesbian mothers are perceived as selfish and unstable when they divorce a heterosexual spouse while comparable gay male fathers are not. Taken together these

observations hint at a unique interaction between gender and orientation bias that has not been noted in the literature.

Perhaps it is more jarring to a court when a woman decides to leave a "traditional," heterosexual family for reasons of their own sexuality than for a father to do likewise. As previously noted in Chapter 3, the essentialized mother is expected to value the family above all else (Chodrow & Contratto, 1982; Dow, 2016; Gerson, 1986; Ronner, 2000; Swent, 1996; Watkins, 2011), and the essentialized mother is not expected place a high priority on her own sexual satisfaction (Kim, 2012a; Thompson, 2002). For a mother to divorce for sexual reasons against these expectations thus might appear selfish to the court, and so contrary to the court's expectation that her stability might be questioned. The court might also conclude that this mother, a mother who would leave a traditional family in order to satisfy herself, is not a traditional, "nurturing mother." To explore this observation further, the judicial perception that a parent is selfish or unstable will be coded for during the case analysis portion of this project.

Another area of surprise concerned the assumed division of parental labor by gender, and the confusion created by families that did not split along traditional gender lines (i.e., same-sex couples). It has long been known, of course, that parental labor is traditionally divided into two, well-defined, gendered roles: the "caretake role" (stereotypically female) and the "breadwinner role" (stereotypically male) (Neely, 1984; O'Hanlon & Workman, 1989; Sack, 1991).[149] The fact that courts (and fringe actors like *guardian ad litems* etc.) experienced difficulty with same-sex couples is therefore not surprising, but their description of the resulting confusion does give real reason for concern; several respondents indicated that judges and other fringe personnel found it difficult to envision a female performing the breadwinner role or a male performing the caretaker role, which raises concerns for the evaluation of that parent's parental fitness. These concerns, of course, have been well documented among heterosexual couples (Nickerson, 2000; Purvis, 2013; Ronner, 2000) but in some ways the same-sex couple is in a more precarious position: an opposite-sex couple can at lease conform to the expected stereotype and avoid the legal system's wrath. For at least one member of a same-sex couple that option might not be available.

Gendered expectations also appeared to bias the court's ability to recognize and address domestic violence. Several respondents indicated that domestic violence within same-sex couples simply did not seem to register with the court. Indeed, for one male father the idea of domestic violence between him and his male partner appeared to strike the court as almost humorous.[150] While this was unexpected it does comport with findings in the literature. Several researchers have noted that domestic violence is typically viewed in a gendered fashion, as something that a man

[149] Legally this division is best expressed by the division of labor laid out in Garska v. McCoy. 278 S.E.2d 357 (W.Va. 1981). In Garska, the court defined the "primary caretaker" as the parent who typically performed the following duties: preparing and planning for meals, bathing grooming and dressing, purchasing and cleaning clothes, medical care, arranging the child's social life, arranging alternative care (babysitting), putting child to sleep, waking them up, attending to them at night, disciplinary matters and toilet training, educating (religious, manners etc.), and educating (reading, writing, arithmetic). Garska v. McCoy, 278 S.E.2d 357 (W.Va. 1981). While the role of "primary caretaker" was nominally gender agnostic, the judge admitted that the duties allotted to it were traditionally associated with the mother. *Id* at 362.

[150] "Being abused by a straight white guy. You know, that I usually get an eye roll. Like, "Of course, of course that's happening." This was more like the eye roll of, 'Yep, silly faggots doing silly faggot stuff.'"

does to a woman (Little, 2008). It is also typically viewed as something that occurs in a marital context (Colker, 2005), and thus, to the degree that judges find same-sex marriage paradoxical, same-sex domestic abuse might escape judicial notice.

Some respondents also reported that the gender of the child made a difference. They noted that sons are assumed to approach non-heterosexual parenting in a combative manner, while daughters are assumed to be more fragile. In short, these respondents believed that essentialized perceptions of the "son" or "daughter" biased proceedings. Several respondents also reported that sexual abuse concerns naturally hinged on both the gender of the child and the gender of the parent (e.g., gay male fathers present a sexual abuse risk to sons but not to daughters). This finding was expected, and mimics previous findings on the incidence of the sexual abuse stereotype in gay male and lesbian custody adjudications (Rosky, 2008).

These interviews also shed light on several theorized moderators of orientation bias during the adjudication of custody. As stated in Chapter 3, it is well known that gender, religiosity, age and political persuasion tend to moderate anti-homosexual bias. But in these interviews, only religion was consistently listed as predictive of anti-homosexual bias (44% [16 of 36] indicated the religiosity correlated positively with anti-homosexual bias). Gender and age were mentioned by very few respondents (8% [3 of 36] and 3% [1 of 36] respectively), and politics was mentioned not at all. These results are surprising for several reasons. For one, previous research has indicated that age, gender and political ideology are major moderators anti-homosexual bias (Herek, 1984, 2009a; M. E. Johnson et al., 1997; Nosek et al., 2007) For another, the expression (subtle or explicit) of personal religious views is not typically what one would expect from a judge who's mandate is the follow the law, not their own theological understanding. But the literature on this narrow point (do judges really make their religious views known during custody trials?) actually supports the observation of respondents. One study of custody adjudications concluded that approximately 60% of custody cases employ some sort of religious test or religious logic when evaluating parental fitness (Drobac, 1998).

In terms of affective bias, a substantial percentage (19%, 7 of 36) of respondents described behavior that indicates a disgust bias from the judiciary or other court personnel. While disgust is known to moderate judgment against gay males and, to a lesser extent, lesbians, this effect has never been examined in family court. Chapters 7, 8 & 9 will employ an experiment to explore this possibility.

And finally, these interviews expose a rich vein of material concerning orientation bias, and the costs of that bias, at the fringes of the custody adjudication process: the selection of lawyers, the crafting of litigation strategy, the selection of *guardian ad litems* and the day to day need to navigate court personnel. As stated earlier, the impact of orientation bias at the fringes of the adjudication process is hard to discern from the public record or even from direct trial observation. These interviews were uniquely situated to examine this oft overlooked portion of the process and the results proved enlightening.

First and foremost these interviews uncovered the immense toll orientation bias can levy on these parents at the fringes of the process. A gay male father openly cried after being told by a prospective lawyer that he will "never see [his] daughter again." Home inspectors hinted that a lesbian mother's lifestyle was an abomination. Class mates in a mandated "parenting class" refused to look a gay male father in the eye. One judge specifically refused to refer to gay male fathers as "dads." The reports of emotional strain in these interviews are frequent and unsubtle, and all of them refer to situations that heterosexual parents, by virtue of their sexual orientation alone, are able to avoid.

In addition to the emotional strain is the additional effort required. These parents reported a litany of strategic and procedural concerns that simply do not apply to heterosexual parents: the need to forum shop for a "gay friendly" judge, the need to wait for a "gay friendly" judge to rotate to the family docket, they need to shop for a "gay friendly" attorney, the need to shop for a *guardian ad litem* that "will work with you," the need to strategize how to present your sexuality to the court, the need to form education groups to assist other non-heterosexual parents through the process. All of these are hurdles and burdens that heterosexual couples are able to avoid.

As a final note, these interviews revealed not only great burden and strain at the fringes of the adjudication process but also great resilience. Much of the literature on the advancement of LGBTQ+ rights focuses on attorneys (Hull, 2017; Mertus, 2011), high powered activists (Hull, 2017; Mertus, 2011), high profile cases (Ball, 2019; Hull, 2017) or the work of academics (Hull, 2017). But these interviews revealed an ability among litigants and local attorneys to join together for collective action on a relatively small scale, a "bottom up" approach to solving real issues of orientation bias in the custody space. Respondents in these interviews formed parent support groups, organized protests, formed activist organizations and created shared resource pools to assist other gay parents in the future.

Chapter 5

Case Analysis: Introduction and Methodology

There is no friendship, no love, like that of the parent for the child.[151]

Henry Ward Beecher

Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children.

Justice Henderson, *concurring in part and dissenting in part*
Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992)

In this portion of the dissertation (the "Case Analysis" portion) I examine the text of custody decisions made available through Lexis and Westlaw to gain insight into both the content of judicially expressed orientation bias, outcome disparities across sexual orientation, and the intersectional impact of gender on both. My analysis proceeds in two parts. In the first part, I examine outcome disparities across orientation and highlight the content of judicially held orientation bias. These results will be posted and discussed in Chapter 6 ("Is there still bias and what does it look like?"). In the second part, I examine the intersectional impact of parental gender and gender of the child(ren) at issue on both outcome disparities across orientation and the content of anti-homosexual bias expressed from the bench. These results will be posted and discussed in Chapter 7 ("The impact of gender").

This chapter describe the relevant, methodology, data and descriptive statistics for both chapters 6 and 7.

Data and methods

Analysis for Chapter 6 ("Is there still bias and what does it look like?") is based on every custody case available through Westlaw and Lexis featuring a gay parent through 2017 (*n*=260; 1951 – 2017). This dataset, hereinafter "Dataset One," was compiled using Westlaw and LEXIS legal research software. Search queries were run on both platforms using the terms "custody," "visitation," "divorce[d]," "homosexual[ity]," "gay," "bisexual," "bi-sexual" and "lesbian." Related studies were also consulted to identify cases that may have eluded the text based search (Richman, 2002; Rivera, 1978; Rosky, 2008; Shapiro, 1995b).[152]

[151] (Beecher, 2012).

[152] This study defines "custody case" as the legal adjudication of physical custody or visitation rights. It therefore excludes cases focused solely on the division of marital property, alimony, maintenance, unrelated legal errors or standing issues. It also excludes cases that solely concern legal custody (the right to make legally binding decisions on behalf of the child, as opposed to physical custody).

Cases involving two gay parents were excluded, since the impact of orientation bias on outcome cannot be isolated when both parents are gay, as were cases involving more than two parents.[153] This set also excludes cases concerning non-parental claimants (grandparents, other relatives, the state, etc.) as those cases cannot cleanly be compared to cases involving two legal parents.[154]

Once assembled Dataset One was loaded into a qualitative data analysis program (Atlas-Ti) for case-specific coding. Qualitative coding was conducted in three rounds, with the second and third rounds serving as a check for errors. Subsequent data analysis was conducted in STATA.

Background Codes recorded the gender of the non-heterosexual parent, the gender of any children involved, the state of origin, the level of the case (trial, appellate or Supreme Court), and the year the case was decided.[155]

Custody Codes recorded the outcome for each case in terms of primary custody allocation and the identity (gender and orientation) of the parent whose custody was altered; any decision that granted or affirmed custody was coded as a grant of custody; any decision that denied or affirmed the denial of custody rights was coded as a custody denial. Initial (trial level) decisions that awarded joint custody were coded as joint awards (neither an award nor denial), but none of those decisions were present in these sets.[156] In addition, a motion to modify custody that resulted in a custody gain was coded as a custody grant while those that resulted in a custody loss were coded as a custody denial.[157] Cases that remanded all issues of custody to a lower court were coded as remands.

Restriction Codes recorded the outcome of each case in terms of visitation restrictions imposed and the identity of the parent whose visitation was altered.[158] The following restrictions were coded for: partner restrictions, overnight restrictions, and supervision restrictions. Partner

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[153] While rare, this has happened; *See*, for example, Dawn M. v. Michael M., 47 N.Y.S.3d 898 (N.Y. Slip Op. 2017).

[154] For the purpose of this analysis "parent" is defined as one with the legal status of parent. Thus "parent" includes not just biological parents but also adoptive parents and parents by other legal means (parenthood by estoppel, de facto parenthood, etc.). It does not, however, include claimants who do not have the legal status of parent but are seeking it (grandmothers and grandfathers, other relatives, the state etc.).

[155] While the interviews suggested that the gender of the judge may moderate, the gender of the judge was not readily available from the published record alone; modern judges can easily be researched (and their outward gender surmised) but this proved to be impossible for judges that pre-dated the internet era. The impact of the judge's gender will thus be examined experimentally in Part Three.

[156] This is not surprising given the very small number of trial level decisions in this set (3%).

[157] Cases that remanded all issues of custody or visitation rights to a lower court were coded as neither grants nor denials.

[158] "Visitation restriction" is the conventional term but it is slightly misleading. In reality, some of these restrictions can be imposed upon custody as well. For example, a court could hold that a mother will receive primary custody but only if she agrees to keep her same-sex partner away from the house and the child. This is technically a restriction upon her custody, not her visitation. These instances are rare but when they occurred in these data they were coded simply as restrictions. For the purpose of this analysis, the distinction is irrelevant, and this author prefers to use the conventional term (visitation restrictions) for clarity.

restrictions encompassed any order prohibiting the presence of a romantic partner or potential romantic partner during visitation or custody. Overnight restrictions encompassed any order prohibiting the parent from staying overnight while visiting, while supervision restrictions encompassed any order mandating the presence of a supervisor or chaperone during visitation. Once again, remands on these issues were coded as remands and not considered impositions or denials.

And finally, Dataset One was coded for the content of judicial orientation bias by coding judicial arguments against gay male and lesbian parental fitness. These codes were developed both deductively and inductively from the cases themselves and from the literature. These data were also coded in three rounds for arguments against gay male and lesbian parental fitness *advanced from the bench*. In other words, arguments advanced by litigants or others that were not endorsed by the majority, the concurrence or the dissent were not coded. In addition, Dataset One was coded for the judicial perception that the gay parent was selfish or unstable.

Analysis for Chapter 7 ("The impact of gender") makes use of Dataset One (described above) in addition to a second dataset, hereinafter "Dataset Two." Dataset Two, contains a random sampling of "traditional" heterosexual vs. heterosexual custody cases. This dataset is necessary to cleanly address the topic of this chapter, the impact of parental gender on custody disputes featuring a gay male or lesbian parent. To fully examine the impact of both sexual orientation bias and gender bias on custody adjudications one must compare across not just sexual orientation but also gender. In other words, it becomes necessary to compare the treatment of gay male fathers opposing heterosexual mothers to heterosexual fathers opposing heterosexual mothers, and lesbian mothers opposing heterosexual fathers to heterosexual mothers opposing heterosexual fathers. This requires a second dataset of "traditional" heterosexual v. heterosexual cases that is comparable to Dataset One.

To ensure that these two sets were comparable, care was taken to control for the geographic and temporal parameters of the Dataset One; for each case in Dataset One, a "heterosexual parent vs. heterosexual parent" case was selected from the same state and year. This resulted in a set of "traditional" custody cases that mimicked the temporal and geographic distribution of Dataset One.

Case selection for this dataset utilized a method pioneered by Professor Sarah Benesh to approximate randomness in the selection of case law; cases listed under Westlaw "Topic and Key" number 76(d), all cases dealing with custody, were pulled for each relevant state and year. Cases featuring anything other than two heterosexual parents were excluded, as were cases that did not concern custody (cases focused solely on the division of marital property, alimony, maintenance, unrelated legal errors or standing issues). Cases were then randomly selected from the remaining list for each state and year represented in the first set. In other words, for each custody case in Dataset One, a heterosexual v. heterosexual custody case was randomly chosen from the same state and year for Dataset Two. Randomness was achieved through the use of a random number generator (Ryan, 2014).

Once constructed, Dataset Two was then loaded into a qualitative data analysis program (Atlas-Ti) for case-specific coding. Qualitative coding was conducted in three rounds, with the second and third rounds serving as a check for errors. Subsequent data analysis was conducted in STATA.

Dataset Two was then coded in a near identical fashion to Dataset One. Custody outcomes were coded for both custody allocation and the imposition of visitation restrictions. Gender of the parent impacted for each outcome was also coded. All cases were coded for state of origin and

year of decision, and, in terms of content, Dataset Two was also coded for the judicial perception that either parent was selfish or unstable.

Descriptive statistics

Dataset one. This selection criteria resulted in a population of 212 cases from 42 states, spanning a temporal period from 1951 to 2017 (*See* Figure 1). The vast majority of these cases post-dated 1980 (n=192) and lesbian mothers ($n_{lesbian}$=152) outnumbered gay male fathers ($n_{gay\ father}$=60). Cases with only sons (n=68) nearly equaled cases with only daughters (n=72) overall. Forty-three cases contained both a daughter and a son (*See* Table 1). It should be noted that the spike in cases after 1978 also aligns with the national transition to no-fault divorce (L. D. Wardle, 1991).

Dataset Two. This selection criteria for Dataset Two resulted in a dataset of "traditional" heterosexual v. heterosexual custody cases that exactly mimicked the temporal and geographic distribution of Dataset One. Thus Dataset Two also resulted in a population of 212 cases from 42 states, spanning a temporal period from 1951 to 2017. These cases also, by definition, each contained a mother and a father. Dataset Two was not coded for gender of the child(ren) at issue (*See* Table 1).

Table 1. Datasets One and Two: Descriptive Statistics

Dataset One

	n	Gay Male Father	Lesbian Mother	% Total
Gay male fathers	60	60	0	28%
Lesbian mothers	152	0	152	72%
Cases with only sons	68	24	44	32%
Cases with only daughters	72	21	51	34%
Cases with sons and daughters	43	8	35	20%
Gender of children unspecified	29	7	22	14%
Total # of cases	212	60	152	100%

Dataset Two

	n	Hetero Fathers	Hetero Mothers	% Total
Hetero fathers	*212*	212	0	100%
Hetero mothers	*212*	0	212	100%
Total # of cases	*212*	212	212	100%

Figure 1. *Dataset One. Custody Cases Featuring One Gay Male or Lesbian Parent Opposing a Heterosexual Parent*

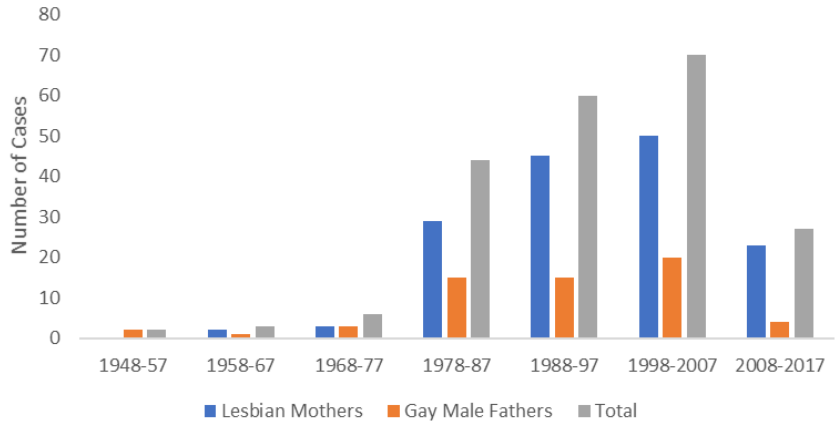
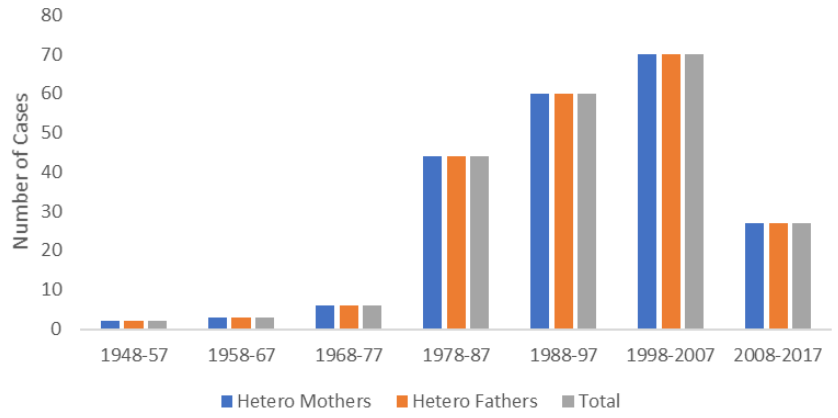


Figure 2. *Dataset Two. Heterosexual vs. Heterosexual Cases by Parental Gender*



Caveats

There are at least four caveats that apply to the design of this analysis. First and foremost is the issue of population inference. While this case law analysis technically examines only custody decisions available through Westlaw and Lexis its import lies in a larger inference: the treatment of gay male and lesbian custody litigants as a whole. But there are good reasons to think that decisions available through Westlaw and Lexis are not a perfect sample of that population. For one, nearly all appellate decisions are published but most trial court decisions are not. Thus, there are many trial-level custody matters with gay male or lesbian parents that are not found in the electronic databases (they were never appealed). In addition, litigants that appeal their trial court rulings are likely different on average than those who do not. It's quite possible, for example, that they possess greater than average wealth (litigation is expensive) or greater than average familiarity with the workings of the judicial system. In short, there are good reasons to believe that appellate decisions are not a perfect representative sample of custody cases in general.

Moreover, it is quite possible, and indeed even likely, that some courts purposefully avoided mentioning orientation in their opinions when faced with a gay male or lesbian parent.

Even today, individuals can face serious repercussions for being outed and this was even more true in the middle of the 20th century. It stands to reason that some courts would keep such details private, especially if they thought their inclusion unnecessary.[159]

This study also does not distinguish between a motion to modify an existing order and an initial appeal. Parents typically face a different standard of review when attempting to modify an existing order than they do in the appeal of that order. In an appeal, courts overturn a decision if the lower court made a legal error or abused their discretion. In a motion to modify courts will change the terms of an order without evidence of a legal error or an abuse of discretion, but they generally want evidence of a substantial change in circumstances before revisiting the matter. Both therefore have a "*status quo* bias" but that bias differs and comparing across the two is slightly inaccurate.

There is also a small loss of fidelity attributable to the inclusion of trial court decisions. Trial court decisions are, of course, *de novo* decisions; the trial court will make decisions of both law and fact and issue an opinion. In an appeal, as stated above, courts overturn a decision only if the lower court made a legal error or abused their discretion. This is a high bar and thus appellate decisions have a strong "*status quo* bias" that trial court decisions do not. Comparisons between the two are thus slightly off center. This bias is mitigated in this instance though by the small number of trial court decisions in this dataset (just 3% of the cases in Dataset One, after all relevant exclusions).

And finally, it should be noted that this methodology is not able to measure the impact of three, possibly very influential variables: race of the parent, race of the child and gender of the judge. There has been considerable work discussing variation of homosexual bias in terms of race, though none of these works, to this author's knowledge, has examined the topic empirically. Russell Robinson's "racing the Closet" implies that the stereotype of "disease carrier" applies more heavily to black gay men than to white gay men and several authors have noted generally that black homosexual individuals face different biases than their white counterparts (Carbado, 1999, 2007; Robinson, 2009; Russell K. Robinson, 2013). Moreover, there is wide agreement that the black homosexual male experience differs from the black lesbian experience.[160] It has also long been known that pro-LGBT activists tend to favor white members of the LGBT community when depicting their cause to the public, suggesting a belief amongst activists that bias against homosexuals differs by race at least in terms of valence (Strolovitch, 2008). It would be useful to fully tease out these assumed interactions in terms of both stereotype and attitude but unfortunately racial data is hard to come by in judicial decisions (or, for that matter, in the judicial record). Opinions rarely mention the race of a litigant unless it is pertinent to the case (on a doctrinal level). Thus, while the endeavor would be worthwhile the data, at least as gathered through this methodology, are unavailable.

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[159] The late professor Herman Hill Kay noted the reluctance of California courts to publish such information in the mid-seventies (Davidson et al., 1974). Likewise, Benna Armanno reported a similar reluctance when investigating the topic in the early 70's ("[T]he issue is rarely mentioned above the level of a whisper, and the few cases that reach the appellate level are almost always ordered excluded from official and unofficial reports") (Armanno, 1973).

[160] Much of the literature has focused on this divergence from a wider, structural level. Carbado, for example, argues that the "gay identity" has been whitewashed, thus closeting the black homosexual identity (Carbado, 1999) Russell Robinson echoes similar concerns (Robinson, 2009). *See also* (Crenshaw, 1989).

Race of the child at issue is also likely relevant to this inquiry. It has long been known that courts tend to police the behavior of children of color more strictly than the behavior of white children (Rachlinski et al., 2008; R. Smith et al., 2014). While these disparities typical arise in the context of criminal proceedings it is reasonable to believe that courts might differ across race in their approach to policing childhood development as well. But, once again, racial information is hard to come by in judicial decisions. Thus, while the endeavor would be worthwhile the data, at least as gathered through this methodology, are unavailable.

This methodology is also not able to measure the impact of the judge's gender. While it is known that anti-homosexual bias tends to differ by the gender of the observer,[161] judicial gender is not always available from the text of the opinions themselves. While modern judges can easily be researched (and their outward gender surmised) this proved to be extraordinarily difficult for judges that pre-date the internet era. The impact of the judge's gender will thus be examined experimentally in Chapters 8, 9 & and 10.

[161] Straight males typically report a negative attitude towards gay males and more positive attitude towards lesbians, whereas straight women tend to hold an equally positive valence toward both gay males and lesbians (Breen & Karpinski, 2012; Herek & McLemore, 2013).

Chapter 6

Case Analysis: Is There Still Orientation Bias and What Does it Look Like?

In this chapter I examine the text of custody decisions in Dataset One (custody cases within Lexis or Westlaw featuring one gay parent opposing a heterosexual parent, *n*=212) to gain insight into both the content of judicially expressed orientation bias and a measure of outcome disparities across sexual orientation.

Outcome disparities across sexual orientation

This section charts custody outcomes (the allocation of custody and the imposition of visitation restrictions) across sexual orientation to examine anti-homosexual bias in the adjudication of custody disputes. In terms of formal legal doctrine, non-heterosexual parents have largely approached these contests on equal legal footing since the introduction of orientation neutral rules in the late 1970s, but scholars and activists argue that they still face significant real-world bias (Eskridge, 2009; Gates & Williams Institute, UCLA, 2011; Rosky, 2013b). This opinion, however, is not universal. Other voices, particularly conservative scholars and public officials who share their sympathies, have argued that this bias has either dramatically diminished or disappeared over the most recent decades (George, 2009; Sprigg, 2012; L. D. Wardle, 1997). A real dispute exists on the current reality of anti-homosexual bias in custody adjudications.

As stated earlier in Chapter 3 ("What remains obscured"), there is little to no hard data on custody outcomes across sexual orientation, but from the literature we do have some predictions can be made. Overall, we expect a disparity in outcomes across sexual orientation, with gay parents on the losing side of the difference (Eskridge, 2009; Gates & Williams Institute, UCLA, 2011; Rivera, 1978; Rosky, 2013b; Shapiro, 1995a). We expect this disparity to exist for custody allocation rates and for the imposition of visitation restrictions. It is, however, an open question if this disparity remains in the last few decades of our data. While it is expected that the predicted outcome disparity across orientation has diminished in recent decades, some conservative scholars believe that gay parents have fared as well, if not better, over the last ten to fifteen years than heterosexual parents in custody matters (George, 2009; Sprigg, 2012; L. D. Wardle, 1997).

a) Results: Disparate custody outcomes

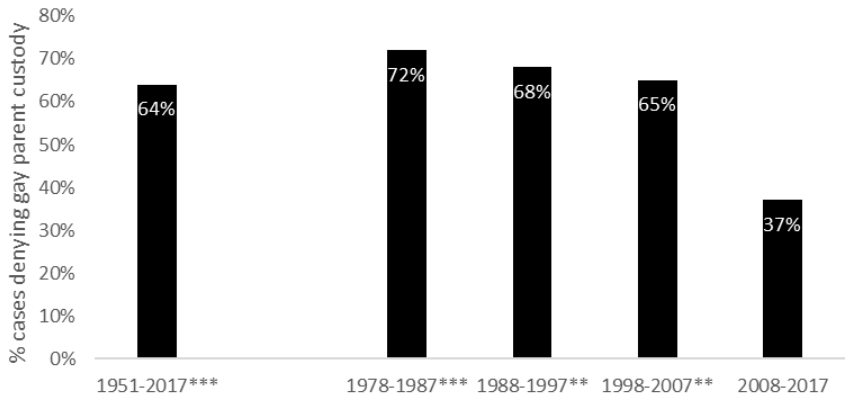
As expected, custody allocation rates indicate that gay male and lesbian parents have faced substantial anti-homosexual bias over the last several decades. In the 66-year period from 1951 to 2017, when gay male or lesbian parents contested custody against heterosexual parents, they lost those contests at a 64% rate (their heterosexual opponents found themselves on the losing end of the contest at a 36% rate), a difference in outcomes that is statistically significant (*p*=0.000) (the null hypothesis held that gay parents and heterosexual parents faced the same denial rate, 50%).[162]

This main effect of orientation on custody allocation lessened over time. Gay male and lesbian parents have fared better against heterosexual parents, in terms of custody allocation, in every decade following 1978 (the first decade with enough cases to make meaningful measurements) until rough parity is achieved in the decade following 2008. In fact, these data argue that they obtained more than simple parity in the decade following 2008, they appear to have

[162] This statistic was generated by conducting a two sample test for proportions. The null hypothesis is that gay male or lesbian parents and heterosexual parents faced the same denial rate (50% each).

obtained an advantage over their heterosexual opponents. But the post 2008 data should be viewed with some skepticism; it is based on a small sample (*n*=27) and the differential in denial rates is not statistically significant.

Figure 1.
Denial of gay parental custody when opposing heterosexual parent



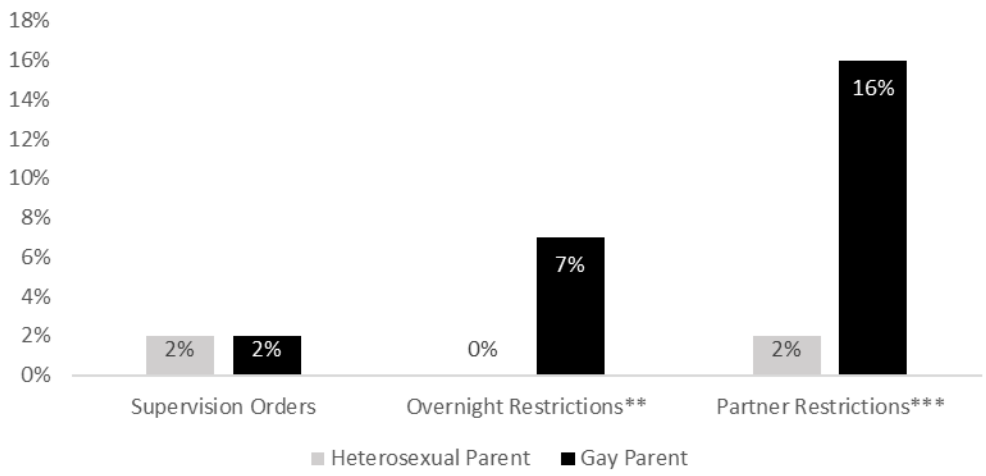
Note. **p*<.05, ***p*<.01, ****p*<.001. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-2017). 1951-2017 *n*=212; 1978-87 *n*=44; 1988-97 *n*=60; 1998-07 *n*=70; 2008-17 *n*=27.

Courts have also been far more likely to impose visitation restrictions on gay parents than opposing heterosexual parents; when opposing a heterosexual parent, gay male and lesbian parents have suffered partner restrictions at a 16% rate (restrictions prohibiting the presence of significant others during visitation or custody). But opposing heterosexual parents suffered partner restrictions at a mere 2% rate. Again, this difference is statistically significance (*p*=0.000). A similar pattern emerges when one examines the imposition of overnight restrictions (parent is barred from visiting the child overnight). Like partner restrictions, judges impose these restrictions fall significantly more often on gay male and lesbian parents (7% to 0% respectively; *p*=0.007). Supervised visitation emerged as the least common of the three restrictions studied, burdening only a tiny fraction of parents of both orientations.[163]

[163] Keen observers might argue that this is not a clean comparison. Given the fact that the heterosexual parent obtained custody in 64% of these cases, it might seem that non-heterosexual parents simply have more visitation to restrict than the heterosexual parents in this sample. While there is some truth to this claim it is not as damning as one might initially think. Only rarely did parents receive *complete* physical custody in these cases. Typically they received primary custody, with the other parent having some custody during specific times of the year. During these periods, even the "primary" custody holder could see their visitation restricted.

Figure 2.

Visitation restrictions imposed by sexual orientation

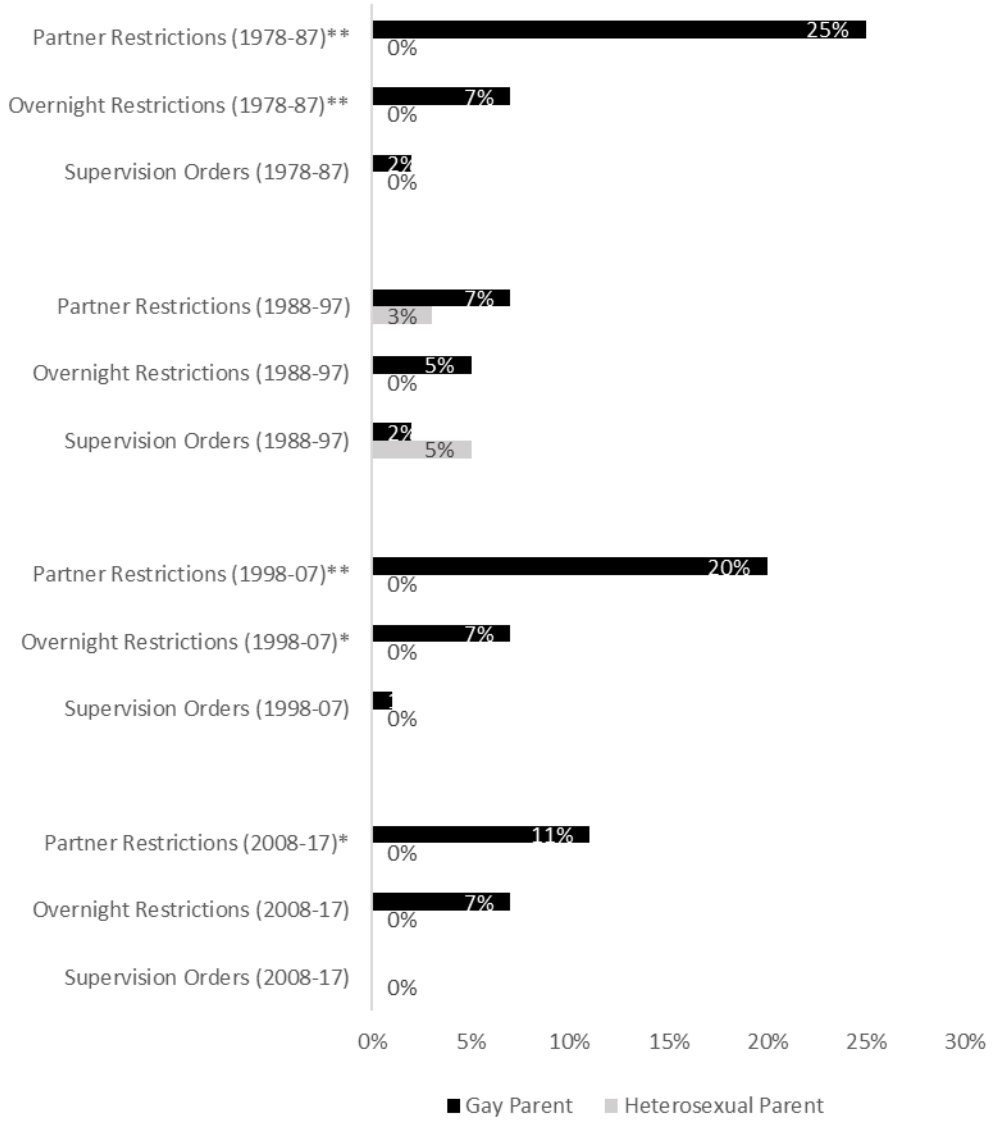


Note. $*p<.05$, $**p<.01$, $***p<.001$. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1951 - 2017, n=212).

Over time we see that this disparate impact has lessened, but significant bias remains. In particular, partner restrictions (i.e., barring the presence of the parent's significant other), remains a substantial risk for gay male and lesbian parents in cases through 2017. Even during this last decade of data, gay male and lesbian parents were substantially more likely to bear partner restrictions than opposing heterosexual parents (p=0.04). This difference is even more notable when one considers that no heterosexual parents in this sample suffered visitation restrictions of any sort after 1998.

Figure 3.

Visitation restrictions imposed in custody cases by sexual orientation over time (1978-2017)



Note. $*p<.05$, $**p<.01$, $***p<.001$. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1951 - 2017). 1978-87 $n=44$; 1988-97 $n=60$; 1998-07 $n=70$; 2008-17 $n=27$.

b) Discussion

These data support the claim that the grant of legal, *de jure* orientation equality did not result in actual orientation equality on the ground in terms of custody outcomes. While gay male and lesbian parents have approached custody on equal legal footing since the 1970s, these data indicate that they faced substantial, statistically significant bias in terms of both custody allocation and visitation restrictions in the decades that followed.

These data also indicate that gay parents may be facing less bias, or even no bias, in terms of custody *allocation* over the last ten years. At the very least, these data cannot support the argument that gay parents have continued to face anti-homosexual bias when it comes to custody allocation since 2008.

But while the recent data on custody allocation rates may seem encouraging, the data on visitation restrictions are not. Courts continue to impose visitation restrictions on gay male and lesbian parents significantly more often than their heterosexual opponents. In particular, partner restrictions, the prohibition of a significant other's presence, is still quite common for gay male and lesbian parents while it appears to be vanishingly rare for their heterosexual opponents. The same appears to be true for overnight restrictions: gay male and lesbian parents suffered overnight restrictions noticeably more often than their heterosexual opponents, though the difference was not statistically significant during the final decade of data.

The implications of these findings are several. First, scholars interested in the treatment of sexual orientation during the custody process should include visitation restrictions in their analyses. The vast majority of scholarship on custody bias focusses only on the allocation of primary custody (Artis, 2004; Bahr et al., 1994; Lemon, 1981; Nickerson, 2000; Pearson & Ring, 1982; Polikoff, 1981; Swent, 1996; Weitzman & Dixon, 1979b), and these data demonstrate that the true brunt of anti-homosexual bias may lie elsewhere.

Second, these data support the notion that new allocation rules should be considered. Just as scholars of gender bias in custody have proposed alternative allocation rules to address bias that arose with the unfettered judicial discretion of the "best interest" standard (primary caretaker, child's preference etc.), perhaps similar discussions should be had to address anti-homosexual bias during the adjudication of custody.

And third, these data support the need for data to track anti-homosexual bias in custody (and perhaps in adoption as well). Such policy interventions have been considered before. In 2016, allegations surfaced of severe anti-homosexual bias within the Kansas Department of Family Services (the department that oversees adoptions). Members of the Kansas state bar and at least one state judge called for a data driven audit of the Department of Family Services in response to these allegations, but to date the Kansas legislature has resisted this request. To justify this refusal they cite, among other things, a lack of clear evidence for its need (Shoreman, 2016). Studies such as this, if anything, support the call for such audits. It also supports the need to record trial-level data on all custody adjudications, with variables such as sexual orientation, gender, race and others continually tracked.

The content of orientation bias

Disparate custody outcomes across sexual orientation are only part of the story. There are also ingrained beliefs that non-heterosexual parenting is inferior, dangerous or both. Gay parents who contested custody have suffered, and continue to suffer, a myriad of stereotypes, incorrect assumptions and outright slanders on their ability serve as parents. But to date there has been no systematic investigation into the opinions held by the judiciary on this matter.

As stated earlier in Chapter 3 ("What remains obscured"), we do have a wealth of analysis on the various stereotypes and biases that gay parents face when they adjudicate custody, but we lack a clear understanding on several points. First, we lack a *comprehensive catalogue* of these biases. Analyses to date typically highlight one bias and then dissect it, or point to a cluster of biases that are thematically related and do the same (Eskridge, 2000; Rosky, 2008, 2012a;

Sedgwick, 1993). What we lack is an up-to-date, comprehensive catalogue of judicially held orientation biases.

We also lack insight into the relative prevalence of these biases. What *most concerns* the judiciary about gay parenting? What concerns the judiciary *the least*? And how have these concerns shifted over time?

And finally, we lack a clear demarcation of *judicially held* anti-homosexual bias from anti-homosexual bias overall. Previous analyses of anti-homosexual bias in custody have often failed to distinguish judicially held biases from the biases of the litigants or others that are also expressed in judicial opinions.

In this section, I once again look to the judicial decisions available through Lexis and Westlaw to fill this void.

a) Results: Judicial Arguments against Gay Male and Lesbian Parental Fitness

Coding for this project determined that judicial arguments against gay male and lesbian parental fitness can be meaningfully grouped into nine, recurring arguments: the fear of immoral exposure, concern for societal morality, the fear of some unidentified future harm, illegality, the potential for stigma, the fear of orientation modeling, the fear of gender modeling, the fear of sexual abuse and the fear of disease transfer. These arguments are described below in order of their prevalence within Dataset One (all custody decisions available through Westlaw or Lexis featuring one gay parent opposing a heterosexual parent through 2017).

i. Immoral Exposure

The most common "harm" that American courts consistently link to gay male and lesbian custody is the claim that their presence or behavior will endanger the moral development of their children. For the scholar this argument is maddeningly vague; what does "proper" moral development look like and how do non-heterosexual parents threaten it? What evidence is there that the children of gay and lesbian parents are less morally fit than the children of heterosexual parents? Rarely (if ever) are these questions addressed.

The most common form of this argument is the most basic: gay male or lesbian parents are themselves immoral and thus they will impart bad morals to their children. This argument contains the base assertion that homosexuality is immoral and the subsequent assertion that exposure to this immorality will damage the child's moral compass ("[exposing the child to his mother's homosexuality] is likely to negatively affect the development of the children's moral values").[164]

Examples of these arguments are too numerous to list but they all contain the same essential flaws. Rarely do the courts making them ever evaluate evidence and conclude that the parents have *actually* harmed their children; rarely do they ever explain how or why parental orientation will harm their morals in the future and rarely do they ever explain what they actually mean by "moral development damage."

This argument does, however, have a more sophisticated (though equally troublesome) variant, and it concerns the inability, prior to *Obergefell*, of most gay male and lesbian parents to marry partners of the same gender (*Obergefell v. Hodges* held that the fundamental right to marriage includes same-sex couples).[165] For these parents, the post-divorce presence of a newly

[164] Hertzler v. Hertzler, 908 P.2d 946, 953 (Wy. 1996).

[165] *Obergefell v. Hodges* held that the fundamental right to marriage includes same-sex couples. 135 S.Ct. 2584 (U.S. 2015).

found same-sex partner frequently presented courts with an easy out; they could rely on their jurisdiction's "paramour provision" to justify restricting the custody rights of the gay male or lesbian parent. A paramour provision, loosely stated, allows a court to deny or restrict custody to any parent cohabitating with a sexual partner outside of marriage. The catch being, of course, that gay male and lesbian parents lacked the ability to sanctify their relationship through marriage while their heterosexual counterparts did not.

This argument was occasionally taken to absurd lengths; in *Henry v. Henry* (1988), a South Carolina trial court denied custody to a lesbian mother because she lived with her same-sex partner, despite the fact that their relationship was committed, long-term and they owned a house in common. The court justified this order by noting that the father was also barred from cohabitating with an unmarried partner ("We're not going to make a distinction between paramours of one sex or the other"), but seemingly ignored the fact that the heterosexual father had the opportunity to marry his partners while the lesbian mother did not. On appeal, the mother correctly argued that the Court essentially made her custody rights contingent upon one member of the couple moving out of their own house, a building they lawfully owned in common.[166]

ii. Societal Morality

Second only to the concern of immoral exposure is a concern for the moral cohesion of society as a whole. Courts have routinely limited the custody rights of gay male or lesbian parents because their orientation or behavior is said to threaten societal morality. While this line of argument may seem similar to others on this list, there is a crucial difference; in these instances courts are not limiting custody because the parent's alleged immorality will harm the child in some fashion; rather they are limiting custody because granting it, in the court's mind, would challenge societal morality itself.

> Consider this line of reasoning from *Collins v. Collins* (1988):
> The courts of this state have a duty to perpetuate the values and morals associated with the family and conventional marriage, inasmuch as homosexuality is and should be treated as errant and deviant social behavior. I would have this Court declare under this or a similar set of facts that a practicing homosexual parent be disqualified from obtaining legal custody of one's minor child or children (Collins v. Collins).[167]

The societal morality argument should trouble the legal scholar because it seems beyond the court's mandate to protect society's moral norms in the context of a custody dispute; typically, courts are instructed to place the interest of the *child* paramount in such matters, not the state.

iii. Unspecified Future Harms

The third most common justification for denying gay male and lesbian custody is the fear that some unspecified, future harm will result if custody is granted. Arguments in this category are usually prefaced by an assertion that the court "need not wait" for an identifiable harm to surface before taking measures to protect the child:

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[166] Henry v. Henry, 296 S.C. 285 (S.C.App. 1988).
[167] Collins v. Collins, 1988 WL 30173 (Tn. App. 1988) (Tomlin, Presiding Judge, Western Section, concurring).

> Admittedly, Cynthia has been examined and found to be normal, well adjusted, and unaffected as yet by the fact that her mother is a lesbian. However, we agree with the court in *L. v. D.*, 630 S.W.2d 240, 245 (Mo. App. 1982), when it stated the following: 'The Court does not need to wait, though, till the damage is done…[168]

These arguments put non-heterosexual parents in a near unwinnable situation; it's hard to argue against an unidentified harm that has not yet occurred. They also tread uncomfortably close to what the Nexus Test was designed to eliminate: removing custody from a parent merely because the court finds the parent's unrelated conduct objectionable.[169]

iv. Illegality

The illegality argument hinges on the fact that same-sex sex was illegal in most states prior to *Lawrence v. Texas* and same-sex marriage was illegal in most states prior to *Obergefell v. Hodges*.[170] When courts deploy this argument they point to the illegality of the parent's sexual behavior or the legally unrecognized status of their relationship as a legitimizing ground for the court's own moral condemnation of homosexuality. While it may not have seemed judicial to enforce the court's own moral opinion, it seemed more so when the authority of the state appeared to agree:

> Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.[171]

Courts have even equated same-sex sex to other, more traditional criminal activities in an effort to further justify this line of reasoning:

> Where [sic] a bank robber is allowed full visitation rights, as defendant has hypothesized, surely the exercise of these rights whether expressed or implicit is restricted to exclude his exposing the child to any aspects of this most unacceptable line of endeavor. Similarly, a homosexual who openly advocates violations of the

[168] Bennett v. O'Rourke, 1985 WL 3464, 3 (TN.App. 1985).

[169] Legal scholars will note that this argument appears to fail the "nexus" requirement that governs the relevance of parental morality in the adjudication of custody disputes. The "nexus test" requires some demonstrable link between harm to the child and the moral failing at issue. But in this argument, courts have failed to even identify the harm.

[170] Obergefell v. Hodges, 135 S.Ct. 2584 (U.S. 2015); Lawrence v. Texas, 539 U.S. 558 (U.S. 2003).

[171] In re D.H. v. H.H., 830 So.2d 21, 26 (Al. 2002).

> New Jersey statutes forbidding sodomy, N.J.S.A. 2A:143-1 and related statutes, may also be restricted.[172]

v. The Stigma Argument (A.K.A. "the *Palmore* Argument")

Courts frequently argue that gay male and lesbian parents will harm their children by exposing them to social ridicule. The logic of this argument proceeds as follows: because gay males and lesbians are scorned by society children left in their care will suffer as well, either through direct antagonism or by proxy. Numerous courts have relied on this logic to deny or restrict the custody rights of gay male and lesbian parents.[173]

The Supreme Court, of course, addressed a similar argument in *Palmore v. Sidoti* (1984), which held that a mixed-race couple cannot be denied custody merely because the novelty of their interracial relationship might subject the child to ridicule.[174] But the two arguments are not completely analogous; race is a protected class, demanding strict review on constitutional grounds. But sexual orientation, at least until recently, was clearly not.[175] Numerous courts have justified "stigma arguments" in the context of gay male and lesbian parents, even after *Palmore*, by noting this distinction. Consider Missouri's curt dismissal of *Palmore* in *S.E.G. v R.A.G* (1987):

> *Palmore* involved an interracial marriage where the mother was seeking custody of her child in her own interracial home. We do not agree that *Palmore* applies to the situation at hand. Homosexuals are not offered the constitutional protection that race …. [has] afforded.[176]

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[172] In the Matter of J.S. & C., 129 N.J.Super 486, 498 (Sup.Ct NJ 1974).

[173] For just a few examples, see Berry v. Berry, 2005 WL 1277847, 1 (Tn. App. 2005) ("[u]ndoubtably he will have to deal with his mother's sexuality and the controversy associated with that sexuality as he matures"), Bottoms v. Bottoms, 249 Va. 410, 420 (VA. 1995) ("active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large'"), Collins v. Collins, 1988 WL 30173, 3 (Tn. App. 1988) ("if the child remains with her mother, she faces a life that requires her to keep the secret of her mother's lifestyle, or face possible social ostracism and contempt. This adds tremendous pressure to a young child's life") or Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) ("Furthermore, we cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to 'suffer from the slings and arrows of a disapproving society'").

[174] Palmore v. Sidoti, 466 U.S. 429 (1984).

[175] The status of sexual orientation is currently unsettled in this regard. In short, sexual orientation appears to now be a suspect class in the 9th Circuit, at least in certain contexts. Smithkline Beecham v. Abbott, 740 F.3d 471 (9th. Cir. 2014). And there is reason to believe that the Supreme Court decisions have held likewise; *Windsor*, *Hollingsworth* and *Obergefell* certainly contained language hinting at heightened review, as the 9th circuit just famously noted in *Smithkline Beecham v. Abbott* ("*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary …. [we consider] what the Court actually did"). Id.

[176] S.E.G. v. R.A.G. 735 S.W.2d 164, 166 (Mo. App. 1987).

Recently courts have begun to push back on these arguments, and, while they rarely cite *Palmore* as a binding precedent, they often follow *Palmore's* logic:[177]

> Of greater concern is the trial court's rationale relating to the mother's lesbianism. The trial judge is appropriately sensitive to the fact that Nicholas is embarrassed, confused and angry over other people's reactions to his mother and Sandy E.'s relationship. However, the merits of a custody arrangement ought not to depend upon *other people's* reactions. Would a court restrict a handicapped parent's custody because *other people* made remarks about the handicapped parent which embarrassed, confused and angered the child? We think not.[178]

vi. Orientation Modeling

The fear that gay or lesbian parents might "recruit" or "model" their children into a homosexual orientation was expressed openly in custody opinions well into the 2000's.[179] The argument implies, of course, that one's sexual orientation can be swayed by persuasion or environmental influence.[180] The argument also implies that a homosexual orientation is an outcome to be avoided.

This concern often takes one of two forms: the gay or lesbian parent will push the child towards homosexuality through modelling and normative influence, or the parent will "seduce" the child into homosexuality through direct invitation. The latter, of course, blends into the fear of sexual abuse and these two fears are often hard to parse when arguments such as these are confronted in the case law.

The first version of the argument is common in the case law and hard to miss. Note the clear "orientation through example" argument from the Appellate Court in *Black v. Black* (1988):

> We feel it is unacceptable to subject children to any course of conduct that might influence them to develop homosexual traits, and the facts of this case indicate that

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[177] While courts have pushed back this argument has not entirely disappeared; it was used as recently as 2017 by the trial court in *In Re the Marriage of Black* to limit the custody rights of a lesbian mother. 188 Wash.2d 114 (WA. 2017).

[178] Blew v. Verta, 420 Pa.Super. 528, 536 (PA 1992).

[179] *See* the trial court's finding in *Collins v. Collins*, 183 Or.App. 354, 356 (Or. App. 2002) ("Of significance to the court, was the evidence at hearing that [daughter] has, on several occasions, participated in intimate sexual-like contact with one of her 9-year-old female friends, which the court finds to have been [daughter's] effort to mimic conduct [daughter] observed between her mother and another adult").

[180] There is an active debate on this claim that is beyond the scope of this article. Put briefly, there is some evidence that children raised by gay male and lesbian parents are slightly more likely to engage in same-sex sex than children raised by heterosexual parents. Many other scholars, however, vehemently disagree with this assertion (Ball, 2005; Stacey & Biblarz, 2001; L. D. Wardle, 1997). Of course, even if true, the correlation would not prove the claim that one's sexual orientation can be influenced. There is also the very real possibility that familial acceptance simply lowers the child's inhibition against expressing an in-born sexual orientation.

> there is a strong possibility, because of the living arrangements of Mother and her lover, the children would be subjected to such influences.[181]

The latter, more sinister version of the argument is typically less explicit. For example, in the Missouri Case of *J.L.P. v. D.J.P.* (1982), the Court described a gay father's open advocacy for LGBT rights and his membership in a "gay friendly church" as "seductive in nature." And later in that same opinion the Court blended its argument with an insinuation of actual sexual invitation, darkly noting that father had already taken his son "out of state" with "another homosexual and his juvenile nephew."[182] While not explicit, the implication of sexual invitation, placed alongside orientation concerns, appears to imply a more sinister means of recruitment.[183]

vii. Gender Modeling

The recruitment fear can also take a more subtle tack, the fear of gender recruitment. This fear argues that gay male and lesbian parents will fail to impart traditional gender norms to their children.[184] While the first flavor of this argument concerns sexual orientation, this version concerns the understanding and performance of gender roles: the fear that the children of non-heterosexual parents will fail to "act like traditional boys and girls" or understand the societal role of either in a traditional way.[185]

These gender modeling arguments are also explicit and hard to miss. Consider *Lundin v. Lundin*.[186] In *Lundin*, an expert witness for the heterosexual husband of a lesbian mother offered testimony concerning his fears of gender recruitment (1990):

> A two-year-old child is at a stage of development where they are forming a gender identity and learning sex appropriate roles for their own sex, whatever, masculine and female rolls. [sic] It's preferable that they have good roll (sic) models in a stable environment always. I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected.[187]

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[181] Black v. Black, 1988 WL 22823, 3 (TN. App. 1988).

[182] 643 S.W.2d 865, 866 - 67 (1982).

[183] Of course this argument also creates a host of constitutional concerns. It arguably violates the child's right to free expression (1st Amendment). It likewise may fail Equal Protection from the standpoint that that state arguably has no rational basis to prefer heterosexuality (Rosky, 2013b).

[184] Just as there is a debate concerning the tendency of gay male or lesbian parents to raise homosexual children, there is also a debate concerning the tendency of gay male and lesbian parents to raise gender non-conforming children. Once again, there is some evidence that the children of gay male and lesbian parents are more likely to engage in gender non-conforming behavior, though this conclusion is also hotly debated (Ball, 2005; Rosky, 2012a; Stacey & Biblarz, 2001; L. D. Wardle, 1997).

[185] This argument creates at least one additional constitutional concern; it may run afoul of the constitutional prohibition against the promotion of gender roles (Tenuta, 2010). *See* also Craig v. Boren, 429 U.S. 190 (1976).

[186] Lundin v. Lundin, 563 So.2d 1273 (La.App. 1990).

[187] *Id.* at 1275.

The *Lundin* Court accepted this argument, and reversed the trial court partially on these concerns:

> [I]n this case where the sexual preference is known and openly admitted, where there have been open, indiscreet displays of affection beyond mere friendship and where the child is of an age where gender identity is being formed, the joint custody arrangement should award greater custodial time to the father.[188]

Or consider the trial court's opinion in *Pleasant v. Pleasant* (1993), which found (after declaring the mother "a defiant and hostile admitted lesbian") that "having [her son] in the presence of gays and lesbians was endangering his gender identity and morals and not in his best interests."[189]

viii. Sexual Abuse Fears

A once common argument raised by opponents of non-heterosexual parenting is the charge that gay male and lesbian parents are more likely than heterosexual parents to sexually abuse their children.[190] This charge is empirically false; straight males are statistically more likely to sexually abuse minors than any other demographic, while lesbians and straight women are the least likely. Gay males fall somewhere in between (Herek, 1991; Rosky, 2008).

Despite the factual evidence, courts occasionally cited this concern well into the late 1990's.[191] But more common than the explicit mentions are the numerous opinions that allude to the threat. Take *Woodruff v. Woodruff* (1979), wherein the Court darkly notes that a gay male father was seen "[taking the] parties' son on a walk in a secluded area near their home."[192] The *Woodruff* court did not recount actual evidence of sexual abuse by the non-heterosexual parent, but the court arguably insinuated that the fear of such abuse was present.

ix. Fear of Disease

A frequent argument against the parental fitness of gay male and lesbian parents, especially during the H.I.V. scare of the 1980's, has been that they will expose their children to disease. This

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[188] *Id.* at 1277.

[189] Pleasant v. Pleasant, 256 Ill.App.3d 742, 750 (Ill.App. 1993); The trial court's obsession with traditional gender performance was on clear display during its examination of the (lesbian) mother and her decision to bring her son to the local gay pride parade: "the judge asked if there were men who are not masculine in the parade. When respondent answered that there were no "unmasculine" men in the parents' group with which she walked, the judge argued with her about the presence of so-called "unmasculine" men" (appellate court recounting the trial court proceedings). *Id.* at 747.

[190] This has been an oft repeated argument. Anita Bryant deployed it frequently during her successful 1977 campaign to overturn Dade County Florida's Antigay discrimination ordinance ("a particularly deviant-minded [gay or lesbian] teacher could sexually molest children") and it regularly surfaced in the public relation battles surrounding same-sex marriage (Bryant, 1977; Nussbaum, 2010). The argument appears to have grown less common in recent years though it has not disappeared.

[191] *See* Hertzler v. Hertzler, 908 P.2d 946 (Wy 1996).

[192] Woodruff v. Woodruff, 44 N.C.App. 350, 350 (N.C. App. 1979).

fear was undoubtedly exacerbated by early notions that H.I.V. was a "gay disease" and the popular misconception that it could be spread through ordinary contact.[193]

Parents contesting custody against gay males or lesbians raised this argument frequently well into the mid 2000's,[194] but this study has uncovered only one instance where the argument was explicitly accepted by a court. In *Stewart v. Stewart* (1988), an Indiana appellate court affirmed a denial of custody based primarily on the argument that HIV *could* be transferred by extracting the child's tooth:

> [I]t is theoretically possible for a parent to infect a child with the AIDS virus while extracting a child's tooth. Under these circumstances, a parent "might" infect his child with AIDS. Because the statute clearly invests the trial court with a broad discretion in this area, I believe the trial court did not manifestly abuse its discretion by denying appellant his visitation rights under these circumstances.[195]

b) Results: The Incidence of Arguments against Gay Male and Lesbian Parental Fitness

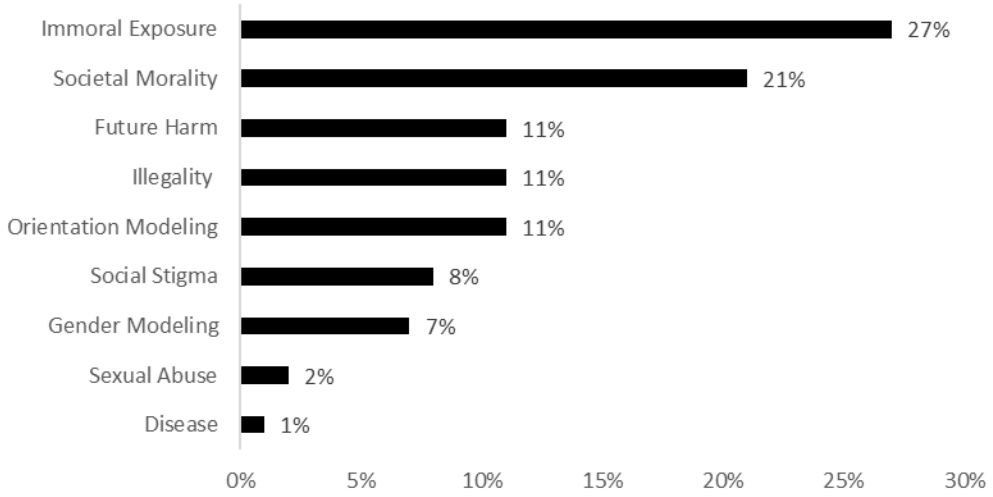
When one examines the incidence of these arguments empirically it shows that some judicial concerns have clearly trumped others. Of primary importance has been morality; courts have most stressed the need to protect childhood moral development (immoral exposure) and the preservation of traditional moral norms (societal morality). The fear of sexual abuse and disease appear to trouble the courts the least, while all other concerns fall somewhere in the middle.

[193] Surveys from 1999 and 2000 indicate that nearly one half of Americans still believed H.I.V. could be transmitted by coughing, sneezing or sharing the same glass (Lentine et al., 2000).

[194] The last mention of this argument appears to have occurred in the case of Soteriou v. Soteriou, 2005 WL 3471472 (CN. 2005) (unpublished). For examples of litigants raising this fear, *see* Conkel v. Conkel, 31 Ohio App.3d 169, 173 (OH. App. 1987) ("appellant mother also indicates being "petrified" that the children will contract AIDS"), J.P. v. P.W., 772 S.W.2d 786, 789 (Mo.App. 1989) ("She is also concerned with the exposure of the child to AIDS") and Soteriou v. Soteriou, 2005 WL 3471472, 3 (CN Sup.Ct. 2005) ("While at home on maternity leave with their second child, the plaintiff learned that the defendant was engaged in extramarital homosexual activities and 'spreading disease'").

[195] Stewart v. Stewart, 521 N.E.2d 956, 967 (IN. App. 1988).

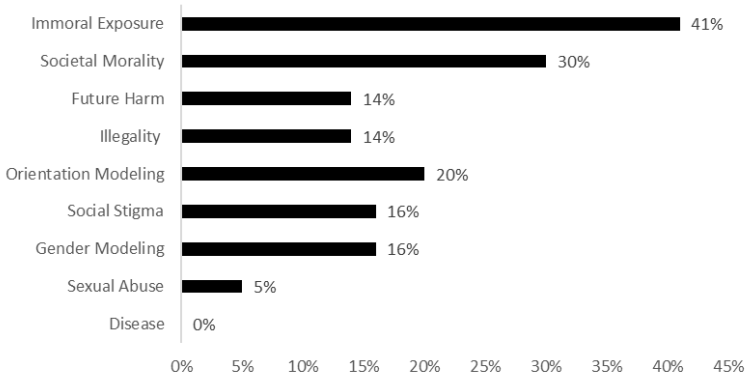
Figure 1.
Judicial arguments against gay parental fitness in custody decisions (1951 - 2017)



Note. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1951 - 2017, n=212).

The incidence of all of these arguments has decreased in frequency over the years, which is to be expected. But some arguments diminished more rapidly than others. The explicit fear of disease transfer, for example, disappeared from judicial decisions available through Lexis and Westlaw after the 1988 – 1997 period. The explicit fear of sexual abuse did likewise. Judicial concerns regarding orientation and gender modeling have also vanished, last appearing during the 1998 – 2007 period (*See* Figures 2 through 5).

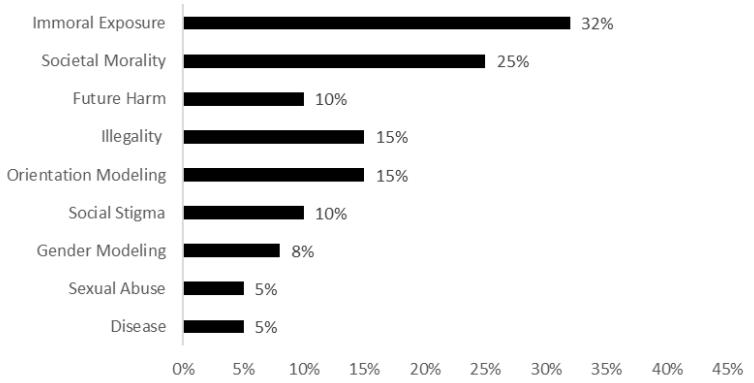
Figure 2.
Judicial arguments against gay parental fitness in custody decisions (1978 - 1987)



Note. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1978 - 1987, n=44).

Figure 3.

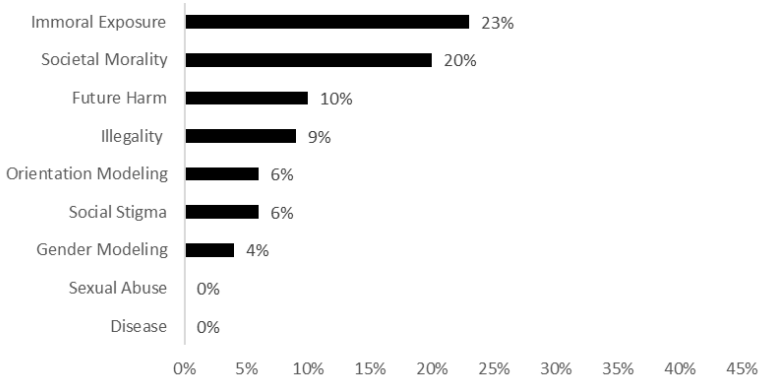
Judicial arguments against gay parental fitness in custody decisions (1988 - 1997)



Note. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1988 - 1997, n=60).

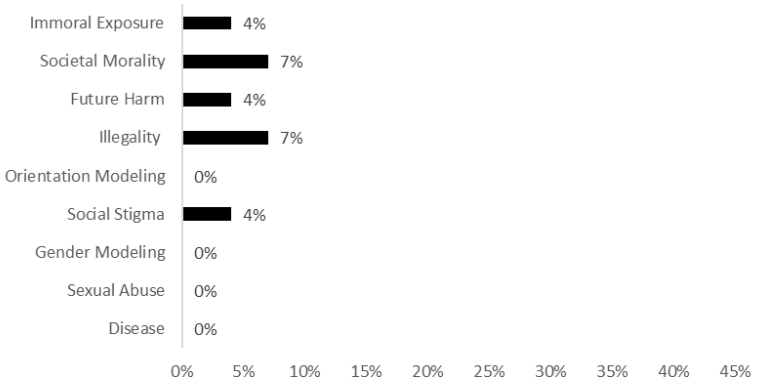
Figure 4.

Judicial arguments against gay parental fitness in custody decisions (1998 - 2007)



Note. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (1998 - 2007, n=70).

Figure 5.
Judicial arguments against gay parental fitness in custody decisions (2008 - 2017)



Note. Percentages drawn from all published custody decisions featuring a gay parent opposing a heterosexual parent (2008 - 2017, *n*=27).

c) Discussion

Overall, the data indicate that when the judiciary evaluates the parental fitness of gay parents, its primary concern has been exposing the children to immorality and the potential impact of non-heterosexual parenting on societal morality. That is until approximately 2008, after which all concerns dwindle. No one argument against gay parental fitness appeared in more than 7% of the cases after 2008.

But more interesting is what the judiciary was not concerned about, and the disconnect this reveals between the courts, the academy and the political press. Despite the political focus on sexual abuse and disease, these arguments were almost completely absent from the case law examined. Even in cases predating 1990, when they flourished politically, courts rarely expressed these concerns in the opinions themselves, and they disappeared completely after 1998. There is also a mismatch of concern when compared to academia. Fears of orientation modeling and gender modeling were never high on the judiciary's list of concerns, at least not explicitly. And they dwindled to a rarity after 1998, despite the fact that the "no difference" debate started in earnest just a year before with Wardle's 1997 publication. The courts, at least explicitly, were not tracking the concerns of the political press or the academy.

These data lend themselves to several interpretations. On the one hand, perhaps the data mean what they say. Perhaps it is true that the courts were primarily concerned with issues of morality in these cases Perhaps they held little concern for gender and orientation modeling and similarly little fear that gay parents would sexually abuse their children or expose them to disease.

On the other hand, perhaps it is unwise to read these data too literally. The judiciary (at least in the later years of this dataset) were no doubt aware of the constitutional landmines presented by *Romer v. Evans*, *Craig v. Bowen,* and *Lawrence v. Texas*. Judges were no doubt conscious of the fact that the Nexus Test required a link between their concern and some identifiable harm to the child. And they must have realized that linking gay parents to a threat of sexual abuse or disease was impolitic in polite society by at least the 1990s. Concerns of "immoral exposure" or damage to "societal morality" are vague and ill-defined. They are also less assailable by legal constraints and easier to justify in public. Perhaps these data are tainted both by a social desirability bias (a recognition that certain arguments against gay parental fitness are now considered offensive by many) and a recognition of legal constraint.

And finally, the positive implications of this research should not be overlooked. These data show conclusively that (explicit) judicial concerns regarding the parental fitness of gay parents have declined dramatically over the last several decades (within electronically available case law). No single rationale appeared in more than 7% of the cases published from 2008 – 2017. This is a dramatic improvement over previous decades.

Chapter 7
Case Analysis: The Impact of Gender

In this chapter I examine the text of custody decisions in Dataset One (custody cases within Lexis or Westlaw featuring one gay parent opposing a heterosexual parent, *n*=212) and the text of custody decisions in Dataset Two (a random sampling of "traditional" heterosexual parent vs. heterosexual parent custody cases, *n*=212) to examine the intersectional impact of gender on the adjudication of gay parental fitness in custody matters. I examine the intersectional impact of parental gender and gender of the child(ren) at issue separately.

Parental gender: lesbians are selfish, gay males are self-actualized

Anti-homosexual bias within custody matters has received considerable academic focus. Scholars have detailed how gay male and lesbian parents are routinely confronted with arguments that they will lure their children into homosexuality (through modeling or outright recruitment), that they may sexually abuse their children or that they may infect their children with disease (Eskridge, 2000; Herek, 1991; Rosky, 2008, 2012a; Shapiro, 1995a). Scholars have likewise highlighted that courts often express anti-homosexual bias openly, either in the form of lengthy anti-homosexual rants or in more subtle turns or phrase (Ronner, 1995; Rosky, 2008).

The impact of gender bias on custody has likewise been well studied; from legal rules that specifically hinge on parental gender (paternal preference, the tender years doctrine, etc.) to extra-legal biases that skew custody along gendered lines (e.g., the mother is inherently more nurturing, the father is the assumed bread winner) (Artis, 2004; McNeely, 1997; Neely, 1984; Polikoff, 1981; Warshak, 2011; Widiss, 2011).

But there has been comparatively little focus on the intersectional impact of gender *and* orientation bias on these parents, both in terms of custody outcomes and the content of the biases they face. Previous analyses of gay male and lesbian custody have too often focused on one axis and ignored the other.[196] They have focused on the burdens facing gay male fathers or lesbian mothers individually (Dalton & Bielby, 2000), or they have studied their burdens as a single unit (Connolly, 1996, 1998; Dalton, 2000; Richman, 2002, 2010). Very few have considered the implications of the child's gender or the gender of the judge. And the danger of "single-axis" analysis is well known.[197]

That said, from the literature we do have it is possible to make some well-founded predictions. First, I expect gay parental gender to significantly impact custody outcomes. It is well known that parental gender significantly skews outcomes in "traditional" heterosexual vs. heterosexual custody cases (Artis, 2004; Bahr et al., 1994; Lemon, 1981; Nickerson, 2000; Swent, 1996), and it stands to reason that parental gender in gay parental custody cases will do the same.

The parameters, however, and perhaps even the direction, of that impact are uncertain. In "traditional" custody cases (heterosexual parent vs. heterosexual parent), it is widely agreed that

[196] Though there have been notable exceptions. Clifford Rosky's work on the incidence of homophobic stereotypes during the custody process stands out as an analysis that aims to deal with the intersectional dimensions of this issue (Rosky, 2008). *See* also (Watkins, 2011).

[197] Clifford Rosky's work is a notable exception, though he also notes that the area needs more analysis ("In the legal academy's responses to stereotypes about gay and lesbian parents, scholars have been blind to the influence of gender") (Rosky, 2008).

essentialized notions of the mother as nurturing and family focused have supported a bias towards the mother in terms of custody allocation (Blair-Loy, 2001; Chodrow & Contratto, 1982; Dow, 2016; McNeely, 1997; Watkins, 2011). But there are some indications that these essentialized notions might not apply to lesbian mothers. In the interview portion of this project several respondents indicated that lesbian mothers did not seem to benefit from the same parenting assumptions as heterosexual mothers. As one attorney put it: "normally judges assume that mother should be raising these kids. But with lesbian moms, they lost their motherly shine." Respondents also noted that lesbian mothers who divorced from heterosexual families often appeared selfish and unstable to the court, while gay male fathers who did likewise did not. It was theorized previously (in the analysis portion of Chapter 3) that courts may find a mother divorcing from a heterosexual family for reasons of sexual orientation to be more "jarring" than a father doing the same, solely because courts essentialize mothers as individuals who place their family above all else while fathers are not assumed to do likewise. Thus while it is predicted that parental gender will skew outcomes in these cases, the magnitude and direction of that skew are uncertain.

I also expect parental gender to skew the content of judicially expressed anti-homosexual bias in these cases. Previous research, for example, has indicated that gay male fathers are viewed as sexual abuse threats while lesbian mothers are not (Herek, 1991; Rosky, 2008). These findings also correlate with respondent answers to the interview portion of this research,[198] and with the general stereotype that men are both more sexually focused and more aggressive than women (Dowd, 2008; Purvis, 2013). Gay male fathers are also more associated with sexually transmitted disease than lesbian mothers (especially H.I.V.) and thus I expect the fear of disease transfer to be more prevalent when gay male fathers are before the bench.[199]

a) Results

i. Custody Outcomes by Gender and Sexual Orientation

As expected, the "heterosexual vs. heterosexual" sample reveals a significant custody bias favoring heterosexual mothers.[200] When opposing a heterosexual father for custody, heterosexual mothers prevailed at a 59% rate while heterosexual fathers obtained custody at a mere 41% rate. But lesbian mothers enjoyed no such advantage when they opposed heterosexual fathers for custody. Rather, they found themselves at a significant disadvantage, obtaining custody in only 36% of those contests.

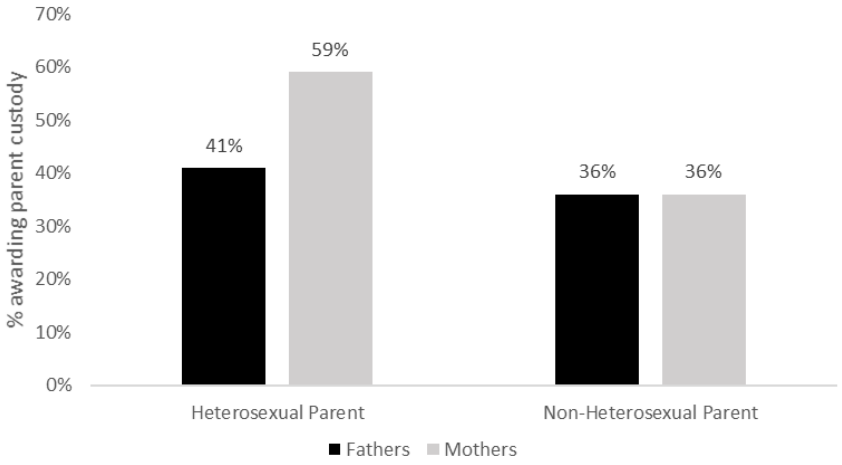
[198] While sexual abuse fears were listed in relation to both gay male and lesbian parents, several respondents stated that this fear was more pronounced when gay male fathers contested custody. *See* "Parental Gender," Chapter 3.

[199] Rosky's 2008 analysis also found the fear of disease transfer to be primarily associated with gay male fathers, though Rosky's analysis did not isolate judicially held bias from the biases of litigants, experts and others (Rosky, 2008).

[200] This result concurs with numerous studies that have shown a similar bias over the last several decades (Bahr et al., 1994; Gender Bias Study Committee, 1990; Lemon, 1981; Pearson & Ring, 1982; Polikoff, 1981; Swent, 1996; Weitzman & Dixon, 1979a).

Figure 1.

Granting custody by sexual orientation and gender



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, *n*=212) and a comparable sample of heterosexual vs. heterosexual cases (1951-17, *n*=212).

This difference in success rate for mothers, the "orientation penalty," is rather stark. A lesbian mother contesting custody against a heterosexual father is 61% less likely to prevail than a heterosexual mother contesting custody against a heterosexual father, and this differential is statistically significant (p=0.001).

But gay male fathers appear to be burdened less. When opposing a heterosexual mother for custody gay male fathers prevailed at a 36% rate, which was not statistically different from the 41% success rate enjoyed by comparably situated heterosexual fathers (p=0.654).[201]

These data thus support the anecdotal observation recorded during the interview portion of this project: while heterosexual mothers hold an advantage over heterosexual fathers in custody allocation, lesbian mothers hold no similar advantage when they oppose heterosexual fathers. The long-held assumption that mothers are inherently superior caregivers disappears once the heterosexual context is removed.

But for gay male fathers the burden is different. While they are burdened in other ways during the custody process there is no evidence, at least statistically in this analysis, that they have suffered an "orientation penalty" in terms of custody allocation relative to heterosexual fathers.[202]

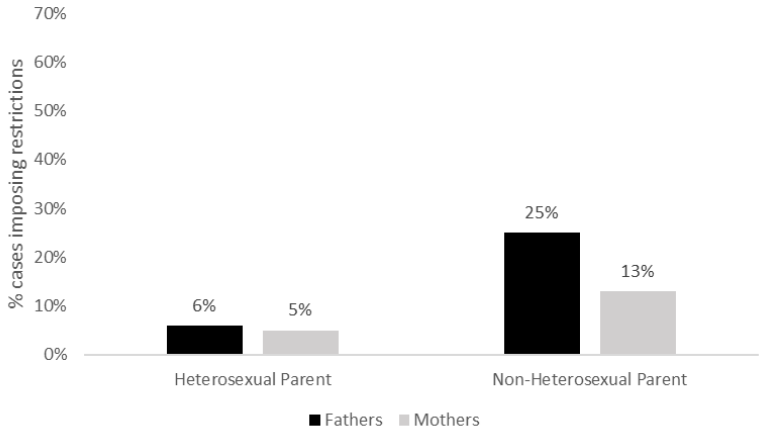
Visitation restrictions also demonstrated a disparity by both parental gender and sexual orientation. In terms of sexual orientation both gay male and lesbian parents suffered partner and overnight restrictions significantly more often than their heterosexual peers. But in terms of parental gender, gay males felt these burdens more often than lesbian mothers, though only one restriction, partner restrictions, differed to a statistically significant degree. Gay males received

[201] Recall that there are far fewer gay male father cases in the judicial decisions available through Lexis and Westlaw (*n*=60) than lesbian mother cases (*n*=152), thus far less power is available to compare custody rates across orientation for fathers.

[202] This is not to suggest that gay male fathers suffer no discrimination in custody proceedings, even relative to heterosexual fathers. Custody is but one outcome of a custody hearing. Visitation restrictions, for example, are also frequently contested.

partner restrictions in 25% of the cases in Dataset One, while lesbian mothers received the same restriction in only 13% (p=0.025).

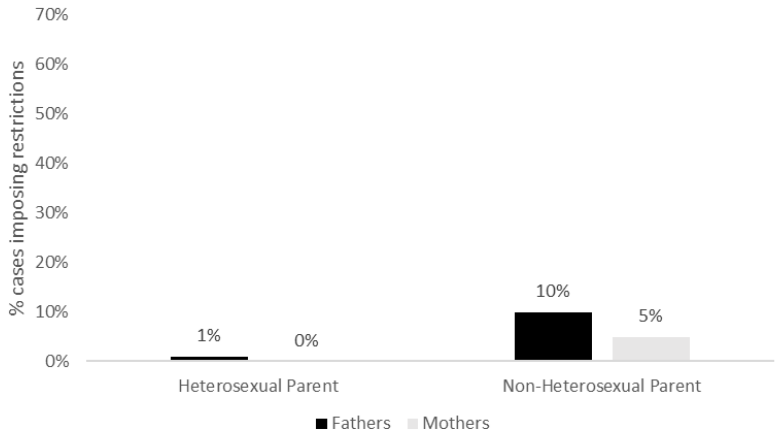
Figure 2.
Partner restrictions imposed by sexual orientation and gender



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212) and a comparable sample of heterosexual vs. heterosexual cases (1951-17, n=212).

Overnight restrictions reflected a similar gender imbalance, gay males received overnight restrictions more often than lesbian mothers in Dataset One (10% to 5% respectively), though the difference was not statistically significant (p=0.213).

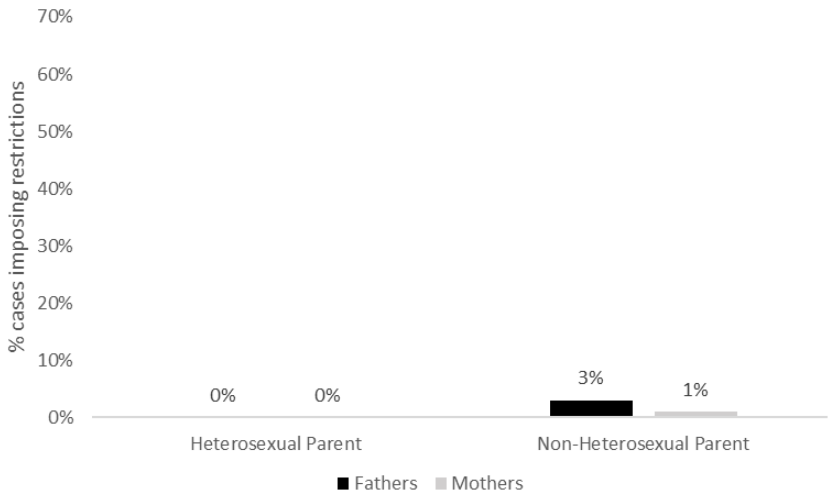
Figure 3.
Overnight restrictions imposed by sexual orientation and gender



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212) and a comparable sample of heterosexual vs. heterosexual cases (1951-17, n=212).

Supervision orders remained relatively rare for both gay male and lesbian parents and their heterosexual counterparts. No significant differences, or even noticeable differences, were uncovered on this analysis.[203]

Figure 4.
Supervision imposed by sexual orientation and gender



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, *n*=212) and a comparable sample of heterosexual vs. heterosexual cases (1951-17, *n*=212).

ii. Judicial Perceptions

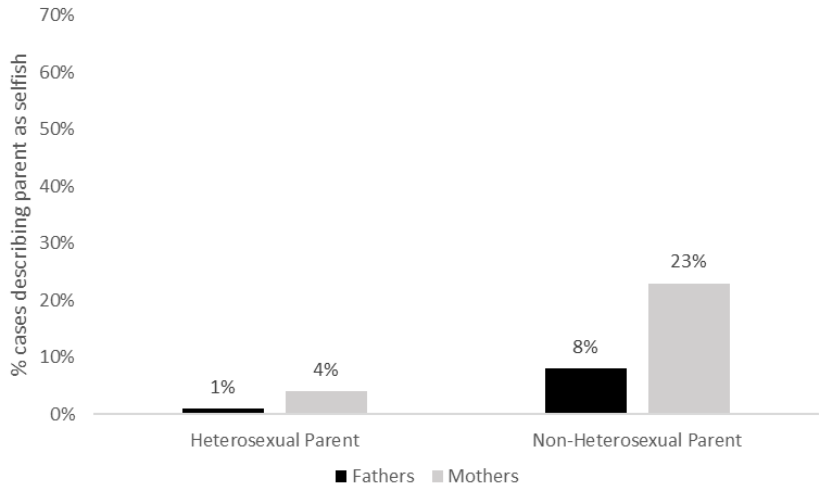
Lesbian mothers divorcing a heterosexual spouse were described as selfish significantly more often than comparably situated gay male fathers, heterosexual mothers or heterosexual fathers. Courts described these mothers as selfish in 23% of the cases examined, while courts described comparably situated gay male fathers, heterosexual mothers and heterosexual fathers as selfish at a mere 8%, 4% and 1% rate respectively.[204] These disparities are all statistically significant.[205]

[203] Given that this is a low base-line event it was deemed wise to also utilize a logistic odds-ratio analysis in the non-heterosexual condition. This subsequent analysis likewise established that the imposition of supervision orders did not significantly differ by parental gender for non-heterosexual parents (β = .950, p=0.348, *OR* = 2.59 (95% CI: .36, 18.79)).

[204] It bears noting, again, that gender of the judge may also moderate these results. Unfortunately accurate information on judicial gender was not available. Please see footnote 170.

[205] Courts described lesbian mothers divorcing a heterosexual spouse as selfish at a significantly higher rate than comparable situated gay male fathers (p=0.0138), heterosexual mothers (p=0.000) and heterosexual fathers (p=0.000).

Figure 5.
Parent described as selfish in a custody case



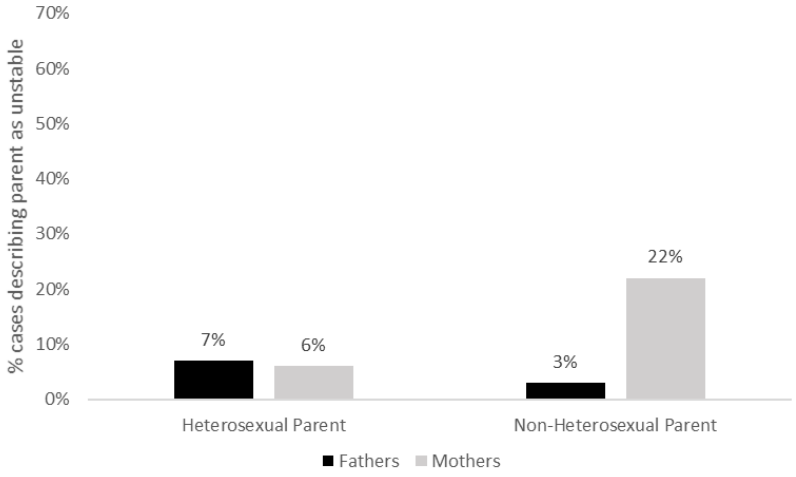
Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212) and a comparable sample of heterosexual vs. heterosexual cases (1951-17, n=212).

The judicial perception of instability displayed a similar tendency. Courts described lesbian mothers divorcing a heterosexual spouse as unstable at a 22% rate, while courts described comparable gay male fathers, heterosexual mothers and heterosexual fathers as unstable at a mere 3%, 6% and 7% respectively. Once again, these disparities are all statistically significant.[206]

[206] Lesbian mothers are also described as unstable significantly more often than comparable situated gay male fathers (p=0.001), heterosexual fathers (p=0.000) and heterosexual mothers (p=0.000).

Figure 6.

Parent described as unstable in a custody case

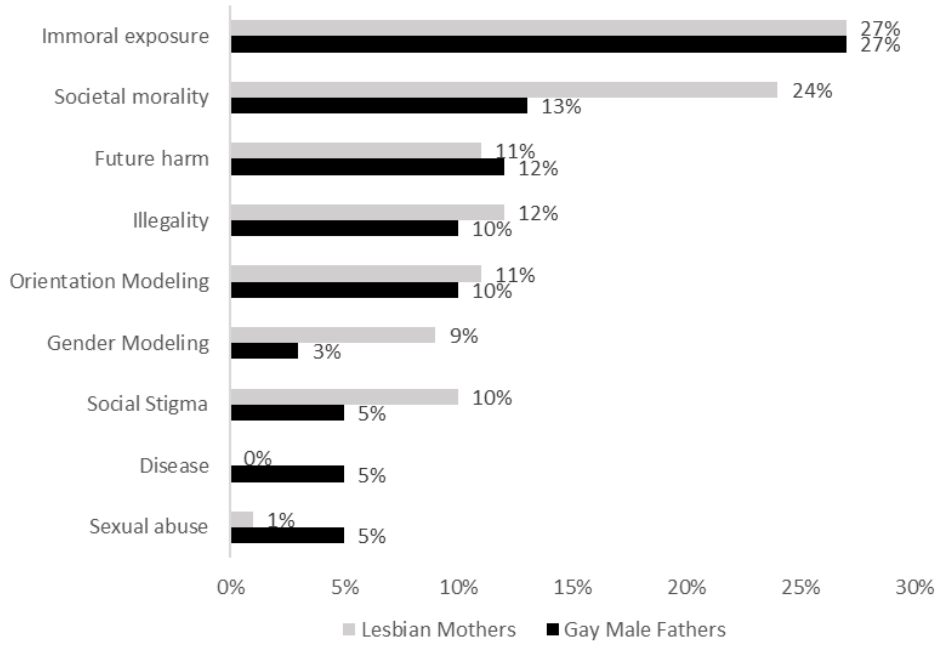


Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212) and a comparable sample of heterosexual vs. heterosexual cases (1951-17, *n*=212).

iii. Arguments Against Gay Parental Fitness

While arguments against gay parental fitness certainly differed by parental gender that difference might be less than expected. The only *statistically* significant difference concerned the argument that gay parents might expose their children to disease. That argument burdened 5% of the gay males in Dataset One but none of the lesbian mothers. The argument that gay parents will expose their children to immorality noticeably burdened more lesbian mothers than gay fathers, though that difference was not significant.

Figure 7.
Judicial arguments against gay parental fitness by gender



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, *n*=212).

b) Discussion

These data indicate a strong anti-homosexual bias, but when gender is taken into account that bias differs in meaningful ways. Most noticeably, lesbian mothers appear to bear the brunt of the custody allocation bias. While heterosexual mothers enjoyed a substantial advantage over their heterosexual male opponents in custody allocation, that "motherly advantage" disappeared once the heterosexual context was removed. Gay males, on the other hand, suffered only a nominal, and statistically non-significant bias when compared to their heterosexual peers on this front. But gay males found themselves burdened in other ways. They received partner restrictions significantly more often than lesbian mothers. They also exclusively faced the judicial concern of disease transfer.

These data are notable because they suggest that gay male fathers have not fared significantly worse than heterosexual fathers in terms of custody allocation. This appears to contradict both the qualitative data gathered for this project (100% of the applicable interview respondents in the interview portion on this project stated that gay males suffered notable custody allocation discrimination in comparison to their heterosexual peers), and the general scholastic consensus (Eskridge, 2000; Leinauer, 2021; Rivera, 1978; Rosky, 2008, 2012a; Shapiro, 1995a). But this discrepancy could simply reflect a limitation with the methodology. It could well be, for example, that gay male fathers simply perceived the odds stacked against them as more ominous than their lesbian peers, and thus avoided litigating marginal cases at a higher rate than their lesbian peers. These data could, in other words, suffer from a selection bias across parental gender.

Other interpretations are also available. It is well known that fathers are frequently viewed as "providers" by the court, and it likewise known that gay males are often assumed to be

financially secure (Artis, 2004; Ferreiro, 1990; S. Williams & Haas, 2013). Perhaps the essentialist role of the father is less impacted by deviance from heteronormativity than the essentialist role of mother is impacted by the same deviance.

But perhaps the most noteworthy difference uncovered in these data concerns the judicial perception of selfish or unstable parenting. Put bluntly, courts described lesbian mothers divorcing heterosexual parents as selfish or unstable dramatically more often than gay male or comparable heterosexual parents. This finding supports the observation recorded during the interview portion of this project that lesbian mothers are often considered "crazy" or "selfish" when they divorce from a heterosexual family while gay male fathers are occasionally perceived as self-actualized for the same behavior.[207] These judicial perceptions also mattered in terms of outcome. A judicial description of a lesbian parent as selfish or unstable significantly predicts the denial of that mother's custody petition. The same is not true for gay male fathers (*See* Appendix A).

Why do courts view lesbian mothers as selfish and unstable more often than comparably situated gay male fathers, heterosexual mothers and heterosexual fathers? How do these judicial tendencies speak to the loss of the "motherly advantage" for lesbian parents in terms of custody allocation, and how do these results sit alongside the relevant literature?

This next section answers these questions by placing the results alongside previous scholarship, the case law and the broader universe of feminist thought.

i. Why are Lesbians Selfish while Gay Males are Self-Actualized?

In judicial decisions available through Lexis and Westlaw, lesbian mothers who divorce a heterosexual spouse have been described by the court as "selfish" at a rate of 23%. As discussed earlier, this rate dramatically exceeds the judicial tendency to label gay male fathers selfish in the same situation (gay male fathers were labelled selfish at a rate of 8%). While this disparity alone is noteworthy, analysis of the case law reveals finer detail: lesbian mothers are not only labelled selfish more often than their gay male peers, they are also labelled selfish for reasons relating to their sexuality more often than their gay male peers.

In 57% of the cases labelling a lesbian mother selfish, the court expressed one of two allegations that specifically concerned the lesbian mother's sexuality.[208] Most common was the assertion that a lesbian mother selfishly valued a same-sex relationship more dearly than her own

[207] It should be noted that case law analysis did not uncover examples of *courts* describing gay male fathers as "self-actualized" for coming to terms with their sexuality. The claims referred to here reference the interview portion of this research (the interviews questioned gay male fathers and their attorneys, not judges).

[208] In the remaining 43% of these cases, lesbian mothers were described as selfish for garden variety issues of selfish parenting, issues that did not revolve around their sexuality. Typically, these courts worried that the mother was unable to "put the child's needs first," or that that child was not the mother's "highest priority." Consider the court's language in *Chicoine v. Chicoine*, wherein the court stated that they were "not reassured, given Lisa's past actions, that she will be able to put the needs of her children first." Chicoine v. Chicoine, 479 N.W.2d 891, 894 (S.D. 1992). Or the finding of the trial court in *The Marriage of Williams*, abruptly stating that "the child does not appear to be the mother's highest priority." In re the Marriage of Williams, 205 Ill.App.3d 613, 614 (Ill.App. 1990). While these allegations of selfish parenting do not concern the mother's sexual orientation it is still noteworthy that even these "general allegations" of selfish parenting are far more prevalent when a lesbian mother is before the court.

children.[209] Consider *Bark v. Bark*, where the Court found it reasonable to conclude that "the mother's primary concern was not her children but her lover."[210] Or the case of *Mobley v. Mobley*, where the trial court argued that the "[Mother] deemed her relationship and time spent with [her same-sex partner] to be more important than most anything else."[211] Or *Hall v. Hall*, where the court concluded that, if given the choice, the mother would "unquestionably choose [her same-sex relationship] over the children."[212]

In the second, more nuanced, allegation of selfish parenting, courts labeled the mother selfish for "choosing homosexuality" or "practicing lesbianism." In other words, the very act of practicing a non-heterosexual orientation rendered these mothers impermissibly selfish.

Consider *Collins v. Collins*.[213] In *Collins*, the Tennessee Appellate court made clear that it deemed a mother selfish for simply engaging in a (post-divorce) same-sex relationship, or, in the court's words, for "submitting" to the desires of her sexual orientation. The court argued that a true mother would "sacrifice" her same-sex yearnings and continue to live in the heteronormative mold:

> While Mother's homosexuality may be beyond her control, submitting to it and living with a person of the same sex in a sexual relationship is not. Just as an alcoholic overcomes the habit and becomes a nondrinker, so this mother should attempt to dissolve her "alternate life style" of homosexual living. Such is not too great a sacrifice to expect of a parent in order to gain or retain custody of his or her child. This Court can take judicial notice of the fact that throughout the ages, dedicated, loving parents have countless times made much greater sacrifices for their children.

The *Collins* court arrived at this conclusion even though the mother was, by all accounts, a good mother. The court admitted that "Mother [had] done a good job in providing for her daughter," and all parties believed that the "child had been well cared for."[214] But in the court's eyes the mother's inability to sacrifice her "alternative lifestyle" made the mother selfish and unworthy of custody.

And the *Collins* court is not alone. This same logic arose in 20% of the cases labelling a lesbian mother selfish. Consider the case of *L v. D.*, where the mother's refusal to "give up [her]

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[209] Of course, there is anecdotal evidence that heterosexual women suffer the same dilemma – an assumption that they are "bad mothers" if they value their intimate relationships over their children. Ayelet Waldman, for example, received a torrent of criticism for being a "bad mother" after asserting that she loved her husband more than her children in a 2005 New York Times op-ed (Dominus, 2009). Analysis of heterosexual vs. heterosexual custody opinions, however, indicate that lesbian mothers are described as selfish for such behavior (or the perception of it) more readily than heterosexual mothers. *See* "Results" section in this chapter.

[210] Bark v. Bark, 479 So.2d 42, 43 (Al.App. 1985).

[211] Mobley v. Mobley, 2013 WL 1804189, 9 (Tn.App. 1983).

[212] Hall v. Hall, 95 Mich. App. 614, 615 (Mich. App. 1980).

[213] Collins v. Collins, 1988 WL 30173 (Tn.App. 1988).

[214] The court also acknowledged that the daughter appeared successful and well adjusted ("she is a good student, well disciplined, sensitive and her social skills are above average"). Collins v. Collins, 1988 WL 30173 (Tn.App. 1988).

life-style of being a homosexual" is listed as a justification for describing her as selfish.[215] Or the case of *Pleasant v. Pleasant*, where the mother's refusal to "promise that she would not take the child in the presence of any gays," prompted the trial court to conclude that the "the Respondent's gay life was more important than her child."[216]

Gay male fathers who divorced a heterosexual spouse were viewed quite differently. Courts labeled them selfish at a rate of only 8% (compared to a 23% rate for lesbian mothers), and in all but one instance these allegations of "selfish parenting" involved nothing more than garden variety selfishness.[217] Courts found a gay male father "self-indulgent" for taking a vacation immediately before his own father's death,[218] selfish for failing to take a child to the emergency room,[219] and selfish for refusing to go to marital counseling.[220] These cases did not label a gay male father selfish for "practicing homosexuality" or for valuing a same-sex lover more than his own child. These allegations of selfish parenting did not, in fact, involve the father's sexual orientation at all.

We see a similar pattern when it comes to the perception of instability. Lesbian mothers divorcing a heterosexual spouse are routinely framed as "unstable" by the courts, but comparable gay male fathers are not. Courts applied this description to 22% of the lesbian mothers in Dataset One but only 3% of the gay male fathers. Once again, the statistical disparity is striking, but, once again, the reasons *why* these parents were deemed unstable is also revealing.

As was the case with the perception of selfish parenting, lesbian mothers often found themselves labelled unstable for reasons that concerned their sexuality. For example, in 49% of the relevant cases courts labelled a lesbian mother unstable because, in the court's mind, they dated too much. Courts typically phrased this concern in one of two ways. In the first, they argued that a constant stream of new lovers made the mother's home less stable.[221] In the second, they argued

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[215] L. v. D., 630 S.W.2d 240, 244 (Mo.App. S.D. 1982) ("When asked "(i)f you thought that you could keep your children, would you give up your life-style of being a homosexual," the appellant replied, "no").

[216] Pleasant v. Pleasant, 256 Ill.App.3d 742, 750 – 51 (Ill.App. 1993) ("[W]hen the Respondent had an opportunity to have unsupervised visitation on her promise that she would not take the child in the presence of any gays, she defiantly refused, stating, 'that she was a lesbian and that she would not promise that she would not take the child amongst her friends,' and the Court concludes that the Respondent's gay life was more important than her child.").

[217] The "one instance" referred to here is the Virginia case of *Roe v. Roe*. 228 Va. 722, 728 (Va.Sct. 1985). In *Roe* the Court declared a gay male father unfit because he was willing to impose societal scorn upon his family by living as an out gay male. While selfish parenting was not invoked directly this reasoning could be read as an allegation of "selfish parenting" based on the father's decision to practice his sexual orientation. At the very least the accusation concerned the father's sexual orientation. *Id.*

[218] In re the Marriage of Walsh, 451 N.W.2d 492, 493 (IA 1990) (The appellate court did not agree with this assessment of the trip or of the father's character in general).

[219] Jenkins v. Jenkins, 2001 WL 507221, 6 (Tx.App. 2001).

[220] McGriff v. McGriff, 140 Idaho 642, 651 (ID 2004).

[221] See, for example, Clark v. Boals ("Appellee is in committed marital relationship and can provide Kyle with stability and a family unit, unlike appellant who has different partners moving in and out of the home"). Clark v. Boals, 2007WL1395339, 5 (Ohio.App. 2007). *See also* In re Marriage of Martins ("The evidence shows that the petitioner had had numerous female roommates, gay and nongay, since the time of the dissolution. Such circumstances did not serve

that the mother's dating behavior reflected an inability to commit to *any* relationship. In this latter version, the mother herself is considered unstable because she allegedly lacks the ability to settle down.[222]

Both versions of this argument are problematic because they brush up against the well-worn trope that non-heterosexuals lack the ability to form long-lasting, committed relationships.[223] But the first version is less problematic because in some cases it is undoubtable true; a home that features a procession of significant others can be reasonably labelled "less stable" for child rearing than a home that features only one, long-term significant other.

But when lesbian mothers are concerned this argument is often applied in a heavy-handed, seemingly biased fashion. For example, in *Clark v. Boals*, the court labelled a lesbian mother's living situation unstable because she had "different partners moving in and out of the home." But the mother in question had engaged in only two relationships over the previous four years and had lived with her most recent partner for the last two.[224] The court rendered a similarly questionable assessment in *Piatt v. Piatt*, when it concluded that a lesbian mother who engaged in two post-divorce relationships was meaningfully less stable than a father who had engaged in only one.[225]

In the second version of this argument courts argue that the lesbian mother's dating history evidenced an inability to commit to *any* relationship, thus rendering her unstable. Consider *J.A.D. v. F.J.D.*, which held that the father possessed "greater stability" than the lesbian mother because she displayed "immaturity in seeking after repeated new love relationships."[226] Or *Collins v. Collins*, where the court implied that the mother's "chosen life-style" was to proceed from one same-sex relationship to the next ("In this child's short life she has already been exposed to her

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to create a stable home environment for the minor children."). In re Marriage of Martins, 269 Ill.App.3d 380, 390 (Ill.App. 1995), and Piatt v. Piatt 27 Va.App. 426, 433 (Va.App. 1998) (the court found the mother's home unstable partially because she dated several people and admitted to two sexual relationships since the divorce).

[222] This argument echoes a well-worn trope that non-heterosexuals lack the ability to form committed, long lasting relationships. This trope can be found throughout the cases in Dataset One, usually in the form of expert testimony. See, for example, In re Jane B., where an expert for the father testified that "a homosexual sometimes switches affection to another partner." 85 Misc.2d 515, 522 (NY 1976).

[223] For a thorough summary of this trope and the misinformation called forth to support it *see* Same Sex Marriage: Till Death do we Part?, a pamphlet distributed by the Family Research Institute in the early 2000s. This pamphlet argued, among other things, that "homosexual relationships are short lived," and that most "homosexuals" tend to live alone because "most homosexual relationships are fragile" (*Paul Cameron: Introduction*, n.d.) This trope also appears rather frequently in dataset one. See, for example, In re Jane B., where an expert for the father testified that "a homosexual sometimes switches affection to another partner." 85 Misc.2d 515, 522 (NY 1976).

[224] Clark v. Boals, 2007WL1395339, 5 (Ohio.App. 2007). It is also worth noting that mother and her partner were splitting mortgage payments, further indication of a serious, long-term relationship. *Id.*

[225] Piatt v. Piatt, 27 Va.App. 426 (Va.App. 1998). The dissent agreed with this critique, noting that there was little meaningful difference between the two parents' post-divorce relationship history. *Id* at 433.

[226] J.A.D. v. F.J.D., 978 S.W.2d 336, 337 (Mo. 1998).

mother's four serious lesbian relationships. This is the chosen lifestyle of the Mother…").[227] Or *Cole v. Cole*, which held that a lesbian mother's "multiple short-lived relationships … *and entry into a same-sex marriage*" evidenced "an absence of stability," clearly discounting both the permanence of a same-sex marriage and the stability of character demonstrated by a non-heterosexual marital commitment.[228]

Courts also frequently questioned the stability of lesbianism itself. In 17% of the applicable cases courts described these mothers as inherently confused or unsettled in their sexual identity. In *Piatt v. Piatt*, the trial court described a lesbian mother as "still in turmoil… as to her sexual orientation and how her life should go forward."[229] In *M.P. v. S.P*. the dissent described a lesbian mother as an individual who was constantly trying to "find herself," and thus concluded that the father "provided a more stable atmosphere."[230] In *Jacoby v. Jacoby* the trial court doubted a mother's own assessment of her lesbian identity, despite the fact that she had been living with a same-sex lover for over two years, stating:

> [T]he mother might not, in fact, be homosexual. If that turned out to be true, the … 'the permanence of her home becomes quite suspect.'[231]

But gay fathers who divorced a heterosexual spouse were rarely labeled unstable. Gay male fathers suffered this perception in only two cases, a mere 3% of the applicable cases in Dataset One. The first had nothing to do with the father's sexual orientation. Rather, the court found the father unstable because he had frequent employment difficulties.[232] The second described a gay male father's home as unstable because he "over- emphasiz[ed] the issue of homosexuality with [his] children" by taking them to "gay religious services and ceremonies, gay social events and gay artistic performances." While this assessment certainly concerned the father's sexuality, the rational differed from the lesbian mother cases discussed above. It was not the father's frequent dating, inability to commit or identity confusion that rendered him unstable, rather the (alleged) indoctrination of his children rendered his home unstable.[233]

While initially puzzling, this disparate treatment becomes explicable when one considers the differing societal expectations of mothers and fathers. Mothers are expected to prioritize family over their own sexuality. Thus, mothers perceived as upending the family for reasons of a recently acknowledged lesbian identity are viewed as selfish. They are accused of valuing a same-sex relationship over their own children. They are viewed as selfish for even acknowledging or practicing their lesbian identity. They are likewise viewed as unstable. To contradict the ingrained,

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[227] Collins v. Collins, 1988 WL 30173 (Tn.App. 1988).
[228] Cole v. Cole, 2012 Ark.App. 528, 2 (Ark.App. 2012) (emphasis added).
[229] Piatt v. Piatt, 27 Va.App. 426, 428 (Va.App. 1998).
[230] M.P. v. S.P. 169 N.J.Super. 425, 451 (Nj.App. 1979). *See also* S.N.E. v. R.L.B., where the trial court appears to have agreed with father's assessment that his now out ex-wife was "emotionally unstable." 699 P.2d 875, 878 (Al 1985). Or the case of Tucker v. Tucker, where the trial court seemingly accepted an expert opinion that the lesbian mother was "not as settled in her identity, … given to mood swings, and is more conflicted and less stable in relationships with others." 910 P.2d 1209, 1211 (Utah 1996).
[231] Jacoby v. Jacoby, 763 So.2d 410, 416 (Fl.App. 2000).
[232] In re The Marriage of Teepe, 271 N.W.2d 740, 743 (Iowa 1978).
[233] Marlow v. Marlow, 702 N.E.2d 733, 737 (Ind.App. 1998).

essentialist notion of how a mother is expected to act is to appear unbalanced to the court. The court may suspect that this mother's home is too unstable to raise a child. The court may suspect that this mother lacks the ability to commit to *any* relationship, or that she is simply delusional or confused.

Fathers arrive at family court against a backdrop of different expectations. They are expected to be providers and protectors, but they are not expected to prioritize the family over their own sexuality. They may be chastised for not doing so, but they are not *expected* to sacrifice their own sexuality (Artis, 2004; Bartlett, 1999; Ferreiro, 1990; Kim, 2012b; Sack, 1991; Weisberg, 1995; S. Williams & Haas, 2013). Thus, a father who upends the family for reasons relating to his sexual identity is not seen as impermissibly selfish for doing so. He may, in fact, be viewed as self-actualized for doing so. He is likewise not viewed as unstable because he has not contradicted the essentialist mold of his assumed role.[234]

And these perceptions matter. A judicial description of a lesbian parent as selfish or unstable significantly predicts the denial of that mother's custody petition. The same is not true for gay male fathers.

Thus, the loss of the "motherly advantage" for lesbian mothers in custody matters can be partially explained by the impact of differing gender expectations. The very act of upending familial cohesion for reasons of personal sexuality runs counter to the essentialist notion of motherhood that traditionally undergirds that advantage. Lesbian mothers gain no custody advantage, therefore, over opposing heterosexual fathers while heterosexual mothers enjoy a sizeable advantage in the exact same context. The long-held assumption that mothers are inherently superior caregivers appears to disappear once the heterosexual context is removed.

ii. Are Heterosexual Mothers also Perceived as Selfish and Unstable?

But what of heterosexual mothers who divorce a heterosexual spouse? These mothers can be seen as upending the family unit as well, and they also exist against a societal expectation that they should prioritize the family above all else. Are these mothers also viewed as selfish and unstable?

These data suggest that they are not. Heterosexual mothers divorcing a heterosexual spouse are labelled selfish at a mere 4% rate, significantly less often than comparably situated lesbian mothers who were labelled selfish at a 23% rate. Likewise, heterosexual mothers who divorce a heterosexual spouse were labelled unstable at a mere 6% rate, significantly less often than comparable lesbian mothers who were labeled unstable at a 22% rate. Moreover, we do not see the within orientation disparity that we witnessed in Dataset One. While lesbian mothers are labelled selfish or unstable at a significantly higher rate than gay male fathers, heterosexual mothers are not labelled selfish or unstable at significantly higher rates than heterosexual fathers.[235]

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[234] While these data do not allow deep analysis on race (racial demographics are rarely reported in the published record) it would be wise to investigate how courts essentialize fatherhood across race. Are courts less likely to assume that a father of color can serve as a provider, an assumption that makes some sense given discrimination in the employment market?

[235] Heterosexual mothers were labelled selfish by the court at a 4% rate while heterosexual fathers were so labelled at a 1% rate, a statistically insignificant difference (p=0.1). Likewise, both heterosexual mothers and heterosexual fathers were labelled unstable at comparable rates (6% and 7% respectively), a statistically insignificant difference [p=0.790]).

Why would this be so? One obvious answer is that this is not a perfect "apples to apples" comparison. When a divorce occurs between a lesbian mother and a heterosexual father, or when a motion to modify is filed after such a divorce, the mother's sexual orientation is frequently seen as the driving factor. Typically, the mother acknowledges a lesbian identity and a divorce or motion to modify custody ensues in reaction to that acknowledgment. The lesbian mother's sexuality, in other words, is typically front and center when she adjudicates custody against a heterosexual spouse. The same cannot be said for heterosexual mothers divorcing heterosexual fathers, which can result from any number of factors: the father's infidelity, financial difficulties, ordinary loss of affection, etc. Thus, disparate treatment across orientation can, to some degree, be explained by the differing circumstances of these mothers. If courts consider mothers who upset familial cohesion for reasons related to their own sexuality selfish and unstable for doing so, it makes sense that this fate would befall lesbian mothers divorcing heterosexual spouses more often than heterosexual mothers divorcing heterosexual spouses; lesbian mothers are far more likely to adjudicate custody for reasons relating to their own sexuality than heterosexual mothers.

That said, there is evidence in the case law that lesbian mothers are viewed as selfish or unstable for pursuing their sexual interests to a greater degree than heterosexual mothers who upend the family for similar reasons.

For one, divorcing heterosexual mothers are rarely labelled selfish for pursuing their own sexual interests. For example, in *The Marriage of Rodgers*, a recently divorced heterosexual mother twice abandoned her family, unannounced, to live with a new lover out of state. On appeal, the court did not label this mother selfish for valuing her new lover over the needs of her children. Rather the Court went out of its way to make clear that it did not question her devotion to the children ("We do not question Phyllis's love for her children").[236] Or consider *Duning v. Streck*, wherein a mother planned to move out of state, with her child, to live with her boyfriend. The court agreed that the move would "have an adverse effect on the child's relationships" but did not label the mother selfish for pursuing a relationship at the expense of her child's welfare.[237]

In fact, this study did not uncover a single instance of a heterosexual mother being labelled selfish for reasons relating to her sexuality. When these mothers were labelled selfish, they were labelled selfish for garden variety instances of selfish parenting: routinely disrupting the family to score points in a petty squabble with the father,[238] severely restricting the child's activities to accommodate the mother's religious beliefs,[239] pressuring the child to skip school so she could

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[236] In re the Marriage of Rodgers, 470 N.W.2d 43, 45 (Ia.App. 1991).

[237] Duning v. Streck, 2002 WL 1358683, 3 (Oh.App. 2002). Rather the court chastised mother for planning the move without telling the father. *Id*.

[238] Altieri v. Altieri, 156 A.D.3d 667, 667 (NY.App. 2017). In Altieri, the mother routinely disrupted the family by making fraudulent, criminal, accusations against the father. *Id*.

[239] Holder v. Holder, 171 Ohio.App.3d 728, 730 (Ohio.App. 2007). The mother in this case is described as selfish by the court for severely restrict the child's activities in order to accommodate her own religious beliefs ("Michelle can only swim if she wears a dress and there are no boys in the water. Michelle cannot wear pants or shorts. Michelle can only wear dresses that are below the knees and cover three-quarters of her arms. The defendant does not believe females should cut their hair, wear make-up, jewelry or nail polish. The defendant will not allow Michelle to watch television. Defendant does not support or approve of Michelle participating in sports or dance."). *Id*.

babysit for the mother,[240] and so forth. They were not labelled selfish for pursing a romantic relationship or for "practicing heterosexuality," despite the fact that such situations did exist.

Likewise, with the perception of parental instability. Heterosexual mothers who divorced heterosexual fathers were rarely labeled unstable, and the perception concerned garden variety instability, not instability relating to the mother's sexuality.[241] These mothers were labelled unstable because they were violent,[242] consumed drugs with their children,[243] suffered from alcoholism,[244] or suffered from a drug addiction.[245]

But, as before, Dataset Two contains numerous heterosexual mothers who expressed their sexuality in ways that frequently resulted in lesbian mothers being labelled unstable, and yet these mothers were not so described. In *Heatherington v. Heatherington*, a heterosexual mother "lived in various locations and married and divorced three times," but the court did not describe her as "unstable."[246] In *Dockins v. Dockins*, a heterosexual mother admitted to an extra-marital affair, and then further admitted to inviting her paramour into the house while the children were present, and yet she was not labelled unstable.[247] Likewise in *Kean v. Kean* and *Rowe v. Franklin,* these heterosexual mothers engaged in a string of extramarital affairs and yet they were not perceived as unstable by the court.[248]

This across-orientation disparate treatment is likewise puzzling, but it gains clarity when placed against what is already known about the judicial evaluation of parental sex. In *The Neutered Parent,* Professor Suzanne Kim observed that in custody matters some parental sexual activity is considered salient while some is considered neutral. Parents who practice their sexuality within the confines of marriage are considered sexually neutral, their sex lives are not considered relevant to custody proceedings. But parents who stray from these confines will find that their sex lives are now considered "sexually salient" to the custody hearing, an issue that must be addressed. But the observation that is key for our purposes is Professor Kim's realization that some non-marital sexual activity is more salient than others (Kim, 2012b).

Professor Kim acknowledges that, historically, mothers who engaged in non-marital sex and lesbian and gay parents have been viewed as sexually salient to the courts in custody

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[240] R.W.T. v. T.L.C., 855 A.2d 1084, 1088 (De.Fct. 2003).

[241] There was one case where a heterosexual mother was labelled unstable, at least partially, for reasons relating to her sexuality. In Bourlon v. Bourlon, the court described the mother is unstable, in part, because she "entered into a long period of sexual encounters with several different men." But this was just one fact of many reasons the court cited. Mother also abused drugs and alcohol (occasionally in front of the children), supplied alcohol to teenagers, helped teenagers enter drinking establishments, stayed out late and appeared nude in front of the children on multiple occasions. *Id*. It is uncertain how determinative mother's sexual exploits were in forming the opinion that she was unstable. 670 P.2d 1004, 1005 (Ok.App. 1983).

[242] Altieri v. Altieri, 156 A.D.3d 667, 667 (NY.App. 2017). In Altieri the mother was also labelled unstable because she had a history of violence towards the father.

[243] Whittington v. Strancener, 964 So.2d 407, 410 (La.App. 2007).

[244] McSwain v. McSwain, 844 So.2d 47, 51 (Ms.App. 2006).

[245] Nicholson v. Nicholson, 2013 Ark.App. 44, 52 (Ark.App. 2013).

[246] Heatherington v. Heatherington, 677 So.2d 1312, 1312 – 13 (Fl.App. 1996).

[247] Dockins v. Dockins, 475 So.2d 571 (Al.App. 1985).

[248] Kean v. Kean, 754 S.W.2d 922 (Mo.App. 1988); Rowe v. Franklin, 105 Ohio App.3d 176 (Oh.App. 1995).

matters.[249] But she also makes clear that non-heterosexual sexual activity is considered *more salient* than heterosexual activity.[250] This is the observation that explains these data. When mothers divorce or disrupt the post-divorce *status quo* for reasons relating to sexuality their sex lives are considered salient to any judicial proceedings that follow, but if that sexual activity is of the non-heterosexual variety it is considered especially salient.[251] Lesbian mothers will be judged more harshly and labelled selfish or unstable. Heterosexual mothers may be viewed negatively but they will not be deemed selfish or unstable.

This analysis echoes the more classic observations of Gayle Rubin. Professor Rubin noted in the 1980s that society applies a "hierarchical valuation" to all sex acts. Marital, heterosexual, pro-creative sex lies at the very top. It receives praise and legislative support. While cross generational sex (adults having sex with children) lies at the very bottom and receives both scorn and criminal sanction. Professor Rubin noted that within this scale heterosexual sex is viewed more positively than non-heterosexual sex (Rubin, 1984).

Taken together these insights explain the cross-orientation disparity revealed in these data. Lesbian mothers who divorce or disrupt the post-divorce *status quo* for reasons of sexuality are judged more harshly than heterosexual mothers who do likewise because their sexual activity is simply more salient to the court, and it is more salient because it is more stigmatized than heterosexual sexuality. It is also more jarring, when contrasted against the expectation that she will value the family over her own sexual happiness a lesbian mother's decision to upend a heterosexual family for reasons of her own personal sexuality appears all the more stark. She will be viewed as selfish and unstable while the heterosexual mother will not, and her custody outcomes will suffer accordingly.

iii. Gay Male Fathers as a Physical Threat

Of all the judicial arguments routinely considered by the bench before awarding a gay parent custody only two concern an actual, physical threat to the child: the fear of disease transfer and the fear of sexual abuse. It bears noting that both occur more often when gay male fathers are before the bench. Courts worried about potential disease transfer in 5% of the gay male father cases, but in none of the lesbian mother cases, a statistically significant difference.[252] They likewise expressed concern that a gay male father might sexually abuse his child in 5% of the gay male father cases, but in only 1% of the lesbian mother cases. A difference that, while not statistically

[249] While Professor Kim does not dwell on the distinction, her analysis makes clear that she also sees a powerful gender bias in the judicial tendency she describes; fathers who engage in non-marital sexual activity are quite clearly, in her estimation, less sexually salient to the judiciary than mothers who engage in non-marital sexual activity. (Kim, 2012b)

[250] *See* The Neutered Mother at 24 ("The sexuality (in the form of sexual conduct or orientation) of lesbian and gay parents now attracts greater judicial attention in the divorce context relative to that of heterosexual mothers").

[251] It should be clarified that this assessment applies only to *non-marital* heterosexual activity. In Professor Kim's formulation, when mothers remarry courts do not consider their subsequent (marital) sexual activity salient (Kim, 2012b) This begs the question, now that same-sex marriage is legal nationwide will courts likewise consider non-heterosexual marital sexual activity "sexually neutral." This is an important question that should be addressed as data become available.

[252] Courts described gay male fathers divorcing a heterosexual spouse as a disease concern at a significantly higher rate than comparable situated lesbian mothers (p=0.01).

significant, still serves as evidence of elevated concern.[253] Taken together these data suggest a judicial perception of the gay male father as a physical threat to the child, while the lesbian mother is not so viewed.

Both of these concerns have historic roots. Gay males, for example, have long been perceived as sexual abuse threats (Herek, 1991; Herek & McLemore, 2013; Jenny et al., 1994; Madon, 1997a; Rosky, 2008). In the early 20th century gay males were commonly referred to as "wolves," reflecting their assumed proclivity to prey upon young, unsuspecting men (who were themselves routinely referred to as "chickens" or "lambs") (Canaday, 2011).[254] Educational films warned students of predatory gay males throughout the 1960's,[255] and Anita Bryant frequently deployed this stereotype during her 1977 campaign to overturn Dade County, Florida's anti-gay discrimination ordinance.[256] In more recent times, this slur regularly surfaced during the same-sex marriage debates of the early 2000s (Cameron & Cameron, 1996; Sprigg, 2012).

Gay men have also historically been associated with disease. In the early 20th century, military recruiters believed that male homosexuality could be identified by outward signs of disease.[257] They likewise believed that gay males were likely to suffer from venereal disease and other "loathsome ailments," a belief widely shared by physicians and policy makers of the day (Brandt, 2020; Canaday, 2011; Lydston, 1906). The recent H.I.V. crises only exacerbated this tendency. H.I.V. was widely considered a gay male disease throughout the final decades of the twenty-first century, and it is still considered a predominately gay male disease even today (Herek, 1994; Herek & McLemore, 2013).

Both of these stereotypes are also explicitly present within Dataset One. Consider this notorious excerpt from the 1980's, wherein the court dismissed expert testimony on the matter in lieu of the "common knowledge" that gay males are "probably" more prone to sexual abuse than heterosexual males:

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[253] Statistically one can state that these incidences truly differ at the population level with 89% confidence (p=0.11) while convention requires 95% confidence (p=0.05) to be considered "significant."

[254]Similar imagery was used to support police harassment of gay individuals throughout the 1940s and 50s (Freedman, 1987). (Freedman, 1987)

[255] For an example of this genre, see the notorious 1961 film "Boy's Beware." This film featured a series of cautionary tales depicting gay men as sexual predators, pedophiles and hebephiles. BOYS BEWARE, http://www.imdb.com/title/tt0259898/ (last visited Dec 20, 2018). This film was originally produced in 1961 but was reproduced in 1973 and 1979. Records indicate that it was widely distributed throughout the duration of this period. The original can still be viewed, in its entirety, at https://www.youtube.com/watch?v=fTn7ALbLYPI. Films such as these continued in wide circulation well into more recent decades. Two such films, "The Gay Agenda" and "Gay Rights, Special Rights," appeared in church screenings and cable television throughout the 1990s. Both discussed pedophilia alongside images of gay parents. BRIEF OF THE ORGANIZATION OF AMERICAN HISTORIANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[256] "[A] particularly deviant-minded [gay] teacher could sexually molest children" (Bryant, 1977; Nussbaum, 2010).

[257] In the early 20th century it was quite common to believe that gay males could be identified by their (allegedly) diseased and frail bodies (Canaday, 2011; Lydston, 1906). (Canaday, 2011; Lydston, 1906)

> The experts' testimony with respect to molestation of minors is likewise suspect. Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated. … It may be that numerically instances of molestation occur with more frequency between heterosexual males and female children, but given the statistical incidence of homosexuality in the population, which the father claims is 5 to 10%, homosexual molestation is *probably*, on an absolute basis, more prevalent (emphasis added). [258]

Or this argument from an Indiana appellate court, denying a gay male father custody at least partially because he could, theoretically, transfer H.I.V. to a child by extracting the child's tooth:

> [I]t is theoretically possible for a parent to infect a child with the AIDS virus while extracting a child's tooth. Under these circumstances, a parent "might" infect his child with AIDS. Because the statute clearly invests the trial court with a broad discretion in this area, I believe the trial court did not manifestly abuse its discretion by denying appellant his visitation rights under these circumstances.[259]

What might get lost in the recitation of these well-known slurs is the degree to which they are both intersectional, representing an interaction of anti-gay and anti-male stereotypes.[260] Gay males and lesbian women alike have both long been seen as "hypersexual," overly fixated on and overly expressive of their own sexuality (K. J. Anderson, 2009). Scholars note that they are routinely accused of "flaunting" or stressing their sexuality.[261] They are also assumed to fixate on sexuality more than heterosexuals, and to place sexual satisfaction at a higher priority than their heterosexual peers (K. J. Anderson, 2009; Herek, 1991).

Men, on the other hand, have always been seen as more aggressive, promiscuous, physically violent, and risk seeking than women (Connell, 1992; Herek, 1986; Kimmel, 2004; Levit et al., 2011). The stereotype of gay males as a sexual abuse threat can thus be seen as a result of the anti-gay slur that gay parents are hypersexual, interacting with the anti-male slur that men are overly aggressive, risk seeking and prone to physical violence.

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[258] J.L.P. v. D.J.P., 643 S.W.2d 865 (Mo.App. W.D. 1982)

[259] Stewart v. Stewart, 521 N.E.2d 956 (In.App. 1988).

[260] It bears repeating that both of these judicial concerns are either empirically false or misguided. Gay males are no more likely to sexually abuse a child than heterosexual males (Herek, 1991; Jenny et al., 1994). Likewise there is no empirical support for the claim that the children of gay parents are more likely to contract disease (Ball & Pea, 1998; Herek, 1991; Stacey & Biblarz, 2001).

[261] The inner workings of this stereotype are complicated and well beyond the scope of this article. For reference see Professor Kim's observation that non-heterosexual expression is simply more salient to the general public, thus allowing homosexual expressions to appear over the top when they are, in fact, equivalent to many heterosexual expressions that are considered mundane (Kim, 2012a). *See also* Rubin's analysis of the sexual hierarchy, arguing that non-heterosexual sexuality simply attracts more interest (and condemnation) than heterosexual sexuality (Rubin, 1984).

This interaction also contributes to the stereotype that gay men are more likely to be physically diseased. It stands to reason that a hypersexual (gay stereotype), aggressive and risk seeking individual (male stereotype) would also be more likely to contract a contagious, sexually transmitted disease.[262]

The intersectional nature of these slurs is further demonstrated by the fact that they by and large do not apply to lesbian women. 20th century military recruiters did not generally associate lesbian women with venereal disease and "loathsome ailments" (Canaday, 2011). Nor did policy makers and physicians (Canaday, 2011). H.I.V. was likewise not associated with lesbian women, and recent public opinion surveys confirm that disease in general is still not widely associated with lesbian women (Herek, 1991; Nussbaum, 2010; Rosky, 2008). Lesbian women have also never been strongly associated with the threat of sexual abuse (Herek, 2002; Madon, 1997a; Rosky, 2008).

These data indicate that the judiciary shares this unique, intersectional bias. Once again, courts worried about potential disease transfer in 5% of the gay male father cases, but in none of the lesbian mother cases, a statistically significant difference.[263] And they expressed concern that a gay male father might sexually abuse his child in 5% of the gay male father cases, but in only 1% of the lesbian mother cases. [264]

c) Conclusion

When Kimberle Crenshaw first outlined the concept of intersectionality she did more than simply highlight the fact that multiply marginalized persons often suffer unique bias. She highlighted the fact that less privileged members of a bias interaction often suffer unique biases that escape notice (Crenshaw, 1989).[265] The black, female employees in *DeGraffenreid v. General Motors* faced unique discrimination as black women, certainly. But they were without remedy because racial discrimination had been framed from the perspective of black men while gender discrimination had been framed from the perspective of white women. Their unique discrimination was obscured from view and erased from legal salience (Crenshaw, 1989).[266]

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[262] Paul Cameron's (notorious) work exemplifies the tendency for the hypersexual and risk seeking stereotypes to blend into the notion that gay males are likely to be physically diseased; note how Cameron quickly slips from risky sexual excess to disease threat in his analysis of gay male behavior: "homosexuals are more apt to engage in highly risky and biologically unsanitary sexual practices …. as a consequence of this activity, they increase their chances of getting AIDS and other sexually transmitted or blood-borne diseases" (*What Causes Homosexual Desire - Dr. Cameron*, n.d.).

[263] Courts described gay male fathers divorcing a heterosexual spouse as a disease concern at a significantly higher rate than comparable situated lesbian mothers (p=0.01).

[264] Statistically one can state that these incidences truly differ at the population level with 89% confidence (p=0.11) while convention requires 95% confidence (p=0.05) to be considered "significant."

[265] DeGraffenreid v. General Motors, 413 F. Supp. 142 (E.D. Mo 1976).

[266] In this instance, of course, "erased from legal salience" is meant literally. As black women they were unable to plead a viable claim of race discrimination because the employer at issue had a history of hiring black men, and unable to plead a viable claim of gender discrimination because the employer had a history of hiring white women (Crenshaw, 1989). DeGraffenreid v. General Motors, 413 F. Supp. 142 (E.D. Mo 1976).

In this analysis we see a similar effect. The mitigation and discussion of orientation bias has traditionally been framed from the context of the gay male. While the mitigation and discussion of gender bias has traditionally been framed from the context of the straight woman (Crenshaw, 1989; Hooks, 1990). Through an analysis of orientation bias across gender, this paper highlights not only that gay men and lesbian women face different, unique biases during the adjudication of custody, but also that the least privileged members of that intersection, lesbian women, face unique biases that have heretofore escaped notice.[267]

To review, these data indicate that when gay male fathers and lesbian mothers adjudicate custody they do, in fact, face unique biases from the bench (as a plurality of the interview respondents predicted). Gay male fathers elicit significantly more judicial concern of disease transfer (to the child) than lesbian mothers. They also elicit more concern that they might sexually abuse their child, though the difference on this point did not rise to the level of strict statistical significance. Taken together these data suggest a judicial perception of the gay male father as a physical threat to the child, while the lesbian mother is not so viewed.

This finding is not particularly surprising. Both stereotypes, the gay male as sexual predator and the gay male as diseased, have long histories,[268] and they have been noted in the analyses of gay male custody adjudication before (Herek, 1991; Rosky, 2008). They also neatly align with a bias interaction that is in some ways to be expected. Gay male fathers approach the bench as gay individuals and thus they face a perception that they are hypersexual (K. J. Anderson, 2009). But they also approach the bench against a backdrop of masculine gender expectations, and thus they are suspected of being aggressive, physically violent and risk seeking (Connell, 1992; Herek, 1986; Kimmel, 2004; Levit et al., 2011). It is not completely surprising that individuals perceived as hypersexual, aggressive and physically violent are also perceived as potential sexual abuse threats. Likewise, one might expect a parent perceived to be both hypersexual and risk seeking to arouse concerns that they might catch a contagious disease.

Lesbian mothers, of course, were also found to face a unique set of intersectional biases. Lesbian mothers who divorce a heterosexual spouse were routinely described as selfish by the court while comparable gay male fathers were not. They were also described as unstable by the court while gay male fathers were not. These findings, however, were not expected. To this author's knowledge there is no previous analysis of orientation bias in custody adjudications that has highlighted these specific intersectional concerns.

But an analysis of the case law, alongside the first person interviews discussed in Chapter 3, offers a convincing explanation: lesbian mothers who divorce from heterosexual families also do so against a backdrop of gendered expectations. The assumption that mothers prioritize family over sexual fulfillment, normally an advantage in custody proceedings (Artis, 2004; Blair-Loy,

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[267] Once again, the term "privileged" may not be the most appropriate in this context, though it is a term frequently called upon to denote the concept at hand. Gay male fathers in custody adjudications are certainly not "privileged" in the common sense of the word. Without question they suffer prejudice and stereotype in this arena that is both offensive and detrimental to their outcomes. But they are privileged in a very narrow sense. The discussion and mitigation of orientation inequality is typically framed from the gay male perspective, and thus the experience of lesbian women is often obscured.

[268] There is a long history of perceiving gay males as sexual abuse threats. (Herek, 1991; Herek & McLemore, 2013; Madon, 1997b; Rosky, 2008) And a long history associating gay males with disease. (Brandt, 2020; Canaday, 2011; Lydston, 1906; Nussbaum, 2010)

2001; Dow, 2016; Gerson, 1986; Hays, 1998; Kim, 2012b; D. E. Smith, 1993; Thompson, 2002; Uttal, 1999; Weisberg, 1995), operates to the disadvantage of lesbian mothers who divorce from heterosexual families. They are seen as selfish for pursuing their own sexual fulfillment at the expense of familial cohesion while gay male fathers are occasionally seen as self-actualized for the same behavior. Courts also perceive these mothers as unstable because they appear to contradict their essential nature as mothers.

Most interesting is the fact that these unique, intersectional biases have not been recognized before, at least by the academy. Crenshaw's observation that the least privileged members of a bias interaction are often ignored remains prescient (Crenshaw, 1989).

This analysis also offers meaningful insight on disparate outcomes. As stated earlier, while the impact of gender bias on custody outcomes has been studied extensively (Bahr et al., 1994; Chesler, 1991; Lemon, 1981; Maccoby & Mnookin, 1992; Nickerson, 2000; Polikoff, 1981; Swent, 1996; Warshak, 2011; Weitzman & Dixon, 1979b), the intersectional impact of gender and sexual orientation on *custody outcomes* has not been previously examined. These data reveal that, in the case law available through Westlaw and Lexis, gay male fathers and lesbian mothers have been denied custody at exactly the same rate when they contest custody against a heterosexual spouse. They have also suffered the imposition of visitation restrictions at a near equivalent rate when they contest custody against a heterosexual spouse.

At first glance these data appear to indicate that gay male fathers and lesbian mothers have suffered the burden of anti-homosexual bias, at least in terms of outcomes, equally. But when placed in a larger context these data take on an entirely different meaning. Mothers traditionally receive custody at a substantially higher rate than fathers (Bahr et al., 1994; Lemon, 1981; Nickerson, 2000; Swent, 1996).[269] Thus these data actually indicate that, rather than an equivalence of suffering, lesbian mothers have born a heavier burden than gay male fathers, at least when compared to their heterosexual peers. The long-held assumption that mothers are inherently superior caregivers appears to disappear once the heterosexual context is removed.

Gender of the child: the moral sex

In the previous section, I examined how parental gender impacted these adjudications. In this section I examine the impact of gender from another angle, the gender of the child at issue. Do judicial conceptions of "the daughter" or "the son" shape the adjudication of gay male or lesbian custody rights?

Once again, there is reason to suspect that the gender of the child matters. During the interview portion of this project, 17% of interview respondents believed that the contested child's gender shaped the biases they confronted. Many respondents also mentioned biases that arose only in the context of a particular gender pairing. For example, several respondents highlighted role modeling concerns that arose only when a gay mother fought for custody of a daughter, or when a gay father fought for custody of a son. Respondents also noted biases specific to the gender of the

[269] But there is some debate on this point. Some scholars agree that mothers remain preferred for custody but disagree as to why; they argue that the low percentage of custody awards to fathers reflects disinterest on their part rather than judicial bias. (Chesler, 1991; Maccoby & Mnookin, 1992; Polikoff, 1981; Weitzman, 1985; Weitzman & Dixon, 1979b) For a thorough summary of this debate see *Parenting by the Clock,* at 92 – 93 and especially footnotes 34 and 35 (Warshak, 2011).

child itself, biases based on judicial conceptions of "the daughter" or "the son." They noted that judges assumed sons would be more unaccepting and combative,[270] while daughters would be more fragile.[271]

There are also reasons to suspect that courts will value the development of "traditional," masculine men more than the development of "traditional," feminine women, and thus display more reluctance to award sons to gay parents than daughters. Clifford Rosky's analysis of gay parental custody cases found that courts expressed a greater fear of gender and orientation "recruitment" when sons were before the court (Rosky, 2008). Likewise, Sedgwick argues that psychology (and the wider culture in general) has always displayed more concern over the development of homosexuality in men than the development of homosexuality in women. Accordingly I predict that courts will be more likely to deny custody when sons are at issue. I likewise predict that courts will express more concerns of orientation and gender modeling when sons are before the court.

a) Results: Custody Outcomes

It has already been established in Chapter 6 that, within judicial decisions available through Lexis and Westlaw, gay male and lesbian parents have faced substantial anti-homosexual bias over the last several decades. In the 66 year period from 1951 to 2017, gay male and lesbian parents lost custody contests to heterosexual parents at a rate of 64%, a difference in outcomes that is statistically significant (p=0.000).[272]

The present analysis demonstrates that the gender of the child matters greatly in these contests. Most notably, courts have been less willing to place daughters into gay male and lesbian hands than sons. When daughters were at issue, gay male and lesbian parents found themselves on the losing end of custody contests 74% of the time, while they failed to secure the custody of their sons at a mere 49% rate. This difference in denial rates is statistically significant (p=0.014).[273]

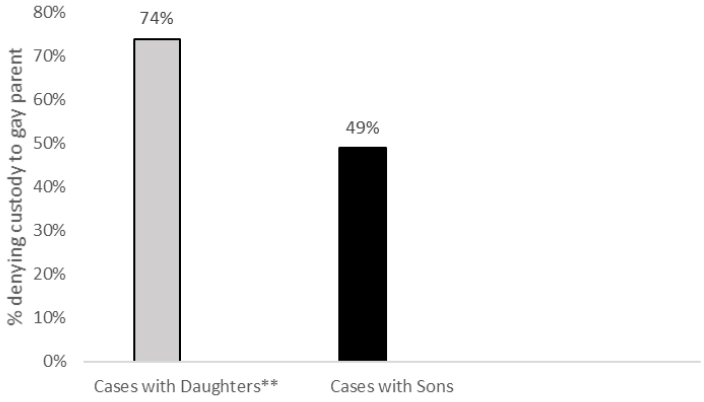
[270] One attorney who has handled many of these cases noted, "[Y]ou could say they expected more acting out from the boys."

[271] An attorney with experience in these matters noted, "It's hard to say. Sometimes I just think they see the girls as delicate. You know, fragile. Especially the young ones."

[272] This statistic was generated by conducting a two-sample t-test for proportions. Thus the null hypothesis is that gay male or lesbian parents and heterosexual parents faced the same denial rate (50% each).

[273] In addition, this disparity does not appear to be the byproduct of older social norms regarding gender. Courts were substantially less likely to place daughters into gay male or lesbian hands before 1995, and they were substantially less likely to do so after 1995. In fact, these data indicate that the reluctance to award daughters to gay male and lesbian parents, relative to sons, has remained remarkably constant; 1951 - 1995: : $n_{daughter}$=21, n_{son}=22, statistical probability that the difference in allocation rates arose by chance: p=0.065; 1996 - 2017, : $n_{daughter}$=22, n_{son}=23; statistical probability that the difference in allocation rates arose by chance: p=0.095.

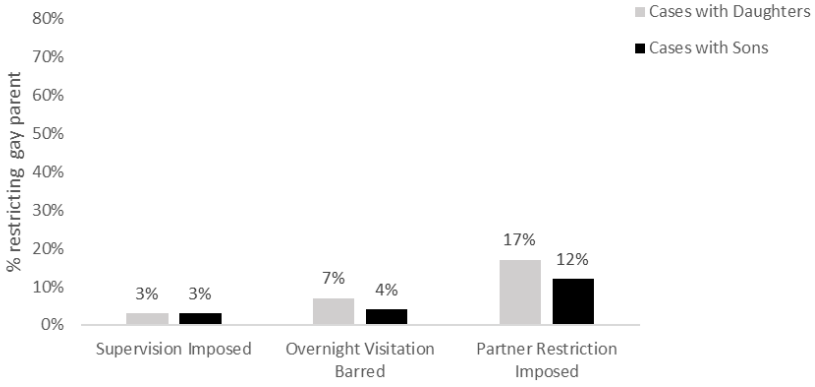
Figure 1.
Custody denial rates for gay parents by gender of the child contested



Note. *$p<.05$, **$p<.01$, ***$p<.001$. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212). Cases with both daughters and sons were dropped (n=140).

The gender of the child contested did not *significantly* impact the tendency to apply visitation restrictions though there was a discernable pattern. Specifically, cases with daughters received more visitation restrictions than cases with sons (daughter: 17% partner, 7% overnight; son: 12% partner, 4% overnight) with the sole exception of supervision orders which were applied to both cohorts more or less equally (3% imposition rates for both daughters and sons).

Figure 2.
Visitation restrictions imposed on gay parents by gender of the child contested



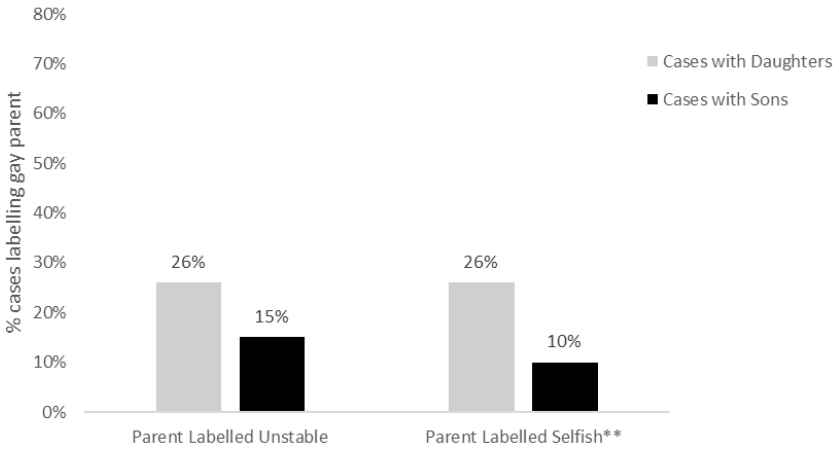
Note. *$p<.05$, **$p<.01$, ***$p<.001$. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212). Cases with both daughters and sons were dropped (n=140). No difference was statistically significant.

b) Results: Judicial Perceptions

Judicial perceptions of the gay parent differed dramatically by gender of the child. Courts have been significantly more likely to label a gay parent selfish for divorcing a heterosexual parent when the child at issue was a daughter (26% rate for cases with daughters compared to a 10% rate

for cases with sons; p=0.0142). There were likewise more likely to label a gay parent unstable when the child at issue was a daughter, though this disparity was not significant (26% rate for cases with daughters compared to a 15% rate for cases with sons; p=0.09).

Figure 3.
Judicial perception of gay parents by gender of the child contested

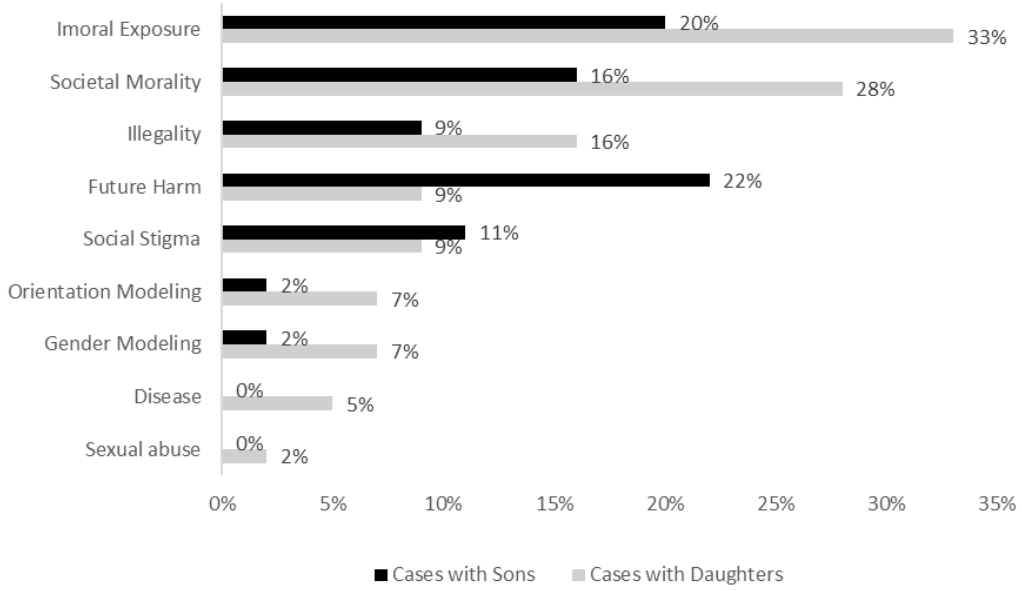


Note. *$p<.05$, **$p<.01$, ***$p<.001$. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, n=212). Cases with both daughters and sons were dropped (n=140).

c) Results: Arguments Against Gay Parental Fitness

This chapter also examines the judicial arguments against gay male and lesbian parental fitness, and once again the gender of the child at issue clearly matters. Courts express notably different concerns when gay male or lesbian parents seek the custody of a daughter as opposed to a son. When daughters are at issue, courts have been dramatically more concerned with immoral exposure, societal morality and the historic illegality of same-sex intimacy. When sons are at issue courts have less concern in almost every category, with the notable exception being concern for "unidentified future harms." This (vague) concern spikes dramatically when sons are at issue.

Figure 4.
Judicial arguments against gay parental fitness by gender of the child contested



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, *n*=212). Cases with both daughters and sons were dropped (*n*=140).

d) Discussion

These data indicate that the gender of the child matters when gay male or lesbian parents contest custody, but in an unexpected way; courts have been less willing to place daughters into gay parental custody than sons. They have also been more willing to restrict the visitation rights of gay parents when daughters are at issue, and the overall judicial perception of gay parents as selfish and unstable is noticeably more pronounced when the custody of a daughter is before the court.

These data also demonstrate that courts have particular concerns when daughters are at issue. They are more concerned with the child's exposure to immorality, and they place a greater emphasis on prohibitions against same-sex sex and same-sex marriage, both legal prohibitions and the prohibitions of traditional morality, when the custody of daughters is at stake.

But while these data are informative they do not fully explain the inner-workings of the phenomena uncovered or place them alongside the related literature. What does the raw custody allocation data really tell us? What is it precisely about the judicial view of young women that has rendered these courts less willing to place them into gay male or lesbian hands? Why is it that courts are more concerned with immoral exposure and prohibitions against same-sex sex intimacy when daughters are at issue? And how do these data speak to previous scholarship that highlighted a judicial impulse to protect the development of masculine sons in these cases?

i. Placing these data alongside previous scholarship

It is useful to place these data alongside previous literature on the topic. As noted earlier, previous scholarship suggested a judicial tendency to prioritize the masculine development of sons.

Clifford Rosky noted an uptick in the presence of two homophobic stereotypes in these cases: the "recruiting" stereotype and the "role modeling" stereotype. In short, he noted that judges, litigants and their experts appeared to worry more about recruiting or role-modeling young men into homosexuality than recruiting or role-modeling young women into homosexuality. He concluded that judges, litigants and their experts valued the preservation of heterosexual masculinity more than the preservation of heterosexual femininity (Rosky, 2008). This argument also loosely comports with an overall perception that society, on average, demonstrates a patriarchal bias; given society's assumed prioritization of men over women, it makes sense that society in general (including the courts) would protect the development of traditional, "masculine" men in these cases by keeping them from the non-traditional parent.

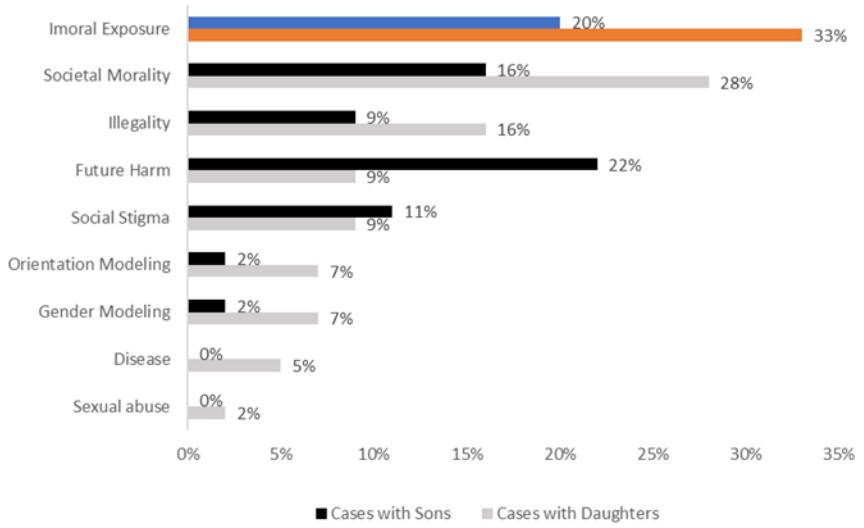
Data from this chapter may appear to contradict those conclusions but on closer inspection they do not. While it is true that the present analysis reveals an even greater aversion towards placing young women into gay male or lesbian hands than young sons, that does not mean that courts were not also averse to placing sons into their hands. Indeed, these data also indicate that gay parents failed to secure the custody of their sons (when contesting against a heterosexual opponent) at a 55% rate through the year 1995. These data also reveal a tendency to apply partner restrictions when gay parents contest the custody of their sons at a rate (12%) far higher than the average rate of such restrictions when heterosexual parents are before the court (2%).

In short these data do not disprove a judicial tendency to protect the masculine development of young sons in custody cases, rather these data reveal a separate, perhaps deeper tendency, to police the moral development of young women. Both can be true simultaneously and the data generated here argues that they are.

ii. Policing the Moral Development of Young Women

These data reveal that one judicial concern routinely trumps others when a gay parent seeks the custody of a daughter: exposure to immorality. Courts voiced this concern in 33% of all cases featuring just a daughter. Of further note, courts have been far more concerned about exposing daughters to the immorality than sons. When sons are before the court, the judiciary has been notably less worried about exposing that son to the "immorality" of homosexuality.

Figure 5.
Policing moral development



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, *n*=212). Cases with both daughters and sons were dropped (*n*=140).

A close reading of the case law reveals even finer detail. It shows that courts were frequently concerned with shielding young women from one type of "immorality" in particular: the rejection of heteronormativity. Numerous cases make this fixation quite clear. Consider this opinion from the Alabama Supreme Court in 1998:

> Both the mother and G.S. have testified that they would not discourage the child from adopting a homosexual lifestyle. In short, the mother and G.S. have established a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage…[274]

The daughter's subsequent acceptance of this moral equivalency particularly irked the court. They noted several times that the daughter believed same-sex marriage to be the equivalent of heterosexual marriage.[275]

Consider also the Missouri Court of Appeals in *J.P. v. P.W.*, which took issue with a gay father for stating that he thought it would be beneficial to expose his daughter to "homosexual people" as well as "heterosexual people," because the daughter could then recognize both as part of a "broad spectrum . . . of human interaction:"

> He believes it would be a healthy and broadening influence upon the child's upbringing and development to be exposed to the alternate lifestyle of he and Reed.

[274] Ex Parte J.M.F., 730 So.2d 1190, 1195 (Al. 1998).
[275] *Id.* at 1192 ("The record contains evidence indicating that the child has remarked several times that girls may marry girls and that boys may marry boys.").

> He added, "It would allow her to see a broad spectrum, perhaps, of human interaction not just between heterosexual people, but also homosexual people."[276]

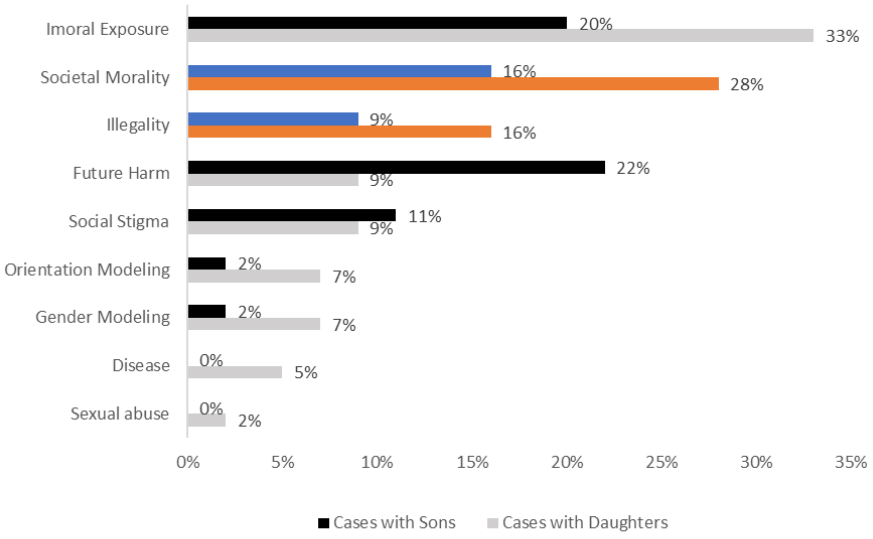
Or consider the Missouri Appellate Court in *N.K.M. v. L.E.M.* (1980), that chastised a lesbian mother's lover for "broach[ing] the idea of homosexuality" with the mother's young daughter, and for instructing her that "that homosexuality is a permissible life style-an 'alternate life style'..." The court subsequently expressed concern that this same lover was overheard saying, "If Julie is going to turn out to be a homosexual, that is her life, it's up to her."[277]

Examples of this moral concern are plentiful, but, as can be seen above, they all contain the same basic fear. The fear that a young daughter will be swayed into believing that homosexuality is the moral equivalent to heterosexuality or, put another way, the fear that a young daughter will reject heteronormativity.

iii. Highlighting the Outside Enforcement of Heteronormativity

These data also demonstrate that courts cite societal morality and the (then) illegality of same-sex sex and same-sex marriage more often when the custody of daughters is at issue. Once again, a careful reading of the case law shines a brighter light on these tendencies. It reveals that both of these concerns are often an expression of the same impulse: the need to stress outside prohibitions against same-sex intimacy to a greater degree when the custody of daughters is before the court.

Figure 5.
Highlighting the enforcement of heteronormativity



Note. Based on all published custody decisions featuring a gay parent opposing a heterosexual parent (1951-17, *n*=212). Cases with both daughters and sons were dropped (*n*=140).

When a court highlights the fact that same-sex sex or same-sex marriage are illegal, the court is clearly noting that the state both condemns and refuses to recognize the intimate lives of

[276] J.P. v. P.W., 772 S.W.2d 786, 788 (Mo. Ct. App. 1989).
[277] N.K.M. v. L.E.M., 606 S.W.2d 179, 185 (Mo.App. W.D. 1980).

the gay parents before the court. When a court highlights the fact that traditional morality condemns same-sex sex, the court is asserting the same point on behalf of society rather than the state. But reading the case law reveals the depth of this impulse. Often, the courts making these arguments do not simply mention them in passing, rather they present them as a quasi-lecture that extends several pages.

The Mississippi appellate decision *S.B. v. L.W* offers a good example.[278] In *S.B.*, the court did not simply mention the state's prohibition against same-sex marriage, it also mentioned the state's prohibitions against same-sex adoption, bestiality, and same-sex sex.[279] It then discussed, at length, similar prohibitions from Florida, New Hampshire, Colorado, Pennsylvania, and Wisconsin.[280]

Or consider the 2002 Alabama opinion *Ex. Parte H.H.*, where the concurrence, in the process of deciding a lesbian mother's custody rights, went beyond reference to the state's prohibition against same-sex sex and same-sex marriage.[281] It also mentioned the state's anti-gay educational curriculum, condemnations from William Blackstone, treatises on slander from the 1890's, the Bible's Genesis and Leviticus, Roman law, parliamentary edicts from the sixteenth century, natural law, Thomas Aquinas, and the writings of Sir Edward Coke, all in order to reinforce the point that influential sources have condemned same-sex intimacy, both legally and socially, for the majority of recent history.[282] The concurrence's lecture on this point ran for over ten pages.[283]

Expositions like these are common in the dataset for this chapter, and—as the excerpts above make clear—are not designed to merely cite authority for the court's disapproval of same-sex intimacy. They are designed to drive home a point—that the law and societal morality have condemned same-sex intimacy for several centuries. These expositions are an assertion of authority in support of heteronormativity. What is interesting for the purposes of this chapter is that they occur more frequently when daughters are before the bench.

iv. Placing These Results within the Broader Currents of Feminist Scholarship

In her canonical essay *Deconstructing Gender*, Joan Williams aptly describes the pre-modern conception of women as the "weaker vessel:"[284]

> Before the mid-eighteenth century, women were viewed not only as physically weaker than men; their intellectual and moral frailty meant they needed men's guidance to protect them from the human propensity for evil. Women's intense sexuality and their fundamental irrationality meant they were in need of outside control, because women in their weakness could be easily tempted. The darkest

[278] S.B. v. L.W., 793 So. 2d 656, 662 (Miss. Ct. App. 2001).
[279] *Id.* at 662 (Payne, J., concurring).
[280] *Id.* at 663.
[281] *Ex Parte* H.H., 830 So.2d 21, 26-38 (Ala. 2002) (Moore, C.J., concurring specially).
[282] *Id.*
[283] *Id.*
[284] For greater insight into the pre-modern stereotype of women as the "weaker vessel," see Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Antonia Fraser, THE WEAKER VESSEL (1984); Nancy F. Cott & Jonathan Trumbull, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 (1997).

> expression of the traditional view that women unsupervised quickly slipped into collusion with evil was the persecution (during some periods, massive in scale) of women as witches.[285]

Note the complexity of this stereotype. It purports that women are not just physically frail, but intellectually frail as well. Compared to men, women were deemed irrational and easily overcome by emotion. Thus, women were thought to lack the intellect and self-restraint to resist the siren song of evil. In this view, women needed guidance and "outside control" if they were to lead morally upright lives (J. C. Williams, 2018).

Williams argues that this conception of women changed in the modern era.[286] The rise of political liberalism and its tenet that all "men" are created equal clashed with the notion of the inferior woman.[287] Accordingly, the ideology of domesticity took hold. In this new schema, women remained physically and intellectually weaker than men but were newly heralded as inherently virtuous—"the moral sex."[288] Thus, they were no longer inferior, just differently abled and their inherent morality made them ideal for the domestic sphere of life.[289] They were also less well-situated for the coarse, and often ethically suspect, public sphere.[290]

The "separate spheres" ideology was, of course, a primary target of feminism's second wave. Feminists and activists from Betty Friedan to Ruth Bader Ginsburg built careers attempting to dismantle it.[291] But in the data analyzed in this chapter, we see a judicial impulse—perhaps an unconscious one—to cement this ideology into our legal system. If women are to remain in their sphere, if they are to fulfill the domestic role, then their moral character must be preserved. Operating under this premise, courts have been averse to placing daughters into environments that challenge society's traditional moral norms. It makes sense that they express especial outrage when gay parents teach their daughters to break or question those norms. And it makes sense that courts felt a greater need to stress the legal and cultural dictates undergirding those norms when daughters were before the court.

Given the prevailing societal norm that the woman's place was in the domestic realm, it is unsurprising that the judiciary reflected a similar view. Our legal system has repeatedly demonstrated its tendency to disproportionately police the moral behavior of women,[292] and it is similarly true that society perceives it as a serious threat to social norms when women challenge heteronormativity.[293] Liberal feminists may recognize this as yet another impulse to confine

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[285] Williams, *supra* note 155 at 804.
[286] *Id.* at 804-09.
[287] *Id.* at 806-07.
[288] *Id.* at 807.
[289] *Id.*
[290] *Id.*; Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920,* 89 AM. HIST. REV. 620, 620 (1984); Barbara Welter, *The Cult of True Womanhood: 1820-1860,* 18 AM. Q. 151, 153 (1966).
[291] BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism,* 63 HASTINGS L.J. 1267, 1286-96 (2011).
[292] *See* Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization,* 49 DEPAUL L. REV. 817 (2000).
[293] *See* Ruthann Robson, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992).

women to traditionally heterosexual domestic roles.[294] Dominance feminists may see these data as evidence of judicial reinforcement of the patriarchy by channeling women towards traditional heterosexual norms (MacKinnon, 1989). And critical and post-modern feminists may view this policing and channeling as yet another constraint on the rational agency of young women.[295]

e) Conclusion

In some respects, the findings of this chapter are counterintuitive in the face of the research upon which it builds. For instance, it will likely surprise many that these data uncovered evidence of a greater judicial reluctance to place daughters into gay parental custody than sons. But in other respects, the findings are not at all surprising. Courts, the law, and society in general have always policed women more than men. It follows that, because courts reflect prevailing social norms, their impulse when presented with a perceived challenge to heterosexual norms—at least when the custody of a daughter is before the court—is to channel that daughter towards heteronormativity.

In more specific terms, this paper argues that a judicial impulse to police the moral development of young women, especially as it relates to the development of heterosexual norms, has created a unique burden for gay male and lesbian individuals in the custody process. It has rendered courts averse to placing daughters into gay male or lesbian hands. It has likewise prompted courts to stress the outside control of sexuality and intimacy, both from the state and from the strictures of traditional morality, to a greater degree when daughters are at issue.

[294] Friedan, *supra* note 178.

[295] Kathryn R. Abrams, *Fighting Fire with Fire: Rethinking the Role of Disgust in Hate Crimes*, 90 CALIF. L. REV. 1423 (2002).

Chapter 8
Randomized, Controlled Experiment: Data and Methods

Part three of this dissertation consists of a randomized, controlled experiment. This examination of anti-homosexual bias is pursued primarily because it addresses gaps in the previous two methods. Textual analysis of the published case law cannot isolate orientation bias from the innumerable confounding variables that impact a custody decision. For example, questions of the parent's financial status, court room demeanor, parental history, personal stability (drug use, drinking, etc.), economic prospects and preference of the children differ markedly from one case to the next. While textual analysis is undoubtably valuable, it is limited in its ability to contribute to a persuasive case for or against the presence of orientation bias in these matters.

Although they have many benefits, semi-structures interviews can also present limitations. The samples in this study are, by necessity, small and potentially biased. As stated earlier, the sample for the interview portion of this analysis was acquired in a snowball fashion (known parents or lawyers with applicable experience recommended others), which entails geographic and (likely) ideological biases (lawyers that focus on these matters are likely to support orientation equality to a greater degree than the general public). Phone interviews also create issues of social desirability bias that are easier to overcome in an anonymous experiment.

Both methods also limit analysis of respondent characteristics, which can be central to a full understanding of bias. While a semi-structured interviews of a small sample allows for the collection of some basic characteristics (gender, general location, status as litigant or attorney), it is unable to acquire a vast number of relevant background traits. It is also limited in its ability to acquire relevant trait characteristics: in this case an individual's moral traditionalism, gender role beliefs, disgust sensitivity and sexual prejudice etc.

Experimental methods can be helpful in addressing the above limitations. Their controlled nature allows one to limit the influence of confounding variables. They also generally allow for a more rigorous collection of background characteristics and are thus better situated to measure the impact of theorized moderators. Despite these advantages, in this area of study experiments constitute a novel approach. To this author's knowledge, no previous study has ever addressed anti-homosexual bias in custody adjudications from an experimental perspective.

What follows is an analysis of orientation bias in custody matters based on a randomized, controlled experiment. This experiment is designed to address two objectives. The first is testing for the alleged existence of orientation bias in custody adjudications, it's disparate impact across gender, and an exploration of possible moderating variables. These questions will be addressed I Chapter 9. The second explores the possibility that disgust sensitivity, primarily towards gay men, fuels anti-homosexual bias in custody. This, second question will be addressed in Chapter 10.

Materials and Methods

a) Participants

I recruited 381 English speaking U.S. residents for an online survey through Amazon's Mechanical Turk (Mturk). Mechanical Turk has been shown to offer a diverse sample of respondents (Buhrmester et al., 2016), and well established research findings have been replicated through the use of Mechanical Turk (Berinsky et al., 2012). Respondents were paid for their work at a rate equivalent to Federal Minimum Wage ($7.25 an hour).

Thirty respondents were excluded for failing a manipulation check.[296] A further 44 respondents were excluded for failing an attention check built into the disgust sensitivity scale – revised. Of the 307 respondents that remained 153 identified as male (50%), 153 identified as female (50%) and 1 identified as other (0%). They reported an average age of 35 years (SD=10.44). Politically the sample leaned slightly liberal (M=3.2 on a 7 point scale, with 1 corresponding to "extremely liberal" and 7 corresponding to "extremely conservative"). The sample reported a higher than average level of education (81% had completed at least a 4 year degree)[297] and a habit of church attendance that roughly equaled the national average.[298]

The post-exclusion sample contained 78 replies to the gay male liaison condition, 77 replies to the lesbian liaison condition, 74 replies to the heterosexual male condition and 78 replies to the heterosexual female condition. An a priori power analysis using G*Power 3 software indicated that 82 respondents per condition were needed to detect a medium effect (ρ=.30) with adequate power (1-β=0.8) (Faul et al., 2007). Actual power, after greater than expected attrition from the attention and manipulation checks, was still sufficient to detect a medium effect (ρ=.31) with adequate power (1-β=0.8) (Faul et al., 2007).

b) Materials

Vignettes. All respondents received one of eight vignettes, each describing a dispute common to family courts: a motion to modify an existing child custody agreement that involves the evaluation of one parent's post-divorce sexual behavior. Respondents were told that two divorced, opposite-sex parents shared the custody of their six year-old child equally, meaning that the child spent half the year with parent one, and half the year with parent two. Respondents were next told that one parent is now engaged in a romantic liaison with a new partner and that this newly dating parent is "making out" and caressing their new partner in front of the child. The new lover is also staying overnight while the child is in the newly dating parent's custody. In addition, they have audible sex at night and the child's bedroom is directly across the hall.

Finally, respondents were told that the non-dating parent believes that the newly dating parent's behavior is harmful and confusing to their child. The non-dating parent thus petitions the court for full custody of the child (custody removal from the dating parent). The non-dating parent also requests two restrictions to the newly dating parent's visitation rights. Specifically, the non-dating parent asks that the dating parent's significant other to be barred from visitation hours (partner restriction). The non-dating parent also asks that the newly dating parent not be allowed to visit the child overnight (overnight restriction). Respondents are then asked to decide the matter as if they were the judge overseeing the case. They are further instructed to decide the matter according to the child's best interest, not the parent's best interest, in accordance with the prevailing legal standard (L. J. Johnson, 2004; Warshak, 2011).

The vignettes differed randomly on three variables, the orientation of the liaison (heterosexual or homosexual), the gender of the newly dating parent (male or female) and the

[296] All analyses were calculated without excluding participants who failed the manipulation check and the results did not significantly alter any pertinent results on the dependent variables.

[297] According to the U.S. census, approximately 33.4% of Americans had at least a bachelor's degree as of 2017 (Bureau, n.d.)

[298] 50% of the sample reported attending church "a few times a year or less," which is nearly equivalent to the percentage reported by Pew in 2019 (54% reported attending church "a few times a year or less" in 2019) (G. Smith et al., 2019).

gender of the child (male or female). The gender of the child was included for exploratory purposes and these responses were collapsed after confirming that the child's gender did not significantly alter any pertinent results on the dependent variables (*See* Appendix B). This study thus contained a between-subjects design with four conditions (heterosexual male liaison, heterosexual female liaison, gay male liaison condition and lesbian liaison condition).

Dependent Variable One (Partner Restriction). Respondents were first asked if they would limit the newly dating parent's visitation rights by prohibiting the presence of the newly dating parent's new romantic partner during visitation with the child. Respondents were presented with a six point Likert scale that contained three "limit the partner's presence" options and three "do not limit the partner's presence" options, gradated by degree of likelihood in order to measure the strength of their conviction (*extremely unlikely, moderately unlikely, slightly unlikely, slightly likely, moderately likely, extremely likely*). A six point scale was chosen to mimic the actual work of a judge, who cannot select a "middle option" but rather must make a binary choice.

Dependent Variable Two (Overnight Restriction). Respondents were next asked if they would limit the newly dating parent's visitation rights by prohibiting the parent from visiting the child overnight. Respondents were again presented with a six point Likert scale that contained three "limit" options and three "do not limit" options, gradated by degree of likelihood in order to measure the strength of their conviction (*extremely unlikely, moderately unlikely, slightly unlikely, slightly likely, moderately likely, extremely likely*).

Dependent Variable Three (Custody Removal). Finally, respondents were asked how likely they would be to grant the petitioning parent full custody of the child (removing custody from the newly dating parent). Respondents were again presented with a six point Likert scale that contained three "remove custody" options and three "do not remove custody" options, gradated by degree of likelihood in order to measure the strength of their conviction (*extremely unlikely, moderately unlikely, slightly unlikely, slightly likely, moderately likely, extremely likely*).

Following these questions respondents were also asked five additional questions to gather data for a separate project (See Appendix C).

Diversionary Tasks. Respondents next received two diversionary tasks designed to dissipate any state level disgust that the vignette may have generated. Respondents were asked to create at least three words from the letters in "sycamore," "postage," and "airplane." Respondents were then asked to complete a simple word fragment task: completing five incomplete words. These steps were taken out of an abundance of caution. The disgust sensitivity measure chosen for these studies, the disgust sensitivity scale revised, is not thought to reflect state-level disgust (Jones & Fitness, 2008) and state-level disgust is thought to be short lived once the disgust elicitor is removed (Jones & Fitness, 2008; Scherer & Wallbott, 1994). Nonetheless, in an effort to minimize the possibility of contamination it was considered wise to dissipate any disgust that might be present. The disgust sensitivity measure has also been separated from the vignette as much as possible (the disgust sensitivity measure follows two additional measures that should not generate disgust).

ANES Moral Traditionalism Scale. To assess adherence to traditional moral beliefs, all respondents completed the four item Moral Traditionalism Scale employed by the American National Election Study since 1986 (W. Miller, 2012). Respondents were asked whether they agree or disagree with four statements on a five point scale (*Disagree strongly, Disagree somewhat, Neither agree not disagree, Agree somewhat, Agree strongly*).

Gender Role Beliefs Scale (Short). Respondents' adherence to traditional gender role beliefs was next assessed via the short version of the Gender Role Beliefs Scale, a recently

developed ten item measure that measures gender role beliefs on a 7-point scale (J. Brown & Gladstone, 2012).

Disgust Sensitivity Scale Revised. Pathogenic Disgust Sensitivity is next assessed via the Disgust Sensitivity Scale Revised (DS-R), a modified version of the original Disgust Sensitivity Scale developed by Haidt, McCauley and Rozin in 1994. The DS-R consists of 25 items and 2 attention checks. It measures disgust sensitivity across three domains on a five-point scale: core (12 questions), animal-reminder (8 questions) and contamination (5 questions) (Haidt et al., 1994b; Olatunji et al., 2007). This measure is specifically chosen because it focuses on pathogen-related avoidance, excluding avoidance related to sexual or moral concerns (Kiss et al., 2020; Olatunji, 2008; J. M. Tybur et al., 2009; Van Overveld et al., 2010). Disgust sensitivity scores derived from this scale have also been shown to possess an insignificant correlation with trait based anger (Jones & Fitness, 2008), which has been theorized to confound studies of disgust and its relationship to judgment (Giner-Sorolla et al., 2012a, 2018; Pizarro et al., 2011).

Sexual Prejudice Measure. Attitudes towards lesbians and gay males was measured using Gregory Herek's Attitudes Towards Lesbians and Gay Males scale (short version). This measure consists of ten items and assesses attitudes towards gay males and lesbian women (Herek, 1988).

Manipulation Check. Next respondents were presented with a manipulation check. The manipulation check asks for the name of the newly dating parent (Jason or Kathy). This check confirms that the respondent remembers the gender of the newly dating parent and, by extension, the orientation of the liaison.

Individual Measures. A variety of individual measures were captured. Respondents were asked for their gender (male, female or other), age and level of education. Their socio-economic status was assessed by requesting their parents' level of education, and their religiosity was assessed by asking how often then attended religious services (Fisher et al., 1994). Finally, their political leanings were assessed via a single item measure borrowed from the National Election Survey. Reponses to this item were measured on a 7-point Likert scale (*extremely liberal, liberal, slightly liberal, middle of the road, conservative, slightly conservative, extremely conservative*) (Knight, 1999).[299]

Conclusion. At the conclusion of the instrument respondents received a debrief. They were then thanked for their time and paid the agreed upon wage.

[299] Measures of education, socio-economic status religiosity and political ideology were treated as an ordinal approximation of continuous variable for the purpose of analysis (D. R. Johnson & Creech, 1983; Norman, 2010; G. M. Sullivan et al., 2013; Zumbo & Zimmerman, 1993). For the purpose of analysis gender was treated as a binary, categorical variable, excluding the single respondent who selected "other" for this measure.

Chapter 9

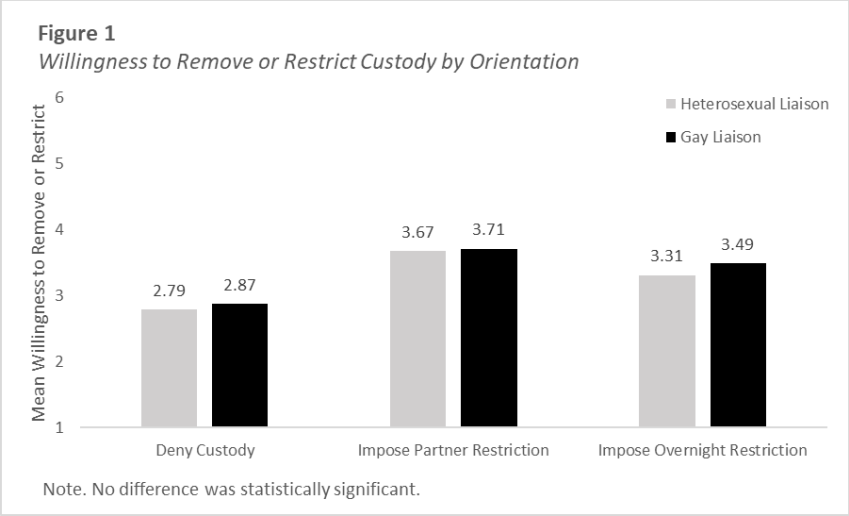
Experimental Results: Orientation Bias in Custody Adjudications and its Alleged Moderators

In this chapter I utilize a randomized, controlled experiment to test the general hypothesis that gay parents face an orientation bias when adjudicating custody before the bench. I then test for a disparate effect across parental gender by testing for anti-homosexual bias against fathers and mothers separately. Finally, I perform an exploratory analysis by testing the moderating impact of six respondent characteristics: gender, age, education, socioeconomic status, religiosity and political ideology.

Results: Anti-homosexual Bias

H_1: Respondents presented with the homosexual liaison condition will be more willing than those presented with the heterosexual liaison condition to deny custody and restrict visitation.

I first tested for the differential treatment of the homosexual liaison condition through the use of three, separate independent-samples t-tests (comparison of means). While it was hypothesized that the homosexual liaison condition would fare worse on all three dependent variables no significant difference was uncovered (removal of custody: p=0.660, partner restriction: p=0.804, overnight restriction: p=0.322; $n_{homosexual}$ = 180, n_{hetero}=179).[300]



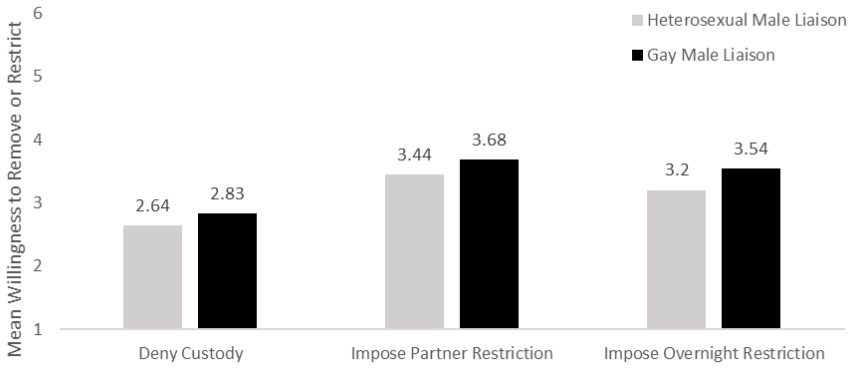
H_2: Respondents presented with the male liaison condition will be more likely to deny custody and restrict visitation when the liaison is homosexual.

[300] These results did not materially change if respondents who failed the manipulation check were included (removal of custody: p=0.650, partner restriction: p=0.609, overnight restriction: p=0.351; $n_{homosexual}$ = 191, n_{hetero}=190).

A within-gender examination of the male liaison condition led to similar results. While it was hypothesized that respondents would be more willing to remove custody and restrict visitation in the gay male liaison condition than the heterosexual male liaison condition, there was no significant difference across orientation (removal of custody: p=0.471, partner restriction: p=0.331, overnight restriction: p=0.181; $n_{gaymale}$=93, $n_{heteromale}$=86).[301]

Figure 2

Willingness to Remove or Restrict Custody by Orientation in Male Condition



Note. No difference was statistically significant.

H_3: Respondents presented with female liaison condition will be more likely to deny custody and restrict visitation when the liaison is homosexual.

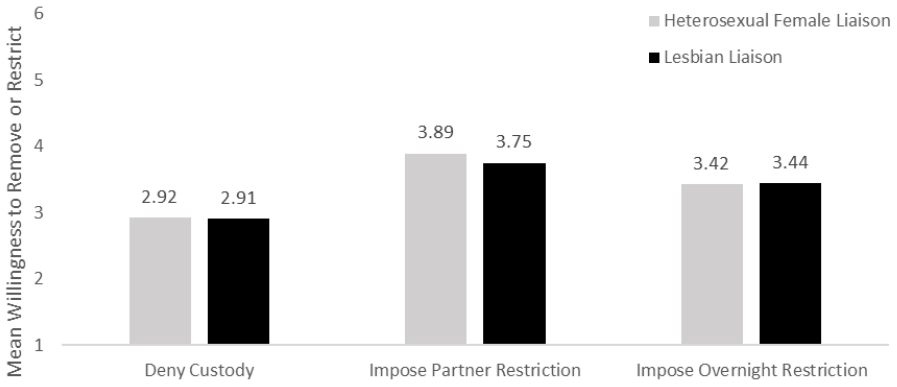
And finally, a within-gender examination of the female liaison condition reached the same conclusion. While it was hypothesized that respondents would be more willing to remove custody and restrict visitation in the lesbian liaison condition than the heterosexual female liaison condition, there was no significant difference across orientation (removal of custody: p=0.946, partner restriction: p=0.542, overnight restriction: p=0.945; $n_{lesbian}$ = 87, $n_{heterofemale}$=93).[302]

[301] These results did not materially change if respondents who failed the manipulation check were included (removal of custody: p=0.978, partner restriction: p=0.386, overnight restriction: p=0.372; ; $n_{gaymale}$=94, $n_{heteromale}$=96).

[302] These results did not materially change if respondents who failed the manipulation check were included (removal of custody: p=0.540, partner restriction: p=0.823, overnight restriction: p=0.676; $n_{lesbian}$ = 97, $n_{heterofemale}$=94).

Figure 3

Willingness to Remove or Restrict Custody by Orientation in Female Condition



Note. No difference was statistically significant.

Results: Moderator Analysis – Orientation Bias

H_4: There will be an interaction effect between each background characteristic and liaison orientation on the willingness to remove custody and restrict visitation. Specifically I predict that:

1. Respondents high in religiosity will be more willing to remove custody and apply visitation restrictions in the homosexual liaison condition than the heterosexual liaison condition.
2. Respondents high in conservative political ideology will be more willing to remove custody and apply visitation restrictions in the homosexual liaison condition than the heterosexual liaison condition.
3. Older respondents will be more willing to remove custody and apply visitation restrictions in the homosexual liaison condition than the heterosexual liaison condition.
4. Male respondents will be more willing to remove custody and apply visitation restrictions in the homosexual liaison condition than the heterosexual liaison condition.
5. Respondents low in education will be more willing to remove custody and apply visitation restrictions in the homosexual liaison condition than the heterosexual liaison condition.
6. Respondents with low socio-economic status will be more willing to remove custody and apply visitation restrictions in the homosexual liaison condition than in the heterosexual liaison condition.

I examined the relationship between six alleged moderators and the willingness remove custody and restrict the visitation rights of parents engaged in a sexual liaison through the use of linear regressions. While it was hypothesized that all six would interact with liaison orientation only conservative political ideology was predictive of an orientation bias, and this result did not manifest consistently across dependent measures. Conservative political ideology predicted a greater willingness to apply partner restrictions in the homosexual liaison condition than in the heterosexual liaison condition (β =.30, p=0.002), but it did not predict a similar orientation bias on the willingness to remove custody or restrict overnight visitation.

Religiosity was strongly predictive of all three dependent variables overall, but it was no more predictive of a willingness to remove custody or restrict visitation in the homosexual liaison condition than the heterosexual liaison condition. Religiosity, in other words, predicted a willingness to remove and restrict but it did not predict an orientation bias in those decisions. None of the other alleged moderators (age, education, socio-economic status and respondent gender) predicted bias at any level.

Table 1. Summary of linear regression analyses. Respondent characteristics and liaison orientation predicting a willingness to deny custody (Model 1) (N = 358), apply partner restrictions to visitation rights (Model 2) (N = 358), and apply overnight restrictions to visitation rights (Model 3) (N = 358).

Religiosity	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .12 (SE = 1.59)		adj R^2 = .04 (SE = 1.51)		adj R^2 = .05 (SE = 1.64)	
Variables	**β**	**SE**	**β**	**SE**	**β**	**SE**
Religiosity	.61***	.09	.35***	.08	.39***	.09
Homosexual Liaison	.01	.17	.00	.16	.13	.17
	adj R^2 = .12 (SE = 1.59)		adj R^2 = .04 (SE = 1.51)		adj R^2 = .05 (SE = 1.64)	
Religiosity	.62***	.13	.27*	.12	.44***	.13
Homosexual Liaison	.05	.36	-.27	.34	.29	.37
Religiosity * Homosexual Liaison	-.02	.17	.15	.16	-.09	.18

Note. *p<.05, **p<.01, ***p<.001

Political Ideology	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .05 (*SE* = 1.65)		adj R^2 = .04 (*SE* = 1.52)		adj R^2 = .03 (*SE* = 1.65)	
Variables	**β**	**SE**	**β**	**SE**	**β**	**SE**
Political Ideology	.24***	.05	.20***	.05	.19***	.05
Homosexual Liaison	.04	.17	.01	.16	.14	.17
	adj R^2 = .05 (*SE* = 1.66)		adj R^2 = .06 (*SE* = 1.50)		adj R^2 = .04 (*SE* = 1.65)	
Political Ideology	.21***	.07	.05	.07	.10	.07
Homosexual Liaison	-.17	.39	-.99**	.36	-.46	.39
Political Ideology * Homosexual Liaison	.06	.11	.30**	.10	.18	.11

Note. *p<.05, **p<.01, ***p<.001

Age	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.00 (*SE* = 1.70)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = -.00 (*SE* = 1.68)	
Variables	**β**	**SE**	**β**	**SE**	**β**	**SE**
Age	-.00	-.01	-.01	.01	-.00	-.00
Homosexual Liaison	.08	.18	.04	.16	.18	.17
	adj R^2 = -.00 (*SE* = 1.70)		adj R^2 = .00 (*SE* = 1.55)		adj R^2 = -.00 (*SE* = 1.68)	
Age	-.00	.01	-.02	.01	-01	-.01
Homosexual Liaison	-.35	.63	-.92	.58	.63	-.52
Age * Homosexual Liaison	.01	.02	.03	.02	.02	.02

Note. *p<.05, **p<.01, ***p<.001

Gender	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.00 (*SE* = 1.70)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = -.00 (*SE* = 1.68)	
Variables	**β**	**SE**	**β**	**SE**	**β**	**SE**
Gender	.19	.18	.03	.16	-.12	.18
Homosexual Liaison	.07	.18	.04	.16	.18	.18
	adj R^2 = -.00 (*SE* = 1.70)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = -.00 (*SE* = 1.68)	
Gender	.14	.25	-.22	.23	-.23	.25
Homosexual Liaison	.02	.26	-.22	.24	.06	.26
Gender * Homosexual Liaison	.10	.36	.51	.33	.24	.36

Note. **p*<.05, ***p*<.01, ****p*<.001

Education	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .00 (*SE* = 1.69)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = -.00 (*SE* = 1.68)	
Variables	**β**	**SE**	**β**	**SE**	**β**	**SE**
Education	.12	.07	.06	.06	.06	.07
Homosexual Liaison	.07	.18	.04	.16	.17	.08
	adj R^2 = .00 (*SE* = 1.69)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = -.00 (*SE* = 1.68)	
Education	.17	.10	.05	.09	.09	.10
Homosexual Liaison	.44	.63	-.08	.58	.36	.63
Education * Homosexual Liaison	-.08	.14	.03	.13	-.04	.14

Note. **p*<.05, ***p*<.01, ****p*<.001

S.E.S	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.00 (*SE* = 1.70)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = .00 (*SE* = 1.68)	
Variables	**β**	**SE**	**β**	**SE**	**β**	**SE**
S.E.S.	.07	.06	.03	.05	.08	.06
Homosexual Liaison	.09	.18	05	.16	.19	.18

	adj R^2 = -.00 (*SE* = 1.70)		adj R^2 = -.00 (*SE* = 1.55)		adj R^2 = .00 (*SE* = 1.68)	
S.E.S.	.09	.08	.02	.08	.11	.08
Homosexual Liaison	.25	.49	-.00	.45	.44	.49
S.E.S. * Homosexual Liaison	-.03	.12	.01	.11	-.06	.11

Note. **p*<.05, ***p*<.01, ****p*<.001

Results: Orientation Bias Within the Male Liaison Condition

H_5: There will be an interaction effect between each background characteristic and liaison orientation on the willingness to remove custody and restrict visitation in the *male liaison condition*. Specifically I predict that $H_{4.1-6.1}$ will also hold in the male liaison condition.

I next employed linear regressions to examine the relationship between the six hypothesized moderators and the willingness to remove custody and restrict the visitation rights of *fathers* engaged in a sexual liaison. While it was hypothesized that all six would interact with liaison orientation only conservative political ideology and education were predictive of an orientation bias. Conservative political ideology predicted a greater willingness to apply partner restrictions (β =.57, *p*=0.000) and overnight restrictions (β =.40, *p*=0.007) in the gay male liaison condition than in the heterosexual male liaison condition, but it did not predict a similar orientation bias on the willingness to remove custody. Political ideology also returned unusual results across all three dependent variables because, in general, liberal respondents were significantly harsher towards the heterosexual male condition than conservative respondents while conservative respondents were significantly harsher towards the gay male condition than liberal respondents (*See* Appendix D).

Low education predicted a greater willingness to apply overnight restrictions (β =-.38, *p*=0.046) in the gay male liaison condition than in the heterosexual male liaison condition, but it did not predict a similar orientation bias on the willingness to remove custody or the willingness to apply partner restrictions.

Once again religiosity was strongly predictive of all three dependent variables overall, but it was no more predictive of a willingness to remove custody or restrict visitation in the gay male liaison condition than the heterosexual male liaison condition. None of the other alleged moderators (age, socio-economic status or respondent gender) predicted bias at any level.

Table 2. Summary of linear regression analyses in the *male condition (fathers)*. Respondent characteristics and liaison orientation predicting a willingness to deny custody (Model 1) (*N* = 179), apply partner restrictions to visitation rights (Model 2) (*N* = 179), and apply overnight restrictions to visitation rights (Model 3) (*N* = 179).

Religiosity	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .17 (*SE* = 1.58)		adj R^2 = .09 (*SE* = 1.54)		adj R^2 = .06 (*SE* = 1.64)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Religiosity	.12	**.77*** **	.23	**.53*** **	.13	**.44*** **
Homosexual Liaison	.24	-.01	.23	.10	.25	.23
	adj R^2 = .17 (*SE* = 1.59)		adj R^2 = .09 (*SE* = 1.54)		adj R^2 = .06 (*SE* = 1.64)	
Religiosity	.19	**.77*** **	.18	**.42***	.20	**.57****
Homosexual Liaison	.51	-.02	.50	-.23	.53	.64
Religiosity * Homosexual Liaison	.25	.00	.24	.18	.26	-.23

Note. *p<.05, **p<.01, ***p<.001

Political Ideology	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .02 (*SE* = 1.72)		adj R^2 = .02 (*SE* = 1.60)		adj R^2 = .01 (*SE* = 1.69)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Political Ideology	.08	**.18***	.07	**.16***	.08	.10
Homosexual Liaison	.26	.18	.24	.23	.25	.33
	adj R^2 = .03 (*SE* = 1.72)		adj R^2 = .11 (*SE* = 1.52)		adj R^2 = .04 (*SE* = 1.66)	
Political Ideology	.11	.08	.10	-.12	.10	-.10
Homosexual Liaison	.56	-.49	.50	**-1.64*** **	.54	-.97
Political Ideology * Homosexual Liaison	.15	.20	.14	**.57*** **	.15	**.40****

Note. *p<.05, **p<.01, ***p<.001

Age	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.01 (*SE* = 1.75)		adj R^2 = -.01 (*SE* = 1.62)		adj R^2 = -.00 (*SE* = 1.70)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Age	.01	-.00	.01	.00	.01	-.00

Homosexual Liaison	.27	.18	.25	.24	.26	.33
	adj R^2 = -.01 (*SE* = 1.75)		adj R^2 = -.00 (*SE* = 1.62)		adj R^2 = -.01 (*SE* = 1.70)	
Age	.02	.00	.02	-.01	.02	-.00
Homosexual Liaison	.95	.43	.88	-.55	.92	.40
Age * Homosexual Liaison	.03	-.01	.02	.02	.03	-.00

Note. *p<.05, **p<.01, ***p<.001

Gender	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.00 (*SE* = 1.75)		adj R^2 = -.00 (*SE* = 1.62)		adj R^2 = .01 (*SE* = 1.69)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Gender	.26	-.30	.24	.22	.25	-.37
Homosexual Liaison	.26	.20	.24	.25	.25	.36
	adj R^2 = -.00 (*SE* = 1.74)		adj R^2 = -.00 (*SE* = 1.62)		adj R^2 = .01 (*SE* = 1.69)	
Gender	.38	-.57	.35	-.49	.36	-.64
Homosexual Liaison	.38	-.08	.35	-.03	.37	.09
Gender * Homosexual Liaison	.52	.52	.48	.52	.51	.51

Note. *p<.05, **p<.01, ***p<.001

Education	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.00 (*SE* = 1.74)		adj R^2 = -.00 (*SE* = 1.62)		adj R^2 = .01 (*SE* = 1.69)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Education	.10	.08	.09	.08	.10	.11
Homosexual Liaison	.26	.19	.24	.23	.25	.34
	adj R^2 = -.00 (*SE* = 1.75)		adj R^2 = -.01 (*SE* = 1.62)		adj R^2 = .02 (*SE* = 1.68)	
Education	.14	.11	.13	.12	.13	**.30***
Homosexual Liaison	.89	.41	.83	.58	.85	**1.97***
Education * Homosexual Liaison	.20	-.05	.18	-.08	.19	**-.38***

Note. *p<.05, **p<.01, ***p<.001

S.E.S	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.00 (*SE* = 1.74)		adj R^2 = -.00 (*SE* = 1.62)		adj R^2 = .01 (*SE* = 1.69)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
S.E.S.	.08	.09	.07	-.01	.08	.08
Homosexual Liaison	.26	.19	.24	.24	.25	.34
	adj R^2 = -.00 (*SE* = 1.75)		adj R^2 = -.01 (*SE* = 1.62)		adj R^2 = .01 (*SE* = 1.69)	
S.E.S.	.12	.09	.11	-.02	.12	.19
Homosexual Liaison	.68	.24	.64	.14	.66	1.13
S.E.S. * Homosexual Liaison	.16	-.01	.15	.02	.16	-.21

Note. *p<.05, **p<.01, ***p<.001

H_6: There will be an interaction effect between each background characteristic and liaison orientation on the willingness to remove custody and restrict visitation in the *female liaison condition*. Specifically, I predict that $H_{4.1-6.1}$ will also hold in the female liaison condition.

Finally, I employed linear regressions to examine the relationship between the six alleged moderators and the willingness remove custody and restrict the visitation rights of *mothers* engaged in a sexual liaison. While it was hypothesized that all six would interact with liaison orientation none of the alleged moderators were predictive of an orientation bias. Religiosity and

conservative political ideology were strongly predictive of an overall willingness to remove and restrict the custody rights of mothers engaged in a sexual liaison, but the orientation of that liaison was immaterial. Of further note, in the female conditions political ideology behaved in a consistent manner across orientation (unlike in the male condition). Liberals were more forgiving than conservatives in both the heterosexual female and lesbian condition (*See* Appendix D).

Table 3. Summary of linear regression analyses in the *female condition (mothers)*. Respondent characteristics and liaison orientation predicting a willingness to deny custody (Model 1) (*N* = 180), apply partner restrictions to visitation rights (Model 2) (*N* = 180), and apply overnight restrictions to visitation rights (Model 3) (*N* = 180).

Religiosity	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .06 (*SE* = 1.60)		adj R^2 = .00 (*SE* = 1.47)		adj R^2 = .03 (*SE* = 1.65)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Religiosity	.12	**.46*** **	.11	.17	.13	**.34** **
Homosexual Liaison	.24	.00	.22	-.13	.25	.03
	adj R^2 = .06 (*SE* = 1.60)		adj R^2 = .00 (*SE* = 1.47)		adj R^2 = .02 (*SE* = 1.65)	
Religiosity	.17	**.49** **	.15	.13	.17	.32
Homosexual Liaison	.51	.15	.47	-.32	.52	-.04
Religiosity * Homosexual Liaison	.14	-.08	.22	.10	.25	.04

Note. *p<.05, **p<.01, ***p<.001

Political Ideology	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .07 (*SE* = 1.59)		adj R^2 = .06 (*SE* = 1.43)		adj R^2 = .07 (*SE* = 1.62)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Political Ideology	.07	**.30*****	.07	**.23*****	.07	**.28*****
Homosexual Liaison	.24	-.11	.21	-.21	.24	-.07
	adj R^2 = .07 (*SE* = 1.59)		adj R^2 = .05 (*SE* = 1.44)		adj R^2 = .06 (*SE* = 1.62)	
Political Ideology	.10	**.34*****	.09	**.22***	.10	**.31****
Homosexual Liaison	.55	.19	.50	-.25	.56	.08
Political Ideology * Homosexual Liaison	.15	-.09	.13	**.**01	.15	-.04

Note. *p<.05, **p<.01, ***p<.001

Age	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = -.01 (*SE* = 1.66)		adj R^2 = -.00 (*SE* = 1.48)		adj R^2 = -.01 (*SE* = 1.68)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Age	.01	.00	.01	-.00	.25	-.00
Homosexual Liaison	.25	-.02	.22	-.12	.25	.02
	adj R^2 = -.00 (*SE* = 1.66)		adj R^2 = -.00 (*SE* = 1.48)		adj R^2 = -.00 (*SE* = 1.67)	
Age	.02	-.01	.01	-.02	.02	-.02
Homosexual Liaison	.87	-.95	.77	-.99	.88	-1.37
Age * Homosexual Liaison	.02	.03	.02	.03	.02	.04

Note. *p<.05, **p<.01, ***p<.001

Gender	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .03 (*SE* = 1.62)		adj R^2 = .00 (*SE* = 1.47)		adj R^2 = -.01 (*SE* = 1.68)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Gender	.24	**.68****	.22	.28	.25	.13
Homosexual Liaison	.24	-.01	.22	-.13	.25	.02
	adj R^2 = .03 (*SE* = 1.63)		adj R^2 = .00 (*SE* = 1.47)		adj R^2 = -.01 (*SE* = 1.68)	
Gender	.34	**.80***	.31	.02	.35	.14
Homosexual Liaison	.35	.11	.31	-.40	.36	.02
Gender * Homosexual Liaison	.49	-.24	.44	.53	.50	-.01

Note. **p*<.05, ***p*<.01, ****p*<.001

Education	**Model 1** Deny Custody		**Model 2** Partner Restrictions		**Model 3** Overnight Restrictions	
	adj R^2 = .01 (*SE* = 1.65)		adj R^2 = -.01 (*SE* = 1.48)		adj R^2 = -.01 (*SE* = 1.68)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
Education	.10	.17	.09	.04	.10	.01
Homosexual Liaison	.25	-.02	.22	-.14	.25	.02
	adj R^2 = .00 (*SE* = 1.65)		adj R^2 = -.01 (*SE* = 1.48)		adj R^2 = -.00 (*SE* = 1.67)	
Education	.14	.23	.12	-.03	.14	-.16
Homosexual Liaison	.90	.49	.80	-.80	.91	-1.46
Education * Homosexual Liaison	.20	-.12	.18	.15	.20	.34

Note. **p*<.05, ***p*<.01, ****p*<.001

S.E.S	**Model 1**		**Model 2**		**Model 3**	
	Deny Custody		Partner Restrictions		Overnight Restrictions	
	adj R^2 = -.01 (*SE* = 1.66)		adj R^2 = -.01 (*SE* = 1.48)		adj R^2 = -.01 (*SE* = 1.68)	
Variables	**SE**	**β**	**SE**	**β**	**SE**	**β**
S.E.S.	.08	.05	.07	.06	.08	.07
Homosexual Liaison	.25	-.00	.22	-.12	.25	.04
	adj R^2 = -.01 (*SE* = 1.67)		adj R^2 = -.01 (*SE* = 1.48)		adj R^2 = -.01 (*SE* = 1.68)	
S.E.S.	.11	.08	.10	.04	.11	.02
Homosexual Liaison	.72	.25	.64	-.28	.73	-.39
S.E.S. * Homosexual Liaison	.17	-.06	.15	.04	.17	.11

Note. **p*<.05, ***p*<.01, ****p*<.001

Discussion

These data are in many ways unexpected. First and foremost, the experiment failed to uncover any evidence of anti-homosexual bias in the adjudication of custody, either for the assessment of same-sex sexual behavior overall or for the assessment of gay male or lesbian sexual behavior separately. This finding not only contradicts the hypotheses, it is at variance with the general scholastic assessment of gay parental custody adjudications (Eskridge, 2000; Gates & Williams Institute, UCLA, 2011; Rosky, 2008, 2013a; Shapiro, 1995b). It is also at variance with the overall trend in the judicial decisions available through Lexis and Westlaw. Recall that when gay male fathers and lesbian mothers contested custody against heterosexual parents in these cases, they found themselves on the losing side of that contest 64% of the time. Interview respondents in Part One likewise believed in the existence of this bias: a full 100% reported that gay parents faced bias on account of their orientation during the judicial adjudication of custody.

So why did this experiment fail to detect bias? One strong possibility is the growing acceptance of gay parenting and homosexuality in general. Opinions polls are in near universal agreement the support for both have increased rapidly over the last twenty years, as has support for related policy issues (same-sex marriage, same-sex adoption, etc.) (Flores, 2014; McGee, 2016a, 2016b; "National Trends in Public Opinion on LGBT Rights in the United States," 2014). A closer examination of the case law analysis can also support this take: while gay parents found themselves on the losing end of custody challenges overall at a 64% rate, data from the most recent decade suggests a slight advantage for the gay parent (though the result was not statistically significant). It is also possible that recent Supreme Court opinions have furthered public acceptance of gay parenting and homosexuality in general. Previous scholarship on the Court's relationship with public opinion has argued that Court opinions can accelerate public acceptance of controversial positions. Specifically, evidence exists that the Supreme Court accelerated the social acceptance of life-saving abortions (C. H. Franklin & Kosaki, 1989), interracial marriage (Marshall, 1987) and birth control (Marshall, 1987).

The exploratory analysis of theorized moderators was likewise surprising. While it was hypothesized that respondents' gender, age, education, socioeconomic status, religiosity and political ideology would predict anti-homosexual bias only one moderator was predictive: (conservative) political ideology. This, of course, contradicts previous data on the first four moderators and can be viewed as a positive. Numerous scholars, activists and concerned observers have worried that a lack of diversity on the bench created a bias rich environment for gay male and lesbian litigants, specifically in terms of age (the bench trends older) and gender (the bench trends male). These data do not support those concerns, though given the moderate power of this research they do not precisely rule them out either.

The data provided more insight when broken down by parental gender. While it appeared that political conservatism predicted an orientation bias overall, within-gender analysis revealed that this burden fell exclusively on fathers. Politically conservative respondents were significantly more likely to restrict the visitation rights of fathers (on both measures, partner restrictions and overnight restrictions) engaged in a gay male liaison than those engaged in a heterosexual liaison. Conservative respondents were *not* more likely to express a similar orientation bias when the liaison involved a mother. In fact, none of the alleged moderators (political ideology, religiosity, education, age, socio-economic status or respondent gender) predicted an orientation bias against mothers.

These results only further the conclusion that has been reiterated throughout this dissertation: the analysis of anti-homosexual bias must take gender into account. More specifically, the judicial biases faced by gay male fathers are distinct from the biases faced by lesbian mothers, both in kind and degree. Any analysis of these adjudications that fails to address the impact of gender is likely to miss the true signal.

These data also suggest an intriguing evolution of anti-gay bias in these decisions. While orientation bias obviously contains many facets (gender assumptions, moral concerns, etc.) these results suggest that the preservation of patriarchy might be a primary source of anti-homosexual bias in decisions of this type. It is notable that male violations of traditional norms appear to offend the politically conservative more than female violations. These results can also be seen as further evidence of lesbian erasure. As discussed in Part Two of this project, lesbian sexuality has traditionally been less salient than gay male sexuality (Kim, 2012b; Rubin, 1984). Ancient prohibitions against homosexuality often refer solely to gay male sexuality, and recent arguments against the legalization of same-sex sex, same-sex marriage and same-sex adoption frequently applied only to the exclusion or criminalization of gay males. Taken together, this lack of concern for the impact of lesbian sexuality suggests a patriarchal worldview that assumes greater salience for male conduct.

And finally these data suggest an intriguing possibility for the impact of religiosity in these adjudications. Religiosity has long been suspected as a primary source of anti-homosexual sentiment in custody decisions (Fisher et al., 1994; Jonathan, 2008; Rowatt et al., 2006). The interview respondents in Part One of this project also held this view, listing judicial religious belief as the primary source of orientation bias in their own cases.[303] Religious justifications are also frequently seen in published opinions that deny or curtail the custody rights of gay parents.[304] But

[303] 43% of interview respondents listed judicial religiosity as a primary source of anti-gay bias in their decisions.

[304] *See* Collins v. Collins, 1988 WL 30173 (Tn. App. 1988) (Tomlin, Presiding Judge, Western Section, concurring) and In re D.H. v. H.H., 830 So.2d 21, 26 (Al. 2002).

these data suggest that religiosity might not bias the evaluation of gay male or lesbian parents at all. Rather these results suggests that religiosity correlates with a dim view of sexual indiscretion more generally rather than a selective bias against of homosexual sexuality specifically. This conclusion should, however, remain tentative. While the religiosity measure employed here is a common one (church attendance), it does not distinguish between religious denominations and there is evidence that some denominations are less tolerant of homosexuality than others (Fisher et al., 1994).[305]

[305] Respondents who categorize themselves as "fundamentalist," "Christian" or Baptist have been shown to display a high degree of anti-homosexual sentiment while members of other denominations have displayed less. There is also some evidence that religious attendance correlates positively with anti-homosexual bias for the less tolerant denominations but fails to correlate with anti-homosexual bias for members of the more tolerant sects (Fisher et al., 1994).

Chapter 10

Experimental Results: Toxic Sexuality (Disgust and the Judicial Evaluation of Gay Parents)

It is well known that disgust biases the evaluation of homosexual individuals. Both induced disgust (Cunningham et al., 2013; Dasgupta, 2002; Inbar et al., 2012) and disgust sensitivity (Ernulf & Innala, 1987; Haidt et al., 1994b; Inbar et al., 2009; Tapias et al., 2007; Van de Ven et al., 1996) have been shown to predict the negative assessment of homosexual individuals and their conduct. The impact of disgust on the *judicial* evaluation of gay individuals, however, remains unclear.[306] To date there has been no empirical examination of disgust as a moderator in the judicial evaluation of gay litigants.

This oversight is especially meaningful in the custody space. For one, an orientation related bias in the evaluation of parental fitness creates a very real threat to gay male and lesbian parents (the loss of custody or restricted visitation). In addition, the existence of such a bias would arguably contradict binding precedent in at least 23 states, and possibly violates the equal protection and due process rights of these parents (Stern et al., 2016).

In this chapter, I test for the biasing impact of disgust sensitivity in the simulated custody dispute previously described. As stated earlier, participants are presented with one of four conditions (gay male liaison, lesbian liaison, heterosexual male liaison or heterosexual female liaison) and then asked to rule on the aggrieved parent's motion as if they were the judge on the case. Specifically they are asked how willing they would be to remove custody from the engaged parent, prohibit the presence of the engaged parent's new partner during visitation, and prohibit the engaged parent from visiting their child overnight. The impact of the respondent's disgust sensitivity is then assessed.

Disgust and Moral Judgment

Disgust is a complicated emotion (Inbar et al., 2009). It is widely understood as an affective reaction that evolved to protect us from objects that threaten bodily integrity: objects linked to parasites, germs and disease (Curtis & Biran, 2001; J. Tybur et al., 2013). This conclusion flows from both the nature of disgust elicitors (predominately pathogenic threats like rotting food, corpses, feces, and blood) and the behavioral response produced (withdrawal from the disgusting object, contortions that protect the mucus membranes of the face, immediate removal of the disgusting object from the body) (Chapman & Anderson, 2013; Rozin et al., 1999; Susskind et al., 2008).

But disgust also exerts a powerful influence on moral judgment. Induced disgust has been shown to render moral judgments more severe (Dasgupta, 2002; Horberg et al., 2011; Inbar et al., 2012; Schnall et al., 2008; Wheatley & Haidt, 2005). Disgust induced by working in a messy room, for example, has been shown to render moral evaluations more negative (Schnall et al., 2008), and the presence of words conditioned to elicit disgust in a vignette results in a greater condemnation of moral violations described in that vignette (Wheatley & Haidt, 2005). Likewise, an individual's

[306] To this author's knowledge, only one study has examined the impact of disgust on a simulated trial evaluation. But this study differed from the instant project in that it simulated the decision making of a jury (rather than a judge) and did not focus on the evaluation of gay individuals (Jones & Fitness, 2008).

disgust sensitivity has been shown to correlate positively with a tendency to render more negative moral assessments (Giner-Sorolla et al., 2012a; Inbar et al., 2009; Jones & Fitness, 2008; Olatunji, 2008). Highly disgust sensitive individuals, for example, have been found more willing to convict in a simulated criminal trial, to describe criminal defendants as evil, to recommended longer criminal sentences, and to inflate local crime levels (Jones & Fitness, 2008).

Scholarship on this relationship is broad and varied, but clarity can be gained if one divides the whole along the classical distinction between "is" and "ought."[307]

On the "is" side of the ledger are studies probing the mechanism of the relationship: why would disgust, an affective response that evolved to police bodily integrity, influence moral judgment? Some argue that this relationship is best understood as a by-product of disgust's core function. From this perspective, disgust biases only those moral evaluations that involve a bodily threat (Bloom, 2005; Oaten et al., 2009; Pizarro et al., 2011; Rozin et al., 1999). For example, induced disgust has been shown to amplify the negative assessment of sex between cousins and eating a dead dog, both actions that involve threats to bodily integrity or the bodily integrity of one's progeny (Wheatley & Haidt, 2005). Others maintain adjacent positions whereby disgust biases not only evaluations concerning bodily threats but also those that concern the violation of bodily norms (Giner-Sorolla et al., 2012a) or purity concerns (Graham et al., 2009; Horberg et al., 2009), violations that still frequently concern a perceived threat to bodily fitness (Russell & Giner-Sorolla, 2013).[308]

But there is evidence that disgust biases the evaluation of "non-bodily" moral violations as well (Chapman & Anderson, 2013; Crawford et al., 2014; Jones & Fitness, 2008; Kam & Estes, 2016; Olatunji, 2008).[309] Induced disgust, for example, has been shown to result in a greater condemnation of moral violations that bear no relation to bodily integrity (shoplifting, stealing library books, taking bribes, condemnation of an "ambulance chasing" lawyer) (Wheatley & Haidt, 2005). Induced disgust likewise correlates with a greater likelihood that individuals will reject an "unfair" offer in an economic game (Moretti & di Pellegrino, 2010). Disgust sensitivity also correlates with a tendency to render harsh assessments of "non-bodily" moral violations (Giner-Sorolla et al., 2012a; Inbar et al., 2009; Jones & Fitness, 2008; Olatunji, 2008). Highly disgust sensitive individuals, for example, have been found more willing to convict for burglary, to describe burglary defendants as evil, and to recommend that they receive longer criminal sentences (Jones & Fitness, 2008).

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[307] Hume famously postulated that one cannot logically proceed from factual, "is," statements to normative "ought" statements without calling upon additional, subjective premises (Hume, 1888).

[308] Giner-Sorolla has since altered his position, accepting that "moral disgust" can influence the assessment of "bad character" even when they characteristics assessed are unrelated to bodily norms or bodily integrity (Giner-Sorolla et al., 2018).

[309] In a related vein, there is also evidence that non-bodily moral violations can *generate* disgust. Descriptions of theft, lying and fraud have been shown to reliably generate self-reports of disgust (J. M. Tybur et al., 2009), as have descriptions of behavior that demonstrates a disregard for the rights of others (joining the klu-klux-klan) or a dismissal of one's communal obligations (failing to attend the funeral of a mother) (Hutcherson & Gross, 2011). Likewise, individuals are more likely to complete a word-stem exercise with a disgust related word after reading a description of non-pathogenic criminal activity (burglary) (Jones & Fitness, 2008). But well known scholars have challenged these conclusions, arguing that they are the result of poor experimental design (Giner-Sorolla et al., 2012a, 2018; Nabi, 2002; Pizarro et al., 2011).

Disgust also correlates with conservative normative positions that have no obvious relation to bodily integrity. Men who violate traditional gender norms have been found to elicit disgust (Caswell & Sackett-Fox, 2018). Likewise there is evidence that disgust sensitivity correlates with a strong adherence to heteronormativity (Ray & Parkhill, 2020), traditional sexual morality (Crawford et al., 2014; Olatunji, 2008), fear of sin (Olatunji, 2008), and a demand for policies that reflect traditional moral norms (Kam & Estes, 2016).[310]

Several theories have been presented to explain these results. Some argue that at least a portion of the above findings reflect poor experimental design or a confound with trait anger (Giner-Sorolla et al., 2012a; Pizarro et al., 2011; Russell & Giner-Sorolla, 2013). But others offer models of disgust that account for a biasing effect on moral evaluations unrelated to bodily threats. Kelly, for example, has advanced a "co-option thesis," whereby disgust was co-opted to regulate the increasingly complex field of human social interaction in addition to its primary function of repulsing from germs and disease. In this model, disgust evolved to police exposure to "cultural pathogens," behaviors or concepts that threaten local social norms or worldviews, in addition to physical pathogens (Kelly, 2011). It has likewise been theorized that disgust serves a self-regulatory function by keeping anxiety producing thoughts at bay (Giner-Sorolla et al., 2018). In this framework disgust polices exposure to both physical threats and psychological threats, such as a challenge to deeply held worldviews or normative positions. In a similar fashion it has been claimed that disgust protects not just the body but also the "soul" from rot and decay, with "soul" being loosely defined as an individual's core beliefs or self-conception (Rozin et al., 1999).

In all three models disgust has evolved to police not only exposure to pathogens or other threats to bodily fitness, but also threats to one's worldview, local cultural norms or deeply held normative positions. Overall these theories offer an explanation for the observed correlation between disgust and "conservative" or "traditional" beliefs, and the tendency for disgust to harshen the evaluation of non-bodily moral violations that appear to flout those beliefs.[311]

On the "ought" side of the ledger are articles discussing the propriety of granting disgust relevance in moral evaluations, or, in other words, articles asking the question: *should* disgust be afforded relevance in moral evaluations. There is a strong trend within this portion of the literature to treat disgust as an overly blunt evaluative instrument (Kumar, 2016; Nussbaum, 2010). Scholars of this persuasion argue against affording disgust normative relevance because its evaluative impact is frequently misdirected, disproportionately burdens the marginalized, dehumanizes its targets and lacks flexibility.

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[310] Kam and Estes administered a shortened version of the disgust scale revised, the same disgust sensitivity scale utilized in this article. The Disgust Scale Revised focuses on "core" or pathogenic disgust (Kam & Estes, 2016).

[311] The general belief that disgust is relevant to the preservation of deeply held normative positions is an old one. It can clearly be seen in Lord Devlin's "disintegration thesis," in which disgust is said to highlight (and defend) normative positions so fundamental to society that their erosion would threaten society itself (Devlin, 1965; Dworkin, 1996). And it can be seen in later theorists as well. Kass, for example, argued that disgust provided a useful heuristic by highlighting normative shifts that threaten something fundamentally important but beyond the comprehension of reason alone (Kass, 1997). Similar arguments have been advanced by others (Hauskeller, 2006; Kahan, 1998; Kekes, 1992; Kumar, 2016). *See* also Chapman et. al. for an excellent summary of such arguments and the theoretical models they imply (Chapman & Anderson, 2013).

The "misdirected" critique often refers to disgust's odd tendency to irrationally contaminate non-disgusting targets. Disgust has long been known to operate by the "law of contagion" or "sympathetic magic," meaning that a disgusting object will make a non-disgusting object disgusting by mere physical contact, resemblance or social interaction (Kelly, 2011; Rozin et al., 2008). Water from a bedpan, for example, is disgusting even if that bed pan has been sterilized; food in the shape of feces is considered disgusting even if it is known to contain no feces (Rozin et al., 1986). Contact with disgusting behaviors contaminates as well; people are disgusted at the thought of wearing Adolf Hitler's sweater (even if it has been thoroughly dry cleaned) because of the behavior that sweater shared physical contact with. People are likewise repulsed at the idea of wearing the clothing of a notorious criminal (Rozin et al., 1986, 2008). Disgust's evaluative impact in these instances is thus "misdirected," inaccurate or irrational because disgust generated by an unrelated object, person or behavior is allowed to negatively bias the assessment of a seemingly non-disgusting object, person or behavior.

Sometimes the "misdirection" critique references what psychologists would call "priming." In a priming scenario, some stimulus causes an observer to feel disgust (a disgusting smell, a disgusting image, etc.) and the disgust sensation causes that observer to evaluate an unrelated person, object or behavior more harshly. People are more condemning, for example, of sex between cousins if they are asked to evaluate the transgression after being exposed to a disgusting smell (Schnall et al., 2008); likewise people judge the keeping of an untidy room more harshly after being exposed to a disgusting film (Horberg et al., 2009). And, importantly for our purposes, people tend to evaluate disgust relevant populations, such as gay men, more negatively after they have been exposed to an unrelated disgusting stimulus (Dasgupta et al., 2009; Inbar et al., 2012; Tapias et al., 2007).[312]

In all of the above cases, critics note the misdirection or irrationality of disgust's impact on assessment and evaluation. Disgust is a poor evaluative instrument, they argue, because its impact on evaluations and assessments is frequently misdirected; disgust towards X often irrationally impacts the evaluation of an unrelated Y.

Critics also note that disgust's impact on evaluation disproportionately burdens the marginalized. Individual disgust sensitivity is highly correlated with "intergroup disgust sensitivity (ITG-DS)," a tendency to view outgroups as repulsive (Hodson et al., 2013). Disgust sensitivity has also been shown to correlate with explicit prejudice towards a range of historically marginalized outgroups, including: Muslims, immigrants, ethnic minorities, foreigners, homosexuals, Jews, Blacks, Mexicans, and First Nations (Hodson et al., 2013).[313] On the other side of the coin, disgust sensitivity has been shown to positively correlate with support for entrenched hierarchical social ranking and resource inequities (Giner-Sorolla et al., 2012b; Hodson & Costello, 2007b). From this angle, disgust is a poor evaluative instrument because it tends to harshen our judgment of the vulnerable more than the privileged.

Disgust is also said to restrict the mental flexibility required for rational assessment.[314] Several scholars note that disgust influenced judgments appear immune to subsequent mitigating information and that disgust induced decision makers are unable to state any reason for their

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[312] Both implicit and explicit negative assessments were increased.

[313] Not surprisingly, models of prejudice are increasingly including disgust (Hodson et al., 2013; E. Smith, 2014).

[314] *But see* Kumar, arguing that disgust is more flexible that critics often allow (though his examples are so narrow it is hard to accept his argument on broader terms (Kumar, 2016).

judgments in hindsight (Giner-Sorola & Harris, n.d.; Haidt et al., 2000). In a similar fashion, people give less elaborate reasons for disgust based evaluations than they do for decisions based on other emotions, often relying on tautological explanations that reference disgust itself ('Pedophiles are disgusting because they are gross'') (Russell & Giner-Sorolla, 2011).

And finally, disgust is thought to "dehumanize" its human targets. The research of Harris and Fisk suggests that disgusting individuals are perceived as so strikingly different from non-disgusting individuals that they fail to fully activate the primary regions of social cognition in the medial pre-frontal cortex. This has led several researchers to suggest that disgust correlates with an "othering" that effectively treats disgust eliciting individuals as something less complex and less social than other human beings, a tendency that may lead to less accurate assessments of those individuals and their actions (Giner-Sorola & Harris, n.d.; Harris & Fiske, 2007; Russell & Giner-Sorolla, 2011).

Defenders of disgust as an evaluative barometer typically concede the majority of these points. But they often argue that disgust plays a unique and necessary role in the evaluation of offenses that are, by their very nature, disgusting. Dan Kahan, for example, argues that disgust is *indispensable* to the appropriate evaluation of extremely disgusting incidents:

> It signals seriousness, commitment, indisputability, presentness, and reality... It marks out moral matters for which we can have no compromise ….no other moral sentiments is up to the task of condemning such singular abominations as rape, child abuse, torture, genocide, predatory murder and maiming."

(Kahan, 2000).

Kahan's argument touches upon a crucial distinction, the distinction between integral and incidental emotional effects. When someone experiences an integral disgust reaction, the disgust generated by an event or object influences their judgment about that same event or object. But when someone experiences an incidental disgust reaction, the disgust elicited by an event or object influences their evaluation of another, unrelated event or object (Horberg et al., 2009; Jones & Fitness, 2008). The instances of "misdirected" bias discussed above would fall in the incidental category.

Kahan and others who defend disgust as an evaluative instrument frequently concede the problem of incidental disgust but argue that disgust is necessary when faced with instances of integral disgust (Kahan, 1998, 2000; Kumar, 2016). One cannot fully assess the horror of child rape, for example, without the negative punch of disgust.

But even this argument has its critics. For one, while disgust may on occasion be appropriate it is so frequently misdirected that many argue we should doubt its accuracy by default (Kelly & Morar, 2014; Nussbaum, 2010). For another, Kahan's argument does nothing to allay the concern that disgust hinders the cognitive assessment that sophisticated moral evaluation demands (it appears to limit one's ability to reassess evaluations after the introduction of new evidence and it appears to encourage tautological conclusions) (Giner-Sorola & Harris, n.d.; Russell & Giner-Sorolla, 2011).

And finally, there is another possible retort to Kahan's argument that has not yet been voiced (to this author's knowledge): disgust's tendency to disproportionately burden the marginalized means that even when it is accurately applied we should discount it because disgust tends to bias our evaluations of the marginalized more than our evaluations of the privileged.

Disgust, from this perspective, is a "guilt enhancer" that violates or sense of fairness, even when it is accurately being elicited by a truly noxious behavior.

Disgust and the Evaluation of Gay Individuals

Gay individuals have long been identified as a "disgust relevant group," meaning that gay individuals elicit disgust and disgust has been demonstrated to bias the evaluation of gay individuals (Cottrell & Neuberg, 2005; Dasgupta, 2002; Tapias et al., 2007). Individuals with a high propensity for disgust, for example, report elevated levels of prejudice towards gay individuals (Ernulf & Innala, 1987; Haidt et al., 1994a; Van de Ven et al., 1996), and disgust sensitivity has been shown to correlate positively with both implicit and explicit negative attitudes towards gay men (Inbar et al., 2009; Tapias et al., 2007).[315] Likewise induced disgust has been shown to negatively influence both the implicit assessment of gay individuals (Dasgupta et al., 2009) and the explicit measure of warmth towards gay men (Cunningham et al., 2013; Inbar et al., 2012).[316] And thoughts of gay men have been shown to elicit significantly more disgust than thoughts of activist feminist or fundamentalist Christians (Cottrell & Neuberg, 2005). Studies in political science have likewise linked disgust to orientation bias in the political arena. Disgust, for example, has been linked to the tendency to oppose same-sex marriage (Kam & Estes, 2016), same-sex adoption (Nussbaum, 2009) and anti-orientation discrimination ordinances (Nussbaum, 2010).

But the mechanism behind this relationship is unclear. Does disgust impact the evaluation of gay individuals because gay individuals are associated with a bodily threat, a perceived threat to one's deeply held normative positions, or some mixture of both? A prevailing theory, mentioned sporadically in the literature (Haidt et al., 1997; Olatunji, 2008) and occasionally in more popular works (Nussbaum, 2010), concerns the mental association between gay males and anal sex (Haidt et al., 1997; Nussbaum, 2010; Olatunji, 2008). This association is, of course, unfair (heterosexual individuals also engage in anal sex), but the popular association between gay males and anal sex has been well documented (Madon, 1997a; Nussbaum, 2010). It is also evidenced by the sheer number of derogatory terms our culture has applied to gay males that focus on that one, particular sex act ("List of LGBT Slang Terms," 2020).[317]

Anal intercourse is a relatively high risk sexual act due to the possibility of disease transfer through contact with blood and feces (Baldwin & Baldwin, 2000; M et al., 2000). Anal sex also involves a non-traditional penetration of the body envelope (Haidt et al., 1997). Meanwhile disgust

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[315] Tapias et. al utilized a narrow measure of disgust sensitivity designed to measure sex-related disgust sensitivity. They found that individuals highly sensitive to sex-related disgust were significantly more likely to express gay male prejudice (Tapias et al., 2007).

[316] There is at least one (unpublished) study that failed to replicate this result. Specifically, induced disgust failed to negatively influence the implicit assessment of gay males (A. R. Smith, 2012).

[317] The sheer number of these derogatory (and highly offensive) terms is evidence of the popular fixation on the act of gay male anal sex. For the purpose of this article, it also bears noting that a great number of these terms specifically reference pathogenic disgust elicitors (feces, penetration). Consider this, partial list: sodomites, bugger (a man who enjoys anal sex), Fudge-packer, Cola (Spanish word for "tail," refers to a man who enjoys being anally penetrated), Brownie or Brownie King (a man who enjoys being anally penetrated), Batiman (Brazilian Creole meaning "Butt man," a man who enjoys anal sex), anal assassin, ass bandit, back door bandit, bone smuggler, butt pirate, cock jockey, donut puncher, pillow biter and shit stabber ("List of LGBT Slang Terms," 2020).

is a known mechanism for pathogen avoidance, and bodily penetration (cuts, gashes, etc.), blood and feces all create the risk of pathogen transfer. Thus a mental association between gay males and anal sex could explain a portion of the observed relationship between homosexuality and disgust.

But this is by no means the only possible mechanism. As stated earlier, disgust also correlates with traditional or conservative normative positions, positions that would likely predict a disapproval of homosexual individuals or homosexual sex on their own: traditional gender role beliefs (Caswell & Sackett-Fox, 2018), a strong adherence to heteronormativity (Ray & Parkhill, 2020), traditional sexual morality (Crawford et al., 2014; Olatunji, 2008), a fear of sin (Olatunji, 2008), and a demand for policies that protect traditional moral norms (Kam & Estes, 2016).

Gender offers an opportunity to parse these competing explanations. Gay males are strongly associated with anal sex but lesbian women are not. Sensitivity to the pathogenic risk of anal sex should therefore bias the assessment of gay males but not lesbians.

To date, however, there has been little empirical effort to parse the observed relationship between pathogenic disgust sensitivity and the evaluation of gay individuals by gender. Several studies of this relationship have collapsed gender and focused on "homosexuals" or "gays and lesbians" as a cohort (Crawford et al., 2014; Inbar et al., 2009; Olatunji, 2008; Terrizzi et al., 2010). Still others have focused on gay males exclusively (Inbar et al., 2009; Lai et al., 2014; A. R. Smith, 2012), while some have measured a relationship between disgust sensitivity and the evaluation of gay individuals as a cohort but at least partially theorized a relationship between disgust sensitivity and the evaluation of gay men (Olatunji, 2008).[318] The impact of disgust sensitivity on the evaluation of lesbian women remains unclear (Inbar et al., 2009; Kiss et al., 2020; Olatunji, 2008).[319]

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[318] For example, Olatunji et. al argue that several domains of disgust may relate to negative attitudes towards *gay individuals as a cohort*, but theorize this association primarily by reference to gay men: "Core disgust may predict negative attitudes towards homosexuals because it pertains directly to bodily products (e.g., semen) which are commonly associated with gay sexual activity. Animal-reminder disgust may also be a predictor of negative attitudes towards homosexuals as it encourages boundaries between humans and animals. Animal-reminder disgust also involves a forcible breach of the exterior envelope of the human body which is often associated with gay male sexual activity (e.g., anal sex)." Olatunji et. al. were aware of this conflation: "However, researchers should exercise caution when interpreting these findings. It does appear that homophobic attitudes are more pronounced against gay men than lesbians. Due to measurement limitations, gender differences were not addressed and it remains unclear if these findings are specific to gay men or if they also apply to attitudes towards lesbians" (Olatunji, 2008) (*internal citation omitted*).

[319] There is some indication that the relationship between *state-level* disgust and the evaluation of homosexuality differs by gender, but the results have been tentative and mixed. Inbar et. al. found that induced disgust resulted in negative explicit attitudes towards gay men but not lesbian women. A subsequent study by the same authors, however, failed to replicate those results (Inbar et al., 2012). On the other hand, Cunningham et. al. found a seemingly opposite indication when focusing on a separate disgust domain. They found that respondent's highly sensitive to *sexual disgust* (not pathogenic disgust) expressed less warmth towards lesbians relative to heterosexual women but not gay males relative to heterosexual men after inducing disgust via a body odor smell (Cunningham et al., 2013).

And this gap in our understanding has been noted. Numerous researchers of the disgust-homosexuality relationship have commented that their research might not apply to lesbian women and called for a greater examination of the possibility (Inbar et al., 2009; Olatunji, 2008).[320] Likewise meta-analytic reviews have called for a greater focus on how the disgust-homosexuality relationship parses across gender (Kiss et al., 2020; Morrison et al., 2019).

The Current Study: Disgust and the Judicial Evaluation of Gay Parental Fitness

There is good reason to suspect that judges highly sensitivity to disgust might be biased against gay parents during the adjudication of custody disputes. As stated above, evidence from both psychology and political science have demonstrated that such bias exists during the general evaluation of gay individuals and the evaluation of policy matters related to LGBTQ+ populations.

There are suggestions in the case law as well. Judicial descriptions of gay parents as "despicable,"[321] "repugnant,"[322] or "detestable;"[323] are not infrequent in judicial decisions available through Lexis and Westlaw. Nor are over the top descriptions of same-sex sex that appear to evince an almost visceral objection to the practice ("abhorrent ... a violation of the laws of nature and of nature's God,"[324] "abominable, detestable, unmentionable, and … disgusting,"[325] "inherently inimical to the general integrity of the human person"[326]), as well as literal concerns that gay parents might "contaminate*"* their children.[327] Respondents to the interview portion of this dissertation also made this connection. Recall that a full 20% of interview respondents indicated that the judges in their case appeared to be "repulsed" by the gay parent.

But to date there have been no empirical examinations of disgust related orientation bias in a judicial setting. Disgust has been *theoretically* linked to orientation discrimination in judicial proceedings (Kahan, 1998), but to date there has been no empirical examination of the possibility. The "is" of disgust moderated orientation bias in the law remains unverified.

Importantly, evidence of such a bias would also create more than the traditional normative concerns. Hume correctly notes that one cannot logically move from "is" to "ought" without first accepting a normative premise (Hume, 1888) - but the law provides such premises. Our constitutional structure and system of legal authority create a framework of normative prescriptions that must be followed if an outcome is to be deemed "legal" or "constitutional." Accordingly, one can logically conclude that disgust moderated bias in a judicial determination *ought not occur* if the bias contravenes precedent, equal protection or due process.

As alluded to earlier, there are several of reasons why disgust moderated judgement appears to be incompatible with our legal system. First, the tendency of disgust to "misdirect" its

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[320] Consider, for example, this statement by Inbar et. al.: "The results reported here do not allow us to examine whether disgust sensitivity might be more strongly related to negative implicit attitudes toward gay men as opposed to lesbians (or vice versa), and future research should investigate this possibility" (Inbar et al., 2009).

[321] Lewis v. Lewis, C.A. No. 626, 1976 Ohio App. LEXIS 6024, at 5 (Ohio Ct. App. July 1, 1976).

[322] Weigand v. Houghton, 730 So.2d 581, 590 (Miss. 1999).

[323] *Id*.

[324] In re D.H. v. H.H., 830 So. 2d 21, 26 (Ala. 2002).

[325] Ex. Parte H.H., 830 So.2d 21, 37 (Al. 2002).

[326] *Id.*

[327] Chicoine v. Chicoine, 479 N.W.2d 891 (S.D. 1992) ("she should be totally estopped from contaminating these children").

negative bias renders it unreliable. It would certainly offend our sense of due process if an event were judged more harshly because a disgusting smell wafted into court. Likewise we would shrink at the notion of a person or event being judged more harshly because their actions or attire conjured up associations to some other, unrelated but disgusting, object.

Disgust's tendency to disproportionately burden the marginalized also creates obvious equal protection and footnote four concerns. Our system demands that we asses all individual equally, and it is especially protective of those populations that routinely suffer discrimination and bias. Disgust appears to tilt in the opposite direction, negatively biasing evaluations of the marginalized (Muslims, immigrants, ethnic minorities, foreigners, gay men, Jews, Blacks, Mexicans, First Nations, etc.) more than the privileged.

Researchers have also noted that disgust appears to work at cross purposes with the cognitive expectations of Due Process. Due Process demands rationale reassessment, especially when mitigating information is introduced, but disgust appears to inhibit the practice. Due Process also demands reasoned assessment, while disgust tends to encourage tautological conclusions ("Pedophiles are disgusting because they are gross'') (Russell & Giner-Sorolla, 2011).

In the narrow case of adjudicating a gay parent's custody rights we can make more specific claims. In at least 23 states, binding precedent holds that the judicial evaluation of a parent's sexual behavior during a custody adjudication must be orientation agnostic.[328] In addition, current precedent arguably holds that such discrimination would violate the constitutional protections of gay parents. *Romer* and *Lawrence* both hold that the due process clause prohibits the state from demeaning or stigmatizing gay individuals merely for their sexual orientation.[329] *Windsor* holds that the state must not deny same sex marriages the same privileges and benefits afforded traditional marriages.[330] By treating gay sexuality as more toxic than heterosexual sexuality courts arguably violate both precedents.

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[328] *See* Anson v. Havron, 140 So.3d 476 (Al.App. 2013), Nadler v. Superior Court of Sacramento County, 255 Cal.App.2d 523 (Ca.App. 1967), Jacoby v. Jacoby, 763 So.2d 410 (Fl.App. 2000), In the Interests of R.E.W., 220 Ga.App. 861 (Ap.Ga. 1996), McGriff v. McGriff, 99 P.3d 111 (Idaho 2004), Pryor v. Pryor, 709 N.E.2d 374 (In.App. 1999), In re Marriage of R.S., 286 Ill.App.3d 1046 (Ill.App. 1996), Maxwell v. Maxwell, 382 S.W.3d 892 (Ky.App. 2012), Bezio v. Patenaude, 410 N.E.2d 1207 (Ma. 1980), Fulk v. Fulk, 827 So.2d 736 (Ms.App. 2002), J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo.App. 1998), Shipman v. Shipman, 2003 357 N.C. 471 (N.C. 2003), Damron v. Damron, 670 N.W.2d 871 (Nd.App. 2003), Hassentab v. Hassentab, 6 Neb.App. 13 (Ne.App. 1997), In re J.S. & C., 129 N.J.Super. 486 (N.J.Sct. 1974), Guinan v. Guinan, 102 A.D.2d 963 (N.Y. 1984), State ex rel. Human Services Dept., 107 N.M. 769 (N.M.App. 1988), Inscoe v. Inscoe, 121 Ohio App.3d 396 (Oh.App. 1997), Fox v. Fox, 904 P.2d 66 (OK 1995), Massey-Holt v. Holt, 255 S.W.3d 603 (Tn.App. 2007), Tucker v. Tucker, 910 P.2d 1209 (Utah 1996) and In re Marriage of Black, 188 Wash.2d 114 (Washington 2017).

[329] Romer v. Evans, 517 U.S. 620, 635 (1996). Lawrence v. Texas, 539 U.S. 558 (2003).

[330] U.S. v. Windsor, 133 S. Ct. 2675 (2013). Both Windsor and Romer famously avoided a clear statement of the applicable level of scrutiny such decisions should employ. At the very least, these decisions apply the elevated version of rational basis ("rational basis with bite") first described in U.S. Dep't of Agric., et. al. v. Moreno, 413 U.S. 528 (1973). But others, including the 9th Circuit, believe that Romer, Windsor and Obergefell employed either heightened or strict scrutiny. The Ninth Circuit famously noted in SmithKline Beecham that "Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an

Complicating matters is the issue of gender. As stated earlier, there is more evidence of disgust biasing the evaluation of gay males than lesbian women. Moreover, there is a theoretical reason to suspect that gay males will suffer the lion share of disgust bias (the mental association between gay males and anal sex). It is therefore possible that a failure to parse the alleged moderating effect of disgust on the evaluation of gay parents by gender might obscure the impact of disgust on gay parents all together.

Further complicating matters is the issue of correlated normative positions. Disgust sensitivity is known to correlate with traditional normative positions, normative positions that might independently predict an orientation or gender bias in these evaluations. Controlling for relevant, traditional normative positions would thus make a stronger analysis of disgust sensitivity's moderating impact.

In this chapter I test the general hypothesis that disgust sensitivity biases the judicial evaluation of gay male sexuality but not lesbian or heterosexual sexuality in custody adjudications. This hypothesis is based on the observation that gay males (but not lesbian women or heterosexuals) are strongly associated with anal sex, a practice associated with known pathogenic disgust elicitors.

To test this hypothesis, I analyze the dataset described in chapter 8. Participants were 381 individuals who were presented with a simulated child custody dispute. Recall that this dispute concerns a parent who engages in a post-divorce sexual liaison (the "engaged parent"). The non-engaged parent believes this liaison to be confusing and harmful to their child, and thus files a motion in court to modify their current custody order. This motion asks to court to grant the non-engaged parent full custody of the child and to restrict the engaged parent's visitation rights in two ways: prohibit the presence of the engaged parent's significant other during visitation hours (partner restriction) and prohibit overnight visitation by the engaged parent (overnight restrictions). The gender and orientation of the liaison is randomly varied to create four conditions: gay male liaison, lesbian liaison, heterosexual male liaison and heterosexual female liaison.

Participants are then asked to rule on this motion as if they were the judge on the case. Specifically they are asked how willing they would be to remove custody from the engaged parent, prohibit the presence of the engaged parent's new partner during visitation, and prohibit the engaged parent from visiting their child overnight. Participants' disgust sensitivity is then assessed, as are the participants' adherence to traditional normative positions that might also explain a gendered or orientation-biased response: traditional gender roles beliefs, traditional morality and sexual prejudice.

I hypothesize: that (H_1) disgust sensitivity will predict a willingness to remove custody and visitation rights in the gay male liaison condition but not in the lesbian liaison condition or the heterosexual conditions; (H_2) disgust sensitivity will correlate positively with traditional gender role beliefs, moral traditionalism and sexual prejudice, and (H_3) disgust sensitivity will predict a willingness to remove custody and visitation rights in the gay male liaison condition but not in the lesbian liaison condition or the heterosexual conditions even after controlling for the influence of these correlated normative positions.

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express declaration is not necessary …. [we consider] what the Court actually did." SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480 (9th Cir. 2014) (internal quotations and citation omitted).

Results

H_1: Disgust sensitivity will predict a willingness to remove custody and visitation rights in the gay male liaison condition but not the lesbian liaison condition or the heterosexual liaison conditions.

I examined the relationship between disgust sensitivity and the willingness to remove custody from parents engaged in a same-sex and heterosexual liaisons through the use of four separate linear regressions. As expected, disgust sensitivity predicted a willingness to remove custody from parents engaged in a gay male liaison (β =.03, *p*=0.005) but not from parents engaged in a lesbian liaison (β =.01, *p*=0.335), heterosexual male liaison (β =.02, *p*=0.083) or heterosexual female liaison (β =.02, *p*=0.068). It should be noted, however, that pathogenic disgust sensitivity did marginally predict a willingness to remove custody in the two heterosexual conditions. While the results failed to reach significance at conventional levels, they were close, and the two-tailed test employed is by nature conservative.[331]

Table 1. Summary of separate regression analyses for individual differences in disgust sensitivity predicting a willingness to remove custody.

Model 1: Predicting Custody Removal in Gay Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.3	2.91	0.005
Constant	.79	.60	-.28	1.30	0.198

Model 2: Predicting Custody Removal in Lesbian Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.01	.01	.13	0.97	0.335
Constant	2.03	.76	-.11	2.66	0.010

Model 3: Predicting Custody Removal in Hetero Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.19	1.76	0.083
Constant	1.32	.59	-.33	2.25	0.028

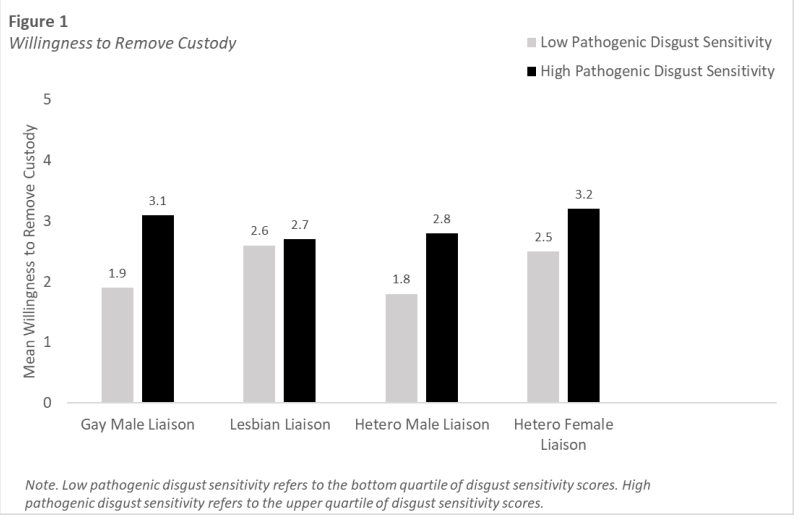
Model 4: Predicting Custody Removal in Hetero Female Liaison Condition

Variable	B	SE B	β	t	p

[331] These results did not materially change if respondents who failed the manipulation check were included (removal of custody gay male: *p*=0.005, removal of custody lesbian mother: *p*=0.335, removal of custody heterosexual male: *p*=0.080; removal of custody heterosexual female: *p*=0.069).

Disgust Sensitivity	.02	.01	.17	1.85	0.068
Constant	1.69	.52	-.18	3.25	0.002

Note. Model 1: *n*=78; adj R^2 = .09, *SE* = 1.62. Model 2: *n*=77; adj R^2 = -.00, *SE* = 1.62. Model 3: *n*=74; adj R^2 = .03, *SE* = 1.149. Model 4: *n*=78; adj R^2 = .03, *SE* = 0.90. All regressions are two-tailed. Disgust sensitivity scores correlate positively with individual disgust sensitivity.



Analysis of the willingness to apply partner restrictions returned a different result. Disgust sensitivity predicted a willingness to apply partner restrictions to the newly dating parent's visitation rights in the gay male liaison condition (β =.03, *p*=0.004) and in both of the heterosexual conditions (heterosexual male:β =.02, *p*=0.049; heterosexual female: β =.03, *p*=0.002), but not in the lesbian liaison condition (β =.02, *p*=0.093). Again, however, it should be noted that this relationship could be classified as marginally significant.[332]

Table 2. Summary of separate regression analyses for individual differences in disgust sensitivity predicting a willingness to impose partner restrictions on visitation rights.

Model 1: Predicting Partner Restrictions in Gay Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.34	2.96	0.004
Constant	1.85	.60	-.12	3.06	0.003

Model 2: Predicting Partner Restrictions in Lesbian Liaison Condition

Variable	B	SE B	β	t	p

[332] These results did not materially change if respondents who failed the manipulation check were included (partner restrictions gay male: *p*=0.004, partner restrictions lesbian mother: *p*=0.093, partner restrictions heterosexual male: *p*=0.049; partner restrictions heterosexual female: *p*=0.002).

Disgust Sensitivity	.02	.01	.24	1.70	0.093
Constant	2.43	.75	-.05	3.24	0.002

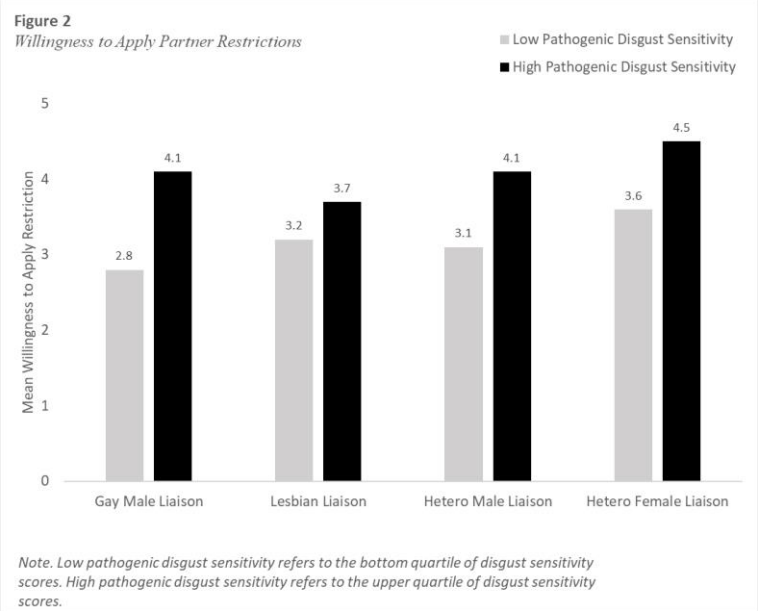
Model 3: Predicting Partner Restrictions in Hetero Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.23	2.00	0.049
Constant	2.22	.58	-.23	3.85	0.000

Model 4: Predicting Partner Restrictions in Hetero Female Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.26	3.15	0.002
Constant	2.57	.44	.10	5.90	0.000

Note. Model 1: *n*=78, adj R^2 = .09, *SE* = 1.62. Model 2: *n*=77, adj R^2 = .02, *SE* = 1.59. Model 3: *n*=74, adj R^2 = .04, *SE* = 1.45. Model 4: *n*=78, adj R^2 = .10, *SE* = 1.27. All regressions are two-tailed. Disgust sensitivity scores correlate positively with individual disgust sensitivity.



Willingness to apply overnight restrictions followed the same pattern. Disgust sensitivity predicted a willingness to apply overnight restrictions to the newly dating parent's visitation rights in the gay male liaison condition (β =.04, *p*=0.000) and in both of the heterosexual liaison

conditions (heterosexual male: β =.04, *p*=0.003; heterosexual female: β =.03, *p*=0.006), but only marginally in the lesbian liaison condition (β =.03, *p*=0.069).[333]

Table 3. Summary of separate regression analyses for individual differences in disgust sensitivity predicting a willingness to impose overnight restrictions on visitation rights.

Model 1: Predicting Overnight Restrictions in Gay Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.04	.01	.40	3.88	0.000
Constant	1.26	.59	-.01	2.12	0.037

Model 2: Predicting Overnight Restrictions in Lesbian Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.24	1.84	0.069
Constant	1.89	.77	-.13	2.47	0.016

Model 3: Predicting Overnight Restrictions in Hetero Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.04	.01	.35	3.09	0.003
Constant	1.23	.62	-.19	1.99	0.051

Model 4: Predicting Overnight Restrictions in Hetero Female Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.27	2.82	0.006
Constant	1.83	.55	-.08	3.32	0.001

Note. Model 1: *n*=78, adj R^2 = .15, *SE* = 1.59. Model 2: *n*=77, adj R^2 = .03, *SE* = 1.62. Model 3: *n*=74, adj R^2 = .11, *SE* = 0.93. Model 4: *n*=78, adj R^2 = .08, *SE* = 0.96. All regressions are two-tailed. Disgust sensitivity scores correlate positively with individual disgust sensitivity.

[333] These results did not materially change if respondents who failed the manipulation check were included (overnight restrictions gay male: *p*=0.000, overnight restrictions lesbian mother: *p*=0.069, overnight restrictions heterosexual male: *p*=0.003; overnight restrictions heterosexual female: *p*=0.005).

Figure 3

Willingness to Apply Overnight Restrictions

Note. Low pathogenic disgust sensitivity refers to the bottom quartile of disgust sensitivity scores. High pathogenic disgust sensitivity refers to the upper quartile of disgust sensitivity scores.

H_2: Disgust sensitivity will correlate positively with traditional gender role beliefs, moral traditionalism and sexual prejudice.

But disgust sensitivity is also known to correlate with conservative or traditional normative positions, positions that might independently explain an increased willingness to remove custody or visitation rights from a gay parent, or a disparate willingness to remove custody or visitation rights across gender (Crawford et al., 2014; Kam & Estes, 2016; Olatunji, 2008; Ray & Parkhill, 2020). This might also hold for disgust sensitivity and normative positions relevant to the custody dispute at issue: traditional gender role beliefs, moral traditionalism and sexual prejudice. To account for this possibility a correlation analysis was conducted on disgust sensitivity, traditional gender role beliefs, moral traditionalism and sexual prejudice.

I hypothesized that disgust sensitivity will positively correlate with conservative positions on gender role beliefs, moral traditionalism and sexual prejudice and I find that this is indeed the case. Disgust sensitivity displayed a significant, though weak, correlation with all three measures (gender role beliefs r = 0.29***; moral traditionalism r = 0.19*; sexual prejudice r = 0.24***). The other measures (gender role beliefs, moral traditionalism and sexual prejudice), however, displayed strong correlations with each other.

Table 4. Descriptive Statistics and Correlations for Study Variables.

Variables	n	M	SD	1	2	3	4	5	6	7
1. Disgust Sensitivity	155	52.25	14.94	--						
2. Gender Role Beliefs	155	25.16	10.49	0.28***	--					
3. Moral Traditionalism	155	9.07	4.45	0.17*	0.67***	--				
4. Sexual Prejudice	155	15.41	10.32	0.26***	0.67***	0.73***	--			

5. Custody Removal	155	2.61	1.66	0.23**	0.56***	0.48***	0.46***	--		
6. Partner Restriction	155	3.61	1.65	0.27***	0.46***	0.51***	0.49***	0.69***	--	
7. Overnight Restriction	155	3.35	1.68	0.32***	0.44***	0.40***	0.42***	0.71***	0.83***	-

Note. * p<0.05, ** p<0.01, *** p<0.001

H_3: Disgust sensitivity will predict a willingness to remove custody and visitation rights in the gay male liaison condition but not the lesbian liaison condition or the heterosexual liaison conditions after controlling for the influence of traditional gender role beliefs, moral traditionalism, and sexual prejudice.

Finally, I examine the impact of disgust sensitivity on the willingness to remove custody and visitation rights from parents across both gender and orientation, while controlling for correlated normative positions that might also explain a gender disparate or orientation disparate willingness to remove or restrict. I hypothesize that disgust sensitivity will predict a willingness to remove custody and visitation rights in the gay male liaison condition but not the lesbian liaison condition or the heterosexual liaison conditions even after controlling for the influence of traditional gender role beliefs, moral traditionalism and sexual prejudice.

Six separate multi-variate regression analyses returned mixed results. When controlling for traditional gender role beliefs, moral traditionalism and sexual prejudice, disgust sensitivity remained predictive of a desire to remove custody (β=.02, p=0.04), apply partner restrictions (β=.02, p=0.032) and apply overnight restrictions (β=.03, p=0.004) in the gay male liaison condition. And disgust sensitivity remained non-predictive of the willingness to remove custody (β=-.00, p=0.848), apply partner restrictions (β=.01, p=0.314) and apply overnight restrictions (β=.02, p=0.275) in the lesbian liaison condition. Moreover, it should be noted that these results could not be classified as marginally predictive either. When correlated normative positions on gender role beliefs, traditional morality and sexual prejudice are controlled for, pathogenic disgust sensitivity had very little, if any, predictive power on the willingness to remove custody or restrict visitation in the lesbian condition.

But results for the heterosexual conditions were mixed. Disgust sensitivity predicted a willingness to apply partner restrictions in the heterosexual female liaison condition (β=.02, p=0.005), and overnight restrictions in both the heterosexual male and heterosexual female liaison conditions (heterosexual male:β =.03, p=0.017; heterosexual female: β =.02, p=0.039). But disgust sensitivity remained unpredictive of the most severe custody ruling, the complete removal of custody, in both heterosexual liaison conditions. In addition, disgust sensitivity did not even marginally predict a willingness to impose this (most severe) sanction when controlling for correlated normative positions (custody removal in hetero male condition: β =.14, p=0.215; custody removal in hetero female condition: β =.10, p=0.264).

Table 5. Summary of simultaneous regression analyses for individual differences in trait characteristics predicting a willingness to remove custody in all four liaison conditions.

Model 1: Predicting Custody Removal in Gay Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.19	2.09	0.044
Gender Role Beliefs	.05	.02	.37	2.45	0.017
Moral Traditionalism	.17	.05	.40	3.20	0.002
Sexual Prejudice	-.01	.02	-.08	-0.61	0.545
Constant	-.89	.56	-.04	-1.57	0.121

Model 2: Predicting Custody Removal in Lesbian Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	-.00	.01	-.02	-0.19	0.848
Gender Role Beliefs	.08	.02	.65	3.42	0.001
Moral Traditionalism	-.06	.06	-.15	-0.98	0.332
Sexual Prejudice	.04	.02	.21	1.48	0.143
Constant	.72	.72	.05	1.00	0.321

Model 3: Predicting Custody Removal in Hetero Male Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.14	1.25	0.215
Gender Role Beliefs	.02	.02	.19	1.01	0.317
Moral Traditionalism	.06	.08	.14	0.77	0.446
Sexual Prejudice	-.05	.03	-.29	-1.38	0.172
Constant	1.13	.67	-.33	1.68	0.097

Model 4: Predicting Custody Removal in Hetero Female Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.01	.01	.10	1.13	0.264
Gender Role Beliefs	.07	.03	.54	2.49	0.015
Moral Traditionalism	.06	.06	.14	0.91	0.367
Sexual Prejudice	-.06	.04	-.35	-1.66	0.101
Constant	.64	.59	-.09	1.08	0.282

Note. Model 1: n=78, adj R^2 = .42, SE = 1.29. Model 2: n=77, adj R^2 = .25, SE = .82. Model 3: n=74, adj R^2 = .02, SE = 0.88. Model 4: n=78, adj R^2 = .14, SE = 1.44. All regressions are two-tailed. Disgust sensitivity scores correlate positively with individual disgust sensitivity. Gender role belief scores correlate positively with traditional gender role beliefs. Moral traditionalism scores correlate positively with traditional moral beliefs. Sexual prejudice scores correlate positively with sexual prejudice.

Table 6. Summary of simultaneous regression analyses for individual differences in trait characteristics predicting a willingness to apply partner restrictions in all four liaison conditions.

Model 1: Predicting Partner Restrictions in Gay Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.21	2.19	0.032
Gender Role Beliefs	.04	.02	.35	2.12	0.037
Moral Traditionalism	.18	.05	.49	3.56	0.001
Sexual Prejudice	-.01	.02	-.06	-0.40	0.692
Constant	.16	.55	.15	0.29	0.770

Model 2: Predicting Partner Restrictions in Lesbian Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.01	.01	.14	1.01	0.314
Gender Role Beliefs	-.00	.03	-.04	-0.18	0.857
Moral Traditionalism	.05	.06	.15	0.86	0.393
Sexual Prejudice	.05	.03	.34	2.05	0.044
Constant	1.70	.75	-.05	2.26	0.027

Model 3: Predicting Partner Restrictions in Hetero Male Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.18	1.52	0.134
Gender Role Beliefs	.03	.02	.28	1.40	0.166
Moral Traditionalism	.02	.07	.05	0.26	0.799
Sexual Prejudice	-.05	.03	-.34	-1.54	0.129
Constant	2.20	.65	-.23	3.41	0.001

Model 4: Predicting Partner Restrictions in Hetero Female Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.25	2.87	0.005
Gender Role Beliefs	.05	.02	.44	2.11	0.038
Moral Traditionalism	.01	.06	.03	0.21	0.834
Sexual Prejudice	-.06	.03	-.38	-1.90	0.061
Constant	2.08	.51	.15	4.09	0.000

Note. Model 1: n=78, adj R^2 = .45, SE = 1.26. Model 2: n=77, adj R^2 = .18, SE = 1.45. Model 3: n=74, adj R^2 = .05, SE = 1.44. Model 4: n=78, adj R^2 = .14, SE = 1.25. All regressions are two-tailed. Disgust sensitivity scores correlate positively with individual disgust sensitivity. Gender role belief scores correlate positively with traditional gender role beliefs. Moral traditionalism scores correlate positively with traditional moral beliefs. Sexual prejudice scores correlate positively with sexual prejudice.

Table 7. Summary of simultaneous regression analyses for individual differences in trait characteristics predicting a willingness to apply overnight restrictions in all four liaison conditions.

Model 1: Predicting Overnight Restrictions in Gay Male Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.29	3.01	0.004
Gender Role Beliefs	.05	.02	.36	2.19	0.032
Moral Traditionalism	.11	.06	.28	2.03	0.046
Sexual Prejudice	-.01	.02	-.05	-0.32	0.748
Constant	-.07	.61	.19	-0.11	0.911

Model 2: Predicting Overnight Restrictions in Lesbian Liaison Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	-.02	.01	.14	1.10	0.275
Gender Role Beliefs	.02	.03	.16	0.76	0.451
Moral Traditionalism	.03	.07	.07	0.45	0.654
Sexual Prejudice	.04	.03	.21	1.33	0.187
Constant	1.06	.79	-.09	1.34	0.184

Model 3: Predicting Overnight Restrictions in Hetero Male Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.03	.01	.29	2.45	0.017
Gender Role Beliefs	.03	.02	.25	1.27	0.209
Moral Traditionalism	.09	.08	.22	1.11	0.273
Sexual Prejudice	-.07	.04	-.43	-2.01	0.048
Constant	1.00	.69	-.20	1.45	0.152

Model 4: Predicting Overnight Restrictions in Hetero Female Condition

Variable	B	SE B	β	t	p
Disgust Sensitivity	.02	.01	.21	2.10	0.039
Gender Role Beliefs	.08	.03	.61	2.56	0.013
Moral Traditionalism	-.01	.07	-.03	-0.17	0.865
Sexual Prejudice	-0.4	.04	-.26	-1.15	0.252
Constant	1.04	.63	.06	1.65	0.102

Note. Model 1: n=78, adj R^2 = .36, SE = 1.38. Model 2: n=77, adj R^2 = .13, SE = 1.53. Model 3: n=74, adj R^2 = .12, SE = 1.55. Model 4: n=78, adj R^2 = .19, SE = 0.14. All regressions are two-tailed. Disgust sensitivity scores correlate positively with individual disgust sensitivity. Gender role belief scores correlate positively with traditional gender role beliefs. Moral traditionalism

scores correlate positively with traditional moral beliefs. Sexual prejudice scores correlate positively with sexual prejudice.

Discussion

These results are partially consistent with the hypothesized model. As hypothesized, disgust sensitivity predicted a willingness to remove custody (β=.3 p=0.005), restrict partner presence (β=.34 p=0.004) and bar overnight visitation (β=.4 p=0.000) in the gay male liaison condition (H_1). Disgust sensitivity also correlated with traditional gender role beliefs (r = 0.28***), moral traditionalism (r = 0.17*), and sexual prejudice (sexual prejudice r = 0.26***), normative positions that could independently predict either a tendency to disfavor parents involved in a same-sex liaison or a disparate willingness to remove custody or visitation rights across gender (H_2). But even after controlling for these normative positions disgust sensitivity remained predictive of a willingness to remove custody and restrict visitation rights in the gay male condition (H_3). These findings suggest that disgust elicitors are strongly associated with gay male liaisons.

But results were less consistent with the hypothesized impact of disgust sensitivity on the evaluation of the lesbian and heterosexual liaisons. While H_1 hypothesized that disgust sensitivity would fail to predict negative outcomes in the lesbian and heterosexual conditions, disgust sensitivity did predict both partner and overnight restrictions in the heterosexual male (partner: β=.14; p=0.049; overnight β=.35; p=0.003) and heterosexual female conditions (partner: β=.26; p=0.002; overnight β=.27; p=0.006). Moreover, many results in the non-gay male conditions were "marginally predictive." While these results did not rise to statistical significance, they were close, and thus they failed to present strong evidence of an orthogonal relationship between disgust sensitivity and the evaluation of lesbian or heterosexual liaisons, especially considering that the regressions testing H_1 utilized a relatively conservative two-tail design.

But the multivariate analysis of H_3 returned a much more robust comparison across gender and orientation, and a particularly strong disparity on the most severe sanction available to participants, the complete removal of custody. When controlling for traditional gender role beliefs, moral traditionalism, and sexual prejudice, disgust sensitivity remained strongly predictive of a willingness to remove custody (β=.19; p=0.044) and restrict visitation rights (partner: β=.21; p=0.032; overnight β=.29; p=0.004) in the gay male condition, and unpredictive of a willingness to remove custody in the lesbian and heterosexual condition. Moreover, in these, multivariate, analyses, disgust sensitive failed to display even a marginally predictive relationship in the lesbian or heterosexual conditions on the removal of custody (lesbian liaison: β=-.02 p=0.848; hetero male liaison: β=.14; p=0.215; hetero female liaison: β=.10, p=0.264). Thus, when controlling for gender role beliefs, traditional morality and sexual prejudice, disgust sensitivity had very little, if any, predictive power on the willingness to remove custody in the lesbian or heterosexual conditions.

Disgust sensitivity did, however, predict a willingness to apply the less severe sanctions available to participants, visitation restrictions, in both heterosexual conditions, and these results held even after controlling for relevant normative positions.

These data thus support the conclusion that disgust sensitivity predicts an important bias against the evaluation of gay male sexuality in custody disputes. While disgust sensitivity predicts a willingness to restrict visitation in the heterosexual liaisons as well, it predicts a willingness to level the most severe sanction, the complete removal of custody, only in the gay male liaison condition. Moreover, this disparity grows stronger when normative positions correlated with

disgust sensitivity, normative positions that might independently predict a gender disparate or orientation disparate response, are controlled for.

This finding has several implications. First, it demonstrates a very real bias against gay male parents in a judicial setting. These findings also support (though do not prove) the longstanding assumption that gay male sexuality is considered more toxic to children than heterosexual or even lesbian sexuality to evaluators that are sensitive to disgust (Rosky, 2008, 2013a). And, this experiment suggests that this bias can have serious, adverse consequences for gay male parents if their dispute is adjudicated before a disgust sensitive bench.

Second, the bias demonstrated here, if operative in real cases, arguably violates legal side constraints. As stated previously, at least 23 states have held that the evaluation of parental sexual activity must be orientation agnostic in a custody hearing. These data demonstrate that it is not when fathers are before the bench, at least when they are evaluated by individuals highly sensitive to disgust. In addition, *Windsor*, *Romer* and *Obergefell* arguably hold that this bias violates the due process and equal protection rights of gay male parents.

And finally, these data once again demonstrate that gender is a crucial variable in the examination of orientation bias overall. While disgust sensitivity was found to bias the evaluation of gay male sexuality, it registered no statistically significant impact on the evaluation of lesbian sexuality.

Limitations

This analysis does not account for trait anger, and both anger and disgust are theorized to play a large role in moral assessment (Haidt, 2003; Prinz, 2007). Furthermore, anger and disgust are both known to inform the negative moral assessment of some sexual activities (Giner-Sorolla et al., 2012a). Both emotions, for example, have been shown to influence the moral assessment of rape (Giner-Sorolla & Pascale, 2009) and sex education (Irvine, 2006). This study is unable to parse the impact of disgust sensitivity from the impact of anger sensitivity. But there are good reasons to believe that this limitation is nonconsequential. First, the disgust sensitivity scale utilized for this study, the Disgust Sensitivity Scale Revised, demonstrates an insignificant correlation with anger sensitivity (Jones & Fitness, 2008). Second, the relationship between disgust sensitivity and moral assessment has been found to hold even when controlling for anger sensitivity (Chapman & Anderson, 2014). Third, when compared in experimental conditions, disgust has been shown to bias the evaluation of gay individuals while anger has not (Dasgupta et al., 2009; Seger et al., 2017; Tapias et al., 2007).

While pains were taken to simulate the realistic aspects of a custody decision, the study lacks ecological validity, as the decision making does not take place in a real-life setting. This is a common trade-off in achieving the internal validity required to make causal inferences. In this case, it is possible that the online, simulation method dampened reactions to the targets or encouraged a social desirability bias, especially among respondents who were able to discern that anti-orientation bias was a focus of the study.

And finally, this analysis is limited because it uses a sample of adults as a proxy for the judiciary. It may well be that disgust sensitive judges, individuals with specific training in both the law and in the avoidance of bias, are able to avoid the biases demonstrated here. A similar study using only judges as participants would be ideal.

Chapter 11

Conclusion

This project intended to address a hole in the existing scholarship. When gay male and lesbian parents contest the custody of their children they face a bewildering array of alleged bias. Published decisions and firsthand accounts suggest a biased a judiciary.[334] Firsthand accounts also suggest a biased bar,[335] in addition to a biased apparatus of home inspectors, guardians ad litem, court reporters and others.[336] Gay parents and their attorneys have long been aware of these alleged biases, but to date there has been very little empirical examination of their contours.

This project aimed to fill some of these gaps through the use of multiple methodologies – semi-structured interviews, a textual analysis of judicial decisions available through Lexis and Westlaw, and a controlled experiment. It focused on alleged anti-homosexual bias from the bench, and it explored three primary questions. The first queried the very existence of anti-homosexual bias during the adjudication of custody and the impact of its alleged moderators.

On this front conventional wisdom received qualified support. The experimental portion of this project failed to find any evidence of current anti-homosexual bias in terms of outcome. Participants were as willing to remove custody or restrict visitation rights in the heterosexual liaison conditions as they were in the homosexual liaison conditions. Moreover, the case law contained no evidence of anti-homosexual bias in terms of the most severe sanction, the denial of custody, during the last decade of data. But analysis of the case law found substantial bias over time (gay parents have been denied custody at a 64% rate when opposing a heterosexual parent for custody), and it found substantial bias in the allocation of visitation restrictions, a bias that remains in the most recent decade of data. Respondents to the interview portion of this project also believed, unanimously, that gay parents continue to face orientation bias from the bench, and these same respondents reported substantial bias on the fringes of the adjudication process, bias that is rarely discussed (bias from *guardian ad litems*, bias from court personnel, etc.).

Taken together these data suggest that while judicial anti-homosexual bias during the adjudication of custody is still a cause for concern, it may be waning and it may reside most powerfully in underexamined portions of the custody adjudication process: the imposition of visitation restrictions, the selection of lawyers, the navigation of court personnel and guardian ad litems. This does make sense alongside recent polling data and legal developments. Public opinion polls have recorded a steady increase of support for LGBTQ+ rights over the last several decades, and a growing acceptance of same-sex parenting (Flores, 2014; McGee, 2016a, 2016b; "National Trends in Public Opinion on LGBT Rights in the United States," 2014). Moreover, recent high

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[334] Recall that a full 100% of the respondents in the interview portion of this project believed that gay male and lesbian parents faced a biased judiciary when they adjudicated the custody of their children. Moreover, textual analysis of the published case record uncovered numerous instances of explicit anti-homosexual bias from the bench.

[335] Once again, the interview portion of this project evidences this claim well ("I remember one of my earliest cases, he came to me and he had been to two other attorneys. I don't know if this is helpful or not. But anyway, he'd been to two other attorneys, and one of them had just said, "Well, you'll never see your daughter again." Then the other one had said, "Let's pray and I'll get my bible." Those were the responses that he had and [he] was practically crying.").

[336] *See* Chapter II.

court decisions, in particular *Lawrence, Romer, Windsor* and *Obergefell,* signal a judiciary that has grown in its acceptance homosexuality and same-sex families.[337]

It has likewise been theorized that some judges are more burdened by anti-homosexual bias than others. This suspicion is based on both firsthand accounts and the analysis of anti-homosexual bias in the general population. Research has long suggested, for example, that males harbor a stronger bias against gay individuals than females (Breen & Karpinski, 2013; Herek & McLemore, 2013),[338] and that age is positively correlated with negative attitudes towards gay individuals (Herek, 1984, 2009; Johnson et al., 1997). Education also appears to be negatively correlated with anti-homosexual bias (though low education is not a real concern for the judiciary) (Herek, 1994, 2009; Loftus, 2001; Strand, 1998),[339] and the general consensus holds that as religiosity increases, attitudes toward lesbian and gay individuals become more negative (Jonathan, 2008; Rowatt et al., 2006).[340] Political conservatism has also been associated with the negative evaluation of lesbian and gay individuals (Herek, 2009; Nosek et al., 2007).[341]

But here again it is noteworthy what the experimental data failed to confirm. While there was a strong belief that male gender and advanced age would predict anti-gay bias in the simulated custody dispute that did not turn out to be the case.

It is likewise noteworthy that religiosity proved to be a non-issue in the experimental portion of this project. While respondents high in religiosity were far more likely to remove

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[337] *See* Lawrence v. Texas, 539 U.S. 558 (2003), Romer v. Evans, 517 U.S. 620 (1996), U.S. v. Windsor, 133 S. Ct. 2675 (2013), Obergefell v. Hodges, 135 S.Ct. 2584 (U.S. 2015).

[338] While the literature differs upon the strength of the effect size, straight males typically report a negative attitude towards gay males and more positive attitude towards lesbians, whereas straight women tend to hold equally positive valences toward both gay males and lesbians (Breen & Karpinski, 2012).

[339] There are also hints that a legal education, which is thought to stress egalitarian norms, may grant decision makers an elevated ability to cabin automatic biases and associations that are formally considered impermissible. Rachlinski, et. al, for example, found that trial judges were able to suppress the impact of their implicit racial biases on theoretical judicial decisions when the race of the theoretical litigants was made explicit, thus offering some support for a correlation between legal education and tolerance on the bench (Rachlinski et al., 2008). But those same judges were unable to suppress the impact of their implicit biases when the race of the litigants was subliminally primed and not explicit (Rachlinski et al., 2008). It should also be noted that Rachlinski did not test a control group of "non-judges," so any conclusions regarding the impact of legal or judicial training based on this study is tentative at best.

[340] Sophisticated studies of "Religiosity" and its interaction with homosexual bias have traditionally relied on three separate measures, religious fundamentalism, right-wing authoritarianism and Christian Orthodoxy, with religious fundamentalism being the strongest predictor of the three (Rowatt et al., 2006). Since this study does not focus on religiosity specifically but rather examines its impact as a moderator, religious attendance will serve as a proxy for religiosity. This is a common measure of religiosity and it has been shown to correlate positively with anti-homosexual bias (Fisher et al., 1994).

[341] In addition, several scholars have pointed to conservative political backlash as a possible explanation for the disparate treatment of same-sex parents, arguing that conservatives have adopted a reflexive aversion towards the rise of LGBT identity politics (Haidt & Hersh, 2001; Kam & Estes, 2016).

custody or restrict visitation overall, they proved no more likely to sanction homosexual liaisons than heterosexual liaisons. This finding flies in stark contrast to popular opinion, which consistently ranks religion as a primary source of anti-homosexual bias (Jonathan, 2008; Rowatt et al., 2006). It also flies in stark contrast to the interview results, which also cited religiosity as a primary source of anti-homosexual bias in custody cases.[342]

The impact of conservative political ideology did, however, bias the evaluation of same-sex liaisons, but not entirely in the manner that was predicted. While conservative participants proved more likely to apply visitation restrictions to parents engaged in same-sex liaisons, when the results were parsed by gender it became evident that this bias only burdened gay males. When evaluating fathers engaged in a sexual liaison, conservatives were more likely to apply partner and overnight restrictions to fathers who had engaged in a same-sex liaison than fathers who had engaged in a heterosexual liaison. But when evaluating the parental fitness of mothers who had engaged in a sexual liaison, conservative political ideology did not predict an orientation bias.

These findings suggest an intriguing evolution of anti-gay bias in these decisions. While orientation bias obviously contains many facets (gender assumptions, moral concerns, etc.) this result suggests that the preservation of patriarchy is a primary source of anti-homosexual bias in decisions of this type. It is notable that male violations of traditional gender norms appear to offend the politically conservative more than female violations. These results can also be seen as further evidence of lesbian erasure. As discussed in Part Two of this project, lesbian sexuality has traditionally been less salient than gay male sexuality (Kim, 2012; Rubin, 1984). Taken together, this lack of concern for the impact of lesbian sexuality suggests a patriarchal worldview that assumes a greater salience for male conduct.

The disparate impact of political ideology also, of course, speaks to the second query of this project, the impact of gender on anti-homosexual bias in custody adjudications. Perhaps the most singular take away from this project is that when one discusses anti-homosexual bias in the custody space one cannot do so coherently without addressing gender. Gay male fathers and lesbian mothers, much like their heterosexual counterparts, face distinct biases when they navigate custody, so much so that gender neutral anti-homosexual bias might be an incoherent concept.

Gender, of course, has always biased the adjudication of custody, and thus when gay male and lesbian parents adjudicate the custody of their children they sit at the intersection of two regimes of bias: sexual orientation bias and gender bias. The intersection of these two biases was predicted to produce distinct and unforeseen results, and this general hypotheses was confirmed. These data reveal that lesbian mothers who divorce from heterosexual families are viewed as both selfish and unstable, while comparable gay male fathers are not. On the other hand, gay male fathers who divorce from heterosexual families are often viewed as potential threats for sexual abuse or disease transfer, while lesbian mothers are not. In addition, lesbian mothers appeared to lose the custody advantage that heterosexual mothers have long enjoyed, receiving a denial rate equivalent to the denial rate of gay male fathers.

Analysis of the case law reveals that these unique biases result from an interaction between anti-orientation bias and gendered expectations. The assumption that mothers will prioritize their

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[342] *See* Chapter II (43% listed high religiosity at the primary predictor of anti-orientation bias, more than any other background characteristic). Caution is to be advised on these data however, as the current experiment did not account for religious denomination (only frequency of church attendance), and there is reason to think that membership in only certain religious traditions will predict orientation bias (Fisher et al., 1994; Rowatt et al., 2006).

family over sexual fulfillment, normally an advantage in custody proceedings, operates to the disadvantage of lesbian mothers who divorce from heterosexual families. They are seen as selfish for pursuing sexual compatibility at the expense of the family's cohesion while gay male fathers are occasionally seen as self-actualized for the same behavior. These mothers are also perceived as unstable because they appear to contradict their essential nature as mothers.

Gay males, on the other hand, are routinely viewed as "hypersexual" while men in general are regularly seen as more aggressive, promiscuous, violent, and risk seeking than women (Anderson, 2009; Connell, 1992; Herek, 1986; Kimmel, 2004; Levit et al., 2011). The stereotype of gay fathers as a sexual abuse threat can thus be seen as a result of the anti-gay slur that gay men are hypersexual, interacting with the anti-male slur that men are overly aggressive, risk seeking and prone to physical violence. This interaction also contributes to the stereotype that gay men are more likely to be physically diseased. It stands to reason that a hypersexual (gay stereotype), aggressive and risk seeking individual (male stereotype) would also be more likely to contract a contagious, sexually transmitted disease.[343]

Textual analysis further suggests that the gender of the child at issue also biases both judicial concern and custody outcomes. Courts have been considerably less willing to place daughters into the hands of gay male and lesbian parents than sons, and they have likewise been more willing to restrict the visitation rights of gay parents when daughters are at issue. Moreover, courts have particular concerns when daughters are at issue. They are more concerned with the child's exposure to immorality, and they place a greater emphasis on both legal prohibitions and the prohibitions of traditional morality, when the custody of daughters is at stake.

Taken together, this dissertation argues that a judicial impulse to police the moral development of young women, especially as it relates to the development of heterosexual norms, has created a unique burden for gay male and lesbian individuals in the custody process. It has rendered courts averse to placing daughters into gay male or lesbian hands.

The final query addressed by this dissertation concerned the impact of disgust, specifically an individual's sensitivity to disgust, on the judicial evaluation of gay male and lesbian parents. As expected, disgust sensitivity did predict an orientation bias when evaluating the sexual behavior of parents in a custody dispute, but only when gay male sexuality was before the bench. Disgust sensitivity did not predict any sort of orientation bias when evaluating the impact of lesbian sexuality in a custody matter.

This finding has several implications. For the analysis of disgust and its tendency to harshen the moral evaluation of homosexuality as a whole, it lends support to the theory that this relationship stems from, at least in part, an association between gay males and the pathogenic disgust elicitors associated with gay male sex (but not lesbian sex). But for the narrow purpose of this analysis it lends credence to the theory that disgust does indeed bias the evaluation of gay male fathers during the adjudication of parental custody rights.

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[343] Paul Cameron's (notorious) work exemplifies the tendency for the hypersexual and risk seeking stereotypes to blend into the notion that gay males are likely to be physically diseased; note how Cameron quickly slips from risky sexual excess to disease threat in his analysis of gay male behavior: "homosexuals are more apt to engage in highly risky and biologically unsanitary sexual practices …. as a consequence of this activity, they increase their chances of getting AIDS and other sexually transmitted or blood-borne diseases." What Causes Homosexual Desire - Dr. Cameron, http://www.biblebelievers.com/Cameron3.html (last visited Feb 12, 2021).

Future directions and final thoughts.

This dissertation provides many firsts. It is the first experimental investigation of anti-homosexual bias in custody adjudications. It is the first experimental investigation of affective disgust bias in the judicial decision making context, and it is the first attempt to codify past anti-homosexual bias in custody determinations by systematically examining published case law. This dissertation also explores an intersectional concern that most examination of anti-homosexual bias in the law do not: the impact of gender. And this dissertation obtains data on the impact of anti-homosexual bias at the fringes of the adjudication process (the selection of attorneys, guardian ad litems, etc.), a portion of the process that most inquires ignore.

The insights uncovered, however, are sterile without some recommendations for future. In terms of future research, this dissertation demonstrates the need for empirical data in the examination of orientation bias within the law. Absent a close examination of custody outcomes, it would remain obscured that gay male and lesbian parents still suffer noticeable outcome bias in the area of visitation restrictions (an outcome that receives less attention than the allocation of custody), and absent a close, systematic coding of the case law it would escape notice that mothers appear to lose their custody allocation advantage once they transgress the heterosexual norm. Moreover, it is difficult to examine the impact of affective bias on judicial decision making without conducting an experiment. In short, some insights require the acquisition of empirical data in a systematic manner, and some claims require experimental or quantitative methodologies. Legal scholarship would greatly benefit from a greater supply of both.

This dissertation also begs the question of mitigation. At first glance the mitigation possibilities appear sparse. Custody adjudications are bench trials, and thus new evidentiary rules appear to be off the table (without a jury there is no one to exclude evidence from). Moreover, jury selection is also not an issue in these cases, and thus changes to the rules governing preemptory challenges are also off point. These biases are likewise immune to changes in jury instructions, for the same reason (there is no jury). It is considerably harder to address issues of bias when the bias you intend to address is coming from the bench rather than the jury.

But there are means of addressing judicial bias. In the family law setting, for example, it is common for judicial training to stress that problematic gender role assumptions should be avoided (the mother should not work, the father must serve as the provider etc.) (Polikoff, 1981). And while courts certainly still suffer from these biases, there is some indication that they have lessened over time (Nickerson, 2000).

Implicit judicial bias is also a well-known issue to the courts (Kang et al., 2011; Rachlinski et al., 2008), and there are means to address them.[344] Merely learning to doubt one's objectivity, for example, has been shown to significantly decrease the impact of automatic bias (Pronin & Kugler, 2007), as has the conscious attempt to slow one's thinking (Kang et al., 2011). It is also possible to train one's mind to reject certain automatic assumptions (Mendoza et al., 2010). And, thankfully, judicial training to combat the impact of implicit or automatic bias has become increasingly common over the course of the last decade (Levinson, Bennett, and Hioki 2017).

Thus this dissertation will conclude with a call to restructure judicial training. Judges must be made aware of the impact of disgust when evaluating gay men. They must be taught that lesbian mothers may appear selfish and unstable, not because they are, but because their status as *lesbian* mothers contradicts deeply ingrained gender expectations. Judges should be made aware that gay

[344] It should be noted that the efficacy of many interventions, such as the interventions listed here, are disputed (Lai et al., 2014).

parents appear to suffer visitation restrictions at a significantly higher rate than comparably situated heterosexual parents, and that they have suffered custody denial at a significantly higher rate historically.

Perfection may not be possible but improvement is, so effort must be made.

Appendices

Appendix A

A judicial description of a lesbian parent as selfish significantly predicts the denial of that mother's custody petition. The same is not true for gay male fathers, though the results could be said to be "marginally significant." While the results failed to reach significance at conventional levels, they were close, and the two-tailed regression employed is by nature conservative.

Table 1. Judicial perception that parent is selfish predicting the denial of a custody petition. Summary of separate linear regressions.

Model 1: Predicting Custody Denial in Gay Male Condition

Variable	B	SE B	β	t	p
Parent Described as Selfish	.36	.20	.22	1.78	0.081
Constant	.24	.06	-.10	4.00	0.000

Model 2: Predicting Custody Denial in Lesbian Condition

Variable	B	SE B	β	t	p
Parent Described as Selfish	.25	.09	.23	2.69	0.008
Constant	.38	.05	.26	8.35	0.000

Note. Model 1: n=60; adj R^2 = .04, SE = 0.44. Model 2: n=152; adj R^2 = .04, SE = 0.49. All regressions are two-tailed.

A judicial description of a lesbian parent as unstable significantly predicts the denial of that mother's custody petition. The same is not true for gay male fathers. In this case, results in the gay male condition cannot be said to be marginally predictive.

Table 2. Judicial perception that parent is unstable predicting the denial of a custody petition. Summary of separate linear regressions.

Model 1: Predicting Custody Denial in Gay Male Condition

Variable	B	SE B	β	t	p
Parent Described as Unstable	.24	.32	.09	0.75	0.456
Constant	.26	.06	-.10	4.40	0.000

Model 2: Predicting Custody Denial in Lesbian Condition

Variable	B	SE B	β	t	p
Parent Described as Unstable	.20	.10	.18	2.07	0.040
Constant	.39	.05	.26	8.61	0.000

Note. Model 1: *n*=60; adj R^2 = -.00, *SE* = 0.45. Model 2: *n*=152; adj R^2 = .02, *SE* = 0.49. All regressions are two-tailed.

Appendix B

The gender of the child was included for exploratory purposes and these responses were collapsed after confirming that the child's gender did not significantly alter any pertinent results on the dependent variables.

Table B1 (Custody). Summary of separate regression analyses for liaison sexual orientation predicting a willingness to remove custody rights while controlling for gender of the child.

Model 1: Predicting Custody Removal

Variable	B	SE B	β	t	p
Liaison Orientation	.08	.18	.02	0.44	0.633
Gender of Child	.10	.18	.03	0.54	0.590
Constant	2.74	.15	-.05	17.72	0.000

Model 2: Predicting Custody Removal in the Male Liaison Condition

Variable	B	SE B	β	t	p
Liaison Orientation	.19	.26	.06	0.72	0.472
Gender of Child	.01	.26	.00	0.02	0.985
Constant	2.64	.23	-.11	11.59	0.000

Model 3: Predicting Custody Removal in the Female Liaison Condition

Variable	B	SE B	β	t	p
Liaison Orientation	-.01	.25	-.00	-0.07	0.946
Gender of Child	.19	.25	.06	0.76	0.450
Constant	2.83	.21	-.00	13.43	0.000

Note. Model 1: *n*=359, adj R^2 = -.00, *SE* = .99. Model 2: *n*=179, adj R^2 = .00, *SE* = 1.03. Model 3: *n*=180, adj R^2 = -.01, *SE* = 1.66. All regressions are two-tailed. Liaison orientation is coded 1 = homosexual liaison, 0 = heterosexual liaison. Gender of Child is coded 1 = male child, 0 = female child.

Table B2 (Partner). Summary of separate regression analyses for liaison sexual orientation predicting a willingness to impose partner restrictions while controlling for gender of the child.

Model 1: Predicting Partner Restrictions

Variable	B	SE B	β	t	p
Liaison Orientation	.04	.16	.01	0.25	0.806
Gender of Child	.04	.16	.01	0.27	0.786
Constant	3.65	.14	-.01	25.82	0.000

Model 2: Predicting Partner Restrictions in the Male Liaison Condition

Variable	B	SE B	β	t	p
Liaison Orientation	.24	.24	.08	0.98	0.330
Gender of Child	-.08	.24	-.02	-0.31	0.754
Constant	3.48	.21	-.10	16.50	0.000

Model 3: Predicting Partner Restrictions in the Female Liaison Condition

Variable	B	SE B	β	t	p
Liaison Orientation	-.13	.22	-.04	-0.61	0.543
Gender of Child	.16	.22	.05	0.74	0.462
Constant	3.80	.19	.07	20.21	0.000

Note. Model 1: n=359, adj R^2 = -.01, SE = 1.55. Model 2: n=179, adj R^2 = -.01, SE = 1.06. Model 3: n=180, adj R^2 = -.00, SE = 1.48. All regressions are two-tailed. Liaison orientation is coded 1 = homosexual liaison, 0 = heterosexual liaison. Gender of Child is coded 1 = male child, 0 = female child.

Table B3 (Overnight). Summary of separate regression analyses for liaison sexual orientation predicting a willingness to impose Overnight restrictions while controlling for gender of the child.

Model 1: Predicting Overnight Restrictions

Variable	B	SE B	β	t	p
Liaison Orientation	.18	.18	.05	0.99	0.324
Gender of Child	.06	.18	.02	0.34	0.732
Constant	3.28	.15	-.03	21.43	0.000

Model 2: Predicting Overnight Restrictions in the Male Liaison Condition

Variable	B	SE B	β	t	p
Liaison Orientation	.34	.25	.10	1.35	0.178
Gender of Child	-.17	.25	-.05	-0.67	0.505
Constant	3.28	.22	-.04	14.86	0.000

Model 3: Predicting Overnight Restrictions in the Female Liaison Condition

Variable	B	SE B	β	t	p
Liaison Orientation	-.02	.25	.01	0.07	0.944
Gender of Child	.29	.25	.09	1.15	0.251
Constant	3.28	.21	-.01	15.38	0.000

Note. Model 1: *n*=359, adj R^2 = -.00, *SE* = 1.68. Model 2: *n*=179, adj R^2 = -.01, *SE* = 1.06. Model 3: *n*=180, adj R^2 = -.00, *SE* = 1.48. All regressions are two-tailed. Liaison orientation is coded 1 = homosexual liaison, 0 = heterosexual liaison. Gender of Child is coded 1 = male child, 0 = female child.

Appendix C

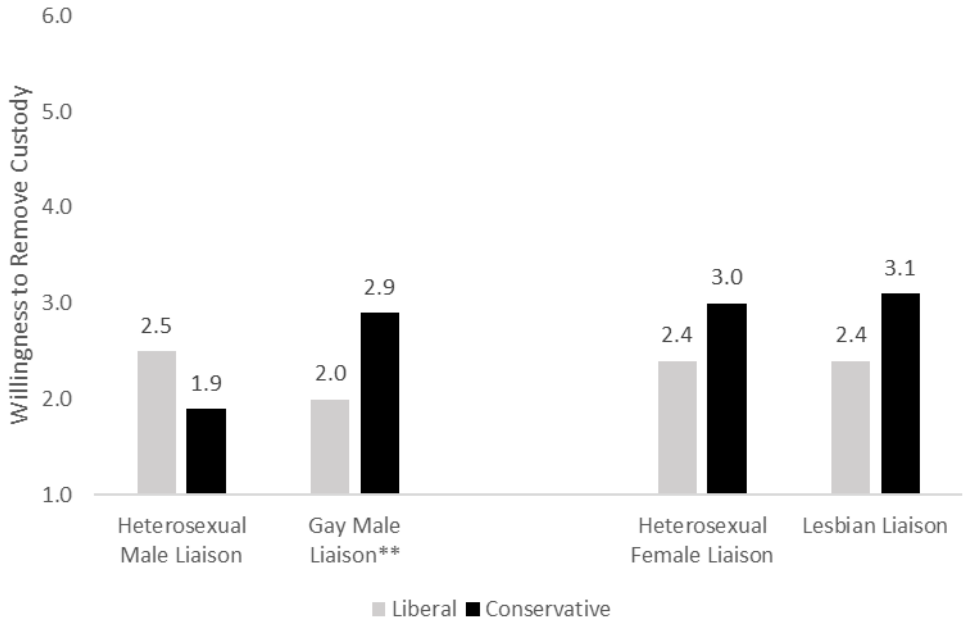
The survey instrument included five questions for use in subsequent articles. Two questions concerned the willingness of the respondent to simply request (rather than order) behavioral accommodations from the newly dating parent: (1) "would you recommend that the newly dating parent cease displays of affection when the child is present?" and (2) "would you recommend that the newly dating parent find a bedroom for the child that is further away from his or her own bedroom?" The remaining three questions queried whether the respondent was concerned that the newly dating parent's behavior might damage the child's moral development, encourage the child to develop a non-traditional sexual orientation, or encourage the child to develop a non-traditional gender identity. These variables were not designed for the hypotheses at issue here and would be problematic if utilized for that purpose. The first two involve requests rather than orders, and are designed to measure willingness to intrude into relationships by gender and orientation (it is theorized that male judges will be more likely to request accommodations from lesbians than gay males). The last three variables measure the perceived impact of gay parenting on childhood development and are clearly unrelated to the hypotheses at issue here.

Appendix D

Political ideology returned unusual results across all three dependent variables in the male conditions because, in general, liberal respondents were significantly harsher towards the heterosexual male condition than conservative respondents, while conservative respondents were significantly harsher towards the gay male condition than the liberal respondents (See Figures 1,2 & 3).

Figure 4.

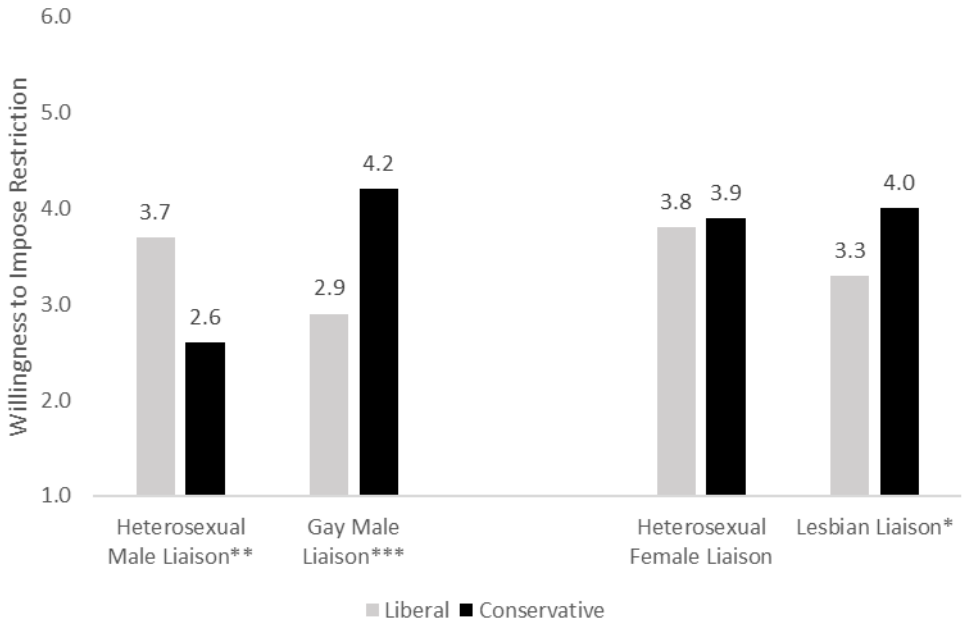
Denial of Custody by Political Ideology across Orientation and Gender of Liaison



Note. *$p<.05$, **$p<.01$, ***$p<.001$. All comparisons utilize a two-sample comparison of means.

Figure 5.

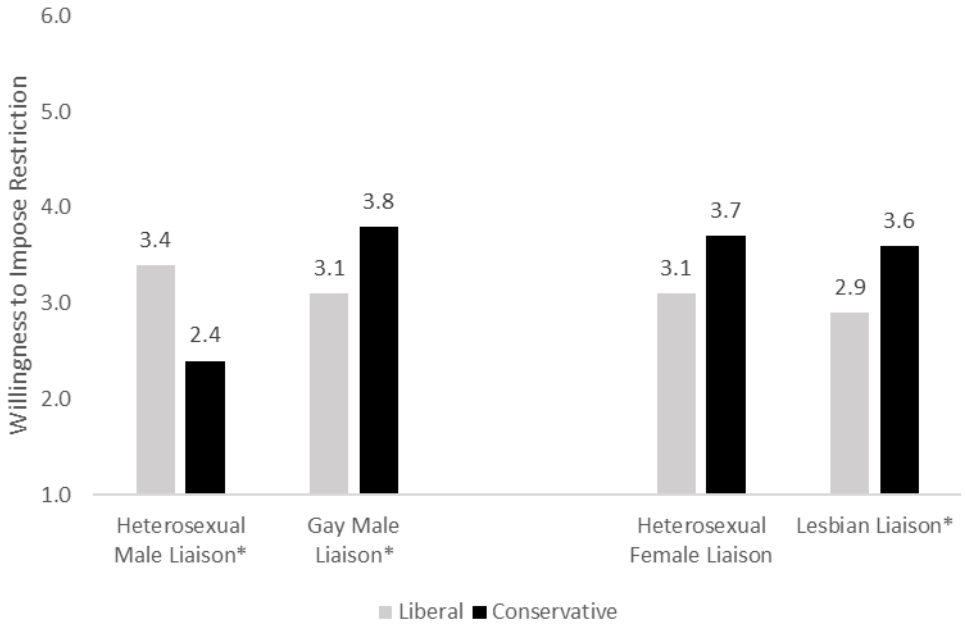
Imposition of Partner Restrictions by Political Ideology across Orientation and Gender of Liaison



Note. *$p<.05$, **$p<.01$, ***$p<.001$. All comparisons utilize a two-sample comparison of means.

Figure 6.

Imposition of Overnight Restrictions by Political Ideology across Orientation and Gender of Liaison



Note. *$p<.05$, **$p<.01$, ***$p<.001$. All comparisons utilize a two-sample comparison of means.

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