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Immoral Because They’re Bad, Bad Because They’re Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes

Of all the cases which involve gay issues, those involving the custody of children of gay parents are the most numerous. Although the number of child custody cases that have been determined on the basis of sexual orientation of the parent is not known, because most never go beyond the trial level, the number of published appellate cases have been numerous enough to clearly illustrate the reluctance of the courts to give custody to a gay parent. Thus, gay parents are frequently denied primary custody and allowed visitation only under restricted guidelines. Oscar Wilde, nineteenth century poet and playwright, expressed the pain felt when a child is taken from a parent by the courts when he wrote, while imprisoned for sodomy, that he could bear all else except that “my two children are taken from me by legal procedure. That is and always will remain to me a source of infinite distress, of infinite pain. . . . [T]he disgrace of prison is as nothing compared with it.”

Case and statutory law virtually always require courts to base custody decisions on the best interest of the child. What is in the child’s best interests is frequently determined by an examination of the fitness of each parent. The question then raised is to what extent homosexuality may enter into this determination of fitness.

In evaluating the fitness of a homosexual parent, courts have adopted three approaches. The first approach, called the per se approach, activates a “rebuttable” presumption that the gay parent is unfit. Thus, regardless of other factors involved, the fact of

2. Id. at 329. Virtually all of the cases cited in this Comment will involve custody; especially those found in Part II(A) & (B) illustrate this point. See generally Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. at 812-21 (1985).
3. See Part II(A) & (B) of this Comment.
5. Virtually any child custody case or periodical regarding custody makes clear that custody is to be based on the “best interests of the child.”
7. Id.
8. See infra text accompanying notes 98-113.
homosexuality alone is used to deny custody to the gay parent. The next approach, frequently referred to as the middle ground approach, does not presume that the gay parent is per se unfit, but relies on the presumption that a child will be harmed by exposure to the gay parent's homosexuality. Thus, the court will require the gay parent to forgo sexual activity with members of the same sex, separate from a same-sex partner, or follow other restrictive behavioral guidelines. Finally, under the nexus approach, the court requires proof that the parent's homosexuality has or will adversely affect the child before custody can be denied. Only in this approach does the court rely on the evidence, rather than on presumption, to determine the parental capabilities of each parent.

The presumptions of the gay parent's unfitness used in the per se and middle ground approach are usually supported by the following rationales. First, courts believe that the child's morality will be adversely affected by exposure to the parent's homosexuality. Second, courts fear that the child will be forced to absorb oppression, harassment and stigmatization caused by society's negative view of homosexuality. Third, state sodomy statutes forbid by definition many forms of homosexual sex; consequently, many practicing homosexuals are engaging in criminal behavior. The court then reasons that homosexuals, as criminals, are unfit parents. Fourth, courts fear that exposing the child to the gay parent's homosexuality might cause the child to be sexually disoriented. Finally, courts fear that the child might contract AIDS from the gay parent.

If homosexuals were treated as a quasi-suspect class, would the five interests of the state mentioned above, which support the presumptions of the gay parent's unfitness, be considered important enough to withstand intermediate scrutiny? In other words, could presumptions of unfitness still be used against the gay parent in child custody cases? The Supreme Court has stipulated that if a

9. Id.
10. See infra text accompanying notes 114-22.
11. Id.
12. See infra text accompanying notes 123-32.
13. Id.
14. See infra text accompanying notes 139-57.
15. See infra text accompanying notes 158-75.
16. State sodomy statutes forbid contact between the genitals of one person and the mouth or anus of another. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986), and infra text accompanying notes 176-82.
17. Id.
18. See infra text accompanying notes 183-88.
19. See infra text accompanying notes 189-91.
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law classifies on the basis of a quasi-suspect class under the equal protection clause of the fourteenth amendment, it must serve an important governmental interest and must be substantially related to the achievement of that interest in order to pass intermediate scrutiny. In Part I of this Comment, an argument for classifying homosexuals as a quasi-suspect class entitled to intermediate scrutiny is examined. That examination shows that gay men and lesbians meet the criteria necessary for a quasi-suspect class. Part II examines the approaches courts use to deal with child custody disputes involving gay parents, and how the presumptions of the gay parent's unfitness found in two of these approaches might be affected were they forced to withstand intermediate scrutiny. This Part reveals that if gays were classified as a quasi-suspect class, presumptions of unfitness could no longer be used to deny custody to the gay parent. Part III examines the interests purportedly served by the state in order to support these presumptions of unfitness, and whether these interests would be insufficient to deny custody to the gay parent, if gays were classified as a quasi-suspect class.

I. INTERMEDIATE SCRUTINY FOR HOMOSEXUALS

The Supreme Court applies one of three levels of scrutiny to legislative classifications challenged under the equal protection clause of the fourteenth amendment: rational relationship, intermediate, and strict. Part A of this section discusses the standard of review for rational relationship and strict scrutiny, and when these levels of scrutiny are typically applied. Part B of this section discusses the standard of review for intermediate scrutiny, and the four criteria necessary to form a quasi-suspect class. Part B argues that gays meet the four criteria and should, therefore, be classified as a quasi-suspect class entitled to intermediate scrutiny.

A. Rational Relationship and Strict Scrutiny

The Supreme Court usually applies only minimum scrutiny to legislative classifications challenged under the equal protection clause of the fourteenth amendment. The Court has held that under minimum scrutiny, a state law must be only rationally re-


lated to a legitimate state interest. In nearly every case in which the rational relationship test is used, the Court has upheld the challenged law.

The Court will depart from the rational relationship test and use a heightened level of scrutiny under equal protection if a challenged law classified based on a quasi-suspect or suspect class. The criteria necessary to trigger the use of heightened scrutiny is basically the same for both quasi-suspect and suspect classes. The primary difference between the two classes is the standard of review which a law must undergo in order to be upheld.

Under strict scrutiny, a law which contains a classification based on a suspect class must be substantially related to a compelling governmental interest. The Court restricts the suspect classification primarily to race and national origin. The challenged law is almost always invalidated when strict scrutiny is imposed.

The standard of review for intermediate scrutiny, which is used for laws which contain a classification based on a quasi-suspect class, is analyzed in the following section, as well as the criteria necessary to signal the use of a quasi-suspect classification.

### B. Intermediate Scrutiny

The Supreme Court applies intermediate scrutiny to classifications which involve a quasi-suspect class. When a law classifies based on a quasi-suspect class, the law must serve an important governmental interest and must be substantially related to the achievement of that interest. The classifications to which the court has applied intermediate scrutiny are primarily restricted to

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22. *Id.*
23. *Id.*
27. See *supra* note 25.
28. See *supra* note 25.
29. The only exception is Korematsu v. United States, 323 U.S. 214 (1944) ("the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny.")
30. The criteria necessary to form a quasi-suspect class are discussed in Part I(B) of this Comment. These criteria explain why a class needs the extra protection given in intermediate scrutiny. See *supra* note 20.
31. *Id.*
gender,\textsuperscript{32} illegitimacy,\textsuperscript{33} and alienage.\textsuperscript{34} The Supreme Court has stated four criteria which determine
the use of heightened scrutiny for a particular classification. As
mentioned previously, the criteria which a class must have in or-
der to signal the use of heightened scrutiny are basically the same
for both quasi-suspect and suspect classes.\textsuperscript{35} First, members of
the class must possess an immutable trait that is due to factors be-
yond the individual's control.\textsuperscript{36} Second, the class must be labeled
with incorrect stereotypes.\textsuperscript{37} Third, the class must have expe-
rienced a history of discrimination.\textsuperscript{38} Finally, the class must be a
politically powerless minority.\textsuperscript{39}

The Supreme court has never decided whether homosexuals
meet the above criteria and should, therefore, be classified as a
protected class. Federal courts, however, have decided the issue in
directly conflicting ways. Gays were not classified as a quasi-sus-
psect or suspect class in \textit{Ben-Shalom v. Marsh}.\textsuperscript{40} There, a U.S.
Army Reserve sergeant was barred from reenlistment on grounds
that she was an admitted homosexual.\textsuperscript{41} She brought an action
against the Army alleging that its regulations making the status
of homosexuality a nonwaivable disqualification for service re-
gardless of conduct violated, among other things, her constitu-
tional right to equal protection. The court stated that "[i]f homo-
sexual conduct may be criminalized, (such as it was in \textit{Bowers v.
Hardwick}), then homosexuals do not constitute a suspect or quasi-
suspect class entitled to greater than rational basis scrutiny for
equal protection purposes."\textsuperscript{42} The court upheld the Army's regu-
lation against enlistment of homosexuals because the regulation was
rationally related to the government's interest in avoiding the risk
that "accepting admitted homosexuals into the armed forces
might imperil morale, discipline, and the effectiveness of our fight-
ing forces."\textsuperscript{43}

In 1987, the U.S. District Court for the Ninth District in Cali-
fornia held that gay people are a quasi-suspect class entitled to

\begin{footnotes}
\item[32.] Reed v. Reed, 202 U.S. 71 (1971).
\item[35.] See supra note 26.
\item[36.] See infra text accompanying notes 57-64.
\item[37.] See infra text accompanying notes 65-75.
\item[38.] See infra text accompanying notes 76-84.
\item[39.] See infra text accompanying notes 85-95.
\item[40.] Ben-Shalom v. Marsh, 881 F.2d 454 (1989).
\item[41.] \textit{Id.} at 464.
\item[42.] \textit{Id.} at 464. For a discussion of the facts of \textit{Bowers, supra} note 16, see infra text
accompanying notes 176-82.
\item[43.] \textit{Id.} at 461.
\end{footnotes}
heightened scrutiny under the equal protection clause in High Tech Gays v. Defense Industrial Security Clearance Office.\textsuperscript{44} There, a nationwide class action was brought challenging the Department of Defense's policy of subjecting lesbian and gay applicants for secret security clearances to expanded investigations and mandatory adjudications because they were lesbian or gay.\textsuperscript{45} The Department of Defense stated that it was necessary to subject lesbians and gay men to expanded investigations and mandatory adjudications because homosexuality "indicates a personality disorder or could result in exposing the individual to . . . blackmail or coercion."\textsuperscript{46} The court held that the Department of Defense's arguments were without merit.\textsuperscript{47} The court stated that homosexuality did not indicate a personality disorder since "the uncontroverted consensus of the American professional psychological community has been that homosexual orientation itself is not a psychological problem."\textsuperscript{48} Further, defendants produced no evidence on the record that lesbians and gay men were subject to blackmail.\textsuperscript{49} Because the expanded investigations and mandatory adjudications in this case were not substantially related to an important state interest, the court held they were unconstitutional.\textsuperscript{50}

In Watkins v. United States Army, a soldier challenged the constitutionality of army regulations barring homosexuals from military service regardless of their rank or position.\textsuperscript{51} There, the court classified homosexuals as a suspect class.\textsuperscript{52} Thus, the Army's regulations, which classified on the basis of sexual orientation, were subjected to strict scrutiny.\textsuperscript{53} The Army used the same arguments as those found in Ben-Shalom: mainly, that homosexuals might disrupt the morale and discipline of the armed services.\textsuperscript{54} The court stated that the defendants offered no evidence to support their argument.\textsuperscript{55} Thus, the court, using a strict standard of review, held that the regulations violated the soldier's equal protection guarantee because they were not substantially related to a compelling governmental interest.\textsuperscript{56}
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The remainder of Part I will examine the four criteria necessary to form a quasi-suspect class and whether homosexuals meet each criterion. (As noted previously, the Supreme Court has never decided whether homosexuals meet the criteria necessary to form a quasi-suspect class.) The treatment of laws which classify on the basis of sexual orientation differ from circuit to circuit because federal courts have decided the issue in directly conflicting ways. Because the court has reserved strict scrutiny to race and national origin, and given the current conservative majority of the Supreme Court, only an argument for a quasi-suspect classification for homosexuals will be examined. This examination will reveal that gays meet the criteria necessary to form a quasi-suspect class; thus, laws which classify on the basis of sexual orientation should be forced to undergo intermediate scrutiny.

1. Homosexuality Is Immutable and Unchangeable

In gender and illegitimacy cases where intermediate scrutiny is used, the Supreme Court has stressed that the trait which characterizes the classification must be immutable and determined by causes not within the individual's control. Courts have held that race, national origin, alienage, illegitimacy, and gender are immutable. Can homosexuality be compared to those classes already classified as holding immutable traits? Justice Norris in Watkins makes the following argument:

Although the Supreme Court considered immutability relevant, it is clear that by immutability the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes 'pass' for whites . . . [or] even change their racial appearance with pigment injections. At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change in identity. . . . [I]mmutability may describe those traits that are so central to a person's iden-

held in an en banc rehearing that the Army was estopped from barring Watkins' reenlistment solely because of his acknowledged homosexuality and that it was, therefore, unnecessary to reach the constitutional issues raised in the court's previous decision.

58. See generally Parham, supra note 57, at 347.
59. Watkins, supra note 51, at 1347.
tity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.

We have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. Allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.  

Another court, however, believes that homosexuality is more or less a choice, rather than an immutable and unchangeable trait. A 1988 Tennessee appellate court case states that young people form their sexual identity partly on the basis of models they see in society. The court believed that if homosexual behavior is legalized, an adolescent might question whether he or she should "choose" heterosexuality. In other words, if homosexuality were legalized, adolescents might choose homosexuality, rather than "traditional heterosexual family relationships."  

Despite the belief held by this court that homosexuality is a choice, there is a general consensus among sexual scientists and psychotherapists that sexual orientation, like gender and illegitimacy, is immutable and unchangeable, and beyond an individual's control. Thus, homosexuals meet this criterion of a quasi-suspect class.

2. Gays are the Target of Incorrect Stereotypes

Additionally, the Supreme Court demands that a given classification not be based on a mistaken premise which unfairly discriminates against a class. The Court, in its analysis, considers whether the class has "been subjected to unique disability on the basis of stereotyped characteristics not truly indicative of their abilities." Put another way, the Court asks whether the disadvantaged class is defined by a trait that "frequently bears no rela-

60. Id.
62. Id.
63. Id.
tion to ability to perform or contribute to society."\textsuperscript{67} As acknowledged in \textit{Watkins}, "[s]exual orientation plainly has no relevance to a person's ability to perform or contribute to society. This irrelevance of sexual orientation to the quality of a person's contribution to society . . . suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes. . . ."\textsuperscript{68} This point was particularly obvious in \textit{Watkins}, since repeated evaluations by Watkins' superiors stated that Watkins was an exemplary soldier.\textsuperscript{69}

The court in \textit{High Tech Gays} stated the following:

Wholly unfounded, degrading stereotypes about lesbians and gay men abound in American society. Examples of such stereotypes include that gay people desire and attempt to molest young children, that gay people attempt to recruit and convert other people, and that gay people inevitably engage in promiscuous sexual activity. Many people erroneously believe that the sexual experience of lesbians and gay men represents the gratification of purely prurient interests, not the expression of mutual affection and love. They fail to recognize that gay people seek and engage in stable, monogamous relationships. Instead, to many, the very existence of lesbians and gay men is inimical to the family. For years, many people have branded gay people as abominations to nature and considered lesbians and gay men mentally ill and psychologically unstable. The stereotypes have no basis in reality and represent outmoded notions about homosexuality, analogous to the 'outmoded notions' of the relative capabilities of the sexes that require heightened scrutiny of classifications based on gender.\textsuperscript{70}

Further, the court stated that gay men and lesbians are not "enemies of American culture and values, [but] occupy positions in all walks of American life, participate in diverse aspects of family life, and contribute enormously to many elements of American culture."\textsuperscript{71}

Another stereotype frequently attached to homosexuals is that all homosexuals live a so-called "gay lifestyle".\textsuperscript{72} As the dissent stated in \textit{The Matter of the Adoption of Charles B.}, "all adult male homosexuals do not pursue a 'gay-lifestyle' any more than all adult male heterosexuals pursue a 'swingers-lifestyle'."\textsuperscript{73} The

\textsuperscript{67} \textit{Frontiero}, supra note 57, at 686.
\textsuperscript{68} \textit{Watkins}, supra note 51, at 1346.
\textsuperscript{69} See generally \textit{Watkins}, supra note 51.
\textsuperscript{70} \textit{High Tech Gays}, supra note 44, at 1369.
\textsuperscript{71} \textit{Id.} at 1370.
\textsuperscript{72} A gay lifestyle is typically thought of as including promiscuous sexual activity. See \textit{High Tech Gays}, supra note 44, at 1369. See also \textit{The Matter of the Adoption of Charles B.}, WL 119937 (Ohio App. 1988).
\textsuperscript{73} \textit{The Matter of the Adoption of Charles B.}, WL 119937 (Ohio App. 1988).
court stated that courts should focus on whether an unmarried adult lives a gay or swinger lifestyle, and whether that lifestyle is practiced in such a manner so as to be a detriment to or against the best interests of the child.74

Because homosexuals have "been subjected to unique disabilities on the basis of characteristics not truly indicative of their abilities," they fulfill this criterion for a classification as a quasi-suspect class.75 Because stereotypes of homosexuals are consistently negative, courts which use stereotypes to determine a gay parent's fitness will inevitably deny custody to the gay parent. Using stereotypes to generalize about homosexuals sidesteps the need to look at each person as an individual, helps to perpetuate discrimination against them, and furthers their stigmatization.

3. Gays Have Faced a History of Discrimination and Stigmatization

Intermediate scrutiny has also been used to protect those classes which have suffered from a history of purposeful and unfair discrimination.76 For example, discrimination and stigmatization have historically been a part of the lives of American blacks.27 Heightened scrutiny both compensates for the past discrimination suffered by blacks, and helps to curb the persistent prejudice that exists against them today.78 Like blacks, "[l]esbians and gays have been the object of some of the deepest prejudice and hatred in American society."79 Gays are frequently victims of violence and have been excluded from jobs, schools, housing, churches, and even families.80

In High Tech Gays, the court stated that "[s]ome people's hatred for gay people is so deep that many gay people face the threat of physical violence on American streets today."81 Justice Brennan, in his dissent from the Supreme Court's denial of certiorari in Rowland v. Mad River Local School District, concluded that "homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely to reflect deep-seated prejudice

74. Id.
75. Massachusetts, supra note 66.
76. See supra note 26.
77. Strauder v. West Va., 100 U.S. 303, 308 (1880).
78. Id.
80. Watkins, supra note 51, at 1329 (citing Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 51 S. Cal. L. Rev. 797, 824-25 (1984)).
rather than rationality.\textsuperscript{82}

The government sanctions discrimination through laws which purposefully and unfairly discriminate against gays. Sodomy statutes, as applied to homosexuals, were upheld as constitutional in \textit{Bowers v. Hardwick}.\textsuperscript{83} By prohibiting sodomy, the statutes are prohibiting many types of sexual practices in which gays engage. Thus, sodomy status is used to support and justify numerous other laws and policies which discriminate against gay people.\textsuperscript{84}

4. Gays are a Politically Powerless Minority

The Supreme Court has required that laws undergo intermediate scrutiny when they classify on the basis of a class which the court considers to be a discrete and insular minority.\textsuperscript{85} The Court looks to whether the group has been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”\textsuperscript{86}

The pervasive discrimination against gays has seriously impaired their ability to gain a political voice for their views in state and local legislatures and in Congress.\textsuperscript{87} Gays attempting to form associations to represent their political and social beliefs, free from destructive reprisals in jobs or other social activities as a result of their sexual orientation, are the type of discrete and insular minority that deserve the protection of intermediate scrutiny.\textsuperscript{88} The pressure to conceal one’s homosexuality commonly deters gays from openly advocating pro-gay legislation, thus intensifying their inability to make effective use of the political process.\textsuperscript{89} Because of the immediate and severe opprobrium often manifested against gays once their homosexuality is made public, gays are particularly powerless to pursue their rights openly in the political arena.\textsuperscript{90}

\textsuperscript{82} 470 U.S. 1009, 105 S. Ct. 1373, 84 L. Ed. 2d 392 (1985).

\textsuperscript{83} \textit{Bowers}, 106 S. Ct. 2841 (1986).


\textsuperscript{86} \textit{San Antonio}, supra note 85.

\textsuperscript{87} \textit{High Tech Gays}, supra note 44, at 1370.


\textsuperscript{89} \textit{Watkins}, supra note 51, at 1348.

\textsuperscript{90} \textit{Watkins}, supra note 51, at 1348 (Brennan, J., dissenting denial of cert.) (quoting
Even if gays do overcome prejudice enough to participate openly in politics, the general animus towards homosexuality may render this participation wholly ineffective, because elected officials sensitive to public prejudice may refuse to support pro-gay legislation.\textsuperscript{91} These barriers to political power are underscored by the underrepresentation of avowed homosexuals in government.\textsuperscript{92}

Another court, however, believes differently. In Ben-Shalom, the court stated that “in these times homosexuals are proving that they are not without growing political power. It cannot be said ‘they have no ability to attract the attention of the lawmakers.’ A political approach is open to them to seek [congressional representation].”\textsuperscript{93} Thus, the court rejected the idea that gays met the criteria of a quasi-suspect class.\textsuperscript{94}

The stereotypes and prejudice attached to gays affect the minds of lawmakers as well as those of the general population. Because of this stereotyping and prejudice, gays are assured of receiving little representation in government, as illustrated by the persistent official discrimination described above. Despite lobbying and other political efforts of various gay organizations, legal discrimination in all areas continues to be a part of gay life.\textsuperscript{95}

Part I has examined the four criteria the Supreme Court has held are necessary to form a quasi-suspect class. Because homosexuals meet these criteria, they should be given the status of quasi-suspect class.\textsuperscript{96} Thus, laws which classify on the basis of sexual orientation should be subjected to equal protection intermediate scrutiny in order to withstand a constitutional challenge. Intermediate scrutiny demands that laws which classify on the basis of quasi-suspect class must serve an important governmental interest and must be substantially related to the achievement of that interest.\textsuperscript{97} The rational relationships standard, typically used by courts to determine whether laws which classify on the basis of sexual orientation should be upheld, has been insufficient to strike down laws which unfairly discriminate against gays. Intermediate scrutiny would require courts to analyze more carefully laws which


\textsuperscript{92} Watkins, supra note 51, at 1349.

\textsuperscript{93} Ben-Shalom, supra note 40, at 466.

\textsuperscript{94} Id.

\textsuperscript{95} Watkins, supra note 51, at 1349; Ben-Shalom, supra note 40, at 466.

\textsuperscript{96} Because the criteria which a class must have in order to signal the use of heightened scrutiny is basically the same for both quasi-suspect and suspect classes, gays would meet the criteria for suspect classes as well. See supra note 26.

\textsuperscript{97} See generally Note, Quasi-Suspect Classes, supra note 24.
classify on the basis of sexual orientation, and would, therefore, reveal the unfairness of these laws.

Part II will now examine the three approaches used in child custody disputes involving a gay parent, and how the presumptions of a gay parent's unfitness used in the per se and middle ground approaches could be dissolved under equal protection challenges if subjected to intermediate scrutiny, instead of the currently-used rational relationship standard.

II. JUDICIAL APPROACHES IN CHILD CUSTODY DISPUTES INVOLVING A GAY PARENT

In determining the fitness of a homosexual parent, courts have used three approaches: the per se approach, the middle ground approach and the nexus approach. This section defines these approaches, reveals the effects of their use, and analyzes how each would fare under equal protection intermediate scrutiny.

A. The Per Se Approach

The approach which generally results in the denial of custody to the gay parent is the per se approach.\(^8\) Under this approach, the parent's homosexuality presents a rebuttable presumption that the parent is unfit.\(^9\) Because the best interests of the child usually rest on the fitness of the parent, the gay parent can be refused custody without any evidence of an actual adverse effect on the child.\(^10\) From the outset, the per se approach presents the gay parent with the nearly impossible challenge of disproving his or her unfitness.\(^11\) Here, it is both the status of being a homosexual and the homosexual conduct of the gay parent upon which the court frowns. Punishment through the denial of custody for the mere status of being homosexual is unique to the per se approach.

A typical case using the per se approach is *T.C.H. v. K.M.H.*\(^12\) There, the Missouri Court of Appeal granted custody of the couple's two children to the father, rather than to the lesbian mother. The children expressed a desire to live with their mother. The court acknowledged that the psychologists and social workers testified that the mother would be a better custodian. However, the court stated that the mother might adversely affect her chil-

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10. See generally supra note 98.
11. Id.
dren’s morality, basing that argument solely on the fact that the mother was a lesbian.\textsuperscript{103} The court noted that the mother had lied about her relationship with her lesbian lover in depositions, and at other times.\textsuperscript{104} The court concluded that the mother's lies were evidence of poor moral standards.\textsuperscript{105} However, once the mother told the truth about her lesbianism, the court used that as evidence of poor moral standards.\textsuperscript{106}

Another recent case illustrates how strong and nearly irrefutable this presumption of unfitness is. In \textit{G.A. v. D.A.}, the Missouri Court of Appeals granted custody of the couple’s only son to the father, rather than the lesbian mother, based solely on the mother’s lesbianism.\textsuperscript{107} The court stated that because the mother lived with her lesbian lover, and because there was no mention by the mother of any religious training that she would make available to her child, the environment in which the child would be raised would be unhealthy and harmful to the child’s moral development.\textsuperscript{108}

Justice Lowenstein, in his dissenting opinion, argued against the presumptions of unfitness used by the court against gay parents. He stated that:

\begin{quote}
[a]ny doubt as to the irrefutable or conclusive presumption based on what ‘may’ . . . result from a child in the custody of a homosexual parent, would . . . be here dispelled by an affirmation based on these facts. The mother provides the child with his own room in a well kept house, enrolls him in a pre-school, has a steady nursing job, [and] cares about the child. . . . The father has limited education, an income of $6,500 [annually] and lives in . . . a one room cabin containing a toilet surrounded by a curtain; the child sleeps in a foldup cot by a woodstove and plays in an area littered with Busch beer cans, collected by the father's 'slow' sister. . . . To say it is in the best interests of this little boy to put him in the sole custody of the father, who was pictured leering at a girly magazine, solely on the basis of the mother's sexual preference, would be and is a mistake.\textsuperscript{109}
\end{quote}

As the above cases illustrate, presuming that the gay parent is unfit, especially when faced with evidence to the contrary, may frequently leave the child in the hands of a less-fit parent or third party. If homosexuals were classified as a quasi-suspect class, then presumptions of the gay parent's unfitness would be dissolved. In-

\begin{itemize}
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} 745 S.W.2d 726 (Mo. App. 1987).
\item \textsuperscript{108} \textit{Id.} at 727.
\item \textsuperscript{109} \textit{Id.} at 729.
\end{itemize}
termediate scrutiny requires that laws serve an important governmental objective and be substantially related to achieving that objective. The Court would unquestionably find that protecting the best interests of the child is an important governmental objective. However, the means used under the per se approach are not substantially related to achieving that objective. The courts’ presumptions sidestep the need for factual analysis of the parties’ parental capabilities and of the particular needs of the child. Thus, some fit parents are inevitably deprived of custody while some unfit parents or third parties are granted custody. This runs counter to the child’s best interests. Therefore, because the means are not substantially related to achieving the important governmental objective of protecting the best interests of the child, the per se approach would fail a constitutional challenge utilizing intermediate scrutiny.

The per se approach would also be constitutionally impermissible under intermediate scrutiny because it punishes gay parents solely for the status of being homosexual. In Robinson v. California, the Supreme Court held that punishing a narcotics addict for the status of being an addict is cruel and unusual punishment in violation of the fourteenth amendment. The Court reasoned that laws could forbid conduct, such as the use of narcotics, but could not inflict punishment for the status of addiction alone. An appellate court held that a gay parent’s status as a homosexual cannot be used to establish parental fitness since homosexuality, like alcoholism, does not involve conduct when it is not practiced. Having the status of being homosexual versus homosexual conduct is a distinction that the courts have recognized in using the middle ground approach.

B. The Middle Ground Approach

Under the middle ground approach, the parent’s homosexuality does not make him or her per se unfit, but the court usually requires the parent to forego sexual activity with members of the same sex, separate from a same-sex partner, or follow other restrictive behavioral guidelines before custody will be granted. This approach, unlike the per se approach, frowns only on homosexual conduct and not on the mere status of being homosexual. Thus, while all homosexuals are not presumed to be unfit parents,
all sexually active homosexuals are presumed to be unfit parents. Sexually active homosexual parents have the same difficult burden to overcome as do all homosexual parents under the per se approach. They must disprove their unfitness. This burden is virtually impossible to overcome, because even with ample witnesses, expert testimony, and other evidence to prove that the parent is fit and that the child is happy and well-adjusted, the court will usually deny custody if the parent refuses to follow the court’s guidelines. Under this approach, the sexual behavior of the parent is frequently scrutinized through inquiry with whom the gay parent has sex, where sex occurs, where sexual acts occur, and how many times sexual acts occur in a usual week.

An illustrative case using the middle ground approach is Collins v. Collins. There, the father, rather than the lesbian mother, was granted custody of the daughter. Further, in order to be granted visitation, the mother was enjoined from having the child around the mother’s “lesbian friend” on an overnight basis. The court stated that “[w]hile mother’s homosexuality may be beyond her control, submitting to it and living with a person of the same sex in a sexual relationship is not. Just as an alcoholic overcomes the habit and becomes a nondrinker, so this mother should attempt to dissolve her alternative lifestyle of homosexual living. Such is not too great a sacrifice to expect of a parent in order to gain or retain custody of his or her child. This Court can take judicial notice of the fact that throughout the ages, dedicated, loving parents have countless times made much greater sacrifices for their children.”

In S.E.G. v. R.A.G., the Missouri Court of Appeals restricted the visitation rights of a lesbian mother, requiring that the mother’s lover not have contact with the children. The court reasoned that the mother’s lover “has chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community. We are not forbidding Wife from being a homosexual, from having a lesbian relationship, or from attending gay activist or overt homosexual outings. We are restricting her from exposing those elements of

116. J.P. v. P.W., 722 S.W.2d 788 (Mo. App. 1989) (“The gay parent and his homosexual lover, Harry Reed, lived in an apartment. They kiss and hold hands. They sleep in the same bed. He and Reed perform oral sex on each other approximately once or twice each week.”).
118. Id.
119. Id. (concurring opinion).
120. 735 S.W.2d 167 (Mo. App. 1987).
her 'alternative life style' to her minor children. We fail to see how these restrictions impose or restrict her equal protection or privacy rights.... The cost to the mother for being a lesbian was the loss of custody of her four children, the loss of the home to the husband because he received custody of the children, and restricted visitation privileges.

Under intermediate scrutiny, the middle ground approach suffers from the same flaws as the per se approach. The means used are not substantially related to achieving the important governmental objective of determining what is in the best interests of the child. The courts' presumptions ignore the need for factual analysis of the parties' parental capabilities and of the particular needs of the child. This runs counter to the child's best interest. Thus, the presumption of the gay parent's unfitness found in the middle ground approach would be dissolved under equal protection intermediate scrutiny.

C. The Nexus Approach

Under the nexus approach, the court requires proof that the parent's homosexuality has or will adversely affect the child before custody can be denied. This approach is unique in that homosexuals are not challenged from the outset with presumptions of unfitness and are, therefore, on a more even footing with their heterosexual contestants. Neither the status of being homosexual nor the conduct of the homosexual, absent adverse effects on the child, are valid considerations when determining what is in the child's best interest.

For example, in Marriage of Birdsall, the California Court of Appeals overturned a trial court ruling prohibiting the gay father from having any friend, acquaintance or associate known to be homosexual in the presence of his son during his son's overnight visitation. The court held that a parent's sexual orientation alone is not a proper basis for restricting visitation. Rather, an affirmative showing of harm or likely harm to the child is necessary to restrict parental visitation.

In Conkel v. Conkel, the court also followed the nexus approach in holding that the gay father could not be denied overnight visitation.

121. Id.
122. Id.
123. Bergie, supra note 4, at 74. See infra text accompanying notes 124-32.
126. Id. at 1028.
127. Id.
tion with his two sons on the basis of his homosexuality, absent evidence that visitation would be harmful to the boys or that the boys would be psychologically or physically harmed. The court stated that:

[too long have courts labored under the notion that divorced parents must somehow be perfect in every respect. The law should recognize that parents, married or not, are individual human beings each with his or her own particular virtues and vices. The children of married parents are expected to take their parents as they find them—as Oliver Cromwell said to his portraitist, ‘with warts and all.’ [Thus.] before depriving the sexually active parent of his crucial and fundamental right of contact with his child, a court must find that the parent’s conduct is having, or is probably having, a harmful effect on the child.

In this case, there was no evidence that the children were adversely affected by their father’s homosexuality.

Most appellate courts dealing with heterosexual parents cohabitating without marriage require some nexus between the parent’s behavior and harm to the child before custody will be denied. For example, in Jones v. Haraway, the mother sought to restrict the child’s overnight visits with the father because he was living with his girlfriend out-of-wedlock. The court denied the mother’s requests for restricted visitation, reasoning that “custody will not be modified where the party seeking modification fails to establish a substantial detrimental effect on the welfare of the child as a result of the indiscreet conduct. In cases of primary custody, indiscreet behavior, such as living with someone of the opposite sex without the benefit of marriage, is only a factor to be considered, and our case law requires that there be evidence presented showing that such misconduct is detrimental to the child.” The same standards should be used in cases involving gay parents with live-in lovers. A court should find that a parent’s conduct is having an adverse effect on the child before custody can be denied, regardless of whether the parent is heterosexual or gay.

Of the three approaches, the nexus approach is the only one which meets the standards applied in intermediate scrutiny. Be-

129. Id.
132. Id. at 947.
cause the court, under this approach, actually analyzes the evidence regarding the fitness of the parent and the particular needs of the child, rather than bypassing these questions through presumptions, the best interests of the child can be more consistently and accurately determined. Because the nexus approach is substantially related to the important governmental objective of protecting the best interests of the child, it is the only approach which would endure an equal protection intermediate scrutiny analysis.

To summarize, the presumptions of the gay parent’s unfitness used in both the per se and middle ground approaches ignore the need for factual analysis of the parties’ capabilities and of the particular needs of the child. Under these approaches, courts consistently push aside evidence that the gay parent is fit and that the child is not adversely affected by the parent’s homosexuality, in favor of presumptions that the gay parent’s sexual orientation must be harmful to the child. Both approaches inevitably deprive deserving parents of custody while arbitrarily granting custody to undeserving parents or third parties. Because these approaches run counter to the governmental objective of protecting the child’s best interests, both approaches should fail intermediate scrutiny. “An approach which allows litigants to fairly confront [the issue of being a gay parent] and which allows courts to use complete information instead of speculation . . . should be encouraged.”

That approach is the nexus approach, because it uses the facts of each case to determine whether the gay parent is fit and whether the child is adversely affected by the parent’s homosexuality, rather than presumptions. Thus, only the nexus approach is substantially related to the governmental objective of protecting the best interests of the child.

Having established that two of the current approaches used by courts to grant custody would not survive intermediate scrutiny, this Comment will now examine, in Part III, the most common reasons courts give for denying custody to the gay parent. These reasons are used to support the presumptions found in the per se and middle ground approaches.

III. Sufficiency of the State’s Reasons Used to Support the Denial of Custody to Gay Parents

The court frequently advances five reasons for denying custody to the gay parent. These reasons are used to support the presumptions of unfitness found in the per se approach and the middle

ground approach. First, courts believe that the child's morality will be adversely affected by exposure to the parent's homosexuality. Second, courts fear that the child will be forced to absorb oppression, harassment and stigmatization caused by society's negative view of homosexuality. Third, state sodomy statutes forbid by definition many forms of homosexual sex; consequently, many sexually active homosexuals are engaging in criminal behavior. The court reasons that homosexuals, as criminals, are unfit parents. Fourth, courts fear that exposing the child to the gay parent's homosexuality might condemn the child to sexual disorientation. Finally, courts fear that the child might contract AIDS from the gay parent. This section analyzes the logic of these reasons and reveals that they would be insufficient to withstand equal protection intermediate scrutiny.

A. Gay Parent Adversely Affects Child's Morality

The most frequent reason given by courts for denying custody to a gay parent is that the parent's homosexuality will adversely affect the morality of the child. An inference which must be drawn from this conclusion is that the court believes homosexuals themselves are inherently immoral. To use the words of a 1989 Missouri appellate custody case:

Private personal conduct by a parent which could well have an effect on children during years in which their character, morality, virtues and values are being formed cannot be ignored or sanctioned by courts. Private conduct of a parent in the presence of a child or even under some other circumstances may well influence his or her young, impressionable life. . . . No matter how [the gay parent] or society views the private morality of the situation, we cannot ignore the influence [the gay parent's] conduct may well have upon the future of this child and cannot give our judicial cachet to such conduct by etching in the law-books for all to read and follow. We see no salutary effect for the young child by exposing him to the [gay parent's] miasmatic moral standards.

A 1988 Tennessee appellate court case expressed its opinion even more succinctly: "Homosexuality has been considered contrary to the morality of man for well over two thousand years. It has been
and is considered to be an unnatural, immoral act."  

Could laws which discriminate against homosexuals on the basis of majoritarian morals be upheld if homosexuals were classified as a quasi-suspect class? Gay litigants have argued that majoritarian morals should not be the focus of lawmakers. However, the state can and does base laws on majoritarian moral values. In Bowers v. Hardwick, the Supreme Court upheld a Georgia sodomy statute, stating that the "presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable" was an adequate rationale to support the statute. Justice Norris in Watkins, on the other hand, believed that majoritarian morals cannot withstand an equal protection challenge: "[E]ven accepting arguendo [the] proposition that anti-homosexual animus is grounded in morality [as opposed to prejudice masking as morality], equal protection doctrine does not permit notions of majoritarian morality to serve as compelling justification for laws that discriminate against [protected] classes." The principle of equal treatment, when imposed against majoritarian rule, arises from the Constitution.

Some feuding heterosexual couples have even tried to use the other parent's association with homosexuals as a ground for denying custody, claiming that the children's morality would be adversely affected. In The Marriage of Walls, the father sought a change of custody due to the mother's association with gay men. The father argued that the mother's association with gay men would subject the children to an "unwholesome influence." Although the court denied the father's request to change custody, it based its decision on the fact that there was no evidence that the men with whom the mother associated were, indeed, gay, and that the mother herself was not a lesbian. The fact that the court found it necessary to determine that the people involved were not gay before allowing the mother to retain custody shows its willingness to believe that gays may present an unwholesome influence.

Another reason courts believe that gay parents will adversely affect their children's morality is that they will teach them that

141. Collins, supra note 61.
143. Id.; see also Bowers, supra note 16.
145. Watkins, supra note 51, at 1351.
146. Id. at 1341.
147. 743 S.W.2d 137 (Mo. App. 1988).
148. Id.
149. Id.
being gay is not immoral. But a court cannot justify denial of custody because it believes the gay parent should indoctrinate the child into sharing society’s antipathy towards gays.\(^{150}\) In *Kallas v. Kallas*, the Supreme Court of Utah noted that the child of gay parents may experience some conflict concerning basic life styles, but stated that the assumption that it is better for a child to grow up feeling antipathy towards gays than to experience any conflict created in the child due to the parent’s homosexuality contradicts basic notions of tolerance critical to our pluralistic society.\(^{151}\) Although the court can forbid conduct it believes is immoral, the first amendment forbids courts to outlaw beliefs.\(^{152}\)

Majoritarian morals were not considered important enough to overshadow the rights of those in protected classes in *Loving v. Virginia*.\(^{153}\) There, the presumed belief of the majority of the public that interracial marriage is immoral was insufficient to uphold antimiscegenation statutes.\(^{154}\) The lower courts’ view of morality served merely as a mask for prejudice. The trial court stated in its opinion that “almighty God had created the races different colors and placed them on different continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that God separated the races shows that he did not intend for the races to mix.”\(^{155}\) The Virginia Supreme Court, which upheld the trial court, held that the state had a legitimate purpose “to preserve the racial integrity of its citizens” and to prevent “the corruption of blood,” “a mongrel breed of citizens” and “the obliteration of racial pride.”\(^{156}\) Clearly, the court based its decision on its own prejudice, and not on morality.

If gays were classified as a quasi-suspect class, legislators could no longer rely on majoritarian morals when making laws which classify on basis of sexual orientation. Courts could no longer use a child to “punish or reward conduct a particular judge might condemn or condone.”\(^{157}\) Relying on majoritarian values, rather than on a factual analysis of the parties’ parental capabilities and of the particular needs of the child, is irrational and counter-pro-

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151. 614 P.2d 641, 463 (Utah 1980).
153. 388 U.S. 1, 87 S. Ct. 1917, 18 L. Ed. 2d 1010 (1967).
154. *Id.* at 2.
155. *Id.* at 1.
156. *Id.*
157. *Conkel, supra note 113.*
ductive in determining the best interests of the child. Because reliance on majoritarian values is not substantially related to the important governmental objective of protecting the best interests of the child, they should not be allowed as a basis to deny custody to the gay parent under equal protection intermediate scrutiny.

B. Harassment and Stigmatization of Child Due to Parent’s Homosexuality

Having shown the negative reactions of people and courts to gays based on majoritarian morals and prejudice, common sense insists that some children of gay parents will be the target of harassment due to the parent’s homosexuality. But courts do not usually deny custody to the gay parent because the facts have revealed that the child has experienced specific incidents of harassment. Rather, the court relies on the presumption that the child has or will become a victim of societal prejudice and will, therefore, be stigmatized. However, the dissenting opinion in a 1987 Missouri appellate case argued that “[t]o tip the scales solely on the basis of what ‘may’ befall the child because of the [gay parent’s] sexual preference results in . . . the child’s welfare being made on less than complete information and renders it suspect.”

According to Palmore v. Sidoti, denying custody because the child might feel stigmatized by societal prejudice is constitutionally impermissible. In Palmore, the Supreme Court held that denial of custody because the child might be stigmatized by the mother’s interracial remarriage would violate the equal protection clause, since a major purpose of the fourteenth amendment was to do away with governmentally imposed discrimination. The Court recognized that “[t]here is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not [otherwise] present,” but nevertheless held that the denial of custody could not be based on “private biases and the possible injury they might inflict.” It noted, “the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, given them effect.”

159. G.A., supra note 158, at 729.
161. Id. at 432-33.
162. Id.
163. Id.
164. Id.
By using potential stigmatization of the child as a reason for denying custody to the gay parent, courts are giving allegiance to societal prejudices, which is disallowed under equal protection.

Similarly, the Ohio Supreme Court in *Portage County Welfare Dept. v. Summers* approved the adoption of a black child by Caucasian petitioners over strenuous opposition by the Welfare Department.\(^{166}\) The court granted the adoption despite the belief of the Welfare Department that the different racial backgrounds of the parties would cause the child to be unable to blend into society free from controversy and stigma.\(^{166}\) As in *Palmore*, the court was not allowed to deny custody based on the belief that the child might be stigmatized by societal prejudice.

*Palmore* and *Portage* can easily be applied to custody disputes involving gay parents. The potential stigmatization of children of gay parents, like the children of interracial couples, is caused by societal prejudice. *Palmore* stated that a potential stigmatization of the child caused by societal prejudice cannot be used by courts to deny custody.\(^{167}\) Doing so violates the equal protection clause, since the core purpose of the fourteenth amendment was to do away with all governmental imposed discrimination.\(^{168}\) Thus, denying custody to gay parents due to fear that the children will be stigmatized by societal prejudice is unconstitutional. The Supreme Court of Alaska applied the holding in *Palmore* in *S.N.E. v. R.L.B.*., a 1985 custody case involving a lesbian mother.\(^{169}\) The court held that, when determining custody rights, “it is impermissible to rely on any real or imagined social stigma attaching to [the] Mother’s status as a lesbian.”\(^{170}\)

Further, denying custody to the gay parent would not eliminate the possibility of harassment of the child. A New Jersey appellate court refused to change custody of the children from the gay father to the mother based on potential stigmatization.\(^{171}\) The court stated that changing custody would not remove the source of stigma and potential embarrassment,\(^{172}\) and that leaving the children with their gay parent gave the children the beneficial effect of overcoming “the constraints of currently popular sentiment or prejudice.”\(^{173}\) In a 1987 Ohio appellate custody case, the court

\(^{165}\) 38 Ohio S. Ct. 2d 144 (1974).

\(^{166}\) Id.

\(^{167}\) Palmore, supra note 160.

\(^{168}\) Id.


\(^{170}\) Id. at 879.


\(^{172}\) Id.

\(^{173}\) Id. at 438.
used the same logic when denying a mother's request to limit custody to the gay father based on the potential stigmatization of the child, stating that the children would eventually have to come to terms with their father's homosexuality regardless of how visitation was structured.\textsuperscript{174} Thus, potential stigmatization of the child should not be used as a basis to deny custody to the gay parent.\textsuperscript{175}

C. Under Sodomy Statutes, Gays are Criminals and, Therefore, Unfit Parents

Another reason frequently used by courts to deny custody to the gay parent is because many sexually active gays are engaging in criminal behavior under sodomy statutes.\textsuperscript{176} In \textit{Bowers v. Hardwick}, the Supreme Court upheld the rights of states to enforce sodomy statutes as applied to homosexuals, stating that the due process clause provides no substantive privacy protection for acts of private homosexual sodomy.\textsuperscript{177} Because sodomy statutes criminalize most gay sexual activity, courts in custody disputes have denied custody to gay parents on the basis of their criminal behavior.\textsuperscript{178} The court reasons that the parent is unfit because he or she is a criminal. This argument is without merit.

Firstly, sodomy statute do not make criminals out of all homosexuals. As the court in \textit{High Tech Gays} stated:

\begin{quote}
[H]omosexual sodomy is not a crime in over half the states. It appears that people who engage in private consensual sodomy rarely if ever face actual prosecution today. In fact, the state of Georgia never even presented a criminal charge to the grand jury against plaintiff in \textit{Hardwick} [citation omitted]. Justice Powell in his concurrence in \textit{Hardwick}, noting that there was no reported decision involving prosecution under the Georgia statute for several decades, suggested that actual prosecution and imprisonment of plaintiff may violate the eighth amendment. He described laws proscribing private consensual sodomy as having 'a history of nonenforcement' that suggests the 'moribund character' of such laws today [citations omitted].\textsuperscript{179}
\end{quote}

Further, not all homosexual behavior is outlawed.\textsuperscript{180} Since

\begin{footnotes}
\item[174] \textit{Conkel}, supra note 113, at 987.
\item[175] \textit{Id}.
\item[176] Sodomy statutes forbid contact between the genitals of one person and the mouth or anus of another, and are currently in force in twenty-four states and the District of Columbia. These statutes prohibit many forms of sexual activity in which gays can engage, even if the acts occur between consenting adults in the privacy of the home.
\item[177] 106 S. Ct. 2841, 2843 (1986).
\item[179] \textit{High Tech Gays}, supra note 44, at 1373.
\item[180] See \textit{id}. at 1374: "[A]ll but four of the states that continue to outlaw homosex-
\end{footnotes}
fewer than half the states have sodomy statutes, and since most sodomy statutes do not prohibit many types of sex in which homosexuals can engage, most gays are not engaging in criminal behavior under sodomy statutes.

However, courts assume that the gay parent has engaged in prohibited sexual conduct, when, in fact, many gay people do not engage in sodomy. A growing number of gay men, in an effort to reduce the spread of the HIV virus (which is thought to cause AIDS), do not engage in sodomy. Further, “eighteen of the twenty-four states and the District of Columbia that continue to proscribe sodomy, proscribe it for both homosexuals and heterosexuals. Consequently, if engaging in private consensual sodomy indicates lack of willingness to uphold public law, heterosexuals’ willingness to uphold public law appears equally to be called into question.” If the court is going to presume illegal sexual activity, it must make that presumption for heterosexuals too, and must subject both heterosexuals and gays to fact-gathering on the issue.

“Finally, the fact that a person lacks respect for one law does not imply that he or she lacks respect for laws in general. The argument that persons who ‘behave improperly in one regard are likely to transgress in others . . . is both a logical nonsequitur and a psychological error.”

In summary, it is incorrect for courts to assume that all gays are criminals under sodomy statutes. Over half the states do not have sodomy statutes. Further, most sodomy statutes do not prohibit many types of sexual activity in which gays can engage. Even if a gay parent does engage in sodomy, denying custody to the parent on that basis is not in the best interests of the child, because a fit parent who engages in sodomy could be denied custody on that basis in favor of a less-fit parent or third party. In order to determine the best interests of the child, those factors which affect the child should be considered above those which do not. Thus, presuming that a gay parent engages in criminal behavior under sodomy statutes, and denying custody on that basis, is not substantially related to the governmental objective of determining the best interests of the child. Under intermediate scrutiny, even if the parent did engage in sodomy, the court would still have to show that this had an adverse effect on the child before

183. Id. (citing Rosenblum, Moral Character, 27 STAN. L. REV. 925 (1975)).
denying custody to the gay parent. Assuming that the sexual activities were done in private and not in view of the child, it is difficult to imagine how a child could be adversely affected if his or her parent were engaging in sodomy rather than in other sexual acts, such as manual stimulation, which are not prohibited.

D. Exposing Child to Gay Parent's Homosexuality Might Make Child Gay

Another reason frequently given by the state for denying custody to the gay parent is that exposure to the gay parent's homosexuality will make the child gay.\(^{184}\) Homosexuality is viewed as a learned behavior. For example, in a 1988 Tennessee appellate case, the court gave weight to expert testimony which stated that "there is disagreement as to whether homosexuality is a learned behavior or is genetically determined, that [the expert] is of the opinion it is a learned process more than a genetic process, and that the learning continues past the age of nine."\(^{185}\) In another 1988 Tennessee appellate case, the court stated that "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 [the mother and her lesbian lover live together], the children would be subjected to such influences."\(^{186}\)

This belief runs contrary to scientific evidence which shows that children raised by homosexual parents are no more likely to become homosexual than are children raised by heterosexual parents.\(^{187}\) The fact that a great majority of homosexuals had heterosexual parents is a further indication that sexual orientation is not learned from the parent. In Conkel, the court rejected the mother’s argument that contact with the children’s gay father might trigger homosexual tendencies in the two boys, stating that there was a substantial consensus among experts that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual.\(^{188}\) The court relied on numerous studies, as well as the opinion of an expert in gender identity in

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185. Collins, supra note 185.
186. Black, supra note 184.
188. Conkel, supra note 113, at 986.
children, who said that "no theory in the developmental psychology literature suggests that having homosexual parents leads to a homosexual outcome."¹⁸⁹

Relying on the presumption that gay parents make their children gay, as with all the reasons in Part III advanced by courts to deny custody to the gay parent, runs counter to the best interests of the child. The court, once again, is relying on an unsupported presumption, rather than on a factual analysis of the parental capabilities and of the particular needs of the child. Thus, this reason would fail under equal protection intermediate scrutiny, since it is not substantially related to the important governmental objective of determining the best interests of the child.

E. Child Will Contract AIDS

AIDS, an acronym for Acquired Immune Deficiency Syndrome, is being used more and more frequently in custody and visitation disputes to deny custody to a gay parent.¹⁹⁰ Because those infected with the HIV virus in the United States are predominantly male homosexuals, the issue of contracting AIDS will probably be found more and more in custody cases involving gay males. To date, most cases to change custody or deny visitation solely on the parent's possible or actual infection with the HIV virus have been unsuccessful.¹⁹¹ Courts have relied on the large body of medical evidence which finds that AIDS is not transmitted through casual contact.¹⁹² Thus, an equal protection challenge has not yet been necessary to dissolve this reason as a basis to deny custody to the gay parent. It is mentioned in this Comment primarily as a warning that fear of the child getting AIDS from the gay parent will be used with increasing frequency in the future, and that gay parents, especially males, should be prepared to defend against it in custody battles.

This Comment has examined the five reasons frequently given by courts to deny custody to gay parents. These reasons are used to support the presumption of unfitness of the gay parent found in the per se and middle ground approaches. Under intermediate scrutiny, neither majoritarian morals, a perceived risk of possible future stigmatization of the child, the presumed criminal status of

¹⁸⁹. Id. (quoting Dr. Richard Green, Professor of Psychiatry, State University of New York at Stony Brook) (citing Green, Best Interests, supra note 187, at 9).


¹⁹¹. Id.

¹⁹². Id.
The odds are currently heavily skewed against gay parents in custody disputes. If gays were classified as a quasi-suspect class, the rights of homosexual and heterosexual parents would be more equal. Homosexuals deserve to be classified as a quasi-suspect class because they meet the four criteria determined by the Supreme Court to justify such a classification. Homosexuality is immutable and unchangeable. Gays are the target of incorrect stereotypes. Gays have faced a history of discrimination and stigmatization. Gays are a politically powerless minority with very little representation in government.

Under intermediate scrutiny, the per se approach and the middle ground approach would fail an equal protection challenge. Under the per se and middle ground approaches, the courts' presumptions sidestep the need for factual analysis of the parties' parental capabilities and of the particular needs of the children. Both approaches inevitably deprive deserving parents of custody, while arbitrarily granting custody to some undeserving parents or third parties. Because these approaches run counter to the governmental objective of protecting the child's best interest, both should fail intermediate scrutiny. Only the nexus approach does away with presumptions of the gay parent's unfitness and requires proof that the parent's homosexuality has or will adversely affect the child before custody can be denied. Because the court under this approach chooses to analyze the evidence, rather than bypassing these questions with presumptions, it is the only approach which is substantially related to the governmental objective of protecting the best interests of the child and thus the only approach which can withstand intermediate scrutiny.

The five reasons used by courts for denying custody to gay parents support the presumptions of unfitness of gay parents used in the per se and middle ground middle approaches. Under intermediate scrutiny, neither majoritarian morals, a perceived risk of
possible future stigmatization to the child, the presumed criminal status of the gay parent due to his or her homosexuality, an unsupported belief that gay parents make their children gay, nor fear of exposing the child to the AIDS virus would be sufficient reasons for denying custody to the gay parent without affirmative proof of an actual adverse effect on the child. The best interests of the child are met by using tests of parental fitness which do not rely on biased presumptions.

Not only does the gay parent suffer when custody is denied solely due to that parent's sexual orientation, but the child of the gay parent suffers as well. "The need of a child for visitation with a separated parent is a natural right of the child, and is as worthy of protection as is the parent's rights of visitation with the child; thus, [unfair denial of visitation] is an infringement of the child's right to receive the love, affection, training, and companionship of the parent."193

This Comment only addresses the irrationality of laws which deny gay parents custody of their children, and how both gay parents and the interests of their children would be better served were laws which classify on the basis of sexual orientation submitted to intermediate scrutiny. It should be noted that a quasi-suspect classification would further serve to protect homosexuals against the private and official discrimination they encounter in virtually all other areas.

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