

# CONTEXTUALIZING AND ANALYZING ALABAMA'S APPROACH TO GAY AND LESBIAN CUSTODY RIGHTS

## I. INTRODUCTION

In *Ex parte D.W.W.*,<sup>1</sup> the Alabama Supreme Court affirmed the trial court's award of custody and visitation rights of two minor children to their father. The trial court found that the father:

1. "has threatened to kill [the mother], the children, and others";
2. "closed his infant son in a clothes dryer";
3. "ran into a tree stump, totalling his car, while driving intoxicated with his daughter in the vehicle. She was 23 months old at the time and was not secured in a child safety belt";
4. "had received numerous D.U.I. citations before his marriage, one while [the mother] was pregnant with their first child, and one during the pendency of this action";<sup>2</sup>
5. returned the children "from [his] house with flea bites, and both [children] contracted scabies after visiting their father";<sup>3</sup>
6. "has a history of serious alcohol abuse and violence";
7. "has been charged with domestic abuse on three occasions, and [the mother] testified that there were many unreported incidents of abuse during their 10-year marriage";
8. had been cited for "third-degree assault" and was described by police as "highly intoxicated and using abusive language";
9. "was arrested for third-degree assault and . . . the police noted a bruise on [the mother's] left eye and [the police] was forced to apprehend [the father] after he fled the

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1. 717 So. 2d 793 (Ala. 1998).

2. *Ex parte D.W.W.*, 717 So. 2d at 797 (Kennedy, J., dissenting).

3. *Id.* at 798 (Kennedy, J., dissenting).

scene on foot"; and

10. "has consistently demonstrated his willingness to disparage [the mother] in front of the children and to use them as pawns in this [custody] dispute."<sup>4</sup>

The trial court found that the mother:

1. "at times displayed poor parenting skills";
2. "could have found that [the mother] had hit her daughter with the buckle of a belt, leaving marks on the child";<sup>5</sup>
3. heard testimony that the mother had been an "impatient parent," at times "even shaking her son."<sup>6</sup>

The Alabama Supreme Court approvingly cited an additional factor that the trial court found weighed against awarding the mother custody and liberal visitation rights: The children's mother is a lesbian.

The court elaborated on the problems with a lesbian mother having custody of her children: "[T]he conduct inherent in lesbianism is illegal in Alabama. . . . therefore, [the mother] is continually engaging in conduct that violates the criminal law of this state."<sup>7</sup> Exposing the children to "such a lifestyle" could "greatly traumatize them" because the conduct is "illegal under the laws of this state and *immoral* in the eyes of *most* of its citizens."<sup>8</sup> The supreme court held that the trial court's findings with respect to the mother ultimately fulfilled the "strong presumption that the trial judge correctly exercised his discretionary authority"<sup>9</sup>

Although Justice Kennedy, in his dissent, stated that he believed that the "trial court abused its discretion by severely limiting [the mother's] visitation,"<sup>10</sup> the purpose of this Note is not to argue whether Justice Kennedy or the majority most accurately reviewed the appeals court reversing the trial court's award of custody to the father and strictly limiting visitation

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4. *Id.* at 797 (Kennedy, J., dissenting).

5. *Id.* at 795 (Hooper, C.J.) (interpreting the trial court's record).

6. *Id.* (Hooper, C.J.).

7. *Ex parte D.W.W.*, 717 So. 2d at 796 (Hooper, C.J.).

8. *Id.* (emphasis added).

9. *Id.* at 795 (Hooper, C.J.) (citing *Hagler v. Hagler*, 460 So. 2d 187, 188 (Ala. Civ. App. 1984)).

10. *Id.* at 798.

rights to the mother. Rather, this Note argues that the Alabama Supreme Court's decision in *Ex parte D.W.W.* affirms the trial court's violations of the Fourteenth Amendment's guarantee of equal protection under the United States Constitution. Further, various state courts throughout the United States unconstitutionally discriminate against gay and lesbian parents. These courts are motivated by prejudice against and moral disapproval of a homosexual lifestyle.

Denying custody to a woman because she identifies as a lesbian and therefore chooses to spend her life with women is gender discrimination, and such discrimination fails the intermediate level of review articulated in *United States v. Virginia* (or "VMI").<sup>11</sup> Although the best interests of a child is an important governmental interest, denying custody and severely limiting visitation because of a parent's homosexuality—based on the mere fact that the mother is a lesbian and not on how her lesbian lifestyle specifically effects the best interests of her children—certainly is not substantially related to promoting those interests.

## II. OVERVIEW OF CHILD CUSTODY CASES

In child-custody cases, the principal goal is to find a resolution or compromise that is in the best interests of the child.<sup>12</sup> This evaluation is complicated when one parent seeking custody is homosexual. Courts generally have developed three approaches to child-custody determinations when one of the involved parents is homosexual. On one end of the spectrum, there is a per se approach that poses a virtually irrebuttable presumption that homosexual parents are unfit.<sup>13</sup> It consistently denies gay and lesbian parents custody and liberal visitation rights of their

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11. 518 U.S. 515 (1996).

12. See, e.g., *Gandy v. Gandy*, 370 So. 2d 1016 (Ala. Civ. App. 1979) (holding that in custody determinations, the court is guided by the best interests of the child); see also *Bailes v. Sours*, 340 S.E.2d 824 (Va. 1986) (stating that in child-custody cases, the best interests of the child are most important and should guide the decision of a court that is determining the dispute).

13. See, e.g., *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (stating that "[t]he father's continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law.")

children because of the belief that the homosexual lifestyle is inherently immoral and illegal. On the other end of the spectrum is the nexus approach that only considers a parent's homosexuality if it has a distinctly negative impact on the child(ren).<sup>14</sup> Between these two points is a compromise, a middle ground approach. It considers homosexuality as a factor in child-custody determinations, but it does not always lead to the conclusion that because a parent is homosexual, he or she should not have custody.<sup>15</sup>

Informing the application of these approaches are two United States Supreme Court decisions *Stanley v. Illinois*<sup>16</sup> and *Palmore v. Sidoti*.<sup>17</sup> In *Stanley v. Illinois*, an unwed, biological father sought standing to ask for custody of his minor child. The Court ruled that society's biases against nontraditional families (e.g., a single father raising a child) could not overcome the presumption favoring custody to a biological parent.<sup>18</sup> This presumption is particularly strong where there is no evidence that such a parent having custody would harm the minor child.<sup>19</sup> If there is no evidence of a nexus between the parent's status and any adverse impact on the child, then a court simply looks to what is in the best interests of the child, without considering the parent's nontraditional status.<sup>20</sup>

In *Palmore v. Sidoti*, the Court addressed a situation in which a white father sought custody of his child because the white mother had married a black man.<sup>21</sup> The Court recognized society's biases against interracial couples and the possible effect of these biases on the child, but it refused to reinforce those biases by depriving the mother of custody on those grounds.<sup>22</sup>

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14. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (holding that the State may not deprive a parent of custody of his or her children merely because that parent's household may fail to meet the ideals approved of by the community).

15. See, e.g., *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982) (noting that in child-custody cases involving homosexual parents, the determining factor should be the effect that the homosexual relationship has on the child).

16. 405 U.S. 645 (1972).

17. 466 U.S. 429 (1984).

18. *Stanley*, 405 U.S. at 657-68.

19. *Id.*

20. See *id.* at 648-50, 658.

21. 466 U.S. at 430.

22. See *id.* at 433-34. The Court stated: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach

*Palmore* and *Stanley* are significant in the context of gay and lesbian custody suits because they stand for the proposition that courts must look primarily to the best interests of the child. This proposition remains true in light of challenges founded on biases against nontraditional families. Generally, the Supreme Court refuses to reinforce society's existing prejudices.

### A. *The Per Se Approach*

A minority of states follow the per se approach.<sup>23</sup> Theoretically, it applies a rebuttable presumption that a gay or lesbian parent is unfit and that it is not in the best interests of a child to be exposed to a homosexual lifestyle. Applied in practice, however, this presumption is virtually irrebuttable.<sup>24</sup>

An example of the per se approach as applied is the Virginia Supreme Court's decision in *Roe v. Roe*.<sup>25</sup> The trial court awarded joint custody to the father, who was gay.<sup>26</sup> It found that the child was happy and that there was "no evidence that

of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433.

23. Courts in Kentucky, Mississippi, Missouri, Nevada, North Carolina, Tennessee and Virginia mostly follow the per se approach. *See, e.g.*, *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980); *White v. Thompson*, 569 So. 2d 1181 (Miss. 1990); *J.P. v. P.W.*, 772 S.W.2d 786 (Mo. Ct. App. 1989); *G.A. v. D.A.*, 745 S.W.2d 726, 727-28 (Mo. Ct. App. 1987) (denying a lesbian mother custody because her lesbianism and her failure to specify a program of religious training for her child indicated that she would provide an unhealthy and harmful environment); *Daly v. Daly*, 715 P.2d 56 (Nev. 1986); *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. Ct. App. 1979); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123, \*29, 30 (Tenn. App. Mar. 30, 1988) (stating that:

While Mother's homosexuality may be beyond her control, submitting to it and living with a person of the same sex in a sexual relationship is not. . . . [T]his mother should attempt to dissolve her "alternate life style" of homosexual living. Such is not too great a sacrifice. . . . This Court can take judicial notice of the fact that throughout the ages, dedicated, loving parents have countless times made much greater sacrifices for their children.

(Tomlin, P.J., concurring)); *Dailey v. Dailey*, 635 S.W.2d 391 (Tenn. Ct. App. 1981); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

24. Regardless of whether the presumption is rebuttable or virtually irrebuttable, it runs contrary to *Stanley* and *Palmore*. The per se approach *assumes* that a homosexual lifestyle is not in the best interests of the child, whereas *Stanley* and *Palmore* require proof that a nontraditional family structure adversely affects a child.

25. 324 S.E.2d 691 (Va. 1985).

26. *Roe*, 324 S.E.2d at 692.

the father's conduct had an adverse effect on the child.<sup>27</sup> Because the father was living with his male lover, the court conditioned child custody on the father not sharing the same bedroom with any male while the child was present.<sup>28</sup>

The Virginia Supreme Court reversed the trial court and held:

The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law. . . . [W]e have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large. . . . The father's unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification.<sup>29</sup>

Even though the trial court found both parents to be "fit, devoted and competent custodian[s],"<sup>30</sup> the Virginia Supreme Court considered the father's homosexuality to be a *per se* bar to custody.<sup>31</sup> Contrary to the usual analysis applied in custody cases, the court did not look to proof of harm to the child before it irrebuttably concluded that living with a homosexual parent could not be in the best interests of the child.<sup>32</sup>

The court's opinion reveals the prejudices inherent in its formulation. The first of these prejudices is that homosexuality is immoral.<sup>33</sup> Another is that because homosexuality is immoral

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27. *Id.*

28. *Id.*

29. *Id.* at 694.

30. *Id.* at 692.

31. *See Roe*, 324 S.E.2d at 694. Interestingly, a trial court's findings in custody suits are reviewed under an abuse of discretion standard. The trial court's rulings should not be disturbed unless they are plainly wrong or without evidence to support them. *Id.* at 691. The Virginia Supreme Court's reversal of the trial court was based on its finding that the lower court was clearly and palpably wrong and that it abused its discretion. *Id.*

32. *See id.* at 694.

33. The Virginia Supreme Court referred to the father's homosexual relationship as "immoral and illicit." *Id.* Similarly, other courts have explicitly found that homosexuality is immoral. *See, e.g., T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284-85 (Mo. Ct. App. 1989) (finding that the mother's lesbian relationship and the "series of lies" she told in denying it are "proof" of her immorality); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123, at \*129 (Tenn. App. Mar. 30, 1988) (finding that the

and illicit, the gay father is necessarily an unfit and improper parent as a matter of law.<sup>34</sup> The third prejudice is that harm to the child from possible social condemnation inevitably leads to the conclusion that living with her gay father is not in her best interests.<sup>35</sup> The final prejudice is that homosexuality is a selfish, lascivious lifestyle choice.<sup>36</sup>

It is beyond the scope of this Note to specifically address social science data and studies that both refute and support the Virginia Supreme Court's assumptions/prejudices.<sup>37</sup> However, it is important to note that not all Americans believe that homosexuality is immoral. The "immoral" label results from the social and, likely, particular religious beliefs of individual judges. Even if homosexuality could be characterized properly as immoral, it does not necessarily follow that a gay parent is wholly immoral and therefore an unfit parent. Many parents have engaged in immoral conduct of some kind, and while this conduct should not be condoned, it should not also deprive a parent of his or her fitness to raise a child when there is no resulting harm to the child.

Further, the Virginia Supreme Court's decision flies in the face of the Supreme Court's holding in *Palmore v. Sidoti*, decided in 1984, only a year before *Roe*. In *Palmore*, the United States Supreme Court stated that "[t]he Constitution cannot control such [racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>38</sup> *Palmore* is, of course, distinguishable in that race is considered a suspect clas-

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mother set an immoral example homosexuality has been immoral for over two thousand years).

34. In *Roe*, the court noted that a homosexual relationship rendered the father an unfit and improper custodian, as a matter of law. 324 S.E.2d at 694.

35. *See id.*

36. *See id.*

37. It is difficult to point to a social science study that 100% accurately evaluates and determines the effect of a homosexual parent's lifestyle on his or her child(ren). Compare Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, with Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833. See also Philip A. Belcastro, *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105, 110 (1993).

38. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

sification and is subject to the "most exacting scrutiny,"<sup>39</sup> however, as argued in Parts III.A and IV, classifications based on sexual orientation are truly classifications based on gender, therefore subject to intermediate scrutiny—with a bite—under *United States v. Virginia*.

### B. Middle Ground Approach

An approach that is less harsh and unbending than the *per se* approach is the middle ground approach. It modifies the *per se* approach in that it looks at a parent's homosexuality as one factor, albeit a necessary factor, in determining what is in a child's best interests.<sup>40</sup>

In *M.J.P. v. J.G.P.*,<sup>41</sup> the Oklahoma Supreme Court looked to the best interests of the child in making its custody determination.<sup>42</sup> It also used language that indicated that it considered whether a homosexual environment would harm the child an evaluation most common under the nexus approach.<sup>43</sup> However, the court merely surfacely employed the rhetoric of "harm" and nonetheless found that living with a homosexual parent is inherently not in a child's best interests. Indeed, the court actually required the lesbian mother to disprove a presumption of harm.<sup>44</sup>

The court found that the lesbian mother did not rebut the presumption.<sup>45</sup> It relied on a psychiatrist's testimony that it is in the child's best interests to be taught society's mainstream morals, that the child may be teased by people about his mother's lesbianism, and that he may have problems with identification roles.<sup>46</sup> The court ignored studies that found essential-

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39. *Palmore*, 466 U.S. at 432.

40. See, e.g., *H.J.B. v. P.W.*, 628 So. 2d 753 (Ala. Civ. App. 1993); *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct. 1985) (finding that a parent's homosexuality is a relevant consideration in custody disputes involving visitation or partial custody, but a *per se* approach should be rejected).

41. 640 P.2d 966 (Okla. 1962).

42. See *M.J.P.*, 640 P.2d at 968.

43. See *id.* at 968-69.

44. See *id.* at 969.

45. *Id.*

46. *Id.*

ly no difference in the development of the children of homosexual and heterosexual mothers.<sup>47</sup> In addition, no proof was presented of particularized harm to the son; the court assumed that a homosexual lifestyle would not be in the best interests of the child.<sup>48</sup>

The middle ground approach, arguably, merely pays lip service to a consideration of whether living with a homosexual parent is in the best interests of children. Often, it still considers homosexuality to be immoral. It attaches great power and significance to society's reactions to the children of gay and lesbian parents. It assumes that children of homosexual parents will be more likely to have sexual identification problems.<sup>49</sup>

### C. *The Nexus Approach*

The approach that most courts adopt is the nexus approach.<sup>50</sup> This approach not only considers the best interests of

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47. *M.J.P.*, 640 P.2d at 968.

48. *See id.* at 969.

49. An overwhelming number of studies find no connection between a parent's sexual orientation and the development of his or her child. This may indicate that there is no such connection. On the other hand, it may indicate that many researchers are biased towards finding that gay and lesbian parents are fit, capable parents, thereby indicating that perhaps there are not so many Americans who view homosexuality as immoral. *See, e.g.,* Julie Schwartz Gottman, *Children of Gay and Lesbian Parents*, in *HOMOSEXUALITY AND FAMILY RELATIONSHIPS* 177, 189 (Frederick W. Bozett & Marvin B. Sussman eds., 1990) (finding no significant differences in gender role preferences between adult daughters of lesbian mothers and those of divorced heterosexual mothers); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *HOMOSEXUALITY AND THE FAMILY* 123, 132 (Frederick W. Bozett ed., 1989); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 *J. CHILD PSYCHOL. & PSYCHIATRY* 551, 562 (1983) (noting that regardless of parents' sexual orientation, their children were happy with their gender and had no desire to be a member of the opposite sex); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 *AM. J. ORTHOPSYCHIATRY* 545, 545 (1981) (finding no correlation between the sexual orientation of parent and child).

50. Courts that have applied the nexus approach include: *S.N.E. v. R.L.B.*, 699 P.2d 875, 878-79 (Alaska 1985) (holding that the scope of judicial inquiry is limited to facts directly affecting the child's well-being. There must be a nexus between the conduct of the parent relied on by the court and the parent-child relationship. "[I]t is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian."); *Nadler v. Superior Court*, 63 Cal. Rptr. 352 (Cal. Ct. App. 1967); *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973); *Maradie v. Maradie*,

a child, but it also requires a showing that a homosexual parent's lifestyle has an adverse effect on the child.<sup>51</sup> If there is no adverse effect, then a parent's heterosexuality or homosexuality is irrelevant.<sup>52</sup> Furthermore, the burden to prove this harm is on the heterosexual parent, as distinguished from the homosexual parent's burden of rebutting the presumption under the middle ground approach.<sup>53</sup>

An example of an application of the nexus approach is in *Bezio v. Patenaude*.<sup>54</sup> In that case, the trial court held that because the children's mother was a lesbian, the environment that she would provide to them would adversely affect their welfare.<sup>55</sup> The Supreme Court of Massachusetts reversed, finding that:

[A determination] that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average.<sup>56</sup>

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680 So. 2d 538 (Fla. Dist. Ct. App. 1996); *In the Interest of R.E.W.*, 471 S.E.2d 6 (Ga. Ct. App. 1996); *In re Marriage of Martins*, 645 N.E.2d 567 (Ill. App. Ct. 1995); *Teegarden v. Teegarden*, 642 N.E.2d 1007 (Ind. Ct. App. 1994); *Hodson v. Moore*, 464 N.W.2d 699 (Iowa Ct. App. 1990); *Lundin v. Lundin*, 563 So. 2d 1273 (La. Ct. App. 1990); *Whitehead v. Black*, 2 FAM. L. REP. (BNA) 2593 (Maine Super. Ct. Cumberland County, June 1976); *North v. North*, 648 A.2d 1025 (Md. Ct. Spec. App. 1994); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *In re Jacinta M.*, 764 P.2d 1327 (N.M. Ct. App. 1988); *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (N.Y. 1986); *Stroman v. Williams*, 353 S.E.2d 704 (S.C. Ct. App. 1987); *Van Driel v. Van Driel*, 525 N.W.2d 37 (S.D. 1994); *In re marriage of Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986); *Rowsey v. Rowsey* 329 S.E.2d 57 (W.Va. 1985); *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995).

46 *See, e.g.*, *Bezio v. Patenaude*, 410 N.E.2d 1207, 1216 (Mass. 1980) (holding that the State may not deprive homosexual parents custody of their children unless the homosexual behavior is shown to have an adverse effect on the children).

51. *See Bezio*, 410 N.E.2d at 1216.

52. *See, e.g.*, *In re Diehl*, 18 FAM L. REP. (BNA) 1128, 1129 (Ill. App. Ct. 2 Dist., Nov. 1991) (finding that the heterosexual father had not borne his burden of demonstrating the threat of serious endangerment necessary to restrict the lesbian mother's visitation with her daughter).

53. *Bezio*, 410 N.E.2d at 1207.

54. 410 N.E. 2d at 1215

55. *Id.* at 1211.

56. *Id.* at 1216 (citing *Custody of a Minor*, 393 N.E.2d 379, 383 (Mass. 1979)).

The nexus approach does not presume that because a parent is homosexual, then the environment that he or she can provide is automatically harmful to children unless proven otherwise. Indeed, the nexus approach leaves the prejudices of individual judges out of the determination of an award of custody more than the other two approaches.

### III. ALABAMA'S APPROACH TO GAY AND LESBIAN CUSTODY DISPUTES

#### A. *Ex parte D.W.W.*

In *Ex parte D.W.W.*,<sup>57</sup> the Alabama Supreme Court applied a variation of the middle ground approach, basing its evaluation on whether "visitation restrictions were reasonably drawn to protect the best interests of the minor children."<sup>58</sup> The trial court had awarded custody of the couple's two minor children to the heterosexual father, and it had severely restricted the lesbian mother's visitation.<sup>59</sup> The court of appeals reversed the visitation order.<sup>60</sup> The supreme court reversed the appellate court and re-instated the visitation restriction.<sup>61</sup> It held that the trial court had not abused its discretion by imposing the restrictions on the lesbian mother because her homosexual lifestyle had harmed the children and had the continued potential to harm them.<sup>62</sup>

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57. 717 So. 2d 793 (Ala. 1998).

58. *Ex parte D.W.W.*, 717 So. 2d at 795 (emphasis added).

59. *Id.* at 794. The visitation restriction provided that the mother is: entitled to have visitation with the minor children every other weekend . . . from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and one evening of the intervening week; however, such visitation shall be exercised only at the maternal grandparents' home under their supervision and control and in no event shall the children be around [the mother's sexual partner] during *any* visitation period. . . . Neither party shall have overnight adult guests (family excluded) while [the] children are in their home and under their custody unless they are married thereto.

*Id.*

60. *Id.*

61. *Id.*

62. *Ex parte D.W.W.*, 717 So. 2d at 794-96. The supreme court applied an abuse

The supreme court discussed three findings that not only justified it in affirming the trial court, but that also lead it to conclude that the visitation restrictions were "reasonably drawn to protect the best interests of the minor children."<sup>63</sup> Apparently, the court considered the most persuasive finding to be that

appear to have been detrimentally affected by their mother's [homosexual] relationship. . . . Evidence was presented . . . that . . . the children began using inappropriate and vulgar language and required psychiatric counseling. The mother herself admits that her daughter began having problems with manipulation and lying. The evidence showed that this child also experiences problems dealing with anger and that she sometimes acts violently.<sup>64</sup>

Although the court purported to look to the best interests of the children, it simply looked to whether the children were harmed by the mother's lesbian lifestyle, and it unanalytically found that they were.<sup>65</sup> The court did not identify any connection between the daughter's anger and violent outbursts and her mother's homosexuality.<sup>66</sup> In addition, although there is evidence that the children began using inappropriate and vulgar language and received psychiatric counseling, there was no link established between this evidence and their mother being a lesbian.<sup>67</sup> Indeed, Justice Kennedy's dissenting opinion addresses this absence of "causation." He states:

[T]he main opinion . . . argues that the children have been adversely affected by their mother's relationship with [her lesbian partner]. In reality, many of the children's learning and behavioral difficulties began before [the mother] separated from [the fa-

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of discretion standard, stating that "an appellate court cannot substitute its own judgment for that of the trial judge." *Id.* at 794-95 (citing *Geisenhoff v. Geisenhoff*, 693 So. 2d 489, 491 (Ala. Civ. App. 1997)). It also noted that an appellate court cannot alter a trial court's judgment unless it is "clearly and palpably wrong." *Id.* at 795. (citing *Everett v. Everett*, 660 So. 2d 599, 602 (Ala. Civ. App. 1995)).

63. *Id.* This suggests that not only did the trial court not abuse its discretion, but that the supreme court also found the trial court's holding to be reasonable.

64. *Id.* at 796.

65. *Ex parte D.W.W.*, 717 So. 2d at 796.

66. *See id.*

67. *See id.* Indeed, Justice Kennedy's dissent notes that the children only went to counseling because the father had begun taking them to his sessions with *his* alcoholism therapist. *Id.* at 797 n.4 (Kennedy, J. dissenting).

ther] and therefore could not be attributed to [the mother's] relationship with [the partner], as the main opinion implies.<sup>68</sup>

The link between the children's behavioral difficulties and their mother is, apparently, the mere fact that the mother is a lesbian. Indeed, Justice Kennedy points out that "[t]he main opinion's true emphasis seems to be on the supposed illegal nature of [the mother's] lifestyle, and it goes to great lengths to paint a radical picture of [the mother]."<sup>69</sup>

The majority states:

[T]he trial court did not abuse its discretion in considering the effects on the children of their mother's ongoing lesbian relationship. Both women [the mother and her partner] are active in the homosexual community. They frequent gay bars and have discussed taking the children to a homosexual church. Although they do not engage in intimate sexual contact in front of the children, they openly display affection in the children's presence.<sup>70</sup>

There is nothing inherently harmful about the mother being involved in a homosexual community. There is nothing inherently harmful about taking children to a homosexual church, nor is there anything inherently harmful about children witnessing affection between two women. Indeed, the supreme court notes that the women do not allow the children to witness more intimate sexualized contact acts which, homosexual or heterosexual, may be inappropriate for children to witness.<sup>71</sup> Instead, the court is concerned with harm that may arise, not from these activities, but from the homosexual nature of the activities. The implication, then, is that these activities would not be at issue if a heterosexual couple engaged in them. Harm to the children, resulting in an atmosphere that does not promote their best interests, is assumed based on prejudice against homosexuality.<sup>72</sup>

Alabama is one of a shrinking number of states that still

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68. *Id.* at 798 (Kennedy J., dissenting).

69. *Ex parte D.W.W.*, 717 So. 2d at 798 (Kennedy, J. dissenting).

70. *Id.* at 796.

71. *Id.*

72. The court specifically states that "the trial court would have been justified in restricting [the mother's] visitation, in order to limit the children's exposure to their mother's lesbian lifestyle." *Id.*

makes sodomy a crime,<sup>73</sup> and the supreme court uses the fact that sodomy is illegal in order to rationalize enforcing the severely restrictive visitation rights. It states that:

Moreover, the conduct inherent in lesbianism is illegal in Alabama [(citation omitted)]. [The mother], therefore, is continually engaging in conduct that violates the criminal law of this state. Exposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them.<sup>74</sup>

There are two immediately apparent problems with this analysis. First, there was no evidence presented that the mother and her partner ever actually engaged in sodomy. To be homosexual does not necessarily mean that such a relationship involves sodomy.<sup>75</sup> Second, even if the court is justified in assuming that the mother engaged in sodomy, this is a lesser crime than the many in which the father has been repeatedly convicted.<sup>76</sup> Further, sodomy is less directly threatening to the children than the crimes for which the father has been arrested and convicted. The father has been arrested for third-degree assault of the mother.<sup>77</sup> He pled guilty to one assault charge.<sup>78</sup> The father has threatened to kill his children, their mother and others.<sup>79</sup> The father has been charged with domestic abuse on three occasions.<sup>80</sup> He totaled his car because he was driving drunk and ran into a tree stump; at the time, his twenty-three-month old daughter was in the car with him, not secured in a safety seat.<sup>81</sup>

In addition to the direct threat that the father's crimes and arrests pose to the children, his very lifestyle even though it is

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73. "A person commits the crime of sexual misconduct if: . . . He or she engages in deviate sexual intercourse with another person under circumstances other than those covered by Sections 13A-6-63 and 13A-6-64." ALA. CODE § 13A-6-65(a)(3) (1975).

74. *Ex parte D.W.W.*, 717 So. 2d at 796.

75. Sodomy is a misdemeanor under Alabama law. ALA. CODE § 13A-6-65(b).

76. The majority does not acknowledge the fact that the mother has never been convicted of the crime of sodomy, and yet the father has been convicted of numerous D.U.I.s. See *Ex parte D.W.W.*, 717 So. 2d at 797 (Kennedy, J. dissenting).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Ex parte D.W.W.*, 717 So. 2d at 797 (Kennedy, J. dissenting).

heterosexual causes harm to the children. The father closed his infant son in a clothes dryer.<sup>82</sup> The children often returned from their father's house with flea bites.<sup>83</sup> They contracted scabies after visiting their father.<sup>84</sup> The father allegedly increased his son's Ritalin dosage without consulting the child's physician.<sup>85</sup> The daughter's school had called to complain about her personal hygiene, after weekend visits with her father.<sup>86</sup> Although there were several negative effects associated with the mother's parenting, the primary reason for upholding the restrictions on her visitation was her homosexuality, despite any meaningful connection between harm to the children and the mother's lesbianism.<sup>87</sup>

A problem that the *Ex parte D.W.W.* decision did not address is that of Equal Protection violations. Applying the standard in *United States v. Virginia*,<sup>88</sup> that a state's justification for gender discrimination must be "exceedingly persuasive,"<sup>89</sup> denying custody to the mother and strictly limiting her visitation rights is gender discrimination that does not have an exceedingly persuasive justification. In considering whether the justification for gender discrimination is "exceedingly persuasive," the state's gender classification must serve an "important governmental objective[]," and "the discriminatory means employed" must be "substantially related" to achieving those objectives.<sup>90</sup> Further, the justification "must not rely on overbroad generalizations about the different talents, capacities,

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82. *Id.*

83. *Id.* at 798.

84. *Id.*

85. *Id.* at 797.

86. *Ex parte D.W.W.*, 717 So. 2d at 797 (Kennedy, J. dissenting).

87. The majority noted that the trial court could have found that the mother had hit her daughter, leaving marks on her. *Id.* at 795. However, Justice Kennedy's dissent explained that these marks on the daughter actually resulted from the mother grabbing the daughter's arm to rescue her from drowning in a pool. *Id.* at 798. The majority also noted that testimony presented to the trial court indicated that the mother had "at times displayed poor parenting skills[.]" and also that she had been impatient. *Id.* at 795.

88. 518 U.S. 515 (1996).

89. *VMI*, 518 U.S. at 552-53 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 24 (1982)).

90. *Id.* at 553 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724)).

or preferences of males and females.<sup>91</sup> This intermediate level of review (perhaps even intermediate-with-a-bite) applies to gender classifications, not homosexual classifications specifically. However, because sexual orientation and one's choice of a partner is inextricably intertwined with gender, gender discrimination necessarily fits into the equation of discrimination against gay men and lesbians.

The trial and supreme courts' decisions are primarily based on the fact that the mother is a lesbian.<sup>92</sup> Considering the sexual activity of the mother arguably serves an important governmental objective—promoting the best interests of the children. However, the trial and supreme courts did not find the mother's activity with her partner to be per se against the best interests of her children; ultimately, it was against their best interests because of the fact that the mother is a woman, not a man, in a relationship with another woman. If the mother were a *man* engaging in the kind of relationship that she has with her *female* intimate partner, then the Alabama courts certainly would not have maintained the position that they did in this case. Indeed, there was no evidence presented that the mother and her female companion ever displayed any inappropriate sexual affections in front of the children.<sup>93</sup> There is no connection, much less a substantial relationship, between the state's objective of preserving the best interests of the children and the discriminatory means employed, thereby violating the Supreme Court's mandates in *United States v. Virginia*.<sup>94</sup>

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91. *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

92. See discussion *supra* pp. 9-12.

93. See *Ex parte D.W.W.*, 717 So. 2d at 795-96.

94. It is, therefore, unnecessary to move to the second part of the inquiry: whether a permissible justification impermissibly relies on overbroad generalizations. It is also unnecessary to examine whether there is an exceedingly persuasive justification involved in the state's possible interest in enforcing its laws against sodomy. Indeed, the mother was not charged or convicted of sodomy, and there was no proof presented that she had even engaged in the conduct of homosexual sodomy. See *id.* at 798 (Kennedy, J., dissenting).

The main opinion questions [the mother's] parental fitness, based on the alleged criminal nature of her relationship with [her partner]. Despite a complete lack of evidence regarding the specifics of [the mother's] sex life, the main opinion accuses [her] of "continually engaging in conduct that violates the criminal law of this state" [citation omitted], and suggests that lesbianism, in general, is illegal under § 13A-6-65(a)(3), Ala. Code 1975.

B. *Ex parte J.M.F.*

*Ex parte J.M.F.*<sup>95</sup> is another Alabama Supreme Court decision in which the court relied primarily on the mother's homosexuality to find that she should not have custody of her child. However, *Ex parte J.M.F.* is distinguishable from *Ex parte D.W.W.* because the daughter in *Ex parte J.M.F.* did not experience any effects, much less any negative effects, from her mother's lesbianism.<sup>96</sup>

In *Ex parte J.M.F.*, the mother was awarded custody of her daughter upon her divorce from the child's father.<sup>97</sup> The father did not object to the mother having custody, although the mother was involved in a homosexual relationship, as long as the mother kept the relationship discreet.<sup>98</sup> When the father learned that the affair was not discreet,<sup>99</sup> he sought and was awarded custody of his daughter. The trial court found that he met the heavy burden of proving that such a change in custody would "materially promote the child's best interest" by showing that "the positive good brought about by the modification would more than offset the inherently disruptive effect caused by uprooting the child."<sup>100</sup> It further found that the father even met the additional burden imposed in change-of-custody cases based solely on sexual misconduct—proving that the misconduct has a detrimental effect on the child.<sup>101</sup> The supreme court still found that the trial court did not abuse its discretion in holding that the child should live with the heterosexual father.<sup>102</sup> The evidence presented in *Ex parte J.M.F.* showed that neither the mother nor the father had any record of poor parenting

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*Id.* (quoting *id.* at 796 (main opinion)).

95. 730 So. 2d 1190 (Ala. 1998).

96. See *Ex parte J.M.F.*, 730 So. 2d at 1192-93.

97. *Id.* at 1191.

98. *Id.* at 1191-92.

99. *Id.* at 1192-95. The father concluded that the affair was not discreet based on the fact that the mother and her partner were openly displaying their affection and that they shared a bedroom. *Id.*

100. *Ex parte J.M.F.*, 730 So. 2d at 1194 (citing *Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984)).

101. *Id.*

102. *Id.* at 1196.

skills.<sup>103</sup>

The child was also examined by three psychologists, two concluding that the child was a healthy, normal girl who did not exhibit any pathology or mental illness.<sup>104</sup> The child's primary therapist, Dr. Sharon Gotlieb, testified that the "child's relationship with her mother is excellent" and that it was beneficial to the child.<sup>105</sup> She further testified that "a change in custody would have a substantial detrimental effect on the child, perhaps causing her to have immediate and/or long-term behavior problems, school problems, or depression."<sup>106</sup> The court-appointed psychologist, Dr. Karen Turnbow, stated that the child had a good relationship with her mother and father.<sup>107</sup> In a custody situation, Dr. Turnbow did not think that the homosexuality of a parent should be the sole consideration.<sup>108</sup>

The pastoral counselor, Dr. Daniel McKeever, brought in by the father to evaluate the child, had different conclusions than those of Dr. Gotlieb and Dr. Turnbow.<sup>109</sup> The father brought the child to Dr. McKeever because he said that he had observed the child touching herself excessively in the genital area.<sup>110</sup> Dr. McKeever testified that the child may have "issues of anger and sexuality, based upon his perceptions of the child's play with anatomically correct dolls."<sup>111</sup> He was also suspicious that the child may have been subjected to physical abuse.<sup>112</sup> The court assumed that this "abuse" would have come from the mother.<sup>113</sup> He could not be sure of these findings, though, because he had only met with the child twice, and he never interviewed the mother or the mother's partner.<sup>114</sup> The supreme court also reviewed evidence presented to the trial court concerning scientific studies of the effect on a child of growing up in a homosexu-

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103. *See id.* at 1191-96.

104. *Id.*

105. *Ex parte J.M.F.*, 730 So. 2d at 1193.

106. *Id.* (emphasis added).

107. *Id.*

108. *Id.*

109. *Id.*

110. *See Ex parte J.M.F.*, 730 So. 2d at 1193.

111. *Id.*

112. *Id.*

113. *See id.* at 1193-94.

114. *Id.*

al home. Dr. James Collier testified that he had reviewed at least fifty articles from journals that are subject to peer review, and the articles consistently found that there are no adverse consequences for children growing up in a homosexual household.<sup>115</sup> The child's guardian ad litem, Terry Cromer, noted that there are also studies that come to the opposite conclusion.<sup>116</sup>

The supreme court nonetheless found that the trial court did not abuse its discretion in taking custody away from the mother and imposing restricted visitation on her because of two changes in circumstances.<sup>117</sup> First, the father had married again and was no longer a single parent.<sup>118</sup> Second, the mother's lesbian relationship went from being discreet to being openly displayed.<sup>119</sup> There are two primary problems with the court's rationale in this holding. First, there is no reliable evidence to support a finding that not living with the mother promotes the child's best interests. Indeed, the majority of the evidence presented consisting of psychological evaluations and social science data actually indicates that living with her lesbian mother would not harm the child and may actually be in the child's best interests.<sup>120</sup> Privileging a heterosexual environment merely because the environment is not homosexual reinforces society's stereotypes and prejudices that a homosexual home is inferior to a heterosexual home. This conclusion violates the United States Supreme Court's mandates in *Palmore v. Sidoti*.<sup>121</sup>

Surprisingly, the trial court found that the father carried the heavy burden of proving that "the positive good brought about by the modification would more than offset the inherently disruptive effect" of uprooting the child<sup>122</sup> because the father

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115. *Ex parte J.M.F.*, 730 So. 2d at 1193.

116. *Id.*

117. *Id.* at 1195. The visitation restrictions did not allow the mother to visit with the minor child in the company of a person to whom she is not related by blood or marriage. Additionally, the restriction did not apply to the company of "the general public, casual, professional, platonic or business relationships." *Id.* at 1194.

118. *Id.*

119. *Ex parte J.M.F.*, 730 So. 2d at 1194.

120. *See id.* at 1195.

121. *See* 466 U.S. 429 (1984).

122. *Ex parte J.M.F.*, 730 So. 2d at 1194 (citing *Ex parte McLendon*, 455 So. 2d

had established a happy marriage with a woman who loved the child.<sup>123</sup> Although it is true that living with the father would most likely not harm the child, it is highly suspect to assert that such benefits are so strong as to outweigh the significant effect on the child of taking her away from her mother.<sup>124</sup>

The Alabama Supreme Court seems to advance the myth of the ideal "traditional family." In *The Potential Impact of Homosexual Parenting on Children*, Lynn D. Wardle<sup>125</sup> elaborates on the alleged advantages of a traditional family. Specifically, Wardle cites "experts" that find with "surprising unanimity" that

[m]others smile and verbalize more to the infant than fathers do, and generally rate their infant sons as cuddlier than fathers do. Moreover, "[m]en encouraged their children's curiosity in the solution of intellectual and physical challenges, supported the child's persistence in solving problems, and did not become overly solicitous with regard to their child's failures." One study found that six-month-old infants whose fathers were actively involved with them "had higher scores on the Bailey Test of Mental and Motor Development." Infants whose fathers spend more time with them are more socially responsive and better able to withstand stressful situations than infants relatively deprived of substantial interaction with their fathers. . . . Fathers have a powerful influence upon academic achievement of children, and "[m]any researchers today believe that a father's expectations regarding future roles for his child will have an influence upon the child's

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863 (Ala. 1984)).

123. *Id.* at 1195.

124. The court makes the comparison between the home offered by the father and by the mother:

[T]he inestimable developmental benefit of a loving home environment that is anchored by a successful marriage is undisputed. The father's circumstances have changed, and he is now able to provide this benefit to the child. The mother's circumstances have also changed, in that she is unable, while choosing to conduct an open cohabitation with her lesbian life partner, to provide this benefit.

*Id.* at 1196. A heterosexual environment is simply better, according to the court, for the child. This is unsupported by two of the three psychologists who examined the child (and, certainly, the objectivity of the religious-affiliated dissenting psychologist, whose brief evaluation was premised on the father's unsubstantiated fears, should be seriously questioned). *See id.* at 1193. It is also unsupported by much of the scientific evidence that was presented. *See id.* at 1194-96.

125. 1997 ILL. L. REV. 833, 857-61.

cognitive competence.<sup>126</sup>

This research of experts illustrates that sons who are raised in homes without fathers—who are raised in untraditional homes—will be cuddled more than other sons in traditional homes because mothers cuddle sons more than fathers and there will be no fathers to balance-out the cuddling effects. Sons in single-parent homes, or even worse, in lesbian homes (double the cuddles!), will be feminized. They will grow up to be feminine men, homosexual perhaps. Research also shows that boys and girls raised by single mothers will grow up feeble-minded and physically stunted. They will be less able to interact in society and handle stress. Finally, the lack of a father figure will handicap children's cognitive competence. In sum, children growing up in households with single mothers will be socially, mentally and physically inept and lack proper gender identities. And this does not even account for the damage that *two* women can do, raising children in a lesbian family.

Wardle's cited research illustrates the stereotypes and serious misconceptions that in large part form the foundation for asserting the goal of preserving the traditional family. Specifically, traditional families are important because children need the different role models provided by mothers and fathers. Children need the balance of women nurturing them and taking care of their emotional needs and men challenging them and taking care of their intellectual and physical development. These assumptions are based, as the research above clearly illustrates, on stereotypes that cast women in roles that existed in the Nineteenth Century, perhaps even further back. And yet these are the same roles that some courts implicitly encourage women and men to play by promoting the "traditional" family.

A second problem with the supreme court's rationale is that its conclusion—that the change in the mother's lesbian relationship from discreet to more open is not in the child's best interests—is also based on prejudice against homosexuality in gener-

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126. *Id.* at 858 (citing Tiffany Field, *Interaction Behaviors of Primary Versus Secondary Caretaker Fathers*, 14 DEVELOPMENTAL PSYCHOL. 183-84 (1978) and quoting L. Colette Jones, *Father-Infant Relationships in the First Year of Life*, in DIMENSIONS OF FATHERHOOD 92, 105 (Shirley M. H. Hanson & Frederick W. Bozett eds., 1985)).

al. Importantly, though, it encourages gay and lesbian parents to keep clandestine the nature of their relationships and their love. It is indisputable that children should not be exposed to a parent's heterosexual or homosexual misconduct where such misconduct has a detrimental effect on a child.<sup>127</sup> However, the mother in *Ex parte J.M.F.* did not participate in sexual misconduct in the presence of her child if, indeed, it should be assumed that she participated in *sexual misconduct* at all. Moreover, there was no evidence of any detrimental effects on the child.<sup>128</sup> The mother merely expressed her love and affection for her lesbian partner. Yet the court, apparently, censors even this affection, preferring it to be kept secret from children.<sup>129</sup>

One could argue that the supreme court was merely giving proper deference to the trial court. However, the supreme court's discussion undermines this conclusion. The court justifies its decision by stating that the mother

has chosen to expose the child continuously to a lifestyle that is "neither legal in this state, nor moral in the eyes of most of its citizens." . . . [T]he inestimable developmental benefit of a loving home environment that is anchored by a successful marriage is undisputed. The father's circumstances have changed, and he is now able to provide this benefit to the child. The mother's circumstances have also changed, in that she is unable, while choosing to conduct an open cohabitation with her lesbian life partner, to provide this benefit.<sup>130</sup>

Just as in *Ex parte D.W.W.*, the supreme court favored a heterosexual parent, absent any showing that the homosexual environment is not in the best interests of the child. Indeed, the court may even make a more drastic statement in *Ex parte J.M.F.*, where the child has experienced no adverse effects in general and where the standard for changing custody is higher than in

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127. See *Taylor v. Taylor*, 563 So. 2d 1049, 1051 (Ala. Civ. App. 1990) (holding that where a parent seeks a change of custody based on heterosexual misconduct of the custodial parent, Alabama law requires an additional showing that the misconduct has a detrimental effect on the child).

128. See *Ex parte J.M.F.*, 730 So. 2d at 1193.

129. The court assumed that the child saying on several occasions that "girls could marry girls" indicated that living with her lesbian mother was not in the best interests of the child. See *id.* at 1192.

130. *Id.* at 1196 (quoting *Ex parte D.W.W.*, 717 So. 2d at 796).

*Ex parte D.W.W.*

What the Alabama Supreme Court holds, then, is that, under the guise of a "best interests of the child" test, a homosexual household is inherently, and without any required showing of proof, not in the best interests of a child. While it may appear, judging from the language that the supreme court uses, that Alabama is a jurisdiction that takes the middle ground approach, or even the nexus approach with its discussion of adverse effects on the child it is really coming closer to being a *per se* approach jurisdiction.

#### IV. CONSTITUTIONAL IMPLICATIONS OF ALABAMA'S APPROACH TO GAY AND LESBIAN CUSTODY RIGHTS

Regardless of their categorization, the decisions in *Ex parte D.W.W.* and *Ex parte J.M.F.* both violate the mothers' rights under equal protection under the Fourteenth Amendment. As discussed in Part III.A, there is no "exceedingly persuasive" justification<sup>131</sup> for treating a woman in an intimate relationship with a woman differently from a man in an intimate relationship with a woman. Accepting the presumption that the ensuring the best interests of a child are "important governmental objectives,"<sup>132</sup> the discrimination is not substantially related to achieving those objectives.<sup>133</sup> Indeed, the only true link between this interest and depriving the mothers of custody and imposing strict visitation rights is discrimination against women in relationships with women—prejudice against homosexuality.

Analyzing the courts' rationales for denying such custody reveals that the gender discrimination is not substantially related to furthering the best interests of a child. The Alabama Supreme Court asserted that homosexuality is immoral, that children of homosexuals should not be exposed to this immoral environment, and that immoral parents are not fit parents.<sup>134</sup> A fundamental problem with these conclusions is that there is no

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131. *VMI*, 518 U.S. at 533 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

132. *Id.* (citing *Mississippi Univ. for Women*, 458 U.S. at 724).

133. *Id.*

134. See generally, *Ex parte D.W.W.*, 717 So. 2d at 796; *Ex Parte J.M.F.*, 730 So. 2d at 1196.

proof that homosexuality is, indeed, immoral.<sup>135</sup> A determination of immorality is the result of the individual beliefs of particular justices. To simply assume that homosexuality is immoral is a faulty basis upon which to found a decision because evidence is generally not heard on what constitutes morality and immorality in custody disputes, and judges, instead, consistently impose their personal morality on others when making such a determination.<sup>136</sup>

Presenting homosexuality as immoral because it is a crime also is an unsuccessful approach to creating a substantial relationship between gender discrimination and promoting the best interests of children. The first problem with this analysis is assuming that *status* (identifying oneself as "homosexual") directly translates into *conduct* (engaging in acts of homosexual sodomy). Another problem is equating violating a law with immorality. If committing a crime were equated with immorality, then many Americans, indeed, would be immoral. It is unfortunate, but many people violate traffic laws, copyright laws, laws regarding what two consenting, unmarried and married, heterosexual adults do in the privacy of their bedroom, and numerous other laws.<sup>137</sup> Although courts certainly should not ignore that parents commit certain crimes, at the same time they should not condemn all parents who commit these *malem prohibitorum* crimes as immoral and, therefore, as not deserving custody and visitation rights of their children.<sup>138</sup>

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135. See, e.g., Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 549-57 (1990) (arguing the morality of lesbian conduct).

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A principled judge should not simply enforce her or his own personal morality. There is no social consensus about the morality of homosexual conduct or even nonmarital heterosexual conduct; instead, the morality of much sexual conduct is both contested and unsettled. Under these conditions, invocation of universally accepted standards of morality is unpersuasive.

Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 655-56 (1996).

137. *Id.* at 657.

138. Of course, there is a different question involved when parents commit *malem in se* crimes, such as murder, armed robbery, rape, and so on.

## V. CONCLUSION

With the Alabama Supreme Court's recent decisions in *Ex parte D.W.W.* and *Ex parte J.M.F.*, the court has clarified Alabama's approach to determining whether gay and lesbian parents will be awarded custody. Although the language that the court employs indicates that it uses a middle ground approach purportedly considering the best interests of the child when making custody determinations its approach as applied really comes closer to the per se approach used in a minority of jurisdictions. The court considers what is in the best interests of children, but such consideration deems homosexuality in general as not furthering children's best interests. The court reaches these conclusions either absent proof or absent logical connections of available proof to any adverse effects on children involved in the custody dispute.

In order to preserve the constitutional rights of all parents regardless of sexual orientation the court should adopt the nexus approach, as a majority of jurisdictions in the nation have done. A nexus approach would not consider homosexuality as a factor unless a homosexual lifestyle was proven to have adverse effects on the child(ren) involved, thereby not promoting their best interests. It would allow children to live in a homosexual environment, when the alternative involves, for example, a heterosexual environment in which the father drives drunk with his young child unrestrained in his car, puts his infant son in a clothes dryer, and threatens the lives of his family members.

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