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I. INTRODUCTION

The recent social trend approving greater self-actualization for women has raised a variety of new cultural and legal issues. New and specialized areas of law have been developed to deal with discriminatory practices women encounter in employment, credit, education, and the criminal law, to name only a few. The discrimination is now recognized as pervasive. It is encountered directly or, often, under the surface, by women in all walks of life, in even the most personal aspects of their lives. Often there is challenge to the basic human rights of a specific and determinable socialized group or class of people. Recent developments in the area of family law and child custody, and a noticeable increase in coverage by the news media, have begun to show that the rights of one such class, women who are both mothers and homosexuals, are being infringed upon. Child custody is by its very nature an extremely subjective area of the law, one in which legislatures acknowledge the need to evaluate each custody question in terms of individual factors.[1] For this reason, custody determinations affecting a noticeable class of people should be closely scrutinized. One writer, Judge Carl Weinman of Ohio, has stated that in most cases of uncontested divorce no problem of child custody is raised for consideration by the court.[2] According to Weinman,

> . . . it is usually . . . the aggravated case involving the moral character of the wife which results in a contest concerning the custody of the children.[3]

He goes on to say that this is true because more often that not "men recognize that their children will be better cared for by the

1. The broad discretion of trial judges in interpreting and applying the law will be discussed in more detail below.

2. Weinman, *The Trial Judge Awards Custody*, 10 LAW AND CONTEMP. PROBS. 721 (1944). [Hereinafter cited as Weinman]. The writer, at the time he wrote this article, was a judge of the Court of Common Pleas of Jefferson County, Ohio.

3. *Id.* at 724.

mother."[4] What has become apparent is that one such aggravated case is that of the mother whose primary sexual orientation is toward other women. This article examines current child custody law and practices, and their application to cases in which the mothers petitioning for custody are homosexuals. Its initial premise is that sexual orientation is not relevant to child custody. The nature of the article is therefore argumentative, advocating realistic appraisal of the relevance, or irrelevance, of sexual orientation to quality of parenthood. Its aim is to present a case for eliminating the newly emerging classification "homosexual mothers" so that all mothers', and indeed all parents', parental ability be assessed by a single set of standards.

II. CUSTODY LAW TODAY

In order to understand the legal dilemma faced by women who are homosexuals, also mothers, and wish to retain custody of their children, it is helpful to know something of the current state of child custody of children, provides, *inter alia*, that in awarding custody first preference should be given equally to either parent, according to the best interests of the child. Section 4600 is the controlling statute for the issues of child custody which often accompany marital dissolutions.

In applying section 4600, a court must apply the nebulous standard of what custody arrangement is in the "best interests" of the child. It is the court's duty in each case to determine whether the child involved will receive better care, training, security and happiness with his or her father, or mother.[5] To make this very subjective decision the court is endowed with very broad discretion,[6] and need rarely fear reversal.[7] In fact, the decision of a trial judge on custody issues will not be set aside unless the record discloses a clear abuse of discretion.[8] Such broad discretion in the trial judge often results in decisions being based on the parties' personal lives and on the moral biases of the judge rather than on objective factors.

It has been stated in the text of opinions that a custody proceeding is not meant to serve the purpose of disciplining one party

4. *Id.*

5. Bull v. Bull, 206 Cal. App. 2d 642, 24 Cal. Rptr. 149 (1962).

6. Bookstein v. Bookstein, 7 Cal. App. 3d 219, 86 Cal. Rptr. 495 (1970).

7. Sigesmund v. Sigesmund, 115 Cal. App. 2d 628, 252 P.2d 713 (1953).

8. Bookstein v. Bookstein, 7 Cal. App. 3d 219, 86 Cal. Rptr. 495 (1970).

for his or her shortcomings as an individual, nor to reward the other for wrongs suffered therefrom; and that the acts of one party which offend the other, or the public at large, are not matters determinative of the best interests of the child.[9] While this statement may be true in theory, in practice equally as many opinions stand for the idea that a parent's morals or lack thereof,[10] and a parent's conduct for years prior to the custody hearing,[11] *are* relevant and *may* be considered on the issue of the best interests of the child.

Exactly what do we know about this statutory "best interests" standard? It was originally advanced by Cardozo in 1925:

> [The judge] is not adjudicating a controversy between adversary parties, to compose private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. . . . Equity does not concern itself with such disputes. . . . Its concern is for the child.[12]

The court's main consideration must be to protect the child by placing it in the custody of a person who will provide an environment affording the child the best opportunity to grow into a well-adjusted person.[13] While on its face the standard seems to imply an impartial determination of what external circumstances will really best serve to benefit the child, in truth a parent's personal conduct is also given great weight.[14]

Hand in hand with the "best interests" test's determination of what will benefit each child is a determination of the "fitness" of its parent(s).[15] Elements to be weighed to determine fitness are,

> a good home, congenial surroundings, intelligent attention and direction in matters affecting the health and development of the child.[16]

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9. Russo v. Russo, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501; Washburn v. Washburn, 49 Cal. App. 2d 581, 122 P.2d 96 (1942).

10. Saltonstall v. Saltonstall, 148 Cal. App. 2d 109, 306 P.2d 492 (1957).

11. Russo, *supra* note 9.

12. Findlay v. Findlay, 240 N.Y. 429, 433-4, 48 N.E. 624, 626 (1935).

13. *In re* Miller, 17 Cal. App. 2d 12, 3 Cal. Rptr. 450 (1960).

14. Further discussion of this area follows below.

15. 4 GODDARD, CALIFORNIA PRACTICE § 127 (1972).

16. *Id.*

The fitness test establishes that a natural parent, and particularly a mother, should be deprived of custody only when "unfit" in terms of those elements.[17] By means of this test courts have been able to consider the moral character and emotional stability of the parent seeking custody, including gross immorality or drunkenness, conviction of crime, mental illness, cruelty or violence, sexual conduct and other such factors.[18] Weighing parental fitness was apparently thought by the legislators to be an effective way of subordinating the parents' interests to the child's welfare,[19] on the theory that arbitrary rules of any kind "tend to inhibit a sound determination of what serves the best interests of the child."[20] This approach, however, may encourage subordination of the independent issue of a child's wellbeing to consideration of its parent's values, lifestyle, sexual and other social behavior. It is conceivable that those factors could have little or no bearing on a child's condition or comfort. It also seems true that the fitness test may enable courts effectively to deprive unfavored minorities (*e.g.*, homosexual women) of custody of their children.

Modern American courts today for the most part espouse the rule that mothers and fathers have attained an equal legal right to custody. Supporting this idea is the California statute referred to at the outset.[21] A 1972 modification of that law took the form of a deletion of a phrase in subdivision (a) which provided that "other things being equal, custody should be given to the mother if the child is of tender years."[22] On its face, the present statute gives mother and father equal right to custody. In actuality, the issue instead is most often whether or not there are substantial reasons why the mother in a given case should not have custody.[23] This attitude is based, of course, on the still prevalent and stereotypical idea of mother as the "ultimate source of [a child's] . . . pleasure

17. Foster and Freed, *Child Custody, Part I*, 39 N.Y.U. L. REV. 423 (1964). [Hereinafter cited as Foster and Freed].

18. *Id.* at 435.

19. *Id.* at 435.

20. *Id.* at 441.

21. Cal. Civ. Code § 4600 (West Supp. 1972).

22. According to the U.S. DEPT. OF LABOR, WOMEN'S BUREAU, 1969 HANDBOOK ON WOMEN WORKERS, as of 1969 only eight states still had provisions giving mothers that statutory preference. The number may have decreased further in the past four years.

23. *Case Summary, Child Custody*, WOMEN'S RIGHTS L. REP. No. 2 at 18 (Spring 1972).

and his survival."[24] The evaluation of this issue is extremely subjective with biased societal stereotypes as to what makes a woman "unfit" controlling the outcome.

The generally accepted rule is that evidence of a mother's "immorality" is clearly relevant to a determination of custody.[25] The question of immorality of the father is rarely raised,[26] and where it is raised it is unclear how much weight the information is actually accorded.[27] A mother's morality, on the other hand, is often determinative of her custody rights. Courts have held that a mother's close association with a man with a criminal record makes her not a fit and proper parent[28] as does a mother's adultery[29] and a mother's pregnancy by a man other than her husband.[30] Such cases have prompted two writers to note the obvious:

> The cases indicate that a double standard is applied in custody cases and that a mother's adultery is a much stronger factor in determining fitness than a father's[31]

The result of this double standard is that judges, using the two tests and taking advantage of their malleability, can make value judgments about woman's/mother's behavior, and sanction it or refuse to do so by awarding or denying her child custody claim.

Given the sorry state of custody law as it affects "normal" (heterosexual) women/mothers, it is not surprising to discover as described below, that lesbian mothers' rights to custody of their children are almost non-existent in the eyes of the law. In fact, the issue is rarely mentioned above the level of a whisper, and the few cases that reach the appellate level are almost always ordered excluded from official and unofficial reports.

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24. M. Eisenberg, M.D., *Sexuality and Its Implications for Personal Identity and Fulfillment*, in CHILD STUDY ASSOCIATION OF AMERICA, SEX EDUCATION AND THE NEW MORALITY.

25. Molloy v. Molloy, 460 S.W.2d 15 (Ky. 1970); Anonymous v. Id., 436 P.2d 157 (Ariz. Ct. App. 1968).

26. WOMEN'S RIGHTS LAW REPORTER, *supra* note 21.

27. Bruggisser v. Bruggisser, 244 So. 2d 518 (Fla. Dist. Ct. App. 1970); Berigan v. Berigan, 176 N.W.2d 1 (Neb. 1970).

28. Reynolds v. Reynolds, 149 Cal. App. 2d 409, 308 P.2d 921 (1957).

29. Kelly v. Kelly, 173 Cal. App. 2d 469, 343 P.2d 391 (1959).

30. Stuart v. Stuart, 209 Cal. App. 2d 478, 25 Cal. Rptr. 893 (1962).

31. Foster and Freed, *supra* note 17 at 431.

III. HOMOSEXUAL MOTHERS' RIGHTS UNDER EXISTING CUSTODY LAW

Upon what specifics in the body of custody law may a lesbian mother rely to bolster her argument that she should have custody of her child? There is a strong presumption in favor of parental custody in California; removal will occur only if allegations in the pleadings overcome that presumption by demonstrating actual deficiency in the home environment.[32] Removal occurs most often in cases of extreme physical mistreatment,[33] or severe emotional maladjustment on the part of the child,[34] at least in the cases permitted to reach the public eye. The Second Appellate District in California has held that "sexual misconduct per se does not render a mother unfit."[35] Nor may a parent be deprived of her children merely because the home environment "may appear deficient when measured by dominant socio-economic standards."[36] Judicial intervention in the form of removal has even been characterized as a "drastic" step.[37]

At first glance these holdings appear favorable to a mother who is also a lesbian. The problem, however, is that the absence of clear-cut rules for custody decisions provides judges with escape devices, allowing them to apply, ignore and interpret cases as they wish. Precedent in this area is not strictly controlling,[38] or even moderately so, and study of the individual decisions provides no predictability besides that of the same established socio-economic standards that *In re Raya*[39] was thought to reject.

Diligent search of the California reports unearthed but one reported case acknowledging specifically a mother's homosexuality as an issue in custody proceedings. In that case, *Nadler v. Superior Court in and For the County of Sacramento*,[40] the appellate court held that the trial court failed in its duty to exercise discretion in

32. *In re* Donna G., 6 Cal. App. 3d 890, 894, 86 Cal. Rptr. 421, 423 (1970).

33. *In re* Corrigan, 134 Cal. App. 2d 751, 286 P.2d 32 (1955).

34. People v. Farley, 162 Cal. App. 2d 474, 328 P.2d 230 (1958).

35. Bialic v. Bialic, 240 Cal. App. 2d 940, 50 Cal. Rptr. 12, 15 (1966).

36. *In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252, 255 (1966).

37. *Id.*

38. Foster and Freed, *supra* note 17 at 438.

39. *In re* Raya, *supra* note 36.

40. 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

determining the best interests of the child, where it held as a matter of law that the mother was unfit and not entitled to custody because she was allegedly a homosexual. The trial judge expressly stated that he was *not* exercising his discretion and that the issue was determinable as a matter of law,[41] and refused to hear all the evidence on the issue of the mother's homosexuality (or lack of it). On the writ of mandate filed in the Court of Appeals, Third District, that court held that it was not until all the evidence had been considered that the issue could be determined, and that at that point the judge *must* exercise his discretion.[42] The case was remanded and has not been heard from since.

Vague and anonymous mention of other cases involving lesbian mothers is made in such publications as *Ms.* magazine.[43] A Seattle court is reported by that magazine to have rejected testimony of a psychiatrist and a social worker as to the well-being of the children involved, and to have granted custody to the two lesbian mothers only on condition that their two families not live together. That apparently has been the approach taken by a California court in the San Jose area as well, while a court in southern California awarded custody of her two children to a lesbian mother but ordered that custody of the son be awarded to his father when the boy reached the age of five.[44] Decisions based on maintenance of separate households by lesbian partners who are also mothers are reportedly grounded in the fear that two lesbians in the same household will undoubtedly influence the children toward homosexuality. Unfortunately, a major effect of such decisions has been to deprive the children, and their mothers, of the substantial financial savings of the two families maintaining a single household, and reallocation of those funds for the children's benefit. Such decisions are arguably contrary to the best interests of the children. With employment disabilities being what they are for women today, these families need all the financial savings they can manage.

The San Francisco Chronicle[45] reported another current California case. The California Supreme Court, on November 7, 1973, denied without comment the petition of Carol Parrott for return to

41. 255 Cal. App. 2d 524.

42. 255 Cal. App. 2d 525.

43. Martin and Lyon, *Lesbian/Mother*, 2 Ms., No. 4 at 78, (October, 1973).

44. *Id.* Diligent efforts failed to unearth a citation for either case.

45. *Lesbian Won't Get Kids*, San Francisco Chronicle, November 8, 1973 at 2.

her custody of two of her daughters, the removal of whom had resulted from evidence at the custody hearing that Parrott was a lesbian and carried on a homosexual relationship with another woman in her home. Her children are now in foster homes, a disposition often considered by authorities to be a "drastic" measure.[46]

The Parrott case, known as *In re Tammy F., et al.*,[47] serves to emphasize the argument of Foster and Freed[48] that the criteria used by courts in custody cases are,

> inadequate, in that they fail to force courts to consider essential factual, social, medical and psychological information. Consequently, a judge may have nothing but his common sense to guide him. . .[49]

Judge Weinman agrees:

> . . .his decision will be affected by his own experience, education, his family life, his character. . .and his philosophical and religious background. [A judge] follows the dictates of his own conscience. . . .[50]

IV. PRACTICAL ARGUMENTS

What can be done to improve the chances of a homosexual woman seeking a grant of custody of her children? The most obvious, and probably least hopeful, method is to embark on a program of educating judges as to the real facts about homosexuality, homosexual women/mothers, and their qualifications to raise children. As Martin and Lyon note in their book *Lesbian/Woman*, "love and security in the home overshadow almost all other factors in determining the emotional stability of the child."[51] Lesbian mothers are at least arguably as capable of providing that as hetero-sexual mothers—and heterosexual fathers. What judges should be told is that the "sickness theory"[52] of homosexualtiy that has pre-

46. *In re* Raya, *supra* note 36.

47. 1 Civ. No. 32648, Court of Appeals, First Appellate District, August 21, 1973.

48. Foster and Freed, *supra* note 17.

49. *Id.* at 438.

50. Weinman, *supra* note 2 at 721.

51. D. MARTIN and P. LYON, LESBIAN/WOMAN (1972).

52. Parker, *The Homosexual in American Society Today*, 8 CRIM. L. BULL. 692, 695 (1972).

vailed until recently is today slowly being challenged by the "non-sickness" views of such writers as Alfred Kinsey, Evelyn Hooker, Michael Schofield, Thomas Szasz, Judd Marmor and George Weinberg:[53]

> More and more specialists are coming to realize that the sickness theory, though still widely accepted, is based on limited and distorted samples, unexamined assumptions, unrealistic definitions and the mere comparison of non-conformity to illness.[54]

According to William Parker,[55] Mark Freedman has recently written about more than a dozen studies which show that "when homosexual subjects are compared with heterosexual control groups, except for sexual preference, there is no significant difference between them."[56] Parker also notes that two other health writers have pointed out that "when the mental health of homosexuals and heterosexuals is judged by the same standard, homosexuals are found to function quite well."[57] In the *Nadler* case, discussed above, a psychiatrist testified on the mother's behalf to the effect that her homosexual activity in and of itself had not had any effect upon the children. Unfortunately the judge was less concerned with the mother's maternal abilities and the children's condition than he was with what she actually did in bed.[58] Another psychiatrist, Dr. Harvey Kaye, has claimed that a lesbian parent will rarely have a homosexual child.[59] His comment emphasizes a fact that judges rarely notice, but should be made aware of: today's homosexuals are for the most part, the children of yesterday's heterosexuals.

In the courts there has been progress through law in resolving homosexuals' grievances in an employment context,[60] and in nat-

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53. *Id.* at 695.

54. *Id.* at 695.

55. See *supra* note 52.

56. Parker, *supra* at 695, citing M. FREEDMAN, HOMOSEXUALITY AND PSYCHOLOGICAL FUNCTIONING (1971).

57. *Id.* at 695, citing Simon and Gagnon in 9 J. Hlth. & Socl. Behvr., 177 (1967).

58. LESBIAN/WOMAN, *supra* at 137.

59. *Id.* at 137.

60. Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968); Morrison v. States Board of Education, 1 C.3d 314, 82 Cal. Rptr. 175 (1969).

uralization,[61] and two judges stress the need for independent investigations and reports by trained professionals to receive active consideration in custody proceedings.[62] In California such investigations are provided for by statute.[63] However, their usefulness remains questionable, because judges tend to ignore them in favor of exercising their discretion. Foster and Freed emphasize that what is needed is an "open-minded willingness [on the part of judges] to listen to the specifics . . . of the experts."[64] They state that "it is imperative that social and psychiatric information be produced for the guidance of judges,"[65] and suggest that family court procedures become "problem-solving rather than contest-supervision."[66] No body of information presently exists as to what type of adult a child who lives with his or her lesbian mother will grow up to be; such information is certainly needed.

To demonstrate to judges that lesbians' homes meet generally accepted standards, and to show them that perversion is not rampant in those homes, attorneys representing lesbian mothers might press for on-site inspection by judges of mother and children in the home environment. If judges were to visit and become acquainted with these women, who are lesbians as well as mothers, they might learn that some of them have chosen to remain in their heterosexual lives, and marriages, purely "for the sake of the children,"[67] and in order to retain custody of their children. Others, who have felt that such a situation breeds tensions too strong for their children to bear, obtain divorces but keep silent about their sexual preference for the rest of their lives, their goal also being retention of custody.[68]

There can be little doubt about the devotion of those women to the happiness, comfort and mental health of their children. Mothers such as these do seem to demonstrate genuine concern for what is really in the best interest of the children, and this should be shown to judges. To lead lives openly as lesbians would be to

61. *In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971).

62. Sweeney, HABEAS CORPUS—CUSTODY OF CHILDREN, 22 TEMP. L.Q. 289, 299 (1949); Pfaff, *Domestic Relations Investigations*, 35 L.A. BAR. BULL. 192, 192 (1961).

63. Cal. Code Civ. Proc. § 263 (West 1970).

64. Foster and Freed, *supra* at 627.

65. *Id.* at 627.

66. *Id.*

67. LESBIAN/WOMAN, *supra* at 132.

68. *Id.*

leave themselves open to the constant threat of exposure, of being declared unfit mothers solely because they are lesbians. They would be forever vulnerable.

Until custody determinations become more objective, judges will be able to apply inappropriate standards and use such arguments as the unavailability of precedent as a basis for refusing custody to the lesbian mother,[69] without doing what they can to discover the facts. Martin and Lyon report that in one case a judge successfully—and probably with a sigh of relief—awarded custody of the child to her father. "Sometime later he [the father] . . . turned over the responsiblity for the care of his daughter to her lesbian mother, without [even] so advising the court."[70]

Another possible "practical" solution to the lesbian mother's dilemma is custody held simultaneously and equally by both parents. Known as joint custody, this solution is probably viable in only a small minority of cases. Obvious problems in day to day family decision-making complicate matters here, and joint custody leaves the right of custody as it was during marriage—neither parent has a greater right than existed prior to the award.[71] Impasse may result.[72] If the potential impasse were to become capable of resolution through a court-drawn division of areas of responsiblity be tween the two parents, or through some other acceptable means, perhaps the fear and resentment on the part of at least some fathers would be dissipated in the knowledge that they have a legal right to participate in raising their children and in protecting them from potential degeneracy.

Since the standards for custody will probably long remain as discretionary as they are today, and since the standards do not operate in their favor, lesbian mothers seeking custody face a difficult task. Their strategy must be, at the very least, to insure that fitness standards are applied as objectively as possible. As Foster and Freed note:

> Many courts. . .in reaching a determination as to what may adversely affect a child's physical or mental health, perhaps have paid insufficient

69. *Id.* at 140.

70. *Id.*

71. 4 Goddard, CALIFORNIA PRACTICE § 141 (1972).

72. Burge v. City and County of San Francisco, 41 C.2d 608, 262 P.2d 6 (1953).

> attention to the expert testimony of psychologists, psychiatrists and social investigators.[73]

If more credence is given to such experts, perhaps more realistic evaluations of parental fitness will result.

V. CONSTITUTIONAL ARGUMENTS

Court challenge of custody awards on constitutional grounds has been and should continue to be made by lesbian mothers seeking custody of their children.

Due process is perhaps the most obvious ground for challenge. To argue on due process grounds, a petitioner's attorney would assert that the United States Supreme Court has held that the right of a parent to raise his or her children is a basic civil right,[74] far more precious a right than property rights.[75] The Supreme Court has held that a state cannot deprive an individual of such a right without a hearing that satisfies the requirements of procedural due process.[76] In addition, California has added the standard that "the extent to which procedural due process must be afforded is influenced by the extent to which the person affected may be condemned to suffer grievous loss."[77] This due process argument implies that depriving a homosexual mother of custody of her children would be just such a grievous loss, and doing so without allowing her fully to prepare a defense would thus violate due process.

Coupled with the due process argument, another constitutional argument can and should be propounded on equal protection grounds. The U.S. Supreme Court in *Shapiro v. Thompson*[78] and other cases, and the California Supreme Court in *Serrano v. Priest*[79] and other cases, have adopted an attitude of active critical analysis of state action when that action is challenged as violating equal protection. By means of a dual test, the Court inquires into the existence of fundamental rights or suspect classifications in a given case.

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73. Foster and Freed, *supra* at 439.

74. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

75. May v. Anderston, 345 U.S. 528 (1952).

76. Stanley v. Illinois, 405 U.S. 645 (1972).

77. *In re* David K., 28 Cal. App. 3d 1061, 1063, 105 Cal. Rptr. 209, 210 (1972).

78. 394 U.S. 618 (1969).

79. 5 C.3d 584, 96 Cal. Rptr. 601 (1971).

If either of these factors is found to be involved in a situation, the state action is subjected to very strict scrutiny. In such cases a state must demonstrate a compelling interest on its part in taking the initiated action in order for the Court to consider allowing such action. The state must also show a rational connection between the compelling interest of the state and the conduct sought to be prohibited, regulated or interfered with in any way.

Already scrutinized under this standard has been state action on such personal questions as the right not to bear children,[80] procreation,[81] and an indigent mother's court costs for divorce.[82] The right of a parent to the care, custody, companionship and control of her children should be found to be at least as fundamental as an indigent mother's right to court costs for a divorce.[83] Once custody rights have been classified as fundamental, a finding which is long overdue, the right of a mother to custody should receive no less protection than that of a father, and the right of a lesbian mother no less protection that that of a mother of any other sexual orientation. Such treatment would accord with basic concepts of equal protection under the Fourteenth Amendment.

A state, in order to justify the present treatment afforded lesbian mothers' child custody claims, should have to show that it has a compelling interest, in its role of *parens patriae*, in the subject matter of concern, *i.e.* child custody. Admittedly, as a practical matter, a state will have no trouble in showing that it has a compelling interest in the welfare of the children involved. If that were enough to satisfy the Court there would be no real basis for disputing the state's action in determining custody rights on the basis of the parent's sexual orientation. Fortunately, however, that will not suffice to satisfy the Court's test. The state must also show at least a rational connection between the compelling interest in the welfare of the children and the conduct sought to be interfered with, the sexual orientation of the mother seeking custody.[84]

80. Roe v. Wade, 410 U.S. 113 (1973).

81. Skinner v. Oklahoma, *supra* note 74.

82. Boddie v. Connecticut, 401 U.S. 371 (1971).

83. This position is adopted in Justice Black's dissent in Kaufman v. Carter, 402 U.S. 954, 960 (1971).

84. In fact, the standard of proof, according to two recent Supreme Court cases, Roe v. Wade, *supra* note 80, and Doe v. Bolton, 410 U.S. 179 (1973), may require demonstration of more than merely a rational connection between the child's welfare and the parent's private sexual orientation.

Were the inquiry aimed at whether the woman regularly engages in homosexual activity in the presence of her children, the state might arguably be able to show such a connection. However, that is not the focus of the state's inquiry. States use the mere fact that a woman is a lesbian as a basis for depriving her of custody of her own children. Such action is patently unfair. The mere fact that a woman is a lesbian does not mean that she engages in sexual activity in the presence of her children any more than does a heterosexual mother. Sexual orientation in and of itself should not be used as a reason for depriving people of custody of their children. What is clear is that all parents, mothers and fathers, whether heterosexual or homosexual, should have their fitness as parents evaluated according to the same set of standards. That is the only way that equal protection of the laws can be afforded them.

Yet another argument in favor of lesbian mothers' rights to custody of their children, despite their sexual orientation, is based on the United States Supreme Court's position that the right to personal privacy is one of the personal rights which, although not specifically enumerated in the Constitution, are nonetheless protected from state and federal governmental interference.[85] When the Court announced this position in a decision which invalidated a state law prohibiting all use of contraceptives, even by married couples, it made reference to a "zone of privacy," a concept which was first articulated over seventy-five years earlier.[86]

It would now seem fair to say, in light of constitutional concepts of personal privacy, that even when a state agency is legally empowered to investigate private conduct, as in custody hearings, the scope of its inquiry may not intrude unnecessarily on a person's private life.[87]

In California, the state constitutional characterization of the right to privacy as an inalienable right has been held by the California courts to include control of one's own body,[88] and employment.[89] Other courts have held that it protects nudism,[90] and na-

85. Griswold v. Connecticut, 381 U.S. 479 (1965).

86. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

87. Roe v. Wade, *supra* note 80; Eisenstadt v. Baird, 405 U.S. 438 (1972).

88. People v. Belous, 71 C.2d 954, 80 Cal. Rptr. 354 (1969).

89. Morrison v. State Board of Education, *supra* note 60.

90. Bruns v. Pomereau, 319 F. Supp. 58 (D. Mary. 1970).

turalization rights.[91] An argument can and should be made that an individual's private sexual life may reasonably be included within that zone of privacy protected from state interference. Maternal rights are arguably stronger than, or at least equally as strong as, employment rights and the right to control of one's own body. It is reasonable to conclude that an objective court, given the proper test case, will find that the state cannot demonstrate either a compelling interest in regulating this area or a rational connection between the mother's sexual orientation and her fitness as a parent, both of which elements must be demonstrated to remove a child without doing so unconstitutionally.

A constitutional right of freedom of association, also not explicitly found in the Constitution, was nevertheless clearly established as an independent and protected constitutional right under the First Amendment in *NAACP v. Alabama.*[92] State action attempting to limit this right is subject to the strictest scrutiny.[93] While most freedom of association cases have involved political organizations and the rights of their members to *speak*, the Supreme Court has made it clear that associated activity need not be "subsume[d] under a narrow, literal conception of freedom of speech, petition or assembly" to qualify for constitutional protection.[94] Although the Court has extended the *privacy* right to the marriage relationship,[95] it has not as yet clearly been extended to extramarital relations.[96] An argument can be made that freedom of *association* protects extra-marital relationships. It has been held by at least one court that association with persons within one's home is an activity constitutionally protected,[97] and some support for this position can be drawn from at least one Supreme Court case,[98] in which the Court noted the defendant's constitutional right "to satisfy his intellectual and emotional needs in the privacy of his own home."[99] The right to private associations within one's own home provides the lesbian mother's cause with a dual argument as to her status.

91. *In re* Labady, *supra* note 61.

92. 357 U.S. 449 (1958).

93. *Id.* at 461.

94. NAACP v. Button, 371 U.S. 415, 430 (1965).

95. Griswold, *supra* note 86.

96. *See* 84 HARV. L. REV. 1525 (1971) for a forceful argument to this effect.

97. Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972).

98. Stanley v. Georgia, 394 U.S. 557 (1969).

99. 394 U.S. 565.

Her right to be a lesbian should be protected under the constitution, at least as long as she doesn't "practice lesbianism" on the streets; and her right to live the way she wishes within her home, and to have her lesbian partner live with her should be protected as well. Although sexual orientation has not yet been characterized as a suspect classification it probably will be. The state should thus be required by the courts to demonstrate factually, and with expert testimony, exactly how the domestic relationship has affected the children within a particular home, before attempting to exercise its claimed right to remove those children.

States contend that within the homes of lesbian mothers criminal activities take place regularly, and for this reason alone children should be removed. They refer, of course, to the categorization of homosexual acts as "sex offenses." Fornication, defined as human sexual intercourse other than between a man and his wife, whether adulterous or not, is not itself illegal today in California, although "adulterous cohabitation" is a crime.[100] Actual prosecutions under the statute are rare however,[101] and a recent change in the law reduced the offense from a felony to a misdemeanor.[102] Oral sex is presently illegal in California, whether it takes place between members of the same sex or opposite sexes.[103] (That statute makes voluntary and forcible acts equally illegal.) This broad issue of victimless crimes and whether or not they should be punished at all has a potentially enormous impact on lesbians and lesbian mothers, and the latters' rights to their children.

Although fornication is not illegal today in California, that may not be true in another state where a lesbian is fighting for custody. It seem clear that in such a state the illegality would be a bar to that mother's claim of right to custody. Yet even if fornication is a crime, no positive proof has been offered which correlates the commission of such a crime to inability to care for children properly. If opponents of the punishment of people for victimless sex crimes in California are successful, the authorities here will be stripped of their main assertion of compelling state interest.

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100. Cal. Pen. Code § 288(a) (West 1972).

101. S. Beserra, *et al.*, Sex Code of California: A Compendium, Public Education and Research Committee of California (1973) at 96. It is estimated that there are twenty convictions for every six million homosexual acts. Fisher, *The Sex Offender*, 30 MD. L. REV. 91, 95 (1970).

102. Stats. 1971-72, c. 276, p. 380, § 1.

103. Cal. Pen. Code § 288(a) (West 1972).

A case in Los Angeles Superior Court recently held that "the issue directly presented is whether or not a state can constitutionally make unlawful the private consensual act of oral copulation between adults. This court has concluded that it cannot."[104] A more recent San Diego Superior Court case is in accord.[105] The state interests usually articulated in cases such as these include preventing illegitimacy, and the classic public health interest (fighting VD), as well as enforcing public morality. If regulation of sexual conduct is ultimately overturned, it will have to be done for *all* adults so as not to violate the Fourteenth Amendment.[106] The question really becomes "whether the state's interest in the protection of public morality can, standing alone, justify the regulation of harmless private conduct."[107] One writer notes:

> . . .it is not easy to see what legitimate state interests are served by an enforced adherence to conventional sexual morality. It has been argued that conventional morality—including sexual morality—is the mortar which binds a society together, and consequently must be enforced by law.[108]

He continues:

> . . .such a view seems plainly inconsistent with the basic philosophy of a pluralistic society.[109]

And further notes:

> . . .'morals legislation' may do much to damage the integrity of the legal system by inviting widespread disregard for the law. And these statutes can only be enforced by extensive and repellent invasions of privacy.[110]

Even the American Law Institute has excluded laws such as these

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104. People v. Schwartz, *et al.*, No. A-282165, September 13, 1972.

105. People v. Baldwin and Dill, No. CR.28119, March 9, 1973.

106. Eisenstadt v. Baird, 405 U.S. 438 (1972).

107. 84 HARV. L. REV. 1525, 1533 (1971).

108. *Id.* at 1534, citing P. DEVLIN, THE ENFORCEMENT OF MORALS (1959).

109. *Id.* at 1534, citing Katin, *Griswold v. Connecticut: The Justices and Connecticut's Uncommonly Silly Law*, 42 NOTRE DAME L. REV. 680 (1965).

110. *Id.* at 1535. *See,* for example, Smayda v. U.S. 352 F.2d 251 (9th Cir. 1965), *cert. denied,* 382 U.S. 981 (1966), the subject of which was spying on homosexuals by a peephole cut in the ceiling.

from its Model Penal Code,[111] and perhaps this view will gain greater acceptance in the near future.[112]

Another constitutional argument may be made based on the Ninth Amendment's reserving of rights "retained by the people." Justice Goldberg's concurrence in *Griswold* argued that the Ninth Amendment was included in the Bill of Rights to protect from federal infringement the fundamental rights not otherwise safeguarded, and that the Fourteenth Amendment extended the Ninth to the states. This and other arguments to limit state action may have some life in them once sex offense statutes are overturned.

The problem with using the Ninth Amendment, admittedly, is that in order to argue it effectively one must assert as fact that the right to choose one's own sexual orientation is a basic right retained by the people through that Amendment. General law in this area will have to be developed further before such an argument would be useful.

VI. CONCLUSION

Perhaps America's fearsome sex hang-ups are the real foundation of the lesbian mother's problem. One writer notes:

> . . .we have turned sex into such a fearful, isolated, episodic kind of experience that we are no longer able to see it as an integral aspect of [functioning relationships].[113]

In any case, the real issue in custody should not be the parent's "fitness" in terms of public morals, but his or her fitness in terms of ability to love, care for and provide for the child. If we can remove the former consideration and concentrate on the latter, lesbian mothers should receive the objective evaluation to which many people feel they are entitled. In addition, as society becomes more comfortable with the concept of freedom to choose one's own sexual orientation, hopefully lesbian mothers' maternal abilities will be more readily appreciated and accepted.

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111. Comment, § 277, Tent. Draft. No. 4 (1955).

112. If the Equal Rights Amendment is passed, lesbian mothers could make the argument that removal of their children is exactly the patent discrimination along sexual lines prohibited by it. The text's words "on account of sex" can reasonably be read to proscribe discriminatory treatment of homosexuals, and homosexual mothers.

113. L. Kirkendall, *The Search for a Meaningful Sexual Ethic*, in SEX EDUCATION AND THE NEW MORALITY, *supra* note 24.