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To Be Male: Homophobia, Sexism, and the Production of “Masculine” Boys

Clifford J. Rosky

This chapter is about the relationship between homophobia and sexism in family law. By conducting an empirical analysis of custody and visitation cases, it shows that stereotypes about the children of lesbian and gay parents are both sexist and homophobic. In some cases, the relationship between homophobia and sexism becomes especially obvious, when stereotypes explicitly conflate the sexual orientation, gender identity, and gender roles of children and parents. By looking more closely, however, we can find more subtle evidence of this relationship in a much wider range of cases, wherever stereotypes of the children of lesbian and gay parents appear.

In masculinities studies, the relationship between homophobia and sexism is most often theorized in terms of “hegemonic masculinity,” the dominant concept of masculinity within particular cultures (Connell and Messerschmidt 2005). Among others, Michael Kimmel has observed that hegemonic masculinity is principally defined in negative terms, as that which is neither “female” nor “homosexual” (Kimmel 1997, Pleck 1980). In this field, masculinity is portrayed as a confluence of sexism and homophobia—a collection of essentialist distinctions between “male” and “female,” on the one hand, and “straight” and “gay,” on the other hand. In this respect, masculinities studies follows a long line of feminist and queer theorists who have observed connections between sexism and homophobia (Valdes 1995, Koppelman 1994, Sedgwick 1993, Law 1988, MacKinnon 1983).

In most legal disputes over lesbian and gay parenthood, however, the relationship between sexism and homophobia has been ignored. Opponents of lesbian and gay parenthood have claimed that “children” should not be exposed to the “homosexual lifestyle,” and they have urged people to choose between homosexuality and parenthood; advocates have called such claims “homophobic” and “heterosexist,” and they have urged legislatures and courts to reject them. In both camps, the terms of the debate have remained neutral with regard to sex: Fathers have been lumped together with mothers; sons have been lumped together with daughters. As a result, the influence of sexism on legal disputes over lesbian and gay parenthood has been left unexplored.

For the most part, the U.S. legal scholarship on lesbian and gay parenthood reflects a similar framework. If sexism has had any influence in disputes over lesbian and gay parenthood, legal scholars have apparently overlooked it. Over the past several decades, lawyers and law professors have written dozens of articles about homosexuality and parenthood, in which they have generally argued for pro-gay reforms to family law. In most of these articles, lesbian mothers and gay fathers have been considered together, and the legal problems that they face have not been distinguished (Harding 2010: 8). While several scholars have written articles specifically about lesbian mothers (Dalton 2003, Velte 2001, Robson 2000, Boyd 1998, Polikoff 1996, Peltz 1995, Ronner 1995, Robson 1994, Robson 1992, Sella 1991, Polikoff, 1990, Polikoff 1986, Hunter & Polikoff 1976), only a few have written specifically about gay fathers (Spitko 2005, Hollandsworth 1995, Rush 1993), and almost none have separately theorized the obstacles confronted by these two groups of parents.¹

¹ The tendency of legal scholars to lump together lesbian mothers and gay fathers is nicely captured by the following title: “Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?” (Boyd 1998). The title refers to the difference between queer and heterosexual parents. Although the article is primarily based on cases involving lesbian mothers, the author does not distinguish cases involving gay fathers.

In this body of scholarship, moreover, no one seems to have considered the influence of the child's sex on disputes over lesbian and gay parenthood.²

This chapter argues that sexism influences the expression of homophobic stereotypes about the children of lesbian and gay parents. On a general level, it challenges a paradigm that seems to ignore the influence of sexism, or pretend that sexism has no influence at all; on a specific level, it focuses on the influence of maleness—on fathers and sons—a subject that has generally been neglected by lesbian, feminist, and family law scholars. By conducting a comparative analysis of reported family law opinions, the chapter shows that the children of lesbian and gay parents are subjected to stereotypes in custody and visitation cases that are both sexist and homophobic—influenced by both the parent's sex and the child's sex. By taking account of the complex relationship between homophobia and sexism, the chapter aims to develop a more compelling case for lesbian and gay families—a case that vindicates the developmental interests of children, in addition to the parental interests of lesbians and gay men.

The argument proceeds in two parts. The first part is based on my analysis of a collection of almost 200 family law opinions, which represents every custody and visitation case involving a gay, lesbian, or bisexual parent and a heterosexual parent reported in the United States since the 1950s. The part begins with a description of my methodology for collecting and analyzing these cases, and a brief consideration of how legal and social norms have developed in this field during the relevant time period. Next, it lays out the focus of my analysis—the stereotype that children raised by lesbian and gay parents are likely to develop homosexual fantasies, engage in homosexual behavior, and identify as gay, lesbian, or bisexual.

By comparing how often this stereotype appears in cases involving fathers, mothers, sons, and daughters, I illustrate that homophobia is influenced by sexism in both obvious and subtle ways. In general, this stereotype is influenced by the child's sex: It is applied more often to sons than daughters. In particular, however, the stereotype is influenced by the relationship between the child's sex and the parent's sex: It is applied most often to sons raised by gay fathers, slightly less often to sons and daughters raised by lesbian mothers, and almost never to daughters raised by gay fathers. By drawing upon relevant literature on homophobia, sexism, and the psychology of child development, and taking a closer look at each group of cases, I reveal the underlying assumptions about childhood sexual and gender development that have produced this hierarchy of sexual development concerns. A close reading of this pattern of stereotypes betrays hetero-patriarchal assumptions about the need to secure the role of “masculine” fathers in the development of “masculine” boys.

In responding to these stereotypes, the US legal academy has cited a large body of empirical studies claiming that children raised by lesbian and gay parents are “no different” than children raised by heterosexual parents. As I explain in the second part of this chapter, however, the reliability of these claims has not withstood independent review. In 2001, two sociologists published a comprehensive meta-analysis of the best-designed studies, in which they found that researchers had overlooked significant differences in the sexual and gender development of children raised by lesbian and gay parents.

² In her recent book, *Regulating Sexuality*, Rosie Harding briefly considers the influence of the child's sex on similar stereotypes that appear in a related context. Based on a series of in-depth interviews, she shows that counselors who serve lesbian and gay parents in assisted reproduction clinics have applied different stereotypes about boys and girls raised by lesbian mothers and gay fathers (2010: 132-134).

To date, most advocates for lesbian and gay parents have responded to these provocative findings by downplaying or ignoring them. In his 2003 article, however, Carlos Ball took the academy's first, courageous step toward confronting these findings. Rather than downplaying the data, he both entertained and defended the possibility that children raised by lesbian and gay parents were more likely to violate traditional sex stereotypes. In this article, however, Professor Ball was not willing to entertain the possibility that such children were more likely to engage in homosexual behavior or identify as lesbian, gay, or bisexual.

In this chapter, I push Ball's argument one step further: I argue that the state has no legitimate interest in discouraging children from being lesbian, gay, or bisexual, and that any attempt to distinguish between homophobic and sexist stereotypes is unnecessary and unhelpful. Based on my empirical analysis of custody and visitation cases, I claim that homophobia and sexism are inextricably intertwined in stereotypes about the children of lesbian and gay parents. As a result, any strategy that specifically targets sexist stereotypes—as distinguished from homophobic stereotypes—is likely to be futile, and any victory against sexism is unlikely, and likely to be short-lived. Because homophobia and sexism are connected, conflated, and collapsed in this context, opponents will readily shift from one discourse to the other, and neither stereotype will fall by itself.

The chapter concludes by suggesting that sooner or later, we will have to launch a coordinated attack against both of these forces, in which the battle is joined on both fronts. If we mean to redefine what it is to be male, then ultimately, we must be prepared to defend not only a boy's right to be feminine and a girl's right to be masculine, but any child's right to be lesbian, gay, or bisexual.

I. Heteropatriarchy and the Production of Masculine Boys

Feminism . . . has a theory of power: Gender is sexualized as sexuality is gendered.

—Catherine MacKinnon³

This empirical study of disputes over lesbian and gay parenthood is based on my analysis of a collection of 191 reported judicial opinions from 171 family law cases. To the best of my knowledge and effort, the collection includes every custody and visitation case involving a lesbian, gay, or bisexual parent and a heterosexual parent reported in the United States between 1950 and 2007, when the empirical phase of the study concluded.⁴ To build this database, I systematically gathered all of the reported opinions available in Westlaw, Lexis, casebooks, and law reviews.⁵ The collection consists exclusively of cases in which a man and a woman were married, had at least one child together, were divorced, and entered into custody or visitation proceedings; at some point in these cases, one of the parents was identified as gay or lesbian to the court. In such cases, litigants

³ MacKinnon 1983.

⁴ My search did not reveal any relevant opinions reported before 1952. This fact is likely explained by the limitations of Westlaw and Lexis archives, which do not include a wide range cases reported before 1945. In addition, in early cases, litigants and judges were profoundly reluctant to make any explicit references to homosexuality in custody and visitation cases.

⁵ In particular, I would like to thank Kimberly D. Richman of the University of San Francisco for generously sharing her collection of family law opinions involving LGBT parents. I supplemented Richman's list (Richman 2009) with my own research by conducting additional Westlaw and Lexis searches and checking citations in cases, casebooks, law review articles, and internet sources.

and experts have often claimed that a parent's homosexuality has had an "adverse effect" on a child, and judges have often considered such claims in determining the "best interests" of the child.

Of course, social understandings of homosexuality and parenthood have changed dramatically in the U.S. since the 1950s, and to some extent, the laws of custody and visitation have changed with them. Over the last half-century, U.S. courts have gradually adopted a more liberal approach toward a parent's homosexuality in custody and visitation cases. In some early cases, courts had articulated a "per se" rule against custody and visitation claims made by lesbian and gay parents, holding that homosexuality was inherently inconsistent with parenthood as a matter of law (*Roe v. Roe*, Va. 1985, *Evans v. Evans*, Cal. 1960). In the last twenty-five years, the majority of U.S. states have abandoned the per se rule in favor of a "nexus" test (Eskridge & Hunter 2004). Under the nexus test, a parent's homosexuality is not a sufficient ground to revoke or limit the parent's custody or visitation rights, unless one parent proves that the other parent's homosexuality has an "adverse effect" on the child.

As many scholars have observed, the shift from a per se rule to a nexus test represents a measure of progress for lesbian and gay parents (Yoshino 2002, Rubenstein 1997); today, the concept of "homosexual parenthood" is no longer a contradiction in terms. Yet the nexus test has not eliminated homophobia from custody and visitation cases. Because the "best interest of the child" standard is notoriously vague, many courts have continued to presume that when a parent exposes a child to the "homosexual lifestyle"—for example, by coming out to the child, spending time with other gay men or lesbians, displaying same-sex affections, or living with a same-sex partner—the parent's homosexuality has an adverse effect on the child (Wald 2006).

In such disputes, litigants, experts, and judges have expressed a long list of stereotypes about lesbian and gay parents, which have been well catalogued by lawyers, law professors, and social scientists (Patterson 1992, Flaks 1994, Harvard 1989). Courts have suggested, for example, that gay men are likely to be child molesters, and thus, that a gay father is likely to sexually abuse his own child (*J.L.P.(H.) v. D.J.P.*, Mo. 1982).

In recent years, however, such stereotypes have appeared less often in custody and visitation cases (Rosky 2009), and the battle over lesbian and gay parenthood has shifted into the field of child sexual development (Stacey and Biblarz 2001, Bailey et al. 1995). More than anything else, lesbian and gay parents are now portrayed as "recruiters" and "role models"—people who actively or passively encourage children to become homosexual.⁶ In some cases, courts have suggested that lesbian and gay parents will "indoctrinate" children by exposing them to pro-gay events or media—e.g., parades and rallies, weddings and churches, magazines and books, conferences and lectures, and radio and television programs (*Hertzler v. Hertzler*, Wy. 1996). More often, however, courts have suggested that children will "identify" with and "imitate" lesbian and gay parents who model homosexual behavior—e.g., by coming out to a child, living with a same-sex partner, or displaying same-sex affections in front of a child (*Dailey v. Dailey*, Tenn. 1981).

Although recruiting and role modeling concerns are phrased in slightly different terms, they are based on the same underlying stereotypes about children raised by lesbian and gay parents—namely, that such children are likely to develop homosexual fantasies, engage in homosexual behavior, and identify as lesbian, gay, or bisexual. Whether or not these concerns have any factual basis, they draw support from two popular, conventional assumptions about the process of sexual development, which can be traced back to the work of Sigmund Freud (1937, 1905): first, the notion that during early childhood, children have both homosexual and heterosexual tendencies, and

⁶ In *Regulating Sexuality*, Rosie Harding shows that similar stereotypes have been articulated by counselors serving lesbian mothers at assisted reproduction clinics (2010: 132-133).

second, the notion that during adolescence, they develop sexual desires, behaviors, and identities based on models provided by adults, especially parents (Stockton 2010). By keeping children away from lesbian and gay parents, courts have sought to establish “a proper atmosphere for young, pliable minds” in which children are shielded from “any course of conduct that might influence them to develop homosexual traits” (*Black v. Black*, Tenn. 1988).

To examine whether stereotypes about the sexual development of children have been influenced by the parent’s sex and the child’s sex, this Part compares how often they have appeared in cases involving fathers, mothers, sons, and daughters. Based on the distribution of stereotypes in these four groups of cases, Section A derives a hierarchy of concerns about childhood sexual development that have been expressed by litigants, experts, and judges. By drawing upon relevant literature on homophobia, sexism, and the psychology of child development, and taking a closer look at each group of cases, Sections B, C, and D reveal the underlying assumptions about childhood sexual and gender development that have produced this particular hierarchy of concerns.

The method has both qualitative and quantitative elements, as it involves reading rhetoric, counting cases, and theorizing explanations. The approach imposes a handful of intrinsic limitations, three of which I will emphasize here.⁷ First, I recognize that reported opinions are not representative of unreported opinions, appeals are not representative of trials, and neither appeals nor trials are representative of mediations, settlements, or uncontested divorces, which are far more numerous. Second, I emphasize that by focusing strictly on explicit stereotypes, I have taken a conservative approach to my rhetorical analysis. I include only references to stereotypes that appear in the text of opinions, rather than those that might be inferred from factual circumstances or ambiguous remarks. Finally, I note that because I am working with a complete set of opinions rather than a representative sample, I do mean to suggest that my findings can be generalized.⁸

A. Recruiting, Role Modeling, and the Sexual Development of Boys

Since the 1950s, sexual development stereotypes were raised by litigants and witnesses in about 28% (48 of 171) of all reported custody and visitation cases, and they were accepted by judges in about 90% (43 of 48) of these cases. These stereotypes appeared most often in southern and midwestern states, such as Alabama, Tennessee, Ohio, and Missouri, and during the late 1980s and late 1990s, in the midst of national backlashes against lesbian and gay rights.⁹ About half of the stereotypes appeared in the remaining states and about half appeared during other time periods. In

⁷ For a more complete explanation of the method and its limitations, see Rosky 2009.

⁸ In quantitative terms, the question of whether my findings are “statistically significant” has no meaningful answer. The relevant question is not whether the differences that I observe are *significant* but whether they are *meaningful*—that is, whether they are large enough to be regarded as a pattern or trend rather than the random influence of a few anomalous cases. For the purposes of this study, I have defined a difference to be presumptively meaningful when it is based on a disparity of at least three cases, and thus, could not have been produced by one or two outliers. Under this definition, all of the differences identified in this chapter qualified as presumptively meaningful—although, as I indicate in the text, some were more meaningful than others. See Rosky 2009: 276, 299.

⁹ The first backlash was triggered by the public’s awareness of the risk of HIV infection and the scope of the AIDS epidemic (Shilts 2007, Engel 2006). The second backlash was triggered the public’s response to *Baehr v. Lewin* (Hawaii 1993), a case in the Hawaii Supreme Court signaled that it was likely to strike down the state’s law that prohibited same-sex couples from marrying.

the ten years between 1997 and 2007, these stereotypes continued to appear in ten reported cases, including one case published in 2007 (*Holmes v. Holmes*, Ark. 2007).

If we break down these cases based on the parent's sex and the child's sex, we can begin to see interesting patterns that illuminate the influence of sexism on these stereotypes. Comparing cases involving fathers and mothers, it initially appears that the expression of sexual development stereotypes is not influenced by the parent's sex at all. Sexual development stereotypes are applied equally often to the children of fathers and mothers—in exactly 28% (14 of 50) of the cases involving gay fathers and about 28% (34 of 121) of the cases involving lesbian mothers.

Given that these are stereotypes about the sexual development of *children*, however, it is not surprising that the child's sex has a more obvious influence upon them than the parent's sex. Comparing cases involving sons and daughters, we can see that sexual development stereotypes were applied to sons 49% more often than daughters—specifically, in about 38% (20 of 52) of the cases involving sons and 26% (16 of 62) of the cases involving daughters.

Based on this pattern of stereotypes, it seems that litigants, experts, and judges generally expressed greater concerns about the sexual development of boys than the sexual development of girls. Needless to say, this hierarchy of concerns was not explicitly acknowledged in the reported opinions; no one in these cases claimed, for example, that it was more important or more challenging to discourage homosexuality in boys.

By breaking down the cases by both the parent's sex and the child's sex, we can begin to see the influence of sex on the expression of sexual development stereotypes in more detail. The following matrix shows how often sexual development stereotypes appeared in four groups of cases defined by the parent's sex and the child's sex: (1) cases involving gay fathers and sons; (2) cases involving lesbian mothers and daughters; (3) cases involving lesbian mothers and sons; and (4) cases involving gay fathers and daughters.

Distribution of Sexual Development Stereotypes by the Parent's Sex and the Child's Sex

	Fathers	Mothers
Sons	50% (9/18)	32% (11/34)
Daughters	10% (2/20)	33% (14/42)

By breaking down the cases in this manner, we can see that the parent's sex does influence the distribution of these stereotypes after all. It is not simply that litigants, experts, and judges were more concerned about the sexual development of boys. Rather, they were concerned about particular relationships between parent and child, which were shaped by particular pairings of the parent's sex and the child's sex.

Based on this pattern of sexual development stereotypes, we can identify the following hierarchy of concerns expressed by litigants, experts, and judges in custody and visitation cases:

- (1) They were *most* concerned about gay fathers raising gay sons; this stereotype appeared in half (9 of 18) of the cases involving fathers and sons.
- (2) They were *slightly less* concerned—but still quite concerned—about lesbian mothers raising lesbian daughters; this stereotype appeared in one-third (14/42) of the cases involving mothers and daughters.
- (3) They were *equally* concerned about lesbian mothers raising gay sons; like the second stereotype, this one appeared in about one-third (11/34) of the cases involving mothers and sons.

(4) They were *least* concerned—indeed, hardly concerned at all—about gay fathers raising lesbian daughters; this stereotype appeared in only two cases—one-tenth (2/20) of the cases involving fathers and daughters.

Above all, the differences between the last group of cases and the first three groups seem to be most meaningful¹⁰: Litigants, experts, and judges were five times more concerned about gay fathers raising gay sons than gay fathers raising lesbian daughters; similarly, they were three times more concerned about lesbian mothers raising gay sons or lesbian daughters than gay fathers raising lesbian daughters. The following sections explore what underlying, conventional assumptions about childhood sexual and gender development have produced this particular hierarchy of concerns.

B. Identification: Like Parent, Like Child

It is not difficult to understand why sexual development stereotypes were so prevalent in cases where the parent's sex and the child's sex were the same. In cases involving fathers and sons, the stereotypes reflect the assumption that boys are more likely to identify with male role models; in cases involving mothers and daughters, the stereotypes reflect the assumption that girls are more likely to identify with female role models. Whether or not these assumptions are sound, they draw support from the wisdom of two common proverbs—"like father, like son" and "like mother, like daughter"—which suggest that children typically take after parents of the same gender. More specifically, they draw support from many psychological theories of sexual development, which generally suggest that children typically form a bond of "identification" with parents of the same gender—i.e., boys normally identify with fathers and girls normally identify with mothers (Kaplan & Sedney 1980: 180).

In most of the sexual development cases, courts did not explicitly analyze the relationship between the parent's sex and the child's sex, so the significance of this bond was not often acknowledged. In a few cases, however, courts explicitly suggested that children are more likely to imitate parents of the same gender, in the course of denying custody to lesbian and gay parents. In *Bennett v. O'Rourke* (Tenn. 1985), for example, the court noted that "the homosexual parent and the minor child are both female"; in denying the mother custody of her daughter, the court explained, "we consider this factor particularly important because of the increased chance of role-modeling." In *Glover v. Glover* (Ohio 1990), when the court rejected the testimony of the father's expert witness, it expressed similar concerns about sons raised by gay fathers: "Although studies showed that children raised by lesbian mothers were not affected by the custodial parent's sexual preference, [the expert] admitted no such research was available for male children raised by homosexual fathers." In a similar vein, opponents of lesbian and gay parenthood have often claimed that "[p]arents are important as role models for their children of the same gender because children learn to be adults by watching adults" (Wardle 1997: 860-61).

C. Gender Identity Disorder: Lesbian Mothers, Effeminate Sons

The question remains, however, why the sons of lesbian mothers were often viewed so differently than the daughters of gay fathers. If the children of gay fathers were stereotyped so differently along gender lines, then why were the children of lesbian mothers stereotyped so equally across gender lines? Why would litigants, experts, and judges be so concerned about the possibility

¹⁰ For a quantitative definition of the term "meaningful," see *supra* note 8.

that the sons of lesbians might be gay, and so unconcerned that the daughters of gay men might be lesbian?

Answers to these questions can be developed from a brilliant essay by Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys* (1993). Sedgwick's essay is a classic text of queer theory, and it deserves a place in the canon of masculinities studies as well. As Sedgwick explains, the modern war over the sexual development of boys has been played out in the evolution of two theories of childhood sexual development that have been adopted by mainstream psychologists during different periods. The first is an old theory of why homosexuality develops in boys, which was closely associated with the diagnosis of homosexuality as a mental disorder. The second is a new theory of why effeminacy develops in boys, which is closely associated with the diagnosis of gender identity disorder of childhood, and the old theory of why homosexuality develops in boys. By briefly reviewing the evolution of these theories, we can develop a more specific understanding of why litigants, experts, and judges expressed heightened concerns about lesbian mothers raising gay sons.

In *Woodruff v. Woodruff* (N.C. 1979), a psychologist testified that there was “a substantiated theory that a male child, raised by an extremely domineering mother, may pursue a homosexual lifestyle.” In the postwar era, this theory was popularized by psychologists who diagnosed homosexuality as mental disorder—specifically, an arrested form of sexual development. Citing clinical observations and psychological studies, these so-called “conversion” therapists claimed that male homosexuality most often developed in boys raised by mothers who were “domineering,” “harsh,” or “close-binding” and fathers who were “weak,” “absent,” or “detached” (Socarides 1978, Bieber et al. 1972). During this period, most psychologists believed that this family dynamic would cause a boy to identify with the “wrong” gender—i.e., with his mother instead of his father—and develop “effeminate” traits, including a sexual attraction toward other males. For many years, this theory both informed and reflected the conventional wisdom that boys raised by “smothering” mothers grow up to be “sissies,” “fairies,” or “mama’s boys” (Green 1987). Although some psychologists proposed similar theories about female homosexual development in this era, none gained widespread acceptance among mainstream psychologists (Goldstein and Horowitz 2003).

Based on this theory of homosexuality, therapists often sought to “convert” male patients to heterosexuality by “curing” them of maternal influences and effeminate traits. In the early 1970s, however, this theory of homosexuality came under attack, as a growing number of psychologists and gay rights activists began to view homosexuality as a normal and healthy form of sexual development. In 1973, the American Psychiatric Association (APA) voted to remove “homosexuality” from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), indicating that psychologists should no longer diagnose or treat homosexuality as a mental disorder. For the next several years, the APA's decision was met with strong opposition from a substantial minority of APA members, including several prominent conversion therapists. By the 1990s, however, the APA's view had been embraced by every major mental health association in the United States. Today, the practice of conversion therapy has been thoroughly marginalized, and the theory that blames domineering mothers for the development of gay sons has been widely debunked (Yoshino 2002).

This is not to say, however, that the underlying logic of the theory has not been abandoned—not even by mainstream psychologists. In 1980, when the diagnosis of “homosexuality” was officially removed from the DSM, a new diagnosis known as “Gender Identity Disorder of Childhood” (GIDC) was added. As Sedgwick and others have noted, the new theory of GIDC is similar to the old theory of homosexuality in at least three ways: (1) it is specifically concerned with the development of effeminacy in boys; (2) it blames mothers for fostering effeminacy in boys; and (3) it links effeminacy in boys to homosexuality in gay male adolescents and

adults (Tucker and Spitzer 2005, Wilson 1998, Sedgwick 1993). Once we spell out the nature of these similarities, it will be easier to see why litigants, experts, and judges have been so willing to believe that lesbian mothers will raise gay sons.

First, like the old diagnosis of homosexuality, the new diagnosis of GIDC was specifically concerned with the gender development of boys. As Sedgwick explains, although the DSM's original diagnosis of GIDC was "nominally gender-neutral," it was "actually highly differentiated between boys and girls," insofar as it established a much lower threshold for diagnosing the disorder in boys. Under the DSM's guidelines, a girl could be treated for GIDC only in the rare case in which she denied that she was anatomically female (e.g., "she is biologically unable to become pregnant," "she will not develop breasts," or "she has no vagina") or asserted that she was anatomically male (e.g., "she has, or will grow a penis"). A boy, by contrast, could be treated for asserting merely that "it would be better not to have a penis," or that "his penis or testes are disgusting"—or alternatively, if he displayed "a preference for either cross-dressing or simulating female attire, or . . . a compelling desire to participate in the games and pastimes of girls" (DSM III 1980: 256-66).

Even today, under the DSM's most recent version of the diagnosis, boys may still be treated for "dressing in girl's or women's clothes," using "[t]owels, aprons, and scarves . . . to represent long hair or skirts," adopting the "mother roles" when "playing 'house,'" and playing with "[s]tereotypical female-type dolls, such as Barbie." Alternatively, even if boys do not display stereotypically feminine behavior, they may still be treated for displaying an aversion toward "rough-and-tumble play" and rejection of "stereotypical boy's toys," games, and activities, such as "cars," "trucks," and "competitive sports" (DSM IV 1994: 533, 537). The DSM's focus on boys is only exacerbated by the secondary literature, which is almost exclusively preoccupied with the diagnosis and treatment of effeminate boys (Sedgwick 1993, Coates and Zucker 1988).

Second, like the old theory of homosexuality, the new theory of GIDC blames mothers for fostering effeminacy in boys. Although the DSM does not specify the causes of GIDC, the secondary literature speculates that effeminacy develops when mothers give boys too much attention and fathers fail to "validate" boys "as masculine." In this account, "[m]others . . . have nothing to contribute to [the] process of masculine validation . . . any involvement is overinvolvement; any protectiveness is overprotectiveness" (Sedgwick 1993). Much like conversion therapists, GIDC theorists often reserve the harshest criticisms for mothers who display any "tolerance" for effeminacy in sons.

Finally, the DSM acknowledges that for most boys, a diagnosis of GIDC is little more than a precursor to homosexuality in adulthood. "By late adolescence or adulthood," the DSM reports, "about three-quarters of boys who had a childhood history of Gender Identity Disorder report a homosexual or bisexual orientation, but without concurrent Gender Identity Disorder" (DSM-IV 1994: 536).

In light of these similarities, some observers have claimed that the APA's introduction of the new diagnosis of GIDC was a "backdoor maneuver" to reinstate the old diagnosis of homosexuality as a mental disorder (Zucker and Spitzer 2005: 32, Mass 1990: 214). Whether or not they are correct, the similarities between the two theories can hardly be doubted. Both theories are specifically concerned with the development of effeminacy and homosexuality in boys, and both theories blame a surplus of mothering and a deficit of fathering for inhibiting the development of "masculine" boys.

In custody and visitation cases, the theory of GIDC has played a significant role in the expression of sexual development stereotypes about sons raised by lesbian mothers. In 55% (6 of 11) of the cases where such stereotypes appeared, litigants, experts, and judges expressed concerns

about the development of “gender identity” or “masculine roles” in boys, in addition to the development of homosexuality in boys.¹¹ In 83% (5 of 6) of these cases, gender identity and gender role stereotypes were accepted by judges. By sharp contrast, gender development stereotypes appeared in only 7% (1 of 14) of the cases involving mothers and daughters, and none (0 of 50) of the cases involving gay fathers. Among all the cases, the term “masculine” appeared three times—all in cases involving sons raised by lesbian mothers—while the term “feminine” did not appear at all. In other words, gender development stereotypes were applied almost exclusively to sons raised by lesbian mothers.

In *Dailey v. Dailey* (Tenn. 1981), the court cited a psychologist’s view that it would be “preferable” to raise Rusty, a four-year-old boy, in “a normal relationship wherein males and females adhere to their roles,” rather than in “a homosexual relationship involving a mother in a submissive role,” because “homosexuality is a learned trait and it would be very difficult for Rusty to learn and approximate sex role identification from a homosexual environment.” Based on this testimony, the court transferred custody to the father and allowed the mother overnight visitation on alternating weekends. On appeal, the custody order was affirmed. Although neither the mother nor the father had challenged the visitation order, it was reversed *sua sponte* by the appellate court. After reciting the expert’s testimony, the court reasoned that the mother’s behavior “could provide nothing but harmful effects in the [boy’s] future life.” Based on this finding, the court prohibited overnight visits with the mother as well as any visits in the presence of the mother’s live-in partner.

In *Lundin v. Lundin* (La. 1990), the court cited a psychologist’s concerns that if a two-year-old boy were raised by his lesbian mother, he may not learn “masculine and female” roles, which the psychologist referred to as “sex appropriate roles.” “I would be concerned,” the psychologist explained, “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.” The court awarded primary custody to the father, based on a specific finding that “the child is of an age where gender identity is being formed.”

In *Pleasant v. Pleasant* (Ill. 1993), the trial court questioned the mother “extensively” about a visit in which she took Jimmie, a ten-year-old boy, to march with her friends in a “gay and lesbian pride parade.”

After asking whether the parade was an appropriate environment for Jimmie and whether it had any effect on his sexual orientation, the judge asked if there were men who were not masculine in the parade. When the mother 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.

In restricting the mother’s visitation rights, the trial court cited a psychiatrist’s testimony that if Jimmie continued to spend extended, unsupervised visits with his mother, he “might not develop a gender identity and may be confused about what it is to be a male.” Based on this testimony, the court found that Jimmie had a “gender identity problem” and that “having Jimmie in the presence of gays and lesbians was endangering his gender identity and morals.” After reviewing the expert’s testimony, the appellate court reversed the trial court’s visitation restrictions, finding that “there is no evidence that Jimmie has a gender identity problem.”

In some cases, gender development stereotypes were raised more obliquely than others: Litigants, experts, and judges expressed concerns that closely tracked the DSM’s diagnosis of gender

¹¹ In these cases, litigants, experts, and judges generally conflated the concepts of “gender identity” and “gender roles” (Ball 2003). This conflation is not surprising, in light of the DSM’s tendency to interpret a child’s failure to conform with traditional gender roles as symptomatic of gender identity disorder—especially when such non-conformity is exhibited by boys.

identity disorder in boys, without explicitly referring to the boy's "gender identity" or his understanding of "masculine" roles. In *Holmes v. Holmes* (Ark. 2007), for example, the court observed that Zachary, a seven-year-old boy, would "not participate in organized sports despite [his father's] efforts to get him involved." To support a transfer of custody, the boy's father testified that "he did not approve of [the mother's] lifestyle and believed that he had a right to raise Zachary in a heterosexual environment." In addition, the father expressed concerns "about how much Zachary cried and about his lack of desire to play sports," and the father's friend testified "that Zachary was whiny and did not like to be rambunctious." The mother acknowledged that "Zachary was afraid of getting hurt," but she insisted that he "was not a whiner"; moreover, she argued, "the evidence that Zachary whines and does not like to play sports is of no consequence." The trial court transferred custody to the father, based on a finding that Zachary's "exposure to [his mother's] sexual partners was detrimental to [his] welfare." The court's order was affirmed on appeal.

In light of these pervasive concerns about the "masculinity" of boys, one might wonder how courts would respond to lesbian mothers who present themselves as "butch" or "masculine" before family law judges. Although this subject has never explicitly been mentioned in any custody or visitation cases, one neglect case suggests that for homophobic judges, a "masculine" woman cannot serve as an acceptable substitute for a father. In *re Breisch* (Pa. 1981), the court suggested that even though a lesbian mother had adopted a "masculine" persona, she was still not capable of raising Joey, her four-year-old son. Based on testimony that "[t]he mother is a lesbian who effects a masculine appearance, wears men's clothing, and has a masculine oriented mental status," the court found that she had exposed Joey "to a chaotic and harmful home life." In this proceeding, the court transferred custody to the local child protection agency, and the court's order was affirmed on appeal.

D. Heteropatriarchy: "Fatherless" Daughters

As some scholars have observed, sexual development stereotypes about boys raised by lesbian mothers reflect not only the prevailing psychology of the times, but much older, much broader concerns about boys raised by "fatherless" families, or families that lack "strong" male role models (Harding 2010; Stacey and Biblarz 2001). Although these concerns were originally a product of the early industrial era (Lamb 2000, Pleck 1997, LaRossa 1997), they continue to spawn controversies over single motherhood in the contemporary United States (Bosman, 2008, Kreisberg 2006, Blankenhorn 2005).

The analogy between lesbian mothers and single mothers may seem far-fetched, but it is made frequently by opponents of lesbian and gay parenthood. Lynn Wardle (1997), for example, has criticized lesbian mothers by invoking studies of children raised by single mothers. Defending the importance of fatherhood, he has argued that "father love and mother love are different kinds of love," because only father love provides children with the following benefits: "First, it provides them with a father's physical protection. Second, it provides them with a father's money and other material resources. Third, and probably most importantly, it provides them with what might be termed paternal cultural transmission: a father's distinctive capacity to contribute to [children's] identity, character, and competence."

Although critics of "fatherless" families profess generic concerns about the impact of fatherlessness on "children," they seem to be especially focused on the impact on boys (Harding 2010). In the landmark marriage case of *Goodridge v. Department of Public Health* (Mass. 2003), three justices objected to the recognition of same-sex marriage on the ground that such unions "raise[] the prospect of children lacking any parent of their own gender." Although the justices initially stated this objection in gender-neutral terms, they promptly slipped into the classic trope of fatherless boys:

“For example,” they explained, “a boy raised by two lesbians as his parents has no male parent. . . . [T]he child himself might invoke gender as a justification for the view that neither of his parents understands him, or that they ‘don’t know what he is going through,’ particularly if his disagreement or dissatisfaction involves some issue pertaining to sex.”

In light of these specific concerns about “fatherless” families, it seems clear that developmental stereotypes about boys raised by lesbian mothers are patriarchal: They imply that every family should have a father, because only a man can raise “masculine,” heterosexual boys. In *Pleasant v. Pleasant* (Ill. 1993), the trial court explained why gay fathers do not fit the bill: When boys are exposed to men who are “unmasculine,” then they are likely to become “unmasculine.” They may fail “to develop a gender identity,” and thus, “be confused about what it is to be a male.” Thus, the stereotypes are not only patriarchal, but hetero-patriarchal (Valdes 1995): Under this framework, boys raised by gay fathers lack “strong” male role models, so they are viewed as “fatherless”—just like boys raised by lesbian mothers. In short, “[t]he stereotype of gay men as effeminate . . . is the basis for questions of whether gay men can be appropriate male role models for children (especially boys)” (Harding 2010: 133).¹²

What about girls raised by gay fathers? We have now analyzed three of the four groups of cases, so only one group of cases remains. There were only two cases in which litigants, experts, or judges expressed stereotypes about gay fathers raising lesbian daughters, and neither case yields any meaningful insights. In *Gottlieb v. Gottlieb* (N.Y. 1985), one judge invoked a generic need for “proper identification” between the “parents” and the “child,” rather than a gender-specific need for identification between fathers and daughters. In *J.P. v. P.W.* (Mo. 1989), the court did not directly express any sexual development stereotypes, but it quoted two such stereotypes from other opinions.

In this context, the silences seem to say more than the stereotypes. In a similar context, Rosie Harding has observed that “the issue of whether a gay man would be able to raise a girl and the issue of appropriate female role models” are not often raised discussions of lesbian and gay parenting (2010:133). The same can surely be said of custody and visitation cases: In 85% (17 of 20) of the cases involving daughters and gay fathers, there were no references to the sexual or gender development of girls.

Even without any text to guide us, we can guess why litigants, experts, and judges may not have been too concerned about the “gender identity” of girls raised by gay fathers. If they were anything like the trial judge in *Pleasant*, then they would have viewed gay men as “unmasculine”—i.e., not only homosexual, but effeminate—so they would have assumed that gay fathers would raise feminine daughters.

While this explanation is an interesting point of departure, it does not provide a wholly satisfying account of the absence of stereotypes in these cases. After all, our culture includes other conventional stereotypes about girls who lack “strong” male role models. In the literature on “fatherless” families, commentators often claim that girls without fathers are likely to be “wayward” or “promiscuous,” bearing children out of wedlock as teenagers (Wardle 1997). In cases involving gay fathers, the opportunity for deploying this stereotype seems especially clear. The same

¹² In Harding’s interviews of lesbian and gay parents, she recounts one interview with a gay man named Michael who seemed to have internalized this stereotype. During his interview, he explained that when he considered the possibility of becoming a father, he expressed concerns about whether he is “capable of raising a man,” in light of his “mannerisms” (2010: 132). He then poignantly observes that he “couldn’t come up with the answer to whether that was myself or whether that was society telling me that.”

commentators who have stereotyped “fatherless” girls as promiscuous have often stereotyped gay men as promiscuous. If litigants, experts, and judges had drawn a link between these two stereotypes, then we would expect them to express concerns that gay fathers would raise promiscuous daughters.

The fact remains, however, that these stereotypes did not appear in any of the custody or visitation cases involving gay men (or lesbians) with daughters. Litigants, experts, and judges expressed no concerns about gay fathers raising promiscuous daughters, and they expressed very few concerns about gay fathers raising lesbian daughters in general. Apparently, they believed that gay fathers were “strong” enough role models for daughters, even if they were not “strong” enough role models for sons. In these cases, “[t]he question of appropriate female role models does not appear to be an issue—or at least has not received anywhere like the amount of attention that has been focused on concerns about appropriate male role models” (Harding 2010: 133).

I can think of only one principle that would explain this belief, and it is derived from the hetero-patriarchal framework itself: If litigants, experts, and judges considered masculinity to be more valuable than femininity—i.e., if they adhered to a male-supremacy principle—then they would generally be more concerned about securing the role of “masculine” fathers in the production of “masculine” sons.¹³

As we have seen in the cases, this principle has ironic implications for both fathers and sons: Once masculinity is held to be more valuable than femininity, it becomes more important to maintain and more costly to lose—more precious and therefore more fragile (Faduli 1999, Kimmel 1994). Litigants, experts, and judges must work harder to make boys into men and fathers into patriarchs; they must intervene more often in families, and earlier in life, in order to secure the production of “masculine” boys.

II. Defending the Protogay Child

To begin to theorize gender and sexuality as distinct though intimately entangled axes of analysis has been . . . a great advance of recent lesbian and gay thought. There is a danger, however, that that advance may leave the effeminate boy once more in the position of the haunting object—this time the haunting object of gay thought itself.

—Eve Kosofsky Sedgwick¹⁴

Drawing upon my empirical findings, this part develops a critique of the U.S. legal academy’s attempts to rebut stereotypes about the children of lesbian and gay parents. In responding to these stereotypes, legal scholars have cited a large body of empirical studies on the sexual development of children raised by lesbian and gay parents. In this literature, “[v]irtually all of the published research

¹³ On the surface, it may appear this distinction can be explained away by the average age of children in custody and visitation cases. In general, most of these cases involve toddlers, and cases involving teenagers are exceedingly rare. As a result, it may well be that litigants, experts, and judges were less concerned about gay fathers raising promiscuous daughters because the girls were still too young to be sexually active.

The gap in this account, however, is that it begs the question of why litigants, experts, and judges did not apply the same principle to sons raised by gay and lesbian parents. The fact that litigants, experts, and judges were willing to intervene earlier in the sexual development of boys suggests that they considered male heterosexuality to be more valuable than female heterosexuality, as I argue in the text.

¹⁴ Sedgwick 1993.

claims to find no differences in the sexuality of children reared by lesbian and gay parents and those raised by non-gay parents,” and more generally, no “significant differences” of any kind (Stacey and Biblarz 2001). In a recent review of the empirical data, the American Academy of Pediatrics reported that “[n]o differences have been found in the gender identity, social roles, or sexual orientation of adults who had a divorced homosexual parent (or parents), compared with those who had divorced heterosexual parents” (Perrin et al. 2002). As both sides of the debate have observed, the “unanimity” among scholars, lawyers, and activists on this subject has been truly “remarkable” (Stacey and Biblarz 2001, Wardle 1997).

In Sections A and B below, I develop the claim that the “no difference” argument suffers from a straightforward weakness: It is based on a questionable view of the empirical data. If anything, early studies seem to suggest that role-modeling stereotypes may be empirically valid; children raised by lesbian and gay parents may be less likely to adopt traditional gender roles, more likely to develop homosexual fantasies, and more likely to engage in homosexual behavior, than children raised by heterosexual parents. If this hypothesis is validated by future studies, it will raise a profound philosophical and tactical dilemma for the LGBT equality movement.

As a rule, however, most advocates for lesbian and gay parents have responded to these provocative findings by downplaying and ignoring them. Section C highlights one of the rare exceptions to this rule: In a pathbreaking article (2003), Professor Carlos Ball both entertained and defended the possibility that children raised by lesbian and gay parents were more likely to violate traditional sex stereotypes. In this article, however, Professor Ball was not willing to entertain the possibility that such children were more likely to engage in homosexual behavior or identify as lesbian, gay, or bisexual. In Section D, I argue that Ball’s distinction between stereotypes about sexual development and gender development is unhelpful. In this context, at least, stereotypes about sexual development and gender development are inextricably intertwined, and thus, our attack against them must be coordinated.

A. Lynn Wardle: Attacking “No Differences”

Since the late 1990s, the U.S. legal academy’s “no differences” paradigm has come under attack from opponents of lesbian and gay parenthood. In *The Potential Impact of Homosexual Parenting on Children* (1997), Lynn Wardle argued that the legal scholarship on lesbian and gay parenthood was written in a “propagandistic style” and based on “very unreliable” body of empirical studies, which he claimed were tainted by methodological and analytical flaws. Most significantly, Wardle claimed that pro-gay researchers and advocates have misrepresented the data produced by studies of lesbian and gay parenthood. Properly understood, he argued, the data “provide[] a basis for serious concerns about potential detrimental effects upon children raised by gay or lesbian parents.” Like most of today’s opponents of lesbian and gay parenthood, Wardle was chiefly concerned with the potential impact of lesbian and gay parents on children’s sexual development: “The most obvious risk to children from their parents’ homosexual behavior suggested by the current studies relates to the sexual development of the child. Both theory and empirical studies indicate the potential that disproportionate percentages of children raised by homosexual parents will develop homosexual interests and behaviors.”

To bolster his argument, Wardle expressed several concerns about the findings of lesbian and gay parenting studies. To a remarkable extent, he shared the same concerns expressed by litigants, experts, and judges in custody and visitation cases. In his view, one study indicated that more than 10% of the sons of gay men identified as gay in adulthood, another suggested “a link between a daughter’s sexual behavior and fantasy and her mother’s homosexual behavior,” and yet another reported that “boys raised by homosexual mothers may have a lower self-image regarding

masculinity.” In other words, Wardle expressed specific concerns about gay fathers raising gay sons, lesbian mothers raising lesbian daughters, and lesbian mothers raising “unmasculine” sons. He did not, by contrast, express any developmental concerns about daughters raised by gay fathers. Like other opponents of lesbian and gay parenthood, Wardle invoked the literature on “fatherless” families, analogizing the children of lesbian mothers to the children of single mothers.

B. Judith Stacey and Timothy Biblarz: Acknowledging Differences

In the ten years since it was published, Wardle’s article has played to mixed reviews in the U.S. While the article has been cited favorably by judges in custody and adoption cases, it has been rejected by most legal scholars, who overwhelmingly support lesbian and gay parenthood. For present purposes, however, the reaction of two sociologists is most relevant. In 2001, Judith Stacey and Timothy Biblarz published an article in the *American Sociological Review*, in which they asked, *(How) Does the Sexual Orientation of Parents Matter?* The answer, they argued, is that the sexual orientation of parents matters “somewhat more” than pro-gay researchers have acknowledged.

The article offers profound insight into the ways that ideology and fear have shaped the popular, academic, and legal debates over lesbian and gay parenthood, so it is worth describing Stacey’s and Biblarz’s argument in some detail. From the start, the authors emphasized that they were sympathetic to the case for lesbian and gay parenthood, and more generally, to the case for the equal treatment of gay men, lesbians, and bisexuals. They were sharply critical of Wardle’s arguments against lesbian and gay parenthood, including his analogy between lesbian and “fatherless” families.

Stacey and Biblarz reluctantly agreed, however, with Wardle’s suggestion that “ideological pressures constrain intellectual development in this field.” “In our view,” they explained, “it is the pervasiveness of social prejudice and institutionalized discrimination against lesbians and gay men that exerts a powerful policing effect on the basic terms of psychological research and public discourse on the significance of parental sexual orientation.” “Because anti-gay scholars seek evidence of harm,” they concluded, “sympathetic researchers defensively stress its absence.”

After surveying the empirical data on lesbian and gay parenthood, Stacey and Biblarz reported a controversial result: They claimed that researchers have “downplayed” evidence that the children of lesbian and gay parents were actually different than the children of heterosexual parents, out of legitimate fears about how such evidence would be used by opponents of lesbian and gay parenthood. Moreover, the authors claimed that researchers have been “hesitant to theorize” about how the “no differences” paradigm could be squared with any of the prevailing theories of sexual and gender development.

To analyze the empirical data, Stacey and Biblarz gathered twenty-one studies of lesbian and gay parenthood published between 1981 and 1998, which they considered the “best equipped to address sociological questions about how parental sexual orientation matters to children.” After conducting an independent review, they found statistically significant differences concerning the sexual and gender development of the children of lesbian and gay parents—differences that they claimed had been downplayed and ignored by the researchers who conducted the studies.

The key findings were related to “children’s gender preferences and behavior” and “children’s sexual preferences and behavior.” With respect to children’s gender development, Stacey and Biblarz relied on five studies of the children of lesbian mothers (Steckel 1987, R. Green et al. 1986, Golombok et al. 1983, Hotvedt and Mandel 1982, Hoeffler 1981). Analyzing these studies, they found that the daughters of lesbian mothers “more frequently dress, play, and behave in ways that do not conform to sex-typed cultural norms” and held “higher aspirations to nontraditional gender occupations . . . such as doctor, lawyer, engineer, and astronaut.” With respect to sons of lesbian mothers, the authors found mixed results. “On some measures, like aggressiveness and play

preferences,” they found that “the sons of lesbian mothers behave in less traditionally masculine ways than those raised by heterosexual single mothers.” “[O]n other measures, such as occupational goals and sartorial styles,” they did not find any statistically significant differences between the two groups of sons.

With respect to children’s sexual development, Stacey and Biblarz relied upon two “intergenerational” studies—one study of the adult children of lesbian mothers (Tasker and Golombok 1997) and one study of the adult sons of gay fathers (Bailey et al. 1995). Of the two studies, the authors emphasized the first, which they regarded as one of the best designed of the twenty-one studies that they reviewed.

Reviewing the first study, Stacey and Biblarz found that the children of lesbian mothers were more likely to engage in homosexual behavior than the children of heterosexual mothers, and even when they had not engaged in homosexual behavior, they were more likely to entertain the possibility of doing so. These children were not, however, more likely to identify as gay, lesbian, or bisexual.¹⁵ Reviewing the second study, the authors found that the adult sons of gay fathers reported “a moderate degree of parent-to-child transmission of sexual orientation.” These sons, in other words, were more likely than others to identify as gay or bisexual.¹⁶

With respect to other aspects of child development, Stacey and Biblarz generally confirmed the other researchers’ conclusions that “no significant differences” existed in the “self-esteem,” “psychological well-being,” and cognitive ability of the children of lesbian and gay parents. “The few significant differences found,” they added, “actually tend to favor children with lesbian mothers.” Based on this review of the empirical data, they argued: “Most of the differences in the findings . . . cannot be considered deficits from any legitimate public policy perspective. They either favor the children with lesbian parents . . . or represent ‘just a difference’ of the sort democratic societies should respect and protect.” For these reasons, they concluded, “there is no evidentiary basis for considering parental sexual orientation in decisions about children’s ‘best interest.’”

C. Carlos Ball: Defending Gender Differences

The Stacey and Biblarz article caused quite a stir in debates over lesbian and gay parenthood. It was widely reported in the popular press when it was published, and it has been frequently quoted in cases, casebooks, and law review articles in subsequent years.

The U.S. legal academy’s response to the article has been a case study in the politics of lesbian and gay parenthood, and a testament to the article’s claim that “ideological pressures constrain intellectual development in this field.” Opponents of lesbian and gay parenthood have welcomed the article, which they cite as conclusive proof that gay men and lesbians should not be granted custody, visitation, adoption, or marriage rights. Among advocates, however, the reaction has been much more guarded. In law review articles, legal scholars have generally downplayed the article’s finding that there were “differences” between the children of lesbian and gay parents and the children of heterosexual parents. If they refer to the article at all, they typically cite only the

¹⁵ This year, however, Stacey and Biblarz published a follow-up meta-analysis in which they found new evidence that the daughters of lesbian mothers were less likely to identify as heterosexual, based on a 2006 working paper by Bos et al. (Biblarz and Stacey 2010). In addition, a more recent study has produced evidence that such girls are more likely to identify as bisexual (Gartrell et al. 2010).

¹⁶ This finding has not been replicated in subsequent studies, which show significant differences in the influence of a parent’s sexual orientation on boys and girls (Biblarz and Stacey 2010, Gartrell et al. 2010).

conclusion that there were “no differences” that could be considered “deficits”—without acknowledging that the authors found significant differences in children’s gender and sexual development.

In this literature, only one scholar has squarely confronted the legal implications of the article’s controversial findings. This exceptional scholar is Carlos Ball, the legal academy’s chief critic of Lynn Wardle’s arguments against lesbian and gay parenthood. In *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference* (2003), Ball considered whether the findings presented by Stacey and Biblarz could justify laws prohibiting adoptions by lesbian and gay couples.

Rather than insisting that the differences observed by Stacey and Biblarz were not significant, Ball acknowledged that they marked a “turning point” in the debate over lesbian and gay parenthood. “As a practical matter,” he conceded, “it is not likely that . . . state policy makers, judges, or the opponents of lesbian and gay families will soon view differences associated with gender and sexual preferences and behavior as irrelevant” to determinations of children’s best interests. “It is therefore necessary,” he resolved, “to explore some of the policy and legal implications of the differences noted by Stacey and Biblarz.”

For the sake of argument, Ball assumed that the article’s findings about children’s “gender related differences” were not only “plausibl[e]” but would be “confirm[ed]” by future studies. In other words, he assumed that when children are raised by lesbian and gay parents, they are less likely to conform to traditional gender roles. “Daughters of lesbians and gay men,” he conceded, “may be more interested in ‘masculine’ clothing or in careers that have traditionally been the prerogative of men,” and “the sons of lesbians and gay men may be less interested in sports or more interested in nurturing.”

Ball argued, however, that even if these findings were confirmed, they could not provide a legitimate basis for laws prohibiting adoptions by lesbian and gay couples, because laws based on sex stereotypes violate the Equal Protection Clause of the U.S. Constitution. Quoting the Supreme Court’s decision in *United States v. Virginia* (U.S. 1996), Ball reasoned that laws cannot be justified by “fixed notions concerning the roles and abilities of males and females” or “overbroad generalizations about the different talents, capacities, or preferences of males and females.”

In light of the “no differences” paradigm of debates over lesbian and gay parenthood, and the legal academy’s tendency to ignore the relationship between homophobia and sexism in this field, Ball’s argument is both refreshing and courageous. Although his claims were specifically tailored to adoption laws, they could be extended to custody and visitation cases with one minor adjustment: In custody and visitation cases, it is not a statute that is based on gender stereotypes but a court’s determination of a child’s best interests.

Based on the analysis of these cases in Part I, we are in a position to see that Ball’s willingness to defend gender development differences could be especially useful to lesbian mothers raising sons, who so often confront stereotypes about the formation of the boy’s “gender identity” and his adoption of “masculine” roles. Rather than conceding that boys should be “masculine”—“no different” than boys raised by “masculine” fathers—lesbian mothers could invoke the constitutional prohibition against sex stereotypes, insisting that the state has no legitimate interest in the production of “masculine” boys.

D. Carlos Ball: Ignoring Sexual Differences

In one respect, however, Ball’s argument is surprisingly limited: It is expressly confined to stereotypes about children’s gender development; it does not address stereotypes about children’s sexual development at all.

In reviewing the Stacey and Biblarz article, Ball drew a sharp distinction between the article's findings on "gender behavior and preferences" and "sexual behavior and preferences." For the sake of argument, he was willing to concede the empirical controversy over children's gender development, so that he could "focus fully on the implications of difference in this area, and in particular on the effects of such difference on the equality claims [of] lesbian and gay parents." He was not, however, willing to concede the empirical controversy over children's sexual development—not even for the sake of argument.

Ball argued that the evidence on gender development had reached "a minimum threshold of plausibility," but he claimed that the evidence on sexual development was not "anywhere near" such a "minimum threshold." On this ground, he refused to entertain the notion that the children of lesbian and gay parents might be more likely to develop homosexual fantasies, engage in homosexual behavior, or identify as lesbian, gay, or bisexual. Above all, he emphasized that the evidence on sexual development was based on "only one study" and contradicted by "many studies," whereas the evidence on gender development was "found in multiple studies." He warned that "[w]e should be careful before we reach any conclusions, even tentative ones, regarding the transmissibility of sexual orientation from parents to children based on only one study of roughly twenty-five children of lesbian mothers." "[W]hatever conclusions are reached from only one study," he continued, "are likely to be so speculative so as to be both useless and dangerous."

This is not the place, and I am not the person, to resolve a long-standing dispute over the empirical data on lesbian and gay parenthood. While I have a few qualms about Ball's view of the data, I will not dwell on the empirical controversy here.¹⁷ For present purposes, I will focus on the strategic implications of Ball's analysis for advocacy on behalf of lesbian and gay parenthood.

In custody and visitation cases, lesbian and gay parents do not have the luxury of avoiding "dangerous" speculations about sexual development—or at least, they cannot avoid them by invoking Ball's sharp distinction between the empirical data on gender development and sexual development. As Francisco Valdes (1995) has observed, our legal system often conflates sex, gender, and sexual orientation in order to facilitate discrimination against "queers, sissies, dykes, and tomboys." Because litigants, experts, and judges conflate sexual orientation with gender identity and gender roles, they also conflate sexual development stereotypes with gender development stereotypes. This dynamic is especially apparent in cases involving boys raised by lesbian mothers, the only cases in which gender development stereotypes have actually appeared. As a result, we cannot pick our battles here, even as a strategic matter. In order to challenge gender development stereotypes effectively, we must challenge sexual development stereotypes as well.

In custody and visitation cases, the overlap between gender development stereotypes and sexual development stereotypes was nearly perfect. In all but one (7 of 8) of the cases in which parents were subjected to stereotypes about gender development, they were also subjected to stereotypes about sexual development. In several of these cases, the two concerns were so thoroughly connected, conflated, and collapsed that it was not possible to say which one influenced the other or even to distinguish them from each other.

Recall that in *Dailey v. Dailey* (1981), a psychologist testified that it would be "preferable" to raise Rusty, a four-year-old boy, in "a normal relationship wherein males and females adhere to their roles," because "homosexuality is a learned trait and it would be very difficult for Rusty to learn and approximate sex role identification from a homosexual environment." In *M.J.P. v. J.G.P.* (1982), a psychiatrist described the "sexual identity" of the mother's six-year-old boy as "masculine." In *Lundin v. Lundin* (1990), the court cited a psychologist's concerns that if a two-year-old boy were

¹⁷ For a more thorough critique of Ball's argument, see Rosky 2009.

raised by his lesbian mother, he may not learn “masculine and female” roles, which the psychologist described as “sex appropriate roles.” In response to the court’s question about the boy seeing his mother and her partner sharing a bed, the psychologist testified: “I would be concerned if the role models were confused so that a child would not understand or know that this”—i.e., the mother’s homosexuality—“was not typical or usual or to be expected.” Finally, in *Pleasant v. Pleasant* (1993), the trial court expressed concerns about a ten-year-old boy’s “sexual orientation” and “gender identity problem,” and the court repeatedly described gay men as “unmasculine.”

The phenomenon is by no means unique to custody and visitation cases. In *Lofton v. Kearney* (Fla. 2004), the plaintiffs argued that Florida’s law prohibiting adoptions by gay men and lesbians was unconstitutional. In defense of the law, the state claimed that “dual-gender parenting” plays “a vital role . . . in shaping sexual and gender identity and in providing heterosexual role modeling.” In upholding the law, the district court relied upon the state’s interest in providing “proper gender role modeling” and promoting “proper gender identification,” while the appellate court relied upon the state’s interest in providing “heterosexual role models.”

In fact, the phenomenon is not even limited to court cases—it comes up often in the scholarship on lesbian and gay parenthood. Lynn Wardle’s (1997) work, for example, leaves little question that his concerns about gender development are both linked to and derived from his concerns about sexual development. For Wardle, “the most obvious risk to children from their parents’ homosexual behavior suggested by the current studies relates to the sexual development of the child.” He has argued at length, in several places, that “children raised by homosexual parents will develop homosexual interests and behaviors.” By contrast, he has spared only two sentences in one article to express concerns about the “masculinity” of boys and the “cross-dressing” of girls, in the midst of a list of other concerns about the sexual development of children raised by lesbian and gay parents.

In light of the ubiquitous conflation of gender development stereotypes with sexual development stereotypes, I am concerned that Ball’s limited defense of gender development differences may fall on deaf ears—especially in cases involving gay fathers raising sons, and lesbian mothers raising daughters, where sexual development stereotypes are most prevalent. Among opponents of lesbian and gay parenthood, concerns about gender development are rarely expressed by themselves, and they are often expressed as synonyms or euphemisms for concerns about sexual development. By overlooking the relationship between sexism and homophobia, Ball seemed to impose an unnecessary limitation on the scope of his argument—a limitation which, in my view, prevented him from hitting his mark.

To some extent, Ball may have been concerned about asking too much of judges: In order to advocate on behalf of lesbian and gay children, one must make a more ambitious argument, which depends on a much broader extension of existing case law. There is no question that under today’s equal protection jurisprudence, it is significantly easier to challenge sexist stereotypes than homophobic stereotypes. Although recent decisions from the California, Connecticut and Iowa Supreme Courts are promising (*Varnum v. Brien*, Iowa 2009, *In re Marriage Cases*, Cal. 2008, *Kerrigan v. Commissioner of Public Health*, Conn. 2008), federal courts have widely rejected the claim that discrimination against gay men and lesbians is “inherently suspect.”¹⁸

In some cases, this tradeoff may not be required; as we saw in Part I, even when judges do not articulate stereotypes about gender development, they sometimes articulate explicitly sex-based

¹⁸ In *Perry v. Schwarzenegger* (Cal. 2010), a federal court struck down California’s Proposition 8. In doing so, however, the judge applied rational basis review, expressly avoiding the question of whether sexual orientation classifications are “suspect.”

stereotypes about sexual development—especially in cases involving a gay or lesbian parent and a child of the same sex. In *Bennett v. O'Rourke* (1985), for example, the court's ruling was based explicitly on the "increased chance of role-modeling" because "the homosexual parent and the minor child [we]re both female." In such cases, the parent might challenge these stereotypes by invoking the Supreme Court's holding in *United States v. Virginia* (1996) that state action may not be based "on fixed notions concerning the roles and abilities of males and females."

Such cases are already rare, however—and if lesbian and gay parents begin challenging judges who articulate sex-based stereotypes, then these cases are likely to become even rarer. Sooner or later, a gay or lesbian parent will be stereotyped as a recruiter or a role model and the judge's assumptions about the parent's sex and the child's sex will not be expressed in his ruling.¹⁹ In these cases, parents and advocates will have to make difficult choices, and the argument for lesbian and gay parenthood will have to stand or fall by itself.

Conclusion

The choices facing lesbian and gay parents are not easy to make, but the options are fairly straightforward. On the one hand, we could insist that the sons and daughters of lesbian and gay parents are "no different"—no more likely to be homosexual, no less likely to be heterosexual—than the children of heterosexual parents. On the other hand, we could acknowledge that they may well be different, but we can insist that a child's homosexuality is "just a difference"—the kind of difference that a democracy should "respect and protect" (Stacey and Biblarz 2001). By confronting the fear of parent-to-child transmission, we stand not only to win greater protections for lesbian and gay parents but to challenge the ubiquitous "fantasy that gay and lesbian youth do not exist" (Ruskola 1996).

Without the support of sex discrimination laws, the route to progress may well be slower, but the argument would not be wholly without precedent. In *Romer v. Evans* (U.S. 1996), the Supreme Court held that under the Equal Protection Clause, a state's actions may not be based solely on "animus" toward gay men and lesbians. More recently, in *Perry v. Schwarzenegger* (Cal. 2010), a federal trial judge applied the principle of *Romer* in a novel and promising manner: In striking down California's Proposition 8—a state law that prohibits same-sex couples from marrying—the judge found that the law was based on the "fear that exposure to homosexuality would turn children into homosexuals," and the assumption that "parents should dread having a gay or lesbian child." These fears, the judge reasoned, were "completely unfounded"—not because a child's sexual orientation cannot be influenced or changed, but because a child's sexual orientation is legally irrelevant. The notion that children should be discouraged from being lesbian, gay, or bisexual, the judge suggested, was nothing more than a form of homophobia—a kind of "animus" against lesbian, gay, and bisexual people, which may no longer serve as a legitimate justification for our country's laws.

¹⁹ This consequence is one of the costs of focusing legal argument on the use of explicit stereotypes, which is well known to civil rights scholars and lawyers in other contexts. By challenging explicit stereotypes, one may effectively "teach" litigants, experts, and judges to avoid making such references in future cases. To some people, a world in which people no longer articulated anti-gay stereotypes may seem like an obvious improvement, but it would not necessarily be a better world for gay and lesbian parents. The literature on implicit bias warns that even when people no longer rely explicitly on stereotypes, they may continue to rely implicitly on stereotypes. In comparison to explicit bias, implicit bias is considerably more difficult to detect and resist (Bodensteiner 2003).

I do not mean to predict that in the short run, lesbian and gay parents will win more custody and visitation cases by adopting this argument, invoking the principle of *Romer* to challenge a judge's conventional, strongly held beliefs about childhood sexual development. In light of the constitutional protections historically afforded to lesbians and gay men—and the pervasive, enduring hysteria surrounding the sexuality of children—such a prediction would be hopelessly naïve. In the short term, it does not seem likely that many judges will be persuaded by this argument—especially those who are already inclined to rule against lesbian and gay parents based on sexist and homophobic stereotypes.

Nor do I mean to suggest casually that lesbian and gay parents should advance a long-shot claim for the long-term good, without regard to the profound interests at stake in custody and visitation cases. When lesbian and gay parents confront homophobia and sexism in such cases, they are asked to balance the fight for a parent-child relationship against the broader fight for lesbian and gay parenthood. In such circumstances, strategic decisions are painful and difficult. I have no magic recipes for making such tradeoffs; I leave them to individual parents and lawyers to make for themselves.

But scholars are another matter. As academics, we have an obligation to make claims that are not only useful but truthful, and we have the freedom to develop arguments that may not be advanced or adopted for years. My hope is that sooner or later—the sooner, the better—parents, lawyers, and judges will be ready to stand up not only for the idea that gay men and lesbians can be parents, but for the idea that children should be free to love who they love, be who they are, and become the kind of adults who they want to become.

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