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### Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles

Nancy Polikoff

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## Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles



Nancy D. Polikoff

### ABSTRACT

Disputes over custody and visitation can arise when a marriage ends and one parent comes out as gay or lesbian. The heterosexual parent may seek custody or may seek to restrict the activities of the gay or lesbian parent, or the presence of the parent's same-sex partner, during visitation. A gay or lesbian parent's assertion of constitutional rights has not been an effective response to such efforts. That is not likely to change. Advocates for gay and lesbian parents have argued forcefully for a nexus text, permitting consideration of a parent's sexual orientation only when there is evidence of an adverse impact on the child. This Essay argues that the nexus test should be replaced with a rule that disallows consideration of a parent's nonmarital sexual relationship in custody or visitation disputes. The nexus test implies that a child might be uniquely harmed because a parent is gay or lesbian or because a parent has a new unmarried partner. This implication is inappropriate. A court can evaluate a child's relationship with a significant person a parent has introduced into the child's life; that evaluation should not turn on whether that person is a spouse or a nonmarital partner. The court can also examine any decision a parent makes that causes harm to a child. It is misplaced to articulate a distinct test for scrutinizing a parent's relationship with a nonmarital partner.

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## INTRODUCTION

Constitutional arguments about equal protection or privacy rights, intellectually appealing as they may be, should be . . . secondary . . . . A lesbian mother is very likely to lose if the civil rights of lesbian mothers in general are allowed to take center stage . . . . The lesbian mother's attorney should not assume that the function of the trial is merely to lay the basis for an appeal on constitutional issues. Regardless of what the appellate court may think of the constitutional questions, a trial judge's decision on the facts in a custody dispute is subject to reversal only for gross abuse of discretion, which is virtually never found.<sup>1</sup>

So wrote two very recent law school graduates, Nan Hunter<sup>2</sup> and myself, in a 1976 law review article, one of the first ever published on custody and visitation disputes between a gay and a straight parent after the end of a heterosexual marriage. Over thirty-five years later, I would write the identical words.

Like many in the heady initial days after the U.S. Supreme Court's opinion in *Lawrence v. Texas*,<sup>3</sup> I thought that case was a game changer. *Lofton v. Secretary of the Department of Children & Family Services*,<sup>4</sup> a case challenging Florida's ban on lesbian and gay adoption, had been argued in the Eleventh Circuit before *Lawrence* was decided. After that opinion came down, the parties in *Lofton* filed supplement briefs. The poetic rhetoric of liberty and freedom in *Lawrence* was a bit hard to pin down doctrinally, but in a conversation I had with Nan shortly after the ruling, we both agreed that whatever it meant, surely gay men and lesbians could no longer be denied the ability to adopt a child on the basis of their sexual orientation alone without violating the Constitution. We even thought it might be harder for a court to use a parent's sexual relationship as a basis for denying or restricting custody or visitation.

We were wrong. The Eleventh Circuit ruled that *Lawrence* established no fundamental right.<sup>5</sup> It also became one of the first courts to quote *Lawrence's* assertion that "[t]he present case does not involve minors"<sup>6</sup> and to skew the

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1. Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 721 (1976).
  2. Nan Hunter became the founding director of the ACLU Lesbian and Gay Rights Project and went on to a career in academia, in which she has continued to develop legal and constitutional theories in support of LGBT rights issues. See, e.g., Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103 (2004).
  3. 539 U.S. 558 (2003).
  4. 358 F.3d 804 (11th Cir. 2004).
  5. *Id.* at 817.
  6. *Id.* (quoting *Lawrence*, 539 U.S. at 578).

meaning of that sentence away from the obvious—excluding sex with children from constitutional protection—and toward an interpretation excluding the claims of lesbian and gay parents and prospective parents from such protection. In the past ten years, no lesbian, gay, bisexual, or transgender (LGBT) parent has successfully invoked *Lawrence* in his or her quest to keep custody of a child or block restrictions on the exercise of visitation rights.<sup>7</sup>

In fact, when it comes to assertions of constitutional rights, there is great similarity in outcome between cases from the 1970s, in the wake of *Roe v. Wade*<sup>8</sup> and the other rights-affirming rulings of that era, and those decided in the years following *Lawrence*. In both time frames, when a child's heterosexual parent has challenged the exercise of custody or visitation by a parent who has come out as gay or lesbian, the gay or lesbian parent's assertion of a constitutional right has amounted to nothing.<sup>9</sup>

I illustrate the above point in the next section of this Essay. I then argue that courts should no longer single out the nonmarital aspect of a parent's new relationship—gay or straight—when deciding whether to limit a child's exposure to that relationship. Advocates for lesbian and gay parents have long argued for a nexus test, banning consideration of a parent's sexual orientation or nonmarital relationship absent evidence of its adverse impact on the child. Though a court can properly consider all parental choices that have an adverse impact on a child, it should ignore all parental choices that do not adversely affect a child. When it comes to a parent's new relationship, these principles apply no matter what the sex of the new partner and regardless of whether the couple has married. The nonmarital nature of the relationship and the gender of the new partner or spouse are irrelevant to de-

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7. In an unreported opinion, a trial judge in Missouri relied in part on *Lawrence* to declare unconstitutional the denial of a foster care license to a lesbian based on her sexual orientation alone. See *Johnston v. Mo. Dep't of Soc. Servs.*, No. 0516-CV09517, 2006 WL 6903173, at \*5 (Mo. Cir. Ct. Feb. 17, 2006). The state changed its regulations and did not appeal. E.g., *Missouri Lifts Restrictions on Gay Foster Parents*, USA TODAY, July 19, 2006, [http://usatoday30.usatoday.com/news/nation/2006-07-19-gayfosterparents\\_x.htm](http://usatoday30.usatoday.com/news/nation/2006-07-19-gayfosterparents_x.htm). State constitution-based liberty arguments have been successful in *Arkansas Department of Human Services v. Cole*, 380 S.W.3d 429 (Ark. 2011), which struck down a ban on adoption or foster parenting by any person living with a nonmarital partner, and *Florida Department of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010), which struck down the country's only remaining ban on adoption by lesbians and gay men.
  8. 410 U.S. 113 (1973).
  9. Although popular culture often represents same-sex couples raising children as wealthy white men raising adopted children or children born of surrogacy, census data demonstrate that the vast majority of same-sex couples raising children are raising a child who is the biological child or stepchild of one partner from a previous heterosexual relationship. Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, FAM. FOCUS, Winter 2011, at F1. The subject of this Essay is the possible challenge from the child's other parent.

termining a child's best interests. A recent California opinion nicely illustrates this principle.<sup>10</sup> And it did not need to cite *Lawrence* or other constitutional principles to justify its conclusion.

### I. GAY AND LESBIAN PARENTS HAVE NOT WON BY INVOKING CONSTITUTIONAL RIGHTS

In *In re J.S. & C.*,<sup>11</sup> a 1974 New Jersey court cited numerous cases, including *Roe v. Wade*, for the privacy rights affording protection to "family relationships" and "child rearing."<sup>12</sup> The court acknowledged that restricting the relationship between the gay father and his children impeded the father's exercise of those rights.<sup>13</sup> Nonetheless, the court said the case presented "a most sensitive issue which holds the possibility of inflicting severe mental anguish and detriment on three innocent children"<sup>14</sup> and then restricted the father during his visitation from having his lover present, living with an unmarried partner, or taking the child to a location where gay men gathered or participated in any "homosexual related activities."<sup>15</sup>

In *In re Jane B.*,<sup>16</sup> a 1976 New York court believed that *Eisenstadt v. Baird*,<sup>17</sup> along with some lower court and state rulings, protected consensual sodomy against criminalization.<sup>18</sup> This was something that the court explicitly said protected "in essence, homosexuality."<sup>19</sup> But, the court continued, these cases did not extend protection to "children who may be affected physically and emotionally by close contact with homosexual conduct of adults."<sup>20</sup> The court further explained that it was "not abridging . . . fundamental rights or privacy but concerns itself solely with the well-being of the child and . . . whether the . . . environment is a proper one," which the court ruled it was not.<sup>21</sup>

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10. See *Bauer v. Bauer (In re Marriage of Bauer)*, No. G043361, 2011 WL 4337093 (Cal. Ct. App. Sept. 16, 2011).

11. 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974).

12. *Id.* at 93 (quoting *Roe*, 410 U.S. at 153).

13. *Id.* at 94.

14. *Id.* at 97.

15. *Id.* This included prohibiting the father from taking his children to "The Firehouse," which the court described as a "meeting hall for homosexuals," as well as to protest marches and rallies. *Id.* at 95.

16. 380 N.Y.S.2d 848 (Sup. Ct. 1976).

17. 405 U.S. 438 (1972).

18. *In re Jane B.*, 380 N.Y.S.2d at 857.

19. *Id.*

20. *Id.*

21. *Id.* at 857, 860.

In that case, the court added one sentence that is a hallmark of post-*Lawrence* cases. It found, as an issue of fact, that the child was “emotionally disturbed”<sup>22</sup> from living with her mother and her mother’s partner, thereby purporting to find a nexus between the mother’s relationship and harm to the child. The only evidence to that effect, however, was the testimony of a school psychiatrist who said the child was living in an “abnormal atmosphere” and concluded the child was emotionally upset, something he admitted on cross-examination could have been caused by the divorce itself.<sup>23</sup>

Post-*Lawrence* cases usually sound less moralistic than these earlier examples, but they equally reject constitutional arguments and find it easy to identify some problem with the children allegedly caused by the parent’s relationship. In *Sirney v. Sirney*,<sup>24</sup> a 2007 Virginia case, a father with custody of four children filed an action three years after the separation to restrict the visitation rights of the mother so that her partner could not spend the night during visitation.<sup>25</sup> The judge granted his request.<sup>26</sup> Two of the children, in chambers, expressed some “discomfort” and “awkwardness” with the mother’s relationship, and one said she preferred time with her mother alone.<sup>27</sup> The judge, restricting the mother from having any sexual partner overnight at her home when the children were there, said the case was “not at all” about the mother’s lesbian relationship.<sup>28</sup> An oblique reference in the opinion implies that an expert witness opposed the limitation.<sup>29</sup>

On appeal, the mother argued that the order violated both equal protection and her “due process right to make decisions about her private conduct.”<sup>30</sup> The appeals court said it deprived her of neither.<sup>31</sup> It disposed of the equal protection claim by pointing out that the restriction applied equally to any heterosexual relationship.<sup>32</sup> The court said she was not deprived of her liberty interest because the decision was based solely on how the children reacted to her relationship, not the relationship itself.<sup>33</sup>

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22. *Id.* at 860.

23. *Id.* at 851–52.

24. No. 0754-07-4, 2007 WL 4525274 (Va. Ct. App. Dec. 27, 2007).

25. *Id.* at \*1.

26. *Id.* at \*2.

27. *Id.* at \*1–2.

28. *Id.* at \*2.

29. *See id.* at \*4 (“[W]hether to accept the testimony of the expert witness was within the purview of the trial court.”).

30. *Id.*

31. *Id.* at \*5.

32. *Id.*

33. *Id.* at \*5.

In *McGriff v. McGriff*,<sup>34</sup> a 2004 case from the Idaho Supreme Court, a mother filed to modify a joint physical custody order because of the father's same-sex relationship, a change in circumstances which the trial judge said would "generate questions from the girls and their friends regarding their Father's lifestyle," especially given "the conservative culture and morays [sic] in which the children live."<sup>35</sup> The trial court ruled for the mother and granted visitation rights to the father on the condition that he not live with his partner during the visits.<sup>36</sup> The trial judge said the ruling was not based on the father's homosexuality and cited some factors the mother never raised.<sup>37</sup>

On appeal, the Idaho Supreme Court quoted extensively from *Lawrence* and said a parent's homosexuality could not be a factor absent a nexus between it and harm to the child.<sup>38</sup> Nonetheless, it upheld the trial court, accepting without questioning the judge's statement that the decision did not turn on the father's homosexuality.<sup>39</sup> The dissenting justice noted how unusual it was to recast a case brought by the mother for the sole reason that the father was living openly with his partner into a case about other factors.<sup>40</sup> The dissent also pointed out a fact the majority omitted: The court-appointed custody evaluator, in spite of his reservations about the dynamics between the mother and the father's partner, recommended that the custody arrangement remain unchanged.<sup>41</sup>

Alabama provides perhaps the most dramatic example of the rejection of constitutional arguments. In a 2004 case, *L.A.M. v. B.M.*,<sup>42</sup> the mother and father divorced when the child was almost four years old, and the mother had primary custody for seven years.<sup>43</sup> Three years after she began living with her partner, the remarried father filed for a change in custody.<sup>44</sup> The trial judge ruled for the father.<sup>45</sup>

On appeal, the mother invoked *Lawrence* in the following way: She noted that in a 1998 case, *Ex parte J.M.F.*, the Alabama Supreme Court approved the

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34. 99 P.3d 111 (Idaho 2004).

35. *Id.* at 117.

36. *Id.* at 114.

37. *Id.* at 116–17.

38. *Id.* at 117.

39. *Id.* at 118.

40. *Id.* at 124 (Kidwell, J., dissenting) (“[I]t is unusual and cause for legal concern, that the magistrate reached for reasons to help [the mother] succeed in her claim when the primary reason stated in her petition to modify custody, homosexuality, is not a legally permissible consideration.”).

41. *Id.*

42. 906 So. 2d 942 (Ala. Civ. App. 2004).

43. *Id.* at 943.

44. *Id.* at 944.

45. *Id.*

transfer of custody from a lesbian mother to a heterosexual father, concluding that “[w]hile the evidence shows that the mother loves the child and has provided her with good care, it also shows that she 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.’”<sup>46</sup> The mother in *L.A.M.* argued that *Lawrence* effectively overruled *J.M.F.* and “expressly confirm[ed] that moral disapproval of homosexual persons is not a legitimate basis for laws that disadvantage lesbians and gay men.”<sup>47</sup> The court disagreed, stating that *Lawrence* was a criminal case, that it did not overrule *J.M.F.*, and that this case did not require the court to “address the lawfulness of a statute or the morality of homosexuality.”<sup>48</sup> “Instead,” the court continued, “we must determine whether the evidence presented to the trial court supports its judgment modifying custody of the child . . . . We answer that question in the affirmative.”<sup>49</sup>

Another Alabama case, decided in December 2012, epitomizes the irrelevance of *Lawrence* in that state’s law, this time in the context of a mother with a male romantic partner. In *D.M.P.C.P. v. T.J.C., Jr.*,<sup>50</sup> a *pendente lite* order gave the mother temporary custody of a two-year-old child.<sup>51</sup> That order lasted three and a half years.<sup>52</sup> When the final custody hearing took place, the mother was living with her male fiancé in the home of her parents.<sup>53</sup> Also in the home were the child’s two half siblings, the mother’s children from her prior marriage.<sup>54</sup> Without factual findings, the trial court awarded custody to the father.<sup>55</sup>

The appeals court pointed out that Alabama case law allows the trial court to consider the “moral needs” of the child and the “respective home environments offered by the parties.”<sup>56</sup> The mother argued that her sexual conduct should not be a factor absent evidence of detrimental impact to the child. The appeals court rejected her argument. It explicitly held that the trial court may, in an initial

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46. *Id.* at 946 (quoting *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998)) (internal quotation marks omitted).

47. *Id.* (internal quotation marks omitted).

48. *Id.*

49. *Id.* at 946–47.

50. No. 2110700, 2012 WL 6554383 (Ala. Civ. App. Dec. 14, 2012).

51. *Id.* at \*1.

52. This unusually long time period was the result of the fact that the husband was charged with sexually abusing his stepdaughter—the mother’s daughter from a prior marriage. The court did not decide permanent custody until the criminal proceedings were resolved with the husband’s acquittal. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at \*3.

56. *Id.* at \*7 (quoting *Ex parte Devine*, 398 So. 2d 686, 696 (Ala. 1981)) (internal quotation marks omitted).

custody determination, “consider a parent’s sexual conduct as it relates to that parent’s character, without a showing that the conduct has been detrimental to the child.”<sup>57</sup> The appeals court assumed the trial court had made the findings necessary to support the judgment and determined that the judgment was not “plainly and palpably wrong”; therefore, the judgment could not be reversed.<sup>58</sup>

In a 2012 Kentucky case, *Maxwell v. Maxwell*, a lesbian mother was successful in overturning a custody award to the heterosexual father, but her ability to live with her partner remained an issue on remand, thereby demonstrating the limits of lower court applications of *Lawrence*.<sup>59</sup> In that case, the trial judge gave custody of three children to their father rather than continue a joint custody order with their lesbian mother.<sup>60</sup> The court order prohibited either parent from living with a nonmarital partner and said:

The [mother] is seeking to live an unconventional life-style that has not been fully embraced by society at large regardless of whether or not same-sex relationships should or should not be considered sexual misconduct. Like it or not, this decision will impact her children in ways that she may not have fully considered and most will be unfavorable.<sup>61</sup>

The appellate court reversed the custody determination and remanded, and it did cite constitutional law: *Romer v. Evans*<sup>62</sup> for the error of singling out the mother for disparate treatment and *Palmore v. Sidoti*<sup>63</sup> for the error of basing custody on the private biases of others.<sup>64</sup> But on the subject of the restriction on living with a nonmarital partner, the court did not cite *Lawrence*.<sup>65</sup> Instead it said that, while such a factor should not be dispositive on its own, the trial court could consider it as long as the focus was the children’s best interests.<sup>66</sup> This is hardly an affirmation of the mother’s right to build a life with her partner.

In *Maxwell*, as in *Sirney* and numerous other cases,<sup>67</sup> the restriction imposed limits on the presence of any nonmarital partner as though that rendered the

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57. *Id.*

58. *Id.* at \*8.

59. *See Maxwell v. Maxwell*, 382 S.W.3d 892 (Ky. Ct. App. 2012).

60. *Id.* at 894–95.

61. *Id.* at 897.

62. 517 U.S. 620 (1996).

63. 466 U.S. 429 (1984).

64. *Maxwell*, 382 S.W.3d at 898–99.

65. *See id.* at 900–01.

66. *Id.*

67. *See, e.g., Burns v. Burns*, 560 S.E.2d 47, 48 (Ga. Ct. App. 2002) (affirming enforcement of a consent decree providing that a lesbian mother could not have “overnight stays with any adult to whom that party was not legally married or related within the second degree”); *A.O.V. v. J.R.V.*,

order more acceptable than a ban on a same-sex partner. Arkansas Initiated Act 1, struck down on state constitutional grounds by the Arkansas Supreme Court,<sup>68</sup> banned adoption and foster parenting by any person living with a nonmarital partner, a provision that is still the law in Utah.<sup>69</sup> Such restrictions allow the conversation to be about the superiority of marriage, partially deflecting attention from the same-sex aspect of a lesbian or gay couple.

## II. A COURT CAN EVALUATE A CHILD'S RELATIONSHIP WITH A PARENT'S NEW PARTNER, BUT WHETHER THE PARENT HAS MARRIED THAT PARTNER IS IRRELEVANT

The principle that a restriction on visitation is valid only if necessary to further a child's best interests,<sup>70</sup> coupled with the protection that *Lawrence* should afford to nonmarital sexual relationships, means that no court should ever make a distinction between an unmarried partner (same or different sex) and a spouse. An unreported California opinion gets the reasoning right without citing *Lawrence* or any constitutional principle.<sup>71</sup> In *Bauer*, a heterosexual father appealed a restriction that denied him overnight visits as long as he remained living with any nonmarital female partner.<sup>72</sup> The order specifically awarded him overnight visits if he lived alone or lived with a spouse.<sup>73</sup> In other words, he would automatically have overnight visitation if he married the woman he lived with. There was evidence at trial that the presence of the father's specific partner was detrimental to the children.<sup>74</sup>

The appeals court agreed that there was sufficient evidence of detriment, but it remanded, noting that "if [the father or his partner] were having a detrimental effect on the children's welfare during overnight visits, this detriment

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Nos. 0219-06-4, 0220-06-4, 2007 WL 581871, at \*2, \*11 (Va. Ct. App. Feb. 27, 2007) (holding that trial court's visitation restriction prohibiting a gay father from having "any companion with whom he has a romantic relationship stay overnight (between midnight and 6:00 a.m.\*)" was not an abuse of discretion).

68. See Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 443 (Ark. 2011).

69. See UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2008).

70. Alabama appears to be an outlier for allowing a court to consider a parent's nonmarital relationship without requiring a connection between that relationship and the child's best interests. See *supra* notes 42-58 and accompanying text. Other states articulate the need to find such a link, although in reality that can amount to little more than paying lip service to the existence of such a connection. See *supra* notes 24-33 and accompanying text.

71. See *Bauer v. Bauer (In re Marriage of Bauer)*, No. G043361, 2011 WL 4337093 (Cal. Ct. App. Sept. 16, 2011).

72. *Id.* at \*1.

73. *Id.* at \*8.

74. *Id.* at \*7.

would not necessarily be remedied by their marriage.”<sup>75</sup> On remand, the trial court needed to “include in the order appropriate factors relating the children’s best interests in fashioning the visitation orders (because [the father’s] marital status alone is not a permissible basis).”<sup>76</sup> In other words, if the partner’s presence was detrimental to the children, then the court could restrict overnight visits in her presence even if the father married her. What the court could not do was restrict her presence only for as long as the couple remained unmarried.

This is the proper focus for a court deciding custody or visitation. Losing this focus could cause a supporter of same-sex marriage to believe that the problem with the restriction on the presence of a nonmarital partner is that same-sex couples cannot marry.<sup>77</sup> Oddly, the *Maxwell* court might have thought along such lines. After remanding the prohibition on the presence of the mother’s nonmarital partner with the instruction that such factor “is not dispositive” and “must be ascertained with the children’s best interests in mind,” the court stated that, “[c]learly, changes in moral standards and the inability of same-sex couples to legally marry are also relevant.”<sup>78</sup>

If this reasoning implies that the unmarried status of same-sex couples is irrelevant only because those couples cannot marry, then that is the wrong approach. Marriage should always be irrelevant. If a parent’s marriage introduces into the children’s lives an adult whose presence is detrimental to their well-being, then the court can take that into account in deciding custody and visitation. But a marriage should be entitled to no more respect when it comes to the best interests of children than the relationship a parent has with a nonmarital partner.<sup>79</sup>

In *Maxwell* itself, the appeals court found that “no evidence was provided that demonstrated the relationship between [the mother and her partner] had any negative impact on the children.”<sup>80</sup> The two older children testified that they liked their mother’s partner and had no problems with her.<sup>81</sup> It was, therefore,

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75. *Id.* at \*8.

76. *Id.*

77. There is usually a student who makes this argument when these cases are discussed in my classes.

78. *Maxwell v. Maxwell*, 382 S.W.3d 892, 901 (Ky. Ct. App. 2012).

79. In another context, I have decried a distinction that some gay-friendly states are making between children born to married lesbian couples and those born to unmarried lesbian couples. For example, in both New York and Massachusetts, a child born to a married lesbian couple has two parents, while a child born to an unmarried lesbian couple has one—the birth mother. I refer to this as the “new illegitimacy,” and I deplore this development as much as I deplore custody and visitation cases that impose restrictions on unmarried partners that would never be imposed on a new husband or wife. See Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U.J. GENDER SOC. POL’Y & L. 721 (2012).

80. *Maxwell*, 382 S.W.3d at 899.

81. *Id.* at 894.

inappropriate for the court to remand the case to the trial court on the issue of a ban on the partner's presence. It is impossible to imagine such a ruling concerning a parent's new spouse.

### III. REVISITING THE NEXUS TEST, WHOSE TIME HAS COME AND GONE

For many years, going back to the early article I wrote with Nan Hunter, advocates for lesbian and gay parents argued for a nexus test, prohibiting consideration of a parent's sexual orientation unless it could be shown to have an adverse impact on the child.<sup>82</sup> This was certainly an improvement over a rule that a parent living with a same-sex partner was per se an unfit parent,<sup>83</sup> or a rule like that in *In re J.S.C.* and *In re Jane B.*, which presumed adverse impact on the child.<sup>84</sup> But more recent analyses recognize that a parent's sexual orientation should be irrelevant to custody and visitation.<sup>85</sup> This is the preferable rule because a parent's sexual orientation, in and of itself, can never have an adverse impact on a child. A parent might not pay sufficient attention to a child's needs and feelings or might choose a new partner who treats a child poorly. These could have an adverse impact on the child. But neither has anything to do with whether the parent is gay or straight, married or not.

It is time to disallow consideration of a parent's nonmarital relationship in custody and visitation disputes. A court needs a very strong reason to ban someone from a child's presence, and the nonmarital nature of the relationship should play no role in such a determination. Certainly the awkwardness and discomfort that the *Sirney* children expressed in the presence of their mother's partner, without more, is insufficient for such a ban.

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82. See Hunter & Polikoff, *supra* note 1, at 714–15 (“[C]ourts . . . ought to rule that, until and unless a nexus is established between lesbianism and its effect on the child, the mother’s sexual activity shall be irrelevant. The nexus itself must be factually specific and concrete. The evidence required to support such a connection must be definite and relevant to the individuals involved. Speculation should not suffice.”).

83. See *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).

84. See *supra* notes 11–23 and accompanying text.

85. See, e.g., Michael S. Wald, *Adults’ Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381 (2006). Professor Wald argues that the nexus test “should be abandoned.” *Id.* at 428. He also states that the rule should ban consideration of sexual orientation, except in the case of an adolescent who expresses strong wishes not to live with a gay or lesbian parent. *Id.* at 431. Even then, this is not a special rule for an older child who does not want to live with a gay parent. Professor Wald makes clear that an older child should not be forced to live with any parent whenever this would be painful or difficult. “[A] special rule in cases involving a gay parent is inappropriate.” *Id.* at 430.

A 1998 Maryland opinion provides a clear, unmistakable articulation of the nexus test in the context of a nonmarital partner:

In all family law disputes involving children, the best interests of the child standard is always the starting—and ending—point. . . . When we narrow the focus to proceedings involving proposed visitation restrictions in the presence of non-marital partners, courts also are to examine whether the child's health and welfare is being harmed. Once a finding of adverse impact on the child is made, the trial court must then find a nexus between the child's emotional and/or physical harm and the contact with the non-marital partner. If no clear, direct connection is found, then the non-custodial parent's visitation rights cannot be restricted.

. . . .  
. . . [T]he actual harm and nexus approach we outline today . . . applies to both heterosexual and homosexual relationships. . . . The only relevance that a parent's sexual conduct or lifestyle has in the context of a visitation proceeding of this type is where that conduct or lifestyle is clearly shown to be detrimental to the children's emotional and/or physical well-being.<sup>86</sup>

Even this articulation misses the mark, however, because the *nonmarital* character of the relationship is not relevant. If the presence of a parent's new husband or wife causes "emotional and/or physical harm" to a child, then a court should restrict that stepparent's presence. And if any decision a parent makes causes "emotional and/or physical harm" to a child, then a court should make an order that reduces or eliminates that harm. If another adult in the home of a parent demeans or abuses a child, the nature of the relationship between the parent and that other adult is irrelevant; it could be the parent's cousin, sister, father, or friend. Indeed, if a parent exposes a child to emotional and/or physical harm from any source, such as placing the child in an after-school activity for which the child is ill-suited, resulting in feelings of inferiority and low self-esteem, or employing a babysitter who slaps a child in the face to get him or her to behave, the court can impose a restriction on the parent's choices.

A distinct rule concerning the presence of a nonmarital partner, even one as narrowly drawn as that in Maryland, singles out the existence of a nonmarital relationship as though that factor requires special monitoring by a court. It does not. The latitude parents have in raising their children should rarely be curtailed, and one standard should apply to all parental decisions. Just as the nexus test for sexual orientation implies that a child *might* be uniquely harmed because a parent

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86. *Boswell v. Boswell*, 721 A.2d 662, 678 (Md. 1998).

is gay or lesbian, the nexus test for the presence of a nonmarital partner implies that a child *might* be uniquely harmed because the parent has a new romantic partner he or she has not married. Neither of these implications is appropriate.

### CONCLUSION

In theory, there is a role for *Lawrence v. Texas* in this critique of any standard that purports to apply a distinct test to the significance of a parent's nonmarital sexual relationship. But as the reasoning of *Bauer v. Bauer* demonstrates, there is no need to resort to constitutional principles to develop a rule that says a parent's marital status is irrelevant to the question of whether the presence of a new adult in the home is detrimental to a child's welfare. Constitutional principles have not succeeded in the past, and if past is prologue, then that is unlikely to change.