THE RIGHT OF GAYS TO ADOPT CHILDREN: FORTIFYING THE DEFENSES AGAINST SOCIETAL PREJUDICE

INTRODUCTION

The right of gays[1] to adopt children is both controversial and pertinent. It is controversial because it calls into play society's prejudices and biases against gays. It is pertinent because it is one area of many in the law in which gays are the victims of discrimination.

This Note explores and explains adoption law with respect to gay applicants. It emphasizes the need to adopt a standard that safeguards the gay applicant from a court's denial of an adoption petition based on untrue and unfounded prejudices and fears.

Part I surveys the relevant case law in terms of the "best interest" of the child standard and demonstrates how this standard has been twisted to meet a court's desired result.

Part II details two cases that determine the constitutionality of statutes passed by Florida and New Hampshire that bar all gays from adopting children. The concurrent examination of these cases allows one to view the total picture that has been painted of this issue.

Finally, Part III examines the potential for gays to be defined as a suspect class, permitting courts to strike down statutes such as those enacted by Florida and New Hampshire. This would allow gays to care for children who are in desperate need of a loving and supportive home environment.

I. AN EXAMINATION OF THE "BEST INTEREST" OF THE CHILD STANDARD

A. Survey of Case Law Re: Adoption by Gays

A number of courts have considered the question of adoption of children by gays. There is a scarcity of case law on this question. Since the issues involved in custody disputes are similar to those confronted by gay individuals involved in adoption proceedings, Section B will analogize the findings in those cases to the issue at hand.

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[1] For the purposes of this Note, unless otherwise specified, the term "gay" refers to homosexual men, lesbian women and bisexuals of either sex.

The standard used by courts to determine whether an individual is eligible to adopt involves weighing what options promote the "best interest of the child." However, an examination of the available case law reveals that courts apply this standard differently. Some courts focus on the "best interest" of the child, weighing the physical and emotional needs of the child against the ability of the adoptive parent to provide the child with these essentials. Some courts concentrate solely on characteristics of the potential adoptive parent in determining his/her suitability as a parent. Whether a court decides to render a gay eligible to adopt depends upon which approach the court employs in making its decision.

In *In re Adoption of Charles B.*,[2] the Supreme Court of Ohio granted the adoption of Charles, an eight-year-old boy, by Mr. B., an active gay man. In doing so, the court's reasoning involved balancing the testimony regarding Mr. B.'s character and conduct with the effect that this conduct would have on Charles. The court reversed the finding by the Ohio Court of Appeals that, "as a matter of law, homosexuals are not eligible to adopt."[3] In effect, the Ohio Supreme Court recognized that it is the "right of homosexual individuals to be evaluated like any other individual engaged in the adoption process."[4]

Charles B., who suffered from leukemia and from numerous physical and mental handicaps, had been in the foster care system for five years. During that time, Charles' handicaps proved to be obstacles in his placement in either a foster care or adoption situation. The Licking County Department of Human Services assigned Mr. B., a psychological counselor, to counsel Charles. Mr. B. lived with Mr. K., a research scientist. "A personal and close relationship"[5] soon developed between Charles and Mr. B. As a result, Mr. B. expressed an interest in adopting Charles and eventually filed a petition with the Agency to do so. One day before the hearing on the adoption request, the Licking County Department of Human Services submitted a statement to the trial court withholding its consent to the adoption. The trial court held that the adoption of Charles B. by Mr. B. was in the best interest of Charles. The Agency appealed and the court of appeals reversed.

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2 552 N.E.2d 884 (Ohio 1990).

3 *Id.* at 885.

4 Judith A. Linn, Note, *The Opportunities, or Lack Thereof, For Homosexual Adults to Adopt Children*, 16 U. DAYTON L. REV. 471, 473 (1991).

5 552 N.E.2d at 885.

In holding that Mr. B. could adopt Charles, the Ohio Supreme Court applied the "polestar . . . of the best interest of the child to be adopted"[6] and determined that this case, as all other adoption cases, must be decided "by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted."[7] In employing this standard, the court examined whether the Agency had shown that Mr. B.'s homosexuality had an adverse impact on Charles.

The court concluded that the evidence presented by the Agency did not show such an adverse impact. In fact, the only evidence presented by the Agency was that the Administrator of Social Services had met with Charles for one hour on only one occasion. The bulk of the Administrator's testimony regarded "the fact that Mr. B. did not meet the agency's 'characteristic profile of preferred adoptive placement.' "[8]

In contrast, Mr. B. testified himself and presented the testimony of six witnesses, including that of Charles' guardian ad litem. The testimony included evidence of the quality of the relationship between Mr. B. and Charles, Mr. B.'s ability to parent, and the familial support available to Mr. B. and Charles from Mr. B.'s mother and sister. The court, in considering all the relevant factors, determined that the evidence favored the adoption of Charles by Mr. B.

The dissent agreed with the majority that Ohio law did not bar the adoption by Mr. B. simply because he was a gay man. The dissent also agreed that the "best interests of the child" was the correct standard to be used in all adoption cases. However, the dissent transformed the test. Instead of the burden of proof being placed on the party opposing the adoption, Judge Resnick, the sole dissenter, advocated balancing the burden on the shoulders of both parties. The majority test requiring the opposing party to show that Mr. B.'s homosexuality impacted adversely on Charles evolved to a test requiring Mr. B. to show that his homosexuality did not have an adverse impact on Charles.

In arguing that Mr. B.'s adoption of Charles would not be in Charles' best interest, Judge Resnick relied on only one piece of evidence, a letter by Dr. Frederick B. Ruymann, M.D.[9] The letter stated that the adoption of Charles by Mr. B. ". . . would, with

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[6] *Id.* at 886.
[7] *Id.*
[8] *Id.* at 888.
[9] Director, Hematology Division; Professor, Department of Pediatrics, Children's Hospital, the Ohio State University.

our present knowledge place Charles at increased risk for exposure to HIV infection. . . . Charles has an altered immune system. The AIDS virus attacks the immune system further destroying it."[10]

This letter, in the opinion of Judge Resnick, provided enough support to determine that Charles' best interest would be subverted if Mr. B. were allowed to adopt him. Interestingly enough, Judge Resnick reached that decision without balancing this one letter against the weight of evidence that favored Mr. B.'s adoption of Charles. Additionally, there was no reference made to case law nor to any sort of documentation that supported Judge Resnick's rationale. This decision "ironically . . . affirm[s] the positive viewpoint that groundless denials of adoption premised solely on a bias against homosexuality will have no source for reference, precedent, nor shared judicial opinion."[11]

As in *In re Adoption of Charles B.*, the New York Surrogate Court recognized that the "best interests of the child" standard requires a court to examine the impact of a same-sex adoption on the child. In *In re Adoption of a Child Whose First Name is Evan*,[12] the court permitted the biological mother's life partner, Diane F., to adopt Evan. The court found the adoption to be in Evan's best interest as it provided him with legal rights that he did not presently possess, guaranteed him economic security and benefits, and ensured that Diane F. be granted visitation rights in the event that the two women separated. This last consideration saw to it that Evan's familial support and devotion would continue despite a separation. Even more importantly, the adoption "[brought] Evan the additional security conferred by formal recognition in an organized society."[13]

The court focused on the impact the adoption would have on Evan. There was minimal concentration on the fact that the court was creating a family headed by same-sex parents. In fact, the court asserted that New York expressly prohibits "discrimination against homosexuality in granting adoption."[14]

Unlike the balancing test used in *In re Adoption of Charles B.*

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[10] *Id.* at 891 (Resnick, J., dissenting).

[11] Linn, *supra* note 4, at 471. Linn puts Judge Resnick's basis for denying the adoption into perspective by pointing out that heterosexual individuals are also at risk of contracting AIDS. Both homosexuals and heterosexuals take the same precautions to prevent getting the disease. Therefore, homosexual adoptive applicants should not be denied the right to adopt because of the possibility of contracting AIDS any sooner than a heterosexual person should.

[12] 583 N.Y.S.2d 997 (Sup. Ct. 1992).

[13] *Id.* at 1000.

[14] *Id.* at 1003; N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16 (1988).

and *Matter of Evan*, the court in *In re Appeal in Pima County Juvenile Action B-10489*[15] ("*Appeal in Pima County*") focused exclusively on the conduct of the potential adoptive parent. However, the Court of Appeals of Arizona contended that it was using the "best interest and welfare" of the child standard.

In affirming the trial court's determination that the applicant was unacceptable, the court of appeals expressly rejected the appellant's argument that the primary concern that fueled the trial court's denial of the petition for adoption was the appellant's bisexuality. Instead, the court of appeals found "ample evidence to support the trial court without examining that issue."[16] It is interesting to note that the court did not proceed to cite the "ample evidence" but instead concentrated solely on the issue of appellant's sexual orientation to arrive at its decision that appellant was an unacceptable candidate to adopt. There was no balancing of the appellant's conduct and character, and the impact it would have on the child's "interest and welfare."

The court reasoned that it did not want to create familial units headed by gays whose conduct is proscribed by statutes which have been upheld by the United States Supreme Court.[17] "It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model, in effect approving that standard, inimical to the natural family, as head of a state-created family."[18]

On the other hand, the dissent in *Appeal in Pima County* weighed all the evidence presented at the hearing in concluding that the appellant was an acceptable candidate to adopt a child. While the dissent conceded that one of the factors to be looked at was the sexual orientation of the potential parent, it also took note of the caseworker's testimony that "an applicant will not be rejected solely on the basis of sexual orientation; rather the inquiry [should focus] on style of living, honesty, integrity, stability of living, strong employment and other general character considerations."[19]

According to the dissent, the approach should be analogous to that governing child custody disputes; courts should review the circumstances surrounding each potential adoptive parent on

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15 727 P.2d 830 (Ariz. Ct. App. 1986).

16 *Id.* at 834.

17 *See* Bowers v. Hardwick, 478 U.S. 186 (1986)(rejecting a homosexual's claim that a Georgia statute that criminalized sodomy was a violation of his right to due process under the XIV Amendment).

18 727 P.2d at 835.

19 *Id.* at 840.

a case-by-case basis and determine whether there is a nexus between a parent's character and conduct, and an adverse impact on the child.

B. Survey of Case Law Re: Custodial Disputes

In recent cases involving the question of whether a gay parent may gain or retain custody of a child, the majority of courts have used a "nexus" test. This test requires a court to focus exclusively on the "best interest" of the child and to determine whether a parent's conduct will have an adverse affect on a child.[20]

In *Bezio v. Patenaude*,[21] the Supreme Court of Massachusetts reversed the decision of the probate court which denied the biological mother's petition to remove the guardian and restore custody of the children to the mother. In arriving at this decision, the probate court judge found that a lesbian household created "an element of instability" that would be detrimental to the children's welfare.

The Massachusetts Supreme Court rejected this finding and held that a person's homosexuality did not *per se* render him or her unfit to be a parent. According to the supreme court, the test that must be applied involves a determination of whether the parent's homosexuality has an adverse impact upon the child. The court relied on expert testimony that there was no correlation between a person's sexual orientation and the development of the child's sexuality.

Dr. Alexandra Kaplan[22] testified that many factors influence child development, but sexual orientation of the parent was generally not among them. In fact, the testimony was that "most children raised in homosexual situation[s] 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, maladjusted than children raised with a loving couple of

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[20] *See* Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987)(rejecting father's claim for change of custody on the grounds that mother's homosexual relationship did not *per se* render her an unfit mother); M.A.B. v. R.B., 510 N.Y.S.2d 960 (N.Y. Sup. Ct. 1986)(granting homosexual father custody of son finding that father's sexual orientation had no adverse effect on his son); S.N.E v. R.L.B., 699 P.2d 875 (Alaska 1985)(reversing lower court's grant of custody to father, because decision was based on mother's homosexuality); Doe v. Doe, 284 S.E.2d 799 (Va. 1981)(mother's homosexual relationship not sufficient to justify severance of her parental rights).

[21] 410 N.E.2d 1207 (Mass. 1980).

[22] Dr. Kaplan was a clinical psychologist and professor of psychology at the University of Massachusetts.

the opposite sex."[23]

The court concluded "that a state may not deprive parents of custody of their children simply because their households failed to meet the ideals approved by the community or because the parents embraced ideologies or pursued life-styles at odds with the average."[24]

Similarly, the Supreme Court of Alaska in *S.N.E. v. R.L.B.*[25] asserted that absent evidence that a parent's homosexuality was inimical to a child's welfare, it was impermissible to declare a gay parent unfit "on any real or imagined social stigma attaching to [that person's] status as a [homosexual]."[26]

As some of the cases above illustrate, these "social stigmas" surrounding gays as a class motivated some courts to deny a gay applicant the chance to adopt. In arguing to deny Mr. B.'s petition, the dissent in *In re Adoption of Charles B.* relied on the mere speculation that Mr. B. would contract the HIV virus and somehow infect Charles. Similarly, the court in *Appeal in Pima County* ignored the factors that favored the adoptive applicant and based its decision to bar adoption solely on the applicant's sexual orientation.

It is apparent that when confronted by the issue of adoption by a gay, courts must adhere to a standard that safeguards the potential adoptive gay parent from decisions based on societal prejudices and stigmas attached to the gay community. As one court concluded, regardless of community mores about homosexuality, "its effect on [the child's] welfare is not a matter of which we can take judicial notice."[27] The "nexus" test provides such a standard, requiring a court to focus solely on those factors that will have an adverse impact on a child.

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23 Benzio v. Patenaude, 410 N.E.2d 1207, 1215 (Mass. 1980).

24 Doe v. Doe, 284 S.E.2d at 806 (quoting Bezio v. Patenaude, 410 N.E.2d at 1216).

25 699 P.2d 875 (Alaska 1985).

26 *Id.* at 879.

27 *Model Amicus Curiae Brief for Child Custody/Visitation Cases involving a Lesbian or Gay Parent*, prepared by the Lesbian and Gay Rights Project of The American Civil Liberties Union 3-4 (quoting Doe v. Doe, 284 S.E.2d 799, 805 (Va. 1981)). The doctrine of "judicial notice" enables a court to note certain facts as being "proved," because they are taken to be common knowledge. The petitioners in Doe did not present any evidence to support their claim that the natural mother's lesbianism rendered her unfit as a parent. Therefore, the court refused to hold that the mother's sexual orientation, standing alone, was detrimental to her child's welfare.

II. Homosexuality as a Bar to Adoption — A Constitutional Perspective

Both Florida[28] and New Hampshire[29] have statutes that expressly prohibit gays from adopting children. The *Opinion of the Justices*[30] and the *Seebol*[31] decisions represent recent judicial determinations that attempt to answer the question of the constitutionality of these statutes prohibiting adoption by gays.

Although these two cases had different results, they are valuable because they open up the floor and debate the issues for and against adoption by homosexuals.

A. Opinion of the Justices

In deciding whether to adopt Public Safety and Welfare Law § 170-B:4, the New Hampshire House of Representatives requested the New Hampshire Supreme Court to render an opinion regarding its constitutionality. Section 170-B:4 prohibits, *inter alia*, gays from adopting children. The Supreme Court of New Hampshire held the prohibition to be constitutional.[32] In its determination, the court examined whether the prohibition violated the Due Process clause, the Equal Protection clause, rights of privacy, and freedom of association.

The court first addressed the question of whether gays constituted a suspect or quasi-suspect class. The court stated that gays did not constitute a suspect or quasi-suspect class, "as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof."[33] Additionally, adoption is a legislative creation, not a constitutionally created right, so the court found no fundamental rights implicated in this case. As such, the court was free to proceed to the next step in the equal protection analysis, the question of whether this legislation was "rationally related to a legitimate governmental purpose."

The court relied on the New Hampshire legislature's expressed purpose that the provision was a measure designed to furnish appropriate role models for children under the care of

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28 Fla. Stat. ch. 63.042(3) (1991)("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

29 N.H. Rev. Stat. Ann. § 170-B:4 (1991) ("Specifically as follows, any individual not a minor and not a homosexual may adopt . . .").

30 Opinion of the Justices, 525 A.2d 1095 (N.H. 1987).

31 Seebol v. Farie, 17 Fam. L. Rep. (BNA) 1331 (May 21, 1991).

32 Opinion of the Justices, 525 A.2d 1095 (N.H. 1987).

33 *Id.* at 1098.

the State. The court dismissed critics' assertions that studies existed which found no correlation between parents' homosexuality and their childrens' sexual orientation. The fact that a possibility existed that the sexual orientation of a parent may exert influence on a child's developing sexuality was enough for the court. Thus, to bar a gay from adoption was a legitimate means to provide children with appropriate role models. As such, the bill did not violate equal protection.

The court then dismissed arguments that the provision violated the Due Process Clause. It stated that there existed "no cognizable liberty or property interest in . . . adopting a child."[34] Thus, there was no entitlement to adoption. Regarding substantive due process, there was no violation because there existed a legitimate relation between the state's objective and the exclusion of gays from adoption. The court concluded that the bill did not explicitly create an irrebuttable presumption that would be violative of due process.

The court distinguished the provision in dispute with those that had been struck down by the United States Supreme Court in *Vlandis v. Kline*[35] and *Stanley v. Illinois*.[36] The court concluded that the statutory provisions involved in these cases created irrebuttable presumptions that could be immediately disproved. Additionally, *Stanley* involved the "legally cognizable interest" of a parent's custody of his own children and a risk of determining parental unfitness that could be easily remedied if and when it occurred.

In contrast, the classification at issue "embodie[d] a prediction of risk not immediately disprovable . . . and one that d[id] not implicate any fundamental interest, and it addresse[d] a risk of harm that would not be readily reversible in those cases in which it could be expected to occur."[37] In other words, the risk that children of gay parents could grow up to be gay was not immediately determinable and if this risk occurred, it could not be easily altered; sexual orientation is not something that can be manipulated. Thus, the provision did not deprive gays of due process of law under the Constitution.

The court then treated the question of whether a right to

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[34] *Id.* at 1100.

[35] 412 U.S. 2230 (1973)(holding that a Connecticut statutory definition of residents and nonresidents for purposes of payment of state university tuition created an irrebuttable presumption that violated the Due Process Clause of the Constitution).

[36] 405 U.S. 645 (1972)(holding that a parent is constitutionally entitled to hearing to determine parental fitness before children are removed from parent's custody).

[37] Opinion of the Justices, 525 A.2d at 1100.

privacy or to freedom of association deprived the provision of its constitutionality. The court found *Bowers v. Hardwick*[38] dispositive on the question of whether the provision violated a gay's right to privacy and held that it did not.[39] Finally, since it had been established that there were no "rights to privacy or to engage in adoption . . .,"[40] the provision did not violate the right to freedom of association.

The provision was held to be constitutional by four of the Justices on the New Hampshire Supreme Court. There was one dissenting opinion by Justice Batchelder. He noted that the bill "presume[d] that every homosexual is unfit to be an adoptive parent . . . and thus preclude[d] every homosexual from demonstrating his or her skills as a parent."[41] He concluded that the provision violated due process, because it created an irrebuttable presumption and the State had available alternatives "to evaluate the qualifications of homosexuals who appl[ied] to adopt."[42]

B. Seebol

In *Seebol v. Farie*,[43] Edward Seebol challenged the constitutionality of Florida Statute § 63.042(3), which provides: "No person eligible to adopt under this statute may adopt if that person is a homosexual."[44] He had applied to adopt a special needs child. The court struck down the provision as violating both the Florida and the Federal Constitutions.

The court examined the question of whether the provision deprived a gay of his right to privacy. According to the court, the Florida Constitution provides for "a broader realm of privacy rights than the Federal Constitution."[45] Encompassed within this realm was an individual's right to be free from governmental interference with his sexual orientation. One of the areas of inquiry on the application to adopt pertains to an individual's sexual orientation. Edward Seebol was told the reason for the denial of his application was his disclosure that he was gay. The court found that the inquiry into the applicant's sexual orientation and

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38 Bowers v. Hardwick, 478 U.S. 186 (1986).

39 The Court in Bowers flatly rejected the proposition "that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription. . . ." 478 U.S. at 191.

40 525 A.2d at 1101.

41 *Id.* at 1101-02 (Batchelder, J., dissenting).

42 *Id.* at 1102.

43 17 Fam. L. Rep. (BNA) at 1331.

44 FLA. STAT. ch. 63.042(3) (1991).

45 17 Fam. L. Rep. at 1331.

the penalizing of his honest answer "unconstitutionally punish[ed] the exercise of the right to privacy of prospective adoptive parents."[46]

The court then proceeded to examine the provision's potential for violating the Equal Protection Clauses of the federal and state constitutions. In finding that it did, the court concluded that gays were a suspect class. The court asserted that homosexuals, "[a]s a class, . . . have been subjected to purposeful discrimination, are defined by a trait that bears no relation to their ability to function in society, are politically powerless, and are defined by traits that are immutable."[47] As such, any regulation that impinged on gays' rights must be subject to strict scrutiny. This required a court to examine a state's objectives in promulgating the regulation and discern whether there were alternatives available that were less intrusive. The court found that the "law spite[d] its own articulated goals" and therefore could not withstand any constitutional analysis. An examination by the court revealed that the State's interest in promoting the best interests of its children and of advancing the best interests of adoptive parents were being contravened by the provision. The State was denying children in need of suitable parents and excluding a class of individuals from adopting. Additionally, the court determined that the state was subjecting gays to a presumption of parental unfitness giving them no means by which to disprove this. The court recommended that an examination of the qualifications of adoptive parents on a case-by-case basis would be a less intrusive means to attain the state's objectives.

III. Argument for Gays Being Classified as a Suspect/Quasi-Suspect Class

It has been said by the United States Supreme Court that "the Constitution cannot control . . . 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."[48] It is therefore imperative that gays are defined as a suspect or quasi-suspect class. This would ensure that facially discriminatory statutes like the ones passed in Florida and New Hampshire would

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[46] *Id.* at 1331.

[47] *Id.* at 1332.

[48] Palmore v. Sidoti, 466 U.S. 429, 433 (1984)(reversal of the Florida District Court of Appeal's decision to deny custody to a mother on the ground that she was cohabiting with an African-American. The Court reasoned that this would not have a detrimental effect on the child if she remained in a racially mixed household).

be struck down. As such, gays would be allowed to adopt and the best interests of the children who desperately need love and care would be furthered.

A. An Equal Protection Analysis

Under an Equal Protection analysis, a court examines whether the law in dispute creates a "rational relationship between the activity in question and the state's purpose for regulating this activity."[49] If such a relationship exists, then the law is legitimate. If, however, the law is either facially discriminatory or affects a fundamental interest, it is unconstitutional.[50]

If a court determines that the law is facially discriminatory, it must then consider the applicable level of judicial scrutiny. There are traditionally two levels of scrutiny, heightened or strict scrutiny and a rationality review. However, recently, the Supreme Court has adopted a third level of scrutiny, intermediate scrutiny, which falls somewhere in between the two traditional levels.[51]

In order to come within the confines of strict scrutiny, a court must determine whether the persons that have been burdened by the law constitute a suspect class.[52] However, a court may find that these persons comprise a quasi-suspect class and in that instance, the law is subject to intermediate scrutiny.[53]

There are several factors that a court must look at in order to examine whether to apply a suspect or quasi-suspect classification. A court must first consider whether the group of persons has "suffered a history of purposeful discrimination."[54] The second factor that a court must look at is "whether the discrimina-

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49 Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)(holding that the requirement of a special use permit to operate a home for the mentally retarded deprived the operators and residents of the home of equal protection of the laws); Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988)(holding that Army regulations barring homosexuals from military service regardless of merit deprive the suspect class of homosexuals of equal protection of the laws); High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361 (N.D.Cal. 1987)(holding that Department of Defense's policy of subjecting lesbian and gay applicants for secret and top secret industrial security clearances to expanded investigations violated equal protection rights of lesbians and gay men). *See generally* Marion Halliday Lewis, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays based on Current Government Security Procedures*, 7 J.L. & POL. 133 (1990)(examination of government security clearance procedures and their effect on gays).

50 *Cleburne*, 473 U.S. at 440 (classification must be "rationally related to a legitimate state interest").

51 *Id.* at 441.

52 *Id.* at 440.

53 *Id.* at 441.

54 *Watkins*, 837 F.2d at 1444.

tion embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious."[55] An affirmative answer to this question requires 1) that the trait defining the class is immutable, beyond the control of class members; 2) that this trait is in no way related to the ability to perform or contribute to society; and 3) that the class suffers from unique disabilities resulting from prejudice or inaccurate stereotypes.[56]

Upon a determination that a court must submit the law to strict scrutiny, a court must then proceed to ask whether the law's "classification is necessary to serve a *compelling*[57] governmental interest."[58] If a court concludes that the law comes under intermediate scrutiny, it must determine if the regulated activity is one that is substantially related to an important governmental interest.[59] Finally, should the law be one that is subject to a rationality review, a court must consider whether the law is rationally related to a legitimate government interest.[60]

B. Gays Constitute a Suspect or Quasi-Suspect Class

The first factor to be considered in determining if homosexuals constitute a suspect or quasi-suspect class is whether gays have "suffered a history of purposeful discrimination."[61] As Justice Brennan noted in *Rowland v. Mad River Local School District*,[62] "homosexuals have historically been the object of pernicious and sustained hostility . . . ."[63] Similarly, the court in *High Tech Gays v. Defense Industrial Security Clearance Office*, recognized that "lesbians and gay men have been the object of some of the deepest prejudice and hatred in American society."[64] It is also pertinent to take note of the Colorado and Oregon initiatives that were on the ballots in the November 1992 election, initiatives that radically limited gays' rights.[65] These were measures that underhandedly legitimized society's prejudices and biases against gays.

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55 *Id.* at 1444.

56 *Id.* at 1444-45.

57 Under strict scrutiny the law must not only be rational, but *necessary* (emphasis added).

58 *Watkins*, 837 F.2d at 1434.

59 Craig v. Boren, 429 U.S. 190, 197 (1976)(holding that an Oklahoma statute prohibiting the sale of "nonintoxicating" beer to males under the age of 21 and to females under the age of 18 violated the Equal Protection Clause).

60 *Cleburne*, 473 U.S. at 440; *High Tech Gays*, 668 F. Supp. at 1368.

61 *Watkins*, 837 F.2d at 1444.

62 470 U.S. 1009 (1985)(Brennan, J., dissenting from denial of cert.).

63 *Id.* at 1014 (quoting Plyler v. Doe, 457 U.S. 202 (1982)).

64 High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987).

65 *Prejudice on Parade*, N.Y. TIMES, Nov. 14, 1992, at A18.

As it can be established that gays have withstood purposeful discrimination, a court must next address the question of whether the discrimination is so "grossly unfair" as to render it inconsistent with the ideals of equal protection doctrine.

The first question to be answered is whether gays as a class have immutable traits. In *Watkins v. U.S. Army*,[66] the Court of Appeals for the Ninth Circuit held that "sexual orientation is immutable for the purposes of equal protection doctrine."[67] The court reasoned that sexual orientation cannot realistically be altered and that individuals have very little control over their sexuality. Additionally, the court noted that "allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws."[68]

The second factor to be examined is whether a person's sexual orientation is relevant to his or her ability to perform or contribute to society. Simply put, the answer is no. Indeed, many of the custody cases involving a gay parent found that sexual orientation was irrelevant to the question of whether he or she possessed the ability to raise a child.[69]

The very fact that courts have considered a person's sexual orientation to be dispositive of his or her ability to parent reflects prejudices and inaccurate stereotypes — the final leg of the suspect class analysis.

In *High Tech Gays*, the court took note of the various "degrading stereotypes" about gays that pervade society. The court stated that many people "fail to recognize that gay people seek and engage in stable, monogamous relationships. Instead, to many, the very existence of lesbians and gay men is inimical to the family."[70]

It is these erroneous stereotypes that allowed Florida and New Hampshire to enact the statutes that bar gays from adopting. The very purpose expressed by the New Hampshire legislature for passing such a statute assumed an untrue and unfounded proposition: that gays do not make for appropriate role models. It is fair to say that discrimination against gays is "likely . . . to

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66 Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988).

67 *Id.* at 1446.

68 *Id.*

69 *See* Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987); M.A.B. v. R.B., 510 N.Y.S.2d 960 (Sup. Ct. 1986); S.N.E v. R.L.B., 600 P.2d 875 (Alaska 1985); Doe v. Doe, 284 S.E.2d 799 (Va. 1981); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980).

70 668 F. Supp. at 1369.

reflect deep-seated prejudice rather than . . . rationality."[71] These statutes are such a reflection.

The existence of such statutes also demonstrates that gays "lack[] the political power necessary to obtain redress from the political branches of government."[72] The very fact that the New Hampshire and Florida legislatures were able to enact these statutes without resistance proves this to be so.

Additionally, since gays constitute a minority in this country, most Americans will "have difficulty understanding or empathizing with gays."[73] With these considerations in mind, many elected officials may be unwilling to support legislation that appears to approve of homosexuality.

In sum, an examination of the relevant factors in ascertaining whether gays constitute a suspect class demonstrates that gays constitute such a class. As such, the statutes barring gays from adopting children must be subjected to strict scrutiny. These statutes may then be upheld only if they are "necessary to promote a compelling governmental interest."[74] In order to satisfy the requirement of necessity, it must be found that no less restrictive alternatives exist.[75]

The statutes barring adoption of children by all gays cannot withstand a strict scrutiny analysis. As the court noted in *Seebol v. Farie*,[76] the Florida statute contravened the very interests that the state sought to promote through adoption. It deprived children, who were in special need, of a loving and caring home and it excluded a class of individuals from adopting.

Additionally, there are less restrictive means available to further the interests of the state than barring all gays from adopting. The purpose of such a statute, as expressed by the New Hampshire legislature, is to promote appropriate role models for children in the care of the state. However, this interest can be furthered simply by investigating each gay who desires to adopt on a case-by-case basis. The state should simply treat gay adoptive applicants as it does heterosexual candidates.

CONCLUSION

Courts have available to them the "nexus" test, the standard

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71 *Rowland*, 470 U.S. at 1014 (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).
72 *Watkins*, 837 F.2d at 1447.
73 *Id.* at 1447.
74 *Id.* at 1448 (quoting Dunn v. Blumstein, 405 U.S. 330 (1972)).
75 *Id.* at 1448.
76 17 Fam. L. Rep. (BNA) at 1331.

implemented in custodial disputes. This standard requires a court to examine each adoptive applicant on a case-by-case basis and determine if there are factors that have a detrimental impact on a child. It is imperative that the "nexus" test be embraced as the mandated standard in adoption cases involving a gay adoptive parent. This is so in order to safeguard the adoptive gay parent from the erroneous societal stigmatized perceptions of gays that now fuel the decisions of so many of this nation's courts.

These same perceptions have led to the blatant discriminatory statutes expressly prohibiting gays from adopting children. In order to strike down these legitimized guises of prejudice and bias, the Supreme Court must constitute gays as a suspect class. It must do this in order to ensure gays the fullest of protections under the United States Constitution.

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