THE "BEST INTEREST OF THE CHILD": IS A CATEGORICAL BAN ON HOMOSEXUAL ADOPTION AN APPROPRIATE MEANS TO THIS END?

"To be happy at home is the ultimate result of all ambition, the end to which every enterprise and labour tends, and of which every desire prompts the prosecution."¹

I. INTRODUCTION

For most, happiness is a lifelong aspiration. This is especially true for those children who are, for whatever reason, denied the benefit of a loving parent. For a child in need of a family, a safe, loving, and happy home is the ultimate goal. However, just as there is no perfect equation with which to obtain a flawless decision in most areas of the law, the "best interest of the child" standard is no exception in cases of child placement. This standard is typically applied in situations concerning child custody in the event of a divorce, termination of parental rights proceedings when a parent is physically or psychologically putting the child in jeopardy, foster care placement, and when a petition for adoptive placement is filed.²

While the practice of adopting children has been in existence for centuries,³ within the American forum different forms of adoption are emerging at an exceedingly rapid pace.⁴ One of these emerging forms is adoption by homosexuals. This Comment will address a number of

---

1. MARGARET KORNITZER, CHILD ADOPTION IN THE MODERN WORLD 123 (1952) (quoting Doctor Samuel Johnson, original source unknown).
4. See generally CHRISTINE ADAMEC & WILLIAM L. PIERCE, PH.D., THE ENCYCLOPEDIA OF ADOPTION (1991). With the ever changing model of the American family, hand-in-hand come many variations of what has historically been known as the traditional adoption. By "traditional adoption" I am referring to a situation involving a married couple who wishes to adopt an infant child. While this connotation may still be that this is "traditional," in today's society, an adoption performed under these circumstances is probably the least common. Today, adoptions include people of all races, heritages, ages, and sexual orientations. These variations include multi-racial/cultural adoption, adult adoption, step-parent adoption, gay and lesbian adoption, and also second-parent adoption, which is a form of gay or lesbian adoption. See id.
issues central to adoption by homosexuals. First, this Comment will give a brief overview of the evolution of adoption and how it has progressed within the American culture—looking specifically at the ends it has sought, and still seeks to achieve. Second, this Comment will analyze the purported constitutionality of state statutes that expressly prohibit adoption by homosexuals. Third, this Comment will contrast this purported constitutionality with caselaw that supports adoption by homosexuals and some of the theories behind these decisions. In conclusion, this Comment will argue for implementation of the “best interest of the child” standard as the quintessential determinant with regard to adoptive placement—considering the sexual orientation of the adoptive parent only when there is another prospective adoptive parent.

II. ADOPTION LAW AND ITS HISTORY

The institution of adoption is not a brainchild of twentieth century America's legal system as many would imagine, but is a tradition dating back over 4,000 years to as early as the Babylonian Code of Hammurabi in 2285 B.C. However ancient its origin, the foundation on which most western societies base their adoption law is the original Roman Code or the later Napoleonic Code.

While the text, and the ultimate result, of today's adoption laws may bear a striking similarity to the laws of those who have preceded us, the goals of early adoption law are quite dissimilar to the interests sought by

5. See State Dep't of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1215-1220 (Fl. Dist. Ct. App. 1993) (holding that statute prohibiting homosexual adoption did not violate plaintiff's constitutional right to equal protection, right to privacy or due process), review granted, 637 So. 2d 234, approved in part, quashed in part, 656 So. 2d 902,reh'g denied (July 5, 1995); In re Opinion of the Justices, 530 A.2d 21, 26 (N.H. 1987) (holding, in response to question posed by the legislature, that proposed bill prohibiting homosexuals from adoption would not violate any substantive right under the state or federal constitutions).


7. See ADAMEC & PIERCE, supra note 4, at xvii. An even earlier reference to adoption is in the Bible wherein a description is given of the adoption of Moses by the Pharaoh's daughter. See id.; 2 Exodus 1:10.

8. See ADAMEC & PIERCE, supra note 4, at xviii. It is agreed upon by most experts that American adoption law is a combination of aspects of Roman law and American adaptations. See id.
the present institution. At its inception, the primary goals of adoption were to benefit society as a whole, and more importantly, to provide an heir for the adopting parent or parents. Without the aid of today's endless list of infertility alternatives, would-be mothers and fathers looked to adoption as a viable solution. As such, prospective parents were quite meticulous when choosing which child to adopt in that he or she would serve as the sole heir to the family estate. It was considered most desirous to find a child that was an aesthetic match to the adoptive family.

In the early 1950s, American society began warming up to the idea of adopting infants for reasons other than gaining an heir or additional laborer. Before the 1954 Supreme Court decision of Brown v. Board of Education, however, minority children were virtually excluded from mainstream charities that were instrumental in adoption placement. Then, with the civil rights movement of the 1960s, the children of the political and racial minorities in need of homes finally began to receive well deserved recognition by child welfare services.

Notwithstanding the integration of minorities into the child welfare system, a significant bias still existed. Through the 1970s "most adoption agencies and adoption intermediaries, such as attorneys or physicians, concentrated on placing healthy white infants with adoptive

9. See id. at xvii. Early on, the needs of society and the needs of the family were the motivating factors behind the institutionalization of adoption. See id. Today, however, "the needs and interests of the child are usually considered the primary reason and purpose for adoption as an institution." Id.

10. The "common denominator" among worldwide cultures for the institutionalization of adoption was that it would serve the needs of society and the family. See id. at xvii. Though the adoption also generally benefitted the adoptee, "such benefit was peripheral and was generally a happy accident." Id.

11. See LEAVY, supra note 3 at 1.

12. See ADAMEC & PIERCE, supra note 4, at xxvii. From the 1950s to the 1970s facilitators of the adoption process concentrated primarily on the placement of white infants with white families. See id. Little attention was paid to black orphans, or other ethnic minority children in need of adoptive or foster placement. See id.

13. See id. "In 1951, an estimated 70% of the children adopted in 21 states were under the age of one year. Unwed mothers were urged or pressured to choose adoption over single parenthood." Id.

14. See id. After passage of the child labor laws, by the late 1930s, the motivation to adopt children shifted from that of a need for an extra hand to "a desire to become a loving parent." Id.


16. See ADAMEC & PIERCE, supra note 4, at xxviii.

17. See id.
families." As such, minority children remained underrepresented in the class of adopted children.

However, with the Baby Boom generation reaching and passing childbearing years in the 1970s, an influx of potential adopters emerged. This emergence, in addition to women's changing belief that single parenting was far better for the mother and the child likely aided in the best home for the child becoming the ultimate goal.

A. Current Developments

In recent years, the "best interest of the child" has become quite complicated. Severe social problems continue to grow in the United States today, which directly impact the field of adoption. Problems such as teenage pregnancy, drug abuse, child abuse, and AIDS all contribute more and more children each year into the foster care system. Though these are tragic circumstances, adoption may be used as a tool in transforming this adversity into prosperity. Also, with this increase in children who are often labeled as hard-to-place, a variety of other considerations come into play, such as, age, race, and physical and mental health of the child.

One result of this influx of children was the 1984 Supreme Court case of *Palmore v. Sidoti*, in which the court held that race could no longer be a determinative factor in custody cases. With this came an increase in transracial adoptions. Today, adoptive families with mixed racial heritage often refer to themselves as "rainbow families." With transracial adoption having become quite accepted, it is no longer receiving as much attention. The hot topic now is not centered on the children who are being adopted, but the parents who are doing the adopting: gays and lesbians. However, unlike the Court's denouncement of race as a factor in adoption proceedings, courts are going the other way with gays and lesbians by proclaiming that homosexuality is the determinative factor. This yields a disheartening result.

18. *Id.* at xxvii.
19. *See id.* "To this date, black children are overrepresented in foster care, and they are often the last to be adopted." *Id.*
20. *See ADAMEC & PIERCE supra* note 4, at xxx.
21. *See id.* at xxix.
22. *See id.* at xxxii.
23. *See id.*
ADOPTION BY HOMOSEXUALS

III. The Prohibition of Adoption by Homosexuals

In the last twenty years, a scattering of prohibitions on adoption by homosexuals has emerged. Courts are denying the adoption petitions of gay and lesbian couples, and legislatures are fostering statutory amendments to adoption statutes which serve to preclude homosexuals from becoming adoptive parents. This trend of regulation seems to be continuing despite many well-founded arguments against it and a few brave states that have either chosen to support it, or at the very least, leave some room for discussion.

A. Statutory Prohibition

In 1977, the Florida legislature amended its adoption statute to include the following provision, "No person eligible to adopt under this statute may adopt if that person is a homosexual." The general intent of the Florida legislature is stated as, inter alia, "to protect... the well-being of persons being adopted... and to provide... a permanent family life" for adopted children. In 1997, the legislature went on to profess its intent "to ensure the integrity of adoption." Though neither of these statements make specific reference to the provision that precludes any homosexual from adopting a child, the latter statement was to be added to the section that discusses the legislative intent of the adoption statute. The attempt to incorporate this wording may very well have been in response to the 1995 Florida Supreme Court decision of State Department of Health and Rehabilitative Services v. Cox.

26. The Supreme Court of Connecticut is the most recent court to speak to this issue. On January 26, 1999, the court issued a lengthy opinion in response to a long line of appeals that culminated in the denial of a lesbian couple's quest for joint, legal parenthood. See In re Adoption of Baby Z, 724 A.2d 1035 (Conn. 1999). In its decision, the court recognized "that all of the child care experts involved in [the] case... concluded that the proposed adoption would be in Baby Z's best interest... [but b]ecause of the statutory nature of [the Connecticut] adoption system, however, policy determinations as to what jurisdictional limitations apply are for the legislature, not the judiciary, to make." 724 A.2d at 1060 (citations in original) (citations omitted). The Connecticut Supreme Court cites the Wisconsin Supreme Court decision In re Angel Lace M., 516 N.W.2d 678 (Wis. 1994), which similarly denied a second-parent adoption, in support of its decision to narrowly construe the adoption statute and to deny the adoption of Baby Z. See In re Baby Z, 724 A.2d 1035.

27. See Cox, 627 So. 2d at 1212; FL. STAT. ANN. § 63.042(3) (West 1997).
28. FL. STAT. ANN. § 63.022(1) (West 1997).
30. See id.
31. 656 So. 2d 902 (Fla. 1995). In the Florida Supreme Court's denial to rehear the Cox case, it effectively affirmed the lower court's holding that a categorical ban on homosexual adoption is neither violative of the equal protection nor the due process clauses of the Florida
order to augment what could be perceived as a somewhat capricious denial of a "right" to parent a child.

Recently, a number of states have attempted to follow the Florida model in banning adoption by homosexuals. For example, in 1998 the Alabama House of Representatives followed suit by adopting a joint resolution "express[ing its] intent to prohibit child adoption by homosexual couples." From that statement of intent, the Alabama Legislature proposed an amendment to its adoption statute that read, "[a]ny adult person, who is not a homosexual, or husband and wife jointly who are adults may petition the court to adopt a minor." The Alabama adoption statute, however, remains free of a prohibition on homosexual adoption.

In addition to Alabama, a number of state legislatures also sought to prevent adoption by homosexuals in their respective states. In January of 1997, the South Carolina Legislature proposed an amendment to its adoption statute to prohibit any person "who is a homosexual or bisexual" from petitioning the court to adopt a child. However, the South Carolina adoption statute remains free of this prohibition. Michigan proposed an amendment similar to that of South Carolina in November of 1998. Yet, Michigan also remains free of a ban on homosexual adoption.

In the same vein, New Hampshire amended its adoption statute in 1987 to provide that, "any individual not a minor and not a homosexual may adopt." The New Hampshire House of Representatives drafted this amendment after requesting an opinion from the Supreme Court of

---

32. I enclose the word "right" in quotation marks to set it off so the reader shall not infer that I am assuming the right to become an adoptive parent is a "fundamental right" under the Constitution. Though the Supreme Court has not stated so expressly, however invidious it may seem, the State of Florida has agreed with the notion that the right to adopt a child is not a fundamental right. See Cox, 627 So. 2d at 1216 ("[A]doption is not a right; it is a statutory privilege" (citations omitted)); Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987).

38. See H.R. 6236, 89th Leg., Reg. Sess. (Mich. 1998) ("A child shall not be placed with a prospective adoptive parent and the court shall not issue an adoption order if a person authorized to place the child or the court authorized to issue the order has reliable information that the prospective adoptive parent is homosexual.").
New Hampshire as to the constitutional viability of House Bill 70, which, inter alia, "prohibit[ed] homosexuals from adopting [children]," and would, if enacted, amend the New Hampshire adoption statute to preclude adoption by homosexuals.\textsuperscript{41} In \textit{Opinion of the Justices}, the New Hampshire Supreme Court responded with a resounding stamp of approval for the proposed legislation as it applied to adoption by homosexuals.\textsuperscript{42} However, in May 1999, the New Hampshire Legislature responded by enacting a provision that serves to remove "the prohibition on adoption and foster parenting by homosexual persons."\textsuperscript{43}

In 1999, there were a number of other states that sought to prohibit homosexual men and women from adopting children. The Indiana House of Representatives introduced a bill to deny homosexuals the right to adopt, or to become foster parents of children.\textsuperscript{44} Texas legislators also proposed a bill that would accomplish the same end by prohibiting placement of a child "in an adoptive home in which homosexual conduct occurs or is likely to occur."\textsuperscript{45} In Arkansas, Representative Minton proposed an amendment to Arkansas's adoption statute that reads: "No person eligible to adopt under this statute may adopt if that person is a homosexual."\textsuperscript{46} Finally, in Oklahoma, legislators have proposed a bill that creates a Child Welfare System Reform Committee whose duties include reviewing the Oklahoma

\begin{itemize}
\item \textsuperscript{41} See \textit{Opinion of the Justices}, 530 A.2d 21, 21-23 (N.H. 1987).
\item \textsuperscript{42} See id. at 24-27.
\item \textsuperscript{43} H.R. 90, 156th Sess. (N.H. 1999) (enacted). In the wake of this enactment, a legislative service request was filed on September 22, 1999 providing for a reinstatement of the prohibition on adoption and foster parenting by homosexual persons. See \textit{LEGIS. SERV. REG.} 2012 (N.H. 1999).
\item \textsuperscript{44} See H.R. 1055, 111th Leg., Reg. Sess. (Ind. 1999).
\item \textsuperscript{45} See H.R. 382, 76th Leg., Reg. Sess. (Tex. 1999). The Texas bill further ensures the accomplishment of its goal of precluding an adoption by homosexuals by mandating an "investigation to determine whether homosexual conduct is occurring or likely to occur in the adoptive home." \textit{Id.}
\item \textsuperscript{46} H.R. 2232, 82nd Leg., Reg. Sess. (Ark. 1999).
\end{itemize}
statutes and preparing recommendations for change. These recommendations are to include the call for the "prohibiti[on of] homosexuals from adopting children."

B. A Challenge: State Department of Health and Rehabilitative Services v. Cox

In March of 1991, James W. Cox and Rodney M. Jackman attempted to sign up for parenting classes at the Department of Health and Rehabilitative Services (HRS) in Sarasota, Florida. Mr. Cox and Mr. Jackman both voluntarily disclosed their homosexual orientation to HRS. Upon becoming aware of the fact that the two men resided at the same address, HRS notified Mr. Cox and Mr. Jackman that it would not accept, from either of them, an application to adopt a child pursuant to § 63.042(3) of the Florida Statutes. Section 63.042(3) provides that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."

Mr. Cox and Mr. Jackman subsequently contacted the American Civil Liberties Union and filed an action challenging § 63.042(3) arguing that it was "unconstitutional on its face and as applied to them." The basis of their complaint was that the statute was violative of both the Equal Protection and substantive Due Process clauses of the Florida and United States Constitutions and also that the statute impinged upon their right to privacy. This Comment will focus on the equal protection analysis in which the reviewing courts engaged.

Mr. Cox and Mr. Jackman initially prevailed at the trial court level, but were unsuccessful on appeal. The Florida Supreme Court followed suit and denied their petition for certiorari. The reversal of the trial

47. See H.R. 1280, 47th Leg., 1st Sess. (Okla. 1999).
48. Id. at Section 4.A.6.h.
50. See id.
51. See id.
52. FLA. STAT. ANN. § 63.042(3) (West 1997).
53. Cox, 627 So. 2d at 1212.
54. See id.
55. Though all three bases of the plaintiffs' complaint are worthy of discussion, the equal protection analysis engaged in by the court is what I find the most provocative and what I feel may be the most closely scrutinized in view of the issues presented.
56. See Cox, 627 So. 2d at 1212.
57. See State Dep't of Health and Rehabilitative Services v. Cox, 656 So.2d 902 (Fla. 1995).
court was partially based on rejection of the plaintiffs' equal protection argument.\textsuperscript{58} Plaintiffs argued that the prohibition set forth in § 63.042(3) of the Florida Statutes, which categorically forbids the class of homosexuals from adopting children, is a denial of equal protection under the Florida\textsuperscript{59} and United States Constitutions.\textsuperscript{60} Plaintiffs submitted that homosexuality is a suspect class and should therefore be subject to strict scrutiny review.\textsuperscript{61}

On the equal protection issue, the trial court concluded that the statute was subject to strict scrutiny review and was, as a result of that analysis, unconstitutional.\textsuperscript{62} The trial court based the bulk of its decision on an unappealed decision from the Florida Circuit Court that held § 63.042(3) invalid as violative of the state and federal constitutions.\textsuperscript{63} The court of appeals reversed, concluding that the plaintiffs failed to establish a basis for strict scrutiny review.\textsuperscript{64}

In its decision, the Florida appellate court relied heavily on the fact that within the federal realm, "neither homosexual orientation nor homosexual conduct has been determined to be a class requiring strict scrutiny review."\textsuperscript{65} The court found additional support for its denial of strict scrutiny review by analogizing the case of In re Florida Board of Bar Examiners,\textsuperscript{66} which concerned the possible denial of homosexuals to the Florida Bar.\textsuperscript{67} Because the Bar Examiners court concluded that the exclusion of homosexuals from the bar did not bear any rational relation to a person's ability to perform as a competent attorney, the Cox court

\textsuperscript{58} See Cox, 627 So. 2d at 1218-20.
\textsuperscript{59} See Fl. CONST. art. I, § 2 ("All natural persons are equal before the law...").
\textsuperscript{60} See U.S. CONST. amend. XIV, § 1 (No state "shall... deny to any person within its jurisdiction the equal protection of the laws.").
\textsuperscript{61} "[S]trict scrutiny [review is required] of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (citations omitted).
\textsuperscript{62} See Cox, 627 So. 2d at 1212.
\textsuperscript{63} See Seebol v. Farie, 16 Fla. L. Weekly C52 (Fla. Cir. Ct. 1991). Seebol was not a published opinion, but its text may be found at Appendix A of the District Court of Appeals Decision of Cox, 627 So. 2d at 1221.
\textsuperscript{64} See Cox, 627 So. 2d at 1219.
\textsuperscript{65} Id. (citations omitted).
\textsuperscript{66} 358 So. 2d 7 (Fla. 1978). In this case the Florida Board of Bar Examiners requested guidance from the Florida Supreme Court regarding a recent applicant who had revealed a homosexual orientation upon applying for admission to the bar. See id. The applicant was fully qualified for admission "in all respects with the possible exception that he may fail to meet the 'good moral character' standard for admission due to his homosexual preference." Id. at 8.
\textsuperscript{67} See id.
presumed that same rational basis test should apply with regard to would-be adoptive parents who are homosexual.\(^6^8\) After engaging in an extensive equal protection analysis, the Cox court concluded that § 63.042(3) was well within the range of the Florida Legislature's public policy decision-making powers.\(^6^9\) Citing the narrowness of rational basis review, the court deferred to the legislature and recognized that "[t]he state clearly has a legitimate governmental purpose in seeking to provide for the best interests of children in need of adoption."\(^7^0\) The court essentially adopted the argument set forth by HRS that heterosexual adoptive parents will serve as better role models to adopted children, and thus, the ban on homosexual adoption promotes the government interest of the best interest of the child.\(^7^1\)

1. The State Interest

In Cox, the court concluded that "[t]he state clearly has a legitimate governmental purpose in seeking to provide for the best interests of the

---

\(^6^8\) In denying plaintiffs' claim, the court relies on a number of cases that hold that homosexual orientation does not warrant strict scrutiny review. See Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 463 (7th Cir. 1989).

\(^6^9\) See Cox, 627 So.2d 1220.

\(^7^0\) Id.

\(^7^1\) Id. The court summarized the argument in support of the ban on adoption by homosexuals as follows:

[\[W\]hatever causes a person to become a homosexual, it is clear that the state cannot know the sexual preferences that a child will exhibit as an adult. Statistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect that parents will provide this education to teenagers in the home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex. It is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood. Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years. Without reliance upon any unsubstantiated notion that a parent could "teach" a child to become a homosexual, HRS maintains that the legislature may still decide that the best interests of children require that they be adopted by persons who can and will serve as heterosexual role models.

Id.]
ADOPTION BY HOMOSEXUALS

child in need of adoption.” While this is clearly a legitimate end of the legislature, the means it employs to achieve it are counterintuitive. By categorically banning any and all homosexuals from having access to the possibility of becoming a parent, and thereby providing a home to a wanting child, the legislature is systematically reducing the chances of parentless children of ever being adopted. How can this be in the “best interest of the child”? Yet, HRS continues to argue “that the legislature can rationally decide that this governmental purpose is promoted by a total prohibition of adoptions by homosexuals.”

The Florida appellate court agreed with HRS and reversed the decision of the trial court that had originally found for Mr. Cox and Mr. Jackman. At the initial trial, the court rejected HRS’s argument and assented to that of the plaintiffs, who relied predominantly on another circuit court decision that declared § 63.042(3) unconstitutional and also adopted the theories and research which generally set forth the proposition that gays and lesbians would clearly be suitable adoptive parents. The court rejected the plaintiffs’ reliance and concluded that they failed “to overcome the presumption of [the] constitutionality” of the statute.

2. Equal Protection and the Minimum Rationality Standard

In its analysis, the Cox court utilized the minimum rationality, or rational basis, standard of review. Under a rational basis analysis, almost any statute will pass constitutional muster since great deference

72. Id.
73. See infra note 144.
74. Cox, 627 So. 2d at 1219.
76. Cox, 627 So. 2d at 1220. See supra notes 65-71, and accompanying text for the court’s reasons for concluding that plaintiffs failed to overcome the presumption of constitutionality.
77. In one of the earliest equal protection cases heard by the United States Supreme Court, Chief Justice Warren clearly spelled out the goal of the rational basis inquiry when he stated in McGowan v. Maryland, that:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

is given to the legislature and its purported ability to craft statutes that employ means that are "reasonably related" to a legitimate state end.\textsuperscript{78} The court asserts that it achieves this reasonable relation by its argument, stated in pertinent part, that "[i]t is in the best interest of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood."\textsuperscript{79} Though this is somewhat persuasive, evidence indicates that this no better furthers the state's interest of the best interest of the child than does a stable, loving, and supportive gay or lesbian parent.\textsuperscript{80} Can a state really purport to be acting in the best interest of its children when it enacts a statute that is so patently overinclusive as to include, for example, a gay man who wishes to adopt a mentally and physically handicapped little boy who would otherwise likely remain either in foster care or in an institution for the rest of his life?\textsuperscript{81} Evidently, if a court can adopt an argument based on pure conjecture and nothing more, situations such as this will be the ultimate result.

**IV. DEFENDING ADOPTION BY HOMOSEXUALS**

In contrast to the prohibitive statutes that are now in force, there are also a number of states that legally recognize adoption by homosexuals. The following are cases wherein courts granted petitions for adoption by homosexuals. While many of the reviewing courts merely interpret the existing statute as to whether adoption by a homosexual is a statutory possibility under current construction of the statute,\textsuperscript{82} there are some states that have expressly sanctioned adoption by homosexuals.

**A. The Cases**

The Supreme Court of Ohio was one of the first courts to offer an affirmative answer to the question of whether a homosexual ought to be allowed to adopt.\textsuperscript{83} In March of 1990, the court granted a single

\textsuperscript{78} See GUNther & SULLIVAN, CONSTITUTIONAL LAW 635-36 (13th ed. 1997).

\textsuperscript{79} Cox, 627 So. 2d at 1220.

\textsuperscript{80} See infra notes 140-47 and accompanying text concerning the parenting skills of homosexuals.

\textsuperscript{81} See infra notes 86-90 and accompanying text for a case such as the one described.

\textsuperscript{82} This type of analysis is quite dissimilar to that in Cox. 627 So. 2d 1210. The Cox Court was burdened with the task of determining the constitutionality of a prohibitive statute that was already in existence, whereas these courts are able to engage in an analysis to determine whether adoption by homosexuals could conceivably be read into the scope of the statute.

\textsuperscript{83} See id.
homosexual male’s (Mr. B) petition to adopt an eight-year-old mentally and physically handicapped boy named Charles.\textsuperscript{84} The court found that Mr. B clearly fell within the scope of the Ohio adoption statute that provides in pertinent part: “The following persons may adopt: . . . [a]n unmarried adult.”\textsuperscript{85} The court then went on to hold that “adoption matters must be decided on a case-by-case basis through the able discretion [of] the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted.”\textsuperscript{86}

In applying this standard, the Ohio Supreme Court concluded that the trial court was correct in its determination that it was in Charles’s best interest to be adopted by Mr. B.\textsuperscript{87} In its decision, the supreme court cited several reasons for its conclusion, including that Charles had undergone a very unstable and abusive childhood, and that since 1986, when Mr. B first met Charles, “Mr. B has been the one consistent and caring person in the life of Charles B.”\textsuperscript{88} The court also recognized that at trial, Mr. B provided six witnesses to testify on his behalf; whereas his opponent, the County Department of Human Services, put forth one woman who had no formal education relative to this decision and stated that the sole reason for denial of his application was that Mr. B “did not meet [the Department’s] ‘characteristic profile of preferred adoptive placement.’”\textsuperscript{89} As a result, the Ohio Supreme Court granted Mr. B’s petition for adoption with relative indifference to the fact that he is homosexual and relying solely on the “best interest of the child” for guidance.\textsuperscript{90}

\begin{footnotesize}
\begin{enumerate}
\item See In re Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990).
\item See id. at 886; OHIO REV. CODE ANN. § 3107.03(B) (West 1996).
\item In re Adoption of Charles B., 552 N.E.2d at 886.
\item See id.
\item Id. at 885.
\item Id. at 888.
\item Id. In its decision, the Ohio Supreme Court references an earlier decision wherein the court of appeals reversed an adoption agency’s decision to deny an adoption petition because of the advanced age of the parties. I believe the sentiment expressed in the following quote is similarly applicable to the issue presented in this Comment.

Obviously, a “structured” agency system taking into account many factors before giving consent to adoption as urged by the professionals is of great importance . . . , but few standards in human affairs can be procrustean in application. In the light of the total evidence, and the singular emphasis on age as the key factor in denying consent, the denial in this case seems an example of a loss of the spirit of the whole adoption system while holding to the letter of part of it. The fault, the unreasonableness, the arbitrariness and the caprice, lie precisely with this
\end{enumerate}
\end{footnotesize}
On January 30, 1992, two years after the Ohio Supreme Court's Decision in In re Adoption of Charles B., the Surrogate's Court of New York County, New York granted one of the first petitions for a second-parent adoption by a lesbian. Petitioner, Diane F., sought to adopt six-year-old Evan, the biological son of her lesbian partner who was artificially inseminated pursuant to their joint decision to become mothers. The following year, a number of states, including New Jersey, Vermont, and Massachusetts, joined New York in accepting the adoption petitions of potential lesbian mothers. As with the adoption of Evan, the three cases decided in 1993 all involved women who were artificially inseminated. As such, the children at issue in the adoption were essentially born into their "adoptive" families. This casts quite a different light on the current debate concerning whether it is good public policy to engage in the practice of actually placing children in adoptive homes where the parents are of a homosexual orientation—perhaps the appropriate policy discussion should center on adoptions similar to the adoption of Evan.

Consistent with the preceding year, in January of 1994 the family court of Monroe County, New York went on to find in favor of two more lesbian families seeking to adopt the biological children of their partners. The four children at issue were all products of artificial insemination. Similarly, in December of 1994, the Family Court of Kings County, New York granted the petition for the adoption of Camilla Joanne Y.-B., who would subsequently be adopted by her biological mother's lesbian partner.

In each of the aforementioned decisions, one of the principal points

---

extraordinary emphasis on a single negative factor in the face of remarkably unanimous opinion that by all other standards the appellees are outstandingly qualified to be adoptive parents.

Id. at 889 (quoting In re Haun, 286 N.E.2d 478, 482-483 (Ohio Ct. App. 1972) (emphasis in original)).


92. See id. at 998.


94. See Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993).

95. See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).


of discussion is the predicament that arises in the context of adoptions by same-sex couples: the termination of the parental rights of the biological parent. The consensus among the states that have approved these adoptions, is to read an adoption by a same-sex parent into the "step-parent exception" of the statute that sets forth the effect of adoption. Though this exception may seem to be applicable solely because one of the parents is indeed the biological parent, this is not the case. For example, in 1995, the District of Columbia joined the ranks of the sanctioning states when it permitted Mark D., a gay male, to join his partner, Bruce M., as Baby Hillary's second adoptive father. In so doing, the court of appeals analogized Mark and Bruce's life partnership to that of a married couple and concluded that although Bruce is not Hillary's biological parent, their joint caring for her as their child is sufficient to include them within the scope of the step-parent exception.

Though the New York decisions cited above emanate from lower courts, in 1995, the highest court of New York voiced its approval of the lower decisions in In re Jacob by announcing that the statutory language in Domestic Relations Law § 110 permits unwed couples to adopt children. In re Jacob consisted of a combination of two appeals: the first concerned an unmarried heterosexual couple and, the second was

98. Most adoption statutes have a provision that mandates the termination of the parental rights of the birth parent upon adoption of the child. In the context of adoptions by homosexuals this presents a significant problem. For example, if a woman wants to adopt her lesbian partner's biological child to become that child's second-parent, under the typical statute the biological mother will have to forfeit her legal rights as the child's mother. This is similarly applicable to two homosexual males who seek to parent a child together. Not only are the legal rights of the parent at issue, but questions of inheritance arise in the event of the death of the second parent. For further discussion on this dilemma, see Ralph C. Brahier, Children and Inheritance in the Nontraditional Family, 1996 UTAH L. REV. 93 (1996); Ralph C. Brashier, Disinheritance and the Modern Family, 45 CASE W. RES. L. REV. 83 (1994); Mary Louise Fellows et al., Committed Partners and Inheritance: An Empirical Study, 16 LAW & INEQ. J. 1 (1998); Emily McAllister, Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance, 29 REAL PROP. PROB. & TR. J. 55 (1994); Laura M. Padilla, Flesh of my Flesh but not My Heir: Unintended Disinheritance, 36 BRANDeIS J. FAM. L. 219 (1997-98).

99. See In re Adoption of Tammy, 619 N.E.2d at 321; In re Adoption of a Child by J.M.G., 632 A.2d at 552-53; In re Adoption of Caitlin, 622 N.Y.S.2d at 837-40; In re Adoption of Camilla, 620 N.Y.S.2d 900-03; In re Adoption of Evan, 583 N.Y.S.2d at 1000-01; Adoptions of B.L.V. and E.L.V., 628 A.2d at 1273-75.


101. See id. at 860.

that of an unmarried homosexual couple. The problem the lower courts encountered was the language in § 110 of the state's Domestic Relations Law. Section 110 provided that "[a]n adult unmarried person or an adult husband and his adult wife together may adopt another person." Presumably, the drafters intent was to ensure that single men and women would be eligible in the eyes of the law to adopt children. However, unmarried couples (both heterosexual and homosexual) saw this as a legal loophole through which they could achieve their goal of becoming parents.

With the increasingly intense debate on whether homosexual men and women should be granted the privilege to become parent, the Jacob Court surprisingly spends little time in addressing this concern. After concluding that both couples indeed have standing to adopt under § 110, it quickly shifts gears to address the termination of parental rights issue posed by § 117 of the Domestic Relations Law. The court disposes with this issue as quickly as the first in concluding that only a "[l]iteral application of this language would effectively prevent these adoptions since it would require the termination of the biological mother's right upon adoption thereby placing appellants in the 'Catch-22' of having to choose one of two coparents as the child's only legal parent." In opting for a "common sense" interpretation of the statute, the court

103. See id. at 398. The unmarried heterosexual couple consisted of Steven K. and Roseanne M.A. See id. At the lower court level, Steven K. was precluded from adopting Jacob, the biological child of Roseanne M.A. See id. Both Jacob and Roseanne resided with Steven since early 1991. See id. G.M. and P.I. made up the homosexual couple, wherein the lesbian partner (G.M.) of Dana's biological mother was precluded from petitioning to adopt Dana. See id. At the time of this decision, G.M. and P.I. had been in a relationship for nineteen years and made the joint decision in 1989 that P.I. would be artificially inseminated so that they could become parents. See id. at 398. P.I. gave birth to Dana in 1990, and in 1993, with P.I.'s consent, G.M. filed a petition to adopt Dana. See id.

104. See N.Y. DOM. REL. LAW § 110 (McKinney 1998).

105. Id.


107. Section 117(1)(a) of the Domestic Relations Law provides in relevant part that "[a]fter the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession ..." N.Y. DOM. REL. LAW. § 117(1)(a) (McKinney 1998).

108. In re Jacob, 660 N.E.2d at 401.

109. In re Jacob, 660 N.E.2d at 405, n.8. This notion of a "common sense" interpretation of a statute concerning termination of parental rights was first set forth in Adoption of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1274 (Vt. 1993). In reference to Vermont's statute, Justice Johnson of the Virginia Supreme Court explained:
ADOPTION BY HOMOSEXUALS

grants the adoptions and thus reaches its holding that unmarried couples, both heterosexual and homosexual may adopt.

Unlike a number of other cases granting homosexual adoption petitions, the Jacob court virtually sidesteps the concurrent issue of whether homosexuals should be precluded from adopting on the basis of their sexual orientation. This court is unique from the others in that it truly focuses in on the "best interest of the child." It essentially defers to the lower courts' analyses in the cases of In re Adoption of Evan and In re Adoption of Camilla and their conclusion that a court may not reject prospective adoptive parents "solely on the basis of homosexuality." The sentiment of the Jacob court may be summarized in one simple phrase of Chief Judge Kaye's opinion: that "granting appellants ... standing to adopt [is] therefore consistent with the words of the statute as well as the spirit behind the modern-day amendments: [which is] encouraging the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them."

When the statute is read as a whole, we see that its general purpose is to clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by certain combinations of individuals. Who may adopt is already covered ... [this section] is concerned with defining the lines of inheritance for adoptees, preserving their right to inherit from their natural parents and granting the right to inherit from the "person or persons" by whom they are adopted. The statute also terminates the natural parents' rights upon adoption, but this provision anticipates that the adoption of children will remove them from the home of the biological parents, where the biological parents elect or are compelled to terminate their legal obligations to the child. This legislative intent is evidenced by the step-parent exception, which saves the natural parent's rights in a step-parent adoption. The legislature recognized that it would be against common sense to terminate the biological parent's rights when that parent will continue to raise and be responsible for the child, albeit in a family unit with a partner who is biologically unrelated to the child.

Id. (emphasis added). The Jacob court also emphasized that "the adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child." In re Jacob, 660 N.E.2d at 399.

112. Evan, 583 N.Y.S.2d at 1002; Camilla, 620 N.Y.S.2d at 900 (quoting 18 N.Y.C.R.R. 421.16(h)(2)).
113. In re Jacob, 660 N.E.2d at 401.
B. Rebutting the Presumption

Throughout the past decade, both legal and psychosocial development scholars have devoted a considerable amount of time to assessing the legitimacy of the claim that homosexuals would not make good parents. The overwhelming majority of these scholars have come to the conclusion that this claim is unsupported.114 Thus, it is relatively inexplicable that with this persuasive research and the appearance of gays and lesbians becoming increasingly more accepted in today's society, we are still seeing the exercise of restraint from state legislatures that have chosen to enact all-out bans on homosexuals who wish to adopt children.115 As we saw in Cox,116 gays are fighting a losing battle when it comes to challenging the statutes that categorically ban gay adoption. However, in states that have statutes that simply provide that "an unmarried adult" may adopt, gay and lesbian couples are often victorious.117

Courts that grant these petitions for adoption are often persuaded by research advanced by plaintiffs and conclude that it is indeed in the "best interest of the child" to grant the adoption. Conversely, though no applicable statute banning homosexual adoption is in force, some courts will disregard favorable research and empirical evidence that the adoption is in "the best interest of the child" and nevertheless deny the adoption petition. Alternatively, other courts reason that the adoption cannot go forward because of a glitch in the adoption statute that mandates the termination of the parental rights of the biological parent.118 As evidenced by a number of decisions, this parental rights termination problem may be sidestepped by invoking the "step-parent exemption"119 in order to allow the adoption to proceed. However, it appears as though the courts declining to take this route are simply resting on the argument that the text of the statute ought to be strictly construed, and with that strict construction, the inescapable conclusion is that the petition must be denied in order to preserve the legal rights of

114. See infra notes 140-47 and accompanying text.
115. I use the word "inexplicable" because it is my understanding that the role of courts and legislatures is to make conclusions based on tangible evidence, not personal biases. It seems apparent that a large number of the courts that reject these would-be adoptive parents claims, have probably made their decisions before even hearing the case.
116. 627 So. 2d 1210. (Fla. 1993).
117. See supra notes 91-97 and accompanying text.
118. See supra note 26.
119. See supra notes 107-13 and accompanying text.
ADOPTION BY HOMOSEXUALS

The courts that disavow potential homosexual adoptive parents and the legislatures that enact or seek to enact prohibitive legislation may be doing so in an effort to please the public. As evidenced by a recent public opinion poll in the Indianapolis Star, public perception of homosexuality remains laden with negativity. However, to defend the public, this negative perception is likely due to a lack of accurate information. To remedy some of these misconceptions, much scholarly research and study in the psychological, sociological, and legal fields has been conducted.

1. Effect of Parent’s Homosexuality on Child’s Sexual Orientation

The assumption that homosexual adoptive parents will somehow make their children homosexual is a fallacy. Research shows that “the incidence of same-sex orientation among the children of gays and lesbians occurs as randomly and in the same proportion as it does among children in the general population; as they grow up, children adopt sexual orientations independently from their parents.”

This assumption that homosexual parents will make their children homosexual likely stems from the earlier presumptions that homosexuals were deviant and that homosexuality was a mental disorder. However, in 1973 the American Psychiatric Association made a move toward dispelling this assumption by removing homosexuality from its list of mental disorders. The American Psychological Association soon followed when in 1975 it adopted the resolution that “homosexuality per se implies no impairment in judgment, stability, reliability of general social and vocational capabilities.”

120. See supra note 26.
121. See Friday Forum Topic: Gay Adoptions. Indianapolis Star, Oct. 9, 1998, at A23. The letters received by readers in response to the “Friday Forum” topic on gay adoptions are quite significant in that some represent the most common concerns addressed by researchers, and presumably the most common concerns of the national citizenry as well. This question was posed in response to the pending Indiana Bill to categorically ban homosexual adoptions. See supra note 44.
124. See id.
125. See id. (citations omitted). For further discussion of this inquiry, see Richard Green, M.D., The Best Interests of the Child with a Lesbian Mother, 10 BULL. OF THE AAPL
With the knowledge that homosexuality is not an exercise in deviant activity, it could still be suggested that homosexuality may be a learned behavior. If this were true, critics of homosexual adoption would have somewhat of a basis for their complaint. However, research indicates that homosexuality is probably more of an inborn characteristic. It has been suggested that the best guess of the cause of homosexual orientation is that it is genetic. It follows that a parent who is homosexual is not likely to influence a child's sexual development.

Moreover, most critics of homosexual adoption fail to realize that though many homosexual men and women are seeking to adopt children, it is not their goal to "convert" these children to the other side. In response to this contention, Dr. Richard Green comments on his discussions with lesbian mothers:

I ask the lesbian mother about her feelings regarding the emerging sexuality of her child and whether she would like her child to be homosexual or heterosexual. The usual response is, "I would like my child to be happy." If I press one step beyond, many mothers will say, "Well, I guess all other things being equal, in this society, it would be easier if he (or she) is heterosexual." Then I ask: "For a moment I would like you to assume that you would like to have your child turn out to be homosexual, and I would like you to tell me how you would go about doing that." I have yet to obtain a plan. Indeed, this lack is honest because no one really knows how to raise a child to be homosexual. We are not certain how to raise a child to be heterosexual.

Thus, one may properly infer that gay and lesbian parents do not

7, 9-10.

126. See Green, supra note 125, at 7. The theory of a genetic basis is evidenced by the Kallman study which compared 39 pairs of monozygotic male twins (presumably "identical" twins) as to their sexual orientation. See id. (citing F. Kallman, Comparative Twin Study on the Genetic Aspects of Male Homosexuality, 115 J. NERV. MENT. DIS. 283-298 (1952)). Kallman selected 39 males, who were predominantly or exclusively homosexual, and then compared each with his twin. See id. For each pair, "the co-twin was also found to be predominantly or exclusively homosexual. This suggests, at the very least, some contribution from genetics." Id.

127. See id.

128. See Susoeff, supra note 122, at 880 n.180 (citing J. FALLWELL, LISTEN, AMERICA! 160 (1980) ("Homosexuals cannot reproduce themselves, so they must recruit . . . . Why must they prey upon our young?").

129. See Green, supra note 125, at 11.
cause their children to become homosexual.

2. Effect of Parent’s Homosexuality on Child’s Identity

Though it is relatively conclusive that a parent’s homosexuality will not have a detrimental effect on a child’s sexual orientation, the question remains whether that child will experience developmental problems with regard to his or her identity. In response to this question, “the general consensus among researchers is that children raised by lesbian mothers develop an appropriate gender identity [and] follow typical developmental patterns of acquiring sex role concepts and sex-typed behaviors . . . .” This conclusion is further supported in that “no consistent pattern of personality traits has been found to characterize homosexual individuals.”

3. Resultant Teasing of Child with a Homosexual Parent

Another common concern of critics of homosexual adoption is that children of homosexual parents will be stigmatized and subject to increased teasing and ridicule from their peers as a result. Though this fear is proven to be relatively unfounded, there are some exceptions. The research in this area is somewhat limited; however, one study concluded that “only about five percent of the children studied who had lived with an openly gay or lesbian parent had been harassed by other children.” Another study of eighteen children being raised in seven lesbian parent families noted that only three of those children reported teasing. The episodes mentioned consisted of minimal verbal teasing such as, “Your mother is a lezzie”—to which the reply was, “So what!”

---

130. Gibbs, supra note 123, at 70; see also Mark E. Elovitz, Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research, 2 DUKE J. GENDER L. & POL’Y 207, 212 n.24 (“[T]he gender identity of children raised by a lesbian mother does not differ from the gender identity of children raised by a heterosexual mother.”); David K. Flaks, Gay and Lesbian Families: Judicial Assumptions, Scientific Realities 3 WM. & MARY BILL OF RTS. J. 345, 364-65 (review of research indicates no inappropriate gender identity in comparison of children living in lesbian and heterosexual-mother homes).


133. See Elovitz, supra note 130, at 215.

134. Susoeff, supra note 122, at 877. (citing research results listed in Brian Miller, Gay Fathers and Their Children, 28 FAM. COORDINATOR 544, 548 (1979)).


136. Id.
This matter-of-fact type of reaction was characteristic—as was obliviousness.137

Despite this mention of teasing of children who are raised by homosexual parents, this finding neglects to account for the customary teasing many children of heterosexual households submit to each day. Lest we forget, children can be cruel, regardless of what type of background a person has. Though the fact that a child has a lesbian or gay parent may provide an additional motive to harass, this will probably not turn an ordinarily amicable child into a bully. Moreover, it is essentially the self-esteem and confidence a child possesses, or lack thereof, that will ultimately lead to his or her warding off, or succumbing to harassment by other children.138 For whatever reason a child is teased, provided that it is not excessive,139 he or she is best equipped to deal with it if he or she is being raised by compassionate, supportive parents, regardless of the parents’ sexual orientation.

4. Parenting Skills of Homosexual Parents

The degree of distaste to the prospect of homosexual adoption exhibited by courts and the public is quite remarkable when viewed in comparison with research that indicates that “[n]o study has shown any harm to children raised by lesbian or gay parents.”140 However, some judges continue to base their decisions on an unsupported belief that homosexual relationships are abnormal and lack stability.141 This presumption then leads them to infer that detrimental effects on the children will result.142

As stated above, there is absolutely no evidence to show that homosexual parents are lacking in any way.143 In fact, research suggests

137. See id.
138. See Gibbs, supra note 123, at 71-72 (acknowledging that “[i]t is likely that ‘lesbian mothers who had accepted their own homosexuality could help their children with conflicts in the neighborhood in a healthy, tolerant way, just as Jewish mothers could help their children cope with anti-Semitism—because they did not feel guilty about being Jewish.’”) (citation omitted).
139. “[G]ay rights’ advocates acknowledge that intense anti-gay prejudice can justify denial of custody in individual cases where children have actually suffered harassment and choose not to live with a gay or lesbian parent.” Susoeff, supra note 122, at 877-78. (citations omitted).
140. Elozvit, supra note 130, at 211.
141. See Flaks, supra note 130, at 351.
142. See id.
143. For a selection of inspiring stories of successful gay and lesbian families see LESBIAN AND GAY FOSTERING AND ADOPTION (Stephen Hicks & Janet McDermott, eds.,
that lesbian and gay parents fare equally to, if not better than, heterosexual parents when judged in terms of parenting skills.\textsuperscript{144} Studies conducted on lesbian mothers conclusively show "a remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data of lesbian mothers and heterosexual mothers."\textsuperscript{145} Another study shows that lesbian mothers show more concern for their children's long-term development as compared to heterosexual mothers as a group.\textsuperscript{146} In terms of gay and non-gay fathers, the research suggests that there are "no discernible differences in parenting style" and also "that the two groups of men shared a similar development orientation toward their role as fathers."\textsuperscript{147}

While these results appear conclusive, as evidenced by legislatures' continuing attempts to categorically ban adoption by homosexuals,\textsuperscript{148} the message is simply not getting through. Courts and legislatures need to take this research into consideration before issuing another decision, or enacting another law, that will deprive so many children of a new mother or father simply on the basis of their homosexuality.

C. A New Standard

The fact remains that there are, as of November 1998, approximately 100,000 children currently in foster care in the United States who are awaiting permanent placement in adoptive homes.\textsuperscript{149} Though there are no statistics available on the number of gay and lesbian people who have sought or have succeeded in adoption,\textsuperscript{150} as evidenced by the number of recent cases challenging denied petitions,\textsuperscript{151} there are undoubtedly many more prospective parents waiting in the wings. Yet, with the relatively uncertain state of the law, it would not be surprising to hear that homosexuals at all interested in adopting children would seek to keep their sexual orientation to themselves in order to have an adoption petition approved. This, however, is exactly what should not be happening.

\textsuperscript{144} See Elovitz, supra note 130, at 211.
\textsuperscript{145} Id.
\textsuperscript{146} See id. (citations omitted).
\textsuperscript{147} Id. (citations omitted).
\textsuperscript{148} See supra notes 27-48 and accompanying text.
\textsuperscript{149} See President Directs HHS to Develop Plan for Using Internet to Increase Adoptions, 25 BNA REP. 1058 (Dec. 1, 1998).
\textsuperscript{150} See Elovitz, supra note 130, at 209.
\textsuperscript{151} See supra notes 83-113 and accompanying text.
It appears as though children who are raised by homosexual parents are happiest when their parents are at ease about their homosexuality.\textsuperscript{152} Forcing would-be adoptive parents to hide their homosexuality in order to progress through the rigors of an adoption agency’s screening process would simply be counterintuitive. It would only emphasize the need to hide who you truly are to a child who, in all likelihood, already feels at home.

In addition to the number of children in the United States in need of permanent homes, and the large number of prospective parents who are being systematically prohibited from having the opportunity to adopt these children, there is yet another reason to open the doors to adoption for gays and lesbians. The Uniform Adoption Act specifically provides in a prefatory note that “[n]o one may be categorically excluded from being considered as an adoptive parent.”\textsuperscript{153}

Though it may appear that I am attempting to argue that being raised in a homosexual household would be entirely equivalent to being raised in a heterosexual household, that is not my intent. It would be naive to infer such to be true. My intent is to convey to judges and lawmakers that while growing up with a homosexual parent or parents would, without a doubt be different, it would not necessarily be adverse. The latter is the presumption that many courts and legislatures have taken.

This Comment proposes that a new standard be set in guiding decision-making procedures with regard to homosexuals seeking to adopt children. In accordance with the true “best interest of the child,” this Comment submits that a new variance of this standard be implemented wherein the sexual orientation of the prospective adoptive

\footnotesize{\textsuperscript{152} See supra notes 135 & 138.}

\footnotesize{\textsuperscript{153} UNIF. ADOPTION ACT Prefatory Note (5), 9 Part 1A U.L.A. 14 (1994). The Prefatory Note of the Uniform Adoption Act begins with the following statement that should be taken into consideration by judges and lawmakers who will ultimately decide whether homosexuals will be permitted to adopt.

The guiding principle of the Uniform Adoption Act is a desire to promote the welfare of children and, particularly, to facilitate the placement of minor children who cannot be raised by their original parents with adoptive parents who can offer them stable and loving homes. The Act is premised on a belief that adoption offers significant legal, economic, social and psychological benefits not only for children who might otherwise be homeless, but also for parents who are unable to care for their children, for adults who want to nurture and support children, and for state governments ultimately responsible for the well-being of children.

Id. at 12.
parent shall be considered only when there is another prospective adoptive parent. This new standard will ensure that the "best interest of the child" is in fact the quintessential determinant in adoptive placement.

V. CONCLUSION

Through this review of history, statutory law, caselaw, and scholarly research, it is indeed evident that a clearer, more succinct standard in judging the prospect of adoption by homosexuals is a necessity. The standard this Comment suggests should lead the way to decisions which truly advance the "best interest of the child."

Jurisdictions that base their decisions on the statutorily mandated termination of parental rights could feasibly override this glitch in the statute by adopting the proposed standard as a resolution of the legislature. In doing so, the need to defer to the strict construction of the statute would be eliminated—and petitions that are denied even though the adoption would be in the child's best interest would be an injustice of the past.\(^{154}\)

Regardless of a legislator's or judge's preconceived notion that homosexuality is wrong—the bottom line must still be the "best interest of the child." How can one maintain a straight face and claim that instituting an all-out ban on adoptions by homosexuals is furthering the state's interest, when in effect, all this is doing is keeping more children in foster care; or in the case of second-parent adoptions, denying a child the right to have two legal parents.

The answer is simple. For the law to protect the "best interest of the child," lawmakers must change the errors of their ways. Opening adoption up to potential gay and lesbian parents is a step in the right direction.

HEATHER J. LANGEMAK

---

154. See supra note 26 and accompanying text.