A Bias for balance, in the best interests of the child

Abstract:

In a private family law dispute, paradigmatically a dispute over which parent the child should live with, the law has to decide which parent is better for the child to live with. I claim that when judges decide this question, the parent's deviancy weighs negatively in the scales. After providing case law illustrations of lesbianism and naturism, I examine the main arguments courts give for this presumption against deviance: 'frightening the horses'; 'social isolation'; and 'open futures'. I suggest that the first two of these arguments *depend on* the parent's deviant status, and that the third argument does not support a general presumption against deviance. I then turn to the hardest question of whether the presumption against deviance is generally justifiable, concluding that judges should at least exercise care and caution, bearing in mind the circularity of the arguments employed against deviants and the stakes that are stacked against them.

Keywords:

Deviance; paramountcy principle; *Re W (Residence Order)* ([1999] 1 FLR 869); *C v C (A Minor) (Custody: Appeal)* ([1991] 1 FLR 223); *M v H (a child) (educational welfare)* ([2008] 2 FCR 280); *Re G (Education: Religious Upbringing)* ([2013] 1 FLR 677)

A. Introduction

In a private family law dispute, paradigmatically a dispute over which parent the child should live with, the law has to decide which parent is better for the child to live with, because, as is well known, private family law disputes are governed entirely by the rule that the child's best interests are paramount. I claim that when judges decide

what is best for the child, they weigh negatively in the scales a parent's deviancy, defined as norm-violation that meets with opprobrium. After providing the case law illustrations of lesbianism and naturism, the former arguably historical and the latter arguably contemporary, I examine the three main arguments the courts give for the presumption against deviance: the 'frightening the horses' argument; the 'social isolation' argument; and the 'open futures' argument. I suggest that the first two of these arguments *depend on* the parent's deviant status, and that the third argument does not support a general presumption against the deviant parent. I then turn to the hardest question of whether the presumption against deviance is generally justifiable, concluding that judges should at least exercise care and caution, bearing in mind the circularity of the arguments employed against deviants and the stakes that are stacked against them.

A. Defining deviance

Before discussing whether there is or should be a presumption against deviant parents, we need to define deviance, and if this definition is to be helpful then it should not be too broad. First of all and most basically, deviance needs to be distinguished from statistical deviation from the norm, which is 'too far removed from the concern with rule-breaking which prompts scientific study of outsiders' (Becker, 1973, p. 5). Red-heads are thus not deviant, and the courts do not operate a presumption against red-headed parents. Becker accordingly defines deviance as 'the infraction of some agreed-upon rule' (1973, p. 8); for Ben-Yehuda (1989, p. 4), it is similarly the violation of a norm.

Secondly, sometimes breaking social or legal rules may lead merely to indifference or even to approval from most other people: Bell (1971, p. 19) suggests that 'the genius, the reformer, the religious leader, and many others' are as deviant from the norms of society as the criminal, and reminds us that 'the person who unquestioningly conforms may be seen as a problem' as much as the deviant (1971, p. 19). For Bell (1971, p. 19), this means that deviance falls on 'a continuum of human acts ranging from the most sinful to the most saintly'; accordingly, for deviance to be seen as undesirable it must be defined as 'bad' deviance. However 'bad', in the sense of attracting social disapproval, is more often incorporated into the definition of deviance (Sagarin, 1975, p. 6). In what follows, I intend to follow Sagarin's definition that 'disvalued people and disvalued behavior that provoke hostile reactions will be considered deviant' (1975, p. 9). This definition that incorporates social disapproval into deviance is more efficient for my purposes, because it means that non-conformism is immediately distinguished from deviance: I am not suggesting that the courts operate a presumption against non-conformist parents. While no illustration is beyond dispute, perhaps, in the United Kingdom in 2016, we could cite the vegetarian as non-conformist but not deviant: I am not claiming that the courts prefer parents who eat meat.

Thirdly, for a parent to harm his or her child, most plainly through physical abuse, is obviously in itself deviant behaviour. The courts certainly disfavour parents who are deviant in this sense, but clearly they are justified in operating a presumption against this form of deviance. Although not always an easy distinction to draw, in what follows I will be concerned not with cases where the parent is deviant precisely because he or she harms his or her child, but rather with cases where the courts

believe that the parents' free-standing deviance results in collateral harm to their children, as a by-product of their deviance.[1]

A. Illustrations of deviance

Private family law disputes over which parent the child should live with offer a particularly clear window onto what judges see as deviant. This is because these are cases where the family has invited the law inside. Judges do not therefore have the option that is available in most other legal disputes to adopt the liberal stance that people's deviance falling short of criminality is of no interest or relevance to the law (see Munby LJ in *Re G (Education: Religious Upbringing)* [2013] 1 FLR 677 at p. 703). The judge simply has to decide which parent is better for the child to live with.

Moreover, since deviance is created by society (Becker, 1973, p. 8) in the strong sense that the deviant 'is one to whom that label has successfully been applied' (Becker, 1973, p. 9), when a family law judge decides against a parent in a dispute about the child's residence on the basis of that parent's non-conformism, that judge may be involved not just in reflecting or even confirming deviance but rather in *creating* deviance, by labelling it - with a far sharper nib than a criminal law judge (but see Green, 2008, p. 280).

One of the most pronounced illustrations of such judicial labelling of deviance is the dispute over the child's residence in *C v C (A Minor) (Custody: Appeal)* ([1991] 1 FLR 223), where the Court of Appeal held that the mother's lesbian relationship was 'an important factor to be put into the balance' (Glidewell LJ at p.

[1] I am grateful to Peter Ramsay for suggesting this distinction.

229 and Balcombe LJ at p. 233), because the home she offered her child was further from the norm than that of her heterosexual husband (see Balcombe LJ at p. 231). Although never formally over-ruled, family law commentators agree that this precedent would no longer be followed (Diduck and Kaganas, 2012, p. 439; Gilmore and Glennon, 2014, p. 459; Harris-Short, Miles and George, 2015, p. 755; Herring, 2015, pp. 544-545). Given the gigantic shift in the legal treatment of lesbians and gay men in the quarter of a century since then (see e.g. Marriage (Same Sex Couples) Act 2013), this view is eminently plausible. If the *C v C* scenario arises again, and the courts treat the lesbian relationship as of no significance, then this will affirm that lesbians are no longer deviant, perhaps even more conclusively than the introduction of same-sex marriage.

However, to confirm that lesbians are no longer stained with even a trace of deviance, we would need a strong case. Imagine a lesbian mother who socialises exclusively with other lesbians. Even in 2016, could a judge count this home life against the mother, as too narrow? If so, then the ghost of *C v C* lives on, for it is, still today, hard to imagine a judge penalising a heterosexual mother just for having no lesbians or gay men within her social circle.

But even if *C v C* has truly fallen, what this means is that the *content* of the deviance category has changed. The deviance framework is still intact in private family law disputes. Fundamental tenets from the sociology of deviance indeed suggest this: first, while a universal content for deviance is arguably non-existent, deviance as an analytical and empirical category is universal (Ben-Yehuda, 1989, p. 11); secondly, deviance is a relative concept (Durkheim, 2013, p. 62), so that

‘deviance can be defined as behaviour which falls on the outer edge of the group’s experience, whether the range of that experience is wide or narrow’ (Erikson, 2005, p. 26). Even if lesbian parents are no longer deviant, there are still deviant parents.

While most family law disputes are decided on child-centred grounds, such as by reference to which parent is closer to the child, the family law reports are peppered with illustrations of the deviance framework in operation. To demonstrate this, let’s look at the surprisingly little discussed Court of Appeal case of *Re W (Residence Order)* ([1999] 1 FLR 869), which casts light on the deviant status of *naturists*.

Re W was the mother’s appeal against a residence order made in favour of the father. The sole area of concern was that their son aged nine and daughter aged six had seen the mother and her new male partner nude, and that the partner had bathed with the son, and there was also a suggestion that all four of them had shared a bath. At the most recent hearing in the proceedings, the trial judge had given the father a residence order, entirely on the basis of the nudity and joint bathing. The Court of Appeal allowed the mother’s appeal, remitting the case for a rehearing. Because of this formal appeal outcome, academic commentators have generally interpreted this case as a triumph for liberalism (Eekelaar, 2006, p. 92; Gilmore, Herring, and Probert, 2009, p. 14; Herring, 2005, p. 162). But when we move away from the appeal *result* and look more closely at Butler-Sloss LJ’s *judgment*, we can see that *Re W* actually *confirms* the deviant status of naturists.

Butler-Sloss LJ recognised a ‘wide variety of viewpoint as to the suitability of nudity from those who extol its virtues, passing through to a middle position of those

who do not do it but do not object to the other extreme of those who are shocked by it' (p. 873). She confirmed (p. 875) that nudity and communal bathing are not child abuse. 'In a happy, well-run family,' she declared (p. 873), 'how the members behave in the privacy of the home is their business and no one else's.' It is easy to see why this has been interpreted as a liberal judgment *par excellence*.

On the other hand, having recognised the 'wide variety of viewpoint', Butler-Sloss LJ remonstrated (p. 873) that everyone who has contact with children has to be 'aware of the delicacy and sensitivity of relationships with children within and without the family.' Even within the family circle, regard had to be paid to concerns (p. 873). 'A balance has to be struck', she declared (p. 873), 'between the behaviour within families which is seen by them as natural and with which that family is comfortable, and the sincerely held views of others who are shocked by it.'

So how does one pay regard to these concerns - how is the balance to be struck - given the diversity of views? Butler-Sloss LJ had clear advice to issue (pp. 873-874):

> It would seem to me wise, in all cases where partners change and children move between the new adult families, for those accustomed to a less inhibited approach to be careful not to raise concerns among the other family who may not share that free attitude. … The concerns may or may not be justified but they will be there and since they are there they must be recognised and it would be wise to pay respect to them. … In brief, the message that I would hope to put over today is that new partners, and particularly male partners, should be cautious in their approach to such issues as nudity when staying in the same household with the other partner's children. Social services, the police and court welfare officers as well as judges will advise those who innocently behave in this way to be cautious and restrained in the presence of children.

Accordingly, Butler-Sloss LJ considered the mother's new partner 'most unwise to bathe with a boy of 9 who was not his child' (p. 874), and she also believed that it would have been wiser for the mother not to have behaved in such an uninhibited manner (p. 874).

In the event, the mother and her new partner in any case promised not to practise nudity and joint bathing any longer (p. 875). Butler-Sloss LJ hoped they would keep this promise as it would put at rest the father's concerns (p. 875). If they did not keep their promise, she reiterated that this would not be abusive, but it would be 'indiscreet, unwise and would perhaps put the children into certain difficulties' (p. 875).

In essence then, while the Court of Appeal found for the mother on the basis that her approach to nudity and joint bathing should not, in and of itself, have decided the case, Butler-Sloss LJ did also read her the Riot Act. Butler-Sloss LJ's judgment in *Re W* makes plain that the 'wide variety of viewpoint as to the suitability of nudity' (p. 873) are not on a level playing field. In 1999, the Court of Appeal labelled naturism deviant, and it is likely that the deviance of naturism has only intensified since (see Gabb, 2013).

A. Arguments against Deviance

Before we look at the particular arguments, we should consider the general question whether it is no more than a tautology that judges disfavour deviants in residence disputes, given that family law judges *create* deviancy by their decisions. On this view, the deviant *is* the one who is disfavoured – *this is the test for deviance*. (This

would of course make redundant the question whether deviants *should be* disfavoured.)

I do not think the presumption against deviance is a tautology. Hypothetically, there clearly are decision rules that would certainly not have this implication, from coin tossing through to a primary caretaker preference. Even within the current best interests framework, which readily lends itself to indeterminacy and even usurpation (see Reece, 1996a, pp. 295-297), I do not think that every parent who loses a dispute about residence has been pronounced deviant. Although sometimes hard to draw the line, I believe that there are *child-centred* reasons for disfavouring a parent in a residence dispute, for instance that this parent has a more distant relationship with the child than the other. In the United Kingdom in 2016, family law cases that create or confirm deviance are the exception rather than the rule.

Since the presumption against deviance is not a tautology, it is an open question whether this presumption is justifiable, so it is worthwhile to look at the arguments that the judges advance for it. This turns out to be a relatively straightforward exercise - although the case law covers a range of discrete deviancies – from lesbianism through cultism to naturism - the arguments for the presumption follow a similar pattern.

B. Frightening the horses

In *Re W (Residence Order)* ([1999] 1 FLR 869) the main, if not the only, reason for the message that Butler-Sloss LJ wanted to put out was to avoid upsetting the father, encapsulated in her comment (p. 873): 'The concerns may or may not be justified but

they will be there and since they are there they must be recognised and it would be wise to pay respect to them.' At first glance, this seems eminently fair-minded and even-handed – don't go out of your way to upset people, least of all the other parent. But on reflection, this inevitably tells against the deviant parent. Almost by definition, deviancy – the socially disapproved of violation of norms - has a tendency to upset. People tend to be offended more by membership of the English Defence League than the Liberal Democrats, more by adherence to the Exclusive Brethren than the Church of England, more by fully fledged naturism than the towel slipping while we hop from the shower to the wardrobe. It is challenging, almost impossible, to be an inoffensive deviant.

Perhaps even more importantly, we both notice and valorise upset more when it stems from deviant behaviour. In *Re W,* Butler-Sloss LJ acknowledges (p. 873) the 'wide variety of viewpoint as to the suitability of nudity from those who extol its virtues, passing through to a middle position of those who do not do it but do not object to the other extreme of those who are shocked by it.' But assuming that the mother was one of 'those who extol its virtues', how far would she have got with the argument that the father's refusal to engage in this beneficial behaviour 'raised concerns' (p. 873) for her? It is the deviant who must not upset the 'normal' (Becker, 1973), never the other way round. In the 'wide variety of viewpoint' that Butler-Sloss LJ pinpoints (p. 873), the advice to avoid 'raising concerns' (p. 873) almost inevitably exerts a pull to the middle. This is particularly troubling given that those on the outskirts of behaviour or opinion tend to feel at least as strongly as – usually more strongly than - those in the mainstream (hence A. J. P. Taylor's (1977, p. 8) oxymoron, when accused by the president of an Oxford college of having strong

political views: 'Oh no, President. Extreme views weakly held'). Extremists pay a heavy price when we ask them to meet us in the middle.

B. Social isolation

Because of the private nature of the deviancy in *Re W (Residence Order)* ([1999] 1 FLR 869), the social isolation argument was only whispered there (p. 875). But in other deviancy cases, this argument holds centre court. *M v H (a child) (educational welfare)* ([2008] 2 FCR 280) is an outstanding example. Here, the Catholic father was preferred in his residence dispute with the Jehovah's Witness mother, in part because Charles J believed (p. 301) that their daughter's stability and security would be assisted by her 'having a wide group of friends of her own age, and relationships with adults, both from divergent backgrounds rather than a social life centred on the Jehovah's Witnesses.'

In relation to the lesbian mother cases in particular, I canvassed possible responses to the social isolation argument twenty years ago (Reece, 1996b, pp. 488-494), not then having fully appreciated the generalizability of the schema. So here I just want to draw attention to the inexorable circularity of the social isolation argument – the way in which the finding of social isolation rests on the stigmatisation of the non-conformist lifestyle.

Setting aside the questionable assumption that social insularity is necessarily negative (see Reece, 1996b, pp. 492-494), how do we set about measuring it? It surely does not consist in counting the number of different people the deviant interacts with, nor the amount of time spent in the company of others: as Bradney

(2009, p. 116) astutely observes in his discussion of child law cases concerning new religions, if this were the measure then we would expect to find the presumption employed against the parent who moves to a rural idyll (or the one who spends every weekend in a country retreat).

In *M v H (a child) (educational welfare)* ([2008] 2 FCR 280) it is not so much that the daughter will be deprived of social contact (although on the particular facts Charles J did form the impression that she and her mother were fairly isolated and lonely (pp. 298-299)), more that her contacts will not be from divergent backgrounds, because her social life will centre on Jehovah's Witnesses (p. 301). But whether or not Jehovah's Witnesses are themselves divergent depends on your standpoint: no doubt, they are young and old, rich and poor, Remain and Leave. Jehovah's Witnesses 'all look the same' to the judge precisely *because* they are deviant. This is because deviancy is a master status – the controlling identification (Becker, 1973, pp. 33-34). Thus, the judge might barely have batted an eyelid if the mother had socialised exclusively with university professors or family lawyers.

Given the master status of deviance, deviants will inevitably fall foul of the social isolation argument – unless they mix with normals. But for many deviants, this will be impossible, either because they are ostracised from normal society, or – more fundamentally – because their deviancy *requires* immersion, if they are members of a religious sect or political campaign, for instance. In relation to the former reason, success breeds success: given the extent to which lesbians have shed their deviant status, intermingling with heterosexual mothers is likely now a realistic option for most lesbian mothers. Conversely, failure breeds failure (Cohen, 2011, pp. 11-12):

> The deviant or group of deviants is segregated or isolated and this operates to alienate them from conventional society. They perceive themselves as more deviant, group themselves with others in a similar position, and this leads to more deviance. This, in turn, exposes the group to further punitive sanctions and other forceful action by the conformists and the system starts going round again.

B. Open future

In *Re G (Education: Religious Upbringing)* ([2013] 1 FLR 677), a dispute over whether the children should receive an orthodox Chareidi education, Munby LJ (p. 700) held that:

> … our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood. And the corollary of this, where the decision has been devolved to a 'judicial parent', is that the judge must be cautious about approving a regime which may have the effect of foreclosing or unduly limiting the child's ability to make such decisions in future.

From a liberal point of view, concern for the child's future autonomy is one of the purest principles available, for the principle does not require us to judge different options, but merely to ensure a full array of options available when the child reaches maturity. Although not always as explicit in the case law as it is in *Re G*, this principle is often there in the background in the deviancy case law. Indeed, it forms the backbone for the social isolation argument (see *M v H (a child) (educational welfare)* ([2008] 2 FCR 280 at p. 301).

But while the open future principle can be readily endorsed on the abstract plane, the difficulty comes – once we move away from guarding against death, and

serious irreversible physical damage – in determining on the concrete plane which childhoods do foreclose or unduly limit the child's ability to make future decisions. Indeed, the assumption in *Re G* itself - that a Chareidi education would necessarily limit future options - has been robustly challenged (Tolley, 2014, pp. 117-122). So long as we are scrupulous about treating deviant and normal futures as equally valuable, ensuring that we are merely concerned to guarantee that both are available to the child on reaching adulthood, it is not obvious that the open future principle points away from the deviant childhood. Only the most abused child – one who spent his or her whole childhood locked in a literal, or perhaps metaphorical, dungeon - could grow up unaware of normal society and its values. And once the child has reached adulthood, it is difficult if not impossible for the parent to prevent the child's exit from the parent's deviancy.

Treating deviant and normal lifestyles on a level playing field, it may be the deviant childhood that provides the more open future. While a child raised by deviants cannot fail to be aware of normality all around them, a child raised to accept conventional social values may find it hard to break free and take the path less travelled. I made this point in the specific context of lesbian and gay parenting twenty years ago, when I argued that while a greater propensity towards homosexuality should be considered neutral, greater freedom to choose and to express one's sexuality should be regarded as a benefit. The contemporary evidence showed that children raised by lesbian or gay parents did indeed experience such enhanced sexual autonomy. Seven year old Ishana (Rafkin, 1990, p. 74) bears re-quoting:

> I want to be a doctor or a veterinarian when I grow up. I don't know if I want to be a lesbian. I might like men. I might get married. I might not like men. I might be a lesbian. I might like to be with both. I don't really know yet. There are a lot of choices.

As the stigmatisation of lesbian and gay choices has diminished in the years since, we would of course expect the differential in sexual autonomy to have diminished in tandem. And it is an empirical question the extent to which any specific deviant childhood will open up options that might otherwise have been overlooked, discounted, or even foreclosed. But from first principles, it is at least a moot point which best enhances future autonomy, the normal or deviant upbringing.

A. Presumption against Deviance?

Consistent with the argument I mounted against the paramountcy principle twenty years ago (Reece, 1996a), I need to ask whether the presumption against deviance is justifiable under first the current legal best interests framework and secondly the broader regime that I would like to see.

When I examined the operation of the presumption against deviance specifically in relation to lesbian and gay parents twenty years ago (Reece, 1996a; Reece, 1996b), I did not answer the question whether lesbian and gay parenting was actually better or worse for children, because I regarded this question as a distraction, partly on the grounds that the presumption against deviance had in this instance *usurped* the paramountcy principle (Reece, 1996a, p. 293). I wrote that 'the policy of supporting normality clearly represents an external value' (Reece, 1996a, p. 296), and part of my justification for reaching this conclusion was that judges then felt no need to hear any evidence about the effect of lesbian and gay parenting on children's welfare (Reece, 1996a, p. 291). Given the febrile bolstering of the traditional heteronormative nuclear family in the late 1980s and early 1990s (see e.g. S. 28 Local

Government Act 1988), specifically in relation to the presumption against lesbian and gay parenting I think that was right.

However, I find trickier the question whether, on a more abstract plane, concern to promote normality is external to children's welfare. While I recognised at the time that it was difficult to draw the line between policies that were external and internal to children's welfare (Reece, 1996a, p. 296), I now find this a more troublesome point, having become more attuned to the way that political goals penetrate right to the heart of all our understandings of children's welfare (see e.g. Lee, Bristow, Faircloth, and Macvarish, 2014). This leads me to wonder whether the presumption against deviance is external to children's welfare in any stronger sense than for example the primary caretaker preference (see e.g. Kukla, 2005).

But even if I now appreciate that there is no neutral or value-free interpretation of children's welfare, judges still do need to decide what is best for children. When doing so, they should at least recognise that the scales are stacked against the deviant parent. Both the 'frightening the horses' argument and the 'social isolation' argument depend on the parent's deviant status: the parent 'frightens the horses' and is 'socially isolated' precisely because he or she is deviant; it is almost impossible to be an inoffensive, sociable deviant. Moreover, it is at least a moot point whether a parent's deviancy promotes or deters the openness of a child's future.

Moving outside the paramountcy principle, in relation to lesbians and gay men twenty years ago I was firm, concluding that any harm their deviance might cause children was outweighed by 'a far more important and socially significant value, the

equal right of lesbians and gay men to be parents' (Reece, 1996a, p. 303). With regard to this then oppressed minority, on the cusp of shedding its deviant status and thereby any residual harm to children, I have had no qualms since. In contrast, I am wary of defending, for all deviants, an equal right to parent.

There are no doubt strong reasons to defend such a right. As is well known, *C v C (A Minor) (Custody: Appeal)* ([1991] 1 FLR 223) stands for the proposition that the judge should 'start on the basis that the moral standards which are generally accepted in the society in which the child lives are more likely than not to promote his or her welfare' (Balcombe LJ, at p. 230), and whatever the current status of *C v C* in relation to the presumption against lesbian and gay parenting, the proposition above is still good law (see *Re G (Education: Religious Upbringing)* ([2013] 1 FLR 677, at p. 692). But Bradney (1999, p. 214) points out:

> … the notion of social unacceptability is nebulous at best. For example, at least for some people in Great Britain, to be a member of the Church of Scientology is socially unacceptable and even immoral, whereas for others eating meat or voting for a particular political party is socially unacceptable. … If a society is pluralistic and tolerates diverse worldviews, then the use of a generalized concept of social acceptability has no empirical referent.

Bradney believes (1999, p. 214) that the 'concept of social acceptability works best in the context of a consensus vision of society where there is one dominant set of mores.' Without such a consensus, 'within our increasingly global and multiethnic societies, the contemporary court's reliance on notions of social acceptability appears little more than a thinly disguised attempt by one social group to impose its mores on other social groups' (Bradney, 1999, p. 214).

However, we need to be careful to draw a distinction between the *source* of the mores – which may often be the elite - and the *level* of consensus (Erikson, 2005, pp. 209-212): in other words, a norm may be imposed, and also consensual (Erikson, 2005, p. 211):

> … it is entirely possible to see the world as a place of conflict or tension, and yet to insist at the same time both that a sense of community can emerge from those turmoils and that the tissues holding it together are akin what Durkheim called "collective conscience."

There certainly are deviancies on which there is currently a clear moral consensus, readily ascertainable by the judiciary (see e.g. Reece, 2010). *Contra* Bradney, surely it is precisely these cases of a small, universally unpopular minority coming up against an overwhelming social consensus that we should be the *most* concerned about crushing (see e.g. Reece, 2010), for isn't a very purpose of the judiciary to protect the rights of unpopular minorities? If a primary function of the courts is to protect individual rights and minority interests, then this can hardly be performed by appeal to a consensus (see Sadurski, 1987).

As the lesbian mother case study illustrates perfectly, even a widely accepted consensus may be nothing more than dressed up prejudice (for discussion, see Sadurski, 1987). While we may want to believe that we got it wrong then because we were prejudiced, but we get it right now because we are enlightened, it is trite that if we were wrong there then, who knows where we might be wrong now (see Herring, 2005, p. 164). Indeed, sociologists of deviance have argued that deviants perform a valuable social role precisely by drawing our attention to how and where we might be wrong. Sagarin (1969, p. 246) puts this point particularly poignantly (see also Green, 2008, p. 286):

> Although theirs is the voice of the distressed, it is also that of the rebels, of people who, often for reasons beyond their control and their understanding, have challenged the taken-for-granted world of others, and are therefore causing those others to reflect on that world, provoking self-doubt where there was once complacency, and marshalling the forces of change. Theirs is the socially useful role … of marginal people who because of their marginality became instruments of scepticism for what can be a world of smugness.

Even so, the argument that we were wrong in the past so we might be wrong now can easily lapse into moral relativism and paralysis. Judges do just have to make a decision, perhaps inevitably drawing on our current moral framework. Twenty years ago, I firmly rejected the presumption against lesbian and gay parenting, defending their equal right to parent (Reece, 1996a, p. 303; Reece, 1996b, p. 498). I cannot conclude this article by joining with Bradney's (1999, p. 214) robust conclusion, albeit written in the specific context of parents in new religious movements, that 'for the state to institute a second level of quasi criminality' by denying custody is in short 'to offend against the liberal principle that the state should be neutral about the value choices of its members.' In examining a residence dispute where deviance plays a role, judges should however ensure they exercise care and caution, bearing in mind the circularity of the arguments employed against deviants and the way in which the stakes are stacked against them.

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