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Doe v. Doe: Destroying the Presumption that Homosexual Parents are Unfit- The New Burden of Proof

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COMMENTS

DOE v. DOE: DESTROYING THE PRESUMPTION THAT HOMOSEXUAL PARENTS ARE UNFIT—THE NEW BURDEN OF PROOF

I. INTRODUCTION

In a recent decision concerning adoption, the Virginia Supreme Court declined "to hold that every lesbian mother or homosexual father is *per se* an unfit parent."[1] This finding was apparently at odds with Virginia statutes outlawing marriages between members of the same sex[2] and making it a criminal offense to engage in a homosexual relationship.[3] In rejecting the trial court's use of a conclusive legal presumption that homosexuality is tantamount to a parent's unfitness, the justices closely examined the effects of the appellant's lesbianism upon her son to "determine whether the consequences of harm to the child of allowing the parent-child relationship to continue are more severe than the consequences of its termination."[4]

The purpose of this comment is to analyze the probable precedential value of *Doe v. Doe.* Though it is one of very few state supreme court decisions clarifying the rights of homosexual parents, it falls within a large number of similar cases of the past decade, litigating custody and visitation rights, which have received considerable attention by commentators.[5] The central significance of *Doe* is that it places Virginia courts squarely within a recent body of law which supports the child-rearing rights of homosexual parents by demanding some clear, factual showing that either homosexuality renders the particular parent unfit, or that his or her homosexuality or homosexual relationship with a partner concretely harms the child. This analysis will make comparisons to other recent decisions in custody and visitation cases to better assess the value of

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1. Doe v. Doe, 222 Va. 736, 284 S.E.2d 799, 806 (1981).

2. VA. CODE ANN. § 20-45.2 (Repl. Vol. 1975) ("A marriage between persons of the same sex is prohibited.").

3. VA. CODE ANN. § 18.2-361 (Cum. Supp. 1981) (crimes against nature).

4. 222 Va. at 747, 284 S.E.2d at 805.

5. *See, e.g.,* Campbell, *Child Custody: When One Parent is Homosexual,* 17 JUDGES J., No. 2 at 38 (1978); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 BUFFALO L. REV. 691 (1976); Comment, *Bezio v. Patenaude: The "Coming Out" Custody Controversy of Lesbian Mothers in Court,* 16 NEW ENGLAND L. REV. 331 (1981). *See generally* the six articles in the symposium at 30 HASTINGS L.J. 799 (1979).

the *Doe* decision for future litigants. The first part will briefly survey some older decisions where judicially imposed standards of proof were absent. Secondly, the facts, the constitutional arguments, and the burden of proof as to the homosexual factor are analyzed. Finally, the analysis will suggest limits to *Doe's* precedential value.

II. Historical Background: The Confusion About Legal Standards

Writing some years ago, two commentators protested that the absence of precise standards of proof in custody cases involving lesbian mothers allowed "judicial homophobia"[6] and unfairly prejudiced the rights of homosexual parents. Some courts, denying custody or visitation to lesbians, gave no concrete reasons for their holdings, but merely recited phrases such as "adverse effect" or presumed a minority sexual preference automatically proved a parent unfit. No causal connection between the homosexuality of the parent and harm to the child was proven or explained in the decisions. Courts which claimed to use some nexus requirement "failed to define how specific and how strong the necessary showing of causal connection must be."[7]

The fact that statutory and common law standards are purposefully vague partly explains the problem. The "best interests of the child" standard, universally applied in custody cases, and the "material change of circumstances" standard, used in change of custody suits, are intended to vest the courts with the broadest discretion.[8] Where the state seeks to remove a child from parental control, language in the statutory standards is broad, perhaps requiring a showing that the child was "neglected" or the parent "depraved."[9] The Virginia termination statute, for example, allows adoption of one's child where the consent of the natural parent "is withheld contrary to the best interests of the child."[10] One study of the application of such termination statutes showed that three experienced juvenile court judges studying the same ninety-four cases agreed with each other in less than half the cases and failed to concur on the priorities

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6. The word "homophobia" has been used by psychologists and commentators to denote an irrational fear of homosexuals in American society. *See* Basile, *Lesbian Mothers I*, 2 Women's Rights L. Rep. 3 (1974); Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 Civ. Lib. Rev. 19 (1979); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (1979).

7. Hunter & Polikoff, *supra* note 5, at 714-15.

8. H. Clark, The Law of Domestic Relations in the United States 572 (1968).

9. *See, e.g.*, Mich. Comp. Laws Ann. § 712A.2 (Supp. 1981); Cal. Welf. & Inst. Code § 600(d) (West 1972); Ill. Ann. Stat. ch. 23, § 2360 (Smith-Hurd 1968).

10. Va. Code Ann. § 63.1-225(c) (Repl. Vol. 1980). For a discussion of the Virginia statute's constitutionality and its effective guidelines, concluding that the standards are specific, and that the law passes constitutional muster, see Comment, *Termination of Parental Rights—An Analysis of Virginia's Statute*, 15 U. Rich. L. Rev. 213 (1980).

among factors to be considered in their determinations.[11]

Where one factor in a case is homosexuality, the possibilities of judicial abuse are particularly clear. Absent any judicially imposed standard of proof about homosexuality as a factor, the trial court judge does not need to specify the weight given any one factor; the reviewing court could either defer to the trial court below or simply posit that the trier of fact may well have considered factors other than homosexuality controlling.

That the absence of any nexus test meant homosexuals were not secure in their rights as natural parents was illustrated by a number of cases. While one Tacoma, Washington, judge awarded custody to a lesbian mother, holding the stability of the relationship between the mother and her sexual partner was not detrimental to the child,[12] a judge in an adjacent county denied a lesbian mother custody because the "[t]he living arrangement of their mother is an abnormal one and is not a stable one."[13] The latter holding was in spite of the children's preference and contrary to expert opinions of a psychologist, a psychiatrist, and a caseworker. The detriment to the children was not concretely specified. Similarly, in a change of custody case, a lesbian mother lost custody because a court concluded, without concrete evidence, that the child was emotionally disturbed because of her mother's sexual preference[14] and "that the home environment with her [mother's] homosexual partner in residence is not a proper atmosphere in which to bring up this child or in the best interest of the child."[15] The court appears to have accepted a psychiatrist's testimony that the child might emulate the mother as among the reasons to accept petitioner's argument that a sufficient change of circumstances existed.

Visitation rights of homosexual parents have also been curtailed or significantly restricted without courts detailing reasons. Typically, one Pennsylvania court curtailed a homosexual father's visitation rights because the children might "be exposed to improper conditions and unde-

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11. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973), *cited in* Brief for Appellant at 44, Doe v. Doe, 222 Va. 736, 284 S.E.2d 799 (1981) [hereinafter cited as Brief for Appellant].

12. Driber v. Driber, No. 220748 (Wash. Super. Ct., Pierce County, Sept. 17, 1973), *cited in* Hunter & Polikoff, *supra* note 5, at 699.

13. Koop v. Koop, No. 221097 (Wash. Super. Ct., Pierce County, Sept., 1973), *cited in* Hunter & Polikoff, *supra* note 5, at 699. These and other cases unreported in appellate reporters are collected in K. DAVISON, R. GINSBURG, & H. DAY, SEX BASED DISCRIMINATION (1974).

14. *In re* Jane B., 85 Misc. 2d 515, 527, 380 N.Y.S.2d 848, 860 (Sup. Ct. 1976). *See also* O'Harra v. O'Harra, No. 73-384 E (Or. Cir. Ct., 13th Jud. Dist., June 18, 1974), *aff'd*, 20 Or. App. 123, 530 P.2d 877 (1975); Townend v. Townend, 1 Family L. Rptr. 2830 (Ohio Ct. C.P., Portage County, March 14, 1975), *analyzed in* Hunter & Polikoff, *supra* note 5, at 696-97.

15. 85 Misc. 2d at ___, 380 N.Y.S.2d at 858.

sirable influences."[16] A New Jersey decision, which claimed fundamental parental rights cannot be denied on the basis of "sexual orientation *per se*," severely restricted visitation and prohibited the children's involvement in gay protest marches, meetings, and social gatherings because of "the possibility of inflicting severe mental anguish and detriment on three innocent children."[17] The detriment was not concretely discussed. Courts have also failed to properly delineate causal connections between parental homosexuality and harm to the child in cases where homosexual parents lost custody to third party relatives.[18]

While lesbian mothers did prevail in some suits in the decade of the seventies,[19] most courts, without pronouncing homosexual parents *per se* unfit, engaged in presumptions which denied them the rights awarded most natural parents. Courts typically presumed that psychological damage was bound to occur in the child of a homosexual parent, or that the rearing of the child in a homosexual home environment assures that the child will assume the same sexual preference, or that peer group pressures, by stigmatizing the child, will cause him or her trauma. Courts very often acted to prevent *future* harm to the child. The *Doe* decision and other contemporaneous holdings have significantly modified this judicial posture by requiring a new burden of proof.

III. *Doe v. Doe:* The Nexus Test and the Burden of Proof

A. *The Facts in* Doe

Custody was not at issue in *Doe*. Rather, the suit originated when Ann Smith Doe, the second wife of John Doe, joined her husband to petition for the adoption of Jack Doe pursuant to the Virginia statute.[20] Jane Doe, the natural mother, refused to give consent. When a Franklin County court found she withheld consent against the "best interests of the child," Jane Doe appealed on the grounds that the trial court finding was not

16. Commonwealth v. Bradley, 171 Pa. Super. Ct. 587, 593, 91 A.2d 379, 382 (1952).

17. *In re* J.S. & C., 129 N.J. Super. 486, 497, 324 A.2d 90, 97 (1974).

18. *See* Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); Bennett v. Clemens, 230 Ga. 317, 196 S.E.2d 842 (1973); Commonwealth *ex rel.* Ashfield v. Cortes, 210 Pa. Super. Ct. 515, 234 A.2d 47 (1967). *See also* analysis in Hunter & Polikoff, *supra* note 5, at 705-11.

19. *See* Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); Mitchell v. Mitchell, No. 240665 (Cal. Super. Ct., Santa Clara County, June 8, 1972); Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973); A. v. A., 15 Or. App. 353, 514 P.2d 358 (1973); Schuster v. Schuster, No. D-36868, consolidated with Issacson v. Issacson, No. D-36867 (Wash. Super. Ct., King County, Dec. 22, 1972). *Nadler* and *A. v. A.* clearly disclaim the presumption that homosexuals are unfit parents *per se*. In all of these cases except *Nadler* where lesbian parents retained or gained custody, the court attached conditions prohibiting the children's exposure to homosexual environments. *See* notes 85-92 *infra* and accompanying text.

20. Va. Code Ann. § 63.1-221 (Repl. Vol. 1980).

supported by the evidence.[21]

Jane Doe married John while she was attending Vanderbilt University, where she obtained a master's degree. After three years in Nashville, John, a Ph.D., honored his commitment to the Army by serving two years in the Washington, D.C., area, where Jack Doe was born in June, 1971. John experienced psychological depression, and the marriage suffered. He obtained an early release from the Army in June, 1972; and the parties eventually moved to Yellow Springs, Ohio, where John worked for a social service agency. Shortly thereafter, the parents separated, the son, Jack, remaining with his mother in Yellow Springs. John left Ohio and remained unemployed until 1974, when he joined the faculty at Ferrum College in Virginia. He obtained a divorce from Jane in April, 1975, and soon thereafter married Ann Smith Doe, by whom a second child was born. Jack Doe periodically visited his father in Virginia, but in February, 1976, John and Ann, over Jane's objection, took Jack to Virginia and in July obtained permanent custody of the child, his mother making no court appearance.[22]

At the trial hearing in October 1978, John and Ann petitioned for adoption, stressing their desire to solidify their family unit. They emphasized the difference in life-styles between Franklin County, characterized as that of a "rural extended family," and Yellow Springs, described as "unstructured and bohemian."[23] The focus, however, was upon the contrast between the "stable" environment in Franklin County and the relationship between Jane and her lesbian partner in Ohio. John Doe testified as to his concern about the *future:* that "at some point he [Jack] will have to attempt to integrate these two life-styles."[24] The only concrete evidence presented by petitioners about harm to Jack was Jane's marriage to her partner (Moya) by a Sufi priest, that a summer was spent by Jane and Jack with Moya and her son Jason in a tee-pee, that Jack was not discouraged from urinating from an upstairs window, and that he was not corrected when he used a four-letter, "barnyard" word.[25] Both John and Ann Smith Doe admitted Jack never verbalized any difficulties with regard to his mother's lesbianism.[26] Neither was it established that sexual

21. 222 Va. at 738, 284 S.E.2d at 800.

22. *Id.* at 740, 284 S.E.2d at 801. Jane Doe explained that Ann and John took Jack to dinner and never returned. This possible matter of kidnapping was not challenged and is relevant only to the custody proceeding; much more detail is related in a letter from Jane Doe to Lois Franklin (Nov. 29, 1978), reproduced in the trial Appendix at A-10 to A-16, Doe v. Doe, 222 Va. 736, 284 S.E.2d 799 (1981).

23. 222 Va. at 740, 284 S.E.2d at 801. Petitioner's attorney questioned each Ohio witness upon this matter in the trial court. *See* Appendix, *supra* note 22.

24. 222 Va. at 740, 284 S.E.2d at 801. *See* testimony in Appendix, *supra* note 22, at A-38 to A-39.

25. 222 Va. at 741, 284 S.E.2d at 802.

26. *Id.* at 740, 284 S.E.2d at 801. *See also* Appendix, *supra* note 22, at A-38. Ann Smith

activity took place within the view of Jack and Jason. Jane Doe described her living arrangements as a family unit and the relationship between Jack and Jason as brotherly.

Both the Children Services Board of Greene County, Ohio, and initially the Franklin County Department of Social Services opposed the adoption. A subsequent supplementary evaluation from the latter source claimed no knowledge of Jane's lesbian relationship.[27] The trial judge concluded that Jack's "being exposed to this relationship would result in serious emotional and mental harm to this child, and that his best interests would be promoted by the adoption."[28]

The issue on appeal was whether evidence was sufficient to show parental unfitness or a situation harmful to the "best interests of the child." The standards established by *Malpass v. Morgan*,[29] cited in the trial court findings of fact and opinion, were argued in the briefs for both appellant and appellee. According to *Malpass*, the rights of natural parents "may not be lightly severed but are to be respected if at all consonant with the best interests of the child."[30] This protection has been established by a significant line of cases.[31] The most important, *Ward v. Faw*,[32] held that the adoptive parent must establish that "continuance of the relationship between the [natural parent and the child] would be detrimental to the child's welfare."[33]

Doe testified: "He [Jack] never really talks about it. I think a lot of stuff he keeps inside of him." Appendix, *supra* note 22, at A-53.

27. *See* "Supplementary Evaluation and Recommendations," where the department said that at the time of the original report it "was not advised of Jane Doe's living arrangements or the lesbian relationship." Appendix, *supra* note 22, at A-7.

28. *See* "Finding of Fact and Opinion" in Appendix, *supra* note 22, at A-6 to A-7.

29. 213 Va. 393, 192 S.E.2d 794 (1972). Jane Doe's counsel stressed "clear and convincing" evidence of unfitness was necessary to terminate a natural parent's relationship with her child and cited: Berrien v. Green County Dep't of Pub. Welfare, 216 Va. 241, 244, 217 S.E.2d 854, 856 (1975); Rocka v. Roanoke County Dep't of Pub. Welfare, 215 Va. 515, 518, 211 S.E.2d 76, 78 (1975); and Wilkerson v. Wilkerson, 214 Va. 395, 397, 200 S.E.2d 581, 583 (1973). Appellee claimed no showing of unfitness was necessary under *Malpass*. *See* Brief for Appellee at 5, Doe v. Doe, 222 Va. 736, 284 S.E.2d 799 (1981) [hereinafter cited as Brief for Appellee].

30. Malpass v. Morgan, 213 Va. at 400, 192 S.E.2d at 799. *Accord*, Walker v. Brooks, 203 Va. 417, 421, 124 S.E.2d 195, 198 (1962).

31. *See* cases cited in notes 29-30 *supra* and Cunningham v. Gray, 221 Va. 792, 795, 273 S.E.2d 562, 564 (1981), where the Virginia Supreme Court said: "[W]hile the welfare of the child is of paramount concern in adoption cases, nonetheless the rights of a natural parent vis-a-vis a non-parent will be maintained if at all consistent with the child's best interests." This protection is generally accorded in all jurisdictions. *See* Annot., 23 A.L.R.3d 6 (1969).

32. 215 Va. 1120, 253 S.E.2d 658 (1979).

33. *Id.* at 1125, 253 S.E.2d at 661 (1979) (citing Malpass v. Morgan, 213 Va. at 399, 192 S.E.2d at 799). The nexus test is clearly applied in *Malpass* and *Ward*, as observed in *Ward*, 219 Va. at 1124-25, 253 S.E.2d at 661.

B. *The Constitutional Arguments: Replacing a Presumption With Proof*

The Virginia Supreme Court did not reach the constitutional issues in *Doe*. Nevertheless, the constitutional arguments, which comprised two-thirds of the appellant's brief, may have been instrumental in convincing the court to construe Virginia's termination statute in the manner it did. Jane Doe's counsel, the ACLU, argued that substantive due process was violated, that the trial court acted upon an impermissible, irrebuttable presumption, and that the Virginia termination statute was void for vagueness.

Substantive due process arguments have seldom succeeded in cases of this nature.[34] The reason is not that the childrearing rights of natural parents are not respected; a signficant number of cases can be cited which regard them as fundamental and hold that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[35] The difficulty is that the rights of parents, which are less than absolute, are weighed against the more important interests of the child,[36] such as those which predominate in custody or adoption proceedings. Additionally the state's interest as protector of the child must be factored into the equation. As the appellee's brief stressed: "The state as *parens patriae* and the protector of its inhabitants has, under proper circumstances, the power to change the status of a minor without the consent of the parent."[37]

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34. That bare constitutional arguments have proved infirm was the general conclusion of Hunter & Polikoff, *supra* note 5, at 721 nn. 122 & 123 and accompanying text. More particularly consult *In re* J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974), in which the court rejected a constitutional argument that a parent's right to child rearing was superior to the state's *parens patriae* authority. Relying on Wisconsin v. Yoder, 406 U.S. 205 (1972), the New Jersey court said: "The power of the parent, even when linked to a free exercise [of religion] claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child." 129 N.J. Super. at ___, 324 A.2d at 94. The superiority of *parens patriae* is argued most exhaustively in *In re* Jane B., 85 Misc. 2d 515, 380 N.Y.S.2d 848 (1976). *Accord,* DeVita v. DeVita, 145 N.J. Super. 120, 366 A.2d 1350 (1976), where the court held that Griswold v. Connecticut, 381 U.S. 479 (1965), was irrelevant to a custody case.

35. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). *See also* Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 281 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *See generally* Note, *Developments in the Law: The Constitution and the Family,* 93 HARV. L. REV. 1156 (1980). That the collective interests of the state should meet strict scrutiny standards of constitutional review is argued in Comment, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383 (1974).

36. *See* note 34 *supra. See also* Riga, *The Supreme Court's View of Marriage and the Family: Tradition or Transition?,* 18 J. FAM. L. 301, 328 (1979-80), showing greater interest in the child's welfare in non-domestic relations cases.

37. Winter v. Director, Dep't of Welfare, 217 Md. App. 391, ___, 143 A.2d 81, 84 (1958).

The due process argument, nevertheless, has importance. According to *Stanley v. Illinois*,[38] "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[39] Similarly, the United States Supreme Court in a recent custody case said:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[40]

A second level of constitutional argument reinforces this insistence upon a standard of evidentiary proof. The United States Supreme Court has consistently disfavored irrebuttable presumptions and found them to violate the Due Process Clause.[41] In *Caban v. Mohammed*[42] the Court struck down a state statute which permitted the adoption of an out-of-wedlock child without the father's consent as based upon an irrebuttable presumption that a protected relationship could not exist between a father and his illegitimate child.

In *Doe* the appellant's argument focused upon the vagueness of Virginia's termination statute.[43] In *Roe v. Conn*[44] a federal district court in Alabama struck down a neglect statute which authorized removal of a child from natural parents if its "welfare [so] requires"[45] and said: "Due

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Accord, Coffey v. Department of Social Servs., 41 Md. App. 340, 397 A.2d 233 (1979).

38. 405 U.S. 645 (1972).

39. 405 U.S. at 651.

40. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (citing Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (Stewart, J., concurring)). *See also* Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976). These are discussed in Comment, *Termination of Parental Rights—An Analysis of Virginia's Statute*, *supra* note 10, at 224-26.

41. *See* Vlandis v. Kline, 412 U.S. 441, 446 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agric. v. Murry, 413 U.S. 508, 514 (1973); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972); Leary v. United States, 395 U.S. 6, 29-53 (1969); Schlesinger v. Wisconsin, 270 U.S. 230 (1926).

42. 441 U.S. 380 (1979). In *Caban* an unwed father successfully argued that a New York adoption statute denied equal protection of the laws. The Court declined to decide the substantive due process argument and focused upon the impermissable gender-based distinction made by the statute. *See* Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 Brooklyn L. Rev. 95 (1979). Similarly, an irrebutable presumption that all unwed fathers are unfit is impermissible.

43. *See* Brief for Appellant, *supra* note 11, at 40-44. *See also* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960); Comment, *supra* note 10, at 227-30.

44. 417 F. Supp. 769 (M.D. Ala. 1976).

45. Ala. Code, tit. 13, §§ 350-52 (1958). On October 9, 1975, the Alabama Legislature passed Alabama Acts No. 1205 to implement the new judicial article of the State Constitution. Article V of this Act purported to repeal immediately Ala. Code. tit. 13, §§ 350-52

Process requires the State to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship."[46] Recent opinions suggest that a bare "best interest" standard is insufficient to warrant breaking up a natural family.[47] In effect, this three-pronged constitutional attack appears to have convinced the Virginia Supreme Court to read into its *Malpass v. Morgan* standards the specific requirement of demonstrating a nexus between homosexuality and harm to the child so that the Virginia statute might pass constitutional muster.

C. *The Homosexual Factor: Meeting the Burden of Proof*

In *Doe*, the Virginia Supreme Court applied "neither the fitness test nor the best interest test to the exclusion of the other."[48] Rather it imposed the nexus requirement and looked for concrete evidence of detriment to the child. Surveying the facts presented by the appellee, the court stated:

> If Jane Doe is an unfit parent, it is solely her lesbian relationship which renders her unfit, and this must be to such an extent as to make the continuance of the parent-child relationship heretofore existing between her and her son detrimental to the child's welfare. *The petitioners introduced no evidence, scientific or otherwise, to establish this fact.*[49]

The court closely scrutinized the testimony of the appellant's witnesses in the trial court record and concluded that the "evidence shows only that Jane is a competent, capable, devoted mother, who is living in a lesbian household. There is no proof Jack has yet been harmed by this fact."[50] The appellee's admission that Jack had not verbalized difficulties in accepting the lesbian relationship and Jane's testimony that should such difficulties arise she "would do whatever [she] had to do, . . . includ[ing] severing a relationship with Moya or anyone else"[51] significantly influ-

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(1958), replacing these sections with new statutory provisions. However, the Alabama Supreme Court concluded that Article V should become effective on January 16, 1977, and that statutory provisions currently effective would remain in full force until that time. Therefore, the controversy was not dismissed as being moot. 417 F. Supp. at 775-76.

46. 417 F. Supp. at 780 (emphasis added) (quoting Alsager v. District Court, 406 F. Supp. 10, 21 (S.D. Iowa 1975)).

47. Quilloin v. Walcott, 434 U.S. 246 (1978); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975); *See also* Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977); Davis v. Smith, ___ Ark. ___, 583 S.W.2d 37 (1979).

48. 222 Va. at 747, 284 S.E.2d at 805.

49. *Id.* at 746, 284 S.E.2d at 805 (emphasis added).

50. *Id.* at 747, 284 S.E.2d at 805.

51. *Id.* at 741, 284 S.E.2d at 802. Jane Doe made this assurance twice in trial court testimony. *See* Appendix, *supra* note 22, at A-63 to A-64.

enced the court.[52] Jane Doe appeared to value her relationship with her son above that with her lesbian partner.[53]

Moreover, the appellant's witnesses gave ample testimony that Jane Doe was both a respected member of the Yellow Spring's community and a nurturing mother. An acquaintance of six years, who was a professional counselor, testified that Jane provided Jack with "loving and learning and educational experiences."[54] Another witness testified that Jane was well accepted in Yellow Springs because "she is so community oriented" and went on to state that "her life-style is not interrogated or questioned."[55] The court noted that though "there was testimony that her relationship with the woman with whom she lives is unorthodox, the testimony is also that Jane Doe is an exceptionally well-educated, stable, responsible and sensitive individual."[56]

More importantly, the court refused to entertain presumptions that harm to the child *pro facto* resulted from his mother's lesbianism. One witness, a professional counselor, who was questioned about problems that Jane's life-style might create for Jack, felt the cruelty of terminating the parent-child association was far greater than any that might be inflicted upon Jack by his peers; should peer pressure occur she felt that Jack being "a self-assured child . . . would talk that out with either of his parents at the time, if it occurred, and would handle it . . . ."[57] Another witness, a member of the faculty at Antioch College, cited an opinion of the American Psychological Association and urged that "a parent's sexual orientation should not be either the sole or primary variable to be considered in determining a child's custody."[58]

Although no expert testimony was heard by the trial court, the Virginia Supreme Court cited the 1980 holding in *Bezio v. Patenaude*.[59] In that case a lesbian mother sought to remove a guardian and regain custody of her two natural children. The court found a total absence of evidence showing a correlation between a mother's homosexuality and her fitness as a parent. The Virginia Supreme Court quoted testimony in the *Bezio*

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52. 222 Va. at 748, 284 S.E.2d at 806.

53. One court concluded that the lesbian parent subordinated the child's interest and denied custody. Hall v. Hall, 95 Mich. App. 614, 291 N.W.2d 143 (1980). Exposure of the child to sexual play between homosexual partners or to a disordered or neglectful environment invites this kind of generalized conclusion by a court.

54. 222 Va. at 741, 284 S.E.2d at 802. Notably this witness was John Doe's first cousin. She described these experiences as trips to libraries and to zoos, and outdoor activities, such as camping. Furthermore, Jane made homemade toys for Jack and was generally concerned about his welfare. *Id.* at 741-42, 284 S.E.2d at 802.

55. *Id.* at 742, 284 S.E.2d at 803.

56. *Id.* at 745, 284 S.E.2d at 804.

57. *Id.* at 742, 284 S.E.2d at 802.

58. *Id.* at 743, 284 S.E.2d at 803.

59. ___ Mass. ___, 410 N.E.2d 1207 (1980). *See* Comment, *supra* note 5.

case offered by a clinical psychologist and professor at the University of Massachusetts to the effect:

> [T]here is no evidence at all that sexual preference of adults in the home has any detrimental impact on children . . . . [M]ost children raised in [a] homosexual situation become heterosexual as adults . . . . There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, [or] maladjusted than children raised with a loving couple of mixed sex.[60]

In essence, the majority in *Doe* rejected the presumptions which governed in the earlier cases and by adopting the *Bezio* testimony appeared to tacitly recognize some expert findings argued in the appellant's brief. The court refused to assume that *future* detriment to the child, traumatic effect of peer pressure, psychological damage, or sexual disorientation would inevitably result from exposure to a lesbian household. Social science studies indicate that the vast majorities of homosexuals perform quite adequately as parents.[61] Studies also indicate no tendency on the part of children who live with homosexual mothers to form transexual images or to become gay themselves.[62] The Green County case worker in *Doe* found Moya's son Jason, who was continually within the lesbian environment, "to be a sexually and emotionally well developed young man."[63] Because the petitioners for the adoption failed to present adequate factual evidence showing a detrimental impact upon Jack's behavior, the appellant succeeded on the weakness of the opposition's case. Moreover, the Virginia Supreme Court obviously invited expert medical or psychological opinions to support its own determination based on the facts.

D. *The Limits of Doe as Precedent*

Because the courts maintain broad discretion in determining parental fitness and in determining the child's interests in adoption, custody, and visitation proceedings, the facts of each case must determine judicial conclusions. At most, the *Doe* opinion indicates that Virginia has joined eleven other jurisdictions which, by establishing a new requirement of

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60. 222 Va. at 748, 284 S.E.2d at 806 (quoting Bezio v. Patenaude, 410 N.E.2d at 1215-16). By deciding to use this passage the court seemed to adopt these conclusions for the majority opinion to explain why lesbian mothers are not unfit *per se;* the two dissenting Justices, Carrico and Thompson, merely reiterated the trial court conclusion.

61. Riddle, *Relating to Children: Gays as Role Models,* 34 J. Soc. Issues 38 (1978). *See also* Campbell, *supra* note 5, an article by a Michigan Circuit Court judge whose viewpoint foreshadows *Doe.*

62. *See* Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents,* 135 Am. J. Psych. 693 (1978); Kirkland, *A New Look at Lesbian Mothers,* 5 Human Behavior 60 (1976).

63. Brief for Appellant, *supra* note 11, at 3.

proof, protect the custody and visitation rights of homosexual parents.[64] The court in *Doe,* and in similar recent cases, still insisted that homosexuality remains an important factor in a balancing process.[65] However, the courts maintain a continuing jurisdiction and have often imposed stringent conditions upon the homosexual parent allowed to retain visitation or custody rights.

The positive value of the current trend is that the new burden of proof provides some constitutional protection for the parental rights of homosexual parents. In *Kallas v. Kallas,*[66] a 1980 decision, the Supreme Court of Utah ruled that a trial court had erred in refusing to admit evidence of a lesbian wife's behavior in specific instances which bore upon her ability to deal with her children and in excluding a psychologist's testimony about the psychological impact upon the children of more extended visitation with the mother. In *People v. Brown,*[67] the court required specific

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64. *See* Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967) (custody involving a homosexual father); Gay v. Gay, 153 Ga. App. 173, 253 S.E.2d 846 (1979) (custody involving a lesbian); Pitt v. Pitt, ___ Ind. App. ___, 418 N.E.2d 286 (1981) (custody involving a lesbian); Bezio v. Pattenaude, ___ Mass. ___, 410 N.E.2d 1207 (1980) (custody involving a lesbian); Hall v. Hall, 95 Mich. App. 614, 291 N.W.2d 143 (1980) (custody involving a lesbian); M.P. v. S.P., 169 N.J. Super. 425, 404 A.2d 1256 (1979) (custody involving a lesbian); DiStefano v. DiStefano, 60 A.D.2d 976, 401 N.Y.S.2d 636 (1978) (custody involving a lesbian); A. v. A., 15 Or. App. 353, 514 P.2d 358, (1974) (custody involving a homosexual father); *In re* Breisch, ___ Pa. Super. Ct. ___, 434 A.2d 815 (1981) (custody involving a lesbian); Kallas v. Kallas, 614 P.2d 641 (Utah 1980) (visitation involving a lesbian). *See also* Peterson v. Peterson, No. 0-66634 (Colo. Dist. Ct. April 26, 1978); Whitehead v. Black, 2 Fam. L. Rep. (BNA) 2593 (Me. Super. Ct. July 13, 1976); Ungland v. Ungland, No. 62380 (Minn. Dist. Ct. June 12, 1978); Anonymous v. Anonymous, No. 19028 (Super. Ct. Wash. 1976).

65. In *Doe,* Justice Harrison stressed that the decision:

> is not to be construed as approving, condoning, or sanctioning such unorthodox conduct, even in the slightest degree. Jane's unnatural life-style was a proper factor to have been considered in determining her fitness as a mother and what was in the best interest of the child. It is not determinative in the [present] case . . . because, standing alone as it does, proof of Jane's unorthodox life style did not outweigh the clear and convincing evidence that she is a devoted mother and, in every other respect, a fit parent.

222 Va. at 748, 284 S.E.2d at 806. *Accord,* D.H. v. J.H., ___ Ind. App. ___, 418 N.E.2d 286 (1981); *In re* Marriage of Teepe, 271 N.W.2d 740 (Iowa 1978); DiStefano v. DiStefano, 60 A.D.2d 976, 401 N.Y.S.2d 636 (1978). Homosexuality remains a proper factor to consider in all cases which demand the nexus factor. *See* note 64 *supra.*

66. 614 P.2d 641 (Utah 1980). The evidence was of sexual advances by the lesbian mother, and the court ruled that an expert's conclusions as to impact of the homosexuality of the mother on the children were admissible though based upon alleged "hearsay" from the children or the father. Visitation rights of the mother were conditioned upon her lesbian partner's absence while the children were in the home. *See* note 90 *infra* and accompanying text.

67. 49 Mich. App. 358, 212 N.W.2d 55 (1973). In this case statements to a policeman by a lesbian mother as to her relationship with her partner were ruled party admissions. *See In re* Jones, ___ Pa. Super. Ct. ___, 429 A.2d 671 (1981), where it was held that the trial court's hearing of testimony, *in camera,* concerning a parent's lesbianism when she was not present, was reversible error.

facts to prove the mother's home was unfit for the children. The court also insisted that the sixth amendment[68] right to counsel applies in custody cases. The court found insufficient evidence to conclude that a lesbian relationship rendered the mother's home an unfit place for her children to reside.

Though not clearly articulated by the *Doe* court, Virginia, along with a number of other jurisdictions, requires that harm to the child be proven by "clear and convincing evidence."[69] In *Gay v. Gay*,[70] a Georgia court refused to deny a mother custody where a homosexual relationship allegedly had existed for two years but was established as an on-going relationship solely on the basis of the hearsay testimony of the father and the maternal grandmother. The court declared that "the natural parents will be awarded custody of the child unless the *present* unfitness of the parents is established by *clear and convincing evidence* . . . ."[71] In *Doe*, Justice Harrison applied the words "clear and convincing evidence" only to the conclusion as to Jane Doe's fitness; however, case law indicates this to be the appropriate standard for Virginia termination cases.[72]

The final benefit of the current trend is the consideration courts have afforded expert opinion. In *M.P. v. S.P.*,[73] presented in full in Jane Doe's brief, a New Jersey court reversed the trial court because the judge there rejected expert testimony. That court noted that the trial judge "overlooked the fact that the assistance of experts as an aid in resolving the difficult questions presented was clearly desirable."[74] Child study specialists are properly relied upon where homosexual parents are not litigants. Among other matters stressed by experts, the court appears to have accepted the notion that community disapproval of homosexuality is not a controlling factor. Alluding to a custody case where there was an interra-

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68. U.S. CONST. amend. VI.

69. The burden of proof in termination proceedings varies among jurisdictions. Illinois, Indiana, and New Mexico provide for "clear and convincing evidence" as a standard by case law; other states employ a "preponderance of the evidence" standard. Recently, the Supreme Court of Texas, citing Stanley v. Illinois, 405 U.S. 645, decided that due process requires a "clear and convincing" standard. *In re* G.M., 596 S.W.2d 846 (Tex. 1980). *See* Comment, *Family Law—Standard of Proof—"Clear and Convincing Evidence" Standard of Proof Will Be Required in all Proceedings for Involuntary Termination of the Parent-Child Relationship*, 12 ST. MARY'S L.J. 559, 563 (1980). *See also* Irish v. Irish, 102 Mich. App. 75, 300 N.W.2d 739 (1980).

70. 143 Ga. App. 173, 253 S.E.2d 846 (1979).

71. *Id.* at ___, 253 S.E.2d at 848 (quoting Childs v. Childs, 237 Ga. 177, 178, 227 S.E.2d 49, 50 (1976)) (emphasis added).

72. A "cogent and convincing" standard is used in Judd v. Van Horn, 195 Va. 988, 81 S.E.2d 432 (1954), *cited in*, Wilkerson v. Wilkerson, 214 Va. 395, 397, 200 S.E.2d 581, 583 (1973). "Clear and convincing" are the words used in Rocka v. Roanoke County Dep't of Pub. Welfare, 215 Va. at 518, 211 S.E.2d at 78, and in Berrien v. Green County Dep't of Pub. Welfare, 216 Va. at 244, 217 S.E.2d at 856.

73. 169 N.J. Super. 425, 404 A.2d 1256 (1979). *See* Brief for Appellant, *supra* note 11.

74. 169 N.J. Super. at ___, 404 A.2d at 1261.

cial marriage,[75] the court analogized: "Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody. Hard facts must be faced. These are matters which courts cannot control . . . ."[76] Expert opinion has played a prominent role in other recent cases with similar facts.

However, expert opinion cuts both ways. In *In re Jane B.*,[77] the court accepted psychiatric testimony that the child's emotional insecurity resulted from the mother's lesbian household arrangement. And in *In re J.S. & C.*,[78] expert opinion did not preclude the court's determination that exposure to gay activities was a positive detriment warranting appropriate prohibitions in this regard during visitations.

The precedential value of *Doe,* however, is limited by its facts and by the discretion each court has to weigh the totality of circumstances in custody and visitation cases. In *Doe,* termination of parental rights was at stake; the mother was in every respect (but her sexual preference) a fit parent; and the relationship with her partner was not detrimental. These factors, together with her former custody of the child, greatly benefitted the appellant. Where the lesbian mother initially was without custody, courts have generally denied a change of custody because the child has become attached to its new parents.[79] Similarly, should the behavior of a lesbian's sexual partner be threatening or their home environment undesirable, the court may transfer custody for reasons of child neglect.[80]

More significantly, in some recent cases the court either did not articulate the nexus test, or in applying the test decided against the petitioner upon other grounds.[81] In a 1980 decision, *Hall v. Hall,*[82] a Michigan court

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75. *See* Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. Super. Ct. 352, 299 A.2d 243 (1973).

76. 169 N.J. Super. at ___, 404 A.2d at 1262.

77. 85 Misc. 2d 515, 380 N.Y.S.2d 848 (1976).

78. 129 N.J. Super. 486, 324 A.2d 90 (1974).

79. *See In re* Volkland, 74 Cal. App. 3d 674, 141 Cal. Rptr. 625 (1977); Roberts v. Roberts, 25 N.C. App. 198, 212 S.E.2d 410 (1975); Cobb v. Cobb, 271 S.C. 136, 245 S.E.2d 612 (1978). In all three cases it appears the mother's willingness to leave a child with others was a more important factor than her lesbianism.

80. In *In re* Jones, ___ Pa. Super. Ct. ___, ___, 429 A.2d 671, 673 (1981), the court stressed that physical threats by the lesbian mother's partner may cause emotional disturbance in the children. In *In re* Breisch, ___ Pa. Super. Ct. ___, 434 A.2d 815 (1981), the smoking of marijuana and theft of porch furniture by the mother and her partner, when considered together with inattention to the child's speech problem, were among matters from which to infer neglect.

81. In Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979), there appears no concrete evidence as to the causal nexus; the court merely referred to "an abundance of evidence to support the critical finding that the environment in which plaintiff has placed the child is not in the child's best interest." *Id.* at ___, 256 S.E.2d at 855. *See also* Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979), where evidence of a father's homosex-

upheld a trial court's generalized conclusion that "given a conflict, the plaintiff would unquestionably choose the [homosexual] relationship over the children."[83] In a 1981 case, *D.H. v. J.H.*,[84] an Indiana court acknowledged that no evidence existed to prove harm to the children as a result of the mother's lesbianism but upheld custody for the father, citing only matters of household neglect.

The court's power to impose conditions upon either maintenance of custody or visitation rights is the final and most important limitation which remains upon the parental rights of homosexual parents. In the *Doe* decision, the Virginia Supreme Court concluded its substantive remarks by asserting:

> [W]e are not unmindful of her [Jane Doe's] testimony that should it become necessary, for her son's sake, she would sever the relationship with the woman with whom she now lives. There may come a time when the welfare and best interests of her son require that she honor this commitment.[85]

Though imposing no concrete restrictions or prohibitions upon Jane Doe as to her lesbian relationship or household, the court had ample precedent[86] to attach such strings to preservation of her visitation rights.

The constitutionality of such court restrictions upon parental life-styles has never been successfully attacked. In *In re Jane B.*,[87] the court concluded that "[t]his is not a matter of constitutional rights . . . to be homosexuals or a violation of their freedom of choice of actions. The fundamental question is whether . . . this type of living environment is detrimental to the welfare of the child and in her best interest."[88] There the court prohibited overnight visitations where homosexuals were present, ordered that the child never be taken any other place where homosexuals were present and that the mother never involve the child in homosexual activities or publicity.[89] Similarly, in *DeVita v. DeVita*,[90] a case involving

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uality alone was given to support the trial court's holding that the mother should have custody.

82. 95 Mich. App. 614, 291 N.W.2d 143 (1980).

83. *Id.* at ___, 291 N.W.2d at 144. Without saying more, the appeals court approved of the conclusion that the lesbian relationship "was clearly the chief priority in [the mother's] life," a "catch-all" factor. *Id.*

84. ___ Ind. App. ___, 418 N.E.2d 286 (1981).

85. 222 Va. at 748, 284 S.E.2d at 806. *See* note 51 *supra* and accompanying text.

86. *See* Buck v. Buck, 238 Ga. 540, 233 S.E.2d 792 (1977); Irish v. Irish, 102 Mich. App. 75, 300 N.W.2d 739 (1980); N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. App. 1980); *In re* J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974); Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979); *In re* Breisch, ___ Pa. Super. Ct. ___, 434 A.2d 815 (1981); Kallas v. Kallas, 614 P.2d 641 (Utah 1980).

87. 85 Misc. 2d 515, 380 N.Y.S.2d 848 (1976).

88. *Id.* at ___, 380 N.Y.S.2d at 858.

89. *Id.* at ___, 380 N.Y.S.2d at 860-61.

90. 145 N.J. Super. 120, 366 A.2d 1350 (1976).

limitations upon a homosexual father's visitation rights, the court denied the "constitutional challenge" and exercised "inherent equitable jurisdiction in its capacity as *parens patriae.*"[91] Because the "best interests of the child" outweigh the child-rearing rights of natural parents, it remains constitutionally permissible to ask parents to alter their life-style as a cost for custody or visitation rights. Presumably, the parent is free to choose his or her course of conduct.[92]

IV. Conclusion

In short, far from curtailing the broad discretion of courts in domestic relations cases, the precedent of *Doe v. Doe* merely instructs Virginia courts to adhere to some more precise burden of proof as to the homosexual factor in adoption, and probably, custody proceedings. To conclude that homosexuality is the determining factor in denying custody or visitation rights, the petitioner must provide concrete factual proof that a homosexual relationship or environment harms the child. Expert medical or psychiatric testimony is admissible and is desirable.

The courts remain free, however, to exercise the broadest discretion in considering all factors and may find other matters determinative. Future litigants need to consider specific factors such as the former custodial history, the defendant or appellant's actual behavior as a parent and reputation as a community member, the details of the homosexual environment to which the child is exposed, and the willingness of the homosexual parent to meet conditions imposed on his or her life-style by the court. Above all, litigants should remember that the courts maintain a continuing jurisdiction over custody and visitation matters. These considerations rightfully and constitutionally belong before the court even under the new burden of proof.

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91. *Id.* at ___, 366 A.2d at 1354. *See* 4 Pomeroy, Equity Jurisprudence § 1303 (5th ed. 1941).

92. 145 N.J. Super. at ___, 366 A.2d at 1354.