Saint Louis University Public Law Review

Volume 21
Number 1 *The Jury's Role in Administering Justice in the United States (Volume XXI, No. 1)*

Article 13

2002

Lofton v. Kearney: Discrimination Declared Constitutional in Florida

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LOFTON v. KEARNEY: DISCRIMINATION DECLARED CONSTITUTIONAL IN FLORIDA

Although many homosexuals desire to adopt children, even hard-to-place children, society does not afford them the same opportunity to adopt enjoyed by heterosexuals.[1] Why does such a disparity exist? Many courts assert that homosexual adoption is inappropriate because homosexuals are unfit parents and such placement is against a child's best interest.[2] Courts fall victim to various misconceptions surrounding homosexuality. Some of these mistaken beliefs are that homosexuals are more likely to molest their children than heterosexuals, children of homosexuals will themselves grow up to be homosexuals, homosexuals will be unable to teach their children "appropriate gender roles," children of homosexuals will be exposed to the AIDS virus and children of homosexuals will be teased and tormented by society.[3] Empirical studies show that these beliefs are generally untrue.[4] By relying on stereotyping and misconceptions, courts are using the long-standing "best interest of the child" standard (hereinafter BIOC) to discriminate against individuals based on their sexual orientation. The sad ending is that both

1. David P. Russman, Note, *Alternative Families: In Whose Best Interests*?, 27 SUFFOLK U. L. REV. 31 (1993) (noting the disparity between homosexual and heterosexual adoptions); *see also* Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 769-71 (1999) (discussing hard-to-place children and how these "undesirable" kids are left to be adopted by non-traditional parents).

2. Lofton v. Kearney, 157 F. Supp. 2d 1372, 1382-83 (S.D. Fla. 2001) (upholding a categorical ban on homosexual adoptions based on the belief that it is in the best interest of Florida's children); *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, 211 (1995).

3. Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 69-85 (1996) (discussing the misconception that homosexuals are unfit parents because they are likely to molest their children, their children are likely to become gay, the inability of homosexuals to teach appropriate sex roles, the fear that their children will be more likely to acquire the AIDS virus, their children will face teasing, as well as morality concerns); *see also* Lin, *supra* note 1, at 778 (discussing the influence of false narratives on homosexuals regarding adoption rights).

4. Charlotte J. Patterson, *Lesbian and Gay Parenting: A Resource for Psychologists*, *available at* http://www.apa.org/pi/parent.html (last visited Jan. 24, 2001) (discussing research findings regarding children of homosexuals). *See generally* Marianne T. O'Toole, Note, *Gay Parenting: Myths and Realities*, 9 PACE L. REV. 129, 144-48 (1989).

special needs children and homosexuals are denied the opportunity to be a part of a family.[5]

I. INTRODUCTION

Although homosexual adoptions are exceedingly more difficult to accomplish than heterosexual adoptions in every jurisdiction across the nation, in the case of *Lofton v. Kearney*[6] United States District Court Judge James Lawrence King left America's toughest legal prohibition intact.[7] In a 2001 decision the U.S. District Court for the Southern District of Florida set the nation back by upholding the constitutionality of a statutory ban on homosexual adoptions.[8] In doing so, the court used the BIOC as a pretext for discrimination.[9] The outcome of this decision is harmful; the state of Florida has lost track of reality. The reality is that there are five hundred thousand children in foster care across the nation.[10] One hundred thousand of these children are awaiting adoption and most of them will never be adopted.[11] In 1997, there were only "qualified" parents for twenty-percent of these children.[12] The remaining eighty-percent continued in foster care years longer than intended. Children even less fortunate are reduced to spending their entire childhoods in institutions and residential facilities and being released at the age of majority to pursue a life on their own.[13] These children will never know what it is to belong to a family.

Even if homosexuals were afforded the right to adopt children nationwide, there would not be enough homes for these hundreds of thousands of family-

5. Elovitz, *supra* note 2, at 210; Heather J. Langemak, Comment, *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*," 83 MARQ. L. REV. 825, 834-35 (2000); *see also* Strasser, *supra* note 3, at 49 (stating "[s]tates may limit the ability of lesbian and gay couples to adopt children . . . . These preclusions have been alleged to further the important state interest of promoting the best interest of the child. Empirical evidence supports the opposite conclusion.").

6. 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

7. *Id.* at 1385.

8. *Id.* at 1374 (holding that Florida Statute 63.042(3) is constitutional). This statute is known as the "homosexual adoption provision" and it prohibits adoptions by homosexuals with the language, "No person eligible to adopt under this statute may adopt if that person is homosexual." Homosexuality is not a mere factor in the adoption consideration, it is a per se ban.

9. *Id.* at 1383.

10. Loretta Casteen, *Should Homosexuals be Banned from Adopting Children?*, *at* http://www.postaholics.com/cgi/news/get.cgi/gayadopt.html (last visited Oct. 19, 2001).

11. *Id*.

12. *Id*.

13. *Id*.

deprived children.[14] Florida's statutory ban on homosexual adoption worsens the situation simply because the court will not open its eyes and acknowledge the devastating statistics. In upholding this ban, Judge King was blind to the truth that the majority of families today do not fit into the cookie cutter image of a family from the past.[15] The families that do fit this ideal mold are not often interested in adopting "special needs" children.[16] In Florida's most recent denial of homosexual rights, the court in *Lofton v. Kearney*[17] discussed a legitimate purpose that lingers in the background of the Court's decision: finding the best possible homes for Florida's foster children.[18] While the purpose appears legitimate, it feigns naivety. The upholding of the statutory prohibition on homosexual adoptions in Florida is not assisting in finding the best homes for Florida's children; it is altogether denying the children of a home.

By adhering to the social stigma that homosexuality is immoral and wrong, the Court's decision in *Lofton v. Kearney*[19] denies many children loving families. The facts of this case evoke powerful questions: how do you tell a ten-year-old boy, who is HIV positive, that he is not entitled to the love and support of the only parents he has ever known and loved? How can a federal appeals court uphold a statute that leaves more children without homes and more deserving adults childless? How can these situations where parentless children are denied the happiness of a permanent home possibly be in the best interest of the child, as claimed by the judge in *Lofton v. Kearney*? It appears that in *Lofton*, the BIOC standard has been misused in order to discriminate against homosexuals and protect society from all the fears and misconceptions surrounding homosexuality. How unfortunate that the federal judge hearing *Lofton* could not recognize how badly the Florida homosexual adoption provision was and still is hurting the one class of people the BIOC aims to protect: the children. This commentary on *Lofton v. Kearney* analyzes the reasoning employed by the federal judge in the Southern District of Florida in upholding the ban on homosexual adoptions, as well as the abuse of the BIOC.

Part I of this Comment provides an overview of the impact of sexual orientation on the rights of individuals: the general purpose, adoption policies, and different jurisdictional approaches surrounding the controversial topic of homosexual adoption rights. Part II focuses on the state of Florida and it's

14. *Id.*

15. Jodi L. Bell, Note, *Prohibiting Adoption by Same-Sex Couples: Is it in the "Best Interest of the Child?"*, 49 DRAKE L. REV. 345, 346 (2001); *see also* Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1991).

16. Lin, *supra* note 1, at 771.

17. 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

18. *Id.*

19. *Id.*

categorical ban on such adoptions. In Part III the Comment examines the case of *Lofton v. Kearney* and the decision to uphold the homosexual adoption provision of the state adoption statute. Finally, in Part IV, the Comment evaluates the real effects and reasoning behind the *Lofton* decision and the impact the case makes on our nation's children. This Comment opposes a per se ban on homosexual adoptions and emphatically rejects the decisions of the Southern District of Florida Court and the Florida Legislature and their belief that homosexual orientation alone renders an individual unfit as a parent.

II. BACKGROUND

Opponents to homosexual adoptions claim that allowing homosexual adoptions is "a victory for homosexual activism and a defeat for children already bruised in life and in need of an intact, committed husband-and-wife family."[20] They further argue, "[c]hildren need a role model, both male and female."[21] Adversaries of homosexual adoption contend that the joint relationship of mother and father contains essential characteristics needed in child rearing that are not provided by homosexual couples.[22] Opponents claim that this denial of homosexual adoption rights is not based on discrimination against homosexuals; rather, opponents believe that the very nature of the homosexual relationship makes gay couples unable to provide the child an "ideal environment."[23]

On the other side of the debate are the advocates for homosexual adoption who insist, "Sexual orientation is not the issue. Parenting ability is the issue."[24] Supporters of the homosexual adoptions argue that one's sexual orientation or marital status does not affect the "parenting ability" of adoptive parents.[25] Such mixed feelings on homosexuals as prospective parents result from deep-rooted moral disapproval and homophobia that is still prevalent in today's society.[26]

A. Homosexual Rights Historically

When a homosexual individual enters into the adoption equation, things become more complex, and judicial involvement becomes nearly inevitable.

20. Phil Belin, *My Two Dads*, 2 PRINCETON UNIV. L.J., *at* http://www.princeton.edu/~lawjourn/Spring98/belin.html (last visited Apr. 24, 2002).

21. Laura Parker, *Daddy, Father, Son Adoption by N. J. Gays Spark Praise, Criticism*, USA TODAY, December 19, 1997, at 1A.

22. *Id.*; Belin, *supra* note 20.

23. Belin, *supra* note 20.

24. *Id.*

25. *Id*.

26. Judith A. Lintz, Note, *The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children*, 16 U. DAYTON L. REV. 471, 487 (1990).

In order to comprehend the difficulty accompanying child custody concerning homosexual parents, an appropriate understanding of the social outlook and underlying biases towards individuals with a same sex orientation is necessary.

1. Sodomy Laws: The Root of Sexual Orientation Based Discrimination

The contemporary intolerance towards homosexuality stems from ancient Judeo-Christian proscriptions against sodomy, which was considered a sinful act.[27] Historically, the American legal system has tried to enforce presumed cultural and moral norms by the means of laws that dictate who individuals may have sex with and how.[28] Predating the foundation of our nation there have been different forms of criminalization of sexual activity between persons of the same sex.[29]

Sodomy laws, which were imported into the American colonies from English common law, underlie present discrimination against gay men and lesbian women because homosexuals are automatically labeled as criminals since they "violate the sodomy law whenever they engage in the very acts that define them as gay men and lesbians."[30] Sodomy laws criminalize private consensual behavior between adults and engender the irrational prejudice that underlies all discrimination against gay men and lesbian women.[31] While homosexuality is not limited to the particular sex acts that sodomy embraces, the social stigma assigned to acts of sodomy has transferred to homosexuals, who have been declared a new class of deviants in today's culture.[32]

27. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 8-16 (1980) (discussing religious justification for punishing homosexuality based on a deep rooted assumption that homosexuality is detrimental to society). The reasons that homosexuality has historically been viewed as a detriment to society is because it is unnatural and non-procreative. *See* ROGER J. MAGNUSON, ARE GAY RIGHTS RIGHT?: MAKING SENSE OF THE CONTROVERSY 109-16 (1990) (characterizing homosexual behavior as immoral and validating arguments with biblical scriptures and references that are purported to condemn homosexual behavior).

28. American Civil Liberties Union, *Lesbian and Gay Rights*, *at* http://www.aclufl.org/body_18.html (last visited Oct. 22, 2001).

29. Rhonda R. Rivera, *Legal Issues in Gay and Lesbian Parenting*, *in* GAY AND LESBIAN PARENTS 199-200 (Frederick W. Bozett ed., 1987). Rhode Island passed its first sodomy law in 1662. Although some states had no criminal sodomy statutes, they adopted instead the common law of England. *Id.*

30. *See* Bowers v. Hardwick, 478 U.S. 186 (1986). *See generally* Abby R. Rubenfeld, *Lessons Learned: A Reflection Upon Bowers v. Hardwick*, 11 NOVA L. REV. 59, 60 (1986).

31. Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 NOVA L. REV. 793 (2000) (citing Rubenfeld, *supra* note 30, at 59).

32. John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 918 (1986) (acknowledging the difference between sexual acts or conduct and sexual orientation and identity); O'Toole, *supra* note 4, at 132

Despite the existence of these sodomy laws there has been a slow trend beginning in the early 1960's to decriminalize consensual, private sexual behavior.[33] A big contribution to this decriminalization was the American Law Institute's (ALI) elimination of criminal penalties for all sexual behaviors except those involving minors, coercion or force and public indecency in the Model Penal Code.[34] In this trend moving away from sexual orientation based discrimination, numerous state legislatures have followed the ALI's lead and have decriminalized adult, consensual, private sexual conduct.[35] A number of state supreme courts including Massachusetts, New Jersey, New York and Pennsylvania have also decriminalized this behavior by declaring such sodomy laws violative of the state constitutions.[36] Today, sodomy laws are only enforced in twenty-three states, as opposed to the unanimous nationwide imposition of the recent past.[37]

2. The Broadened Impact of Sodomy Laws on Homosexuals

The deeply rooted discrimination resulting from sodomy laws is a prejudice that same-sex orientated individuals are forced to face in every facet of their lives, whether it be housing, employment, military, marriage or, as in this case, parenting.[38] While things seem bleak for homosexuals, many

(discussing how labeling homosexuals as deviants is an important distinction as it "makes the beginning of the treatment of a segment of the population as a race apart").

33. Rivera, *supra* note 29, at 199 (discussing the roots of the problem of discrimination and sodomy laws in general).

34. *Id*.

35. Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming are among the states that have moved to decriminalize sodomy.

36. *See* State v. Saunders, 381 A.2d 222 (N.J. 1977); Commonwealth v. Sefranka, 414 N.E.2d 602 (Mass. 1980); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980).

37. American Civil Liberties Union of Florida, *Lesbian and Gay Rights*, *at* http://www.aclufl.org/body_18.html (last visited Apr. 24, 2002) (discussing the struggle for homosexuals still occurring as a repercussion of the sodomy laws that were enacted and the statistics of current state laws on sodomy). Six of the twenty-three states that currently uphold sodomy laws only apply them to individuals of same sex orientation. The other seventeen states apply sodomy statutes to both hetero and homosexual individuals.Even so, the primary effect of sodomy statutes is to "sanction discrimination against lesbian and gay male sex." *Id.*

38. *Id.* Sodomy laws act as invasions of the intimate realm of sexual expression and have provided a legal basis justifying a wide range of discrimination against lesbians and gay men in the areas of housing, employment and parenting. Statistics show that millions of Americans are still denied equality in the areas of child custody, access to housing and public accommodation because they are or are perceived to be homosexual. Sexual orientation based discrimination is now regulated in the military as well. *Id.*

jurisdictions and organizations seem to be on the right path.[39] Despite recent efforts to curb discrimination based on sexual orientation, many barriers still thwart equal treatment of homosexuals.[40] In forty-three states it is still legal to discriminate based on sexual orientation.

Currently, only the state of Hawaii has afforded same-sex marriages legal recognition.[41] "The judiciary has unanimously inferred prohibitions of same-sex marriage from silent state statutes."[42] In *Singer v. Hara*, the long-standing American and English common law notion of marriage as a "legal union of one man and one woman as husband and wife" was upheld.[43] The belief that homosexuals are not entitled the right to marry is attributable to the long-standing societal view of marriage as the appropriate and desirable forum for procreation and the rearing of children.[44] Although this is not possible and is not done by all married, heterosexual couples, procreation is impossible for homosexuals. Thus, the traditional understanding of marriage is inapplicable for homosexual couples.[45]

39. *Id.* Eight states including California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin, as well as the District of Columbia, and over one-hundred municipalities have banned discrimination based on sexual orientation in employment, housing, and public accommodations. Many private institutions, corporations, and universities have enacted "domestic partnership" programs, affording various benefits to homosexuals. *Id.*

40. *Id.* Many employment decisions are based on sexual orientation. There have been many "hate crimes" against gay people and millions are still denied equality in the areas of custody of children, housing, and public accommodations. *Id.*

41. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996) (overturning a prior case in the state of Hawaii that held same-sex marriages were not recognized); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); *see also* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 77 (2d ed. 1987); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family*," 26 GONZ. L. REV. 91, 100 (1991). No court having heard a case on the issue has upheld a same-sex marriage. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971); DeSanto v. Barnsley, 476 A.2d 952 (Pa. 1984).

42. Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193, 196 (1979).

43. Singer v. Hara, 522 P.2d 1187, 1193 (Wash. Ct. App. 1974) (holding the state's denial of a marriage for gay couples was required by the state statute, such a holding is permitted by both the state and federal constitutions); *see also* Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) ("[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the instruction of marriage, an institution which the state not only must allow, but which it has fostered and protected.").

44. *Singer*, 522 P.2d at 1195 (stating that rather than a discriminatory rationale, the reason for not recognizing same-sex marriages is the unique characteristics of the different sexes and the goal of procreation).

45. *Id.* (recognizing that married couples are not required to have children and other married couples are physically unable to have children). Even so, these situations are the exception, and, as a general rule, married couples have children. The state further rationalizes that no same-sex

While forty-nine of the fifty states have been unable to make a commitment for equal rights regarding same-sex marriages, more than two dozen cities have enacted "domestic partnership" ordinances.[46] Such ordinances extend legal recognition to unmarried cohabiters and also confer homosexual couples with economic benefits that married couples typically receive.[47] Even in a minimal percentage of cites that do recognize "domestic partnerships," some marriage advantages are not provided for homosexuals. The major denial that homosexuals, even ones recognized in a "domestic partnership," face is the inability to adopt a child.[48]

B. The Nature of Adoption

It is undisputed that there is no fundamental right to adopt,[49] nor does there exist a fundamental right to be adopted.[50] Adoption is a privilege created by statute, however, it is a privilege that is offered primarily to heterosexual married couples and almost always denied to homosexuals who are non-biological parents.[51] Thus, states have broad discretion in limiting adoption.[52] While adoption is denied status as a fundamental right, adoption is of great importance because a person's interest in raising children is fundamental and

couple offers the possibility of birth by a child of their union. Thus, the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex". *Id.*

46. *Lesbian and Gay Rights*, *supra* note 37.

47. *Id.* Typically, even though "domestic partnerships" do not confer all of the rights and responsibilities of marriage, they grant registered partners sick and bereavement leave and insurance and survivorship benefits for city employees. New York, Los Angeles, Seattle, Minneapolis, and San Francisco are among the cities that recognize domestic partnerships. *Id.*

48. *Id.* Married individuals are always preferred over single parents in like circumstances. The fact that homosexuals cannot ever be married in the legal sense of the term means they are faced with an immense disadvantage. This disadvantage begins just by the essence of the fact that homosexuals are not married. Once other factors such as social stigma, stereotyping, and myths about individuals of same sex orientation are factored in, the hope of adoption is severely frustrated and in some states impossible. *Id.*

49. Lofton v. Kearney, 157 F. Supp 1372, 1378 (S.D. Fla. 2001); Bell, *supra* note 15, at 347; *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The policy reason behind not recognizing a fundamental right to adopt is due to the permanent nature of fundamental rights. "By extending constitutional protection to an asserted right of liberty interest, we to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* at 720.

50. *Id.*

51. *See In re* Palmer's Adoption, 176 So. 537 (Fla. 1937); *see also* Russman, *supra* note 1.

52. Danielle Epstein & Lena Mukherjee, Note, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT, 782, 798-99 (1996).

has been recognized as an essential element in the pursuit of happiness.[53] In order to understand the impact of judicial decisions on homosexual rights regarding prospective parents, it is imperative to understand the purpose and privilege that adoption offers all individuals that are unable, for one reason or another, to have biological children of their own.

Historically, the goal of adoption was to match a married couple with their selection of a suitable child.[54] Throughout the 1970's adoption became a much more complex process, accordingly, the court's role in adoptions has become much greater.[55] In the midst of the growing complexity of adoptions parents have been categorized as either "desirable" or "undesirable."[56] Traditionally, "desirable" children, healthy white infants, are placed with the "desirable" families in "the bastion of American normalcy, heterosexual Caucasian couples with above-average incomes."[57] "Undesirable" children are children with handicaps, older in age, or of a minority dissent.[58] These undesirable children, which comprise the majority of children awaiting adoption, are labeled "hard to place" and are matched with "undesirable parents."[59] Homosexual parents fall into the "undesirable" category.[60]

Today the goal of adoption is to provide the child with a permanent home.[61] This goal signifies a decreased burden from the traditional adoption goal, which required that the child match the adoptive home in every way possible, including physical attributes, religion, intellectual ability, and other

53. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* Michael H. v. Gerald D., 491 U.S. 110, 139 (1989) (Brennan, J., dissenting) ("[C]ertain interest and practices," such as child rearing, "form the core of the definition of liberty.").

54. *See* Sanford N. Katz, C*ommunity Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7, 8 (1964) (discussing the changing focus of adoption over time).

55. *Id*.; *see also* Bell, *supra* note 15.

56. JOY A. SCHULENBURG, GAY PARENTING 99 (1985); Russman, *supra* note 1, at 50.

57. SCHULENBURG, *supra* note 56, at 99 (acknowledging that healthy white babies are usually adopted by white heterosexual couples).

58. *Id*.

59. *Id.* (declaring that undesirable parents are most likely to adopt undesirable children).

60. *Id.; see also* Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 352 (1991). Homosexuals wishing to adopt children must overcome many obstacles. There are barriers placed on homosexual adoptions under all forms of government. *See, e.g.*, FLA. STAT. ANN. § 63.042(3) (1992) (placing a per se prohibition on homosexual adoptions); N.H. REV. STAT. ANN. § 170-B:4 (1992).

61. Bell, *supra* note 15, at 348. This is a change from the traditional goal where adoption agencies preferred to leave a child in an institutional setting rather than place them with a family that did not reflect similar characteristics of the child. *Id.*

such characteristics.[62] Today's notion of adoption is much more realistic; along with increased feasibility comes a lesser focus on stringent and superficial requirements.[63] In turn, the disappearance of the superficial and "perfect" matching requirements opens the door to non-traditional parents to adopt when they are "suitably qualified to care for and rear the child" and when the adoption will promote the child's best interest.[64] The current judicial decisions regarding adoption focus and depend on the BIOC. The decisions have moved away from the rigorous standards that made adoptions too rare in consideration of the number of children placed in agencies.[65] In this shift to the BIOC, recent judicial decisions and legislative proposals have furthered the principle that one's affiliation with a particular class of people alone should not alone preclude one's eligibility to adopt.[66]

C. A New Standard: The BIOC

Since 1988, faced with a decision of child placement, courts have applied the BIOC standard.[67] While the BIOC is used across the nation, each court differs in their interpretation of what the standard entails.[68] The subjective nature and the broad discretion of the standard bestows great power upon the states and judges. With such discretion they can incorporate their own feelings, beliefs, and biases under the pretext of the BIOC. [69] Regrettably, in

62. *Id.* (discussing the traditional adoption goal and the inflexibility of its application which ends with a negative result and leaving many children unnecessarily caught in the adoption system).

63. *Id.*

64. *Id*.

65. *See* JOSEPH GOLDSTEIN, ET AL., THE BEST INTEREST OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 5-7 (1998).

66. *See In re* Appeal in Pima County Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (holding that appellant's bisexuality is not unlawful and cannot be the lone factor in rendering him unfit for parenthood); *see also In re* Opinion of the Justices, 530 A.2d 21, 24-26 (N.H. 1987) (requirement by the court that there be a rational governmental purpose to preclude eligibility for adoption by an entire group of individuals).

67. Felicia E. Lucious, Note, *Adoption of Tammy: Should Homosexuals Adopt Children*?, 21 S.U. L. REV. 171, 175 (1994).

68. Bell, *supra* note 15, at 358.

69. *See* Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1012 (1989) (noting that the best interest standard often includes the court's morality judgments); Judith A. Lintz, Note, *The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children*, 16 U. DAYTON L. REV. 471, 487-93 (1990); SCHULENBURG, *supra* note 56, at 100 (recognizing judicial bias towards homosexuals as parents); *see also* G.A. v. D.A., 745 S.W.2d 726, 727-28 (Mo. Ct. App. 1987) (denying the mother custody because she was in a lesbian relationship and the court was unable to ignore the possible effects this sexual orientation of the mother may have on the child's moral development); S.E.G. v.

many adoption cases the court has used the BIOC as a means to discriminate and act upon biases against homosexuals.[70] To understand the danger of a misused BIOC, it is essential to understand that courts have used the standard to apply a resounding ban on homosexual adoptions.[71] Using the BIOC to uphold custody determinations on the basis of sexual orientation is a misapplication of the standard.[72] Allowing the sexual orientation of an individual be the sole factor for adoption is unconstitutional and against the BIOC.[73] This is not to say that the sexual orientation of the individual should not be a factor in the consideration; it just means that the sexual orientation has to be considered in a reasonable light, accounting for other factors. The customary factors a court considers in determining if an adoptive placement is in the child's best interest are: the home environment of the parents, the stability of the parents, the time a parent and child spend together, the physical and emotional support the child receives from the parents, the quality of the relationship between the parent and child, sexual conduct, criminal background, as well as any other factors that the court may deem appropriate.[74]

D. Myths and Realities of Homosexual Parenthood

There are a number of reasons and misconceptions offered time and again for not allowing homosexuals to adopt children. The most common of these misconceptions are: that homosexuals are more promiscuous than the average heterosexual, that they fail to form the committed and stable relationships needed in raising a child, and that they are more likely to molest a child.[75] Another claim is that homosexual parents are somehow attempting to "recruit"

R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (holding mother's open lesbian relationship presented an "unhealthy environment" for minors).

70. *See* Epstein & Mukherjee, *supra* note 52, at 802; Lin, *supra* note 1. *See generally* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001).

71. *See supra* note 61; *see also* FLA. STAT. ANN. § 63.042(3) (West 1997) (placing a per se prohibition on homosexual adoptions).

72. *See* Bell, *supra* note 15, at 358 (discussing the many factors that must be considered under the BIOC).

73. *See* Ali, *supra* note 69, at 1010 (noting that more and more courts are recognizing that prohibiting homosexuals from adopting or gaining custody of children is not in the child's best interest).

74. Hembree v. Hembree, 660 So. 2d 1342, 1345 (Ala. Civ. App. 1995) (level of care a parent provides for the child discussed as a factor in determining custody); Tucker v. Tucker, 910 P.2d 1209, 1212 (Utah 1996) (assessing the amount of time the parent spends with the child and the adult's stability as factors for custody determinations); Bell, *supra* note 15, at 358 (listing the factors of the BIOC that courts should take into consideration). *See generally* Ward v. Ward, 742 So. 2d 250 (Fla. Dist. Ct. App. 1996). The court was forced to balance whether it is better to place a child with a lesbian mother or a father with a criminal conviction in his background. The court chose to award custody to the father. *Id.*

75. O'Toole, *supra* note 4.

children into the homosexual lifestyle.[76] In addition many people fear that the child of a homosexual will suffer from bias by homophobic individuals in the form of teasing and harassment.[77] These common misconceptions have caused the homosexual community great pain and have kept many potential families apart for reasons that are both wrong and unconstitutional.

The first myths or alleged harms act as buffers for child-parent connections. One myth that courts rely on in denying homosexual adoptions is that homosexual parents are more likely to molest their children than heterosexual parents.[78] There is no evidentiary basis for this claim. Actually, empirical data shows that heterosexual males are the most likely to molest their children by an overwhelming percentage.[79] "Every expert will testify to a court that eighty-five percent of all molestation involves men who are heterosexually oriented while only about fourteen percent concerns men who are homosexually oriented."[80] Studies show that a child is one hundred times more likely to be sexually abused by the heterosexual partner of a relative than by a gay adult.[81]

Another common myth imposed by society on the subject of gay parenting is that the children of homosexuals will become gay.[82] It is unanimous among commentators that this claim is the most ludicrous.[83] Most homosexuals, who have been asked, comment that either they are impartial to the sexual orientation of their child or that they want their children to grow up as heterosexuals.[84] Such myths about homosexuality have stood as obstacles and barriers for homosexuals in so many aspects of life. Now the stereotypes have reached parenting ability and have been the cause of extensive of litigation and legislation.

E. Jurisdictional Approaches

Over the last several decades, many prohibitions have been placed on homosexual adoptions. Courts are denying adoption petitions of homosexual

76. *Id.*

77. *Id.*; *see also* Rivera, *supra* note 29, at 210.

78. O'Toole, *supra* note 4.

79. Patterson, *supra* note 4.

80. Rivera, *supra* note 29, at 211; *see also* D.J. WEST, HOMOSEXUALITY RE-EXAMINED 212-17 (1977); Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623, 629 (1961) (noting that pedophilia, a sexual preference for children, is distinct from homosexuality).

81. *Id.*; *see also* Charlotte J. Patterson, *Research Summary on Lesbian and Gay Parenting*, *at* http://www.apa.org/pi/parent.html (last visited Jan. 25, 2001).

82. Rivera, *supra* note 29, at 211.

83. *Id.*

84. *Id.*

couples while legislatures are adopting statutory amendments to adoption statutes, which serve to preclude homosexuals from becoming adoptive parents.[85] Any inconsistency in state legislative approaches to regulate homosexual adoptions is the consequence of adoption being denied recognition as a fundamental right.[86] Today, many states are silent on the issue of homosexual adoption. "This silence leaves the subject open to interpretation by the courts and subject to the stereotypes that plague homosexuals."[87] A minority of the states have made explicit provisions in their statutes either expressly authorizing or prohibiting homosexual adoption rights.[88] Most of the jurisdictions either allow or deny homosexuals the right to adopt based on case law and the court's interpretation of the BIOC.

1. States Permitting Homosexual Adoptions

In *Holden and Galluccio v. New Jersey Department of Human Services,*[89] New Jersey became the first state to explicitly allow lesbian and gay couples to adopt children jointly and on an equal basis with married couples.[90] The

85. Langemak, *supra* note 5, at 829 (noting that "legislatures are fostering statutory amendments to adoption statutes which serve to preclude homosexuals from becoming adoptive parents").

86. Bell, *supra* note 15, at 345-49 (commenting on the lack of uniformity and consistency from one jurisdiction to the next regarding all adoption cases). The biggest inconstancy in court approaches to adoptions is seen in the views and decisions regarding adoptions sought by parents of same-sex orientation. *Id.*

87. *Id.* at 350. *See, e.g.,* ALASKA STAT. § 25.23.005 (Michie 1999); IOWA CODE § 600.1 (2001); N.J. REV. STAT. § 9:3-37 (2000); WIS. STAT. § 48.82 (1992). No mention of same-sex couples in state adoption statutes is made, thus leaving it up to the court's discretion. Silent states have adoption decisions that are shaped by the courts through judicial precedent and interpretation there from. *See also* Lin, *supra* note 1, at 768 (discussing the absence of statutory proscriptions against same-sex couple adoption).

88. FLA. STAT. ANN. § 63.042(3) (West 1999) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); 1999 N.H. LAWS 18:4 (before the statue was repealed it stated, "any individual not a minor and not a homosexual may adopt"). In 1999, the New Hampshire legislature responded to the state court's decision to ban homosexual adoptions and omitted this provision. *See* N.H. REV. STAT. ANN. § 170-B:4 (1994). Since the repeal of the New Hampshire prohibition on homosexual adoptions, Florida has become the only legislature to expressly prohibit such adoptions in their state statutes.

89. *See* Parker, *supra* note 21.

90. Belin, *supra* note 19 (citing Holden and Galluccio v. New Jersey Dept. of Human Services, Bergen County Superior Court (1997)); N.J. STAT. ANN. § 9:3-43(a) (providing that "any person may institute an action for adoption, except that a married person may do so only with the written consent of his spouse or jointly with his spouse in the same action or if living separate and apart from his child"); N.J. STAT. ANN. § 9:3-40 (providing that the standard in selecting adoptive parents is "the best interest of the child"); N.J. STAT. ANN. § 9:3-54 (empowering the Department of Youth and Family Service to administer New Jersey's adoption statute).

Holden court found that denying same-sex couples the right to adopt violated three state statutes, and, therefore, the court annulled the ban on adoptions by non-married couples.[91] This decision has the force of law in the state of New Jersey. It empowers unmarried couples under the impression that they have been denied the right to adopt based on either marital status or sexual orientation to seek relief in court.[92] New Jersey is not the only state consenting to same-sex child rearing.

Hawaii's permission for same-sex adoptions has evolved as a result of the legality of same-sex marriages in the state. The Hawaii Circuit Court's1996 decision in *Baehr v. Miike*[93] overturned a prior decision denying same-sex marriages legal recognition.[94] In this holding the court implicitly accepted the argument that same-sex couples could provide "an ideal environment for child rearing."[95]

Likewise, Vermont has taken steps to recognize the rights of same-sex couples.[96]While the Civil Union Law does not extend homosexuals the right to marry, it does provide them several protections characteristic of marriage.[97] For instance, homosexuals are given protection in inheritance, property division, child custody and support, family leave, and state tax benefits in recognition of their partnerships.[98] Included in this recognition is the legitimizing of children born to same-sex partners.[99]

New Hampshire amended their state adoption statute in 1987. The amendment provided that "any individual not a minor and not a homosexual

91. Belin, *supra* note 20.

92. *Id.* Please note the decision by the court in *Holden* does not affect cases involving private adoptions.

93. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996).

94. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (the Hawaii Supreme Court upheld state bans on homosexual marriages). Several years later the court overruled this decision and declared homosexual marriage legal in Hawaii. The central thrust of Baehr's appeal was that same-sex couples could provide an "ideal" home for children. In the appeal, *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. 1996), the court implicitly affirmed that same-sex couples can provide an ideal environment for child rearing.

95. 1996 WL 694235 at 17. The legalization of same-sex marriage opened the door for adoptions by same-sex couples. The court was convinced by the expert evidence presented at trial that children raised by same-sex parents were as "happy, healthy and well adjusted" as children brought up in a heterosexual parent setting. *Id.*

96. *See* VT. STAT. ANN. tit. 15 § 1204 (2000) (the Act Relating to Civil Unions provides same-sex families virtually the same statutory rights accorded to heterosexual families).

97. *Id.*

98. *Id.*

99. *See* VT. STAT. ANN tit. 15 §1201, 1204 (2000) (the civil union act intends that children who are born to same-sex parents in the state of Vermont will be considered legitimate and will not be treated differently merely because of the sexual orientation of their parents).

may adopt."[100] This statutory ban on homosexual adoption was given the stamp of approval by the Supreme Court of New Hampshire in *In re Opinion of the Justices*.[101] The state's legislation barring the opportunity for homosexuals to adopt was repealed in May of 1999 as the statute was considered to be "replete with stereotypes." The state determined that families should be recognized based on fitness, not "prejudicial stereotypes."[102] While New Hampshire was making a movement toward equal protection and away from sexual orientation based discrimination, a few states joined Florida in their crusade against adoptions by same-sex couples.[103]

2. States Prohibiting Homosexual Adoptions

The vast majority of states refuse to enact statutory prohibitions on adoptions based solely on sexual orientation. Consequentially, most states wishing to prohibit homosexual adoptions have done so exclusively through the judicial system.[104] Although Florida and Mississippi are the only states with express provisions outlawing homosexual adoptions, many other states have attempted to follow Florida's lead and prohibit homosexual adoptions without success.[105]

Utah and Mississippi have amended their adoption statutes to accommodate for the societal change and recent trend for same-sex couples to

100. N.H. REV. STAT. ANN. § 170-B: 4 (1997).

101. *See generally In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

102. Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 896 (2000).

103. *See* H.R. 90, 156th sess. (N.H. 1999); Legis. Serv. Reg. 2012 (N.H. 1999); UTAH CODE ANN. § 78-30-1 (2000) (denying adoptions to all unmarried cohabitants). Utah law also prohibits same-sex marriages, and, therefore, the amended adoption law in Utah effectively precludes homosexual couples that live together the right to adopt. *See also* MISS. CODE ANN. § 93-17-3 (2000) ("Adoption by couples of the same gender is prohibited.").

104. *See supra* note 86.

105. H.J.R. 35, 1998 Legis., Reg. Sess. (Ala. 1998) (the Alabama Legislature proposed an amendment to its adoption statute stating, "any 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 never enacted this proposal. *See* ALA. CODE § 26-10A-5 (1998); S.B. 904 2001 Gen. Assem., 114th Sess. (S.C. 2001). South Carolina attempted to make a similar amendment to their state adoption statute proposing to prohibit any person "who is a homosexual or bisexual from petitioning the court to adopt a child." Likewise this proposal didn't pass. *See* S.C. CODE ANN. § 20-7-1670 (Law. Co-op. 1998). Michigan also made the same proposal, but it did not pass into the state adoption statute. *See* H.R. 6236, 89th Leg., Reg. Sess. (Mich. 1998) (stating "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"); MICH. COMP. LAWS ANN. § 710.22a (West 1998) (there is no mention of prohibition on homosexual adoption rights in the current Michigan adoption statute).

attempt to adopt children.[106] The Utah state legislature enacted an adoption statute that denies adoptions to all unmarried cohabitants.[107] This change stemmed from a legislative finding that it is not in the best interest of a child to be adopted by persons who are co-habitating in a relationship that is not legally binding.[108] Utah laws refuse to recognize same-sex marriages, and, therefore, the amended adoption law necessarily acts as an effective preclusion on any same-sex couple living together in the state of Utah who wishes to adopt a child.[109]

Similar to Utah and Florida, the state of Mississippi enacted a new law that took effect in July of 2000. The modified Mississippi statute states, "Adoption by couples of the same gender is prohibited."[110] The Mississippi legislature was prompted to make this amendment in response to Vermont's recent finding that same-sex couples could provide children with an ideal environment.[111] Mississippi's statute reflects their belief that family values do not coincide with homosexual relations as an appropriate lifestyle.[112]

No state has a ban on homosexual adoption as exclusive and long standing as Florida.[113] The Florida statute which has given rise to many lawsuits and legal discussions is referred to as the "homosexual adoption provision," and it states, "No person eligible to adopt under this statute may adopt if that person is a homosexual."[114]

III. THE STATE OF FLORIDA

A. The History of Homosexual Rights in Florida

The state of Florida has a history of discrimination against gay men and lesbian women. The state legislature has constantly refused to recognize homosexuality as an entity by existing laws, instead defining homosexuality as individual illegal acts, violative of sex offense statutes.[115] Dating back to 1868, Florida's sexual orientation based discrimination began with a sodomy statute that classified homosexual activities as "crimes against nature."[116]

106. *See* MISS. CODE ANN. § 93-17-3 (2000); UTAH CODE ANN. §§ 78-30-1, 9 (2000).

107. *See* UTAH CODE ANN. § 78-30-1 (2000).

108. UTAH CODE ANN. § 78-30-9 (2000); *see supra* note 82.

109. Carrasquillo Hedges, *supra* note 102, at 896.

110. MISS. CODE ANN. § 93-17-3 (2000) (denoting a per se ban on same-sex adoptions, emulating the state of Florida).

111. *See supra* note 79; *see also* Hedges, *supra* note 102, at 896.

112. MISS. CODE ANN. § 93-17-3 (2000).

113. FLA. STAT. ANN. § 63.042(3) (West 1997).

114. *Id.*

115. Terl, *supra* note 31, at 797.

116. *Id.* at 794.

Florida's homosexual citizens have never been able to free themselves of the sodomy laws and their accompanying social stigma. Homosexuals in the state are still considered criminals, and Florida takes every chance it gets to remind the world that homosexuality is statutorily criminal.[117] Several examples through the decades highlight the kind of discrimination homosexuals suffer in Florida.

In 1954, the City of Miami in Dade County enacted an ordinance prohibiting alcoholic beverage licensees either from knowingly employing, selling to, or allowing homosexuals, lesbians, or perverts to congregate in the store.[118] Just several years later the Florida legislature grew dissatisfied with the state sodomy statute and started down a long road of repression for homosexuals by enacting Investigative Committees.[119] Investigative Committees were comprised of a network of informants who went undercover and spied at "homosexual hangouts," looking for a chance to catch suspected homosexuals.[120] Informants bugged conversations, took pictures and then reported to the police.[121] Within seven years of these Investigative Committees seventy-one teaching certificates were revoked and thirty-nine deans and professors were removed from universities.[122]

In 1970, a lesbian couple was denied the right to marriage even though Florida law did not statutorily prohibit same-sex marriages.[123] In its reason for depriving the homosexual couple recognition of a legal union the court stated, "The main object of marriage is the procreation of progeny, and it would therefore be contrary to public policy to grant them the licenses applied for."[124] While all of the barriers placed on same-sex couples in the state of Florida have encroached upon the rights and privileges of homosexual individuals, in recent years adoption and custody disputes have become the battlefield of the homophobia war.

B. Florida Adoption Laws

117. *Id*.

118. Terl, *supra* note 31, at 795 (citing MIAMI, FLA., ORDINANCE 5135 (1954) (codified at MIAMI, FLA. CODE § 4-13 (1967))).

119. *Id.*

120. Terl, *supra* note 31, at 795 (analyzing the state of Florida's treatment toward homosexuals starting with sodomy laws and traveling through the decades of the fifty's, sixty's, and so on up to the current state where litigation has hit its peek regarding the states denial of rights and freedoms to an entire class of individuals: homosexuals).

121. *Id*.

122. *Id*.

123. *Id.*

124. *Id.* at 801.

Insofar as homosexual adoption is concerned, Florida has the most restrictive adoption statutes in the nation.[125] In 1977, the Florida legislature amended their state adoption statute to include the provision, "No person eligible to adopt under this statute may adopt if that person is a homosexual."[126] This provision prohibits all gay men and lesbian women from adopting children, regardless of all other circumstances.[127] Despite this prohibition on adoption, homosexuals are afforded the opportunity to act as foster parents in the state of Florida.[128] The rationale behind this provision is the furtherance of public morality and the protection and well being of persons being adopted.[129]

Within the borders of Florida alone, 16,500 children await adoption.[130] Fourteen thousand five hundred of these children are prolonging the temporary nature of the foster care system.[131] The majority of these children are difficult to place, and the foster care system is overflowing with special needs children for which there are an insufficient number of adoptive homes.[132] Statistics indicate that, of the children awaiting adoption or foster placement, 80% percent wait more than two years, while 36% wait more than four years.[133] The Florida statute ignores these statistics. By enacting the homosexual adoption provision, Florida has taken an active measure assuring that the state foster care and adoption agencies will continue to be overburdened because there are no available homes for placement.[134]

C. Prior Case Law in Florida

125. *See supra* notes 80 through 92 (discussing state statutes and case law permitting homosexual adoptions, as in the case of New Hampshire, Hawaii and Vermont); *see also supra* note 86 (commenting on the fact that most states are silent on the issue of same-sex adoption rights); UTAH CODE ANN. § 78-30-1 (2000) (advocating a more inadvertent, roundabout way of prohibiting same-sex adoptions).

126. FLA. STAT. ANN. § 63.042(3) (West 1997).

127. Amy Berg, *Suit in Florida Challenges Anti-Gay Adoption Ban, at* http://www.womensenews.org/article.cfm/dyn/aid/495/context/archive (Aug. 16, 2001). Note, ironically, Florida allows homosexuals to act as foster parents for children awaiting adoption.

128. *See generally* Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

129. *Id.*

130. Berg, *supra* note 127.

131. *Id.*

132. *Id.* Some examples of special needs children are those with attention deficit disorder, asthma, autism, fetal alcohol syndrome, epilepsy, and mild mental conditions. *Id.*

133. *Id.* (citing statistics adopted by the Court in *Lofton v. Kearney*).

134. FLA. STAT. ANN § 63.042(3) (West 1997).

In 1990, the American Civil Liberties Union of Florida (hereinafter ACLU) filed the first challenge to the discriminatory adoption statute.[135] Ed Seebol was a single gay man seeking to adopt a child.[136] He indicated willingness to adopt a difficult to place "special needs" child. The local office of the Florida Department of Health and Rehabilitative Services (HRS), however, turned his application down specifically because his homosexuality was noted on the application.[137] The Circuit Court in *Seebol v. Faire*[138] held that Florida's statutory prohibition against adoption by homosexuals was unconstitutionally violative of equal protection and due process guarantees.[139] The statue was also in violation of the individual's right to privacy.[140] The Circuit Court's decision in *Seebol* was never appealed, therefore, the holding that the homosexual adoption provision was unconstitutional acts as precedent only in Monroe County, Florida.[141]

In 1992, the ACLU filed suit on behalf of Bonnie Matthews and Elaine Kohler, from whom the HRS removed a six-year-old boy who had been in their foster care.[142] The ACLU claimed that the Florida statute only prohibited homosexuals from adopting and said nothing about foster care.[143] In 1993, the Circuit Court of Hillsborough County delivered a split decision saying that they could not decide whether to prohibit a foster parent's license based solely on "sexual status." The court did, however, uphold an HRS rule against licensing unmarried couples as foster parents.[144]

Several years later, in *Cox v. Florida Department of Health Rehabilitation Services*,[145] a homosexual male couple from Sarasota challenged the Florida statute forbidding adoption by homosexuals.[146] In *Cox*, two men seeking to adopt a special needs child were denied the opportunity to enroll in pre-adoption classes under § 63.042(3) because they disclosed their homosexuality on the adoption applications.[147] The court observed that the purpose of the

135. Terl, *supra* note 31, at 821 (discussing Seebol v. Farie, 16 Fla. L. Weekly C52 (Fla. Cir. Ct. 1991)).

136. *Id*.

137. *Id.* at 822 (citing a Letter from Carmen Dominguez Frick, District Legal Counsel, HRS District XI, to Edward Seebol (May 10, 1990). Seebol had a respectable reputation in the community and he served as executive director of AIDS Help, Inc.).

138. *Id.*

139. *Id*.

140. *Id*.

141. *Id*.

142. Matthews v. Weinberg, 645 So. 2d 487, 488 (Fla. Dist. Ct. App. 1994).

143. *Id.* at 488.

144. *Id.* at 490.

145. Cox v. Fla. Dep't of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995).

146. *Id.*

147. *Id*.; *see* FLA. STAT. ANN. § 63.042(3).

Florida adoption statute is to protect and promote the well being of adopted children.[148] The court reasoned that there was no evidence showing that adoptions by homosexuals was *not* detrimental to the child and thereby rejected the argument that adoption by homosexual adults may promote the welfare of the child.[149]

Relying on *Bowers v. Hardwick*,[150] the Florida District Court of Appeals in *Cox* overcame a due process challenge to the Florida adoption statute by holding that adoption was not a fundamental liberty and that homosexual conduct was not a fundamental right.[151] The court pointed to the presumption that most children will grow up to be heterosexual adults as indicative that the best interest of Florida's children would be served by placing them with heterosexual parents who could teach them how to relate to the opposite sex.[152] This holding invoked a blanket presumption that homosexuals are inherently unfit parents. Such a presumption taken in conjunction with the BIOC automatically excludes all homosexuals from the pool of potential adoptive parents.

One year later, in *Ward v. Ward*[153] the First District Court of Appeals of Florida awarded custody to a father with a criminal conviction over a lesbian mother.[154] In the custody award determination the court claims that they did not base their decision on the mother's sexual orientation. The court denied the mother custodial rights because it found such placement would not be in the child's best interest.[155] The mother and father divorced in 1992, and at that time the parents stipulated that the mother would have primary custody over their child.[156] This stipulation was made with full knowledge of the mother's lesbian relationships.[157]

Approximately twenty years prior to the divorce and prior to the birth of their children, the father was convicted of the second-degree murder of his first wife.[158] In spite of his criminal record, custody was awarded to the father because he claimed that his daughter was being negatively affected by the

148. *See supra* note 31 (discussing the rational behind adoption statutes).

149. *Cox*, 656 So. 2d at 903.

150. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

151. Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1217 (Fla. Dist. Ct. App. 1993); *see Bowers*, 478 U.S. at 191 (holding there is no fundamental right to engage in homosexual conduct).

152. 627 So. 2d at 1220.

153. Ward v. Ward, 742 So. 2d 250 (Fla. 1996).

154. *Id.*

155. *Id.* at 252.

156. *Id.*

157. *Id.*

158. *Id.* (noting this crime was the result of stupidity, jealousy, and anger and he served eight and a half years in prison for this crime).

exposure she was subjected to while living with her lesbian mother.[159] The court claimed that it was not suggesting that the sexual orientation of the custodial parent by itself justifies a custody change, but rather the central question that must be determined is what conduct the child has been exposed to and what effect that has on the child.[160] This holding is a departure from the Florida statute where the effects on the child are insignificant, and the only important factor is the sexual orientation itself.[161]

The court in *Ward* referred to their decision in *Maradie v. Maradie.*[162] In this case the court laid out a test that required a direct bearing on the welfare of the child, not the "moral unfitness" of a custodial parent, to act as a basis for the deprivation of custody.[163] Another school of thought is termed the "Dinkel approach."[164] Under Dinkel, when the trier of fact made the determination that the parent with primary residential custody was involved in a relationship that adversely affected the child. Such relationship signified a substantial change in circumstances and justified a change in custody. The sexual orientation of the parent was immaterial in the determination.[165]

In *Maradie v. Maradie*,[166] the First District Court of Appeals held that the circuit court could not assume a homosexual environment would adversely affect a child.[167] In order for homosexuality to be found detrimental to the child in a court of law, evidence of such a negative impact on the child was required.[168] In *Packard v. Packard*[169] custody was awarded to a father, over the lesbian mother, even though the father had been alleged to be violent to both the mother and the child.[170]

These cases on homosexual adoption rights in the state of Florida accumulated over several decades. While some of these cases had discriminatory reasoning and effects, this pattern was taken to another level in the Judge James Lawrence King's opinion in *Lofton v. Kearney*.[171]

159. 742 So. 2d at 253.

160. *Id.* at 254.

161. FLA. STAT. ANN. § 63.042(3) (West 1997).

162. Maradie v. Maradie, 680 So. 2d 538, 542 (1996).

163. *Id.*

164. 742 So. 2d at 253 (holding the *Dinkel* approach is correct and properly places the emphases on the best interest of the child).

165. *Id.* Note also in *Ward* that the court declined the opportunity to determine whether the father's criminal background precluded him from parental responsibility since the statute, section 61.13(2)(b), was not raised in the lower court.

166. *Maradie*, 680 So. 2d at 542.

167. *Id.*

168. *Id.*

169. Terl, *supra* note 31, at 828.

170. *Id.*

171. 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

IV. THE ISSUE OF HOMOSEXUAL ADOPTION RIGHTS REVISITED

A homosexual man who was denied the opportunity to apply for adoption of his foster child came before the U.S. District Court in the Southern District of Florida to challenge the constitutionality of the homosexual adoption provision. The State took their most firm and discriminatory stance on homosexual adoption to date. The statute presumes each and every homosexual unfit as an adoptive parent, even if the homosexual seeking to adopt meets all other requirements of the state adoption statute. In *Lofton*, this presumption was once again held constitutional.[172]

A. Case Description of Lofton v. Kearney

Judge James Lawrence King heard the case of *Lofton v. Kearney* on August 30, 2001.[173] The plaintiffs were comprised of a group of homosexual couples that had been denied the opportunity to adopt children under the homosexual adoption provision in the Florida adoption statute.[174] The primary plaintiff was Steve Lofton, a pediatric nurse and "certified long-term foster parent."[175]

Lofton raised three foster children, all three of which were born HIV positive.[176] Two of the children developed AIDS but the third child, plaintiff John Doe, successfully sero-converted during infancy and no longer tested positive for HIV.[177] Lofton cared for these foster children full-time and administered their medications when they were sick.[178] Lofton received the Outstanding Foster Parenting award from the Children's Home Society, a child placement agency.[179] Doe, at ten years of age, was freed for adoption, on May 19, 1994. In September of that year, Lofton submitted an application to adopt Doe.[180] Lofton was automatically disqualified from adopting Doe under the homosexual adoption based on his sexual orientation.[181]

The second plaintiff is Douglas Houghton, Jr. who is a clinical nurse specialist and legal guardian of child, Plaintiff John Roe.[182] Houghton had taken care of Roe since the child was four years old and was voluntarily left to Houghton's care by his father who was suffering from alcohol abuse and

172. *Id.* (upholding the Florida Homosexual Adoption Provision).
173. *Id.*
174. *Id.*; *see also* FLA. STAT. ANN. § 63.042(3) (West 1997).
175. 157 F. Supp. 2d at 1375.
176. *Id*.
177. *Id*.
178. *Id* at 1376.
179. *Id*.
180. *Id.*
181. *Id*.
182. *Id* at 1375.

difficulties in keeping employment.[183] Several years after Houghton attained legal guardianship of Roe, Roe's biological father terminated his parental rights and Houghton decided to adopt Roe.[184] Under Florida's adoption statute, Houghton was first required to receive a favorable preliminary home study evaluation before the adoption could transpire.[185] During this evaluation Houghton was told that "but for his homosexuality and the homosexual adoption provision he would have received favorable preliminary home study evaluation."[186] Houghton was precluded from filing an adoption petition in the State circuit court.[187]

The third plaintiff group was Wayne Smith and Daniel Skahen who became licensed family foster parents in January of 2000.[188] Since then, they cared for three foster children, none of whom were free for adoption.[189] Smith and Skahen submitted an at-large adoption application upon which both men admitted they were homosexual.[190] Several months later they received written notices from the State denying their applications on the basis that the homosexual adoption provision prohibited gay men from adopting.[191]

The defendants were Kathleen Kearney, the Secretary of Florida's Department of Children and Families, and Charles Auslander, the District Administrator of District XI of Florida's Department of Children and Families.[192] These parties were sued in their official capacity, because they are responsible for the enforcement of the homosexual adoption provision.[193]

Preliminarily there was a motion to dismiss and the court concluded that all plaintiffs, with the exception of Lofton and Child Doe, had not actually applied to become adoptive parents for any child and had not been denied the opportunity to adopt. Therefore, the Court dismissed all other claims without prejudice for lack of standing.[194] Plaintiff's (Lofton and Doe and Houghton and Roe) amended the compliant to allege that the homosexual adoption

183. *Id* at 1376.
184. *Id*.
185. FLA. STAT. § 63.112(2)(b) (West 1997).
186. 157 F. Supp. 2d at 1376.
187. *Id*.
188. *Id.*
189. *Id*.
190. *Id*.
191. *Id*.
192. 157 F. Supp. 2d at 1376 (introducing the defendants in the case in their official capacities).
193. *Id.* at 1378.
194. Lofton v. Kearney, 93 F. Supp. 2d 1343, 1346 (S.D. Fla. 2000).

provision violated their fundamental rights to equal protection, familial privacy, intimate association, and family integrity.[195]

V. THE COURTS ANALYSIS

A. Fundamental Rights of Familial Privacy, Intimate Association, and Family Integrity, and the Due Process Clause

The court held that Fundamental rights are rights "deeply rooted in this Nation's history and tradition."[196] Plaintiffs argued that the homosexual adoption provision violated their fundamental rights to family privacy as embodied in their alleged Constitutional right to the care, custody, and control of the children, which the U.S. Supreme Court has declared as one of the oldest fundamental liberty interests.[197]

The plaintiff's argument was that the rights enjoyed by blood relatives regarding childrearing should be extended to foster families and legal guardians because the core of the liberty is the emotional bond that exists between the family members as a result of the shared daily life and not as a result of the blood relationship.[198] The emotional bonds are especially strong when children are in the homes of their caretakers since infancy or childhood and are raised by the foster parents continuously without ever really knowing their biological parents.[199] The court did not contest that the emotional bonds between plaintiffs and their children were present. Nor did they contest the parent-child relationships were deeply loving.[200]

Even so, the court found that the existence of strong emotional bonds between plaintiffs and the children they sought to adopt did not inherently grant them a fundamental right to family privacy, intimate association, or family integrity.[201] Unlike natural families, the court found that "foster parents

195. *See id.* at 1378; *see also* 42 U.S.C. § 1983 (Supp. IV 1994). S*ee generally* U.S. CONST. amend. XIV (providing equal protection as a fundamental right that cannot be deprived). Since the adoption statute only denies homosexuals the right to adopt, it appears that this cross section of citizens is being denied equal protection. U.S. CONST. amend. I (providing individual freedoms of which cannot be deprived). This includes the right to familial privacy.

196. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

197. Troxel v. Granville, 530 U.S. 57, 65 (2000).

198. 157 F. Supp. 2d at 1376 (arguing that the importance of a family to the individuals involved as well as to society is rooted in the emotional bonds between parent and child and not the biological relationship); *see also* Smith v. Org. of Foster Families for Equality & Reform (OFFER), 431 U.S. 816, 844 (1977).

199. *Id*.

200. *Lofton*, 157 F. Supp. 2d at 1379 (the court realized that the relationship between plaintiffs and their foster children were "as close as those between biological parents").

201. *Smith*, 431 U.S. at 845 (the Court acknowledged that a parent-child relationship between an unrelated adult and child might exist and might enjoy Due Process guarantees, but the

do not have a justifiable expectation of an enduring companionship because the emotional ties originate under state law."[202] Although the concept of family covers relationships outside of the archetypical nuclear family, the Constitution only extends to families that are comprised of the traditionally recognized characteristics of a family.[203] The court held that foster families are grounded in state law.[204] The court believed that contractual arrangements and foster care placement was typically meant to be a short, temporary placement while the State seeks to find a permanent placement in an adoptive home.[205] The court claimed that plaintiffs understood that within the foster arrangement was an implicit understanding that they would have to seek State approval in order to adopt the children.[206] The court acknowledged the need and value of foster parents and guardians, but did not extend foster relationships the same rights and interests as biological families, and therefore Lofton and Houghton had no right to exclude the state from their family lives.[207]

B. Equal Protection Clause

The Fourteenth Amendment of the United States Constitution asserts, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of laws."[208] This does not mean that the Equal Protection Clause necessarily forbids classifications; it only means that governmental decision-makers are prohibited from treating individuals who are alike in every relevant respect differently.[209] The federal judge in *Lofton* determined that the rational basis test was appropriate because homosexuals are not a "suspect class" since there is no fundamental right of familial privacy to foster parents.[210] Under the rational basis standard the statute is granted a strong presumption that it is

Supreme Court stopped short of identifying the foster parent-child relationship as one such relationship).

202. *Id.* at 845.

203. *See* Wooley v. City of Baton Rouge, 211 F.3d 913, 921 (5th Cir. 2000); *see also* Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (finding there was no liberty interest in a foster parent-child relationship that existed for more than two years).

204. 157 F. Supp. 2d at 1379.

205. *Id.*

206. *Id.*

207. *Id*.

208. U.S. CONST. amend. XIV, § 1.

209. *See* Nordlinger v. Hahn, 505 U.S. 1, 10 (1992); Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541 (11th Cir. 1994).

210. 157 F. Supp. 2d at 1382 (deciding that Plaintiffs, as homosexuals, were not a suspect class because the Plaintiffs failed to show any case under which the court used a heightened level of scrutiny in determining the constitutionality of classifications targeting homosexuals); *see also* Romer v. Evans, 517 U.S. 620 (1996).

reasonably related to a legitimate government interest and is valid under the equal protection analysis.[211] Accordingly, the homosexual adoption provision shall be granted the presumption that it is rationally related to a legitimate state interest and the burden should be on the plaintiffs to negate "every conceivable basis which might support it."[212]

The State offered two "legitimate" purposes for the existence of the provision.[213] The first purpose was the State's moral disapproval of homosexuality, which was consistent with the legislature's right to legislate public morality.[214] The court, however, held that public morality alone is insufficient to justify the homosexual adoption provisions and "the government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them."[215]

The second legitimate interest claimed by the State was that the homosexual adoption provision serves the best interest of Florida's children. The state asserted that the child's best interest is to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father.[216] Mother and father families are "important for the well-rounded growth and development of the child."[217] According to the State, a married heterosexual family provides adopted children with proper gender role modeling and "minimized social stigmatization."[218] The plaintiffs claimed this stated purpose was merely a pretext to the true reason for the enactment of the homosexual adoption provision which was to exclude homosexuals. The court claimed that it was inappropriate for them to determine whether the stated reason actually motivated the legislature; plausible reasons are sufficient.[219]

Plaintiffs did not dispute the State's declaration that married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes.[220] The Southern District Court held that the plaintiffs did not meet their burden to negate the reasons offered by defendants to justify the homosexual adoption

211. *See* Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW, 485 U.S. 360, 370 (1988).

212. 157 F. Supp. 2d at 1382; *see also* F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993).

213. *Lofton*, 157 F. Supp. 2d at 1382.

214. *Id.*

215. *Id.*; *see also* Berman v. Parker, 348 U.S. 26, 32 (1954) (discussing judiciary's normal role in determining whether exercised power is for a public purpose).

216. 157 F. Supp. 2d at 1383.

217. *See* F.A.C. 65C-16.005(6)(f)(1).

218. *See generally* 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

219. *See Beach Communications, Inc.*, 508 U.S. at 315; United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

220. 157 F. Supp. 2d at 1382.

provision, nor did they raise a material issue of fact with respect to defendants purported legitimate interest, and, therefore, the interest must be found valid.[221] Ultimately, the *Lofton* decision upheld the constitutionality of the homosexual adoption provision.[222] The *Lofton* case is being appealed to the 11th Circuit Court of Appeals, where the issue of gay adoption will be heard by a federal appellate court for the first time ever. If the 11th Circuit upholds the ruling by the Southern District of Florida and the United States Supreme Court grants certiorari, the Supreme Court will have to consider the constitutionality of this holding. In all hope, the Supreme Court will reverse the *Lofton* decision in light of the following considerations.

VI. AUTHOR'S ANALYSIS

A. Misuse of the Best Interest of the Child Standard

It appears as though the decision in *Lofton v. Kearney*[223] is principally fancy footwork by the court used to uphold discrimination against homosexuals as constitutional. Taking a closer look, it seems as though the best interest of the child standard, that was offered as the "legitimate purpose" behind the per se denial of homosexual adoption, is merely a guise for discrimination.[224] Florida argued two legitimate purposes in *Lofton*. The first argument is a public morality argument, while the second is the exact same argument under the pretext of the BIOC.[225]

"Homosexuality has been long disfavored in the law based on beliefs firmly rooted in Judeo-Christian moral and ethical standards for a millennia."[226] As the court correctly claims in regards to this purported rationale, "enacting a classification to express society's disapproval of a group burdened by the law is precisely what the Equal Protection Clause does not allow."[227] The court denied Lofton the right to adopt a child based on the BIOC.[228] This use of the BIOC changes the very purpose for the standard, the child's best interest.

As mentioned earlier, the BIOC, when properly applied, has many factors that a court is supposed to consider and weigh in determining what is best for a

221. *Id*.

222. FLA. STAT. ANN. § 63.042(3) (West 1997).

223. 157 F. Supp. 2d 1372 (2001).

224. *See* Russman, *supra* note 1. *See generally* Langemak, *supra* note 5.

225. 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (stating the reasons for finding that placement with homosexual parents is against the child's best interest are grounded in morality).

226. *See* O'Toole, *supra* note 4, at 130; Boswell, *supra* note 27.

227. *Lofton*, 157 F. Supp. 2d at 1382.

228. *Id.*

child awaiting adoption.[229] Both Lofton and Houghton were found to be acceptable parents outside of their homosexuality. Essentially, the court made homosexuality the only relevant consideration and ignored all the other factors contributing to the BIOC. One factor that the Florida Supreme Court failed to consider is the home environment of the parents. Lofton's home environment was worthy of receiving the Outstanding Foster Parenting award from a child placement agency.[230] Likewise, the child placement evaluator told Houghton on the home study evaluation that he would have received a favorable review for the home study if not for his homosexuality.[231]

Another factor that courts are customarily supposed to take into consideration, in determining what home is in the BIOC, is the time the parent and child spend together and the quality of the relationship between the parent and child.[232] This point seems to show that it is antagonistic to Doe's (the child's) best interest to *not* allow Lofton to adopt him.[233] Doe and Lofton spent the entire duration of Doe's life together as father and son.[234] Doe was placed with Lofton at the time of his birth.[235] Over the ten years of Doe's life Lofton has been the only parent Doe has had the opportunity to know.[236] They truly have a parent-child relationship; all they need to complete this relationship is legal recognition.

Courts often look into what physical and emotional support the potential parent will be able to provide the child.[237] Plaintiffs held respectable jobs and nice homes.[238] Lofton had proven his ability to care for Doe by the fact that he provided him with all the medications Doe needed over a ten-year period.[239] Plaintiffs have no criminal records and no reports of sexual offenses.[240] Another factor, perhaps one of the most important considerations in child placement, is the attachment the child feels to the parent.[241] Here there is no doubt that Doe considers Lofton his parent and would not want to leave

229. Bell, *supra* note 15, at 349 (listing the numerous factors that converge and influence the BIOC).

230. *Id.*; *see also Lofton*, 157 F. Supp. 2d at 1372.

231. *Id.*

232. Bell, *supra* note 15, at 349.

233. *Id.*; *see also Lofton*, 157 F. Supp. 2d 1372.

234. 157 F. Supp. 2d at 1375.

235. *Id.*

236. *Id.*

237. Bell, *supra* note 15, at 349.

238. 157 F. Supp. 2d at 1375.

239. *Id.*

240. *See id.*; Bell, *supra* note 15 (laying out the factor of criminal background as a consideration); *see also* Ward v. Ward, 742 So. 2d 250, 254 (Fla. 1996) (regarding criminal background weighing in the BIOC).

241. Bell, *supra* note 15.

Lofton's care.[242] Considering the factors of care, ability, commitment and attachment it appears as though the Court misapplied the BIOC in allowing homosexuality to outweigh every other factor combined.[243]

It is important to note that Doe and Roe are special needs children.[244] There are no other parents, couples, or individuals seeking to adopt either of these children.[245] In these cases where the court's determination is between authorizing an adoption by a homosexual, who has proved himself a responsible, loving parent or denying the children a permanent home, the majority of courts and legislatures would say that the BIOC would mandate permitting the adoptions. On the other hand, when the situation is one where one homosexual and one heterosexual have a common child, the factor of the parent's sexual orientation must be considered more carefully.[246]

Homosexuality cannot be ignored in considering potential adoptive parents.[247] It is important to consider the nature of the homosexual relationship and the affect it will have on the child.[248] In *Lofton*, the state has not claimed that Lofton's same-sex relationship has negatively impacted Doe in any way. In the circumstances of *Lofton v. Kearney*, there were no other prospective adoptive parents that made Lofton's homosexuality a significant factor. Doe has grown up in a caring loving home with a father figure, but the state refuses to allow Lofton to be Doe's legal father. There is no conceivable reason for the state's denial to offer this family legal recognition, other than blatant discrimination and stereotyping.

The BIOC is a blessing as it is the first articulation of a true adoption principle in today's society. At the same time it is a curse because it allows judges to impose their personal morality, biases and social stereotypes with the force of law.[249] It is seen that sometimes judges will deny adoptions to homosexuals to punish them for their immoral acts.[250] In order to understand

242. 157 F. Supp. 2d at 1375-76.

243. Bell, *supra* note 15; *Lofton*, 157 F. Supp. 2d at 1372.

244. 157 F. Supp. 2d at 1375.

245. *Id.* at 1372; *see also* Lin, *supra* note 1, at 769 (discussing the adoption order and statistics where of desirable versus undesirable children). Hard to place children occupy most of the foster care and adoption agencies. Not many two-parent families want to adopt special needs or older children. *Id.*

246. Ward v. Ward, 742 So. 2d 250, 254 (Fla. 1996).

247. Steve Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward A Rational Custody Standard*, 32 UCLA L. REV. 852, 854 (1985).

248. *Ward*, 740 So. 2d at 253 (finding that the lesbian mother could not gain custody not because of her sexual orientation, but because of the adverse effect it had on her daughter; her daughter was known to make lewd and inappropriate comments believed to have stemmed from her mother's lesbian relationship).

249. Bell, *supra* note 15, at 349.

250. *Id.*; *see also* Lin, *supra* note 1.

the decisions coming out of Florida and the different reactions by many state legislatures, it is essential to realize that "a judge's understanding about homosexuality determines to a great extent his or her view on the proper treatment of [the BIOC standard] under the law."[251] "If a judge lacks accurate knowledge or relies on assumptions based on prejudices, the child's best interests may be sacrificed."[252] This is the only possible explanation for the holding in *Lofton*. The nature and characteristics of judges gives them a perspective where it is difficult for them to see past such traditional factors and recognize the different cultures and different societal situations that people live in.

Courts all across the nation have and will continue to uphold statutes and cases discriminating against homosexuals, simultaneously giving no pause to allowing other groups of potential adoptive parents such as those with criminal backgrounds or histories of child abuse to adopt children.[253] These criminals and child abusers face no categorical ban analogous to the bans placed on homosexuals. In several cases the court has decided that the criminals and abusers make better homes for children than any and every homosexual, even an award winning parent such as Lofton.[254] By this the courts are declaring that homosexuality is so severely immoral that children are better off living without parents or permanent homes and are better off with heterosexual adults, even ones that may be criminal or abusive.

B. Homosexuality should not be a per-se ban on adoption rights, rather it should be only a factor considered in close situations.

Florida has misapplied the BIOC, and many other states have followed their discriminatory lead. Some states have understood the standard and have successfully applied it in cases where an adoptive parent is homosexual. The Arizona court in *In re the Appeal in Pima County Juvenile Action*,[255] held that homosexuality could and should be considered; however, it alone should not make adoption impossible.[256] What Arizona was guarding against was a per se ban on homosexual adoptions like the statute Florida enacted.[257] In *Pima County*, the majority stated, "[t]he division does determine sexual preference but there is no policy to recommend or not recommend an applicant solely because he or she has been identified as a bisexual or homosexual."[258] The

251. Bell, *supra* note 15, at 358.
252. *Id.* at 349.
253. *See Ward*, 742 So. 2d at 254.
254. *Id.*; *see also Lofton*, 157 F. Supp. 2d at 1372.
255. 727 P.2d at 840.
256. *Id.*
257. FLA.STAT. ANN. § 63.042(3) (West 1997).
258. 151 Ariz. at 344.

courts inquiry into sexuality focuses on promiscuity and flamboyancy in any situation. The court does not invoke an automatic presumption that homosexual parents would adversely affect children.[259]

The Alaska Supreme Court reversed a prior decision taking a child away from a lesbian mother realizing that there is no suggestion that the mother's sexual preference is likely to have a negative affect on the child. "It is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian."[260] A model of a non-discriminatory law that really protects the best interests of children is set out in a Michigan decision, *People v. Brown*.[261] This case held the proper rule to be that homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.[262]

The Supreme Court of Ohio also applies a standard that does not violate the constitutional right of homosexuals as seen in the decision of *In re Adoption of Charles B*.[263] It was held that there was no "per se ban on homosexual adoptions;" however, if such an adoption were shown to be harmful to the child, the adoption would not be allowed.[264] This is the intended use of the BIOC.[265] This use of the BIOC draws the line not on the sexual preference of the parents, but instead on the effects the child will undergo.

The BIOC is very fact specific in its application. Florida's statute ignores the facts, making them unimportant. In *Lofton*, if the court had looked into the factual situation, they would have seen the reality and not just the language in their adoption provision. The reality is that both children the plaintiffs wish to adopt are "special needs" children. The plaintiffs had raised these children since infancy or youth. No other applications to adopt these children had been filed. It is not reasonable to believe that someone else will come along to adopt Doe or Roe as statistics show that special needs children who are past newborn and young childhood years are very unlikely to find homes.[266] Taking this into consideration, how could Florida claim that the denial of adoption by the only parents Doe and Roe loved and knew was in their best interest? The real effect of the decision in *Lofton* is to deny these children the happy home they dream of, and to deny all of the other children waiting in

259. *Id*.
260. S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985).
261. People v. Brown, 212 N.W.2d 55, 58 (Mich. Ct. App. 1973).
262. *Id*.
263. *In re* Adoption of Charles B, 552 N.E.2d 884 (Ohio 1990).
264. *Id.* at 92.
265. Bell, *supra* note 15, at 358.
266. *See supra* note 1; *supra* note 191.

foster care or institutions the possibility that someday they may be taken into a real home. The effect of the homosexual adoption provision and the court's decision has forced the 16,500 children in Florida awaiting homes to be perpetually stuck in the system, most likely, until they reach the age of majority or until they slip through the cracks. The only possible rationale for such a negative outcome on so many children is the fear of and disservice to homosexuals as a class. This has been a common theme in custody denials for homosexual parents. The best interest of the child is often overlooked because of the court's distraction with the lifestyle of the same-sex couple.[267]

Statutes and case law that prohibit homosexuals from adopting and even applying to adopt a child will only force homosexuals to lie about their sexual orientation. There is evidence that proves that children raised by homosexual parents are happiest when their parents are at ease about their homosexuality; therefore, we should not force homosexuals to lie to themselves, their children, and others so that they can have the opportunity to have a family.[268] Such a result is in no one's best interest.

V. CONCLUSION

It is not the role of the courts and the legislature to make laws based upon their approval or disapproval of the relationships seeking legal recognition. As the times continue to change and the traditional idea of a family evolves, it is important to realize that the legal definition of a family must change as well. The law must realize that there are many different family structures that will provide the love, security, and a stable environment children need.

It is time for courts to recognize that there are hundreds of thousands of children in foster care, many of which will never be adopted if courts refuse to accept non-traditional families. By enacting and upholding the homosexual adoption provision, the Florida Legislature and the District Court of the Southern District of Florida have forgotten the goals of adoption, and the BIOC has been misapplied. The result of *Lofton* is that it is constitutional to discriminate against homosexuals on the basis of their sexual preference. The effect, besides preventing homosexuals from forming families, is to trap many children in a system that cannot give them the love, support, and family stability they need. This injustice to children is the unnecessary result of the prevalent societal desire to discriminate against individuals of homosexual orientation. The holding in *Lofton* goes so far as to say that children are better off with no family than a family with a homosexual parent.[269] This cannot possibly be the intention behind the BIOC.

267. Bell, *supra* note 15, at 360.

268. SCHULENBURG, *supra* note 56, at 99.

269. *See generally* Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

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* J.D. Candidate, Saint Louis University School of Law, 2003; B.A., University of Iowa, 2000. The author would like to thank Camille Nelson for her comments and assistance. The author would also like to thank her family, especially her parents Kristin and John Grigsby, as well as Kent Caruthers for all of their love, support and patience.