The Moral Sex: How Policing the Moral Development of Daughters Harms Gay Parents in Custody Disputes

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ABSTRACT

When gay parents fight for the custody of their children against a heterosexual parent, they sit at the intersection of two well-known regimes of bias: sexual orientation and gender. Legal scholars have thoroughly discussed the impact of sexual orientation bias on custody outcomes, but the issue has not been analyzed empirically. The intersectional impact of gender in these cases is even less clear. How do courts treat gay fathers differently than gay mothers in these contests? And how do judicial conceptions of “the daughter” or “the son” impact their treatment? These questions have received scant attention in the literature.

This Article examines the impact of the child’s gender on these adjudications. I compile all published decisions that allocate custody between a gay parent and a heterosexual parent through 2017 (n = 128; 1951-2017) and then apply a three-part process. First, I quantify the historical impact of sexual orientation bias on custody adjudications. Second, I explore the impact of the child’s gender on these contests by comparing custody outcomes for gay parents

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across the gender of the child. Third, I place these results into context by comparing judicial rationales advanced against gay parental fitness when daughters, as opposed to sons, are at issue.

I find that courts have historically denied gay parents custody at a rate of 64% when they contest custody against a heterosexual opponent. I likewise find that the gender of the child at issue matters. When a daughter is at issue, it is significantly more likely that courts will deny custody to gay parents (74% denial rate versus a 49% denial rate respectively, a statistically significant difference \(p>|z|=0.014**\)). Furthermore, judicial rationales stressing the alleged harms of immoral exposure, damage to societal morality, and the illegality of same-sex sex (prior to Lawrence) or same-sex marriage (prior to Obergefell) spike when daughters are at stake.

Based on these data and an analysis of the case law, I argue 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 parents in the custody process. It has rendered courts less willing to place daughters into their custody. It has likewise prompted courts to stress the outside control of sexuality and intimacy, the strictures of traditional morality, and the legal prohibitions barring same-sex intimacy to a greater degree when daughters are at issue. I conclude by placing these findings within the broader feminist tradition and discussing implications for the burdens gay custody litigants face more generally.
INTRODUCTION

When gay parents fight for custody of their children against a heterosexual parent, they sit at the intersection of two well-known regimes of bias: sexual orientation and gender. Legal scholars have thoroughly discussed the impact of sexual orientation bias on custody outcomes, but the issue has not been analyzed empirically. The intersectional impact of gender on these cases is even less clear. How do courts treat gay fathers differently than gay mothers in these contests? And how do judicial conceptions of masculinity and femininity impact court decisions regarding daughters versus sons? I examine the impact of a child’s gender on custody disputes between gay parents and their heterosexual counterparts.

The inspiration for this Article stems from a survey conducted in 2018. That survey aimed to capture the experience of fighting for custody as a gay parent and, accordingly, featured interviews of gay parents, their attorneys, and judges with firsthand experience in those matters. These interviews recounted the expected instances of anti-gay bias, strategies for their mitigation, and opinions regarding their roots. They also routinely circled back to a more classic regime of bias: gender. And while this was not unexpected (I predicted that gay fathers and mothers would face different burdens), the degree of this bias was surprising.

Thirty-seven percent of survey respondents reported that the gender of the

2. Id.
3. Id.
non-heterosexual parent had a profound impact upon their treatment in court. Respondents reported either prejudices and arguments that were specific to a particular gender or a general belief that gay fathers and mothers faced different burdens. As one gay father put it, “[I]t wasn’t that I was gay, it’s that I was a gay and a man.” Or as this gay mother explained:

They 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.

Another sizable fraction of respondents, 17%, believed that the contested child’s gender shaped the biases they confronted. Many respondents 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 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, while daughters would be more fragile.

Anti-gay bias within custody matters has received extensive study. Scholars have detailed how gay parents are routinely confronted with arguments that they will lure their children into non-heterosexual behavior, sexually abuse their children, or infect their children with disease. Scholars have likewise highlighted that courts frequently express anti-gay bias openly, either in the form of anti-gay statements or in more subtle turns of phrase.

Likewise, many scholars have examined the impact of gender bias on custody, from legal rules that specifically hinge on parental gender to extra-legal

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4. Leinauer, supra note 1, at 7.
5. For example, one parent reported a judicial fear that only applied to gay male fathers: “[W]e were predatory and [they had] an image of child molesters that’s been used against gay males.” Id. at 19.
6. Id. at 7.
7. Id. at 19 n.8 (emphasis in original).
8. Id.
9. Id. at 7.
10. Id. at 24–25.
11. One attorney who has handled many of these cases noted, “[Y]ou could say they expected more acting out from the boys.” Id. at 24.
12. 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.” Id.
biases that skew custody along gendered lines. But there has been little focus on the intersectional impact of both gender and sexual orientation bias on these parents. And the danger of single-axis analysis is well known: it can obscure real insight and marginalize real experience.

This project addresses holes in the existing scholarship by examining the impact of the child’s gender on the adjudication of custody disputes when one of the parents is gay. I ask, how do judicial conceptions of “the daughter” or “the son” impact the judicial treatment of gay parents who seek their custody? To answer this question, I conduct three analyses of all published decisions through 2017 that allocate custody between a gay parent and a heterosexual parent (n = 128; 1951-2017). The first analysis quantifies the historic impact of sexual orientation bias on custody allocation. The second examines the impact of the child’s gender on these outcomes. And the third examines the impact of the child’s gender on judicial rationales advanced against the parental fitness of gay parents.

I find that courts are nearly twice as likely to deny custody to gay parents when the opposing parent is heterosexual. In addition, the gender of the child at issue matters greatly. Courts have been significantly more reluctant to award custody to gay parents than sons, with a 74% denial rate when daughters are at issue compared to a 49% denial rate for sons. In addition, certain judicial concerns regarding gay parents spike when daughters are at issue. When the custody dispute is about a daughter, courts have been more concerned with the alleged harms of immoral exposure, damage to societal morality, and the illegality of same-sex marriage and same-sex sex (prior to Obergefell v. Hodges and Lawrence v. Texas, respectively).

15. These impacts range from legal rules that hinge on parental gender (paternal preference, the tender years doctrine, etc.) to extralegal biases that skew custody along gendered lines, such as the belief that the mother is inherently more nurturing, and the father is the natural breadwinner. See Nancy D. Polikoff, Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations, 7 WOMEN’S RTS. L. REP. 235 (1982); Cynthia A. McNeely, Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court Comment, 25 FLA. ST. U. L. REV. 891 (1998); Richard Neely, The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed, 3 YALE L. & POL’Y REV. 168 (1984); Deborah A. Widiss, Changing the Marriage Equation, 89 WASH. U. L. REV. 721 (2012); Richard A. Warshak, Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute’s “Approximation Rule,” 41 U. BALT. L. REV. 83 (2011); Julie E. Artis, Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine, 38 LAW & SOC’Y REV. 769 (2004).

16. 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, Like Father, Like Son, supra note 13, at 258.


18. In the published record, when gay parents have contested custody against a heterosexual parent, their custody requests are denied 64% of the time. See infra, Part II.

19. This is a statistically significant difference (p>|z|=0.014**).

Based on these data and an analysis of the case law, this Article 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 parents seeking custody. It has likewise prompted courts to stress the outside control of sexuality and intimacy—both the strictures of traditional morality and the legal prohibitions against same-sex intimacy—to a greater degree when daughters are at issue.

Part I will frame this project within the relevant literature. Part II will describe the methodology employed and report the results of two studies. The first will quantify the historic impact of sexual orientation bias on custody outcomes and then show how those results differ based on the gender of the child at issue. The second will catalogue and quantify the rationales advanced by courts against gay parental fitness and then determine the arguments that predominate when daughters are at issue as opposed to sons. Finally, Part III will look to case law and relevant feminist scholarship to both contextualize and explain the results.

I. AN EXPLORATION OF THE RELEVANT LITERATURE

A. Relevant Ambiguities Regarding Gender, Orientation, and Identity

Before this Article can begin in earnest, it should be noted that it relies on suspect terms and classifications. It analyzes custody cases that feature “gay” fathers, “lesbian” mothers, and “homosexual” parents. But it is not altogether clear what courts mean when they label a parent “gay,” “lesbian,” or “homosexual.” 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, U.S. courts have by and large ignored this separation. Instead, they tend to collapse all those who are “non-cis” or “non-straight” into the category of “homosexual.” Consider the following persons who have been labeled or treated as “homosexuals” by American courts:

21. This Article uses the term “homosexual” at times because it is a word employed by the courts and there is, unfortunately, no accurate substitute when talking about judicial rhetoric. I acknowledge, however, that the word has a clinical history and was often used to argue that persons expressing a non-heterosexual orientation are somehow diseased or psychologically/emotionally disordered—notions discredited by the American Psychological Association and the American Psychiatric Association in the 1970s. See GLAAD Media Reference Guide - Terms to Avoid, GLAAD (May 15, 2020, 10:00 AM), https://www.glaad.org/reference/offensive [https://perma.cc/9MVD-T47Q].


23. Credit should be given to Rhonda Rivera for uncovering the first five examples listed here.
• A father in a heterosexual marriage who experimented with same-sex sex in his late teens;\(^{24}\)
• A man who claimed to be “homosexual” but never admitted to any same-sex sexual activity;\(^{25}\)
• A woman who dressed in “mannish attire;”\(^{26}\)
• Men and women who displayed “homosexual propensities;”\(^{27}\)
• A man with one conviction for soliciting same-sex sex;\(^{28}\)
• A man who denied same-sex attraction but once sent a valentine to his male friend;\(^{29}\)
• A mother who denied she was a lesbian but admitted to a single sexual encounter with her female friend;\(^{30}\) and
• A woman who denied same-sex attraction and same-sex sexual activity but shared a bedroom with another woman.\(^{31}\)

United States courts have also demonstrated difficulty understanding any of these categories (biological sex, sexual orientation, and gender identity) as continuums, despite growing acceptance that all three express as a spectrum.\(^{32}\)

Instead, courts collapse all three into a single binary: homosexual or
heterosexual. In short, U.S. 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 of “homosexual.” Vagaries, distinctions, and spectrums are ignored.

This Article examines all custody cases featuring one parent labeled by a court as “homosexual,” “gay,” or “lesbian.” It 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.

B. Gender Bias, Orientation Bias, and the Adjudication of Custody

Increasingly, scholars recognize that an analysis of human relations should avoid the “single-axis” approach when possible. An analysis of the Black woman’s experience is incomplete if it focuses only on racism or sexism. Similarly, an analysis of motherhood is less sound if it fails to take into account the unique experiences of Black or Hispanic women. 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 of issues includes human interactions that sit at the intersection of multiple “regimes of bias”—well-known biases that have been shown to greatly impact societal outcomes, including biases related to gender, race, ethnicity, and, of course, sexual orientation.

Gay custody litigants sit at the intersection of two well-studied regimes of

33. This “forced binary” is perhaps best demonstrated by the well-studied case, Rowland v. Mad River Local School District, wherein the plaintiff (Ms. Rowland) repeatedly defined herself as a bisexual only to be repeatedly defined as a “homosexual” by both the trial and appellate courts. Rowland v. Mad River Local School District, 730 F.2d 444, 447 (6th Cir. 1984). But Rowland is by no means the only example. The data for this study contains nine examples of similar bisexual erasure; see Commonwealth ex rel. Bachman v. Bradley, 91 A.2d 379 (Pa. Super. Ct. 1952); In re Marriage of 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 Ct. App. 1987); S.B. v. L.W., 793 So. 2d 656 (Miss. Ct. App. 2001); In re Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983); J.L.P. (H.) v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982); Large v. Large, No. 93AP-735, 1993 WL 498127 (Ohio Ct. App. Dec. 2, 1993); In re Marriage of Dorworth, 33 P.3d 1260 ( Colo. App. 2001).

34. In many ways this can also be seen as a rough analogue to the “heterosexual metanarrative” noted by Fineman, wherein the law appears to understand the family in only cis-gendered, heterosexual terms. See MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 145–50 (1995).

35. See Crenshaw, Mapping, supra note 17.


37. See McQuillan, supra note 36.
bias: gender and sexual orientation. When these parents fight for custody of their children, they encounter not only sexual orientation bias, but also the interaction of that bias with biases related to their gender, the gender of the children, and, on occasion, the gender of the judge overseeing the case. Previous analyses of gay parental custody adjudications have too often focused on one of these axes and ignored the others. They have focused on the burdens facing gay fathers or mothers individually, or they have studied their burdens as a single unit. Very few have considered the implications of the child’s or judge’s gender.

1. The Impact of Anti-Gay Bias on Custody Adjudications

Unlike other traditional bias regimes (e.g., racism or sexism), anti-gay bias was not an identifiable variable in the published custody record until recently. The first published custody matter discussing a gay parent (known to this author) dates back to only 1951. And published custody cases featuring a gay parent were relatively rare until the early 1980s.

Initially, anti-gay bias was baked into the rules themselves. Prior to the 1970s, most jurisdictions allowed an inference of parental unfitness based solely on a parent’s non-heterosexual orientation. Known as the per se rule, courts were allowed to assume, “per se,” that a gay parent was less parentally fit than an opposing heterosexual parent, ceteris paribus.

38. 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. See Rosky, Like Father, Like Son, supra note 13. See also Kristina Watkins, Defining Legal Parenthood: The Intersection of Gender and Sexual Identity in U.S. Child Custody Decisions, 2003–2009, OPEN ACCESS DISSERTATIONS 496 (2011) (Ph.D. dissertation, University of Massachusetts, Amherst), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1493&context=open_access_dissertations [https://perma.cc/PL6V-XFVY].


41. Luley v. Luley, 48 N.W.2d 328 (Minn. 1951). Gay parents surely existed prior to the case, but Luley is the first published custody case to openly discuss a parent’s homosexual orientation. Id.

42. Only twenty-one pre-1980 decisions featuring a gay parent are known to the author.

43. Shapiro, supra note 13, at 637–39.

44. There is some dispute on the precise parameters of this rule or inference. Some have implied that the per se rule mandates, as a matter of law, a finding that gay parents are less parentally fit than heterosexual parents. See Shapiro, supra note 13, at 633. Others have implied that the per se rule merely creates a presumption that gay parents are less fit, ceteris paribus, than heterosexual parents. See WILLIAM N. ESKRIDGE, JR., SEXUALITY, GENDER AND THE LAW
The nexus test replaced the per se rule in the 1970s, instructing courts to weigh—rather than assume—the impact of all alleged immorality (not just non-heterosexuality) on the evaluation of parental fitness. The nexus test afforded gay parents some protection in theory because it required a demonstrated nexus between a parent’s sexuality and harm to the child before their sexuality could be deemed relevant to the evaluation of their parental fitness. While this appeared to be progress, in practice, courts were still free to find that sexual orientation rendered gay parents less fit than their heterosexual counterparts. They now simply had to justify their conclusions rather than assert them.

Even after the per se rule fell out of use, most scholars agree that gay parents continued to receive custody less often and see their visitation restricted more frequently than comparably situated heterosexual parents. And it is not hard to see why. In addition to the numerous accounts from lawyers, activists, and academics attesting to the bias they experienced, the opinions themselves openly revealed bias. Consider this quotation from Chicoine v. Chicoine:

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.

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 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

787–88 (3d ed. 2011). The reality is slightly more complicated. In truth, nearly all courts during this period were allowed to presume the parental unfitness of gay parents, but very few of them were actually required to do so. In short, the presumption that a gay parent was less fit to obtain custody was not so much a rule as it was a permissible inference. Shapiro, supra note 13, at 639.


46. Shapiro, supra note 13, at 635–36.

47. Rivera, supra note 18, at 904 (“justice for the homosexual parent does not come cheaply or often”); Shapiro, supra note 13, at 625 (“individual lesbians and gay men routinely lose custody and instead receive restricted visitation simply because they are lesbian or gay”); Richman, Lovers, supra note 40; 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.”).

say that it is not harmful is to experiment with people’s lives, particularly the lives of children.\textsuperscript{49}

The case law is replete with less verbose indications of anti-gay bias: descriptions of same-sex sex as “despicable,”\textsuperscript{50} “repugnant,”\textsuperscript{51} or “detestable”\textsuperscript{52} a recurrent need to place quotation marks around a parent’s same-sex “life partner”\textsuperscript{53} and the obvious slight of describing an individual as an “admitted”\textsuperscript{54} or “avowed”\textsuperscript{55} gay. The presence of anti-gay sentiment in the published record has been explicit, not subtle.

2. The Impact of Gender Bias on Custody Adjudications

Gender biases have skewed custody adjudications in a number of complex ways. Mothers and fathers face different sets of biases\textsuperscript{56} and cases featuring sons often elicit different biases than those featuring daughters.\textsuperscript{57} The gender of the judge may also color the process.\textsuperscript{58} Matters become even more complicated when these biases interact.\textsuperscript{59}

Most scholarship discussing the impact of gender on custody focuses solely on the gender of the parent. Very little scholarship explores the impact of the child’s or the judge’s gender on the custody process, and even less considers the interaction of these biases. This is especially true of scholarship that examines custody issues faced by gay parents, which is limited and largely focused on the gender of the parents, if it considers the impact of gender at all. That said, the existing literature does provide some insight into how gender bias impacts the adjudication of gay parental custody.

3. Bias Related to the Gender of the Parent

Gendered views of the mother and father have always impacted custody outcomes. In fact, for much of U.S. legal history, gendered biases were included in the rules themselves. During the pre-industrial era, courts explicitly preferred to give fathers custody, reflecting an early common law tradition that viewed

\begin{itemize}
\item \textsuperscript{49} Ex Parte H.H., 830 So. 2d 21, 37 (Ala. 2002) (internal citations omitted).
\item \textsuperscript{51} Weigand v. Houghton, 730 So. 2d 581, 590 (Miss. 1999).
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{58} Rosky, \textit{Like Father, Like Son}, supra note 13, at 311–13; Artis, supra note 15.
\item \textsuperscript{59} See generally Rosky, \textit{Like Father, Like Son}, supra note 13.
\end{itemize}
custody as a paternal right. As the industrial era dawned, courts gradually shifted to the tender years doctrine, which favored the mother when the child was of “tender years.” In the mid-twentieth century, many courts adopted a preference for the “primary caretaker,” a rule that did not explicitly favor mothers but did favor the parent who filled the traditional role of the mother—that of caretaker.

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 and fathers, accordingly, received priority to keep them. The tender years doctrine reflected the increasingly widespread assumption that mothers were inherently more nurturing than fathers, and thus better suited for caregiving. The primary caretaker doctrine, while gender neutral on its face, cemented a historically gendered division of parental labor: mothers were caretakers while fathers were breadwinners.

Even after the introduction of facially gender-neutral doctrines in the early 1970s, essentialized views of the mother and the father persisted. Scholars have noted persistent societal assumptions that mothers are more family focused, and that mothers place a lower emphasis on sexual satisfaction. Fathers, on the other hand, are still viewed as

60. Warshak, supra note 15; Polikoff, supra note 15.
61. Polikoff, supra note 15. See also McNeely, supra note 15; Neely, supra note 15; Widiss, supra note 15; Warshak, supra note 15; Artis, supra note 15.
64. See Polikoff, supra note 15, at 235; Samantha Williams & Lior Haas, Child Custody, Visitation & Termination of Parental Rights, 15 GEO. J. GENDER & L. 365, 368 (2014); Artis, supra note 15, at 770.
65. See generally Neely, supra note 15; O’Hanlon, supra note 62; see also Williams & Haas, supra note 64, at 369.
68. See generally Dow, supra note 67; see also Kathleen Gerson, HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD (1986); Ronner, supra note 56, at 184; Chodorow & Contratto, supra note 67; Watkins, supra note 38.
protectors and providers. Some scholars have even argued that judges apply these gendered assumptions consciously.

Considerable scholarship has been devoted to the impact of these assumptions. While scholars generally agree that gender biases continue to impact custody outcomes, they strongly disagree on the degree of that impact. Some argue that courts continue to strongly prefer giving mothers custody because they assume that mothers are more nurturing than fathers. In support of this view, these scholars point to numerous studies and surveys that conclude that mothers receive custody at higher rates than fathers. But others say that these numbers fail to capture the true dynamic at play. 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 actually fight for it. They argue that the lower percentage of custody allocations to fathers is merely a reflection of male disinterest in child rearing.

There is far less scholarship dissecting the impact of gender bias on the judicial perception of gay custody litigants. Still, from the few studies available, some conclusions can be drawn. For one, evidence suggests that gay fathers are more likely to be perceived as potential child molesters than gay mothers. A 2008 study found that gay fathers were stereotyped as potential child molesters in 22%

70. See Artis, supra note 15, at 784; Williams & Haas, supra note 64, at 369.
72. For an excellent summary of this dispute, see Warshak, supra note 15, at 92–93, particularly footnotes 34–35.
73. See, e.g., Artis, supra note 15, at 784–85; Lowery, supra note 71; Felner, supra note 71.
75. Scholars have interpreted some studies to imply that fathers were just as likely to receive custody as mothers in the decades following the demise of the tender years doctrine. See Phyllis Chesler, Mothers on Trial: The Custodial Vulnerability of Women, 1 FEMINISM & PSYCH. 409 (1991); Lenore J. Weitzman, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 216–17 (1985).
77. See Polikoff, supra note 15; see generally, Weitzman & Dixon, supra note 76.
of cases, while gay mothers suffered the slur at a rate of 9%. The same study reported that gay fathers were also more likely to be perceived as vectors of disease than gay mothers. The fear of disease transfer was raised in 12% of cases involving gay fathers, but in none of the cases involving gay mothers.

Finally, a handful of scholars have examined the intersection of sexual orientation bias with judicial conceptions of the mother and the father. Kristina Watkins, for example, concluded that if mothers adopted a norm-aligning caretaker role, courts were more prone to forgive their non-traditional sexual orientation. A related study found that courts were particularly punitive towards gay fathers who engaged in caregiving because they viewed these fathers to be doubly transgressive. Those fathers both expressed a nontraditional sexual orientation and practiced a nontraditional division of parental labor.

4. Bias Related to the Gender of the Judge

Research suggests that male and female judges tend to decide cases differently in at least a handful of legal domains. For example, there is evidence that men are about 10% less likely to side with plaintiffs in sex discrimination cases. In addition, there is evidence that men who sit on panels with women are more likely to side with the plaintiffs in sex discrimination cases than men who sit on all-male panels. There is some evidence that women tend to vote more leniently in obscenity and death penalty cases than their male counterparts. But, perhaps counterintuitively, there is also evidence that women are more punitive than men when sentencing everyday criminal defendants.

On the surface, one might assume that a judge’s gender would affect the outcome of custody cases as well. Custody decisions allow for wide judicial discretion and call upon deep, likely unconscious, assumptions regarding the ideal mother, the ideal father, and the proper division of parental labor.

Unfortunately, only two studies currently address this question and neither yields satisfying results, due, in part, to the limitations of their methods. The first

78. Rosky, Like Father, Like Son, supra note 13, at 286. See also Watkins, supra note 38, at 119–20 (noting the stereotype that gay fathers were more likely to be categorized as potential child molesters).
79. Id. at 279.
80. Id.
82. Id.
84. Id. at 402–06.
87. Some studies on judicial decision-making in custody matters focus solely on male judges. See
study concluded that female judges favor gender-neutral custody rules while male judges prefer the tender years doctrine.\(^8\) But the study was limited by its small sample size (\(n = 25\)) and the strong possibility of a confound: the women in the sample were considerably younger than the men.\(^9\) The second study found that male participants were more willing to award custody to a mother accused of child abuse than female participants.\(^9\) But this study was based on an experimental analysis of lay people rather than judges.\(^1\)

Only one analysis has addressed juridical gender difference impacting custody adjudications for gay parents. That analysis found that male judges were more likely than female judges to accept homophobic stereotypes. Specifically, homophobic stereotypes were accepted by the court in 39% of the cases overseen by men, but in only 5% of the cases overseen by women.\(^2\)

5. Bias Related to the Gender of the Child

There is little analysis on the impact of the child’s gender in custody cases with gay parents. 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?\(^3\) The study catalogued the incidence of homophobic stereotypes within the published custody record 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.\(^4\)

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.\(^5\) This study found that both stereotypes are applied more often when sons are at issue and are rare in cases featuring a gay father and a daughter.\(^6\) It argues that this pattern

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Lowery, supra note 71; Felner et al., supra note 71. Other studies do not specify the gender composition of their sample. See Pearson, supra note 71; Stamps, supra note 71; Thomas J. Reidy, Richard M. Silver & Alan Carlson, Child Custody Decisions: A Survey of Judges, 23 FAM. L.Q. 75 (1989).


89. Id. The study was conducted via a survey as well as interviews. This is not meant to imply that the study’s author oversold her findings; she labeled these findings “exploratory” for the very reasons listed above.


91. Id.

92. Rosky, Like Father, Like Son, supra note 13, at 56.

93. 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). See generally Rosky, Like Father, Like Son, supra note 13. 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.

94. Id. at 298–99.

95. Id.

96. Id. at 298–310.
evidences a concern for the production of “masculine” young men when courts adjudicate the custody rights of gay parents.\(^{97}\)

While important, the aforementioned study was narrowly focused. It did not analyze the impact of the child’s gender on the outcomes of the cases. And while concern for the development of masculine men could well be a driving force, concerns related to the development of young women may also be in play. The study also lacked a clear picture of the judicial view in these cases because it conflated stereotypes applied by litigants, their experts, and the court. In addition, it combined cases that present very different judicial concerns—cases that allocate custody and those that solely concern visitation restrictions—that may have skewed the results.\(^{98}\)

II. STUDIES AND RESULTS

A. Data and Methods

In this Article, I conduct two studies designed to measure the influence of sexual orientation bias and the child’s gender on custody adjudications featuring one gay parent and one heterosexual parent. The first study quantifies the historic impact of sexual orientation bias on custody outcomes and then quantifies the impact of the child’s gender on those outcomes. The second study examines the impact of the child’s gender on the judicial rationales advanced to discredit gay parental fitness.

1. Study One: Analyzing Custody Outcomes

Study One is based on every published custody case through 2017 featuring a gay parent. This dataset was compiled using Westlaw and LEXIS legal research software. Search queries were run on both sites using the key words “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.\(^{99}\)

\(^{97}\) Rosky, Like Father, Like Son, supra note 13, at 298-310.

\(^{98}\) The study noted that its findings echoed Eve Sedgwick’s critique of the early psychoanalytic literature concerning the development of homosexuality and gender identity disorders. Rosky, Like Father, Like Son, supra note 13, at 301–05. Sedgwick argued that this literature demonstrated an outsized concern for the development of masculine young men. Eve Kosofsky Sedgwick, How to Bring Your Kids Up Gay, 29 SOC. TEXT 18, 19–20. She then noted that lesbians were almost entirely absent from these discussions and that early diagnoses of gender identity disorder were easier to obtain if the child was male. Id. In the DSM-III, first published in 1980, young boys merely had to assert that they would prefer a female anatomy or display a “preoccupation with female stereotypical activities” to earn the diagnosis of gender identity disorder. Id. Young girls, on the other hand, had to assert an actual belief that they were anatomically male to earn the same, a much higher bar. Id. The study claimed that the judiciary appears to share this imbalanced concern for the development of heteronormative, masculine men. Rosky, Like Father, Like Son, supra note 13, at 305–06.

\(^{99}\) See generally, Rivera, supra note 23; Shapiro, supra note 13; Rosky, Like Father, Like Son, supra note 13; Richman, Lovers, supra note 40.
Because the allocation of custody is at issue here, cases that did not rule on custody were excluded.\textsuperscript{100} Cases involving two gay parents were also 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.\textsuperscript{101} This set also excluded cases concerning non-parental claimants (grandmothers, other relatives, the state, etc.) as those cases could not be cleanly compared to cases involving two legal parents.\textsuperscript{102}

This selection criteria resulted in a population of 128 cases spanning a temporal period from 1952 to 2017. Gay mothers ($n_{\text{lesbian}} = 103$) greatly outnumbered gay fathers ($n_{\text{gay}} = 25$), but the gender distribution of the children fell nearly even ($n_{\text{boys}} = 71$, $n_{\text{girls}} = 69$).\textsuperscript{103} When cases including both sons and daughters and cases that did not identify the gender of the child were dropped, eighty-eight cases remained, spanning a time period from 1962 to 2017. Gay mothers still outnumbered gay fathers ($n_{\text{lesbian}} = 67$, $n_{\text{gay}} = 21$) and the gender distribution of the children remained nearly even ($n_{\text{boys}} = 45$, $n_{\text{girls}} = 43$).

Once assembled, this dataset 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 and the gender of the child(ren) at issue while Outcome Codes recorded the custody allocation. Decisions that increased or affirmed the physical custody rights of the gay parent were coded as grants of custody and decisions that lessened or affirmed the denial of the gay parent’s physical custody rights were coded as denials. Trial level decisions that awarded joint custody were coded as joint awards, but none of those decisions were present in this set.\textsuperscript{104} In addition, a motion to modify custody that resulted in a custody gain for the gay parent was coded as a custody grant while those that resulted in a custody loss were coded as a custody denial.

These data were then analyzed in STATA. A two-sample t-test for proportions was used to calculate the “gay parent custody denial rate” for cases involving a daughter and cases involving a son. This same test determined if the

\textsuperscript{100} Such exclusions include cases focused solely on visitation, the division of marital property, alimony, maintenance, unrelated legal errors or standing issues, and cases that remanded the issue of custody to a lower court. See, e.g., Blew v. Verta, 617 A.2d 31 (Pa. Super. Ct. 1992); Boswell v. Boswell, 721 A.2d 662 (Md. 1998); In re J.S. & C., 324 A.2d 90 (N.J. Super. Ct. 1974).

\textsuperscript{101} While rare, this has happened. See, e.g., Dawn M. v. Michael M., 47 N.Y.S.3d 898 (N.Y. Sup. Ct. 2017).

\textsuperscript{102} 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, grandfathers, other relatives, the state, etc.).

\textsuperscript{103} There are, of course, cases with more than one child at issue, and some of those cases have both a son and a daughter. In this dataset there are twenty-six such cases. See, e.g., Bamburg v. Bamburg, 386 S.W.3d 31 (Ark. Ct. App. 2011); D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981); Hall v. Hall, 134 So. 3d 822 (Miss. Ct. App. 2014).

\textsuperscript{104} This is not surprising given the very small number of trial level decisions in this set (5%).
difference between the two denial rates was statistically significant. Subsequent analyses tested for the impact of parental gender and time on those data. 105

2. Study Two: Analyzing Judicial Arguments Against Gay Parental Fitness

An analysis of judicial arguments against gay parental fitness is based on the same dataset described above. This comparison also dropped all cases involving two gay parents, cases involving more than two legal parents, and cases involving non-parental claimants, creating a dataset of 128 cases, spanning a temporal period from 1952 to 2017. Gay mothers ($n_{lesbian} = 103$) greatly outnumbered gay fathers ($n_{gay} = 25$), and the gender distribution of the children fell nearly even ($n_{boys} = 71$, $n_{girls} = 57$).

The study coded the cases in three rounds for arguments against gay parental fitness advanced from the bench. Arguments advanced by litigants or others that were not endorsed by the majority, the concurrence, or the dissent were not coded. Tabulation allowed the creation of a ranked list of judicial rationales against gay parental fitness.

To compare the incidence of these arguments across the gender of the child, the study dropped cases concerning both a son and daughter and the argument incidence for each gender was tabulated in STATA. As before, this resulted in a set of eighty-eight cases with gay mothers outnumbering gay fathers ($n_{lesbian} = 67$, $n_{gay} = 21$) and a near even gender distribution of the children ($n_{boys} = 45$, $n_{girls} = 43$).

3. Methodological Caveats

There are at least three caveats that apply to the design of these studies. First and foremost is the issue of population inference. While this study technically examines only published custody decisions, its import lies in a larger inference to the treatment of gay custody litigants as a whole. Published custody decisions, however, 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 parents that do not appear in the published record. In addition, litigants who appeal their trial court rulings are likely different than those who do not. It is possible, for example, that those who appeal 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 sample of custody cases in general.

Moreover, it is likely that some courts purposely avoided mentioning parental sexual orientation in their opinions when faced with a gay parent. Individuals can face serious repercussions for being outed, a reality that was even

105. This process utilized the same process described above, though it also looked at the results for gay fathers and mothers separately.
graver during the middle of the twentieth century. It stands to reason that some courts would keep such details private, especially if they thought their inclusion unnecessary.\footnote{106}

Second, this study does not distinguish between a motion to modify an existing order and an initial appeal. Parents typically face a different legal bar when attempting to modify an existing order than they do in the appeal of that order. In an appeal, courts will overturn a decision if the lower court made a legal error or abused its 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 \textit{status quo} bias. But that bias differs, making a comparison across the two slightly inaccurate.

And third, there is a small loss of fidelity attributable to the inclusion of trial court decisions. Trial court decisions are, of course, \textit{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 will overturn a decision only if the lower court made a legal error or abused its discretion. This is a high bar; thus, appellate decisions have a strong \textit{status quo} bias that trial court decisions do not. Comparisons between the two are therefore slightly off center. This bias is mitigated in this study by the small number of trial court decisions in the dataset: just 5\% of a total 128 cases.

\section*{B. Results}

\subsection*{1. Custody Outcomes and the Gender of the Child}

As expected, custody outcomes indicate that gay parents have faced severe bias over the last several decades. From 1951 to 2017, gay parents lost custody contests to heterosexual parents at a rate of 64\%, a difference in outcomes that is significant well beyond conventional measures ($p>|z|=0.000^{***}$).\footnote{107}

\footnote{106. The late professor Herma Hill Kay noted the reluctance of California courts to publish such information in the mid-seventies. \textit{See} HERMA HILL KAY, TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION (2d ed. 1981). Benna Armanno reported a similar reluctance when investigating the topic in the early 1970s. Benna F. Armanno, \textit{The Lesbian Mother: Her Right to Child Custody}, 4 GOLDEN GATE U. L. REV. 1 (1973) ("[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.").}

\footnote{107. 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).}
As one might expect, bias against gay parents lessened over time. But gay custody litigants did not obtain relative parity to their heterosexual opponents—at least in terms of custody allocation within the published record—until the decade following 2008. In fact, the data suggest that they obtained more than simple parity in the decade following 2008. They appear to have 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 = 19) and the differential is not statistically significant. Custody allocation is also not the sum total of possible bias in these cases, so one should not conclude that anti-gay bias is no longer a concern in these matters. These data are discussed in greater detail in the Discussion Section below.108

Study One also demonstrates that the gender of the child mattered greatly in these contests. It appears courts have been far less willing to place daughters into gay parental custody than sons. When daughters were at issue, gay 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 rate of 49%. This difference in denial rates is statistically significant beyond conventional measures (p>|z| = 0.014**).

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 than sons into gay parental custody both before and after 1995. In fact, the data indicate that the reluctance to award daughters togay parents, relative to sons, has

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108. The differential denial rates for the first four periods depicted in Figure One are statistically significant (1951 – 2017, p>|z| = 0.000***, n = 128; 1978 – 1987, p>|z| = 0.001***, n = 29; 1988–1997, p>|z| = 0.004**, n = 34; 1998 – 2007, p>|z| = 0.007**, n = 40). There is evidence that anti-homosexual bias has either lessened or disappeared in the ten years following 2007 (2008–2017), but the results are not statistically significant (p>|z| = 0.105, n = 19) so a firm conclusion cannot be drawn.
remained remarkably constant.\textsuperscript{109}

The second potential confound is parental gender. This dataset contains substantially more gay mothers than fathers ($n_{\text{lesbian}} = 67$, $n_{\text{gay}} = 21$), and it may well be that courts have simply been reluctant to place daughters with gay mothers. However, when this analysis is run again across the gender of the parent, we find that both gay mothers and gay fathers were denied the custody of daughters at a

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{custody_rates_gay_parents}
\caption{Custody Denial Rates for Gay Parents by Parental Gender and Gender of the Child (1951-2017)*}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{custody_rates_gay_fathers}
\caption{Custody Denial Rates for Gay Parents by the Gender of the Child at Issue}
\end{figure}

\textsuperscript{109} The differential denial rates for the periods depicted in Figure Two are (1951–2017, $p>|z|=0.014**$, $n = 88$; 1951–1995, $p>|z|=0.065$, $n = 43$; 1996–2017, $p>|z|=0.095$, $n = 45$).
substantially higher rate than sons. While the data below concerning the fathers must be viewed with some skepticism (the n is small and the results are not significant by conventional measures), they do indicate a likely bias against awarding daughters to both gay fathers and gay mothers.

2. Categorizing Judicial Rationales Against Gay Parental Fitness

Study Two categorized judicial arguments against gay parental fitness. These arguments are varied, but this study determined that they can be meaningfully grouped into nine recurring arguments: fear of immoral exposure, concern for societal morality, fear of some unidentified future harm, illegality, potential for stigma, fear of orientation modeling, fear of gender modeling, fear of sexual abuse, and fear of disease transfer. These arguments are described below in order of their prevalence within the case set analyzed for this Article. The discussion of Study Two will then examine how the prevalence of these arguments differs according to the gender of the child at issue, thus granting insight into the judicial view of sons and daughters in gay custody cases.

a. Immoral Exposure

The most common “harm” that American courts consistently link to gay parental custody is the claim that their presence or behavior will endanger the moral development of their children. This argument can be 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 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 parents are themselves immoral and thus will impart bad morals to their children. This argument contains the base assertion that non-heterosexuality is immoral and the subsequent assertion that exposure to this immorality will damage the child’s moral compass. However, courts making this argument rarely introduce evidence that the parent’s behavior has harmed their child or explain how the parent’s sexual orientation will harm their child’s moral development in the future.

This argument does, however, have a more sophisticated—though equally

110. This Article analyzes all published custody cases that feature a gay parent opposing a heterosexual parent (n = 212; 1951–2017). See infra, Data and Methods, for a more detailed description of this set.

111. See, e.g., Commonwealth ex rel. Bachman v. Bradley, 91 A.2d 379, 382 (Pa. Super. Ct. 1952) (justifying denying custody to a gay father, in part because his lifestyle was deemed an “undesirable influence[,]” but not defining the imagined moral damage); G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (denying custody to a lesbian mother in part because her sexual conduct “may have a [detrimental effect] on a child’s moral development” (emphasis added)).

112. Hertzler v. Hertzler, 908 P.2d 946, 953 (Wyo. 1995) (Golden, C.J., dissenting) (“[Exposing the child to his mother’s open homosexuality] is likely to negatively affect the development of the children’s moral values”) (quoting the district court).
troublesome—variant concerning the illegality, prior to Obergefell, of same-sex marriage. For some gay parents, the post-divorce presence of a newly found same-sex partner frequently presented courts with an easy out. Courts could rely on their jurisdiction’s cohabitation rule to justify restricting the custody rights of the gay parent. A cohabitation rule, 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 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, 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 together. The court justified this order by noting that the father was also barred from cohabitating with an unmarried partner, 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 made her custody rights contingent upon one member of the couple moving out of their own house, a building they lawfully owned in common.

b. 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 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: these arguments are not limiting custody because the parent’s alleged immorality will harm the child, 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:

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

116. Id. (“We’re not going to make a distinction between paramours of one sex or the other.”).
child or children.  

This 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 make the child’s interest paramount in such matters, not the state’s.

c. Unspecified Future Harms

The third most common justification for denying gay parental custody is the fear that some unspecified, future harm will result if custody is granted. These arguments 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:

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…’

These arguments put non-heterosexual parents in a near unwinnable situation. It is 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.

d. Illegality

The illegality argument hinges on the fact that same-sex sex was illegal in many states prior to Lawrence and that same-sex marriage was illegal in many states prior to Obergefell. In this argument, courts 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 same-sex relationships. 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

122. 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.
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.  

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

e. The Stigma Argument (Also Known as “The Palmore Argument”)

Courts frequently argue that gay parents will harm their children by exposing them to social ridicule. The logic goes that because gay people 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 parents.

The Supreme Court addressed a parallel argument in Palmore v. Sidoti, 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. But the two arguments are not completely analogous. At the time of the Palmore decision, race was a protected class—demanding strict review on constitutional

126. See, e.g., Berry v. Berry, 2005 WL 1277847, at *2 (Tenn. Ct. App. 2005) (“[u]ndoubtedly [sic] he will have to deal with his mother’s sexuality and the controversy associated with that sexuality as he matures”) (internal citation and quotation omitted); Bottoms v. Bottoms, 457 S.E.2d 102, 108 (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’”) (internal citation omitted); Collins v. Collins, 1988 WL 30173, at *3 ( Tenn. Ct. 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”); 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.”) (internal quotation omitted).
grounds—but sexual orientation never clearly obtained that status. Numerous courts justified stigma arguments in the context of gay parents, even after *Palmore*, by noting this distinction. Consider Missouri’s curt dismissal of *Palmore* in *S.E.G. v R.A.G*:

*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] been afforded.

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:

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.

### f. Orientation Modeling

The fear that gay parents might recruit or model their children into a non-heterosexual orientation was expressed openly in custody opinions well into the 2000s. The argument implies that one’s sexual orientation can be swayed by

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128. The status of sexual orientation is currently unsettled in this regard. In short, sexual orientation appears to now be a suspect class in the Ninth Circuit, at least in certain contexts. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) (holding that classifications based on sexual orientation are subject to heightened scrutiny review). There is reason to believe that the Supreme Court decisions have held likewise; *Windsor*, *Hollingsworth* and *Obergefell* certainly contained language hinting at heightened review; 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 express declaration is not necessary … [we consider] what the Court actually did.” Id. at 480 (internal quotations and citation omitted).

129. 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

130. Blew v. Verta, 617 A.2d 31, 35 (Pa. Super. Ct. 1992). But the stigma 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. 392 P.3d 1041 (Wash. 2017) (rejecting the argument that a parent’s sexual orientation can be harmful to the child because it invites bullying).

131. See, e.g., Collins v. Collins, 51 P.3d 691, 692 (Or. Ct. App. 2002) (noting the trial court’s finding that “[a]ll 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.”).
persuasion or environmental influence. The argument also implies that a non-heterosexual orientation is an outcome to be avoided.

This concern often takes one of two forms: the gay parent will push the child towards non-heterosexuality through modeling and normative influence or the parent will seduce the child into non-heterosexuality through direct invitation. The latter, of course, blends into the fear of sexual abuse which makes the two fears hard to distinguish when confronted in the case law.

The “modeling and normative influence” argument is common in the case law and hard to miss. Note the clear “orientation through example” assertion from the appellate court in *Black v. Black*:

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

The “seduction” argument is typically less explicit. For example, in the Missouri case of *J.L.P. v. D.J.P.*, the court described a gay father’s open advocacy for LGBT rights and his membership in a gay friendly church as “seductive in nature.” Later, in that same opinion, the court blended its argument with an insinuation of actual sexual invitation, darkly noting that the father had already taken his son “out of state” with “another homosexual and his juvenile nephew.” While not explicit, the implication of sexual invitation, placed alongside orientation concerns, appears to imply a more sinister means of recruitment.

The recruitment fear can also take a more subtle tack: the fear of gender recruitment. This stance assumes that gay parents will fail to impart traditional

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132. 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 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. See, e.g., Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001); Ball, supra note 32; Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (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 inborn sexual orientation.


134. 643 S.W.2d 865, 868 (1982).

135. Id. at 866–67.

136. Of course, this argument also creates a host of constitutional concerns. It arguably violates the child’s First Amendment right to free expression. It likewise may violate the Equal Protection Clause in that the state has no rational basis to prefer heterosexuality. For a discussion of these theories generally, see Clifford J. Rosky, *No Promo Hetero: Children’s Right to Be Queer*, 35 CARDOZO L. REV. 425 (2013).
gender norms to their children.\footnote{137} While the first flavor of this argument (orientation modeling) concerns sexual orientation, this version concerns the understanding and performance of gender roles, namely, a fear that the children of non-heterosexual parents will fail to act like traditional boys and girls or fail to understand the societal role of either in a traditional way.\footnote{138}

These arguments are also explicit and hard to miss. Consider \textit{Lundin v. Lundin}\footnote{139} in which 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.\footnote{140}

The \textit{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.\footnote{141}

Or consider the trial court’s opinion in \textit{Pleasant v. Pleasant}, 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.”\footnote{142}

\footnote{137. Just as there is a debate concerning the tendency of gay parents to raise gay children, there is also a debate concerning the tendency of gay parents to raise gender nonconforming children. Once again, there is some evidence that the children of gay parents are more likely to engage in gender nonconforming behavior, though this conclusion is also hotly debated. See Stacey & Biblarz, \textit{supra} note 132, at 168–71; Ball, \textit{supra} note 32 \textit{passim}; Wardle, \textit{supra} note 132, at 852, 860–61; Rosky, \textit{Like Father, Like Son}, \textit{supra} note 13, at 301–05.}

\footnote{138. This argument creates the same constitutional issues mentioned in note 126 and at least one other: it may run afoul of the constitutional prohibition against the promotion of gender roles. \textit{See} Christina M. Tenuta, \textit{Note, Can You Really Be a Good Role Model to Your Child if You Can’t Braid Her Hair—The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations}, 14 CUNY L. REV. 351, 380–82 (2011); \textit{see also} Craig v. Boren, 429 U.S. 190, 192–93 (1976).}

\footnote{139. \textit{Lundin v. Lundin}, 563 So. 2d 1273 (La. Ct. App. 1990).}

\footnote{140. \textit{Lundin}, 563 So. 2d. at 1275.}

\footnote{141. \textit{Id.} at 1277.}

\footnote{142. \textit{Pleasant v. Pleasant}, 628 N.E.2d 633, 638–39 (Ill. App. Ct. 1993). The trial court’s obsession with traditional gender performance was on clear display during its examination of a (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.” \textit{Id.} at 637.}
The Moral Sex

h. Sexual Abuse Fears

A once-common argument raised by opponents of non-heterosexual parenting is the charge that gay parents are more likely than heterosexual parents to sexually abuse their children. This charge is empirically false. Current research indicates that gay men are no more likely to sexually abuse children than heterosexual men, and instances of sexual abuse by gay women are exceedingly rare.

Despite the factual evidence, courts occasionally cited this concern well into the late 1990s. But more common than the explicit mentions are the numerous opinions that allude to the threat. Take Woodruff v. Woodruff, wherein the court darkly noted that a gay father was seen “[taking the] parties’ son on a walk in a secluded area near their home.”

i. Fear of Disease

A frequent argument against the parental fitness of gay people, especially during the HIV scare of the 1980s, has been that they will expose their children to disease. This fear was undoubtedly exacerbated by early notions that HIV was a “gay disease” and the popular misconception that it could be spread through ordinary contact.

Heterosexual parents contesting custody against gay parents raised this argument frequently well into the mid-2000s, but this study uncovered only one instance where the argument was explicitly accepted by a judge. In Stewart v.
Stewart, a dissenting judge for an Indiana appellate court supported a trial court’s 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.149

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These nine recurring arguments are homophobic, inaccurate, or both. It is false to assert that being gay makes it more likely that someone will sexually abuse a child.150 It is legally inaccurate to consider the fate of societal morality in an analysis that is meant to hinge on harm to the child, not the state. And while there is some heavily debated literature suggesting that the children of gay parents might be more likely to become gender nonconforming or gay themselves, these arguments betray a clear bias by assuming that these outcomes are harms to be avoided.

Judicial Arguments Against Gay Parental Fitness in Custody Cases 1951-2017*

*Percentages drawn from the population of published custody decisions featuring a gay parent opposing a heterosexual opponent (n = 128).

150. Herek, supra note 13, at 156; Rosky, Like Father, Like Son, supra note 13, at 286.
C. Ranking Judicial Rationales Against Gay Parental Fitness by Gender of the Child

Study Two examined common judicial arguments against gay parental fitness and found that some concerns clearly trump others. Of primary importance are the morality arguments. Courts stress the need to protect childhood moral development (immoral exposure) and the preservation of traditional moral norms (societal morality) the most. The fear of sexual abuse and disease appear to trouble courts the least, while all other concerns fall somewhere in the middle.

But once again, the gender of the child at issue clearly matters. Courts express notably different concerns when gay parents seek the custody of a daughter as opposed to a son. When daughters are at issue, courts are dramatically more concerned with immoral exposure, societal morality, and the historic illegality of same-sex intimacy. When sons are at issue, courts demonstrate 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.

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151 The differential denial rates for Figure Three are (Gay Mothers, p>|z|=0.032*, n = 67; Gay Fathers, p>|z|=0.217, n = 21).
Judicial Arguments Against Gay Parental Fitness in Custody Cases by Gender of the Child (1951-2017)*

- IMMORAL EXPOSURE: 20% (Daughters), 16% (Sons)
- SOCIETAL MORALITY: 16% (Daughters), 28% (Sons)
- ILLEGALITY: 9% (Daughters), 16% (Sons)
- FUTURE HARM: 9% (Daughters), 22% (Sons)
- SOCIAL STIGMA: 9% (Daughters), 11% (Sons)
- ORIENTATION MODELING: 7% (Daughters), 7% (Sons)
- GENDER MODELING: 7% (Daughters), 7% (Sons)
- DISEASE: 5% (Daughters), 5% (Sons)
- SEXUAL ABUSE: 4% (Daughters), 5% (Sons)

*Percentages Drawn from the Population of Published Custody Decisions Featuring a Gay Parent Opposing a Heterosexual Parent. Cases with Both a Son and a Daughter were Dropped.
These disparities do not appear to be an artifact of time or changing norms. While societal attitudes and judicial precedent have shifted dramatically over the last several decades, judicial concerns related to the placement of daughters into gay parental custody have remained stable. When the last forty years of these data are broken into twenty-year blocks, one still sees an elevated concern for immoral exposure, societal morality, and the illegality of same-sex intimacy when daughters are at issue.

*Percentages drawn from the population of published custody cases featuring a gay parent opposing a heterosexual parent. Cases with both a son and daughter were dropped.
These results likewise do not seem to be the product of parental gender. While small sample sizes require caution with this analysis, these data indicate that courts have expressed concern more frequently for immoral exposure, the dictates of societal morality, and the illegality of same-sex intimacy (sex and marriage) when daughters are at issue, regardless of the gay parent’s gender.

### III. Discussion

Data from the published custody record documents strong anti-gay bias in custody allocation over the last several decades. These data also document that the gender of the child at issue mattered: courts have been significantly less willing to place daughters into gay parental custody than sons. Moreover, this trend does not seem to be an artifact of changing social norms or the gender of the gay parent at issue.

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 the legal and moral prohibitions against same-sex sex and same-sex marriage when the custody of a daughter is at stake.

While these data are informative, they do not fully explain the inner workings of the phenomena uncovered. What do the raw custody allocation data really tell us? What is it about the judicial view of young women that has rendered these courts less willing to place them into gay parental custody? Why is it that courts are more concerned with immoral exposure and prohibitions against same-sex intimacy when daughters are at issue? And how are these data in conversation with previous scholarship that highlighted a judicial impulse to protect the development of masculine sons in these cases? This Section answers these questions by placing the results of Studies One and Two alongside existing scholarship, case law, and the broader universe of feminist thought.

A. Interpreting the Raw Custody Allocation Data

Data from the custody record suggest that anti-gay bias presented a major hurdle for gay parents until the mid-2000s. This is not surprising given the social mores of the time, but the extent of the bias may be surprising. Within the published record, when gay parents challenged heterosexual parents for custody, they found themselves on the losing side of that contest 64% of the time. Moreover, this denial rate remained at 65% or higher throughout the thirty years preceding 2008.

Of note is the apparent turnaround of this bias in the mid-2000s. During the ten years following 2008, gay parents found themselves on the winning side of these cases 63% of the time, a dramatic shift. On one level this makes sense: in addition to rapidly changing social norms, the decade following 2008 witnessed numerous legal decisions that improved the legal footing for gay parents. In 2009, a Northern California District Court declared California’s ban on same-sex marriage unconstitutional.152 In 2013, the Supreme Court declared the Defense of Marriage Act unconstitutional.153 In 2014, the Ninth Circuit applied heightened scrutiny to alleged discrimination on sexual orientation grounds,154 and in 2015, Obergefell declared all prohibitions of same-sex marriage unconstitutional.155 While these holdings did not directly address gay custody cases, they still signaled a changing judicial attitude towards non-heterosexuality and gay families in general. It is not surprising that lower courts shifted their views accordingly.156

154. SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).
156. This statement, of course, belies a debate of considerable complexity: the degree to which public opinion and even judicial precedent can shape judicial decision-making. While that discussion is beyond the scope of this Article, see Jonathan P. Kastellec, Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial
While this is positive news, one should also view these data warily. For one, the \(n\) for this last decade is small (nineteen cases) and the results are not statistically significant. Further, custody allocation is not the sole measure of success in a custody case. Courts can restrict visitation rights and, when gay parents are involved, they frequently do.\(^{157}\) They can prohibit the non-custodial parent from visiting overnight and they can prohibit the presence of a parent’s significant other during visitation periods.\(^{158}\) They can even demand the presence of a supervisor during visitation.\(^{159}\) So, it should not be assumed that anti-gay bias is no longer a problem in custody matters merely because the recent allocation data appears promising.

### B. Placing these Data Alongside Previous Scholarship

It is useful to place these data alongside previous literature on the topic. As noted earlier, a previous study suggested a judicial tendency to prioritize the masculine development of sons in these cases. That study noted an uptick in the presence of two homophobic stereotypes when the custody of sons was before the court: the “recruiting” stereotype and the “role modeling” stereotype.\(^{160}\) This finding meshes with an overall perception that society demonstrates a patriarchal bias. Given society’s assumed prioritization of men over women, it makes sense that society in general (including courts) would protect the development of traditional, masculine men by keeping them away from the non-traditional parent.

Data from this project may appear to contradict the conclusions of the aforementioned paper regarding the treatment of sons in family court decisions, but, on closer inspection, they do not. While it is true that Study One reveals a greater aversion towards placing daughters into gay parental custody than sons, that does not mean that courts are not also averse to placing sons into gay parental care. Indeed, Study One indicates that gay parents failed to secure the custody of their sons (when contesting against a heterosexual opponent) at a rate of 55% through the year 1995.\(^{161}\) And, as previously noted, there are other measures of loss in custody cases. It could well be that courts are more likely to restrict the visitation rights of gay parents when a son is at issue than those of a comparably situated heterosexual parent.

Ultimately, these data do not disprove a judicial tendency to protect the masculine development of young sons in custody cases. Rather these data reveal

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160. Rosky, Like Father, Like Son, supra note 13.
161. See supra Part II.
a separate, perhaps deeper, tendency to police the moral development of young women. Both can be true simultaneously and the data generated here argue that they are.

C. Policing the Moral Development of Young Women

The data from Study Two 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, and the primacy of this concern remained constant across time and the gender of the non-heterosexual parent. Of further note, courts have been far more concerned about exposing daughters to immorality than sons. Again, this finding holds constant across time and across the gender of the non-heterosexual parent.

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.¹⁶²

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.¹⁶³

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. He added, “It would allow her to see a broad spectrum, perhaps, of human interaction not just between heterosexual people, but also homosexual people.”¹⁶⁴

Or consider the Missouri Court of Appeals in N.K.M. v. L.E.M., which chastised a lesbian mother’s lover for “broach[ing] the idea of homosexuality” with the mother’s young daughter and for instructing her “that homosexuality is a permissible life style—an ‘alternate life style’. . .”¹⁶⁵ 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.”¹⁶⁶

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 non-heterosexuality is the moral equivalent to heteronormativity or, put another way, the fear that a young daughter will reject heteronormativity.

¹⁶² Ex Parte J.M.F., 730 So. 2d 1190, 1195 (Ala. 1998).
¹⁶³ 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.”).
¹⁶⁶ Id. at 185.
D. Highlighting the Outside Enforcement of Heteronormativity

Study Two also demonstrates 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.

When a court highlights the fact that same-sex sex or same-sex marriage is illegal, the court is clearly noting that the state both condemns and refuses to recognize the intimate lives of 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. 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. It then discussed, at length, similar prohibitions from Florida, New Hampshire, Colorado, Pennsylvania, and Wisconsin.

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. It also mentioned the state’s anti-gay educational curriculum, condemnations from William Blackstone, treatises on slander from the 1890s, 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. The concurrence’s lecture on this point ran for over ten pages.

Expositions like these are common in the dataset for this Article, 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 Article is that they occur more frequently when daughters are before the bench.

E. 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”:

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 expression of the traditional view that women unsupervised quickly slipped into collusion with evil was the persecution (during some periods, massive in scale)

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168. *Id.* at 662 (Payne, J., concurring).
169. *Id.* at 663.
171. *Id.*
172. *Id.*
of women as witches.\textsuperscript{174}

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.\textsuperscript{175}

Williams argues that this conception of women changed in the modern era.\textsuperscript{176} The rise of political liberalism and its tenet that all “men” are created equal clashed with the notion of the inferior woman.\textsuperscript{177} 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.”\textsuperscript{178} Thus, they were no longer inferior, just differently abled and their inherent morality made them ideal for the domestic sphere of life.\textsuperscript{179} They were also less well-situated for the coarse, and often ethically suspect, public sphere.\textsuperscript{180}

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.\textsuperscript{181} But in the data analyzed in the present study, 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,\textsuperscript{182} and it is similarly true that society perceives it as

\begin{itemize}
\item Williams, supra note 173, at 804.
\item Id.
\item Id. at 804–09.
\item Id. at 806–07.
\item Id. at 807.
\item Id.
\item Id.
\item 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).
\item See Naomi Cahn, Policing Women: Moral Arguments and the Dilemmas of Criminalization, 49 DEPAUL L. REV. 817 (2000).
\end{itemize}
a serious threat to social norms when women challenge heteronormativity. Liberal feminists may recognize this as yet another impulse to confine women to traditionally heterosexual domestic roles. Dominance feminists may see the data as evidence of judicial reinforcement of the patriarchy by channeling women towards traditional heterosexual norms. And critical and post-modern feminists may view this policing and channeling as yet another constraint on the rational agency of young women.

CONCLUSION

In some respects, the findings of this Article are counterintuitive in the face of the research upon which it builds. For instance, it will likely surprise many that the 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.

Hopefully, this Article also serves as clarion call for more extensive intersectional research. The data suggest that a full accounting of the gay experience requires the consideration of multiple regimes of bias. In more specific terms, this Article 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 parents in the custody process. This impulse has rendered courts averse to placing daughters into gay parental custody. It has likewise prompted courts to stress the outside control of sexuality and intimacy, the strictures of traditional morality, and the legal prohibitions barring same-sex intimacy to a greater degree when daughters are at issue.

184. Friedan, supra note 181.