SEXUAL ORIENTATION AND THE LAW: VALID AND VALUABLE JURISPRUDENCE

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The thesis of this essay is that sexual orientation and the law is a legitimate course to offer in law schools and an appropriate topic for scholarly endeavor as well.

I would expect the reader to be somewhat confounded by this thesis. Isn't this settled already? Certainly a significant number of law schools regularly offer courses related to this area. Law reviews and journals, including specialty ones such as the one containing this essay, devote pages and even entire volumes to literature on sexual orientation and gender. Law schools and other institutions routinely sponsor symposia and conferences dedicated to unraveling the myriad of legal, political, religious, economic, and social dimensions of sexual orientation.

All this is true, of course. But there is a swirling undercurrent, a backlash perhaps, that cannot be ignored. Since I started teaching law in 1990, and became seriously committed to my identity as a life-long student of the law as well as a law teacher and a legal scholar, I have received less-than-enthusiastic feedback on my plan to produce scholarship on sexual orientation issues. Somewhat surprisingly, this reaction came not from colleagues aligned on the right side of the political spectrum, but rather from some of my more liberal colleagues who are wholly supportive of the extension of basic legal rights and remedies to gays and lesbians.

These colleagues cautioned me that in terms of career advancement generally, and more specifically in terms of being taken seriously as a scholar, writing in the area of sexual orientation is discounted by some members of the academy as being of lesser value than publications in my other areas of interest, such as civil procedure and civil justice reform.

My colleagues' cautionary concerns were undoubtedly voiced in good faith and were not totally removed from reality. People often express their own convictions in the guise of what "other people" think. It is therefore not beyond reason that the colleagues issuing the caution—colleagues who would eventually be evaluating my work for purposes of tenure and promotion—also embrace the "lesser value" perspective,

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perhaps even unconsciously. I have heard academics from law and other disciplines classify sexual orientation literature as everything from the cutting edge of the civil rights movement to political correctness run amok, and even to a left-wing conspiracy to undermine the basic moral values that support all things civilized.

Nevertheless, I made a conscious commitment to direct significant effort to writing and research in the area of sexual orientation and law. My decision is not a blatant act of militancy or defiance. Rather, it is based on a firm conviction that the field of sexual orientation, gender, and the law is an appropriate subject for a law school course and for legitimate legal scholarship.

In defense of my thesis, I present two very different cases that I litigated. The first case, Sandor v. General Motors,[1] has no issues related to sexual orientation. The second, Hertzler v. Hertzler,[2] focuses exclusively on sexual orientation. Their intimate connection lies in the fact that Sandor and Hertzler are, for both personal and professional reasons, the two most difficult cases I have litigated. More important to the topic at hand, these two matters serve as vehicles to compare and contrast how the law functions differently when the sexual orientation of one of the parties is at the heart of the legal dispute.

Sandor v. General Motors

The plaintiff in this case was Erika Sandor, whose fifteen-year-old son Eric died following a tragic and bizarre accident involving a 1982 Buick manufactured by General Motors (GM). I defended GM in this lawsuit.

Mrs. Sandor was a single mother raising two sons, Eric and Richard. Richard was several years older than Eric. Mrs. Sandor and her two sons were extremely close and Eric was by all accounts a devoted son. He was an excellent student and involved in numerous extracurricular activities. His brother Richard had just started a pre-medical school program at a university near the family's home. Everything was going well for this closely-knit family.

In early October 1985, Eric was very excited about going to an upcoming school dance. On October 9, 1985, Eric got a new hairstyle, an Afro-type permanent. Eric and his best friend, Vincent Salupo, then

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[1] Sandor v. General Motors, No. C-86-2744 (N.D. Ohio filed June 2, 1986).

[2] Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995).

stopped to visit Salupo's girlfriend, Dawn Rayborn, to show her Eric's new hairdo. Salupo was driving his father's car, a 1982 Buick. Salupo parked the car in the driveway of the Rayborn house; a large bush grew alongside the house.

According to the police report compiled from interviews of Salupo and Rayborn, the following "freak accident"[3] occurred after Eric exited the Rayborn house:

> While at the home of Vince's girlfriend . . . Eric was in the driveway and did jump into the air in exuberance and yelled out 'I'm beautiful' or similar words and when he was coming down the radio antenna of the auto parked there pierced the right eye socket of Eric. He is alleged to have cried out and fell to the ground. There was some bleeding from the eye and ice and cold water were applied. Within moments it is alleged that the right leg and side of Eric went into spasms & that he could not walk. He was carried to the car of Vince Salupo and . . . Vince & Dawn did drive him to the hospital. . . . . [A] short time later Eric became comatose and has been like that since.[4]

Eric was brain dead shortly after he arrived at the hospital. He was pronounced dead on October 15, 1985.

Mrs. Sandor and her son Richard were devastated by Eric's tragic death. No doubt they sought some explanation, someone or something to blame, to help rationalize this unbelievable tragedy. A plaintiffs' law firm initially took up their cause by exploring a medical malpractice claim against the emergency room doctors, pursuing the theory that Eric would have survived this accident had he received appropriate initial medical care. They abandoned the medical claim theory in favor of pursuing a products liability case against GM.

The Sandor v. GM complaint contained a plethora of product liability theories including negligence, breach of express warranty, breach of implied warranties, and strict liability. My job in defending GM was twofold. First and foremost, my objective was to establish that GM had breached no duty to Eric in its design and manufacture of the antenna and the automobile. This involved the fairly routine task of fleshing out the facts through discovery and comparing them with the applicable legal standards. My second job was to minimize the damage this family had

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[3] Mayfield Heights Police Department Report dated Oct. 11, 1985.

[4] Mayfield Heights Police Department Supplementary Report dated Oct. 11, 1985.

suffered due to Eric's death, and thus lessen the financial compensation that a sympathetic jury might be inclined to provide.

Achieving my first objective, or at least building a solid record toward meeting that objective, was relatively easy. The two-paragraph report furnished by plaintiff's expert stated in conclusory fashion that defendant's "designs were unsafe and unreasonably dangerous with regard to the following: 1. The antenna itself, and 2. The assembly of antenna and vehicle."[5] My deposition of this expert yielded little additional material in support of plaintiff's numerous legal theories. In addition, the deposition raised serious questions as to whether the court would qualify the deponent as an expert, since most of his experience was in structural engineering and was negligible in the complex area of automotive design and production.

Accomplishing the second objective—minimizing the damages the family experienced due to Eric's death—proved far more daunting. I deposed Eric's mother, Erika Sandor. This was the most difficult deposition I have ever done. To zealously and competently represent my client, I had to probe every aspect of her relationship with Eric, try to identify sources of tension between them, and draw out any character flaws in Eric or Mrs. Sandor that would lessen the juror's compassion for them. Instead of identifying shortcomings and gaps, my questions revealed an amazing bond between mother and child. This confirmed by preliminary investigation (and gut feeling) about this case: Eric was a young person that everyone loved, who touched those around him with a special kind of caring. Throughout the deposition, Mrs. Sandor's pain was palpable. It felt as if another entity was in the room with us, draining away any remnants of joy or lightness as she spoke of her profound loss through a constant veil of tears.

Mrs. Sandor also talked about her other son, Richard, who was not coping well with Eric's death. Instead of going to his university classes, he would spend all day at Eric's grave. Richard also became physically abusive with his mother. It was painfully obvious that Eric's death had cost Mrs. Sandor both of her sons.

Perhaps the most profound and defining moment of the case came when I interviewed the county coroner who performed the autopsy on Eric. In the front of the coroner's file were pictures of Eric taken moments before the autopsy began. Even in death he was a beautiful young man—dark curly hair, olive complexion, flawless features. He looked like he was sleeping peacefully, perhaps dreaming of the big dance he had so looked forward to, and that he would awaken at any moment and continue

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[5] Report of A.O. White, Jr., Plaintiff's Expert Witness, dated Jan. 28, 1987 (on file with author).

his life as a happy, healthy fifteen-year-old boy. When I held that picture I realized for the first time the enormity of Mrs. Sandor's loss.

I used the information from the depositions of Mrs. Sandor and her expert and other discovery to prepare a motion for summary judgment. In the motion I characterized the incident that claimed Eric's life as a "tragic, freak accident." I laid out the law and the facts, and made a compelling argument as to why GM was not liable for Eric's death. It was a solid argument.

Plaintiff's counsel never filed a response to my motion. Rather, he requested and received several extensions from the court and kept lowering his demand of my client as each deadline neared. In the end we entered a confidential settlement agreement for what I consider a paltry sum. I doubt that Mrs. Sandor felt any justice was done as a result of this settlement, but I hope that terminating the litigation provided some sort of closure for her.

Hertzler v. Hertzler

Pamela and Dean Hertzler were married for fifteen years. They lived on a farm in Veteran, Wyoming, located in the southeast part of the state. Toward the end of their marriage, they adopted two infants, Joshua and then Miriam, shortly after each child's birth.

There was a lot of tension throughout the marriage. Pamela sought counseling, and during this process of self-reflection, realized that she was a lesbian. Pamela asked Dean for a divorce, and he did not protest; in fact, he offered to help her pack.

The children were quite young when Dean and Pamela divorced in 1991. Dean stipulated to an agreement making Pamela the custodial parent and giving him liberal visitation rights. The court incorporated their agreement into a final decree.

During this time, Pamela and the children lived in Morrill, Nebraska and Dean remained in nearby Veteran, Wyoming. In late 1991, Pamela became romantically involved with a woman from Ohio. About this same time, Pamela confided in a few family members about her sexual identity, and about her new relationship. Her parents told Dean.

On the day after Christmas in 1991, Dean confronted Pamela with this information. Pamela admitted that she was in a lesbian relationship and informed Dean that she was considering relocating with the children to Ohio to live with her new partner.

Dean gave Pamela two choices: voluntarily agree to reverse the provisions of the custody and visitation decree so that he would have custody, or go back to court and fight over custody and visitation.

Pam called me for advice. I explained I was not licensed to practice law in Wyoming or Nebraska, and that I was not a specialist in domestic relations law. I did, however, share my perspective as an academic who had done research in this area of law. In short, I confirmed what local legal counsel told her. The court in rural Wyoming would probably view her homosexuality as automatically rendering her an unfit parent, and the legal battle would be extremely expensive—not just in dollars but in the exceptional emotional toll it would take on everyone, especially the children.

Pamela entered a new stipulation in February 1992, which gave Dean custody and assured Pamela extensive visitation rights. The court entered a final decree based on the stipulation. The children moved back to Dean's farm and Pamela relocated to Ohio. Pamela maintained a daily presence in her children's life through letters, packages, photographs, phone calls, and frequent visits.

The children spent the summers of 1992 and 1993 with Pamela and her partner in Ohio. The children became very close to Pamela's partner during these extended visits.

Immediately after the children returned to Wyoming in late summer 1993, Dean married a woman from Ohio. Dean's new wife, Christine, had decided well before she married Dean that the children needed more discipline, that she would be their mother, and that Pamela would no longer fill that role.

After their marriage, Dean and Christine accelerated their campaign to alienate the children from Pamela. This campaign included repeatedly telling the children that Pamela was an evil person leading an evil life. They also prohibited the children from calling Pamela "mom." Dean and Christine sought to vanquish Pamela from her children's lives because she was a lesbian.

The judicial system was not an immediate ally in their venture to rip Pamela from the children's lives. The court could not reopen the custody and visitation issue unless a "substantial change in circumstances" occurred subsequent to the existing decree that would justify further judicial intervention. And, since Dean had used Pamela's lesbianism to coerce the stipulation upon which the decree was based, he could not claim that her sexual orientation constituted a change in circumstances.

Dean and his new wife Christine needed to identify something else that constituted a significant change in circumstances to get the court's attention. What they devised were allegations that Pamela was sexually abusing her children.

In March 1994, Dean sought a temporary restraining order (TRO) prohibiting all contact between Pamela and her children. His affidavit in support of the TRO identified Pamela as a lesbian and cited behaviors which Dean and Christine allegedly observed in the children and which they concluded were "evidence" of sexual abuse. These behaviors included the licking of an iced tea pitcher and "Go Fish" cards by Pamela's daughter Miriam, and the alleged use of "vulgar" language, such as the use of the correct names for body parts, by their son Joshua. Conspicuously absent from Dean's motion and accompanying materials in support of the TRO were supporting affidavits from medical and mental health care experts qualified to make such child sexual abuse determinations.

Pamela was given less than thirty-six hours to respond to the accusations. She called me, desperately in need of legal help. Her previous lawyer in Wyoming did not want to handle the matter. I was not registered to practice in Wyoming, and I didn't know any lawyers there. So, I started making phone calls, utilizing every possible network I could find. Even the Wyoming ACLU would not return my calls. I knew we had an uphill battle on our hands.

Networking through law professors, I eventually connected with Susan Laser-Bair, an attorney with the Cheyenne office of Holland and Hart. When Susan took my call, she was making plans to travel to Chicago because her father had just died. I have often thought that nothing short of divine intervention led me to her. Despite her immediate personal loss, or maybe because of it, she agreed to serve as co-counsel on a *pro bono* basis.

I then worked with my client for about twenty-four hours straight, preparing counter-affidavits and other documents to fax to Laser-Bair to file with the court. Laser-Bair filed the documents, including one to get me admitted *pro hac vice*. I represented Pam during the TRO hearing via a telephone conference call with the judge. Dean, Christine and their lawyer attended in person.

Dean and Christine recited the allegations in their TRO petition. To no one's surprise, the trial court granted the TRO. The court drastically curtailed Pam's contact with her children, limiting her to a handful of supervised visits with her children each year and a single phone call each week. Pamela's partner was barred from all contact with the children.

One would expect a court to err on the side of caution when an issue as potentially devastating as child sexual abuse is raised. On the other hand,

the possibility that the court's decision was primarily motivated by the stereotypical linking of the words "lesbian," "sexual deviant" and "child molester" can never be lightly dismissed.

The TRO drastically and permanently changed Pam's relationship with her children. It changed her status from an involved parent who could celebrate her children's day-to-day activities and developments to a distant relative whose contact was remote and infrequent. When personal visits were allowed, a licensed social worker or childcare worker had to be present to observe Pamela's interaction with her children. The supervisor's presence conveyed a clear message to the children: your mother has done something bad to you and you must be guarded or she will do it again.

Dean and Christine were constantly reinforcing this message by continually denigrating Pamela to the children despite the TRO's prohibition against such conduct. They listened in on Pamela's phone conversations with her children. Dean also told the children (both before and after the TRO) that their mother was in a lesbian relationship, that lesbians were women who had sex with other women, that God did not like their mother because she was a sinner worse than a thief or a liar or a prostitute, that their mother had left them to lead a life of sin, and that Pamela had abandoned them because she did not want to take care of them anymore. Miriam was four years old and Joshua was six at that time.

Four months after the TRO was issued, a four-day hearing was held to determine whether the restrictions on Pamela's visitation were to be permanent. Dean and Christine testified as they had during the TRO hearing about the children's alleged inappropriate behaviors and claiming that any contact with Pamela caused the children to act out inappropriately.

Dean also offered as his expert Lynn Rhodes, who testified that the children had been "eroticized" while visiting with Pamela and that any contact with her would be harmful to them. This "expert" had received his Master's Degree in counseling just two years prior to being retained by Dean and had very little training or experience in child sexual abuse or in custody and visitation disputes. Mr. Rhodes did, however, have twenty-seven years of experience as a minister in a fundamentalist Christian church and a strong personal view that homosexuality was morally wrong. During cross-examination, Mr. Rhodes admitted that he could not identify which part of his "professional opinion" was based on his moral/religious beliefs and which was based on his training as a counselor.

Pamela and her partner testified, denying all of the allegations of sexual abuse and documenting numerous instances where Dean and Christine alienated the children from Pamela in contravention of the TRO. In addition to offering a number of character witnesses who had observed

Pamela with her children in numerous situations, Pamela offered two expert witnesses, Dr. Larry Bloom and Dr. Carole Jenny.

Dr. Larry Bloom was a clinical psychologist who had been evaluating children for sexual abuse for more than seventeen years and who had done extensive clinical research and writing on the topic. Dr. Carole Jenny was a board-certified pediatrician who had devoted more than two decades of her life working with sexually abused children. At the time of trial Dr. Jenny had been serving for four years as the Director of the Child Advocacy and Protection Team at the Denver Children's Hospital.

Drs. Bloom and Jenny independently concluded that the children had not been sexually abused, that the methodology used by Dean's expert, Mr. Rhodes, concluding otherwise was fatally flawed, that Mr. Rhodes' term "eroticization" was not recognized among health care professionals, and that Dean and Christine were causing serious harm to the children by trying to convince them that their mother had harmed them when she had not.

The trial court's opinion following this hearing characterized Pamela as someone who had abandoned her children to pursue an "open homosexual relationship."[6] The court also relied exclusively on Dean's expert, Mr. Rhodes, to find that "eroticization" had occurred when the children visited with their mother. The court rejected the testimony of Drs. Bloom and Jenny as not being "useful or credible."[7] Based on Mr. Rhodes' testimony, the court restricted Pamela's visitation to one Saturday and Sunday visit every other month, done under supervision with no overnight stays, and one phone call per week.[8] The court also offered the following opinion regarding the incompatibility of homosexuality and parenthood:

> The children in this case are confronted with an extreme clash of values and moral beliefs. The Plaintiff's openly expressed values and morals include homosexuality as an acceptable lifestyle, even in the context of a family. The Defendant's values and morals are that homosexuality is not an acceptable lifestyle. As with other moral values, there is no neutral or middle ground on this issue. Openly expressed homosexuality is either presented as acceptable or unacceptable.

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[6] The court issued a Decision Letter containing these findings on July 21, 1994, which were incorporated into an Order Dated Sept. 8, 1994. These documents are on file with the author.

[7] *Id.*

[8] *Id.* at 3.

> The Court finds that this class of values has already caused concern and confusion for Joshua. Homosexuality is generally socially unacceptable, and it is probable that the children will be subject to social difficulties as a result of the Plaintiff's lifestyle in addition to their personal concern.
>
> The State has an interest in perpetuating the values associated with conventional marriage, as the family is the basic cornerstone of our society. Homosexuality is inherently inconsistent with families, and with the relationships and values which perpetuate families.
>
> The moral climate in which children are raised is an important factor in child custody and visitation. The Plaintiff's open homosexual relationship creates much of the moral climate surrounding her life. The moral climate is probable to have an effect on the children's development of values and character which is inconsistent with that supported by the Defendant or society.
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> Because the Plaintiff's open homosexuality has and is likely to create confusion and difficulty for the children, and because her lifestyle is likely to negatively affect the development of the children's moral values, and because the State has an interest in supporting conventional marriages and families, the Court would find it appropriate to reduce the Plaintiff's visitation with the children even if the issues of sexual abuse or eroticization were resolved.[9]

At Pamela's request, the trial court ordered the parties to jointly select a counselor for the children and to report back to the court in six months (i.e., by January 1, 1995). Pamela agreed to a counselor selected by Dean, Dr. Rachael Moriarty. Unlike Dean's trial expert, Dr. Moriarty had significant experience working with sexually abused children and families in conflict.

After extensive sessions with Dean, Christine, Pamela, her partner, and the children, Dr. Moriarty concluded that the children had not been sexually abused and that Dean and Christine's efforts to alienate Joshua and Miriam from their mother were seriously harming them.

Based on this new evidence from the counselor Dean had selected, we moved the trial court for full restoration of Pam's visitation rights and a

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[9] *Id.* at 4-5.

TRO enjoining Dean from continuing to interfere with her relationship with her children.

During a hearing in January 1995, Dr. Moriarty testified at length about her evaluation of the children and the reasons she had concluded that no sexual abuse had occurred. We also provided compelling evidence that Dean and Christine had made numerous false representations to the court about the children's behavior. Despite this new evidence, the court remained convinced that Pamela had eroticized the children and that her contact with them should remain limited.

The judge denied Pamela's requests for extended visitation and chastised Dr. Moriarty for failing to address the "eroticization" which the court had found. The judge's views were clarified in a comment he made in chambers. "The problem with this expert," he said, "is that she wants to be the judge." My view of course, was just the opposite: the problem was that the judge in this case wanted to be the expert.

Since Wyoming has no intermediate courts of appeal, we appealed the trial court's decision to the Wyoming Supreme Court. All five members of the Wyoming Supreme Court agreed with us that the trial judge erred:

> (1) as a matter of law in qualifying Mr. Rhodes, the former minister hired by Dean, as an "expert" in child sexual abuse;
> (2) in its factual findings – including the finding that the children had been "eroticized" while in Pamela's care—based primarily on Mr. Rhodes' interpretation and presentation of the "facts" as he perceived them; and
> (3) in making the decision largely on his personal bias against homosexuality.[10]

Despite these three alternative, independently sufficient grounds for reversal, the three-judge majority voted to affirm the trial court's decisions curtailing Pamela's visitation. The court concluded: "Searching the record for abuse of discretion, we cannot say, under the circumstances revealed, that the district court's decision was either arbitrary or capricious."[11]

Instead of vacating or reversing the lower court's decision based on the numerous errors it contained, Wyoming's highest court applauded the trial judge for having "wisely eased" the restrictions on Pamela's visitation

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[10] Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995).

[11] *Id.* at 950.

rights following the January hearing and recommended (but did not order) the trial court to continue in that direction.[12]

The dissenting justices opined that the case should be remanded to a non-biased judge and that the majority inappropriately based its decision by rewriting the facts in a manner unsupported by the record:

> As I understand the evidence, the cause of the children's inappropriate behavior is found in the father's and Christine's "zealous machinations," not the mother's.
> The record quite clearly reveals that the father and Christine have worked long and hard at alienating these children from their mother. They should have been held in contempt for what they have done; instead, they are, despite the spin placed on it by the majority, rewarded for their outrageous behavior.[13]

Based on the supreme court's mild directive and Pamela's perseverance, the trial judge finally, in October 1996, extended Pamela's visitation to include a few weeks each summer and additional holiday visits. While this order allowed significantly less visitation than she had prior to Dean's false allegations of sexual abuse, it constituted Pamela's most significant victory since the TRO was entered two and a half years earlier: the visits no longer had to be supervised.

As of the summer of 2000—a full seven years after the start of Dean and Christine's campaign to eliminate Pam from her children's lives—Pamela is almost back to the visitation provided in the original agreement between her and Dean. What has not been resolved, and probably never will be, was the devastation Pam experienced in defending herself and the intense pain the children suffered in this process.

Sandor and Hertzler—Comparing and Contrasting the Cases

Hertzler and Sandor both dealt with a mother's loss of her children. Based on my personal observation, Pamela Hertzler's devastation at being accused of sexually abusing her children and having them torn away from her matched the magnitude of that experienced by Mrs. Sandor upon the death of her son. The losses of these parent/child relationships also had a rippling effect throughout the lives of family members, friends, and members of the parties' respective faith communities.

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12 *Id.* at 952.

13 *Id.* at 954.

Both Sandor and Hertzler were frivolous in that neither case had the factual predicate to satisfy the legal remedy the aggrieved parties were pursuing. And in both cases, the mothers looked to the legal system to provide answers, vindication, a remedy—something to explain why these seemingly surrealistic and tragic episodes occurred in their lives. And in both cases, the legal system not only failed to provide a remedy, but actually exacerbated the injuries as the litigation process itself took an immeasurable toll—not just in terms of money and time, but in an unbounded consumption of the emotional, mental and physical strength these women and their children had once possessed.

Differences between the cases are also acute. While both cases lacked a sufficient factual foundation for plaintiffs to recover, the trial court might well have recognized the fatal flaws in Mrs. Sandor's legal theory at the summary judgment stage. No similar opportunity was available to derail Dean's false allegations of sexual abuse. This was not due to the absence of a procedural device in Hertzler—certainly Pamela could have sought summary adjudication of the accusations against her. The court in Hertzler was simply not capable of entertaining the notion that this lesbian was not sexually abusing her children, much less taking the additional step of realizing that Dean and Christine's militant heterosexuality caused serious harm to the children.

It is not a radical proposition that our system of justice does not always work well. Whether the focus is on domestic relations cases or wrongful death claims based on alleged product defects, lengthy court battles often leave us feeling baffled and betrayed by the apparent lack of fundamental fairness in the final resolution of the matter.

But many times the system does work. Domestic relation courts frequently enter custody and visitation orders—often obtained via mediation rather than litigation—that allow both parents to fully participate in their children's lives, regardless of the ongoing animosity of the parents toward each other. And when a product is in fact defective, and where that defect has lead to a death, wrongful death claims commonly result in at least a form of substituted justice. Obviously the law cannot restore the deceased person to his or her family, but the system does provide some compensation, vindication, and perhaps even closure to the family. Certain verdicts have been known to cause manufacturers of dangerous products to change their designs.

My original thesis is based on my personal experiences as a litigator and as an academic who has carefully analyzed hundreds of cases where the sexual orientation of a party has been revealed in the litigation process. Whether the case involves claims of employment discrimination, child

visitation and custody, the right of an individual to serve in the military, the enforceability and interpretation of a cohabitation agreement, or even a criminal prosecution, our system of justice staggers and often collapses under the inappropriate weight attributed to this single and perhaps even irrelevant fact about one party. Our justice system, or more appropriately the judges, litigators and jurors who *are* the system, cannot handle this single piece of information about a party without it tainting every aspect of the case.

And so, the system of justice breaks down. It breaks down like it did hundreds of years ago when Native Americans were first forced from their land and their way of life and given nothing in exchange. It breaks down just like it did 100 years ago when the courts ruled in Plessy v. Ferguson[14] that separate but equal was appropriate treatment for Blacks, despite the obvious fact that equality was not a reality or even a remote possibility in most instances. It breaks down as it did well into this century, when courts held that a woman was the property of her husband, and that he could have her committed to a mental institution on his word that she was suffering from female hysteria.[15]

Let us revisit the Sandor case for a moment. What if Mrs. Sandor was a lesbian who was deeply in love with another woman? And what if that caused tensions between her and Eric? Would I, would any defense attorney, use that information to try to diminish her loss? Would that information be used to subtly lessen Mrs. Sandor's stature in the eyes of the judge and jurors? Would it persuade them to categorize her as "the other," someone quite distinct from them, thus making it much easier to dismiss her profound suffering at the loss of her son?

Or, what if Eric had been gay? Would this fact be subtly exploited in the case, creating an undercurrent that Mrs. Sandor's damages were somehow less because her son was flawed compared to the heterosexual norm? In the extreme, would his death be viewed by some jurors as a benefit to society?

I know the answers to these questions. I have seen them play out repeatedly in the courts, resulting in decisions we all know are fundamentally unfair.

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[14] 163 U.S. 537 (1896).

[15] See Jeffrey L. Geller & Maxine Harris, Women of the Asylum: Voices from Behind the Walls 1840-1945 xx-xxii, 3-5 (1994); Gerald N. Grob, The Mad Among Us: A History of the Care of America's Mentally Ill 84 (1994).

Our system has the capacity to dispense justice fairly and impartially, and it is simply unacceptable when it falls short of those goals. In short, justice cannot close her eyes to the fact that our system routinely breaks down, sometimes insidiously and sometimes demonstrably, when the sexual orientation of a party significantly impacts the justice dispensed, or the justice denied, in a given case.

This juxtaposition of the Sandor and Hertzler cases is but one telling example of why the study and scholarship of sexual orientation and the law is a legitimate enterprise for law students and legal scholars.